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A critical analysis of South Africa's coastal access laws in light of the principle of coastal environmental justice

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"God called the dry land earth,
and the gathering of the waters He called seas.
and God saw that this was good (pleasing, useful)
and He affirmed and sustained it"
(Genesis 1:10)

I would like to express my sincere gratitude to:

My heavenly Father who knew me even before time began and who orders my steps and directs my path daily.

To my dear late dad for being my best life coach and to my mum who is still my number one mentor and cheerleader.

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ABSTRACT

The purpose of this dissertation is to critically analyse the right to perpendicular coastal access in section 13 of the National Environmental Management: Integrated Coastal Management Act 24 of 2008 (NEM: ICMA), as well as the right to parallel coastal access in section 18 of the Act, to determine whether and to what extent these access rights are capable of achieving the NEM: ICMA's overarching object of equitable access to the coastal zone and whether and to what extent they advance the goal of environmental justice in South Africa.

An analysis of the approach taken by the eThekwini Municipality towards implementing the provisions of section 13 and especially section 18 of the NEM: ICMA reveals some of the difficulties the statutory framework gives rise to. One of these is the relative lack of detail in the statutory provisions themselves. Another is the heavy burden they place on the local government, namely municipalities. The third implementation challenge arises out of the requirement for each local municipality to adopt its own unique set of by-laws which has the potential to create an inconsistency in the approach taken across all municipalities in the implementation process since the legal provisions require each local municipality to develop its own local by-laws to give effect to the coastal access provisions.

An alternative and potentially better approach may be found in the statutory provisions governing public access to the coast in England and Scotland. Whilst both these countries may not have had the same historical disadvantages experienced in South Africa, they however serve as good comparators given the geographical similarities to South Africa. Not only do both countries have long coastlines similar to South Africa they have also both relatively recently conferred statutory rights of access to the coast on the public. More importantly, both countries have adopted very different approaches to securing a right to coastal public access. While Part Nine of the English Marine and Coastal Access Act of 2009 makes provision for a dedicated coastal access route around the entire country, Part One of the Scottish Land Reform (Scotland) Act of 2003 goes much further and makes provision for a general "right to roam" on foot across the entire country.

Being informed by the statutory provisions governing public access to the coast in England and Scotland , some novel ideas have been unpacked to provide a basis for rethinking the approach to coastal public access in South Africa; one which is much bolder and more far reaching and thus more consistent with the notion of equitable access and environmental justice. These include creating a dedicated access route along the entire South African coastline, forming an external

body such as a Coastal Agency for South Africa to develop and monitor the implementation of an outdoor code of coastal conduct. These novel ideas have the potential to broaden the scope and extent of conferring equitable access rights in South Africa to the extent that it subscribes to the principles of coastal environmental justice.

KEYWORDS: Beach apartheid, coastal access, perpendicular and parallel access, environmental justice, environmental law.

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CHAPTER ONE: INTRODUCTION

1.1 Background

The South African coastline spans approximately 3200 kilometres from Namibia to Mozambique with one third of the population living at the coast[1]. It is bordered by the Indian Ocean and the Atlantic Ocean and is shaped by two major currents, namely the warm Agulhas current in the east and the cold Benguela current in the west. [2] As a result of the contrasting temperatures of these two currents, South Africa's coast encompasses a wide range of habitats and supports an extremely diverse range of marine and other species. As the World Wildlife Fund has pointed out, the South African coast is home to ten out of 22 species of albatross: five out of seven species of marine turtles and 37 species of cetaceans (e.g. dolphins and whales, including the blue whale). A 181 cartilaginous fish species (e.g. rays and sharks, including the great white shark) are also found in South African waters.[3]

Given these natural riches, it is not surprising that the coast provides a wide range of cultural, economic and social opportunities for the people of South Africa, and that many South Africans rely on marine and coastal resources for commerce, food, and recreation. In this respect, the National Coastal Management Policy states that the direct economic benefits from coastal resources amount to be approximately 35% of South Africa's annual gross domestic product (GDP), while indirect economic benefits amount to an additional 28% of GDP[4]. Direct economic benefits include the marine fishing industry, port and harbour development and recreational and tourism opportunities. Indirect benefits includes erosion control, providing a medium for waste assimilation , promoting detoxification processes and recycling of gases coastal forests, grassland, and wetlands.[5]

Unfortunately, the economic and social opportunities that the coast provides have not been distributed in an equitable manner among South Africa's people. During the colonial and apartheid eras these opportunities were distributed along racial lines, with white South Africans being

[1] R Chevalier *Promoting the Integrated Governance of South Africa's Coastal Zone* (2015). Available at http://www.saiia.org.za/wp-content/uploads/2015/06/saia_sop_218_chevallier_20150608.pdf, accessed 25 August 2021.
[2] ibid
[3] World Wildlife Fund – South Africa *Ocean Facts and Futures: Valuing South Africa's Ocean Economy* (2016) at 4.
[4] Department of Environmental Affairs (DEA) National Coastal Management Programme of South Africa (2014) at viii.
[5] ibid

preferred over black South Africans. Historically access to the coast was important in order to access the sea in order to harvest marine resources and to travel to different places. These reasons are still important, but today coastal access is also seen as important for development, health, recreation and tourism[6]. In developing countries, it also contributes to environmental conservation and poverty reduction[7]. Therefore and as stated above, the benefits of having coastal access written into South African law go beyond just economic or social gain.

Making coastal access a legal right of way also has the benefit of redressing past historical barriers that prevented this equity in a public right of way. Some of these barriers are environmental (i.e. excluding people from sensitive coastal environments); legal (i.e. land adjacent to coastal public property is privately owned and developed); physical (i.e. the physical features of the area make it dangerous or difficult to access); and geographical (i.e. many people live far away from the beach, especially black and poor people because of apartheid spatial planning. The legal barrier remains the key focus of this research. Although the inequitable and racist distribution of coastal social, environmental and economic opportunities took place in many ways, perhaps the most vivid example was the racial segregation of beaches (so-called beach apartheid).

Given the inequitable distribution of coastal resources and benefits along racial lines, it is not surprising that section 2(d) of the National Environmental Management: Integrated Coastal Management Act[8] (NEM: ICMA) expressly provides that one of its objects is to ensure that the public, not only have a right of physical access to coastal public property, but also have access to the benefits and opportunities provided by the coastal zone.[9] Apart from providing equitable access to the opportunities and benefits of coastal public property, the other objects of the NEM: ICMA are to:

- "determine the coastal zone of the Republic";[10]
- "provide for the coordinated and integrated management of the coastal zone in accordance with the principles of co-operative government";[11]
- "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";[12]

[6] Sophia Jaumain *Changing Coastal Access Patterns: A study of Richards Bay* (MPhil, University of Cape Town, 2009) at 23.
[7] Ibid
[8] 24 of 2008.
[9] NEM: ICMA: section 2(d).
[10] NEM: ICMA: section 2(a).
[11] NEM: ICMA: section 2(b).
[12] NEM: ICMA: section 2(c).

- "provide for the establishment, use and management of the coastal protection zone";[13] and
- "give effect to the Republic's obligations in terms of foreign law regarding coastal management and the marine environment".[14]

To give effect to section 2(d), the NEM: ICMA makes express provision in Section 13 of the Act which provides, inter alia, that "any natural person in the Republic has a right of reasonable access to coastal public property;[15] and is entitled to use and enjoy coastal public property".[16] Since the NEM:ICMA requires coastal access to be provided on a managed basis, it is necessary to introduce two concepts which describe access to the coast, namely that of perpendicular[17] and parallel or lateral[18] access. Kirkby[19] describes these two terms as follows:

1) 'lateral access' which refers to the publics' right to freely walk between the publicly owned sea and the sea-shore regardless of private upland ownership (Summerlin, 1995; Mc Kean, 1970); and
2) The second type of access is 'perpendicular access' which involves crossing over land adjacent to the coast in order to access the sea and the sea-shore (Summerlin, 1996).

In this study, the concept of perpendicular access will be used to refer to access from inland areas to the coast, whilst parallel access will refer to access along the length of the coast. Perpendicular access is provided for in section 13 of the Act and parallel access in section 18.

Although the concept of "equitable access" in section 2(d) of the NEM: ICMA is clearly aimed at addressing the ongoing consequences of colonialism and apartheid, it is submitted that it is not simply aimed at deracialising access to the economic and social opportunities provided by the coast. Instead, it goes much further and encompasses the broader notion of environmental justice or more specifically coastal environmental justice. As Toxopeüs and Kotzé have argued, environmental justice relates to "the equitable distribution of environmental benefits and burdens; to the recognition of group identities and differences within society and how these play into peoples' relationship with the environment; to specific environment-related needs of people differently situated on the socio-economic ladder; and to ways through which people can obtain maximum benefits from life-sustaining resources in an equitable way that also promotes justice in

[13] NEM: ICMA: section 2(dA).
[14] NEM: ICMA: section 2(e).
[15] NEM: ICMA: section 13(1)(a).
[16] NEM: ICMA: section 13(1)(b). This section goes on to provide that a person is entitled to use and enjoy coastal public property only if such use:(i) does not adversely affect the rights of members of the public to use and enjoy the coastal public property; (ii) does not hinder the State in the performance of its duty to protect the environment; and (iii) does not cause an adverse effect.

[17] K Kirkby "*The role of EIA in influencing coastal access in two golf estates in the southern Cape coast, South Africa"* (MSc, University of Cape Town, 2011) at 21.
[18] ibid
[19] ibid

its broadest sense".[20] It is submitted that the advancement of the goal of coastal environmental justice requires an unpacking and understanding of many aspects pertaining to coastal access equity. These may include a social and economic dimension as well. This study however is limited only to those aspects relating to the entry points to the coast, which is the crux of the coastal access provisions in the NEM:ICMA.

By comparison and whilst it is true that the United Kingdom has a vastly different history to that of South Africa, England and Scotland[21] are chosen as a useful comparator in this doctrinal research for the following reasons. First, like South Africa they both have a long coast line; second, both England and Scotland have fairly recently passed legislation to introduce a statutory right of coastal access. Very few other countries have done the same. Third, the approach followed in England differs from the approach followed in Scotland. Given that these two countries provide us with two very different, but interesting ways of providing coastal access, this research unpacks some of these differences in order to guide possible adoption within the South African context.

The purpose of this dissertation is to critically analyse the right to perpendicular coastal access in section 13 of the NEM: ICMA, as well as the right to parallel coastal access in section 18 of the Act, to determine whether and to what extent these access rights can achieve the overarching object of "equitable access" and whether and to what extent they advance the goal of environmental justice in South Africa. This analysis will rely heavily on the different approaches adopted towards securing coastal public access in England and Scotland. Apart from the fact that they both have long coastlines, these two countries have been chosen as comparators because, like South Africa, they have conferred statutory rights of access to the coast on the public and, more importantly, because they have adopted very different approaches in doing so.

1.2 The purpose of the study

As pointed out above, the purpose of this dissertation is to critically analyse the rights of perpendicular and parallel coastal access section 13 and section 18 of the NEM: ICMA to determine whether and to what extent they can achieve the overarching object of equitable access listed in section 2(d) of the Act.

[20] M Toxopeüs and LJ Kotzé "Promoting Environmental Justice through Civil-Based Instruments in South Africa" (2017) 13(1) *Law, Environment and Development Journal* 47 at 49.
[21] In England, a right of coastal access has been conferred on the public in Part Nine of the Marine and Coastal Access Act of 2009 and, in Scotland, a right of coastal access has been conferred on the public in Part One of the Land Reform (Scotland) Act of 2003.

More specifically, the purpose of this dissertation is to

(a) set out and discuss the common law provisions in terms of which a public right of access to the coast may be acquired to understand how these have limitations in advancing the coastal access rights.

(b) set out and discuss the coastal access provisions in section 13 and section 18 of the NEM: ICMA.

(c) to set out the methodology used by the eThekwini municipality in giving effect to the coastal access provisions.

(d) set out and discuss Part Nine of the English Marine and Coastal Access Act of 2009 and Part One of the Scottish Land Reform (Scotland) Act of 2003; and

(e) undertake a critical evaluation of the coastal access provisions in the NEM: ICMA over the past decade to determine the extent to which these provisions provide for the basic right for anyone in South Africa to be able to use and enjoy the coast and its resources in just, fair, and equitable manner.

