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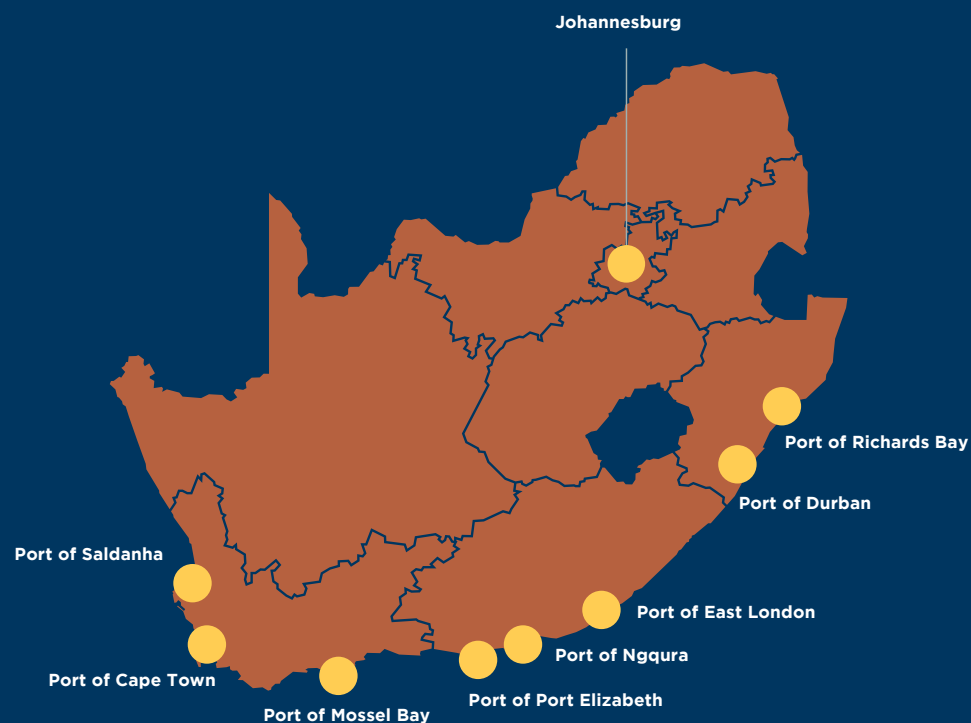


**GUIDE - SOUTH AFRICAN  
PORTS REVIEW, 2019**

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# Introduction: The South African Ports Landscape



South Africa is considered to be one of the foremost shipping hubs in the world with a considerable number of vessels entering and exiting ports around the country's coastline on a daily basis. South Africa boasts eight commercial ports stretching from its West to East coast, these are:

- Saldanha Bay
- Cape Town
- Mossel Bay
- Port Elizabeth
- Ngqura (Coega)
- East London
- Durban
- Richards Bay

The South African ports all fall under the care and responsibility of the Transnet National Ports Authority (TNPA) which is currently a member of the parent company Transnet SOC Limited (Transnet), a multi-divisional state-owned company involved in ports, terminals, rail and pipelines. In 2006 the National Ports Act (the NP Act) and Port Rules were introduced to govern port development

and operations in South Africa. One of the NP Act's objectives is to corporatise TNPA, that is, unbundle it from Transnet. In addition the NP Act introduced the Ports Regulator of South Africa (PRSA). This is an independent regulator whose role is inter alia to monitor and oversee the activities of TNPA only. The PRSA is also responsible for economic regulation of the ports and TNPA requires PRSA approval of its tariffs each year. For example on 1 August 2019, the TNPA submitted its application to the PRSA for tariff increases for the financial year 2020/ 21. It has proposed an average increase of 4.80%. Specific increases are as follows:

- Tariff increase of 9.70% on marine charges (shipping lines);
- An average of 2.85% increase in cargo dues differentiated as follows:
  - 5.00% on liquid bulk and break bulk cargoes;
  - 1.50% on containers;
  - 1.50% on automobiles;
  - 7.4% on coal and magnetite;
  - 5% on other dry bulk.

PRSA has ancillary functions of regulating competition in the ports and regulating the provision of adequate, affordable and efficient port services and facilities. Most of this is done in the context of its regulation of TNPA. The difficulty, however, is that the PRSA has no jurisdiction over TPT, meaning that the only regulation of the tariffs of the latter is by TNPA, which sits within the same corporate stable as TPT. Despite the fact that the NP Act requires TNPA to corporatise and thereby obtain a measure of independence from TPT, for pragmatic and historical reasons this has never happened.

