

# INTEGRATED COASTAL MANAGEMENT AND MARINE SPATIAL PLANNING IN SOUTH AFRICAN LAW

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*South Africa's national environmental management instruments, including the Integrated Coastal Management Act, 2008 ('the NEM: ICMA'), provide statutory mechanisms for achieving cooperative governance in implementing environmental norms. Indeed, the NEM: ICMA provides for establishing integrated coastal management plans within the coastal zone, including South Africa's coastal waters. In terms thereof, its provisions will prevail in the event of any conflict relating to coastal management. Moreover, the NEM: ICMA only requires that its provisions 'be read, interpreted and applied in conjunction with the National Environmental Management Act, 1998 [NEMA]'. However, the recently adopted Marine Spatial Planning Act 2018 (MSPA) contains provisions that purport to override the provisions of any other instrument that conflicts with its requirements regarding plans that impact the marine environment. Certainly, it provides that '[a]ny right, permit, permission, licence or any other authorisation issued in terms of any other law must be consistent with the approved marine area plans'. This article explores the regulatory overlaps between the NEM: ICMA and the MSPA. It has identified potential areas of conflict with regard to the application of the NEM: ICMA, requirements for the approval of coastal management programmes and the contents thereof, coastal authorisations, coastal use permits, and coastal discharge permits. It confirms that the burden of regulatory consistency with marine spatial planning instruments and approved marine area plans is on other environmental instruments. It concludes with recommendations to prevent regulatory conflicts between the NEM: ICMA and the MSPA.*

**[Keywords]** Integrated coastal management, marine spatial planning, coastal management authorisations, coastal use permits

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## I INTRODUCTION

South Africa's environmental governance regime is plagued by fragmentation. It suffers from institutional, legislative, inter-sectoral fragmentation and a fragmented compliance and enforcement regime.<sup>1</sup> This article focuses on two relevant environmental instruments to identify conflicting provisions that may compound an already fragmented regulatory environment, the National Environmental Management Act, 1998 (NEMA),<sup>2</sup> and the Integrated Coastal Management Act, 2008 (NEM: ICMA).<sup>3</sup> The NEMA and several of its specific environmental management acts (SEMAs) such as the NEM: ICMA, provide statutory mechanisms for achieving the environmental rights enshrined in the Constitution of the Republic of South Africa.<sup>4</sup> Among other things, the NEM: ICMA provides for the establishment of integrated coastal management plans within the coastal zone, including South Africa's coastal waters.<sup>5</sup> In terms thereof, its provisions will prevail in the event of any conflict relating to coastal management.<sup>6</sup> However, according to the Marine Spatial Planning Act, 2018 (MSPA),<sup>7</sup> which governs the establishment of marine area plans in South African waters,<sup>8</sup> its provisions prevail should there be a conflict between them and those of any other instrument with regard to marine spatial planning (MSP).

The coming into effect of the MSPA undoubtedly impacts the implementation of existing environmental instruments.<sup>9</sup> Some clarity has been provided with regard to the impact of the

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<sup>1</sup> For a comprehensive overview of the governance framework, see A Paterson & L J Kotzé (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2018) 110–114.

<sup>2</sup> Act 107 of 1998.

<sup>3</sup> Act 24 of 2008.

<sup>4</sup> Constitution of the Republic of South Africa, 1996 ('the Constitution'). See s 24 of the Constitution read with ss 2(a) of the NEMA and 5(2) of the NEM: ICMA. See N King, H Strydom & F Retief (eds) *Environmental Management in South Africa* 3 ed (2018) 128. See Paterson & Kotzé op cit note 1 at 33.

<sup>5</sup> See section V below.

<sup>6</sup> See s 6 of the NEM: ICMA.

<sup>7</sup> Act 16 of 2018. Came into operation on 1 April 2021. See GN 4 in GG 44383 of 1 April 2021.

<sup>8</sup> See sections IV and V below.

<sup>9</sup> See D Metuge 'The impact of marine spatial planning legislation on environmental authorisation, permit and licence requirements in Algoa Bay' (2020) 1 *Journal of Ocean Governance in Africa* at 79–121.

MSPA on the NEMA and some environmental instruments.<sup>10</sup> However, the relevant discussion did not cover the effect that the coming into force of the MSPA would have on the NEM: ICMA, amongst other relevant environmental instruments.<sup>11</sup> Accordingly, there is a need to discuss the relationship between the MSPA and the NEM: ICMA, mainly because in terms of the latter, its provisions must only 'be read, interpreted, and applied in conjunction with the NEMA'.<sup>12</sup> This necessity is because the MSPA applies within the marine part of the coastal zone regulated by the NEM: ICMA and overlaps with the latter's planning system.<sup>13</sup> Indeed, in terms of the National Framework for Marine Spatial Planning in South Africa (NFMSP),<sup>14</sup> '[t]he landward boundary of Marine Spatial Planning and hence the Marine Areas is the high water-mark and the seaward boundary of the Marine Areas will be the outer limit of South Africa's Exclusive Economic Zone (200 nm)'.<sup>15</sup> This overlap affects the coastal zone defined in the NEM: ICMA, which means 'the area comprising coastal public property, [...] the seashore and coastal waters, and includes any aspect of the environment on, in, under and above such area'.<sup>16</sup> Where the provisions of either instrument that applies to the marine environment conflict with the other, such conflicts must be resolved to ensure, inter alia, that coastal management plans are consistent with marine area plans.

