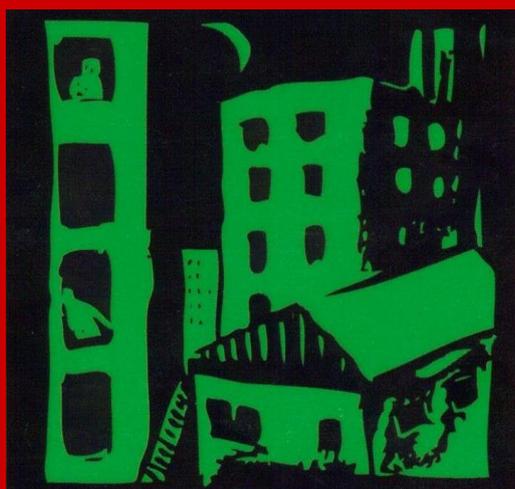


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What happens on the beach stays on the beach: a speculative legal analysis of nudism in South African protected areas

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ABSTRACT

The Hibiscus Coast Municipality assumed it had the authority to issue or amend by-laws to formalise an existing nudist friendly beach within the Mpenjati Nature Reserve. Following a complaint, the Public Protector concluded the same when she investigated the legality of the Municipality's actions. Two immediate questions arise. The first, whether the Municipality and the Public Protector were correct in their view that the Municipality has the authority over the beach irrespective of the presence of a protected area, and the second, whether nudism is a legal activity therein. Both the Municipality and the Public Protector

*overlooked the relevance of the nudist friendly beach being located within a protected area and the power of the management authority to determine the nature of the tourism that takes place therein. Nudism within a protected area appears not to be in conflict with the Sexual Offences Act 23 of 1969 and hence may be a legitimate activity within such area. The National Environmental Management: Protected Areas Act 57 of 2003 and the Regulations thereunder appear not to contain provisions that prohibit nudism or other niche nature based tourism activities. Provided that the activity conforms to the purpose of the Act and protected area management plan and zonation and does not pose a significant physical risk to the integrity of the protected area, the conservation agency may be hard-pressed to refuse a request for a niche nature based tourism activity, such as nudism, to be included in the zonation – should one be received.*¹

Key Words: Municipality, National Environmental Management: Protected Areas Act, nature based tourism, nudist friendly beach, protected area, Public Protector, Sexual Offences Act, zonation.

1. INTRODUCTION

In 2014, the Hibiscus Coast (subsequently renamed as the Ray Nkonyeni) Municipal Council issued a resolution (Resolution C127/10/2014) to relax the Municipal by-laws that relate to beaches and launch sites so as to accommodate the KwaZulu-Natal Naturists Association's application to formalise a "nudist friendly" beach north of Mpenjati Estuary.² This Resolution, as will be seen below, was key to formalising this use of the beach in that the practice of nudism³ at this site has its origins in pre-1994 apartheid South Africa.⁴ The extent of this nudist beach was located entirely on a secluded stretch of beach and within the Mpenjati Nature Reserve (MNR)⁵ and the abutting Trafalgar Marine Protected Area (TMPA).⁶ These two protected areas share a common boundary, regarded as the highwater mark of the ocean (Figure 1).

On 23 October 2017, Advocate Busisiwe Mkhwebane, the Public Protector of the Republic of South Africa (Public Protector), ruled that the process followed leading to the Resolution was, amongst several matters, unlawful.⁷ As a result of this finding, the Resolution was set aside.

¹ The author gratefully acknowledges the supportive environments of Ezemvelo KZN Wildlife and the University of Kwazulu-Natal. The ideas, arguments and opinions expressed in the article are the author's own and do not necessarily represent those of Ezemvelo KZN Wildlife and the University of Kwazulu-Natal.

² Mkhwebane B *Report of the Public Protector in terms of Section 182(1)(B) of The Constitution of The Republic of South Africa, 1996 and Section 8(1) of the Public Protector Act, 1994* (2017) at 63.

³ Also known as "naturism".

⁴ Blackmore A "Much Ado About Nothing: A Conceptual Discussion on Novel or Niche Tourism" (2020) 26 *PARKS* 37 at 37

⁵ Declared a nature reserve in *Provincial Gazette* 799 N 83 of 30 August 2012.

⁶ Declared a marine protected area in *GG* 21948 of 29 December 2000.

⁷ See Mkhwebane (2017) at 62–65.

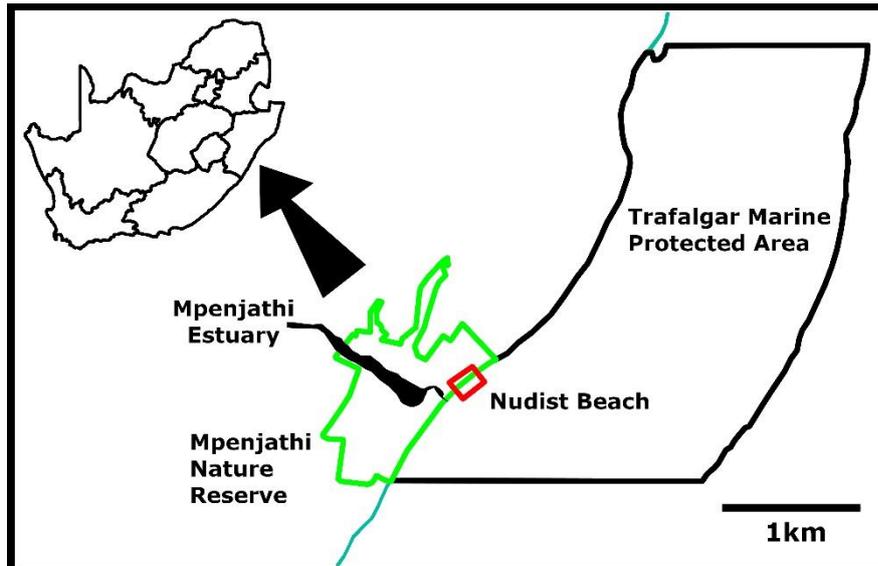


Figure 1: Location of the Mpenjathi Nudist Beach within both the Mpenjathi Nature Reserve and the Trafalgar Marine Protected Area – Kwazulu-Natal, South Africa.