1.3 The methodology of the study

This is a doctrinal study based on primary and secondary legal and other materials which include statute law and case law. In addition, they include textbooks, journal articles, policy papers, reports, and internet websites. The eThekwini Metropolitan Municipality case study highlights some of the challenges associated with coastal access. In addition, there will also be a comparative analysis of English and Scottish access laws to compare these with the local access provisions to unpack those areas which are different to the approach taken by South Africa so that these may guide future improvements or rewording of local access provisions.

1.4 The structure of the study

The study is divided into five chapters:

Chapter One: Introduction

Apart from the background to this study, the research questions, the methodology of the study and the structure of the study are set out and discussed in this chapter. The definition of the coastal zone and the legal status of its different components or zones are also discussed in this chapter.

Chapter Two: Coastal access in terms of the common law

The purpose of this chapter is to set out and discuss the common law principles in terms of which a public right of access to the coast may be claimed, with a specific focus on the acquisition of a public right of way in terms of the doctrine of *vetustas* and the doctrine of custom. Barriers to the public right of way will also be alluded to but the focus of this thesis is limited to the historic legal barriers that resulted in an increase in coastal development on land adjacent to the coastal public property which is owned by private persons.

Chapter Three: coastal access in terms of the NEM: ICMA

The purpose of this chapter is to set out and discuss the provisions of section 13 and section 18 of the NEM: ICMA. In addition, the purpose of this chapter is to set out and discuss the national coastal access strategy and the way these provisions and the strategy have been implemented in the eThekwini Metropolitan Municipality. An analysis will also be undertaken to identify any gaps in the coastal access provisions which may impede the successful implementation at a local level.

Chapter Four: Coastal access in the United Kingdom and Scotland

The purpose of this chapter is to discuss the provisions of Part Nine of the English Marine and Coastal Access Act of 2009 and Part One of the Scottish Land Reform (Scotland) Act of 2003.

Chapter Five: Evaluation and Conclusion

The extent to which the coastal access rights created in section 13 and section 18 of the NEM: ICMA can achieve the overarching object of equitable access listed in section 2(d) of the Act is evaluated in this chapter.

CHAPTER TWO: COASTAL ACCCESS IN TERMS OF THE COMMON LAW

2.1 The South African coastal zone

2.1.1 Introduction

Before turning to discuss the common law principles, it will be helpful to briefly set out the manner in which the coastal zone is defined in the NEM: ICMA and to discuss the legal status of coastal public property.

2.1.2 The coastal zone

The NEM: ICMA defines the coastal zone as "the area comprising the 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 above such area".[22] For the purposes of this study, those aspects pertaining to the coastal public property in relation to coastal access will discussed further.

2.1.3 Coastal public property

(a) Definition

Although the NEM: ICMA does not define coastal public property, it does identify the different components that make up this important part of the coastal zone. The Act provides in this respect that coastal public property consists of:

(a) coastal waters, land submerged by coastal waters and any natural island in coastal waters;[23]
(b) the seashore, including the seashore any island and any land reclaimed from the sea;[24]
(c) any admiralty reserve owned by the state;[25]
(d) any land owned or controlled by the state declared to be coastal public property;[26]
(e) any land reclaimed from the sea in terms of the NEM: ICMA;[27] and
(f) any natural resources on or in any of the categories set out above.[28]

[22] NEM: ICMA: section 1.
[23] NEM: ICMA: section 7(1)(a), (b) and (c). Land submerged by coastal waters includes land flooded by coastal waters which subsequently becomes part of the bed of coastal waters and the substrata beneath such land.
[24] NEM: ICMA: section 7(1)(d).
[25] NEM: ICMA: section 7(1)(e).
[26] NEM: ICMA: section 7(1)(f).
[27] NEM: ICMA: section 7(1)(g).
[28] NEM: ICMA: section 7(1)(h).

Apart from the components set out above, the NEM: ICMA excludes the following things from coastal public property:

(a) any immovable structure, installation or infrastructure located in a port or harbour lawfully constructed by an organ of state;[29]

(b) any part of the seashore which was lawfully alienated before the Seashore Act commenced or which was lawfully alienated in terms of the Seashore Act;[30]

(c) any part of an island that was lawfully alienated before the NEM: ICMA commenced or any portion of a coastal cliff that was lawfully alienated before the NEM: ICMA commenced.[31]

(b) Legal status

The coast, or the sea and the seashore as it was known prior to the commencement of the NEM: ICMA, has always been classified as a public thing (*res publicae*) in South African common law. As Van der Merwe points out, public things are those things which belong to the state or to organs of the state, but which may be used freely by the general public.[32]

Given that these things may be used freely by the public, the right of ownership vested in the state is not the same as private ownership. Instead, it is a form of public ownership. As such, it does not only confer powers on the state, but also imposes obligations, namely to administer and manage public things on behalf of and in the interests of the general public.[33] Unfortunately, this power was abused during the apartheid era to favour whites over blacks.

Whilst the South African Government was advancing apartheid laws, a new school of thought was emerging, one that would result in a shift away from state ownership to public ownership of natural resources. This new way of thinking involved expanding on the public trust doctrine. During the period of 1980, Joseph Sax, who was known as the founder of the water law public trust doctrine, widened the net of the public trust doctrine even further to include land-based activities, policy issues, land reclamation issues and ecological matters. The public trust doctrine has since evolved over time to include people, economics, and environmental impacts and even includes the human environment, thereby making this a priority goal for both the present as well as the future

[29] NEM: ICMA: section 7(2)(a).
[30] NEM: ICMA: section 7(2)(b).
[31] NEM: ICMA: section 7(2)(c) and (d).
[32] CG van der Merwe "Things" in *Law of South Africa (LAWSA) Vol. 27* 2ed (2014) at para 32.
[33] CG van der Merwe "Things" in *Law of South Africa (LAWSA) Vol. 27* 2ed (2014) at para 32.

generations.[34] Yet another key driver of change in the environmental law space foreign which evolved the public trust doctrine theory even further was the Brundtland Commission's report, which in 1987 extended the proclamation of the United Nations Conference on Human Health (UNCHE) into the "sustainable development" concept.[35] Thus, we record that from the 1970s up until 2008 coastal management in South Africa finally made a change in direction from the old way of having a natural resource being owned by the state towards a change in ownership by making the coast a public asset.

The public trust doctrine found its way into the South African Constitution[36] which places a duty on the state and other government agencies that share concurrent powers are charged to administrate as a trustee the following prescribed functions relating to all its duties inclusive of coastal affairs:

"The state, in its capacity as the public trustee of all coastal public property, must:

(a) ensure that the coastal public property is used, managed, protected, conserved, and enhanced in the interest of the whole community.

(b) take whatever reasonable legislative and other measures it considers necessary to conserve and protect coastal public property for the benefit of present and future generations".[37]

Viewed within the context of coastal management, the state is now no longer owner of the coast but rather a public trustee. This translates into a new duty for the state which must ensure that coastal environmental protection and conservation goals remain at the forefront of its administrative duties. One of the duties of the State is described in section 2 of NEM: ICMA, which requires the state to "fulfil environmental rights in coastal environment". These provisions are aligned to the Bill of Rights contained in section 24 of the Constitution which reads as follows:

"Everyone has the right:

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:

  (i) prevent pollution and ecological degradation.

  (ii) promote conservation; and

[34] Resolution A/Res/37/7, proclamation 6 made at the 21st plenary meeting of the United Nations Conference on Human Health held on 16 June 1972

[35] Brundtland Commission report entitled *Our Common Future* (1987), defines this concept as one which must meet the meet the following goal: 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.

[36] Constitution of the Republic of South Africa, 1996.

[37] NEM: ICMA: section 12 (a) and (b).

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development".

The NEM: ICMA introduced the concept of public trust which is a doctrine that specifies ownership in terms of common law proviso of *res publicae* which means that one cannot assign a monetary value to a thing that cannot be owned such as the coast. The NEM: ICMA is significantly more robust in this feature when it provided that "coastal access land could not be acquired by prescription",[38] confirming the property rights with a proviso that whilst the state may act as a trustee, it cannot exercise the right to trade the coast for monetary gain as one would do in the case of private property. Further the public trust doctrine has a far wider net to limit the state's powers it may exercise over its coastal affairs. These limitations prevent the state from taking actions that could result unfairness as was the practice under the apartheid regiment.

The NEM: ICMA also subscribes to the doctrine of public trust, as provided for in section 11, which reads as follows:

"(1) The ownership of coastal public property vests in the citizens of the Republic and coastal public property must be held in trust by the State on behalf of the citizens of the Republic.

(2) Coastal public property is inalienable and cannot be sold, attached, or acquired by prescription and rights over it cannot be acquired by prescription".

The NEM: ICMA imposes general obligations on the state by assigning the state the power of a public trustee. The state is charged to ensure that it discharges its duties in in manner that balances both the environmental rights as well as the public rights and interests of all members of the Republic.[39]

Section 3 of the NEM: ICMA sets out duties of the state whose actions must give effect to the coastal environmental rights set out below:

"In fulfilling the rights contained in section 24 of the Constitution of the Republic of South Africa, the state:

(a) through its functionaries and institutions implementing this Act, must act as the trustee of the coastal zone; and

(b) must, in implementing this Act, take reasonable measures to achieve the progressive realisation of those rights in the interests of every person".

[38] NEM: ICMA: section 11(2).
[39] NEM: ICMA: Chapter 12.

This section further provides that when the state is exercising its powers a public trustee of the coastal zone,[40] the implementation of the provisions of the NEM: ICMA must be undertaken in a manner that ensures these are "reasonable measures" which aspire towards attainment of a "progressive realisation of those rights" [in the coastal environment].[41] Chapter Three of this study will set out the duties of a local municipality and evaluate the implementation challenges that accompany these duties.

2.2 The concept of coastal access

The NEM: ICMA does not provide a description to coastal access in its definitions[42] except to set out in in the key objective the need to "to provide, within the framework of NEMA, for the co-ordinated and integrated management of the coastal zone by all spheres of government in accordance with the principles of co-operative governance".[43] Therefore, borrowing from the position of a general acceptance of public rights being codified in domestic law,[44] and as set out above, the assigning of the coast the property rights in law, making it now a public asset, as provided for in the public trust doctrine is the basis upon which coastal access laws will be discussed in this study.

This study will be also accepting the term access to mean the generally understood practise of ones right to freely roam public open spaces and the countryside and is distinguishable from using the resources of the coast for economic gain. The term coastal access will therefore be underscored by this definition in this study and will be considered within the context of the basic human right to be able to use and enjoy the coast in a fair and just manner.

Building on this premise, to give effect to this right to roam freely within the coastal space, one needs to be able to access the coast. The means of gaining access will become the subject of further discussion under Chapter three but suffice it the onset that in this study the term coastal access refers to the basic right of way to enter the coast to derive benefits from it.

It must also be recognised that the coast is governed by both statutory laws and common law rights which commute this basic right of equitable coastal access. Thus, within the context of this study

[40] NEM: ICMA: section 3(a).
[41] NEM: ICMA: section 3(b).
[42] NEM: ICMA: Chapter 1.
[43] NEM: ICMA: section 2(b).
[44] Refer to Section 24 of South African Constitution and read in conjunction with section 11(1) and (2) of the NEM: ICMA.

the bundle of access rights therefore comprises both of common law rights associated with property rights and the right of way as well as the law of servitudes and other legal statutes such as national, provincial, and municipal laws and by-laws. This therefore necessitates the need to set out and to explore the various legal provisions which give effect to the coastal access bundle of rights to inform the greater debate of whether in fact these coastal access rights confer coastal equity, and if so, then to what extent.

2.3 The doctrine of *vetustas*

The doctrine of *vetustas* or immemorial user provides that a public servitude will be presumed to exist where members of the public have exercised that servitude from time immemorial (i.e., 30 years), even though there is no written proof of the validity of the title. This presumption, however, is rebuttable.[45] The successful application of these principles to coastal access is clearly illustrated in *Langebaan Ratepayers and Residents Association v Dormell Properties 391 (Pty) Ltd*.[46]

In this case a gravel road, known as the White Road, was located on the respondent's property in Langebaan in the Western Cape. This road had been proclaimed as a provincial road in 1968 but was deproclaimed in 1991 after an alternative tarred road was constructed. Even though it was deproclaimed in 1991, members of the public continued to use the road as a thoroughfare until 2011 when the respondent closed it by installing a boom at the southern entrance and a gate at the northern entrance.