This article explores the regulatory overlaps between the NEM: ICMA and the MSPA to identify conflicting regulatory provisions, provide recommendations to redress the conflicting provisions, and enhance consistency with the marine spatial planning framework and approved marine area plans. Ahead of the latter two aspects, the following sections of this article provide an overview of the policy and legal developments that led to the establishment of the NEM: ICMA and the MSPA, respectively. These sections are followed by a brief comparison of their objectives, the application of both instruments,

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<sup>10</sup> Ibid.

<sup>11</sup> Ibid at 121.

<sup>12</sup> See s 5(1) of the NEM: ICMA.

<sup>13</sup> See King et al op cit note 4 at 690.

<sup>14</sup> Published in GN 451 GG 40860 of 26 May 2017.

<sup>15</sup> See par 5.1 of the NFMSP.

<sup>16</sup> See definitions of 'coastal zone' and 'seashore' in s 1(1) of the NEM: ICMA.

institutional arrangements, and requirements for the issue of environmental authorisations and permits in terms of the NEM: ICMA.

## II DEVELOPMENT OF SOUTH AFRICA'S INTEGRATED COASTAL MANAGEMENT LEGISLATION

The coast is the interface between the land and the sea. Inclusive of the shoreline, it extends inland to the extent that the surrounding environment affects the shoreline and as far out to sea as the marine environment affects the shoreline.<sup>17</sup> The significance of a healthy environment in South Africa's legal framework cannot be overstated. The Constitution of the Republic of South Africa, 1996 ('the Constitution'), enshrines everyone's right 'to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations'.<sup>18</sup> A corollary to this environmental right is the obligation borne on the government to adopt 'reasonable legislative and other measures that [...] secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'.<sup>19</sup> Accordingly, the then Ministry of Environmental Affairs and Tourism (now Ministry of Forestry, Fisheries and the Environment) published a White Paper on Environmental Management Policy for South Africa 1998,<sup>20</sup> which contains the government's environmental management policy and gives effect to the environmental rights contained in the Constitution. Specifically, the White Paper on Environmental Management Policy for South Africa 1998 envisions a South African society in harmony with its environment. It states that '[the Republic] can only achieve this through a new model or paradigm of sustainable development based on integrated and coordinated environmental management'.<sup>21</sup> It also emphasises the constitutional imperative for cooperative governance in environmental management.<sup>22</sup>

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<sup>17</sup> See King et al op cit note 4 at 653.

<sup>18</sup> See generally, s 24 of the Constitution.

<sup>19</sup> See s 24(b)(iii) read with s 43 of the Constitution.

<sup>20</sup> See GN 749 in GG 18894 of 15 May 1998.

<sup>21</sup> White Paper on Environmental Management Policy for South Africa at 18.

<sup>22</sup> Ibid at 39–41.

Section 24 of the Constitution triggered the development of a series of domestic environmental laws, the most prominent of which is the NEMA,<sup>23</sup> which gives effect to the recommendations of the White Paper on Environmental Management Policy for South Africa, 1998.<sup>24</sup> The NEMA regulates environmental management in an integrated manner by requiring that all development be ‘socially, environmentally and economically sustainable’.<sup>25</sup> As a matter of principle,

[e]nvironmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated, and it must take into account the effects of decisions on all aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental option.<sup>26</sup>

The first step towards integrated coastal management was the publication of the Coastal Policy Green Paper: Towards Sustainable Coastal Development in South Africa (‘the Green Paper’).<sup>27</sup> The Green paper proposed a vision for the Republic, which included guiding ‘the management of the coast in a way that benefits current and future generations, and honours our obligations and undertakings from local to global levels’ as well as setting out principles for coastal management which would guide the goals and objectives of the coastal policy.<sup>28</sup> Discussions and feedback on the Green Paper informed the development of the White Paper for Sustainable Coastal Development in South Africa, 2000 (‘the White Paper’), which was the product

<sup>23</sup> See *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) 59, (available at <http://www.saflii.org/za/cases/ZACC/2007/13.html>, accessed on 6 October 2023).

<sup>24</sup> For more detail on the history of national environmental law in South Africa, see J Glazewski *Environmental Law in South Africa* (Issue 8, 2020) 7.1.2.

<sup>25</sup> See s 2(3) of the NEMA.

<sup>26</sup> See s 2(4)(b) of the NEMA.

<sup>27</sup> See South African Government ‘Coastal Policy Green Paper’ (1999) (available at <https://www.gov.za/documents/coastal-policy-green-paper>, accessed on 6 October 2023).

<sup>28</sup> *Ibid*, see ‘Proposed National Vision’ and ‘Principles of Coastal Management’.

of an extensive and integrated process of public participation, research, and analysis.<sup>29</sup> The White Paper

drew attention to the fact that existing South African legislation affecting coastal management was fragmented, administered by diverse government departments and agencies, in some cases, outdated or inappropriate in the light of the prevailing state of coastal ecosystems.<sup>30</sup>

It led to the publication of the NEM: ICMA,<sup>31</sup> which is one of the SEMAs that reflect South Africa's environmental law goals.<sup>32</sup>

### III DEVELOPMENT OF SOUTH AFRICA'S MARINE SPATIAL PLANNING LEGISLATION

#### a) An overview

In 2008, the then Department of Environmental Affairs (DEA) published *People – Planet – Prosperity: A National Framework for Sustainable Development in South Africa*.<sup>33</sup> This policy document identified that several issues affect environmental development in South Africa. The issues included the fact that 'integration of environmental considerations with spatial planning remains a major challenge to achieving sustainable development' in the Republic.<sup>34</sup> In October 2012, a Green Paper on the National Environmental Management of the Ocean was published.<sup>35</sup> It acknowledged that various stakeholders

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<sup>29</sup> *White Paper for Sustainable Coastal Development in South Africa 2000* (available at <https://www.westerncape.gov.za/legislation/sustainable-coastal-development-south-africa>, accessed 6 October 2023).

