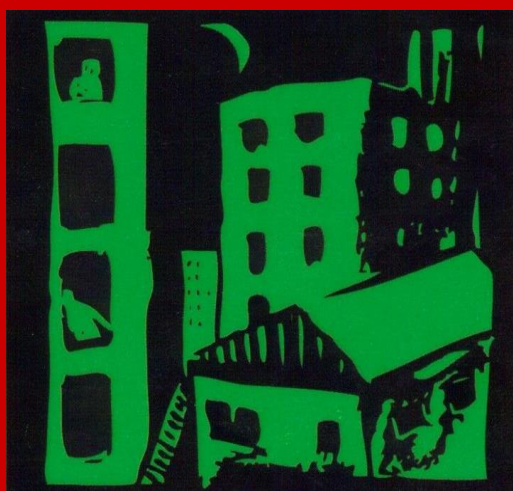
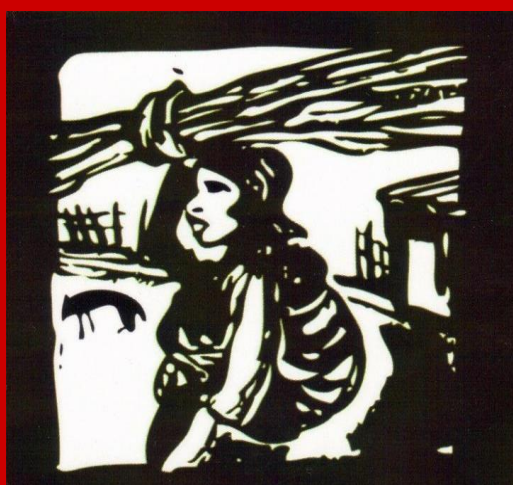


# LAW DEMOCRACY & DEVELOPMENT



**VOLUME 26 (2022)**

DOI: <http://dx.doi.org/10.17159/2077-4907/2021/idd.v26.2>

ISSN: 2077-4907  
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## Concurrent national and provincial legislative competence: Rethinking the relationship between nature reserves and national parks<sup>1\*</sup>

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<sup>1\*</sup> I would like to thank Professor Warren Freedman (School of Law, University of KwaZulu-Natal) and the two anonymous referees for their insightful comments on an earlier draft. The supportive environments of Ezemvelo KZN Wildlife and the University of KwaZulu-Natal are gratefully acknowledged. The ideas, arguments and opinions expressed in the article are my own and do not necessarily represent those of Ezemvelo KZN Wildlife or the University of KwaZulu-Natal.

**ABSTRACT**

*The teleology of concurrent national and provincial legislative competence in South Africa's Constitution has not been adequately investigated, particularly from the perspective of nature conservation and the establishment of protected areas. It is, therefore, questioned whether the concurrent nature conservation competence awarded to the national sphere of government should be equivalent to that awarded to the provinces, or if it precludes the national government from having a greater status than the provinces. It is further questioned whether the provisions of the National Environmental Management: Protected Areas Act (NEMPAA) accurately reflect the constitutional weighting, if any, granted to these two spheres of government by this provision. It is concluded that the concurrent national and provincial legislative competence in respect of nature conservation is most likely to be, at least, equally balanced between the two spheres of government. Contrary to this finding, it is noted that the NEMPAA grants national parks a significantly higher conservation status than nature reserves by diminishing the status and scope the provinces had prior to the promulgation of the Act. It is further concluded that, in this instance, provisions of the NEMPAA are most likely to be unconstitutional. It is recommended that these two kinds of protected areas be consolidated into one category or critically evaluated to correct potentially incorrect categorisation. It is also recommended that the NEMPAA be substantially revised to correct a number of anomalies and illogical provisions.*

**Keywords:** Concurrent national and provincial legislative competence; legislative bias; national parks; nature conservation; nature reserves; NEMPAA; protected areas; unconstitutional.

**1 INTRODUCTION**

Schedule 4 of the Constitution of the Republic of South Africa of 1996<sup>2</sup> specifies nature conservation (excluding national parks, national botanical gardens and marine resources) as a functional area of concurrent national and provincial legislative competence (that is, a concurrent competence). Thus, both the national and provincial government have nature conservation as a primary competence. This Schedule is, however, silent on whether this concurrent function, as is the case with the other 32 functions in the Schedule, is equally weighted or not. The relevance of this consideration lies in whether the nine South African provincial conservation agencies are, from a legal perspective, able to conserve the country's biodiversity on the same legislative footing as the national government's conservation agency, the South African National Parks (SANP). The corollary is that even though the provinces are accorded powers to establish protected areas, and in particular nature reserves, it is uncertain whether these powers should be interpreted as subservient or equivalent to those afforded to

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<sup>2</sup> Constitution of the Republic of South Africa 1996 Part A (the Constitution).

the SANP declaration of national parks.

Two questions arise. The first is whether the Constitution intended the legislative weight of concurrent competence afforded to the provincial sphere to be commensurate with the national sphere of government. Secondly, does the National Environmental Management: Protected Areas Act (NEMPAA)<sup>3</sup> reasonably reflect the weighting of legislative powers envisaged by this constitutional provision? The importance of these questions lies in several domains, which include a greater understanding of (a) the nature and depth of concurrent competence as provided for in Schedule 4 of the Constitution; (b) the relationship between the provincial conservation agencies with the national department for the environment and the SANP (i.e. this being either a collegial or a master-servant relationship); and (c) whether the NEMPAA, from a concurrent-competence perspective, is constitutionally sound.

## **2 ANALYSIS AND DISCUSSION OF THE CONTEXT OF CONCURRENT COMPETENCE**

Powers to conserve biodiversity and the concurrent competence afforded to national and provincial spheres of government are sculptured in the main, as argued below, within legislative contexts preceding the promulgation of the NEMPAA – the roots of which are embedded within South Africa’s colonial legal system. It is essential, therefore, to understand this historical context and the evolution of conservation law from, at least, statutes adopted by the country’s colonial ancestors – from the Union and subsequent establishment of the Republic of South Africa, to the current Constitution and the promulgation of the NEMPAA. In so doing, one is able to gain insights into the balance of power between (a) the obligations of the pre-1994 provinces and the then national government; and (b) post-1994 provinces and the current national government. Such an understanding would provide insight into the balance of legislative power that prevailed between these two spheres of government at the time of the drafting of the NEMPAA.