After the respondent closed the White Road, the applicant applied to the Western Cape High Court, *inter alia*, for an order declaring that a servitude of way had been established in favour of the public by ancient use or immemorial user along the route followed by the White Road. The applicant based its application on the ground that the public had accessed and used the road without hindrance since time immemorial; that the deproclamation of the road had not deprived the public of its ancient right to use the road; and that the respondent's decision to close the road had prevented members of the public from accessing the local beach.

In response to this application, the respondent argued that the White Road was located on private property and, consequently, that it was a private and not a public road. In addition, the respondent

[45] See CG van der Merwe 'Servitudes' in *Law of South Africa (LAWSA) Vol.24* 2ed (2010) at para 626 and AJ van der Walt *The Law of Servitudes* (2016) at 534.
[46] *Langebaan Ratepayers and Residents Association v Dormell Properties 391 (Pty) Ltd* 2013 (1) SA 37 (WCC).

argued that following the deproclamation of the public road it had instituted a system of permits in terms of which members of the public had to obtain a permit before they were allowed to use the road to access the beach and that they were only allowed to do so on foot.

The High Court found in favour of the applicants and granted the order. In arriving at this decision, the Court began its analysis by pointing out that in *De Beer v Van der Merwe*,[47] the Appellate Division held that the doctrine of *vetustas* is based on the notion that when a situation has existed for immemorial period, a legal presumption arises that its origin is legitimate and the party relying on it is relieved of proving this legal situation. It is important to note, however, that *vetustas* does not create a legal situation. It merely dispenses with the need to prove its origin is lawful. Instead, the onus is on the other party to prove that its origin is unlawful.[48]

While the respondents accepted that it was not necessary for the applicants to prove that a public servitude of way had been lawfully created, the High Court pointed out further, they argued that the applicants were required to prove the specific route along which the servitude applied, and that the servitude had been exercised since time immemorial. When it came to proving immemorial use, the respondents argued further, it was not enough to show that no one could remember the exact year when the right was first exercised, or to show that there are no living people who can remember it. Instead, the applicants had to prove "that those people who might be expected to know of the origin of the right, had themselves no knowledge of its origin and did not hear from the generation preceding them that it had previously existed".[49]

The problem with this argument, the High Court held, was that it was too strict. To establish the public right of way over the White Road had been exercised since time immemorial, the applicants had to prove the following:

(a) that "there has been a continuous and uninterrupted activity giving rise to the right by members of the public, whether in general or at a particular locality";
(b) that "the owner or successive owners of affected land have not interfered with members of the public carrying out or performing such activity"; and
(c) that "the activity in question existed so long that its origin cannot now be established".[50]

[47] *De Beer v Van der Merwe* 1923 AD 378 at 383.
[48] *Langebaan Ratepayers and Residents Association v Dormell Properties 391 (Pty) Ltd* 2013 (1) SA 37 (WCC) at para 20
[49] ibid at para 25.
[50] ibid at para 26.

Even if it was wrong, the High Court held further, the applicants satisfied the stricter approach proposed by the respondents. This is because their application did relate to a specific route, namely the White Road, and because the evidence they adduced had not been challenged by the respondents and satisfied the requirements for immemorial use. It followed, therefore, that the applicants had succeeded in proving that a public servitude of way along the White Road did exist.[51] The mere fact that the White Road had been de-proclaimed as a public road did not extinguish this servitude, the High Court held. This is because it is a generally accepted whenever the ownership of land that is burdened with a servitude is transferred to another person, the land is transferred together with the servitude. In other words, the land remains burdened.[52]

Considering these findings, the High Court concluded, the respondents had failed to rebut the presumption that the public servitude of way along the White Road had been lawfully created and, consequently, that members of the public were entitled to use the road to access the beach.

2.4 The doctrine of custom

The doctrine of custom provides that a public right of access may be created where the public or a portion of the public have customarily used a road or path to gain access to the coast and this custom has (a) continued since time immemorial; (b) without interruption; and is (c) reasonable; and (d) certain.[53]

Unlike the doctrine of *vetustas*, the doctrine of custom has not been used to claim a right of public access to the coast in South Africa. However, it has been used for this purpose in other jurisdictions and especially in five states of the United States, namely Florida,[54] Hawai'i,[55] North Carolina,[56] Oregon[57] and Texas.[58]

[51] *Langebaan Ratepayers and Residents Association v Dormell Properties 391 (Pty) Ltd* 2013 (1) SA 37 (WCC) at para 27.
[52] *Langebaan Ratepayers and Residents Association v Dormell Properties 391 (Pty) Ltd* 2013 (1) SA 37 (WCC) at paras 29-30.
[53] ES Pugsley "Custom and Usage" in *Law of South Africa (LAWSA) Vol. 12* 3ed (2020) at para 795.
[54] See *City of Daytona Beach v Tona-Rama Inc* 294 So. 2d 73 (Fla 1974)
[55] See *Public Access Shoreline v Hawai'i County. Planning Commission* 903 P.2d 1246, 1255–56 (Haw. 1995).
[56] See *Nies v Town of Emerald Isle* 780 S.E.2d 187 (N.C. Ct. App. 2015).
[57] See *State ex rel. Thornton v Hay* 462 P.2d 671, 673 (Or. 1969).
[58] *Moody v White* 593 S.W.2d 372 (Tex. Civ. App. 1979).

Although the United States doctrine of custom is derived from English law, in *Van Breda v Jacobs*[59] the Appellate Division (as it then was) held that the requirements that must be proved to establish a valid custom in Roman-Dutch law are the same as the requirements in English law.

The leading and most expansive customary use case in the United States is *State ex rel. Thornton v Hayes,* which was decided in 1969 by the Supreme Court of Oregon. In this case the respondent owned a beach front resort in the State of Oregon. His property extended up to the line of the mean high tide. It thus included the dry sand area, but not the wet sand area. The wet sand area belonged to the State and the public were entitled to access and use and enjoy it.

When he bought the property, Hay knew the public had used the dry sand area for more than 60 years without any objection. Despite knowing this, Hay wanted to fence in the dry sand area so that he could exclude the public from his property. The applicant, who was the Attorney-General for the State of Oregon, then applied for an injunction preventing Hay from doing so.

The trial court granted the injunction on the grounds that a public servitude had been established over Hay's land. Hay then appealed to the Oregon Supreme Court. The Supreme Court dismissed the appeal but arrived at its decision on different grounds. Instead of a public servitude, the Court found that a customary right of access to the dry-sand part of the beach applied to all the dry sand beaches in the State. In arriving at this decision, the Court held all the beaches in the State had been used by Native Americans since time immemorial.[60]

2.5 Acquisitive prescription and ways of necessity

Although it is possible to acquire a private servitude in the form of a right of way by acquisitive prescription and/or a way of necessity (*via ex necessitates*), neither of these methods are applicable when it comes to acquiring public servitudes for the reasons set out below.

The acquisition of a servitude of way by acquisitive prescription is governed primarily by the 1969 Prescription Act.[61] This Act codified the common doctrines set out herein and provides in this

[59] *Van Breda v Jacobs* 1921 AD 330 at 334

[60] This judgment was followed by the decision in *Stevens v City of Cannon Beach* 854 P.2d 449, 454–55 (Or. 1993) In this case the Supreme Court found that the customary right to coastal access was a "background principle" of Oregon property law and, consequently, that Oregon statute law which recognised and gave effect to this principle could not be classified as takings for the purposes of the Fifth Amendment of the Constitution.

[61] Prescription Act 68 of 1969. The 1969 Prescription Act repealed its predecessor (the Prescription Act 18 of 1943), but not with retrospective effect. This means that all prescription periods that began before the 1969 Act came into operation on 1 December 1970 will have to comply with the provisions of the 1943 Acts up until 30 November 1970 and then with the provisions of the 1969 Act for the remainder of the prescription period. Given that both Acts

respect that a person may acquire a servitude by prescription if he or she has "openly and as though he [or she] was entitled to do so, exercise the rights and powers which a person who has a right to such servitude is entitled to exercise, for an uninterrupted period of 30 years".[62]

The greatest challenge in using this statute is that in order to acquire a servitude by prescription, a person must satisfy the following requirements:

(a) he or she must exercise the rights and powers associated with the servitude being claimed.
(b) he or she must exercise these rights and powers openly and as though he or she was entitled to do so; and
(c) he or she must exercise these rights and powers in this way for an uninterrupted period of 30 years.

In *Ludolph v Wegner*[63] the court held that an important consequence of these requirements, is that a servitude may be acquired only by the person who can show that he or she has satisfied them. It follows, therefore, that a public servitude cannot be acquired by acquisitive prescription. This common law rule has been codified by the Prescription Act which provides that it does not apply to public servitudes.[64] This is therefore a major limitation to achieving coastal environmental justice.

The acquisition of servitudes of way by necessity is governed by the common law. The common law provides in this respect that a person may apply to court for a servitude of way of necessity if he or she owns a piece of land that is landlocked by land owned by others or is landlocked by a natural feature such as a river or mountain), to such an extent that the owner does not have "direct or reasonably sufficient access" to a public road.[65]

Apart from the requirement that the "landlocked" requirement, the common law principles governing a servitude of way of necessity also provide that it can be created only in favour of a dominant tenement over a servient tenement. An important implication of this rule is that only praedial and not public servitudes can be created in this way.[66]

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have a 30-year prescription period, their joint operation ran until 30 November 2000. Following that date, most prescription claims will simply have to meet the requirements of the 1969 Act, although there may be exceptions (see G Muller et al *General principles of South African property law* (2019) at 118 and A Pope and E du Plessis *Principles of South African Property Law* 2ed (2020) at 185).

[62] Prescription Act: section 6.

[63] (1888-1889) 6 SC 193 at 198.

[64] Prescription Act: section 9.

[65] See G Muller et al *General principles of South African property law* (2019) at 266 and A Pope and E du Plessis *Principles of South African Property Law* 2ed (2020) at 257.

[66] See AJ van der Walt *The Law of Servitudes* (2016) at 337.

2.6 Conclusion

It has been observed in this chapter that there has been a marked shift in property law rights in favour of strengthening the rights of the public using common provisions attached to servitudes. What is clear is that South African case law favours the doctrine of *vetustas* which places a greater burden of proof on the party refuting such a right exists. The bar sets no prescribed rules to prove the exact date of origin of a public right acquired through continuous practise over land if such actions can be proven to have occurred since 'time immemorial' on a continuous basis. The onus is upon those making such claims to demonstrate the use of land and not to provide any lawful basis for its existence. On the contrary, anyone seeking to oppose this motion must either demonstrate the origins of this right was in fact unlawful or that it did not occur on a continuous basis over a period of thirty years and beyond.

It is clear that common law doctrines described above provide some form of legal basis to address the public right of way to access. NEM: ICMA has opted not to abolish the common law doctrines but instead supplements these doctrines having codified these doctrines into the statue. Although the common law provisions have not been abolished, they cannot achieve the coastal access goals set out in the White Paper described above. This is because they apply only in limited circumstances; it is difficult to satisfy their requirements; they often have to be litigated which is costly and time-consuming; and they rely on private parties taking the initiative rather than the state. Given that the common law provisions have not been abolished, it is important to discuss the common law principles first in order to present a complete picture of the legal framework governing public access to the coast so that the need for a statutory right and not simply a common law right is fully appreciated within the context of this study.

CHAPTER THREE: COASTAL ACCESS IN TERMS OF THE NEM: ICMA

3.1 Introduction

As we have seen in Chapter Two of this study, the *White Paper* provides in Goal B.1 that the state must ensure that the public have a right of perpendicular access to the sea, and parallel access to and along the seashore on a managed basis. These goals have been given legal effect in section 13 and section 18 of the NEM: ICMA. The purpose of this chapter is to set out and discuss these sections. In addition, the purpose of this chapter is to set out and discuss the national coastal access strategy and the way these provisions and the strategy have been implemented in the eThekwini Municipality.