<sup>30</sup> See King et al op cit note 4 at 679.

<sup>31</sup> Act 24 of 2008. See further, M Sowman & N Malan 'Review of progress with integrated coastal management in South Africa since the advent of democracy' 2018 (40) *AJMS* at 121–136 and 124.

<sup>32</sup> See A du Plessis (ed) *Environmental Law and Local Governance in South Africa* (2015) 16. See the definition of 'specific environmental management Act' in s 1 of the NEMA.

<sup>33</sup> See South African Government 'National Framework for Sustainable Development in South Africa' (available at <https://www.gov.za/documents/national-framework-sustainable-development-south-africa>, accessed on 6 October 2023).

<sup>34</sup> See par 7.1.1.

<sup>35</sup> GN 828 GG 35783 of 30 October 2012 (available at [https://static.pmg.org.za/docs/130213gazette\\_0.pdf](https://static.pmg.org.za/docs/130213gazette_0.pdf), accessed on 6 October 2023).

contribute to the aggregate of accumulated impacts on the ocean environment, but little or no attention was given at the time to managing the aggregation and accumulation of human impacts on the ocean.<sup>36</sup> Moreover, its objectives were geared at a move from sectoral ocean planning to coordinated sectoral management.<sup>37</sup> This Green Paper led to a White Paper on National Environmental Management of the Oceans 2014 (NEMO).<sup>38</sup> NEMO posited that the ‘implementation of a coherent and sustainable ocean environmental management policy holds out the possibility of encouraging greater economic development opportunities in the ocean space’.<sup>39</sup> Accordingly, the policy document contemplated further ocean environmental legislation.<sup>40</sup>

Through the DEA, which is now the Department of Forestry, Fisheries and the Environment (DFFE) as well as other relevant organs of State and institutions, NEMO aimed, amongst other things, at

[c]oordinating and supporting the implementation of the relevant statutory and institutional frameworks; [e]stablishing mechanisms for intersectoral data collection and sharing; [c]reating and maintaining a shared national knowledge base on the human use, status and functioning of the ocean; and [e]stablishing integrated ocean sustainable development and conservation ocean plans by the undertaking of strategic environmental impact assessments and the use of spatial planning tools.<sup>41</sup>

Under the leadership of President Jacob Zuma, *Operation Phakisa* was launched in 2014.<sup>42</sup> Modelled on Malaysia’s ‘Big Fast Results’ programme, *Operation Phakisa* aims to stimulate South Africa’s economy and advance the National Development Plan (NDP).<sup>43</sup> The DFFE held ocean economy labs in 2014. These brought together stakeholders from various sectors to

<sup>36</sup> See executive summary.

<sup>37</sup> Ibid at xi.

<sup>38</sup> GN 422 GG 37692 of 29 May 2014.

<sup>39</sup> Ibid at 1.

<sup>40</sup> Ibid.

<sup>41</sup> See 5(b).

<sup>42</sup> See Department of Planning, Monitoring and Evaluation ‘Operation Phakisa’ (no date) (available at <https://www.operationphakisa.gov.za/Pages/Home.aspx>, accessed on 6 October 2023).

<sup>43</sup> See King et al op cit note 4 at 706.

work collaboratively in identifying maritime opportunities and problems, set priorities and targets, and launch planning and delivery processes to achieve the goals of *Operation Phakisa*.<sup>44</sup> *Operation Phakisa* has six focus areas that include, among others, the ocean governance workstream.<sup>45</sup> *Operation Phakisa* brought promises of economic development and challenges, including potentially irreconcilable conflicts between stakeholders and governance instruments that would promote sustainability.<sup>46</sup> Considerations for sustainable ocean development led to a Marine Spatial Planning Bill being introduced in Parliament in 2017. This led to the publication of the MSPA,<sup>47</sup> that came into operation in 2021.<sup>48</sup>

#### IV OBJECTIVES OF THE NEM: ICMA AND THE MSPA

The NEM: ICMA's objective is that it

[...]determine[s] the coastal zone of the Republic; provide[s], within the framework of the National Environmental Management Act, for the coordinated and integrated management of the coastal zone by all spheres of government in accordance with the principles of cooperative governance; preserve[s], protect[s], extend[s], and enhance[s] the status of coastal public property as being held in trust by the State on behalf of all South Africans, including future generations; secure[s] equitable access to the opportunities and benefits of coastal public property; provide[s], for the establishment, use and management of the coastal protection zone; and give[s] effect to the Republic's obligations in terms of international law regarding coastal management and the marine environment.<sup>49</sup>

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<sup>44</sup> Ibid.

<sup>45</sup> See DFFE 'Operation Phakisa-Oceans Economy' (2019) (available at <https://www.dffe.gov.za/operation-phakisa-oceans-economy>, accessed on 6 October 2023).

<sup>46</sup> See King et al op cit note 4 at 706–707.

<sup>47</sup> Act 16 of 2018.

<sup>48</sup> See note 7 above.

<sup>49</sup> Section 2 of the NEM: ICMA.