The Public Protector acknowledged that Ezemvelo KZN Wildlife (Ezemvelo) was to be consulted before a decision being taken by the Council, in terms of section 53 of the National Environmental Management: Integrated Coastal Management Act (ICMA).⁸ Solely referencing this statute suggests that the Public Protector simply ignored the existence, and overlooked the importance, of the MNR and the TMPA, and Ezemvelo being the management authority for these two protected areas. In support of this observation, the Public Protector recorded in her finding that Ezemvelo had not received an application for the nudist friendly beach to be located in, at least, the MNR.⁹ Furthermore, the Public Protector did not consider the nudist beach extending into the TMPA. The significance of the protected areas in terms of whether a nudist beach could be “legalised” remains, therefore, uncharted territory, which, had it been considered, may have caused the Public Protector to find and rule differently.

In this article the author investigates whether a municipality has the authority to designate a portion of a provincial and national protected area for particular tourism use, and whether nudity or partial nudity may be legally permitted within a South African protected area.

2. ANALYSIS AND DISCUSSION

2.1. The protected area realm

The TMPA was originally proclaimed under the provisions of the Sea-Shore Act¹⁰ and was subsequently re-proclaimed in terms of section 43 of the Marine Living Resources Act.¹¹ Neither of these Acts requires or empowers the Minister to appoint a

⁸ Act 24 of 2008.

⁹ See Mkhwebane (2017) at 38.

¹⁰ Act 21 of 1935.

¹¹ Act 18 of 1998.

management authority for marine protected areas. The Oceans and Coast, a branch of the then national Department of Environmental Affairs, assumed responsibility for the management of the TMPA and entered into a service agreement with Ezemvelo that appoints this organisation as the “management authority” for this protected area.¹²

Section 22A of the National Environmental Management: Protected Areas Act (NEMPA)¹³ deems the TMPA to be a protected area under this Act. As such, the provisions of NEMPA would apply to the management of, and any activity that may take place within, the TMPA. The same would apply to the MNR by way of its declaration as a nature reserve in 2012.¹⁴ In this declaration, the Member of the Executive Committee (MEC) confirmed Ezemvelo as the management authority. Section 38(4) of NEMPA, however, requires that “marine and terrestrial protected areas with common boundaries” be managed as an “integrated protected area by a single management authority”.¹⁵ It was this provision upon which the Agreement was centred.¹⁶

Interestingly, however, section 38(1)(aB) requires the Minister to assign “a suitable national organ of state” as the management authority of a marine protected area. Thus, taking into consideration the requirement of a single management authority for an integrated terrestrial and marine protected area, section 38(1)(aB) implies that the

¹² Memorandum of Agreement entered into and between the Department of Environmental Affairs - Branch: Oceans and Coast and KwaZulu-Natal Nature Conservation Board (Ezemvelo) on or about the 14th of March 2018 at 6. As an aside, the appointment of Ezemvelo seeks to give nature conservation life and authority to a provincial entity over an area that lies outside the Province of KwaZulu-Natal. Furthermore, the Memorandum of Agreement is surprisingly silent on whether the Minister delegated the power to appoint the management authority for a marine protected area to the Director-General (s 42(a) of NEMA) and whether this person was granted the authority to sub-delegate this power (s 42(d)) to the Deputy Director-General representing the Oceans and Coast Branch of the Department of Environmental Affairs. In the absence of these delegations, the Deputy Director-General’s actions, by appointing Ezemvelo as a management authority, would be illegitimate and counter to, if not usurping, the power of the Minister (see discussion below). Furthermore, Schedule 4 of the Constitution of the Republic of South Africa, 1996 (Constitution), specifically excludes “marine resources” from being a provincial nature conservation competence. It is thus questioned whether the Minister has the constitutional authority, and by implication the Director-General and the Deputy Director-General, to provide directly or indirectly for a provincial entity to be appointed as a management authority for a marine protected area.

¹³ Act 57 of 2003.

¹⁴ Declared a nature reserve in *Provincial Gazette* 799 N 83 of 30 August 2012. In addition, this protected area was purchased and set by the Executive Committee to the Administrator of Natal as a recreational area for non-white race groups and was named the “Mpenjati Public Resort Nature Reserve”, with the then Natal Parks, Game and Fish Preservation Board (a predecessor to Ezemvelo) as the administrator thereof (Executive Committee Resolution No 142-5 of 27-08-1985).

¹⁵ Interestingly, the Memorandum of Agreement (see fn 12) states that the Oceans and Coast Branch of the National Department is the management authority for the TMPA but is silent on its appointment by the Minister.

¹⁶ Memorandum of Agreement entered into and between the Department of Environmental Affairs - Branch: Oceans and Coast and KwaZulu-Natal Nature Conservation Board (Ezemvelo) on or about the 14th of March 2018, at 6.