3.2 Perpendicular coastal access

In this study, perpendicular access refers to the access to the sea which is perpendicular to the horizon or the seashore. As we have already seen, perpendicular access to the sea is expressly provided for in section 13 of the NEM: ICMA. This section reads as follows:

"Subject to this Act and any other applicable legislation, any natural person in the Republic:

(a) has a right of reasonable access to coastal public property; and

(b) is entitled to use and enjoy coastal public property, provided such use:

  (i) does not adversely affect the rights of members of the public to use and enjoy the coastal public property;

  (ii) does not hinder the State in the performance of its duty to protect the environment; and

  (iii) does not cause an adverse effect".

Considering the following provisions, may be stated that coastal access rights are:

(a) limited to those that are "reasonable"; and

(b) must be exercised in a manner that:

  (i) does not infringe upon the rights of other members of the public.

  (ii) does not obstruct the state's duty to protect the environment; and

  (iii) does not actually or potentially impact on the rights of other members of the public.

In addition, the following two points may be made:

First, unlike the ownership of coastal public property, that the right of access is granted to all "natural" persons and not only to "citizens". In other words, the right of ownership of coastal

public property is separated from the right of access to coastal public property and is vested in different groups. Ownership is vested in citizens and access is vested in all natural persons.

Second, section 13(1) of the NEM: ICMA attempts to strike a balance between three conflicting demands. These are, first, to address the historical legacy of apartheid; second, to provide access to the coast for developmental purposes; and third, to conserve and protect the environmental integrity of the coast. The section attempts to balance this different consideration by conferring a right of access on everyone, but at the same time restricting or regulating the way the right must be exercised.

When it comes to regulating the way in which the right must be exercised, section 13 of the NEM: ICMA provides that it must be exercised reasonably and must not infringe the rights of others to use and enjoy coastal public property; does not obstruct the environmental protection of coastal public property; and does not cause an adverse effect. Unfortunately, the Act does not provide any details insofar as these restrictions are concerned (i.e., no code or guide). They are left to the courts to interpret and apply.

Apart from regulating the way natural persons may exercise their right to access coastal public property, section 13 of the NEM: ICMA also provides that "no person may prevent access to coastal public property".[67] In addition, it also provides that the right of perpendicular access does not prevent the state from prohibiting or restricting access to any part of coastal public property:

"(a) which is or forms part of a protected area;
(b) to protect the environment, including biodiversity;
(c) in the interests of the whole community;
(d) in the interests of national security; or
(e) in the national interest".[68]

Given its power to exclude and thus to undermine the goal of equitable access, it is important to note that section 13 of the NEM: ICMA specifically regulates the power to charge a fee for accessing coastal public property. Section 13 provides in this respect that "no access fee may be charged for access to coastal public property without the approval of the Minister".[69] Apart from this power, section 13 also confers the power on the Minister to prescribe the maximum fees that

[67] NEM: ICMA: section 13(1A).
[68] NEM: ICMA: section 13(2).
[69] NEM: ICMA: section 13(3)(a). The ministerial approval requirement does not apply to fees for the use of facilities or activities which are located on or in coastal public property (s 13(3)(d)).

may be payable for access to coastal public property, or the infrastructure located therein, payable by persons in general or a category of persons.[70]

Before the Minister grants approval for the imposition of a fee, he or she provide interested and affected parties with an opportunity to make representations in accordance with the public participation process set out in Part 5 of Chapter 6 of the NEM: ICMA.[71]

Finally, section 13 provides that it does not apply to "coastal public property (a) for which a coastal use permit has been issued in terms of section 65; or (b) that is, or forms part of, a protected area, or a port or harbour".[72]

3.3 Parallel access

3.3.1 Introduction

Apart from perpendicular access, the NEM: ICMA also makes provision for parallel access to coastal public property. In this respect, section 18 of the Act provides that each coastal municipality must, within four years of the commencement of the NEM: ICMA, make a by-law that designates strips of land as coastal access land.[73] Coastal access land is "automatically subject to a public access servitude in terms of which members of the public may use that land to gain access to coastal public property".[74]

Apart from conferring the power to designating coastal access land on coastal municipalities, the NEM: ICMA also sets out certain principles a municipality must comply with when it exercises this power. In this respect the Act provides that:

(a) the municipal by-law must comply with the other provisions of the NEM: ICMA; the prohibitions and restrictions referred to in section 13(2); the national and provincial coastal management programmes, and any other applicable legislation;[75]

(b) the municipal by-law must not conflict with protected areas, the protection of the environment or the interests of the community;[76]

[70] NEM: ICMA: section 13(3)(b). Any person or organ of state may apply to the Minister to charge a fee more than the maximum published by him or her (s 13(3)(c)).
[71] NEM: ICMA: section 13(4).
[72] NEM: ICMA: section 13(5).
[73] NEM: ICMA: section 18(1).
[74] NEM: ICMA: section 18(2).
[75] NEM: ICMA: section 18(3).
[76] NEM: ICMA: section 13 (2) (a) to (c)

(c) the areas designated as coastal access land must be indicated on the municipal zoning scheme and incorporated into the municipality's integrated development plan and spatial development frameworks;[77] and

(d) the areas designated as coastal access land may not be located within a harbour, defence, or other strategic areas without permission of the relevant Minister.[78]

If a municipality fails to designate strips of land as coastal access the MEC, and failing the MEC, the Minister, may designate such access land. Before doing so, however, the MEC or the Minister must first consult with the municipality (and the MEC in the case of the Minister) and give them a reasonable opportunity to make representations.[79]

Finally, a municipality may, "on its own initiative or in response to a request from an organ of state or any other interested and affected party, withdraw the designation of any land as coastal access land".[80]

3.3.2 The process for designating coastal access land

Section 18 provides, *inter alia*, that "[e]ach municipality whose area includes coastal public property must within four years of the commencement of this Act, make a by-law that designates strips of land as coastal access land in order to secure public access to that coastal public property".[81] Land that has been designated as coastal access land, section 18 goes on to provide "is automatically subject to a public servitude in terms of which members of the public may use that land to gain access to coastal public property".[82]

The process a municipality must follow when it exercises designates land as coastal access land is regulated by the NEM: ICMA. In this respect section 19 of the Act provides that the municipality must:

(a) assess the environmental impact of the designation;[83]

(b) consult with interested and affected parties in terms of section 53 of the Act;[84] and

(c) give notice to the owner of the land regarding the intended designation.[85]

[77] NEM: ICMA: section 18(4).
[78] NEM: ICMA: section 18(4).
[79] NEM: ICMA: sections 18(6) to (8).
[80] NEM: ICMA: section 18(5).
[81] NEM: ICMA: section 18(1).
[82] NEM: ICMA: section 18(2).
[83] NEM: ICMA: section 19(a).
[84] NEM: ICMA: section 19(b).
[85] NEM: ICMA: section 19(c).

3.3.3 The responsibilities of the municipality

In those cases, in which a municipality has designated coastal access land, the NEM: ICMA imposes certain obligations on the municipality. In this respect section 20 of the Act provides that the municipality must:

(a) signpost entrances to coastal access land.
(b) control the use of coastal access land.
(c) protect and enforce the rights of the public to use such access.
(d) maintain the land to ensure continued public access.
(e) promote access via the provision of appropriate amenities such as parking.
(f) ensure that coastal access does not cause adverse environmental effects.
(g) remove inappropriate access that is causing adverse environmental effects.
(h) describe coastal access land in municipal coastal management programmes and in a spatial development framework.
(i) report progress to the MEC on measures to implement these sections of the Act within two years of the Act coming into force; and
(j) perform any other actions that may be prescribed.[86]

3.4 National guidelines

The call for policy formulation in the *White Paper* was achieved through the following publications which are aimed at providing guidance in implementing to coastal access provisions:

- a user-friendly guide to the NEM: IMCA;[87]
- a *National Strategy for the Facilitation of Coastal Access in South Africa*;[88] and
- the *National Coastal Management Programme of South Africa.*[89]

The *National Strategy for the Facilitation of Coastal Access in South Africa* includes a guideline document for the *Designation and Management of Coastal Access in South Africa*. The guideline document prescribes that a municipality may negotiate with the private landowner for a public access servitude over that land when faced with the challenge of access being blocked to the

[86] NEM: ICMA: section 20(1).
[87] T Breetzke, L Celliers, D Malan and T Moore *A user friendly guide to the Integrated Coastal management Act of South Africa (*2009).
[88] The Department of Environmental Affairs *National Coastal Access Strategy for South Africa. Strategy to the Implementation of the ICM Act* (2014).
[89] Department of Environmental Affairs *South Africa's National Coastal Management Programme* (2014).

public. This is one of the measures provided to redress with the past social privileges afforded to a few which resulted in a greater social injustice produced by the exclusive rights to private beach access. [90]

The National Department of Environmental Affairs (DEA) published a *National Strategy for the Facilitation of Coastal Access* in 2014 is a step-by-step support tool which provides guidance for the implementation of the coastal access provisions in a fair, just, and equitable manner.[91]

The NEM: ICMA guarantees the provision of coastal access to members of the public by imposing a further legal requirement on local government to enact a law that clearly demarcates and designates strips of land to be used as public access points to gain entry to the coast. The provision is an obligatory one as directed in the wording "must within four years of commencement of the Act, make a law that designates strips of land as coastal access land".[92]

Access to the coastal public property (CPP) is by means of designating coastal access land, done through the passing of local authority by-laws to promote coastal access to CPP along the coast. In addition, local authorities are required to withdraw inappropriate coastal access land and follow an environmentally sensitive and socially responsible process in designating coastal access land".[93]

In "determining and adjusting coastal boundaries of coastal access land" local municipalities are required to "ensure specified considerations are considered when determining or adjusting a coastal boundary of coastal access land".[94]

3.5 The eThekwini Metropolitan Municipality Beach By-law

Turning attention now to the by-laws enacted by the local authority, the eThekwini Beach By-law[95] provides "for measures to manage, control and regulate public access and behaviour at beaches and beach areas" amongst other provisions. The objects of this By-law are to:

[90] Ibid at 81.
[91] National Department of Environmental Affairs National *Strategy for the Facilitation of Coastal Access* (2014).
[92] NEM: ICMA: sections 18(1).
[93] NEM: ICMA: sections 18 and 20.
[94] NEM: ICMA: section 29.
[95] eThekwini Municipality: Beaches By-Law (2015). This By-law was adopted by the Municipal Council on 24 June 2015.

"(a) create an effective system for the managing and controlling of public access to beaches and beach areas.

(b) provide measures to regulate conduct on beaches and beach areas and to prohibit certain activities or conduct on beaches and beach areas.

(c) provide measures to control and regulate access to and the use of public amenities on the beach and beach areas.

(d) provide penalties for the breach of its provisions; and

(e) provide for related matters".[96]

In 2011, the Coastal Stormwater and Catchment Management (CSCM) Department, eThekwini Municipality, embarked on an exercise to formalise the management of all coastal access points within its 97km coastline. This complex task was broken into several smaller tasks, one of these being the initial task to identify all the different types of accesses that existed within the municipality. These were identified as obscure pedestrian footpaths to formalised concrete slipways. After considering all available tools, the most beneficial tool identified, was the use of GIS software and in particular, the ArcGIS suite was used in this exercise. A Coastal Accesses Database was generated using a variety of information sources which included a desktop survey, workshops, and ground truthing the data through physical field assessments. This process took six months to populate a total of 600 access points.

3.6 The geodatabase

For the creation of a geodatabase, which is an information system used to populate spatial data, all attribute fields needed to be identified. Other eThekwini departments namely the Survey Department, Parks Department and Environmental Department were also consulted on the matter. Table 1 below, covers the range of attributes agreed upon. It was decided that accesses would be identified via a desktop survey. Access points were identified as a point, and not a line nor shape. This reference point would be at the most seaward part of the access.

The 97km of eThekwini's coastline was split into four sections to help accelerate the process. A Graphic User Interface (GUI), which is a specialized equipment used to assist with data collection. The latest lidar data and aerial photographs aided in the information capture. Lidar refers to Light Detection and Ranging and is a remote sensing method that uses light in the form of a pulsed laser to measure ranges (variable distances) to the Earth.

[96] Beaches By-law: section 3.