### **2.1 A brief history of concurrent national and provincial legislative competence**

Nature conservation legislative functions of both the national and provincial spheres of government appear in South African statute law as early as 1909, when the promulgation of the 1909 South Africa Act provided for the formation of the Union of South Africa on 31 May 1910. At that time, nature conservation, amounting to “fish and game preservation”, was as an exclusive competence of the Union’s provinces, which arose from the amalgamation of the Cape Colony, the Natal Colony, the Transvaal, and the Orange River Colony (States).<sup>4</sup> This assignment remained largely unchanged in the wording of the 1961 Republic of South Africa Constitution, which gave rise to the Republic of South Africa on 31 May of that year. The Provincial Government Act of 1961 reconfirmed this position by providing the provincial councils’ powers to promulgate

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<sup>3</sup> National Environmental Management Act 107 of 1998 (NEMPAA).

<sup>4</sup> Section 85(x) of the South Africa Act, 1909.

ordinances relating to fish and game preservation.<sup>5</sup> Although the 1961 Constitution Act was silent on whether nature conservation was a national competence, the national parliament's powers were sweeping and covered any aspect of national interest.<sup>6</sup> These powers, highlighted below, seemingly included the establishment of protected areas.

The first conservation ordinance promulgated was the Natal Fisheries Ordinance,<sup>7</sup> and the term "nature conservation" made its first appearance in South African law in the Natal Nature Conservation Ordinance.<sup>8</sup> It was not until the mid- to late 1960s that the other provinces transitioned from a focus on "fish, game and vermin"<sup>9</sup> to one embracing "nature conservation" in their respective legislation (namely, the Nature Conservation Ordinance<sup>10</sup> in the Cape Province; the Nature Conservation Ordinance<sup>11</sup> in the Transvaal; and the Nature Conservation Ordinance<sup>12</sup> in the Orange Free State).

Notwithstanding this history, and prior to the formation of the Union of South Africa, the four States mentioned above had the ability to establish protected areas. This ability is demonstrated by the fact that the Volksraad (Cabinet) of the then Transvaal established the Pongola Nature Reserve in 1894<sup>13</sup> and subsequently the Sabi Game Reserve in 1896.<sup>14</sup> The latter formed the beginnings of the Kruger National Park and the then National Parks Board, which was founded in 1928.<sup>15</sup> There appears to have been no meaningful difference between the Kruger National Park's purpose, function and legal status and that of its founding Sabi Sands Game Reserve or that of the Pongola Nature Reserve. Furthermore, the status of the National Parks Board as a conservation authority, with respect to nature conservation, appeared to be no different to those conservation authorities that had been established in the provinces.

The earliest record of a "national park" entering South Africa's jurisprudence dates back to 1901, when one Maurice Evans raised the prospect of proclaiming the Natal National Park to safeguard Giant's Castle and surrounding areas.<sup>16</sup> The Natal National Park was proclaimed in 1906 and, with that, became the first national park in South Africa (and Africa), preceding the establishment of the Kruger National Park by a

<sup>5</sup> Section 84(m), in accordance with section 89(1) of the 1961 Constitution Act.

<sup>6</sup> Section 58(1).

<sup>7</sup> Ordinance 11 of 1916.

<sup>8</sup> Ordinance 35 of 1947.

<sup>9</sup> Bigalke R "A biological survey of the Union" (1934) 31 *South Africa Journal of Science* 396 at 396.

<sup>10</sup> Ordinance 17 of 1965.

<sup>11</sup> Ordinance 17 of 1967.

<sup>12</sup> Ordinance 8 of 1969.

<sup>13</sup> Goosen M & Blackmore A "Hitchhikers' guide to the legal context of Protected Area Management Plans in South Africa" (2019) 49 *Bothalia* 1 at 1.

<sup>14</sup> Carruthers EJ *Game protection in the Transvaal, 1846 to 1926* (Unpublished PhD thesis, University of Cape Town, 1988) at 173.

<sup>15</sup> See Carruthers (1988) at 173.

<sup>16</sup> Carruthers J "The Royal Natal National Park, KwaZulu-Natal: Mountaineering, tourism and nature conservation in South Africa's first national park c. 1896 to c. 1947" (2013) 19 *Environment and History* 459 at 463.

decade.<sup>17</sup> With the formation of the Union of South Africa, the Natal Province in effect inherited and administered a national park. Thus, the Natal National Park,<sup>18</sup> together with the Pilanesberg National Park,<sup>19</sup> challenges the constitutional prescript, at least in name (see below), that national parks are solely administered by the national government.

The recognition of the importance of the broader “environment” and its conservation made its debut in 1989 with the promulgation of the Environment Conservation Act<sup>20</sup> (ECA). The drafters of this parasol statute viewed biodiversity, as is the case with NEMA, as a key subset of the environment, which they defined as the “aggregate of surrounding objects, conditions and influences that influence the life and habits of man or any other organism or collection of organisms”.<sup>21</sup> While the ECA embraced a focus on the conservation and protection of biodiversity, it did not venture into the realm of nature reserves and national parks. The ECA did, however, bring into South African law two additional kinds of protected areas, namely the “Protected Natural Environment”<sup>22</sup> (PNE)<sup>23</sup> and the “Special Nature Reserve” for those areas particularly sensitive to human disturbance.<sup>24</sup>

Interestingly, the ECA limits the declaration of a PNE to the then provincial Administrator, a position that equates to the provincial Member of the Executive Committee (MEC) for the environment.<sup>25</sup> While the purpose of a PNE is to enable private landowners to take collective action to protect one or more natural attributes of their properties, the Administrator retained managerial oversight of the entity.<sup>26</sup> This managerial oversight may be assigned to a local authority or organ of state.<sup>27</sup> In view of the political position of the Administrator, such an assignment would be at a provincial level. In contrast, and given that special nature reserves conserve extremely sensitive environments of national importance, the Minister may “assign the control of a special nature reserve to any local authority or government institution”.<sup>28</sup> Section 1(xv) of ECA defines a “local authority” as an organ of state that predominantly functions at a sub-provincial level. Thus, it must be concluded that the legislature viewed the competence of all relevant organs of state at a provincial and sub-provincial level to be equivalent to the national government.