Minister, and not the MEC,¹⁷ would need to appoint the management authority for MNR (a provincial Nature Reserve). This authority cannot be Ezemvelo, as this organisation is a provincial and not a national authority.¹⁸ Should the Minister choose to apply the above-mentioned section, such action would conflict with the existing appointment, by the MEC, of Ezemvelo as the management authority.¹⁹ In spite of these challenges, and on the understanding that the Minister has not assigned a management authority for the integration of the MNR and the TMPA into a single management entity, it must be assumed that these two protected areas were arguably vested with Ezemvelo as the management authority during the Public Protector's investigation into the apparent legitimisation of the nudist friendly beach.

Furthermore, all protected areas must be managed in accordance with, inter alia, the protected area's management plan, which has been approved by the MEC or Minister as the case may be.²⁰ Such a plan must contain a zonation plan which indicates "what activities may take place in different sections" of the protected area.²¹ Nudism, as a nature based tourism activity,²² therefore, would need to be provided for in terms of this zonation plan and it would be the responsibility of Ezemvelo, in the circumstance of MNR and TMPA, to draft such a plan and to determine the tourism or recreational zonation of these protected areas.²³ For the Municipality to designate a nudist friendly beach within either or both MNR and TMPA, where this area is considered a "textiled beach", would constitute a conflict with the zone designated in both protected areas' management plans.²⁴ Furthermore, the rezoning of a portion of a protected area may be considered a substantial change to the management plan, and hence such a change may only be effected after, inter alia, "local communities and other affected parties which have an interest in the area" have been consulted by the management authority.²⁵ Thus, the Public Protector should have advised the Municipality to consult with Ezemvelo KZN Wildlife in terms of NEMPA, which has a greater relevance to this instance than does the National Environmental Management: Integrated Coastal Management Act (NEMICA).²⁶

¹⁷ Following on from the arguments in fn 12 above. This inference would concur with Schedule 4 of the Constitution, in that "marine resources" are excluded from the provincial nature conservation competence.

¹⁸ The KwaZulu-Natal Nature Conservation Board (trading as Ezemvelo KZN Wildlife) was established in terms of the KwaZulu-Natal Nature Conservation Management Act 9 of 1997.

¹⁹ Section 38(2) NEMPA.

²⁰ Section 41 NEMPA.

²¹ Section 41(1)(g) NEMPA.

²² Blackmore (2020).

²³ See, generally, Blackmore (2020).

²⁴ Blackmore (2020).

²⁵ Section 30(3) NEMPA.

²⁶ Act 24 of 2008.

2.2. Powers of the Municipality

The Public Protector appears to have accepted the Municipality's *bona fides* that it has the authority to determine the nature of the recreational use of the beach irrespective of whether the beach occurs within a protected area or not. Beaches and associated amusement facilities are an exclusive functional competence of the local sphere of government, which is vested in the Municipal Council.²⁷ So, too, is the control of public nuisances, which may include "public nudity". It may thus easily be concluded, as the Public Protector appears to have done, that the matter of a nudist friendly beach would fall solely within the constitutionally allocated authority of the Municipality. Thus, on this understanding, the Municipal Council would be entitled to adopt new, or relax existing, by-laws that would pertain to establishing, in this instance, a nudist friendly beach.²⁸

The application of this constitutional competence by municipalities does not, however, exclude either national or provincial powers and functions that may apply. A municipal by-law that conflicts with national or provincial law is invalid.²⁹ Thus, where such conflict arises the affected national or provincial law would take preference. Given that the site of the nudist friendly beach falls entirely within the two protected areas, that portion of the beach would be subject to the legislative authority of both national and provincial spheres of government. Thus, as national legislation, the provisions of NEMPA would take preference over any municipal by-law where they apply. The exception would be "local protected areas," which fall under the administration of the Municipality.³⁰ The authority of the Municipality over local protected areas would not apply to either the MNR or the TMPA, given the respective provincial and national status of these protected areas.

Furthermore, activities within a nature reserve are regulated by regulations promulgated by the MEC,³¹ and the management authority may adopt protected area rules to reinforce or provide for additional mechanisms for the management of the protected area. Section 7 of NEMPA clarifies that the provisions of this Act, and hence prevailing Regulations and Rules, prevail over a municipal by-law. In circumstances where one or more regulations constrain the activities of a protected area management authority, this authority may authorise activities that are contrary to the Regulations.³² This facility may, naturally, be used, by way of an agreement, to allow a local community or municipality to conduct agreed activities within the protected area.³³ Thus it would be appropriate for the KwaZulu-Natal Naturists Association to negotiate

²⁷ Sections 43, 155 & 156, read with Schedule 5 Part B (Functional Areas of Exclusive Provincial Legislative Competence) of the Constitution.

²⁸ Section 156(2).

²⁹ Section 156(3).

³⁰ Definition of "local protected areas" in s 1, read with s 8, of NEMPA.

³¹ Section 87.

³² Section 50.

³³ Section 50(1).

and enter into an agreement with Ezemvelo as the management authority, and not the Municipality, on the use of a portion of the MNR and TMPA as a nudist friendly beach. The same would apply to the Municipality should it seek the establishment of such a facility within the protected area.