The NP Act vests TNPA with powers and responsibilities with regard to port development and maintenance. TNPA is also charged with providing marine-related services out of the ports, such as providing infrastructure for containers, dry bulk, liquid bulk, break bulk and the automotive industry, as well as dredging, aids to navigation, ship repairs and marine operations. As part of the provision of these services, TNPA manages port activities and

fulfils each port's regulatory function, making licensing agreements with the operators of port facilities in order to facilitate service delivery. Lastly, TNPA is responsible for navigation and assistance of the manoeuvring of vessels within each port's limits and along the coast.

This guide sets out recent legal developments which have relevance to ports in South Africa.

*It is not a substitute for legal advice. If you require further information, please contact one of the key contacts listed at the end of this booklet.*

## New moves to corporatise TNPA

The corporatisation of the TNPA (currently operating as a division of Transnet), as mandated by the NP Act, has been a vexed issue for over a decade. One of the key concerns for Transnet has been the effect the split of TNPA from Transnet would have on the Group's balance sheet. Industry has voiced concerns about TNPA's ability to effectively regulate TPT which falls within the same corporate stable as TNPA, despite Transnet's commitment to internal "Chinese walls" and execution of its mandate. The Government is very much alive to the issue, which has been mentioned by both the President and Minister of Public Enterprise in speeches this year. In a display of commitment to moving towards corporatisation, the Department of Public Enterprises has invited service providers to submit a proposal to conduct an

impact assessment study of the corporatisation of the TNPA on Transnet and its operating divisions. The scope of work indicates concerns regarding the potential impact of TNPA's corporatisation on Transnet's balance sheet, solvency, loan covenants and the fiscus.

The closing date for submissions was Monday 12 August 2019.

"New moves to corporatise TNPA are seen as a commitment to increased transparency and efficiency."

# Economic Regulation of Transport Bill provides for extensive regulation of the Transport Sector

The bill was first published in February 2018 and a revised draft was published in November 2018 after public comments were taken into consideration.

The bill seeks to establish a new transport regulator (which will subsume PRSA) to regulate the broader transport sector, namely road, rail, air and port markets, entities, services and facilities. An interesting development is that the regulator may also regulate private companies in the transport sector. The Transport Minister may determine that a private (or public) entity is subject to regulation if certain criteria are met, including:

- Control of more than 70% of the market or absence of preconditions for competition;
- Control of an essential resource or facility;

- The power to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers.

The primary form of intended regulation is price control. Each regulated entity would be required to submit a proposal to the regulator requesting approval of its tariffs on services and facilities offered. In determining appropriate price controls the regulator would be enabled to consider relevant factors such as:

- the regulated entity's operating efficiency and effectiveness;
- the need for investment and security of supply in the regulated market;
- any reasonable cost differentials between the different types of facilities;

- the likely effect of the proposed price control on the economy, employment, consumers and small or medium enterprises.

The bill will interfere with free market conditions, although only in limited circumstances within defined parameters. However, there remains concern that price regulation may impede investment (particularly Greenfield infrastructure projects) in the sector, as investors anticipated returns cannot be projected purely on market forecasts.

“Private companies in the transport sector could be subject to price control, raising concern on the impact on investments in the sector.”

# Proposed Amendments to National Ports Act cause regulatory uncertainty

On 11 July 2019 a draft bill designed to correct technical deficiencies in the NP Act was published for comment. The bill aims to achieve independent and secure funding for the Regulator with a view to facilitating increased autonomy for the Regulator. Another commendable objective of the bill is to give the Regulator increased investigative power to initiate investigations. These powers perhaps ought to be further amplified by permitting the Regulator to obtain search warrants in appropriate instances.

Some concerns regarding the Bill are that it does not:

- Facilitate other relevant Government projects, namely the corporatisation of the TNPA and

the formation of an Economic Transport Regulator (as proposed by the Economic Regulation of Transport Bill of 2018.)

- Set any service standards for the TNPA.
- Afford the Ports Regulator any jurisdiction to regulate terminals, such as TPT.
- Include possible future ports within the definition of "Ports", in which case arguably TNPA would not have jurisdiction over a new port and would be precluded from developing one.

It remains to be seen the impact which the proposed amendment to section 31 of the NP Act will have on redressing the current constraints with Tribunal hearings.

Section 49(1) currently requires the Regulator to hear complaints and appeals with a majority of the members of the Regulator in attendance in the same way that the members would attend a Board meeting.

The reality is that most Members are part-time Members with limited time availability, so to constitute a gathering of more than 50% of the Members for a Tribunal hearing which may last some days is unwieldy and often results in lengthy delays.



"Recent bills with conflicting objectives have caused policy uncertainty."