Since the municipality undertakes aerial inspections of the entire coastline every six months or if a significant storm event has occurred, as a first check, these updated oblique photos were used to verify coastal accesses and structures. Both seaward and landward facing photographs of each of the existing access point were taken.

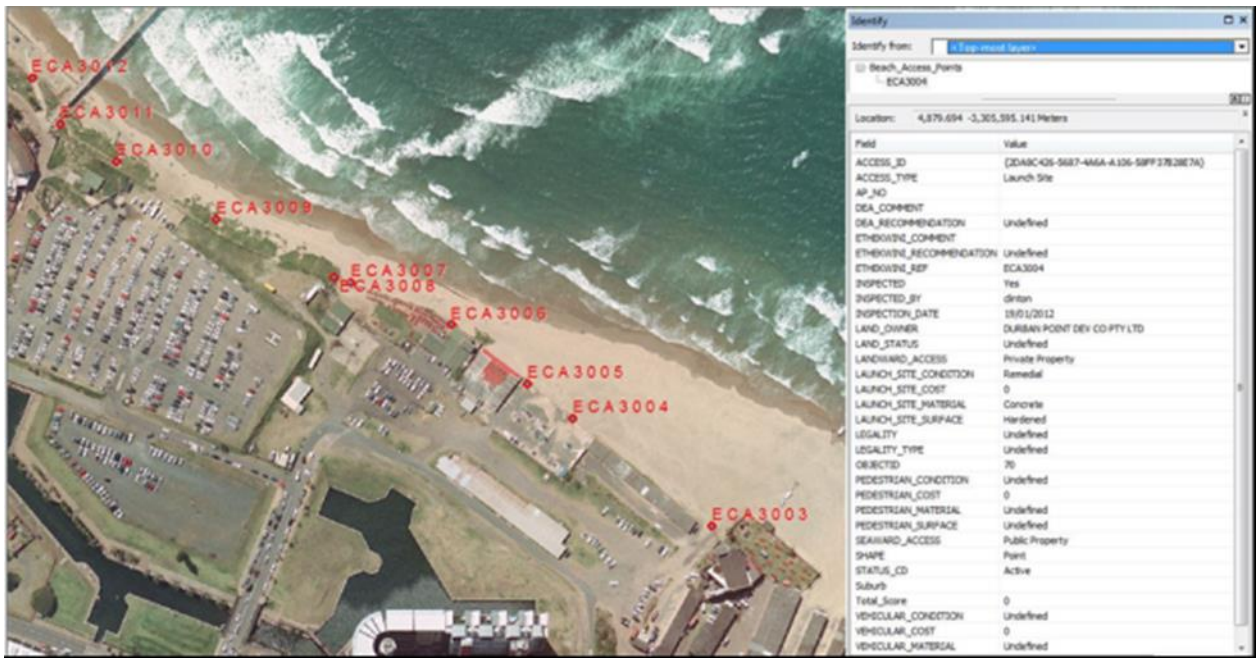

Figure 1: Screen capture of a coastal access point described via the adjoining attribute fields. The right-hand side of the figure shows the attribute fields for the coastal access point in question.

3.7 Ground truthing

Ground truthing refers to a physical field exercise undertaken to verify data collection, and for this the local municipality used vocational students during the holiday periods. The aim was to provide the students with a copy of the geodatabase on a tablet. This tablet would then lead the student to the coastal access point via the captured access point's co-ordinates and the GPS system on the tablet. However, this was not possible at the time as ArcGIS requires a 'Windows' based operation system and in 2010-2011, all tablets where either IOS or Android based.

Hence, the ground truthing task became intense since old school methods were employed using maps with coastal access points physically drawn for each 5km stretch of coastline. The Database was extracted to an Excel format and then loaded onto a Trimble and/or handheld GPS. Another requirement for this exercise was that each access point be verified via a minimum of 2 photographs. Hence students had to also carry a digital camera in the field exercise.

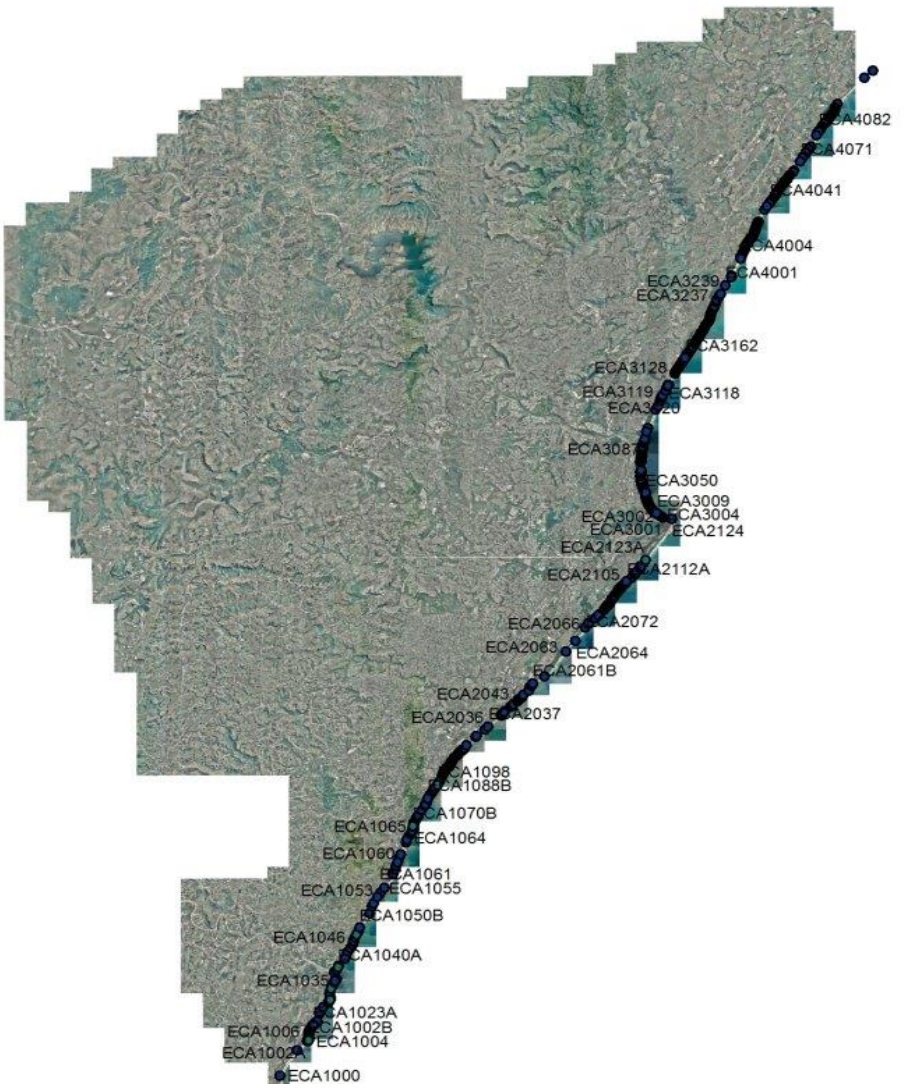

Figure 2: A map depicting coastal access points in existence, details of which were physically verified

Selection criteria when dealing with many access points

Figure: 3 A map with an example of how you determined which access points can remain open versus closing others using the GIS tool to guide decision making processes

In the eThekwini case study, as seen from the above image, the decision was taken to close access points 1008 to 1016 and keep access 1010 open. The reason for this is that the residents have created their own private beach access to the dune area compromising its integrity. Access point 1010 was deemed to be most centralised and since it is situated within a servitude, this made accessibility to all members of the public feasible.

The eThekwini municipality study concluded that the use of GIS software proved to be immeasurable and will greatly aid the CSCM to meet the ICM Acts, Coastal Access requirements. All the information captured, were easily accessible and prominently displayed to all the decision makers. The compilation of the Coastal Access database has provided the department with good experience and will aid in the compilation of the CSCM Coastal Structures Database on an on-going basis.

The database of information will be presented to all interested and affected stakeholders during each step of either designating new access points or closing old access points. This is a positive step in ensuring inclusion of all coastal stakeholders whose right to coastal access requires inclusion in decisions undertaken by the state in advancing this public right. Hence the decision to either close, open, rehabilitate a coastal access could be better facilitated using an evidenced based approach to demonstrate why several coastal access points near each other are better closed so that a single improved and upgraded coastal access point can created to serve a larger segment of the public. The database is also beneficial since it allows for updating information as new access points are created and old ones are closed. Information of this nature provides coastal stakeholders with a sound basis upon which to either support or refute the proposals of local government through submission of comments which may contributed to a more robust process undertaken. This is observed to be a positive step towards attaining coastal environmental justice by informing the decision making process of government to the extent that it is in the best interest of the public.

3.8 Conclusion

The *White Paper's* vision to have both perpendicular and parallel access rights for the public to use and enjoy the coast has been realised in the NEMICMA provisions of set out above.

One of the key objectives of the NEM: ICMA is "to provide, within the framework of NEMA, for the co-ordinated and integrated management of the coastal zone by all spheres of government in accordance with the principles of co-operative governance".[97]

In setting out the provisions above, a closer analysis of the approach taken by the eThekwini local municipality revealed some insights into some of the challenges which could present itself at an implementation level. One of these being that the coastal access provisions are silent when guiding on how to deal with private access points except to suggest that these must be registered as a "non-user conservation servitude" against the title deed of the property owner.

Whilst the eThekwini municipality is a metropolitan municipality, this study was limited in that a comparison was not made with another municipality, one perhaps that was under-resourced to replicate the methodology employed eThekwini's counterparts. The extrapolation one may make however would be to suggest that the state consider setting up a coastal access fund to support

[97] NEM: ICMA: section 2(b).

those municipalities who are under-resourced to accelerate the coastal access provisions along the entire South African coastline.

Access rights extended to include local and foreign nationals to have the equality in access rights - coastal environmental justice- public participation in decision making process: must ensure IAPS are firstly empowered to participate actively in decision making processes going forward if justice is to prevail. Coastal role-players have actively and positively influenced the white paper process which informed the very first coastal act – therefore this concern is not ranked as huge threat for the success of the outcomes intended in the act.

The eThekwini case study is a good test of the implementation challenges that exist when giving effect to the coastal access provisions. Although certain technical challenge, were experienced these were overcome proving that the legal provisions are not far reaching, and implementation is realistically achievable. What is critical is the first step which entails an initial assessment aimed at identifying all existing access points which must be recorded in order to serve as an information tool to guide on both the designation of new access points and the maintenance and/or upgrade of existing coastal access points. In the eThekwini case study, the stakeholder consultation process also formed part of this study.

The eThekwini municipality, when faced with how to deal with the closing out of private access points which were impacting negatively on the coastal dunes, the municipality took a conservative approach by allowing the private access to be unaffected on the private landowner's side of the property and closed off the access points on the seaward side so that dune rehabilitation work could be undertaken as part of the municipality's coastal environmental conservation program.[98] This proved to be the most reasonable and fair approach in the absence of any clear legal rules governing the management of pre-existing private access points in the coastal access provisions. In relation to the common law discussions set out in the previous chapter, this identifies a gap in the existing coastal access legal regime in South Africa, which is silent on legal guidance when faced a local authority encounters such a circumstance. It is therefore submitted that the reasonable thing in this situation is to ensure the rights of both the private landowner as well as the public are equally upheld. Hence, the Ethekwini municipality elected to place emphasis on the objective of providing coastal access to the public rather than to focus its energies and resources on redressing the aspect of private coastal access points. Since the study has not yielded any literature or case

[98] Coastal Stormwater and Catchment Management (CSCM) Department, eThekwini Municipality received via email 27 November 2018 from Coastal Engineer Cameron Gabin

law in South Africa which has tested this approach, the approach taken is still in its infancy stages and is as yet to be tested in terms of its application of the coastal access designation process undertaken by a local municipality.

When analysing the description of the methodology and criteria used in selecting which access points are prioritised over others for upgrades, or possible closure it was observed that the municipality selected the criteria of beach use to inform its decision by ensuring beaches that are used mainly as swimming beaches would have more formalised accesses as opposed to non-swimming beaches. Also, stretches of coastline which are not so densely populated will have access points spaced further apart. Therefore, the number of coastal users and seasonal demands were also used to in the decision-making criteria to inform this exercise of selection of coastal access points.