A protected area is regarded as a “coastal protected area” in terms of NEMICA on the basis that it “is situated wholly or partially within the coastal zone”.³⁴ Furthermore, the Mpenjati estuary and the area below the low-water mark would be regarded as “coastal waters”, and the area between the high-water and low-water marks is the “seashore”³⁵. That area adjoining the high-water mark (varying between 120 feet (36.58 m) and 200 feet (60.95 m) wide)³⁶ is the “admiralty reserve”.³⁷ Together, all of these areas represent the coastal public property, in that it falls within the coastal zone.³⁸ Any area within a coastal zone may be subject to a coastal planning scheme which regulates the purposes for which areas within the coastal zone may be used. Where a coastal planning scheme only applies to a protected area, then the management authority (i.e. Ezemvelo) is responsible for the scheme.³⁹ Where the scheme applies over a greater area (which includes the protected area), then the Municipality is responsible for the scheme. In this instance, the scheme could only be formulated after the Municipality had consulted with the Minister or the MEC and the management authority of the protected area.⁴⁰ Any scheme produced by a municipality is subject to, in descending order, a scheme established by the Minister, the MEC or the management authority of a coastal protected area.⁴¹ It does not appear, therefore, that a scheme adopted by a municipality overrides the zoning of a protected area, as one is based on municipal and the other on national or provincial legislation.⁴²

In view of the foregoing, there appears to be no legal basis for the Municipality to designate a nudist friendly beach within the MNR or the TMPA. The Public Protector was, therefore, amiss in investigating whether, and concluding that, the Hibiscus Coast

³⁴ Section 1 NEMICA.

³⁵ Section 1 NEMICA.

³⁶ Blackmore AC “Rediscovering the origins and inclusion of the public trust doctrine in South African environmental law: a speculative analysis” (2018) 27 (3)*Review of European, Comparative & International Environmental Law* 1 - 12 at 12.

³⁷ Section 1 NEMICA.

³⁸ Section 1 NEMICA.

³⁹ Section 56(3)(b) NEMICA.

⁴⁰ Section 56(3)(d) NEMICA.

⁴¹ Section 56(4) NEMICA.

⁴² This instance contrasts with the circumstance considered in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & another* 2009(1) SA 337 (CC), *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province & others* 2007 (6) SA 4 (CC) and *Maccsand (Pty) Ltd v City of Cape Town & others* 2012 (4) SA 181 (CC), where two organs of State had concurrent powers as envisaged in the relevant schedules in the Constitution. The observations and findings of these judgments are thus peripheral to this matter in that they do not deal with the jurisdiction of the municipality in relation to a protected area.

Municipal Council had “breached its own policies [...] and by-law which prohibits nudism in all its beaches by unlawfully relaxing the said by-law”⁴³, in that the beach referred to was not under the administration of the Municipality. As a consequence, the remedial actions set in place by the Public Protector to address the illegality of Resolution C127/10/2014 have no or limited legal standing.

The same fate applies to the procedural recommendations made by the Public Protector should the Municipality wish to reconsider the establishment of the nudist friendly beach in the future. The corollary being that the Public Protector, given the context of the protected areas, effectively encouraged the Municipality to persist in making decisions outside of the rule of law – this being the very issue the Public Protector was originally asked to address. Should, however, the desired nudist friendly beach be located outside the bounds of the protected areas, the Public Protector’s findings, conclusions and recommendations would be sound.

2.3. The legality of nudist friendly beaches

While the Public Protector considered the legality of nudist friendly beaches in terms of the provisions of the Sexual Offences Act,⁴⁴ she stopped short of ruling on the matter. She did, however, admit that she was of the opinion that this statute was not necessarily intended to criminalise nudity in a designated nudist friendly beach.⁴⁵ This opinion hinged on the imposition of reasonable conditions that ensured that any adults accessing this portion of the beach were aware of its designation and hence, by implication, consented to witness nude bathers.⁴⁶ This opinion does, however, fall short of a determination that nude bathing on South Africa’s beaches may be lawful. Despite the erroneous understanding of the Municipality’s authority in a protected area, remedial actions imposed on the Municipality would be moot should nudist bathing be an illegal activity that cannot be legalised without revision of existing legislation.

The Public Protector cited the Sexual Offences Act as being the principal legislation dealing with public indecency, and section 19 thereof being the crux provision to be considered. Section 19 states:

“Enticing to commission of immoral acts.

(1)

Any person who entices, solicits, or importunes in any public place for immoral purposes, shall be guilty of an offence.

(2)

Any person 18 years or older who wilfully and openly exhibits himself or herself in an indecent dress or manner at any door or window or within view

⁴³ See Mkhwebane (2017) at 63.

⁴⁴ Act 23 of 1969.

⁴⁵ Mkhwebane (2017) at 50.

⁴⁶ Mkhwebane (2017) at 50.

of any public street or place or in any place to which the public have access, shall be guilty of an offence."

The concerns raised by the complainant, Reverend Effanga, on behalf of the "Concerned Citizens of the Hibiscus Coast Municipality", against a portion of the MNR's beaches being used as a nudist friendly beach, relate to whether or not nudity is, *per se*, immoral or will lead to the commission of an immoral act.⁴⁷ This raises the question of whether wilful adult nudity is, in itself, or constitutes, "indecent dress" or "indecent manner", and that "the beach" is a public place or a place to which the public have access. It is common sense that adult nudity that cannot readily be seen by the general public (as opposed to a consenting sector of the public) would not constitute an act of indecency as contemplated in the Act.

The seclusion of the proposed nudist friendly beach reasonably limits the "within view" of a person or persons near, or about to enter, that area. Thus, the consideration of the Act is effectively limited solely, in this instance, to the area designated as a nudist friendly beach and its immediate surrounds. The applicability of the question above therefore hinges, in the first instance, on whether the MNR and TPA beaches constitute a "public place", and in the second instance, on whether a person or persons approaching or entering the area have consented to be exposed to nude or partially nude bathers.