<sup>17</sup> See Carruthers (1988) at 477.

<sup>18</sup> Now known as the Royal Natal National Park.

<sup>19</sup> Established in 1979 and administered by the North West Province.

<sup>20</sup> Act 73 of 1989.

<sup>21</sup> Section 1 of the Environment Conservation Act 73 of 1989.

<sup>22</sup> Section 16.

<sup>23</sup> The Protected Natural Environment was renamed in section 28 of NEMPAA as the “Protected Environment” to cater for other important aspects of the environment.

<sup>24</sup> Section 18(6).

<sup>25</sup> Section 16 Environment Conservation Act 73 of 1989.

<sup>26</sup> Section 16 Environment Conservation Act 73 of 1989.

<sup>27</sup> Section 17(4).

<sup>28</sup> Section 18(4).

It is also evident from the discussion above that immediately prior to the promulgation of the NEMPAA, biodiversity conservation was principally a provincial competence, augmented with those areas promulgated as a national park by the erstwhile National Parks Board. This circumstance would suggest that the Constitution's concurrent competence placed the national government on an equivalent standing to the provinces with respect to the conservation of the country's biodiversity. This equivalence is also underpinned by the provisions of the 1962 National Parks Board Act<sup>29</sup> in that this statute did not differentiate between national parks, nature reserves, and public parks, which were under the National Parks Board's control and administration. Subsequently, section 2 of the National Parks Board Act<sup>30</sup> renamed all the Board's protected areas, where necessary, to a "National Park". This renaming occurred purely to associate a protected area with the then National Parks Board – irrespective of these protected areas' biodiversity value or status.

Thus, at that time, and until the drafting of the NEMPAA, other than an ascribed name, there was no fundamental difference between a national park and a nature reserve. The national and the provincial government therefore were equally empowered to declare a parcel of land as a protected area that contains biodiversity of provincial, national and international importance.

## 2.2 The post-1994 context of nature conservation

### 2.2.1 *Interim Constitution of South Africa*

Schedule 6 to the Constitution of the Republic of South Africa<sup>31</sup> (Interim Constitution) places "Nature conservation (excluding national parks, national botanical gardens and marine resources)" as a national and provincial legislative competence. Schedule 4 of the current Constitution is identical to this provision. Unfortunately, this Schedule does not provide any insight into whether "concurrent competence" is equally weighted between the national and provincial spheres of government. Clarity is, however, gained from the "Constitutional Principles" provided for in Schedule 4 of the Interim Constitution, and, in particular, Principle XXII:

"The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces."

While this Principle provides that "[t]he powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers",<sup>32</sup> the question arises as to whether the term "encroach" would encompass what portion of

<sup>29</sup> Act 42 of 1962.

<sup>30</sup> Act 57 of 1976.

<sup>31</sup> Act 200 of 1993.

<sup>32</sup> *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) (1995) at para 25.

South Africa's biodiversity should be conserved by a national and provincial organ of state. The term is not defined in the Interim Constitution (or the current Constitution) and appears not to have been debated and unpacked in the literature or by the courts. In these many circumstances where encroachment has or has not occurred, the common or ordinary understanding of this term has been relied upon. This is to intrude, violate, infringe, to "advance beyond the usual or proper limits",<sup>33</sup> such that "the first thing spreads or becomes stronger, and slowly begins to restrict the power, range, or effectiveness of the second thing",<sup>34</sup> or "advance[s] gradually beyond usual or acceptable limits".<sup>35</sup>

Given that nature conservation is a concurrent competence, the national government cannot therefore be accused of "encroachment" by exercising its nature conservation mandate within the country, that is, within any of the nine provinces. However, the lessening by the national government of, inter alia, the status or the extent of the provincial mandates by way of statute or application thereof, by way of an authority operating outside of the rule of law, or by way of the *mala fide* creation of a master-servant relationship between the two spheres of government, as demonstrated below, would indeed constitute an "encroachment" and a violation of this Principle.

Principle XXI of the Interim Constitution defines the criteria to be applied in allocating powers to both provincial and national governments. XXI(1) requires decision-making, without distinction between provincial and national governments, to be assigned to that level of government capable of, and accountable for, rendering quality service. However, the distinction between these two levels of government is provided in Principles XXI(2) and XXI(4), which empower the national government to set essential national standards and national uniformity in the rendering of a service. The power to set essential national standards and ensure national uniformity across the country stands alone. It does not intrude into, or lessen, the status of the provincial sphere of government and therein create, for instance, a "master-servant" relationship between the two.

Furthermore, it is widely recognised that the Principle of Purpose of the Interim Constitution was to set aside the dominance (i.e. a master-servant relationship) of the pre-1994 apartheid and dictatorial national government in favour of regionalised administrative power. This understanding was borne out by Justice Chaskalson, who stated in his 1995 Constitutional Court judgement:

"The [interim] Constitution itself makes provision for the complex issues involved in bringing together again in one country, areas which had been separated under apartheid, and at the same time establishing a constitutional state based on respect for fundamental human rights, with a dispersed form of government in place of what had previously been authoritarian rule enforced by a strong central government."<sup>36</sup>

<sup>33</sup> See Merriam-Webster <https://www.merriam-webster.com> (accessed 23 December 2020).

<sup>34</sup> See Cambridge dictionary <https://dictionary.cambridge.org> (accessed 23 December 2020).

<sup>35</sup> Oxford English Dictionary <https://www.lexico.com> (accessed 23 December 2020).

<sup>36</sup> *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) (1995) at para 7.

The notion of centralising the conservation of significant biodiversity with the national government, therefore, would most likely be contrary to the purpose the Interim Constitution was set in place to achieve.