# Application of 80:20 Rule in Maydon Wharf, Durban

In 2017 TNPA introduced the 80:20 “Cargo out” Rule into the Maydon Wharf precinct in Durban. This has had an impact on the operational requirements of the Port and those who make use of facilities at the Maydon Wharf precinct.

In essence the 80:20 rule was implemented in the interest of operational efficiency in the port with a view to decreasing vessel off-loading time and traffic congestion. The rule provides that 80% of cargo discharged must be taken to a warehouse in the Maydon Wharf precinct, while the remaining 20% may be “driven through”, directly to warehousing or storage facilities outside the precinct.

“Questions have been raised regarding the fairness of the application of certain operational policies at Durban’s general cargo berths.”

In 2017 an application was brought by interested parties to amend the Rule so as to apply to the total tonnage handled by a terminal per annum as opposed to on a per shipment basis, but in June 2019 the TNPA reversed its decision. There is an ongoing legal challenge to this decision.

# 2019 Update on TNPA Infrastructure Developments

## TNPA NATIONAL PORTS PLAN UPDATE 2019

In mid-2019, TNPA published an update to its National Ports Plan.

The 2019 Update highlights a number of changes to projects and timelines previously identified in the National Ports Plan, which are summarised below.

The provision of Liquefied Natural Gas (LNG) import facilities, as part of the Department of Energy (DoE) gas-to-power programme, for Richards Bay, Ngqura and Saldanha Bay are new developments. The Richards Bay facility is planned for the short-term (2019 - 2028), whilst the Saldanha Bay and Ngqura facilities are planned for the medium-term (2029 - 2048).

The Maritime Engineering and Maritime Commercial activities have been added

to the plan and form part of Operation Phakisa. New plans for Maritime Engineering include a floating dry dock facility in Richards Bay and increased land use in Saldanha Bay, Port Elizabeth, East London, Ngqura and Cape Town. New plans for Maritime Commercial facilities include expansion up the Buffalo River in East London, a new waterfront development in Mossel Bay and improvements to cruise liner facilities at Durban and Port Elizabeth. Projects that were brought forward include the earlier development of the outer basin for container terminal in Cape Town in the medium-term (2029 - 2048) and the LPG import facility that was recently completed in Saldanha Bay as well as the liquid bulk project in the Port of Ngqura. Other minor changes are mainly related to reprioritisation of land use and upgrades to road and rail infrastructure.

## ONGOING PROJECTS

Other ports, terminals and logistics infrastructure developments in South Africa that may be of interest, include:

- An LPG storage facility currently under construction at Richards Bay;
- Increases to off-shore bunkering operations off Port Elizabeth, as aligned with the Eastern Cape's aim to become Africa's biggest bunkering centre;
- The establishment of new, and the expansion of existing, Special Economic Zones (SEZs) around sea ports and at inland transportation hubs;
- The announcement of a public private sector partnership for the construction of the Tambo Springs Intermodal Terminal near Johannesburg, acknowledging the importance of logistics corridors and inland terminal development;
- Reports of public private sector partnerships to improve facilities at agri-ports in East London and Durban.

## NOTABLE CANCELLED AND DEFERRED PROJECTS

The latest demand forecasts indicate that cargo demand has generally declined since the 2017 update. This has resulted in non-critical projects being deferred. Notable projects that were deferred include the Liquid Bulk expansion in Durban and a portion of the manganese expansion at Ngqura.

It is also notable that the contract issued to the CMI Entateni Joint Venture in July 2018 to deepen, widen and lengthen the North Quay (berths 203, 204 & 205) at the Durban Container Terminal, has been formally cancelled in view of allegations of procurement irregularities. In a statement issued in late May, Transnet said that its internal forensic investigations are still ongoing and have not been concluded. According to its statement it is "currently re-assessing a way forward on the main marine contract scope of works in order to minimise any further delays in realising the benefits of the project."

## AWARD WINNING WORK ON DURBAN CRUISE TERMINAL

Building of the Durban Cruise Terminal is shortly to commence. The concessionaire, KCT is a joint venture between MSC Cruises SA (a subsidiary of MSC Mediterranean Shipping Company SA) and Africa Armada Consortium. This terminal presents a significant opportunity for cruise and tourism operators in the city and province. At least 20 international cruise liners currently call at South African ports, and Durban is well placed to take advantage of expected increases in passenger numbers. This will ensure continued growth for cruising in Durban, and the whole of Southern Africa. The project will create up to 10 000 employment opportunities.

Bowmans recently won the Transportation and Infrastructure Team of the Year Award at the annual African Legal Awards for our work in helping MSC Cruises respond to the public tender for the

proposed Durban Cruise Terminal and then negotiating the concession agreement on behalf of KCT with Transnet National Port Authority (TNPA) to conclusion. We drew on experts from our Ports, Transport and Logistics and Construction Sectors and Environmental and Finance Practices to complete the work. We remain employed on the project and have been acknowledged for our commitment, professionalism and innovation.