The NEMPA prohibits any person from entering a nature reserve without written permission of the management authority.⁴⁸ Furthermore, the Minister may regulate, *inter alia*, "access to protected areas," "tourism in protected areas where tourism is allowed", and entrance fees.⁴⁹ Similar powers are granted to the MEC in respect of nature reserves.⁵⁰ Thus, even though beaches are public property, they are not, strictly speaking, public areas, as access may be controlled and entrance fees and conditions imposed, by the management authority, on people wishing to access and recreate in the protected area. A beach or a portion thereof within protected areas, and in particular an area zoned as nudist friendly, therefore may be argued to be "private", as it does not constitute a "public place", as contemplated in the Sexual Offences Act. Wilful adult nudity in an area designated as a nudist friendly beach within a protected area is, therefore, unlikely to conflict with section 19 of the Sexual Offences Act. Thus, nude bathing within an appropriately designated zone within a protected area is unlikely to be an offence in terms of this Act.

Public nudity, however, may be a complex legal matter which could import a constitutional debate on, amongst others, whether nudism constitutes a right in terms of freedom of expression as contemplated in the Bill of Rights.⁵¹ Nonetheless, for the

⁴⁷ Blackmore (2020).

⁴⁸ Section 46 NEMPA.

⁴⁹ Section 86 NEMPA.

⁵⁰ Section 87 NEMPA.

⁵¹ Section 16(1) NEMPA. Murdoch J "Belief and conscience: can Europe do without a specific guarantee for religion?" in Grütters C & Džananovic D (eds) *Migration and religious freedom* Nijmegen : Wolf Legal

purposes of this article, it is assumed that permitted nudity is likely to be a legal activity within South Africa's protected areas.

2.4. The legality of nudist friendly facilities in protected areas

2.4.1. *Nudism as nature based tourism*⁵²

One of the purposes of a protected area is to “create or augment destinations for nature-based tourism”.⁵³ However, NEMPA is silent on the types of nature based tourism that may take place. This discretion lies with the management authority when drafting the management plan and defining the zonation that determines “what activities may take place in different sections” of the protected area.⁵⁴ The only limitations placed on the type of tourism that may take place are those that “have an adverse effect in protected areas”, which the Minister or MEC, as the case may be, may restrict or prohibit.⁵⁵ To do so, these political heads would need to demonstrate that the activity contemplated had or reasonably would have a significant “adverse effect” on a protected area.

As stated earlier, a MNR/TMPA nudist friendly beach was in existence prior to the establishment of these protected areas. A similar circumstance applies to the Sandy Bay nudist friendly beach which occurs within the Table Mountain National Park⁵⁶ and which abuts the Table Mountain National Park Marine Protected Area.⁵⁷ Given that these nudist friendly beaches appear to have persisted unchallenged, the Minister and MEC would, therefore, be hard-pressed at this late stage to find a nudist friendly beach to have an “adverse effect” on these protected areas. Furthermore, the provision for the Minister or the MEC to prohibit an activity taking place in a protected area is limited to

Publishers (2018) at 165. Generally, Lincoln L “Public Nudity and the Right to Freedom of Expression: Balancing Competing Interests” (2013) Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No 26/2016 available at <https://ssrn.com/abstract=2790689> (accessed 4 October 2020); De Vries B “The right to be publicly naked: a defence of nudism” (2019) 25 *Res Publica* 407 at 414.

⁵² “Nudism” is defined by the International Naturist Federation as tourists who are “in harmony with nature”, who are “characterised by the practice of communal nudity” and who have “respect for others and for the environment” – Deschenes S *The Official INF-FNI Definition of Naturism* (2016) available at https://archive.org/details/OfficialINFFNIDefinitionOfNaturism/mode/2up_at_2 (accessed 16 April 2020). “Nature based tourism” is defined as “the non-material benefits people obtain from ecosystems through spiritual enrichment, cognitive development, reflection, recreation, and aesthetic experiences”: Kim Y, Kim C, Lee DK, Lee H & Andrada R “Quantifying nature-based tourism in protected areas in developing countries by using social big data” (2019) 72 *Tourism Management* 249 at 249.

⁵³ Section 17.

⁵⁴ Section 41(g).

⁵⁵ Section 86(1)(d).

⁵⁶ The Sandy Bay nudist friendly beach was predominantly located within the Cape Peninsula National Park. This Park was renamed the Table Mountain National Park in 2004 (GN 554 GG 26305 of 7 May 2004) and expanded several times until 2015 (GN 480 GG 38822 of 29 May 2015). This expansion included the remainder of the nudist friendly beach.

⁵⁷ Declared on 4 June 2004.

preventing a significant adverse impact on the protected area and hence cannot be extended to include a personal view on the moral or social acceptability of nudism in protected areas or elsewhere. A decision to allow such an extension may be taken on judicial review on a number of the grounds as set out in section 6 of the Promotion of Administrative Justice Act (PAJA).⁵⁸ Of these, and drawing on the arguments above, the following are likely to be key:

- The Minister or MEC, as the case may be, was biased or reasonably suspected of bias;⁵⁹
- The action was materially influenced by an error of law;⁶⁰
- The action was taken:
 - a)
for a reason not authorised by the empowering provision;
 - b)
for an ulterior purpose or motive;
 - c)
because irrelevant considerations were taken into account or relevant considerations were not considered;
 - d)
because of the unauthorised or unwarranted dictates of another person or body;
 - e)
in bad faith; or
 - f)
arbitrarily or capriciously.⁶¹
- The action itself is not rationally connected to the purpose of the empowering provision.⁶²

⁵⁸ Act 3 of 2000.

⁵⁹ Section 6(2)(a)(iii).

⁶⁰ Section 6(2)(d).

⁶¹ Section 6(2)(e).

⁶² Section 6(2)(f)(i)(aa).