### 2.2.2 *Constitution of the Republic of South Africa, 1996*

It is common cause that the current Constitution was founded on the Interim Constitution and therein the Constitutional Principles, in particular Principle XXII. This Principle is captured in its entirety within the “Principles of co-operative government and inter-governmental relations” in the current Constitution (hereinafter “Constitution”), which reads as follows:

“All spheres of government and all organs of state within each sphere must exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.”<sup>37</sup>

Thus, following the reasoning applied to the Interim Constitution above, the duty of governance is most likely to be equally weighted, as it is in the Constitution, between national and provincial governments. Furthermore, the description of the South African government in the Constitution as three “spheres”<sup>38</sup> underpins the notion of an equal balance of power between them. The use of the term “spheres” (as opposed to “tiers”) suggests that the national, provincial, and municipal spheres of government are “distinctive, interdependent and interrelated”,<sup>39</sup> and hence are of equivalent stature and are not overtly hierarchical with cascading or nested legislative powers. In this, it is appreciated that powers of the provinces are subject to the national government’s role to, where necessary, maintain national security, economic unity or national standards, to establish minimum standards required for the rendering of services, or to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or the country as a whole.<sup>40</sup>

Again in the absence of an explicit provision to the contrary, it may thus be assumed that the Constitution’s adoption into South African law either actively or inertly regarded the concurrent national and provincial legislative competence, as provided in Schedule 4, without a weighting bias in favour a particular sphere of government. It is thus a small step to assume an equal weighting. This presumption is underpinned by Justice Ngcobo, who indicated that “[t]he functional areas [of the Constitution] must be purposively interpreted in a manner which will enable the national Parliament and the provincial legislatures to exercise their respective

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<sup>37</sup> Section 41(1)(g).

<sup>38</sup> Section 40.

<sup>39</sup> *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill* (2000) 1 SA 732 (CC) at para 39.

<sup>40</sup> Section 44(2).



legislative powers fully and effectively”.<sup>41</sup> The same was concluded by Du Plessis in the “Interpretation of statutes and the Constitution”:

“The terminological strategy of referring to “spheres” rather than “tiers” of government in the Constitution is of more than semantic significance. It connotes a shift away from a rigidly hierarchical division of governmental (including legislative) powers, and is premised on the assumption that each of the various spheres of government (and their legislatures) has equivalent status, is self-reliant and inviolable, and enjoys sufficient constitutional latitude to define and express its unique character.”<sup>42</sup>

The national legislature, when exercising its legislative authority, “is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution”.<sup>43</sup> One would, therefore, expect this legislature, particularly given the contemporary interpretation of this component of the Constitution, to remain within the realm of an equal balance of power between, at least, the national and provincial spheres of government and not confer greater authority to the national government by removing what was traditionally a primary provincial function.

### *2.2.2.1 Explicit provision of national parks*

Schedule 4 of the Constitution makes for the explicit provision of “national parks” and, in so doing, creates a clear separation between this kind of protected area and others that have been defined within the term “nature conservation”. As a result, the national legislature attached a special significance to national parks. It is unclear whether this significance is limited to ensuring that national parks are constitutionally entrenched within the domain of a national organ of state or, in addition to this requirement, intended national parks to be of greater value than other kinds of protected areas, in particular nature reserves. Noting the conclusion above that the Constitution does not create a hierarchical government, it may be argued, following the Occam's Razor principle, that the intent of the drafters of the Constitution was purely to retain “national parks”, and therein the SANP, as the sole concern of the national government as opposed to an *a priori* setting in place of a hierarchy of protected areas based on the importance of the biodiversity conserved.

### *2.2.3 White paper on the conservation and sustainable use of South Africa's biological diversity*

*The Draft white paper on the conservation and sustainable use of South Africa's biological*

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<sup>41</sup> *Western Cape Provincial Government in Re: DVB Behuising (Pty) Limited v North West Provincial Government* 2001 (1) SA 500 (CC) at para 17.

<sup>42</sup> Du Plessis LM *Interpretation of statutes and the Constitution* Butterworths Durban (1998) at 2C5 quoted in *Swartland Municipality v Louw NO and Others* 2010 (5) SA 314 (WCC) at para 26.

<sup>43</sup> Section 44(4).

*diversity* (White Paper) was never finalised following the public consultation process.<sup>44</sup> Despite its draft status, it does, however, reflect, as a minimum, the mindset of both the national and provincial organs of state concerned with the conservation of biodiversity. Hence it served as the prelude to, if not a founding policy for, the drafting of the NEMPAA.<sup>45</sup> At the outset, the White Paper appears to view the provinces as playing a critical role equivalent to, if not greater than, that played by the national government,<sup>46</sup> but recognises the constitutional role of the national government “to formulate general policy concerning the conservation and use of biodiversity, the implementation of which will be undertaken by different government institutions within central [national], provincial, and local spheres”.<sup>47</sup> It thus may be argued that the White Paper provided sufficient scope, by way of policy, for the national government to legislate national parks as being of greater significance than provincial nature reserves.

Had the drafters of the White Paper intended to incorporate into the policy a hierarchy of protected areas, with national parks being unquestionably the primary core of South Africa’s conservation efforts, they would most likely have made this intention explicit in the document, particularly given that it would set aside a well-entrenched and accepted *modus operandi*. It is thus speculated, if not concluded, that there was no intention to create a hierarchy of protected areas, with national parks having a greater status than nature reserves. Furthermore, and in support of this deduction, the White Paper views national parks and nature reserves equally, in that they are both afforded the same definition and hence function.<sup>48</sup> Again, this equality is underpinned, to some extent, by placing both kinds of protected areas in the IUCN’s Category III. This category is reserved for “National Parks and Equivalent Reserves”.<sup>49</sup> Here it may be assumed at face value, given the context, that “Equivalent” is a term used for those protected areas in countries that may use different terminology to describe their equivalent of a “national park”.

Thus, on the understanding that the draft White Paper effectively represents a record of the mindset of the organs of state responsible for the conservation of biodiversity, there must have been an agreement that there was no intention to set in place, at that time, a hierarchy of protected areas, and particularly a disparity between the significance of “national park” and “nature reserve”.

### 2.2.3.1 *Provinces Exercising its Nature Conservation Mandate*

Schedule 4 read with section 44 and 76 of the Constitution empowers both the national

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<sup>44</sup> *Draft white paper on the conservation and sustainable use of South Africa’s biological diversity*, GN 1095 in GG No. 18163, dated 28 July 1997

<sup>45</sup> Blackmore AC “Rediscovering the origins and inclusion of the public trust doctrine in South African environmental law: A speculative analysis” (2018) 27 *RECIEL* 187 at 187.