**"This multi-user terminal will make Durban an even more desirable destination for cruise ships all over the world. This follows significant growth in demand."**  
*Ross Volk, MD for MSC Cruises South Africa*

## Our Firm

We help our clients manage legal complexity and unlock opportunity in Africa.

We have an enviable track record of providing legal services to the highest professional standards in Africa. We work for clients across numerous African jurisdictions on corporate, finance, competition, taxation, employment, technology and dispute resolution matters.

With seven offices in five African countries and over 500 specialist lawyers, we draw on our unique knowledge of the business and socio-political environment to advise clients on a wide range of legal issues.

Everywhere we work, we offer clients a service that uniquely blends expertise in the law, knowledge of the local market, and an understanding of their businesses. Our aim is to assist clients to achieve their objectives as smoothly and efficiently as possible while minimising the legal and regulatory risks.

Our clients include domestic and foreign corporates, multinationals, funds and financial institutions, across almost all sectors of the economy, as well as state-owned enterprises and governments.

Our expertise is frequently recognised by independent research organisations. Most recently, our South African practice won the 2023 Chambers Africa Award for Law Firm of the Year in South Africa. In 2022, Bowmans won six IFLR Africa Awards including overall M&A Team of the Year; Jurisdictional Firm of the Year: South Africa; Loans Firm of the Year: South Africa; M&A Firm of the Year: South Africa; and Project Finance Firm of the Year: South Africa. We also advised on the deal named M&A Deal of the Year. At the 2022 Africa Legal Awards, we won four practice awards including Banking and Finance Team of the Year; Capital Markets Team of the Year; Tax Team of the Year and Transportation and Infrastructure Team of the Year.

## Our Presence in Africa

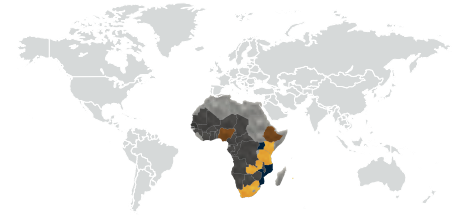
Recognising the size and enormous diversity of Africa, our approach to providing legal services across the continent is intended to offer on-the-ground advice in the countries that matter for our clients. Our presence in Africa is always evolving to meet the changes that are shaping the future of this vast continent.

Currently, we have our own offices in five African countries: Kenya (Nairobi), Mauritius (Moka), South Africa (Cape Town, Durban, Johannesburg), Tanzania (Dar es Salaam) and Zambia (Lusaka).

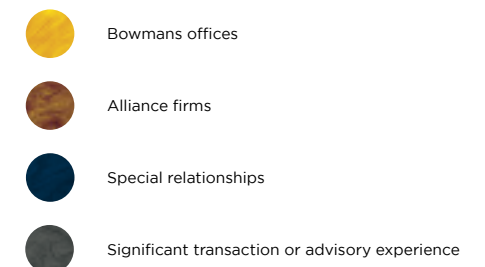
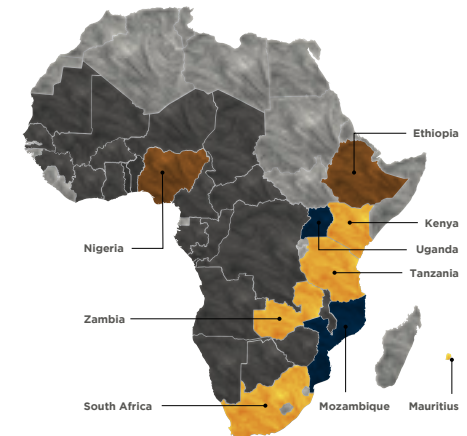
We work closely with our Bowmans Alliance firms in Ethiopia (Aman & Partners LLP) and Nigeria (Udo Udoma & Belo-Osagie). These are two of the leading corporate and commercial law firms in their jurisdictions.

We have special relationships with firms in Mozambique and Uganda. We also have a non-exclusive co-operation agreement with French international law firm Gide Loyrette Nouel that provides our clients access to assistance in francophone west and north Africa.

We ensure that, whenever our clients need legal advice in other parts of Africa, we can assist them by tapping into our comprehensive database of contacts of the best firms and practitioners across the continent.



On the global front, Bowmans has long-standing and excellent relationships with a range of international law firms with whom we often work on Africa-focused client mandates. We are also a member firm of Lex Mundi, a global association of independent law firms in more than 125 countries, which gives us the ability to connect our clients with the best law firms in each of the countries represented.



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