Furthermore, the principle of legality would arise should the Minister or MEC assume powers outside that granted by NEMPA - that is, to consider aspects of nudity that do not have an “adverse effect” on the protected area. In this instance, the legality of the decision taken by the Minister or MEC may be taken on review.⁶³

2.4.2. *Protected area zonation*

The management plan, while ensuring the conservation and protection of the area, must also include, inter alia, zoning that determines the activities that may take place in different sections of the protected area.⁶⁴ While it is realised that, at least in South Africa, nudism is potentially incompatible with other forms of tourism that traditionally occur within protected areas, such incompatibility may be overcome through a spatial or temporal zonation, as has been undertaken to separate sport hunting from safari tourism.⁶⁵

While there are many guidelines for the establishment of zoning,⁶⁶ there is little published on the reasoning underpinning tourism zonation of protected areas. Nonetheless, the management authority is obliged to consult with, inter alia, local communities and other affected parties that have an interest in the protected area.⁶⁷ It is contended that persons or people who have an interest in the provision of nudist opportunities within a protected area have an opportunity to draw the management authority’s attention to such a requirement. In turn, the management authority would need to decide on such a request in a transparent manner, which is independent of personal biases, values, subjective judgements or partisan perspectives.⁶⁸ This decision would, therefore, fall within the ambit of a “decision” and an “administrative action” contemplated in PAJA. The management authority would, therefore, be required to make a decision in a procedurally fair manner⁶⁹ and provide reasons therefor.⁷⁰ Failure to do so would be deemed to mean that the decision “was taken without good reason,”⁷¹ and thus may be subject to judicial review as is contemplated above.

Other than that captured in the purposes of a protected area, namely, to “create or augment destinations for nature-based tourism”⁷² and “generally, to contribute to

⁶³ See for example *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC); *President of the RSA v SARFU 2000* (1) SA 1 (CC); and *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC).

⁶⁴ Section 41(g) NEMPA.

⁶⁵ Blackmore (2018) at 7; Rotich DJ “Concept of zoning management in protected areas” (2012) 2 *Journal of Environment and Earth Science* 173 at 174.

⁶⁶ For example, Rotich (2012) at 174.

⁶⁷ Section 39(3).

⁶⁸ Blackmore (2018) at 7; Addison PFE et al “Practical solutions for making models indispensable in conservation decision-making” (2013) 19 *Diversity and Distributions* 490 at 491.

⁶⁹ Section 3.

⁷⁰ Section 5.

⁷¹ Section 5(3).

⁷² Section 17(i).

human, social, cultural, spiritual and economic development”,⁷³ NEMPA is silent on the character of “nature-based tourism” that may take place. Furthermore, there is no provision in the Act to give greater weight to or to select one form of nature based tourism over another. It must be assumed, therefore, that all forms of nature based tourism must be considered equally and given equal weighting by the management authority. Given that the prime purpose of the protected area is biodiversity conservation and protection, it is logical, however, that a management authority would favour tourism with a low ecological footprint over one that is significantly higher.⁷⁴ Likewise, with the growing dependence of protected areas on tourism revenue, it is further common cause for the management authority of a protected area to gravitate toward tourism that has the greatest revenue generating potential.⁷⁵ It is, therefore, averred that the discretion that may be exercised by the management authority, when favouring one form of nature based tourism over another, is one based reasonably on the potential (1) negative impact on the integrity of the protected area, (2) net profit gained, and (3) the effectiveness of rational recreational zonation.

2.4.3. *Regulations for the proper administration of protected areas*

At the time of drafting this article, two sets of Regulations were in force that provide for the administration of protected areas, namely:

- Regulations for the Proper Administration of Nature Reserves (R-NR);⁷⁶
- Regulations for the Proper Administration of Special Nature Reserves, and National Parks and World Heritage Sites (R-SNRNPWHS).⁷⁷

Other than the prohibition of tourism access to Special Nature Reserves, there is little in these Regulations that refers to or limits the type or character of nature tourism that may or may not take place in a protected area. Both sets of Regulations, however, prohibit any person from behaving in an “offensive, improper, indecent or disorderly manner”.⁷⁸ The Regulations are, however, silent on what would constitute “offensive, improper, indecent or disorderly” and by whose standard. For instance, a woman without a headscarf or who has exposed arms and shoulders may be offensive, improper, and indecent to some, and to others it may be seen as appropriate dress for a

⁷³ Section 17(k).

⁷⁴ Blackmore (2018) at 7; McCool SF “Tourism in protected areas: frameworks for working through the challenges in an era of change, complexity and uncertainty” in McCool SF & Bosak K (eds) *Reframing sustainable tourism* (2016) 2 at 101 available at http://link.springer.com/10.1007/978-94-017-7209-9_7 (accessed 17 January 2020).

⁷⁵ Snyman S & Bricker KS “Living on the edge: benefit-sharing from protected area tourism” (2019) 27 *Journal of Sustainable Tourism* 705 at 705; Blackmore (2018) at 7.

⁷⁶ GN R99 in GG 35021 of 8 February 2012.

⁷⁷ GN R622 in GG 37904 of 15 August 2014.