The MSPA, on the other hand, was enacted to

provide a framework for marine spatial planning in South Africa; to provide for the development of marine spatial plans; to provide for institutional arrangements for the implementation of marine spatial plans and governance of the use of the ocean by multiple sectors; and to provide for matters connected therewith.<sup>50</sup>

MSP comprehensively integrates different governance instruments and mechanisms related to the use of ocean space and cuts across various sectors and agencies.<sup>51</sup> Certainly, the primary objective of the MSPA is to develop and implement a shared marine spatial planning system to manage a changing environment that all sectors and users of the ocean can access.<sup>52</sup> The MSPA also

promote[s] sustainable economic opportunities which contribute to the development of the South African ocean economy through coordinated and integrated planning; conserve the ocean for present and future generations; facilitate responsible use of the ocean; provide for the documentation, mapping and understanding of the physical, chemical and biological ocean processes and opportunities in, and threats to, the ocean; and give effect to South Africa's international obligations in South African waters.<sup>53</sup>

While the MSPA focuses on developing a shared marine spatial planning system,<sup>54</sup> that of the NEM: ICMA is distinct in that it determines South Africa's coastal zone, which is not limited to South African waters.<sup>55</sup> The coastal zone comprises of 'coastal public property, the coastal protection zone, coastal access land, coastal protected areas, the seashore, and coastal waters, and includes any aspect of the environment on, in, under and

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<sup>50</sup> See the long title of the Act.

<sup>51</sup> See N Soininen & D Hassan 'Marine spatial planning as an instrument of sustainable ocean governance' in D Hassan, T Kuokkanen & N Soininen (eds) *Transboundary Marine Spatial Planning and International Law* (2015) 4.

<sup>52</sup> See s 2(a) of the MSPA.

<sup>53</sup> See s 2(b)-(f) of the MSPA.

<sup>54</sup> See s 2(a) of the MSPA.

<sup>55</sup> See s 2(a) of the NEM: ICMA.

above such area'.<sup>56</sup> Moreover, the instruments are quite distinct in that while the MSPA does not limit the scope of South Africa's international obligations to South African waters,<sup>57</sup> the NEM: ICMA only seeks to give effect to South Africa's obligations in terms of international law regarding coastal management and the marine environment.<sup>58</sup>

Essentially, both instruments aim to promote coordinated and integrated planning to achieve sustainable coastal and ocean development.<sup>59</sup> The NEM: ICMA provides for the coordinated and integrated management of the coastal zone by all spheres of government in accordance with the principles of cooperative governance.<sup>60</sup> Moreover, both instruments aim to 'preserve, protect, extend and enhance the status of coastal public property as being held in trust by the State on behalf of all South Africans, including future generations'.<sup>61</sup>

## V APPLICATION OF INTEGRATED COASTAL MANAGEMENT AND THE MARINE SPATIAL PLANNING LEGISLATION

The NEM: ICMA applies to coastal waters, which include internal waters, territorial waters, the exclusive economic zone, and the continental shelf as referred to respectively in sections 3, 4, 7, and 8 of the Maritime Zones Act (MZA)<sup>62</sup> as well as the Prince Edward Islands as referred to in the Prince Edward Islands Act, 1948.<sup>63</sup> The concept of coastal waters in terms of the NEM: ICMA may be problematic in itself because these

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<sup>56</sup> See s 1 of the NEM: ICMA.

<sup>57</sup> See s 2(f) of the MSPA.

<sup>58</sup> See s 2(e) of the NEM: ICMA. For example, a dumping permit may not be issued if the relevant waste contains 'levels of radioactivity greater than as defined by the International Atomic Energy Agency and adopted by the contracting parties to the Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter adopted on 7 November 1996' (s 71(4)(a)(i) of the NEM: ICMA).

<sup>59</sup> See s 2(b) of the NEM: ICMA and s 2(b) of the MSPA.

<sup>60</sup> *Ibid.* The principles of co-operative governance are those contained in chapter 3 of the Constitution and include informing one another of, and consulting one another on, matters of common interest. (See s 2(b) of the NEM: ICMA read with ss 12(b) and 24(2A)(f)(ii) of the NEMA and chapter 3 of the Constitution, 1996).

<sup>61</sup> See ss 2(c) read with 7(1)(a) of the NEM: ICMA, and 2(c) of the MSPA.

<sup>62</sup> Act 15 of 1994.

<sup>63</sup> Act 43 of 1948. See definition of 'coastal waters' in s 1 of the NEM: ICMA.

waters are part of the coastal public property<sup>64</sup> and thus, extend the Republic's sovereignty to maritime spaces over which it may only exercise sovereign rights.<sup>65</sup> The relevant provision must, however, be read restrictively to limit the jurisdiction that the Republic may exercise seaward of its territorial sea. Such a reading is consistent with the scope of State jurisdiction established by the 1982 United Nations Convention on the Law of the Sea (LOSC),<sup>66</sup> and with the Constitutional requirement that domestic courts favour an interpretation of national instruments in a manner consistent with international law over any alternative inconsistent interpretations.<sup>67</sup>

In contrast to the MSPA, the definition of coastal waters also includes estuaries, which – together with inland waters – are excluded from the scope of the MSPA.<sup>68</sup> Thus, the NEM: ICMA contains provisions for a national estuarine management protocol and estuarine management plans.<sup>69</sup> Moreover, the MSPA applies only to MSP on or in South African waters and binds all organs of State.<sup>70</sup> South African waters here refers to

(a) internal waters as referred to in section 3 of the [MZA] but excludes all freshwater bodies and estuaries as defined in section 1 of [the NEM: ICMA]; (b) territorial waters, the exclusive economic zone and the continental shelf as referred to respectively in sections 4, 7 and 8 of the [MZA]; and (c) the zones referred to in paragraph (b) around the

<sup>64</sup> See s 7(1)(a) of the NEM: ICMA.

<sup>65</sup> See King et al op cit note 4 at 684 and 687.

<sup>66</sup> 1833 UNTS 3, (1982) 21 ILM 1261. Adopted: 10 December 1982; EIF: 16 November 1994. South Africa ratified the LOSC in 1997 and it came into force for South Africa in 1998.