<sup>46</sup> See the Draft White Paper at 88.

<sup>47</sup> See the Draft White Paper at 17.

<sup>48</sup> See the Draft White Paper at 27.

<sup>49</sup> See the Draft White Paper at 31.

and provincial spheres of government to pass legislation that provides fulfilment of a concurrent competence. It is these provisions that enable the provinces to retain or promulgate legislation providing for “nature conservation” functions and, therein, the establishment of protected areas. In the circumstances where a conflict between the two sets of legislation arises, the conflict must be resolved in terms of section 146 of the Constitution. Section 146(2)(c)(vi) renders invalid any conflict that may arise by stipulating that national prevails over provincial legislation on matters relating to, inter alia, the “protection of the environment”. Given that biodiversity is a subset of the environment,<sup>50</sup> and given that the objective of the NEMPAA is the protection of biodiversity, it stands to reason that the provisions of the NEMPAA would prevail if found to be in conflict with a provision or provisions in provincial legislation. In this instance, the prevalence of the NEMPAA would cause the conflicting provision in the provincial legislation, and not the provincial legislation per se, to be rendered inoperative as long as the conflict remains. Should, however, one or more provinces dispute that a conflict exists, section 148 of the Constitution enables the provinces to seek relief from the courts. Finally, where a court is unable to resolve the dispute, the national legislation (in this case, the specific provision in the NEMPAA) would prevail over its provincial counterpart.

### *2.2.3.2 Elevating the provincial nature conservation mandate*

While section 146(2)(c)(vi) of the Constitution establishes the pre-eminence of NEMPAA in cases of conflict with provincial legislation, it naturally does not give the pre-eminence of national over the provincial sphere of government. Furthermore, the corollary of this section does not preclude the provincial government from having in place complementary legislation that provides for the establishment and management of protected areas. It is, therefore, plausible that the provinces may create a new kind of protected area that, at least, matches the implied status of a “national park”. It remains to be seen, however, whether this status could supersede, by way of creative nomenclature, that of a national park or whether this new kind of protected area could be set in place to explicitly conserve, for instance, biodiversity of “national or international importance” (see below).

Be this as it may, the provinces may only promulgate legislation (connection to a Schedule 4 competence) that has been referred to the national legislature – which, either directly or by way of mediation,<sup>51</sup> may “pass”, “pass an amended” version, or “reject” the proposed provincial legislation.<sup>52</sup> The national legislature would have the key to unlocking the conundrum of the extent of the scope the provincial legislatures have to restore, if need be, an equal standing of their concurrent (nature conservation) functions with the standing granted to the national government.

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<sup>50</sup> Section 2 of NEMPAA.

<sup>51</sup> Section 76(2)(d).

<sup>52</sup> Section 76(2)(a).

### 2.2.3.3 *Nature conservation and other areas of concurrent competence*

The functions listed in Schedule 4A indicate that the legislature, for whatever reason, viewed the 33 functional areas of concurrent national and provincial legislative competence, and a further 15 local government concurrent competence (Schedule 4B), as principal or discrete, but not necessarily isolated activities, of government.<sup>53</sup> As demonstrated by Van Wyk,<sup>54</sup> there may be a substantial overlap between the competencies exercised by the three spheres of government. Such circumstances promote uncertainty as to which sphere of government is responsible for a particular activity within a concurrent function. This uncertainty is resolved by applying the relevant findings of the Courts and/or through the conflict resolution provisions within the Constitution discussed above.<sup>55</sup>

### 2.2.3.4 *Concurrent competence and the courts*

Conflicts arising out of concurrent competencies between national and provincial governments arose in 2002 in the Western Cape Provincial Government<sup>56</sup> under the auspices of the Interim Constitution. Since then, many cases have arisen to clarify the content and boundaries of various concurrent functions. The majority of these cases focused on resolving conflicts that arise when a statute providing for a function trumps or trespasses on another statute providing for a different function or, as Van der Westhuizen puts it, encroaches on the “territory” of another organ of state.<sup>57</sup> As discussed above, section 148 of the Constitution precludes this course of action for the resolution of the conflict between provincial legislation on matters relating to the environment and therein biodiversity. Thus, any conflict that may arise between a provincial conservation agency and the national department for environmental affairs would need to be addressed by way of co-operative governance, in compliance with Chapter 3 of the Constitution.<sup>58</sup> However, should the conflict or concern held by the province or provinces regarding the provisions of the NEMPAA be of substance, resolution can be effected only through an amendment of the Act.

<sup>53</sup> Van Wyk J “Planning in all its (dis)guises: Spheres of government, functional areas and authority” (2013) 15 *Potchefstroom Electronic Law Journal* at 291.

<sup>54</sup> See generally Van Wyk (2013).

<sup>55</sup> See for example *National Gambling Board v Premier of KwaZulu-Natal*, 2002 (2) BCLR 156 (CC); *Minister of Police and Others v Premier of the Western Cape and Others*, 2013 (12) BCLR 1405 (CC).

<sup>56</sup> See *DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 1 SA 500 (CC).

<sup>57</sup> *Khohliso v S & Another* (2014) ZACC 33 at para 66.

<sup>58</sup> See, for instance, *RA le Sueur v eThekweni Municipality* 2013 JDR 0178 (KZP) at para 20; Du Plessis AA & Van der Berg A “*RA Le Sueur v EThekweni Municipality* 2013 JDR 0178 (KZP): An environmental law reading” (2014) 25 *Stellenbosch Law Review* 580.

### 3 COMPARATIVE ANALYSIS FOR PROVISIONS FOR NATURE RESERVES AND NATIONAL PARKS IN NEMPAA

#### 3.1 National parks and nature reserves

There are two sets of key provisions that provide insight into whether concurrent competence is balanced equally between the national and provincial spheres of government with respect to nature conservation and therein national parks and nature reserves.<sup>59</sup> The first set of provisions encompasses the criteria needed to be met for the establishment of national parks and nature reserves; the second set pertains to the governance of these two protected areas.