⁷⁸ Regulation 53(1)(C) of R- R and Reg 43(n) of R-SNRNPWHS.

tourist on a safari. The discretion to determine whether the behaviour of a person within the protected area is inappropriate lies with the management authority. In the absence of explicit policy, this discretion is likely to be exercised by an official within the protected area. Such discretion, as argued in *Philpott v Police HC*, should be based on whether the action offends “contemporary standards of propriety, to the extent that a reasonable observer would regard it with loathing, disgust and revulsion”.⁷⁹ Here “reasonableness” is in part dependent on whether there is good reason to be offended and whether interference would be a greater offence than that originally caused.⁸⁰

Nonetheless, particularly in the absence of guiding policy, these vague criteria (“offensive”, “improper” and “indecent”) as well as the related terms “obscene”, “objectionable” or “harmful to public morals”, are at risk of being used to sustain political, cultural and religious dominance,⁸¹ or to satisfy the personal biases and values, subjective judgment, or partisan perspectives of an individual or group of individuals as discussed above.⁸²

This component of the Regulations would, however, be moot in an area or a facility expressly set aside for nudism. In this circumstance, this activity cannot reasonably cause offence to, or be seen as improper or indecent behaviour by, those making use of the zoned area or facility. The same applies to the management authority which set in place the zone for this activity to take place. However, should this regulatory prohibition be seen to inhibit or frustrate the establishment of a nudist facility, section 50 of NEMPA empowers the management authority to set this regulation aside (and any other) either generally or for a specific zone within the protected area. Such discretion of the management authority may be exercised, and in accordance with the management plan and its zonation, to accommodate, inter alia, a particular activity “aimed at raising revenue”.⁸³ It is thus conceivable that nudism and other novel or niche activities may, in terms of these Regulations, be catered for in a protected area as revenue raising nature based tourism.

Finally, the concept of nudity within designated zones within a protected area may be offensive and improper or indecent behaviour to some who may not be intending to use or otherwise engage directly with that part of the protected area. This disapproval, in compliance with NEMPA, should be submitted to the management authority within the public consultation process when the nudist activity is introduced into the management plan or when this plan is revised.

2.4.4. *Short-term niche tourism activity*

A transient or an *ad hoc* tourism activity may be accommodated within a protected area by way of the management authority issuing a “Protected Area Notice”. Such

⁷⁹ Lincoln L (2013) quoting *Philpott v Police HC Christchurch AP-138-142, 13 July 1993* at 10–11.

⁸⁰ See De Vries (2019) at 419.

⁸¹ *Print Media South Africa & others v Minister of Home Affairs & others [2012] ZACC* at para 94.

⁸² See Blackmore (2018) at 7; Addison et al (2013) at 491.

⁸³ Section 50(1)(a)(iii).

notice is to be displayed prominently at either the main entrance to the protected area or at every entrance to the designated area therein.⁸⁴ This notice may, inter alia, prohibit or restrict access by any person and define the times and conditions a designated area may be accessed.⁸⁵ As such, the Regulations do not limit the type of event or where the event may or may not take place within the protected area. The plurality of “designated areas” suggests that a protected area notice may be an omnibus one for a number of discrete areas of the same or different activities. It is thus conceivable that the management authority may designate nudist areas other than a provisional “nudist friendly beach”. The management authority may, therefore, choose to cater for additional nudist activities other than nude bathing, such as, temporally designating an accommodation area, a hiking trail, or game viewing area for this type of use.⁸⁶

2.4.5. *Long-term niche tourism activity*

A specifically zoned area would, as discussed above, be the appropriate tool to cater for an enduring nudist area within the protected area. This zone, together with other zones (and other aspects) of the protected area may be managed by way of internal rules.⁸⁷ The management authority may gazette internal rules for a national park, marine protected area, nature reserve or world heritage site, and such must be consistent with the protected area’s management plan and zonation.⁸⁸ The internal rules are binding on all persons within the protected area⁸⁹ and they may include fines for non-compliance therewith.⁹⁰ As such, internal rules may be used as a mechanism to apply and enforce any codes of conduct that may be necessary to regulate the behaviour of tourists and non-tourists within the protected area and within any zone therein. Furthermore, the internal rules, used with appropriate *in situ* signage, may be used as a vehicle to establish and manage temporal zonation where required.

In developing internal rules, the management authority must take two aspects into consideration. The first is the impact on the approved protected area management plan, and the second, the environmental, social and financial effect a rule may have on the environment.⁹¹ The intent and meaning of the second consideration is perplexing, if not incoherent. Stipulating “the environment”⁹² as opposed to “the protected area”

⁸⁴ Regulation 6 of R-NR and Reg 23 of R-SNRNPWHS.

⁸⁵ Regulation 6 of R-NR and Reg 23 of R-SNRNPWHS.

⁸⁶ Blackmore (2018) at 7.

⁸⁷ Sections 52 and 53 NEMPA.

⁸⁸ Section 52(1)(aA).

⁸⁹ Section 52(1)(b).

⁹⁰ Section 52(1)(c).

⁹¹ Regulation 39 of R-NR and Reg 56 of R-SNRNPWHS. These two sets of Regulations are framed identically: hence the Regulations for the nature reserve erroneously refer to the “Minister”, as opposed to the “MEC”, having approved the protected area management plan. As discussed earlier, the Minister does not have a mandate to undertake an exclusive provincial power, such as approving management plans for protected areas.

⁹² Section 1 NEMA defines the environment as:

suggests that the two terms may not be synonymous and that a wider geographical area than the protected area was intended. Should this be the case, the Minister would be of the opinion that the application of a “rule” may have significant consequences beyond the boundary of the protected area. It is mystifying how the day-to-day behaviour of a person (a tourist or official) would have a significant impact beyond the boundaries of the protected area. Further, what the Minister intended to mean by the consideration of “environmental, social and financial effect[s]” on the “environment” is also enigmatic, unless this consideration can be shoehorned into the definition of environment and its influence on “human health and wellbeing”.⁹³ The ambiguity of this requirement outstrips the principle of purpose of the Regulations, and hence is seen as a bridge too far.