<sup>67</sup> See s 233 of the Constitution, 1996. See also, *Mfolozi Community Environmental Justice Organisation and Others v Minister of Minerals and Energy and Others* (82865/2018) [2022] ZAGPPHC 305 (4 May 2022) par 48.

<sup>68</sup> See definition of 'coastal waters' in s 1 of the MSPA.

<sup>69</sup> See ss 33 and 34 of the NEM: ICMA.

<sup>70</sup> See s 3(1) of the MSPA. Organ of state refers to '(a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution— (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer'. [definition of 'organ of state' in s 239 of the Constitution].

Prince Edward Islands as referred to in the Prince Edward Islands Act, 1948 (Act No. 43 of 1948).<sup>71</sup>

In terms of the MSPA, '[a]ny right, permit, permission, licence or any other authorisation issued in terms of any other law must be consistent with the approved marine area plans'.<sup>72</sup> Moreover, '[i]n the event of any conflict between the provisions of this Act and other legislation specifically relating to marine spatial planning, the provisions of this Act prevail'.<sup>73</sup>

In a 'new' environmental governance era that requires consistency with approved marine area plans and MSP legislation in general, relevant environmental instruments must be revised to ensure consistency with the MSPA and marine area plans published in terms thereof. Indeed, it is essential that the NEM: ICMA be revised where it only requires that its provisions 'be read, interpreted and applied in conjunction with [NEMA]'.<sup>74</sup> Moreover, the overlap in applying both instruments over South African waters leaves little doubt of the potential for conflict in their implementation.<sup>75</sup> Thus, it is a recommendation herein that the NEM: ICMA be amended to require the application of its provisions with due regard to, and in a manner consistent with the MSPA.

In an already fragmented environmental governance arena, the overlap in the spatial applications of the NEM: ICMA and the MSPA makes it essential to examine the relevant institutional arrangements established under both instruments and coastal management authorisation and permits issued in terms of the NEM: ICMA. This examination will help identify regulatory conflicts and provide recommendations to prevent the same in the implementation of the NEM: ICMA when marine area plans are established.

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<sup>71</sup> See definition of 'South African waters' in s 1 of the MSPA.

<sup>72</sup> See s 3(2) of the MSPA.

<sup>73</sup> See s 4 of the MSPA.

<sup>74</sup> See s 5(1) of the NEM: ICMA.

<sup>75</sup> See ss 7(1)(a) of the NEM: ICMA and 3(1) of the MSPA read with ss 3(2), 4(2), 7(2) and 8(2) of the MZA.

## VI INSTITUTIONAL ARRANGEMENTS UNDER THE MSPA AND THE NEM: ICMA

This section examines institutional arrangements under the MSPA and the NEM: ICMA. The purpose of the examination is to identify whether the institutions established under the NEM: ICMA are in a position to foster consistency with the marine spatial planning framework and marine area plans established in terms of the MSPA.

The MSPA provides for a MSP system, which is an iterative, phased process consisting of

the development of a marine spatial planning framework; the development of a knowledge and information system [...]; the development of marine area plans; the effective implementation, monitoring and evaluation of marine area plans and; the review of the marine area plans.<sup>76</sup>

The MSPA requires the establishment of bodies tasked, amongst other things, with ensuring the involvement of all relevant sectors in the consultative process of developing marine area plans. The first of these bodies is the National Working Group on Marine Spatial Planning.<sup>77</sup> The National Working Group brings together competent officials from various departments.<sup>78</sup> As a technical group, its responsibilities include developing a draft MSP framework that complies with the objects of the MSPA and the principles and criteria for MSP.<sup>79</sup> It is also tasked with developing draft marine area plans; considering information from the knowledge and information database; and the principles and criteria for MSP including, amongst other things, maps and spatial data of different sectors and, environmental change impacts.<sup>80</sup>

Upon completion of its technical duties, the National Working Group must make a recommendation to the second body, the

<sup>76</sup> See s 6 of the MSPA.

<sup>77</sup> See s 9(1)(a) read with s 8(1) of the MSPA.

<sup>78</sup> The departments include those responsible for defence, energy, environmental affairs, fisheries, mineral resources, planning, monitoring and evaluation, public enterprises, science and technology, telecommunications, tourism, transport, rural development and land affairs. See s 9(1)(a) of the MSPA.

<sup>79</sup> See s 9(2)(a) of the MSPA.

<sup>80</sup> See s 9(2)(b)(i) and (vi) of the MSPA.

Directors-General Committee.<sup>81</sup> It does this by submitting to the Directors-General Committee its draft marine area plans and a report detailing the process leading to the draft plans and transitional provisions to facilitate the implementation of the plans.<sup>82</sup> The recommendation made to the Directors-General Committee must be by consensus.<sup>83</sup> Otherwise, the National Working Group must include all proposed options in the report.<sup>84</sup>

Upon receipt of the recommendation and report from the National Working Group, the Directors-General Committee must either approve and refer a marine area plan and accompanying report to the third body, the Ministerial Committee,<sup>85</sup> or refer the recommendation and report back to the National Working Group with specific instructions.<sup>86</sup> Like at the National Working Group, the decisions of the Directors-General Committee must be arrived at by consensus. However, where there is no consensus, the Directors-General Committee must present all proposed options to the Ministerial Committee for a final decision.<sup>87</sup> In performing its duties, the Directors-General Committee promotes cooperative governance, as its referrals to the Ministerial Committee may include 'recommendations on facilitating cooperation between sector departments'.<sup>88</sup> Similarly, in addition to its competence to decide on marine area plans submitted to it,<sup>89</sup> the Ministerial Committee must also ensure cooperation between sector departments.<sup>90</sup> After the Ministerial Committee has accepted any marine area plans, the Minister must table the plans before parliament in a prescribed manner.<sup>91</sup> The marine area plans must be reviewed at least every five years and, if necessary, amended following the iterative process established in the MSPA.<sup>92</sup>

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<sup>81</sup> See s 9(3) of the MSPA.