##### 3.1.1 *Distinguishing criteria between national parks and nature reserves*

The NEMPAA prescribes an array of protected areas, two of which are national parks and nature reserves.<sup>60</sup> It is logical to assume that, by dint of specification of different kinds of protected areas that comprise the network of protected areas in South Africa, these areas are distinct from each other and serve a particular purpose or purposes listed in the Act.<sup>61</sup> These listed purposes are not categorised according to, and hence do not differentiate between, the various kinds of protected areas. Differentiation between protected areas is, however, established by a set of specific criteria that need to be met in order to qualify for declaration. Thus, a parcel of land may be declared, inter alia, as either a national park or a nature reserve if it meets, as a minimum, one or more of the specific criteria listed in the Act for these two protected areas.<sup>62</sup>

Consequently, the specification of different criteria (and use of different terminology) for, at least, a national park and a nature reserve suggests that the national legislature intended to render each of these discrete and dissimilar entities. It must be concluded therefore that circumstances applicable to a national park would be dissimilar to those that apply to establishing a nature reserve. Notwithstanding the assignment of management authorities by the relevant political head, such distinction, and hence clarity on the application of the NEMPAA, would ostensibly prevent a national park from being declared in the circumstances where a nature reserve would be a more appropriate protected area. Nevertheless, recognising that the two protected areas may be discrete and dissimilar entities may not necessarily entail that one is more important or of greater substance than the other. An analysis of the key biodiversity-focused criteria may, however, provide insights into whether the intention of the national legislature embraced an equal emphasis on the status and significance between national and provincial roles in the protection of biodiversity.

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<sup>59</sup> Section 20 and section 23 of the NEMPAA.

<sup>60</sup> Section 9(a).

<sup>61</sup> Section 17.

<sup>62</sup> Section 20(2) and section 23(2) for national parks and nature reserves, respectively.

### 3.1.1.1 *Significant versus nationally or internationally important*

The prima facie interpretation of the criteria defining a national park and a nature reserve in the NEMPAA suggests that these two protected areas serve different purposes. For instance, a nature reserve is intended to conserve “significant natural features or biodiversity”,<sup>63</sup> whereas a national park is intended to conserve “important biodiversity” of “national or international importance”.<sup>64</sup> The conundrum arises as to whether “significant natural features or biodiversity” is equivalent to “biodiversity of national or international importance”. Neither “significant” nor “important” are defined in the Act, and hence the conventional interpretation of the terms would prevail. The Collins English Dictionary defines “significant” as “important, notable, or momentous” with “momentous” being defined as “of great significance”.<sup>65</sup> Thus, it is commonplace to interpret “significant” as having greater weight than “important”. It is, therefore, plausible, using a strict interpretation of this provision in the Act, that a nature reserve may have equivalent or greater biodiversity value than a national park, in that “significant natural features or biodiversity” could plausibly be of national or international value. Thus, a simplistic reading of the Act would place a provincial conservation mandate on, at least, an equal standing to that prescribed for national government.

The crux of this criterion, however, rests on when a portion of South Africa’s biodiversity landscape is or is not recognised as nationally or internationally important and what constitutes “recognition”, and, consequently, what may or may not be declared as a national park or nature reserve. Given that the NEMPAA must be interpreted in the context of the Environmental Management Biodiversity<sup>66</sup> (NEMBA), the provisions of this Act would prescribe the biodiversity that is recognised as, at least, of “national importance”. Here, NEMBA provides a suite of instruments to identify priority areas for conservation.<sup>67</sup> These include bioregional plans, biodiversity management plans,<sup>68</sup> the listing of threatened or protected ecosystems,<sup>69</sup> and the listing of threatened or protected species.<sup>70</sup> Since one of the objectives of NEMBA is to provide for the management and conservation of biological diversity within South Africa, it is common cause these plans would be drafted in the national interest. This Act, therefore, provides insights into what portion of South Africa’s biodiversity would reasonably be recognised as “nationally important”. Following the argument above, these identified areas would automatically become, on its declaration, the preserve of a national park and not

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<sup>63</sup> Section 23(2)(b)(i).

<sup>64</sup> Section 20(2)(a)(i).

<sup>65</sup> See Collins Dictionary (2020).

<sup>66</sup> Section 6 of Act 10 of 2004.

<sup>67</sup> Section 2.

<sup>68</sup> Chapter 3 Part 1.

<sup>69</sup> Chapter 4 Part 1.

<sup>70</sup> Chapter 4 Part 2.

necessarily a nature reserve.<sup>71</sup>

“Significant natural features”, the criterion of nature reserves, does not have an equivalent qualifier as does the equivalent criterion for national parks, that is, “national or international importance”. It hence stands to reason that the national legislature intended nature reserves to conserve natural features that are considered significant but not necessarily of national or international importance, or that are identified in NEMBA. By implication, the national legislature is likely to have intended nature reserves to protect biodiversity which is noteworthy only at a provincial level and which may be potentially negligible at a national level. Should this deduction be correct, it would mean that the national legislature constrained the adjective “significant” to the very antithesis of its conventional meaning. The net consequence is that the Act, in the context of this criterion, places a nature reserve at a substantially lower conservation status than a national park.

### *3.1.1.2 Significance and viability*

Continuing with this criterion, a parcel of land that is a “viable, representative sample of South Africa’s natural systems or scenic areas” would qualify as a national park.<sup>72</sup> In contrast, the criteria defining a nature reserve do not include an equivalent prerequisite. Consequently, the “viability” condition is viewed as exclusive for national parks. This condition suggests, therefore, that nature reserves and other kinds of protected areas may be declared for samples of South Africa’s natural systems or scenic areas that may not necessarily be viable or where the viability thereof is uncertain. Hence protected areas that are not national parks could conceivably be, following a strict interpretation of the Act, non-viable. The Act does not define “viable”, and hence the common or popular understanding of the term would prevail. The same would apply to “non-viable”, which means “incapable of surviving or working”, “has no prospect of success”, not feasible nor impracticable”.<sup>73</sup> Nonetheless, should a “significant natural feature”<sup>74</sup> be found to be a “viable, representative sample of South Africa’s natural systems or scenic areas”, then a national park, as opposed to a nature reserve, would be the appropriate kind of protected area to be assigned. Such an implied separation between national parks and nature reserves would be contrary, however, to the Principle of Purpose of establishing protected areas. This is to safeguard biodiversity (and in that “scenic areas”) as part of the public trust entity for the enjoyment of current and future generations.<sup>75</sup> To achieve this prerequisite, the

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<sup>71</sup> Section 20(2)(a).