The eThekwini municipality concluded by anticipating public consultation in the future could prove challenging especially when engaging with residents whose private beach accesses is chosen for closing out. Currently private access points are not a priority in the implementation strategy of the eThekwini municipality.

What the eThekwini study has highlighted is that the NEM: ICMA coastal access provisions are realistically achievable, despite the slow rate at which implementation is occurring across all coastal municipalities. The study also uncovered the need for dedicated personnel and resources to render this task meaningful and sustaining.

We now turn our focus onto the foreign arena to perform a comparative analysis of coastal access in England and Scotland in the next chapter.

CHAPTER FOUR: COASTAL ACCESS IN ENGLAND AND SCOTLAND

4.1 Introduction

Like South Africa, both England and Scotland have passed legislation that makes provision for a public right of access to the coast. The relevant English Act is the Marine and Coastal Access Act of 2009, and the relevant Scottish Act is the Land Reform (Scotland) Act of 2003. While the English Marine and Coastal Access Act makes provision for a specific coastal access path and thus adopts a roughly similar approach to the NEM: ICMA (although it goes much further), the Scottish Land Reform (Scotland) Act adopts a radically different approach. Instead of making provision for a specific coastal access path, it confers a right of access over private land in Scotland (including the coast) on the public for recreation purposes (such as pastimes, family and social activities, and more active pursuits like horse riding, cycling, wild camping and taking part in events), educational purposes (concerned with furthering a person's understanding of the natural and cultural heritage), some commercial purposes (where the activities are the same as those done by the general public) and for crossing over land or water.[99]

4.2 Coastal access in England

4.2.1 Introduction

The English Marine and Coastal Access Act is primarily aimed at promoting and maintaining biodiversity in the United Kingdom's oceans and seas. However, the Act does not focus exclusively on the ocean. This is because Part Nine of the Act is aimed at improving public access to, and public enjoyment of, the English and Welsh coasts by creating clear public access rights along the coast for open-air recreation on foot. Although it contains some novel features, the Act also relies on earlier access legislation. In particular, the Act relies heavily on the National Parks and Access to the Countryside Act of 1949 ("NPAC Act") and the Countryside and Rights of Way Act of 2000 ("CROW Act").

[99] Sections 1 and 2 of the Land Reform Act (Scotland) 2003.

4.2.2 The coastal access duty

Part Nine of the Marine and Coastal Access Act begins by imposing a "coastal access duty"[100] on Natural England[101] and the Secretary of State to achieve two related objectives.[102] The first objective is to establish a series of long-distance paths around the entire coast of England along which members of the public will be entitled to journey on foot or by ferry for recreational purposes ("the coastal route").[103] The second objective is to establish a margin of land along the English coast to which members of the public will have access for a limited range of recreational purposes ("the coastal margin").[104]

Apart from imposing this duty Natural England and the Secretary of State, Part 9 of the Marine and Coastal Access Act also sets out certain general obligations which these two bodies must comply with when they discharge their coastal access duty.[105] In particular, they must take into account the "safety and convenience of users of the coastal route", as well as the "desirability of ensuring that the route adheres to the edge of the coast and provides views of the sea and that interruptions are kept to a minimum".[106] Significantly, they must also "aim to strike a fair balance between the interests of the public in having rights of access over land and the interests of any person with a relevant interest in the land".[107]

4.2.3 The process for implementing the coastal access duty

The process for implementing the coastal access duty is divided into two stages by the Marine and Coastal Access Act. Primary responsibility for carrying out this two-stage process lies with Natural England.

[100] Marine and Coastal Access Act: section 296(4).
[101] Natural England is a government advisory body to the United Kingdom's Department for Environment, Food and Rural Affairs (Defra). Defra is the government department responsible for environmental protection, food production and standards, agriculture, fisheries and rural communities in the United Kingdom of Great Britain and Northern Ireland. Accessed from https://www.gov.uk/government/organisations/natural-england on 24 August 2021
[102] Marine and Coastal Access Act: section 296(1).
[103] Marine and Coastal Access Act: section 296(2). See also A Clark "Public access to the English coastline: An analysis of Part 9 of the Marine and Coastal Access Bill" (2009) 30 *Liverpool Law Review* 147.
[104] Marine and Coastal Access Act: section 296(3). See also A Clark "Public access to the English coastline: An analysis of Part 9 of the Marine and Coastal Access Bill" (2009) 30 *Liverpool Law Review* 147.
[105] Marine and Coastal Access Act: section 297(1).
[106] Marine and Coastal Access Act: section 297(2).
[107] Marine and Coastal Access Act: section 297(3).

The first stage requires Natural England to prepare a "coastal access scheme" describing how it plans to carry out its coastal access duty.[108] This scheme must be submitted to the Secretary of State within twelve months of the date on which the Act comes into force.[109]

The Secretary of State has the power to accept, modify or reject the report.[110] Once the Secretary of State has accepted the report, it must be laid before Parliament and Natural England must then act in accordance with the scheme when it carries out its duties.[111]

The second stage requires Natural England to draft one or more "coastal access reports" containing proposals for aligning the coastal route with the coastal margin. This stage of the process is modelled on the procedure for establishing long distance public routes under Part IV of the NPAC Act. These reports must be submitted to the Secretary of State, who may approve, modify, or reject them.[112]

Before it prepares its coastal access report, Natural England must take reasonable steps to consult the owners and occupiers of land affected by its proposals, as well as local access forums, planning authorities and other stipulated bodies.[113] After doing so, Natural England must publish its report and any person is entitled to make representations with respect to the report. These representations must be considered by the Secretary of State before he or she makes any determination.[114]

Landowners and occupiers who are affected by a coastal access report may also object to a report. These objections must be based on the ground that the position of the coastal route or the alignment of the coastal margin has failed to strike a fair balance between the interests of the public and the interests of the landowner or occupier.[115] When he or she decides whether to approve a coastal access report, the Secretary of State must consider any objections that have been made.[116]

Once a route has been approved by the Secretary of State for a particular stretch of coast, any work that is necessary to create new, or to improve existing, means of access must be undertaken. This

[108] Marine and Coastal Access Act: section 298(1)
[109] Marine and Coastal Access Act: section 298(3).
[110] Marine and Coastal Access Act: section 298(2).
[111] Marine and Coastal Access Act: section 298(6).
[112] NPAC: section 55A. See also A Clark "Public access to the English coastline: An analysis of Part 9 of the Marine and Coastal Access Bill" (2009) 30 *Liverpool Law Review* 147.
[113] NPAC: section 51(4) and 55D (6). See also A Clark "Public access to the English coastline: An analysis of Part 9 of the Marine and Coastal Access Bill" (2009) 30 *Liverpool Law Review* 147.
[114] NPAC: Schedule 1, item 2.
[115] NPAC: Schedule 1, item 3.
[116] NPAC: Schedule 1, item 4.

could include, for example, constructing bridges, gates, steps or installing drainage. Depending on the terrain, a specific path might be signed and managed within the coastal margin, to reinforce people's confidence in using the route and to ensure safe and convenient access.[117]

4.2.4 The coastal route and coastal margin

The amendments made by the Marine and Coastal Access Act to the CROW Act allow the Secretary of State to issue an Order identifying land that will be encompassed by the coastal margin. This Order was made on 1 March 2010 and came into operation on 6 April 2010.[118]

This Order provides that the coastal margin will include: (a) land two metres either side of the line of a coastal access route;[119] (b) all land to the seaward side of the route;[120] and (c) any classic coastal land types to the landward side of the route.[121]

The process of determining the line of the route, therefore, has a wider significance than just for the route itself. This is because the extent of the coastal margin will be defined by reference to the alignment of the coastal route.[122]

Apart from allowing the Secretary of State to issue an order identifying land that will be encompassed by the coastal margin, the amendments made to the CROW Act also provide that the public rights of access contained in section 2(1) of the CROW Act will normally also apply to the coastal margin.

4.2.5 Excepted land

Although members of the public will normally have a right of access over land falling within the description of the coastal margin, certain categories of land are excepted from the scope and ambit of this new right. These exceptions are set out in Schedule 1 of the CROW Act as amended by the Order.[123]

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[117] See A Clark "Public access to the English coastline: An analysis of Part 9 of the Marine and Coastal Access Bill" (2009) 30 *Liverpool Law Review* 147.
[118] Access to the Countryside (Coastal Margin) (England) Order 2010: Item 1.
[119] Access to the Countryside (Coastal Margin) (England) Order 2010: Item 2.
[120] Access to the Countryside (Coastal Margin) (England) Order 2010: Item 2.
[121] Access to the Countryside (Coastal Margin) (England) Order 2010: Item 3.
[122] See A Clark "Public access to the English coastline: An analysis of Part 9 of the Marine and Coastal Access Bill" (2009) 30 *Liverpool Law Review* 147.
[123] See A Clark "Public access to the English coastline: An analysis of Part 9 of the Marine and Coastal Access Bill" (2009) 30 *Liverpool Law Review* 147.

For example, any land covered by buildings or the cartilage of any such land will continue to be excepted from the rights of access.[124] Any land used for the purposes of a railway, racecourse, or aerodrome, or for the surface extraction of minerals is also exempted.[125]

4.2.6 Scope of the coastal access rights

As Clark points out, the intention of both CROW and the Marine and Coastal Access Act is to give members of the public a right of access on foot to designated land for a limited range of recreational purposes. The right of access does not extend to rights such as horse-riding or cycling. In addition, Schedule 2 of CROW imposes general restrictions on the types of activities that may be carried out on land designated as "access land". For example, a person is not entitled to be on access land if he any animal with him or her, other than a dog.[126]

4.3 Coastal access in Scotland

4.3.1 Introduction

The Land Reform (Scotland) Act was passed in 2003. Part One of the Act is aimed at improving access to land in Scotland by introducing a statutory "right to roam" over both public and private land for recreation and other purposes.

4.3.2 A right of access

Part One of the Land Reform (Scotland) Act begins by providing that "everyone" has a statutory right of access to land.[127] More specifically, it provides that this right of access is: (a) the right to be, for specified purposes, "on land";[128] and (b) the right to "cross land".[129]

The specified purposes referred to in section 1(2)(a) are divided into three categories. First, the right to be on land for "recreational purposes".[130] Second, the right to be on land for the purpose

[124] CROW: Schedule 1, item 2.
[125] CROW: Schedule 1, items 5-8.
[126] See A Clark "Public access to the English coastline: An analysis of Part 9 of the Marine and Coastal Access Bill" (2009) 30 *Liverpool Law Review* 147.
[127] Land Reform (Scotland) Act: section 1(1).
[128] Land Reform (Scotland) Act: section 1(2)(a).
[129] Land Reform (Scotland) Act: section 1(2)(b).
[130] Land Reform Act: section 1(3)(a).

of carrying out a "relevant educational activity".[131] Third, the right to be on land for the purpose of "carrying on, commercially or for profit, an activity which the person exercising the right could carry on otherwise than commercially or for profit".[132]

The right to be "on land" in section 2(a) includes the right to go into, pass over and remain on it (Scotland) for any of the three purposes listed above and then to leave it. The right to "cross land" in section 2(b) includes the right to go into, pass over and leave it for the purpose of getting from one place outside the land to another such place.[133]

Access rights can be exercised above and below, as well as on, the surface of the land.[134]

4.3.3 Responsible behaviour

The access right created in section 1 of the Land Reform (Scotland) Act vests in a person only if he or she exercises it responsibly.[135] A person is presumed to be exercising his or her access right responsibly if he or she does not unreasonably interference with any of the rights of another person.[136]

However, a person will not be exercising his or her access right responsibly if he or she:

(a) is on land or is crossing land contrary to a court order.
(b) is on land or is crossing land to do something that is an offence.
(c) is hunting, shooting, or fishing.
(d) is on land or is crossing land with an animal that is not under proper control.
(e) is on land or is crossing land to take away anything in or on the land for commercial purposes.
(f) is on land or is crossing land in or with a motorised vehicle; or
(g) is on or is crossing a golf course.[137]

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[131] Land Reform Act: section 1(3)(b). A "relevant educational activity" is defined in section 1(5) as an activity that is carried on by a person for the purposes of (a) furthering his or her understanding of natural or cultural heritage; or (b) enabling or assisting other persons to further their understanding of natural or cultural heritage.
[132] Land Reform (Scotland) Act: section 1(3)(c),
[133] Land Reform (Scotland) Act: section 1(4).
[134] Land Reform (Scotland) Act: section 1(6).
[135] Land Reform (Scotland) Act: section 2(1).
[136] Land Reform (Scotland) Act: section 2(2).
[137] Land Reform (Scotland) Act: section 2(2)(a)(i) read with section 9. Scottish National Heritage (SNH) was established as an executive non-departmental public body (NDPB) under the provisions of the Natural Heritage (Scotland) Act 1991, which in Schedule 1 sets out SNH's constitution. SNH is the lead advisory body on nature, wildlife management, and landscape management across Scotland.