<sup>82</sup> See s 9(3)(a) read with s 9(2)(c) of the MSPA.

<sup>83</sup> See s 9(4) of the MSPA.

<sup>84</sup> See s 9(4) of the MSPA.

<sup>85</sup> See s 10(6)(a) of the MSPA.

<sup>86</sup> See s 10(6)(b) of the MSPA.

<sup>87</sup> See s 10(4) of the MSPA.

<sup>88</sup> See s 10(6)(a)(ii) of the MSPA.

<sup>89</sup> See s 10(5) of the MSPA.

<sup>90</sup> See s 11(6)(a) of the MSPA. The Ministerial Committee is established in terms of s 11 of the MSPA.

<sup>91</sup> See s 12 of the MSPA.

<sup>92</sup> See s 14 of the MSPA.

As far as the NEM:ICMA is concerned, it provides for the establishment of a National Coastal Committee.<sup>93</sup> The National Coastal Committee must 'promote integrated coastal management in the Republic and effective cooperative governance by coordinating the effective implementation of [the NEM:ICMA] and the national coastal management programme'.<sup>94</sup> Specifically, the National Coastal Committee is required to promote the integration of coastal management concerns and objectives into environmental implementation plans and environmental management plans.<sup>95</sup> However, the National Coastal Committee is not required to consider the marine spatial planning framework, marine area plans, or sector regulations published in terms of the marine spatial planning legislation. Thus, there is room for conflict where the ensuing environmental implementation plans conflict with marine area plans or relevant sector plans established in terms of section 13 of the MSPA. An amendment to the applicable provision in the NEM:ICMA to require the National Coastal Committee to promote consistency with MSP legislation would pre-empt this conflict.

In contrast to the MSPA, the membership to the National Coastal Committee must include persons who by virtue of their office or expertise, are able to assist the National Coastal Committee in fulfilling its functions.<sup>96</sup> There is no limitation to competent persons from government departments stated in the MSPA. The lack of a limiting clause allows competent persons from the private sector or civil society to be part of the National Coastal Committee. The NEM:ICMA confirms that the National Coastal Committee may, when required, invite persons with expertise in fields relevant to coastal management and coastal ecosystems.<sup>97</sup> The MSPA, on the other hand, limits the compositions of the National Working Group, Directors-General Committee, and Ministerial Committee to the relevant government officials only.<sup>98</sup> The exclusive character of the institutional bodies established under the MSPA would hopefully be offset by the comprehensive consultation

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<sup>93</sup> See s 35(1) of the NEM:ICMA.

<sup>94</sup> See s 35(3) of the NEM:ICMA.

<sup>95</sup> See s 35(3)(b) of the NEM:ICMA.

<sup>96</sup> See s 36(2) of the NEM:ICMA.

<sup>97</sup> See s 36(2B)(c) of the NEM:ICMA.

<sup>98</sup> See ss 9, 10, and 11 of the MSPA.

procedure established thereunder that would inform final decision-making by the National Working Group.<sup>99</sup>

Furthermore, the NEM: ICMA makes provision for the designation of lead agencies within each province in South Africa.<sup>100</sup> These lead agencies have mandates that include the coordination and implementation of the provincial coastal management programme and the ‘monitor[ing] [of] coastal management in the province to ensure that it is undertaken in an integrated, effective and efficient manner and in accordance with [the NEM: ICMA]’.<sup>101</sup> There is no corresponding provision in the MSPA, on the other hand. In addition, the NEM: ICMA makes provision for the establishment of provincial coastal committees,<sup>102</sup> and municipal coastal committees.<sup>103</sup> The latter is mandated to ‘promote integrated coastal management in the province and the coordinated and effective implementation of [the NEM: ICMA] and the provincial coastal management programme’.<sup>104</sup> They may also ‘promote integrated coastal management in the municipality and the coordinated and effective implementation of [the NEM: ICMA] and the municipal coastal management programme’.<sup>105</sup> Again, there are no corresponding provisions in the MSPA with regard to lead agencies. Nevertheless, the absence of lead agencies under the MSPA does not necessarily imply a regulatory gap. In addition to extensive consultation requirements,<sup>106</sup> the work of the National Working Group will be informed by the significant data captured in the knowledge and information system.<sup>107</sup>

Furthermore, although the NEM: ICMA requires the national coastal management programme to ‘provide for an integrated, coordinated and uniform approach to coastal management by organs of State in all spheres of government, non-governmental organisations, the private sector, and local communities’,<sup>108</sup> it also requires the Minister to prepare and adopt a national coastal management programme for the coastal zone, within

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<sup>99</sup> See s 8 of the MSPA.

<sup>100</sup> See generally, s 28 of the NEM: ICMA.

<sup>101</sup> See s 38(2)(a) and (b) of the NEM: ICMA.

<sup>102</sup> See s 39(1) of the NEM: ICMA.

<sup>103</sup> See s 42(1) of the NEM: ICMA.

<sup>104</sup> See s 39(2)(a) of the NEM: ICMA.

<sup>105</sup> See s 42(4)(a) of the NEM: ICMA.

<sup>106</sup> *Supra* note 80.

<sup>107</sup> See s 7 of the MSPA.