Thus, from an introduction of a niche nature-based tourism activity perspective, such as nudism, it is unlikely that the management authority would be obliged to extend its consideration of the likely impacts beyond compatibility with the protected area management plan and any direct physical impacts such activity would have on the protected area and its values. The corollary is that the Regulations do not provide the management authority with the legislative foundation to venture into the realms of personal biases and values, subjective judgment, or partisan perspectives.⁹⁴

2.4.6. *Co-management within the protected area*

The NEMPA enables the management authority to enter into a “co-management agreement” with, inter alia, a local community, an individual or other party, to undertake the management of an area within the protected area or regulate the activities of people.⁹⁵ This Agreement may provide, inter alia, for the delegation of powers, access to and occupation of certain areas, or any matter required for the novel, nature based tourism activity to take place.⁹⁶ These provisions and the associated Agreement provide an omnibus framework for an entity within that sector of the industry to administer an activity within the protected area.

A co-management agreement must, however, fulfil two conditions. It must be consistent with the provisions of NEMPA, and “provide for the harmonisation and integration of the management of cultural heritage resources by the management

“[T]he surroundings within which humans exist and that are made up of—

- (i) the land, water and atmosphere of the earth;
- (ii) micro-organisms, plant and animal life;
- (iii) any part or combination of (i) and (ii) and the inter-relationships among and between them; and
- (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.”

⁹³ Section 1(iv) NEMA.

⁹⁴ Addison et al (2013) at 491.

⁹⁵ Section 42(1).

⁹⁶ Section 42(2).

authority”.⁹⁷ As discussed above, the undertaking of nature based tourism (including nudism) by definition is not inconsistent with the Act. It remains to be seen, however, whether a co-management agreement providing for the management of a novel or niche nature based tourism activity would be able to reasonably “provide for the harmonisation and integration of the management of cultural heritage resources”. It could be argued that this requirement may be fulfilled in those instances where the nudism has occurred and has persisted in a protected area for some time (eg, the MNNR/TMPA and Sandy Bay nudist friendly beaches). In this instance, it may be argued that these areas have acquired or may be reasonably considered to have a “cultural heritage resource” status and hence may be managed by way of a co-management agreement by a third party.

In view of this limitation and the uncertainty it carries in this context, it is unlikely that the management authority will be able to draw on the provision of a co-management agreement to import and empower expertise to manage areas designated or zoned for niche or specialist tourism activities. Furthermore, given that the management authority would be perpetually responsible for the management of the protected area, it is likely that any agreement with a third party that involves the delegation of powers, access to and occupation of certain areas, or any matter that provided for a form of management of the protected area, is likely to be viewed as a form of “co-management”. Therefore, if this Agreement does not overtly provide for the harmonisation of the management of cultural heritage resources, such Agreement may be found to be in contravention of this provision. Notwithstanding this concern and in the absence of an enabling mechanism outside of NEMPA for co-management agreements, it would be incumbent on the management authority to acquire the necessary competence to manage niche nature based tourism such as nudism. The management authority would, therefore, as with the example of sport hunting, need to overcome the possibility that various staff may find nudity personally objectionable.

3. CONCLUSION

The decision by the Hibiscus Municipality to relax its by-laws in order to formalise a nudist friendly beach within the MNR and the TMPA precipitated an investigation by the Public Protector into the legality of this decision. This event raised the question of whether a municipality has the powers to authorise a recreational activity within a protected area. The event also raises the question of whether nudity or partial nudity (nudism or naturalism) may be legally permitted within a protected area.

It was discovered that the Municipality does not have the legal standing to, inter alia, directly determine the recreational activities that may or may not take place in either a Nature Reserve or Marine Protected Area. This is an exclusive function of the protected area management authority under the oversight of the Minister (in respect of national protected areas) or the MEC (in respect of provincial nature reserves). This discovery also highlighted the inaccuracy and misdirection of the Public Protector’s investigation and her published Report. By assuming the *bona fides* of the Municipality

⁹⁷ Section 42(3).

as the authority over beaches and by failing to take cognisance of the existence of the MNR and the TMPA, the Public Protector inappropriately investigated the Municipality's compliance with legislation that does not apply. This error in law renders the Public Protector Report of no or limited legal standing. Furthermore, the recommendations on legal compliance provided to the Municipality by the Public Protector are, as a result, unlawful. Thus, the Public Protector has inadvertently encouraged the Municipality to act illegally should the latter wish to persist with the formalisation of the nudist friendly beach. As such, the Public Protector is seen to have failed in upholding her mandate, which is to ensure that the State operates within the confines of the law. The corollary is that the Public Protector Report and the finding and recommendations therein appear, however, to be legally sound for beaches that occur outside of protected areas.

It appears that nudism may be a legal tourism activity within a protected area in that these areas are unlikely to be considered a "public place", as access by the public to these areas is regulated. Furthermore, the seclusion of the nudist friendly beach within the two protected areas is unlikely to put it in the view of the public residing within a public place. It is therefore concluded that a secluded nudist friendly beach within a protected area does not contravene the Sexual Offences Act 23 of 1969. It is, however, acknowledged that public nudity may be a complex legal issue and may require in-depth analysis of, at least, the Constitution of the Republic of South Africa, 1996.

It is finally concluded that, given that nudist friendly beaches have been in existence prior to and have persisted unchallenged (post declaration) in two protected areas, it will be difficult for a management authority or its political head to conclude that nudism, *per se*, has a significant adverse effect on the protected areas. This realisation together with the apparent legality of this type of nature based tourism, means that it is conceivable that nudism may be a feasible tourism activity within protected areas. This conclusion is underpinned by an outcome of an analysis of the NEMPA and the Regulations thereto. It is thus concluded that a South African conservation agency would be hard-pressed to refuse an application to include in a protected area's zonation, one or more areas that cater for niche nature based tourism such as nudism.

Finally, within the confines of a protected area and from the Municipality's and Public Protector's perspective, what happens on the beach stays on the beach!

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