A person will also not be exercising his or her access right responsibly if he or she undoes anything done by Scottish National Heritage[138] or disregards the guide for responsible conduct set out in the Scottish Outdoor Access Code.[139]

The responsible exercise of access rights refers to the exercise of these rights in a lawful and reasonable manner and which takes proper account of other people and the features of the land being accessed.[140]

4.3.4 Excepted land

As a rule, the access right created in section 1 of the Land Reform (Scotland) Act applies to all land in Scotland. However, there are some exceptions to this general rule. The Act provides in this respect that the access right does not apply to the following:

(a) building or other structures or works.
(b) a caravan or tent or another place that provides shelter.
(c) the curtilage of a building which is not a house.
(d) land that is contiguous to or used for the purposes of a school.
(e) land adjacent to a house, caravan, tent, or shelter that gives the person living there a reasonable amount of privacy in that place.
(f) land to which public access is prohibited by another Act.
(g) land which has been developed as a sport field or for another recreational purpose.
(h) land which charges members of the public for admission for more than 90 days a year; and
(i) land on which building, engineering, demolition and mining works are carried out and land on which crops are growing.[141]

4.3.5 The Scottish Outdoor Access Code

The Scottish Natural Heritage is a non-government agency acting as advisor to Scotland government. The access right created by section 1 of the Land Reform (Scotland) Act are outlined in the Scottish Outdoor Access Code[142] and encompasses three core values, firstly to respect the

[138] Land Reform (Scotland) Act: section 2(2)(a)(ii).
[139] Land Reform (Scotland) Act: section 2(2)(b).
[140] Land Reform (Scotland) Act: section 2(3).
[141] Land Reform (Scotland) Act: section 6(1).
[142] Land Reform (Scotland) Act: section 2(2)(b).

interests of others, secondly to care for the environment and lastly to take responsibility for your own actions.[143]

All local authorities and, where relevant, national park authorities had a duty to implement public core path plans shortly after the Act came into force and they retain a continuing role relating to the review and, if necessary, amendment of the relevant core paths plan.

Since there are no dedicated provisions setting out a framework to guide coastal access provisions, one must be guided by the Access Code which states:

"Access to Scotland's beaches and coastline is important, particularly as many people enjoy these places. Where appropriate, work with your local authority and other bodies to help facilitate and manage such access."

Since access rights extend to beaches and the foreshore the Act is reliant on local guidance to ensure continued public rights on the foreshore exist and these must include recreational and fishing rights which must occur responsibly without any disturbance to local nearby residents after dark. The Scottish Outdoor Access Code[144]gives special advice on groups and events.

4.5 Comparative Analysis

In setting out in Chapter three the gaps and limitations that exist within a local municipality implementation level, it is useful to draw from the approach taken by England and Scotland to inform possible solutions to the South African challenges, gaps and limitations set out above.

As stated previously the English Marine and Coastal Access Act makes provision for a specific coastal access path and thus adopts a roughly similar approach to the NEM: ICMA (although it goes much further), the Scottish Land Reform (Scotland) Act adopts a radically different approach.

Let us first consider the English approach which imposes a coastal access duty"[145] on Natural England[146] and the Secretary of State to achieve two linked objectives.[147] The two- stage process adopted by England for implementing the coastal access duty includes firstly a preparation of a

[143] Land Reform (Scotland) Act: section 3 (3.8) to (3.12)
[144] Land Reform (Scotland) Act: section 2(2)(b).
[145] Marine and Coastal Access Act: section 296(4).
[146] Natural England is a non-governmental advisory body to the UK government Department for Environment, Food and Rural Affairs (Defra).
[147] Marine and Coastal Access Act: section 296(1).

"coastal access scheme" indicating how it intends to carry out its coastal access duty and secondly a translation of the "coastal scheme" to an overall schematic plan mapping the coastal access route.

South Africa on the other hand places this burden on a case-by-case basis upon each local municipality to designate its own set of coastal land parcels. The English approach has the potential to inform improvements to the South African approach in this regard. The benefit of this is two-fold, one being that this designation study is to be undertaken by a specialist advisory body (non-government) and secondly at the very onset the coastal assessment is done to inform a spatial planning tool, namely a coastal scheme. Within the context of England, this spatial planning tool is subjected to rigorous scrutiny prior to its adoption in Parliament[148] since the Secretary of State has the power to accept, modify or reject the report.[149]

By contrast, the South African approach relies on each local municipality to utilise any means available to designate coastal land parcels for the purposes of designating these as coastal access paths. The challenge that South Africa approach presents is that it is heavily reliant on a local municipality's case by case assessment. This alone creates room for inconsistencies as each local municipality will have a different criterion to inform its coastal access assessment report since NEM: ICMA does not provide any clear guidelines in this regard either.

England's approach of adopting a coastal scheme at the beginning of the coastal access designation process allows for a wide range of stakeholders to be included in the consultative approach taken the Natural England[150] thereby allowing for fine tuning at the early stages before final adoption by Parliament. In contrast, the South African approach took the form of Parliament adopting a National framework approach which is heavily reliant on local government to implement. The main challenge with this approach lies in the fact that even if guidelines were adopted to further supplement the NEMI: ICMA provisions these will need to first be considered holistically taking the entire South African coastline into account. This provides good motivation for suggesting that South Africa could benefit from amending its coastal access provisions to include the need for a coastal scheme of the entire coast which must inform each local municipal process of designating coastal access paths. One could then go further than this to designate a coastal margin and a dedicated coastal access route all along the South African coastline similar to England since another significantly positive feature of the English approach is that of the creation of a coastal

[148] Marine and Coastal Access Act: section 298(6)
[149] Marine and Coastal Access Act: section 298(2).
[150] Natural England is a government advisory body to the United Kingdom's Department for Environment, Food and Rural Affairs (Defra).

access route and a coastal margin.[151] The benefit of this approach is that unlike South Africa, since England not only provides for perpendicular access points to the coast, but it also went further to provide for an entire coastal access route around England. In contrast, South Africa's coastal access law is limited to only two types of coastal access types, namely a perpendicular and a parallel access to its coast.

A further limitation of the South African approach relates to the legal requirement for a local authority which must "where appropriate and within its available resources, provide facilities that promote access to coastal public property, including parking areas, toilets, boardwalks and other amenities, taking into account the needs of physically disabled persons".[152] This implies that only hardened structures and facilities and amenities are considered in the scope of the coastal access provisions. A limitation that is created in this approach is that it limits access to those pedestrians who need to access the coast on foot from areas that are not serviced like those urbanised towns and cities in South Africa. There is an urgent need for a proposed change to the defined access types and this must consider that this limitation in fact limits the coastal access provisions and indirectly limits the extent of the public right to equitable coastal access. Here again is another example of the NEM: ICMA's unintended consequence limiting the rights of the pedestrianised society of South Africa to equitable coastal access. One possible solution to this challenge may lie in having the legal definition of coastal access redefined to broaden its scope to include other means of coastal access and removing the limitation currently imposed in the statute.

At this point it is necessary to consider the Scottish Land Reform (Scotland) Act[153] which provides for a statutory "right to roam" over both public and private land for recreation and other purposes. The Scottish Act[154] confers a right of access over both private land in Scotland (including the coast) and the right is conferred on the public for both recreation and other purposes.

The Sottish approach not only provides for unlimited access to the public by not being confined to routes, access points, access types or even designated access land, but rather opens the entire countryside to the public. In the absence of setting out clear rules to govern public access specifically , the Scottish context does opens itself to scholarly debate as to what exactly is the extent of the public's right to access in general and more specifically to the coast. Unlike England, Scotland opened its countryside with the "right to roam" approach and sought to use an Outdoor

[151] Marine and Coastal Access Act: section 18. See also the Access to the Countryside (Coastal Margin) (England) Order 2010: Item 1.
[152] NEM: ICMA: section 20(1)(e).
[153] Land Reform (Scotland) Act of 2003.
[154] Land Reform (Scotland) Act of 2003.

Access Code to guide and control responsible public behaviour. Section 5(5) of the Land Reform (Scotland) Act suggests that access rights does not of itself amount to a common law right of ownership since there is no positive description of the right of way provided for in the Act. This therefore places a burden on the state to be able to defend any claim being made in circumstances where public access rights form the subject of any judicial inquiry. However, for a court to make an informed ruling in favour of the public one would need to rely on common law provisions to be successful despite a core path being designated in 2011. However, to date there have been no case specifically relating to the access rights of Scotland to inform this study. The success of this kind of approach therefore relies heavily on the Act providing the means to guide "Responsible behaviour' since the access right created in section 1 of the Land Reform (Scotland) Act vests in a person only if he or she exercises it responsibly.[155]

The access right created by section 1 of the Land Reform (Scotland) Act[156] as outlined in the Scottish Outdoor Access Code[157] encompasses three core values, firstly to respect the interests of others, secondly to care for the environment and lastly to take responsibility for your own actions.[158] Whilst this may be compared with similar controls set in local municipal by-laws in South Africa the marked difference is that the right is not limited to just the coast but the entire countryside of Scotland. The Scottish approach therefore provides the most idealistic way. There are aspects in the approach taken by Scotland which will lend itself well to the South African coastal access law., for example there is a need for South Africa to develop an outdoor code of coastal conduct like that of Scotland's Outdoor access code[159] which can be managed by an external body as is the case with Scotland. Whilst South Africa may not opt to extend the coastal access right over private land, the code of conduct governing responsible behaviour fits well within the approach suggested of creating a coastal access route and coastal margin along the entire coastline. This will alleviate the administrative and legal burden placed on each local municipality in the current form of the South African coastal legal regime.

4.5 Conclusion

Having compared the access laws of England and Scotland, this analysis yielded some insights to inform future improvements to the South African coastal access regime. One such insight to inform future change to the South African coastal access regime could be a moving away from the

[155] Land Reform (Scotland) Act: section 2(1).
[156] ibid
[157] Land Reform (Scotland) Act: section 2(2)(b).
[158] Land Reform (Scotland) Act: section 3 (3.8) to (3.12)
[159]

provision of coastal access paths into a formalised access route along the entire coastline. Another possible change could be the enactment of a coastal code to govern the user behaviour as opposed to being reliant upon a local municipal coastal by-law to do this. Lastly, there is merit in considering creating an external body of coastal specialists to manage coastal affairs beyond that of just coastal access rights. These suggested improvements will be discussed further in Chapter five.

CHAPTER FIVE: ANALYSIS AND CONCLUSION

5.1 Introduction

This dissertation set out to critically analyse the rights of perpendicular and parallel coastal access as set out section 13 and section 18 of the NEM: ICMA in a broad context. To answer the specific research question, it was necessary to set out the legal framework both prior to and post enactment of the coastal access laws. Having then set out the steps undertaken by the eThekwini Municipality to give effect to rights of equitable coastal access in Chapter Three, a comparative analysis was undertaken of the coastal access regimes of both England and Scotland in order to critique the South African access regime. The research question can now be evaluated to determine whether and to what extent the coastal access provisions in South Africa can achieve the overarching object of equitable access listed in section 2(d) of the Act in order to ensure coastal environmental justice is realised.

In essence, the following aspects will be considered:

- Firstly, in answering the research question the analysis will commence by setting out the a few key implementation challenges at a local municipality level this study uncovered.

- Taking cognisance of these challenges an assessment will thereafter be undertaken to determine the limitations or gaps in the coastal access provisions experienced during the implementation process.

- Thereafter a critical analysis will be performed using these gaps and limitations in the coastal access law to determine the extent to which these provide for equitable coastal access and hence coastal environmental justice. This analysis will be necessary to inform the next step of the analysis.