<sup>108</sup> See s 45(1)(b) of the NEM: ICMA.

four years after the Act takes effect.<sup>109</sup> This obligation on the Minister reflects the NEMA's requirement for developing environmental plans within a specific time frame, without relevant detail on consultative processes.<sup>110</sup> Nevertheless, the Minister of Environment Forestry and Fisheries must ensure consistency in coastal management plans and other statutory plans.<sup>111</sup> It stands to reason that approved marine area plans will also have to be considered by the Minister. It is further recommended that the procedures for developing relevant coastal management plans and their contents be amended to require consistency with the marine spatial planning framework and approved marine area plans to avoid conflicts.

## VII ENVIRONMENTAL AUTHORISATIONS AND PERMITS

As stated above, 'any right, permit, permission, licence or any other authorisation issued in terms of any other law must be consistent with the approved marine area plans'.<sup>112</sup> The NFMSP in South Africa states that marine policy guidance and plans will seek to complement rather than replace coastal planning legislation.<sup>113</sup> However, it also envisages the primacy of MSP legislation when it states that '[s]ectoral planning and decision-making in terms of licensing and other management measures will be consistent with the Marine Area Plans'.<sup>114</sup> Consequently, authorisations and coastal management programmes established in terms of the NEM: ICMA that affect the marine environment must be consistent with approved marine area plans. The latter requirement is at the centre of the regulatory conflict because the NEM: ICMA does not require its provisions to be interpreted with due regard to MSP regulations. In addition, it requires that its provisions take precedence in case of conflicts with other legislation relating to coastal management.<sup>115</sup> To avoid conflicts in decision-making, it is imperative to amend the NEM: ICMA to require that authorisations and permits be issued with due

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<sup>109</sup> See s 44(1)(a) of the NEM: ICMA.

<sup>110</sup> See s 11(1)–(3) of the NEMA

<sup>111</sup> See s 52(2) of the NEM: ICMA.

<sup>112</sup> See s 3(2) of the MSPA.

<sup>113</sup> See par 2.7 of the NFMSP.

<sup>114</sup> See par 2.6.1 of the NFMSP.

<sup>115</sup> See s 6(1) of the NEM: ICMA.

regard to the marine spatial planning framework and marine area plans published in terms of the MSPA. Indeed, regarding environmental authorisations, the NEM: ICMA does not require consideration of marine area plans, which is a potential source of conflict.<sup>116</sup>

Moreover, the NEM: ICMA only requires the competent authority to ensure that environmental authorisations are consistent with coastal management programmes.<sup>117</sup> The latter will not be problematic if the provisions with regard to the functions of the various institutional bodies, the criteria for the establishment of coastal management programmes, and the contents of the programmes, are amended. The recommended amendment will require consistency with the marine spatial planning framework and marine area plans published in terms of the MSPA at the various stages of coastal management within the framework of the NEM: ICMA.

The NEM: ICMA also empowers the Minister to authorise effluent discharge into coastal waters after consultation with the Minister responsible for Water and Sanitation.<sup>118</sup> It is also recommended that the authorisation to discharge effluent in coastal waters be contingent on such authorisation not conflicting with approved marine area plans. Likewise, provisions regarding the issue of a coastal discharge permit<sup>119</sup> should be amended to require that the issue of the permit does not prejudice the objectives of the marine spatial planning framework and marine area plans.

As far as coastal use permits are concerned, they are not problematic to the extent that, amongst other things, they require a holder to comply with other legislation.<sup>120</sup> However, consistency with the marine spatial planning framework and marine area plans is not a prerequisite for the issue of a coastal use permit. Indeed, under the current dispensation of the NEM: ICMA, there is no certainty that coastal use permits will be consistent with approved marine area plans. Thus, it is also recommended that the issue of a coastal use permit be contingent on due consideration given to the marine spatial planning framework, and marine area plans published in terms

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<sup>116</sup> See s 63(1) of the NEM: ICMA.

<sup>117</sup> See s 63(5) of the NEM: ICMA.

<sup>118</sup> See s 69(1) and (2) of the NEM: ICMA.

<sup>119</sup> See s 69(3) and (8) of the NEM: ICMA.

<sup>120</sup> See s 65(5)(b) of the NEM: ICMA.

of the MSPA. Moreover, the validity of issued permits should not exceed five years,<sup>121</sup> to enhance consistency with marine area plans that must be revised every five years.<sup>122</sup>

## VIII CONCLUSION

The NEM: ICMA and the MSPA have similar objectives but can potentially exacerbate an already fragmented regulatory regime, especially where their institutional arrangements and regulatory measures overlap and conflict. Indeed, both instruments have made provisions for the establishment of institutions to promote the development of coastal management plans and marine area plans, respectively.

This article explored the regulatory overlaps between the NEM: ICMA and the MSPA. It identified areas of conflict with regard to the application of the NEM: ICMA, requirements for the approval of coastal management programmes, contents of coastal management programmes, coastal authorisations, coastal use permits, and coastal discharge permits. These conflicts are rooted in the fact that while both instruments apply over South African waters, the MSPA will prevail in the event of any regulatory conflicts as far as MSP is concerned. Indeed, this places the burden of regulatory consistency on other applicable environmental instruments. Moreover, the NFMSMP envisages that sectoral decision-making will be consistent with approved MSP measures.

To resolve the identified conflicts, the NEM: ICMA should be amended as follows:

- (1) The insertion after the definition of 'Marine Living Resources Act' in section 1(1) of the following:  
'Marine Spatial Planning Act' means the Marine Spatial Planning Act, 2018 (Act No. 16 of 2018);
- (2) The insertion after section 5 of the following:  
**5A. Application of the Marine Spatial Planning Act**  
This Act must be applied with due regard to section 3(2) of the Marine Spatial Planning Act and in a manner consistent with any notices published in terms of section 12(2) of the Act.