<sup>72</sup> Section 20(2)(a)(i).

<sup>73</sup> See Merriam-Webster <https://www.merriam-webster.com> (accessed 23 December 2020), Cambridge dictionary <https://dictionary.cambridge.org> (accessed 23 December 2020), and Oxford English Dictionary <https://www.lexico.com> (accessed 23 December 2020).

<sup>74</sup> Section 23 (2)(b).

<sup>75</sup> Section 3 of the NEMPAA. Blackmore AC “The interplay between the public trust doctrine and biodiversity and cultural resource legislation in South Africa: The case of the Shembe Church Worship

biodiversity conserved must be viable over the long term.

It is, therefore, questioned (if not concluded) whether this was a purposeful action on behalf of the national legislature to elevate the status of national parks extensively above that afforded to nature reserves. Irrespective of the national legislature's intent, this criterion appears to have appropriated the provinces' function or power by imposing an inequality or bias in favour of the national government. In so doing, an imbalance is created in the concurrent competence exercised by national and provincial governments.

### *3.1.1.3 Ecosystem conservation*

The Act is silent on the role nature reserves play in ecosystem conservation, whereas one or more functional ecosystems is the criterion set for a national park.<sup>76</sup> Thus, if the assumption is that the criteria were set by the national legislature to overtly differentiate between these two protected areas, then it would be safe to assume that a nature reserve (to avoid qualifying as a national park) would include (nonsensically) no more than a portion of an ecosystem within its bounds, or a number of ecosystems that are non-functional, or where the functionality is unknown. An ecosystem is by its very nature difficult to define, in that ecosystems are a mosaic of nested ecosystems, such as a series of isolated coral reefs (each an "ecosystem") within the marine ecosystem, or the gut ecosystem of an Ixodid tick attached to an elephant in an African savanna ecosystem.<sup>77</sup>

At an operational level a nature reserve therefore must have at least one ecosystem, or a viable portion of an extensive ecosystem, within its boundaries. As a consequence of ecosystems occurring at different spatial scales, this criterion adds no practical value in differentiating between a national park and a nature reserve. The question again needs to be raised about the legislature's intention to emphasise solely the role of national parks in ecosystem conservation where this function is indistinguishable between national parks and nature reserves, given that all nature reserves, at a practical level, must have at least one functional ecosystem within their bounds.

### *3.1.1.4 System of protected areas*

Notwithstanding the list of undifferentiated "purposes" of protected areas discussed above, the legislature included an additional purpose of nature reserves as one of the declaration criteria, namely "to supplement the system of national parks".<sup>78</sup> It is evident from the use of the term "to supplement" that the national legislature viewed national

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Site in Tembe Elephant Park in KwaZulu-Natal" (2014) 10 *LEAD* 1 at 8; see generally Goosen & Blackmore (2019).

<sup>76</sup> Section 20(2)(ii).

<sup>77</sup> See generally Blew RD "On the definition of ecosystem" (1996) 77 *Bulletin of the Ecological Society of America* 171; Bland LM et al. "Developing a standardised definition of ecosystem collapse for risk assessment" (2018) 16 *Front Ecol Environ* at 29.

<sup>78</sup> Section 23(2)(a).



parks as the mainstay protected area forming the system or network of protected areas, and that nature reserves' role is solely to improve or complete (i.e. to be something extra) this system or network.<sup>79</sup> In so doing, the national legislature, in a coup de grâce, unquestionably elevated the standing of national parks over nature reserves, and as a consequence, embedded an imbalance in the concurrent functions – with the role and status of the province being substantially less than the national government.

### *3.1.1.5 Protected area governance*

#### *3.1.1.5.1 Management authorities*

On its declaration, each protected area must be assigned a “management authority” by, as the case may be, the minister or MEC,<sup>80</sup> and such management authority may be a suitable person, organisation or organ of state.<sup>81</sup> In the case of national parks, the minister is compelled to appoint the SANP.<sup>82</sup> In the case of nature reserves, the MEC must assign the management authority to a suitable person, organisation, or by implication, a provincial organ of state. This specification by the national legislature, highlighted above, reinforces the separation of the national nature conservation domain from that of the provinces. As per section 40(1), once appointed, the respective management authority must manage the national park or nature reserve, inter alia, exclusively for the purpose it was set aside for as a protected area and its management plan. The incongruence between the two protected areas arises in the termination of the management authority's mandate due to non-performance. On the discovery of non-performance, and having followed a specified process, the minister or the MEC must terminate the management authority and assign this duty to another organ of state.<sup>83</sup>

The incongruence between the two lies in the reassignment of a new management authority to a national park. To reaffirm, the NEMPAA binds the minister to appoint the SANP as the management authority of national parks. This provision, incomprehensibly, binds the minister to re-appoint the non-performing SANP. Thus, by implication, the national government (by way of the SANP) has unfettered powers to manage national parks. Furthermore, a well-performing provincial conservation agency is prevented from becoming the management authority, should this instance arise, for a poorly managed national park. For a provincial conservation agency to become a management authority of a national park, this protected area must be redeclared as a nature reserve. This renaming is likely to entail withdrawal of the protected area declaration as a national park. This withdrawal may only take place by resolution of the National Assembly. In contrast, however, should the provincial management authority be found to be underperforming, the agency risks being replaced by the SANP or another organ of

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<sup>79</sup> See Cambridge Dictionary (2020).

<sup>80</sup> Section 38.

<sup>81</sup> Section 38(1)(a).

<sup>82</sup> Section 38(1)(aA).

<sup>83</sup> Section 44(2).

state,<sup>84</sup> in that the provinces are not afforded an equivalent “get out of jail card” for non-performance.

While this incongruence could be argued as an error, the NEMPAA has been amended several times with a forthcoming seventh.<sup>85</sup> None of these amendments addresses this anomaly. Hence, it could be assumed that the national legislature is unaware of this error, or this political body wishes to sustain the national government’s unfettered powers to manage its national parks. Whatever the reason may be, this provision within the Act underscores that the national government has been granted, by the provisions of the NEMPAA, more significant powers and security than the provinces. This creates an unbalanced, or national-government favourable, concurrent competence.