- Bearing in mind the English and Scottish comparative analysis undertaken in this study it is then necessary to compare the South African response to that of England and Scotland.

- The conclusion will be informed by the analysis undertaken and set out possible solutions that may inform future amendments and insertions to develop the equitable access goal of the NEM: ICMA in its current form.

5.2 Implementation challenges

Firstly, even before a local municipality can proceed to provide coastal access points there is burdensome requirement arising out a duty to firstly pass by-laws[160] which will enable the municipality to designate strips of land to be set aside for use as coastal access land within the local municipal jurisdiction.

Section 18 (1) of the NEM: ICMA requires that each municipality whose area includes coastal public properly must within four years of the commencement of this Act, make a by-law that designates strips of land as coastal access land to secure public access to that coastal public property.

In response to this requirement, the eThekwini Municipality adopted its Beach by-laws on 24 June 2015. The intent of the by-laws was to:

- provide for measures to manage, control, and regulate public access and behaviour at beaches and beach areas; to provide for the repeal of laws and savings; and to provide for matters thereto

- create the enabling legal framework to discharge its duty at a local government level. The Preamble states in this respect that 'there is a need to develop legislation to govern access to and use of beaches and coastal areas within the jurisdiction of the Municipality".

- "provide measures to control and regulate access to and the use of public amenities on the beach and beach areas" as stated in the section dealing with the 'Objects of the by-law'.

The need for Municipal by-laws to align itself to the new coastal act NEM: ICMA is understandable, yet the rationale for need of having the proviso to pass by-laws to designate coastal access land appears to be an added burden placed on the local municipality. Immediately the need for the by-law is questioned when observation is made of the eThekwini by-laws which clearly highlights a duplication in the coastal access provisions of definitions and purpose. Apart from repeating what is in the Act, the by-law does not go in any further detail to unpack in detail the eThekwini Municipality approach to be taken to provide equitable coastal access at a local level making this is an administrative burden since it appears to be an unnecessary legal requirement

[160] NEM: ICMA: Section 18 (1)

and raises the query as to why this was even considered as a legal requirement for local government who is the implanting agent in this instance. Further to this, the other query that this legal requirement raises is to ask the question as to why the NEM: ICMA being an Act of Parliament and having the powers to make this a duty of local municipality, to ask why was this not written into the coastal act provisions. The possible solution would be to consider having this requirement amended to remove this provision from the coastal access law. The removal of this provision could be motivated to highlight that it will render a quick and immediate implementation response from the local municipality to give effect to the coastal access rights of all members of the public to be able to have equitable coastal access.

It is also noted that the eThekwini coastal access designation case study also highlighted the need for prior assessments to be done in consultation with both the private landowner and the public, as per the legal provisions set out below:

Section 19 of the NEM: ICMA provides that before designating land as coastal access land or withdrawing any such designation, a municipality must:

"(a) assess the potential environmental impacts of doing so.
(b) consult with interested and affected parties in accordance with Part 5 of Chapter 6; and
(c) give notice of the intended designation or withdrawal of the designation to the owner of the land".

Secondly , it is observed that the NEM:ICMA imposes another step as a pre-requirement before the giving legal effect to the coastal access provisions, since municipal designated strips of access land must be registered as a public servitude. This legal requirement as prescribed in guidance from section 18(2), stipulates that:

"Coastal access land is subject to a public access servitude in favour of the local municipality within whose area of jurisdiction it is situated and in terms of which members of the public may use that land to gain access to coastal public property".

Thirdly, in addition to the above requirements, section 20 of the NEM: ICMA imposes the following additional responsibilities on municipalities about coastal access land:

"(1) A municipality in whose area coastal access land falls, must:
(a) signpost entry points to that coastal access land.
(b) control the use of, and activities on, that land.
(c) protect and enforce the rights of the public to use that land to gain access to coastal public property.

(d) maintain that land to ensure that the public has access to the relevant coastal public properly.

(e) where appropriate and within its available resources, provide facilities that promote access to coastal public property, including parking areas, toilets, boardwalks, and other amenities, considering the needs of physically disabled persons; ensure that the provision and use of coastal access land and associated infrastructure do not cause adverse effects to the environment.

(g) remove any public access servitude that is causing or contributing to adverse effects that the municipality is unable to prevent or to mitigate adequately.

(h) describe or otherwise indicate all coastal access land in any municipal coastal management programme and in any municipal spatial development framework prepared in terms of the Municipal Systems Act.

(i) perform any other actions that may be prescribed: and

(j) report lo the MEC within two years of this Act coming into force on the measures taken to implement this section".

Fourthly, another implementation challenges this study revealed was that the NEM: ICMA does not provide any mechanism to deal with private beach access points. The Act is silent on the steps to take when a local municipality encounters a situation where an individual landowner who previously had private beach access rights is now required to end that right by having the private beach access closed off. Under the current legal framework having an exclusive and private access to the beach is unconstitutional since the coast is no longer a state asset but a public asset. As such, it is not a *res commune,* a thing or commodity to be used for personal gain but a *res publicae* and as such must be managed for the benefit of the public and not private individuals or selected groups of individuals. The existence of exclusive private beach access is as a legacy of apartheid municipal by-laws. It therefore makes more practical sense to align the municipal by-laws to the NEM: ICMA in a way that streamlines the process as opposed to over-complicating the steps which need to be taken to give effect to equitable coastal access provisions. This could suggest why there has been such a slow response from municipalities to discharge these duties despite the NEM: ICMA being in existence for more than a decade at the time of this study.

In the fifth instance, the eThekwini case study recorded over six hundred coastal access points with most of these illegally constructed. In closing off illegal access points, the municipality was faced with the financial burden of having to deal with the environmental damages caused to the coastal dunes and vegetation. The Act was silent on how to recover costs from private landowners in instances where the illegal beach access points resulted in coastal environmental damage.

In summary the following implementation challenges were highlighted in the eThekwini study:

- There is a need to have a by-law passed to give effect to the coastal access provisions

- Preliminary assessments must be undertaken involving public and affected stakeholder consultations to inform this assessment process
- In addition to general duties and legal requirements, a further nine responsibilities are assigned to the local municipality to ensure equitable coastal access is provided to all members of the public.
- No guidance is provided for the coastal access provisions to guide the local municipality to deal with private beach access points carried over from the apartheid era. The NEM: ICMA silent on legal remedies to address this implementation challenge within the local space.
- The local municipality must bear the financial burden when closing out illegal beach access points and is also required to undertake its own assessments in terms of Section 19 of the NEM: ICMA.

In appreciation of these challenges faced, the limitations or gaps in the coastal access outlined above provides a basis for a critical analysis of the coastal access law to determine the extent to which these provide for equitable coastal access and hence coastal environmental justice. This analysis now informs the next step of the analysis of the research question.

5.3 Critical analysis

Since the NEM: ICMA has shifted the burden squarely upon the shoulders of the local municipality to give effect to coastal access provisions there is a need to reassign certain broad duties back to National government to ensure equity in the distribution of duties and responsibilities between all state role-players. Firstly, these include the need to pass local by-laws to give effect to the access rights can be fixed in law by ensuring NEM: ICMA legally empowers a local municipality to designate coastal access land within the framework of the coastal access provisions. Secondly, the absence of clear direction and guidance when dealing with private beach access points needs to be addressed in the NEM: ICMA as opposed to it being left to the discretion of the local municipality to resolve. If this is not fixed in NEM: ICMA the coastal access provisions run the risk of creating an unintended consequence caused through a violation of a private landowner's right when trying to give effect to a public right to equitable coastal access. Thirdly, the duties assigned to local government has no financial mechanism or instrument provided for in the Act making this a threat that has probably led to delays in all coastal municipalities implanting these access provisions.

5.4 Conclusion

Apartheid laws denied all South African citizens an equal right to access the coast. The effectiveness of the transformed beach access law in NEM: ICMA were assessed, analysed, and evaluated so that any gaps and challenges identified in implementation process may guide future improvements, additions, or deletions to improve the resilience and robustness of these provisions.

In the critical analysis of the South African coastal access provisions, it is concluded that the coastal access provisions as provided for in sections 13 and 18 of the NEM: ICMA is a positive step towards achieving equitable coastal access and therefore coastal environmental justice. Turning now to the evaluation of the NEM: ICMA coastal access laws in relation to the vision of the *White Paper* which set the policy groundwork for the access provisions enacted in the NEM: ICMA it is concluded that vision in the *White Paper* for coastal access has been translated from policy to law. It has also been observed that the NEM:ICMA has codified common law principles to the extent that the state now bears the legal accountability in ensuring the public right to coastal access is equitable and just.

Since transforming coastal legislation from the Seashore Act[161] which provided no clear rules to various role players to promote an integrated coastal management approach, the NEM: ICMA provides clear direction for achieving public coastal access in an equitable manner. Whilst the scope of the definition of coastal access requires some improvement in the statute, the definition does provide a good legal basis. The approach taken to designate strips of coastal land to be set aside for public access is another positive approach taken.

In considering the steps undertaken by a local municipality in discharging its duties to provide coastal access as set out in NEM: ICMA set out in Chapter three it was concluded that the access provisions do confer equitable access rights to all members of the Republic in a fair and just manner. This chapter highlighted the need for future changes to build on its existing strength to enhance South Africa's coastal access laws to align itself to foreign approaches taken by both England and Scotland whose legal approach to access laws lend itself favourable to the South Africa context to provide for the coordinated and integrated management of the coastal zone in accordance with the principles of co-operative government.[162]

[161] Seashore Act 21 of 1935.
[162] NEM: ICMA: section 2(b).

To evaluate the extent to which the basic human right of access in South African coast compares to those similar foreign access laws, the comparative analysis undertaken of the English and Scottish access laws provided some guidance and novel solutions were unveiled that could improve on the existing South African coastal access provisions.

These suggested improvements are presented below:

The governance aspect relating to the duty of the state needs redrafting since the study concluded that there is a misplacing of the coastal access duty of the state in shifting the responsibility of implementation heavily onto the shoulders of a local municipality in the absence of the necessary support mechanism written into the access law. Informed by the approach taken by England, there is a need to have National government leading the agenda of equitable coastal access for the country. This can be done through the approach taken by both England and Scotland who have outsourced those duties of the country which requires dedicated attention and both specialised technical and community-orientated expertise.

In addition, the provision of access paths although in itself is a positive legal requirement in the coastal access law is deficient insofar as having the limitation of confining the public right to the access path alone. Given the designation of access paths creates a limited legal right to public access in South Africa in its current form and content, it is suggested that by creating a dedicated access route along the entire South African coastline , this will address the limitation to the public right to coastal access in South Africa. All that is required is to expand on the existing concept of designated strips of coastal land to extend this to form access paths or access routes along the coastline. Ideally this should be done along the entire South African coast, however a phased approach may also be considered as a step in the direction towards a coastal access route approach shifting away from the current practise of designation of strips of coastal land.

Further to this, what must be taken into consideration is that unlike England which extended this concept to provide access to the coast by way of an access route, this study concludes that Scotland has taken the access rights to its ideal stage and this require South Africa to develop an outdoor code of coastal conduct like that of Scotland's Outdoor access code[163] which can be managed by an external body as is the case with Scotland.

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In addition, the integration of external coastal stakeholders and the coastal engineering and scientific communities to form a Coastal Agency for South Africa, like Natural England[164] and the Scottish Natural Heritage [165] will plug the gaps, address the limitations, and guide a progressive realisation of coastal management goals and objectives in South Africa. The inclusion of external, non-government bodies or agencies in becoming an extension of government points to a solution for addressing those inconsistences uncovered at an implementation level.

The revised approach suggested in this study will broaden the scope and extent of conferring equitable access rights in South Africa and comes with a bountiful of opportunities in bringing all coastal stakeholders to the forefront of implementation. It is thus concluded that the novel ideas suggested in this doctrinal study may inform and guide the future reconstructing of the existing South African coastal access law to the extent that it subscribes to the principles of coastal environmental justice.

[164] Natural England is a government advisory body to the United Kingdom's Department for Environment, Food and Rural Affairs (Defra).

[165] This is an executive non-departmental public body set up under the provisions of the Natural Heritage (Scotland) Act 1991 and serves in an advisory capacity to the Scottish Parliament.

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