<sup>121</sup> The current dispensation of the NEM: ICMA allows for a fixed period of time of not more than twenty years. See s 66(a) of the NEM: ICMA.

<sup>122</sup> See s 14 of the MSPA.

- (3) The substitution of section 35(3)(b)(iii) with the following:
  - (iii) other plans, programmes and policies of organs of state whose activities may create adverse effects on the coastal environment; **[and]**
- (4) The insertion after section 35(3)(b)(iii) of the following:

(bA) promote consistency with –
- (5) The insertion after section 35(bA) of the following:
  - (i) the applicable marine spatial planning framework and marine area plans published in terms of section 12(2) of the Marine Spatial Planning Act; and
  - (ii) applicable regulations published in terms of section 13 of the Marine Spatial Planning Act.
- (6) The insertion after section 39(2)(a) of the following:

(aA) promote consistency with the applicable marine spatial planning framework and marine area plans published in terms of section 12(2) of the Marine Spatial Planning Act;
- (7) The insertion after section 44(2) of the following:

(2A) Before adopting a programme contemplated in subsection (1)(a), the Minister must ensure that the programme is consistent with the applicable marine spatial planning framework and marine area plans published in terms of section 12(2) of the Marine Spatial Planning Act.
- (8) The substitution of section 45(2)(e)(ii) with the following:
  - (ii) the specific components of the coastal zone; **[and]**
- (9) The insertion after section 45(2)(e)(ii) of the following:

(iii) the specifics of the applicable marine area plan within which it applies; and
- (10) The insertion after section 46(2) of the following:

(2A) Before adopting a programme contemplated in subsection (1)(a), the MEC must ensure that the programme is consistent with the applicable marine spatial planning framework and marine area plans published in terms of section 12(2) of the Marine Spatial Planning Act.

- (11) The insertion after section 47(1)(c)(ii) of the following:  
(iii) the applicable marine spatial planning framework and marine area plans published in terms of section 12(2) of the Marine Spatial Planning Act.
- (12) The insertion after section 48(2) of the following:  
(2A) Before adopting a programme contemplated in subsection (1)(a), a Municipality must ensure that the programme is consistent with the applicable marine spatial planning framework and marine area plans published in terms of section 12(2) of the Marine Spatial Planning Act.
- (13) The insertion after section 49(1)(b)(i) of the following:  
(iA) the applicable marine spatial planning framework, and marine area plans published in terms of section 12(2) of the Marine Spatial Planning Act.
- (14) The substitution of section 51(c) with the following:  
*(c) give effect to the national coastal management programme and any applicable provincial coastal management programme[.];*
- (15) The insertion after section 51(c) of the following:  
(d) be consistent with the applicable marine spatial planning framework and marine area plans published in terms of section 12(2) of the Marine Spatial Planning Act.
- (16) The insertion after section 56(2)(b)(iv) of the following:  
(v) applicable regulations published in terms of section 13 of the Marine Spatial Planning Act.
- (17) The insertion after section 63(1)(b) of the following:  
(bA) the applicable marine spatial planning framework, and marine area plans published in terms of section 12(2) of the Marine Spatial Planning Act.
- (18) The substitution of section 65(3)(b) with the following:  
if the Minister so determines in any specific case, through a prescribed process[.]; and
- (19) The insertion after section 65(3)(b) of the following:  
(c) with due regard for consistency with the applicable marine spatial planning framework and marine area plans published in terms of section 12(2) of the Marine Spatial Planning Act.

- (20) The substitution of section 66(a) with the following:
  - (a) must be awarded for a fixed period of not more than **[20] 05** years whereafter a new application must be made in terms of section 65(3) and (4);
- (21) The insertion after section 66(a) of the following:
  - (aA) must be consistent with the applicable marine spatial planning framework and marine area plans published in terms of section 12(2) of the Marine Spatial Planning Act.
- (22) The substitution of section 69(2) with the following:
  - (2) The Minister may by notice in the Gazette authorise persons in general, or a category of persons, to discharge effluent into coastal waters subject to subsection (2A), and in instances of discharge of effluent into an estuary, only after consultation with the Minister responsible for water affairs.
- (23) The insertion after section 69(2) of the following:
  - (2A) An authorisation to discharge effluent into coastal waters in terms of subsection (2) above must be consistent with the applicable marine spatial planning framework and marine area plans published in terms of section 12(2) of the Marine Spatial Planning Act.
- (24) The insertion after section 69(8)(a) of the following:
  - (aA) to significantly prejudice the objective of the applicable marine spatial planning framework and marine area plans published in terms of section 12(2) of the Marine Spatial Planning Act.
- (25) The insertion after section 71(2)(a) of the following:
  - (aA) the applicable marine spatial planning framework, and marine area plans published in terms of section 12(2) of the Marine Spatial Planning Act.

There is little doubt that the coming into effect of the MSPA impacts on the implementation of existing environmental legislation. While this article addressed the impact of the MSPA on the current dispensation of the NEM: ICMA, there is more work that needs to be done to comprehensively assess the effects of the MSPA on other instruments such as the National

Water Act, 1998,<sup>123</sup> the National Environmental Management: Waste Act, 2008,<sup>124</sup> and the Mineral and Petroleum Resource Development Act, 2002.<sup>125</sup>

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<sup>123</sup> Act 36 of 1998.

<sup>124</sup> Act 59 of 2008.

<sup>125</sup> Act 49 of 2008.