### *3.1.1.5.2 Protected area buffer zones*

In terms of section 28(2)(a), both national parks and nature reserves may have a surrounding buffer to protect these protected areas from, among other things, negative impacts originating from the surrounding landscape. The Act is, however, silent on the extent of the buffer; so too are the Regulations on national parks and nature reserves. Thus, at face value, it may be assumed that the extent of the buffer would be determined by the characteristics of the protected area and activities undertaken in the surrounding landscape. Protected area buffers for both national parks and nature reserves are, however, prescribed in a set of environmental impact Regulations to NEMA.<sup>86</sup> These Regulations arbitrarily define a standard or default buffer to a national park as 10 kilometres and 5 kilometres from the boundary of a nature reserve.<sup>87</sup> By publishing the Regulations into law, the Minister reinforced the notion that a national park is more important or more vulnerable than nature reserves – irrespective of the purpose or vulnerability of that being conserved and protected.

Thus, an instance may arise where a potentially destructive activity could take place at 5.01 km and which may be considered benign at 10 km from the protected area boundary. In this circumstance, a nature reserve would be at risk of being damaged or lost, whereas a national park (with equivalent biodiversity as the nature reserve), as a consequence of the buffer, would be unharmed by the activity. The designation of wilderness further highlights the absurdity of setting a twofold larger buffer for national parks than for nature reserves. The NEMPAA prescribes that part or all of a national park or nature reserve may be designated as “wilderness”. Such designation may only

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<sup>84</sup> Section 44(2).

<sup>85</sup> For instance: National Environmental Management: Protected Areas Amendment Act, No. 31 of 2004; National Environment Laws Amendment Act, No. 14 of 2009; National Environmental Management: Protected Areas Amendment Act, No. 15 of 2009, and the National Environmental Management Laws Amendment Bill, 2017.

<sup>86</sup> Listing notice 3: List of Activities and Competent Authorities Identified in Terms of Section 24(2) and 24D of the National Environmental Management Act 107 of 1998 in Regulation 985 in Government Gazette 38282 of 4 December 2014.

<sup>87</sup> Regulation 2(1).

be assigned to:

- a) protect and maintain the natural character of the environment, biodiversity, associated natural and cultural resources and the provision of environmental goods and services;
- b) provide outstanding opportunities for solitude; and
- c) control access which, if allowed, may only be by non-mechanised means.<sup>88</sup>

It is inconceivable that a wilderness area within a national park is more sensitive and vulnerable and deserves a significantly larger buffer than an equivalent wilderness area in a nature reserve (*id est* both fulfilling the same purpose listed above).

The same argument would hold for the conservation of biodiversity. As argued above, both a national park and a nature reserve may contain biodiversity that may be of national and international importance. Thus, in this instance, it is plausible that both these protected areas would require (at face value) equivalent buffers. Yet this equivalence is not reflected in the Regulations. It must be presumed, therefore, that the Minister *a priori* and capriciously specified the extent of buffers to protected areas purely on designation (namely, national parks) as opposed to the protected area's (a) sensitivity, (b) contribution to the national network of protected areas, (c) achievement of South Africa's national conservation strategy, and (d) the country's international biodiversity conservation obligations. This position taken by the Minister appears to indicate a substantial bias towards national parks. It therefore creates a disparity in concurrent competence between the national and provincial spheres of government.

#### 4 CONCLUSION

"When exercising its legislative authority, [the legislature] is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution."<sup>89</sup> This constitutional requirement raises interest in whether the "limits", should there be any, are encapsulated in concurrent national and provincial legislative competence within the Constitution. It is questioned, at least from a nature conservation perspective, and particularly from a protected-area perspective, whether this concurrent competence limits the national government's scope (the South African National Parks being their conservation agency) to precisely that afforded to the provincial governments and their conservation agencies.

It is argued that the conservation of biodiversity was primarily a provincial competence rooted in the country's colonial history. It was further discovered that the establishment of the South African National Parks ended this exclusivity by ushering in a national conservation competence that was, other than in name, identical in status to that enjoyed by the provinces. This circumstance remained unchanged until 2003. It is further averred, if not concluded, that the provisions of the 1993 and 1996 Constitutions were substantially aligned (although not definitively), with the powers granted under the auspices of concurrent national and provincial legislative

<sup>88</sup> Section 22 and 26.

<sup>89</sup> Section 44(4) of the Constitution.

competence being equally balanced between the two spheres of government. In every practical and legal sense, this circumstance represented the conservation and protected area mindset of the country.

It is also argued that the provisions of the National Environmental Management: Protected Areas Act 57 of 2003 have vanquished the prominent conservation role played by the provinces by elevating the standing of the national parks and diminishing the status of nature reserves to form what appears to be a “master-servant” relationship between the two. In so doing, the national legislature, drawing on its powers to do so, overturned what has been steadfast since at least the formation of the Republic of South Africa and the declaration of the country’s first protected areas. It is therefore speculated that the NEMPAA was adopted into South African law contrary to the provisions of the 1996 Constitution of the Republic of South Africa. Should this prove to be the case, the consequences may be far-reaching for the remaining 32 functional areas of concurrent national and provincial legislative competence and the distribution of legislative power between the two.

The need for national parks and nature reserves is questioned – particularly when the current national parks and nature reserves are highly unlikely to be aligned with the differentiating criteria in the NEMPAA. To address this inherited inconsistency, it is recommended that the two be consolidated into one kind of protected area. Alternatively, notwithstanding the Act’s questionable constitutionality, it is recommended that the current national parks and nature reserves be critically evaluated against the NEMPAA’s qualifying criteria and these protected areas reassigned, based on their biodiversity values, to the appropriate kind of protected area – that is, a national park or nature reserve, as the case may be. While it is acknowledged that the rationalisation of conservation agencies would require a constitutional amendment, the same would be required to vest national parks with the provincial agencies. Finally, it is recommended that the NEMPAA be revised to remove the many anomalies and irrationalities in its provisions, some of which are highlighted in this article.

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