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05 MAY 2022

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AGENDA

Changes in Procurement Legislation

The Future of State Procurement

The Shell case and the One environment system

An analysis of the judgment on Shell's seismic exploration along the Wild Coast and the applicability of the One Environment System

The relevance of land use zoning and the interplay with mining and environmental law

A case study

The impact of National State of Disaster on evictions

The execution and implementation of court orders during the National State of Disaster



Meet our speakers



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Changes in Procurement Legislation: The Future of State Procurement

**Bulelwa Mabasa and Siphosethu
Zazela**





Introduction

- › **Changes in South African Procurement Legislation**
- › **Historical economic exclusion**
- › **Section 217 and section 9 of the Constitution**



State Procurement: Legislative Framework

› Section 217 of the Constitution

- › Further to this, section 217(2) of the Constitution permits organs of state to create policy that provides for categories of preference as it relates to the allocation of contracts; as well as providing for the protection or the advancement of categories of persons disadvantaged by unfair discrimination

› Preferential Policy Framework Review Task Team



Legislative Framework: Promulgation of 2017 PPPFA Regulations

› Regulations 3(b), 4, 9 and 10 of the 2017 regulations

- › These regulations an organ of the state to place prequalification criteria permitting only the following groups of people to respond to the tender advertisement -

tenderers which have a stipulated minimum BBEE rating;

tenderers who are an Exempted Micro-Enterprise ("EME") or Qualifying Small Enterprise ("QSE");

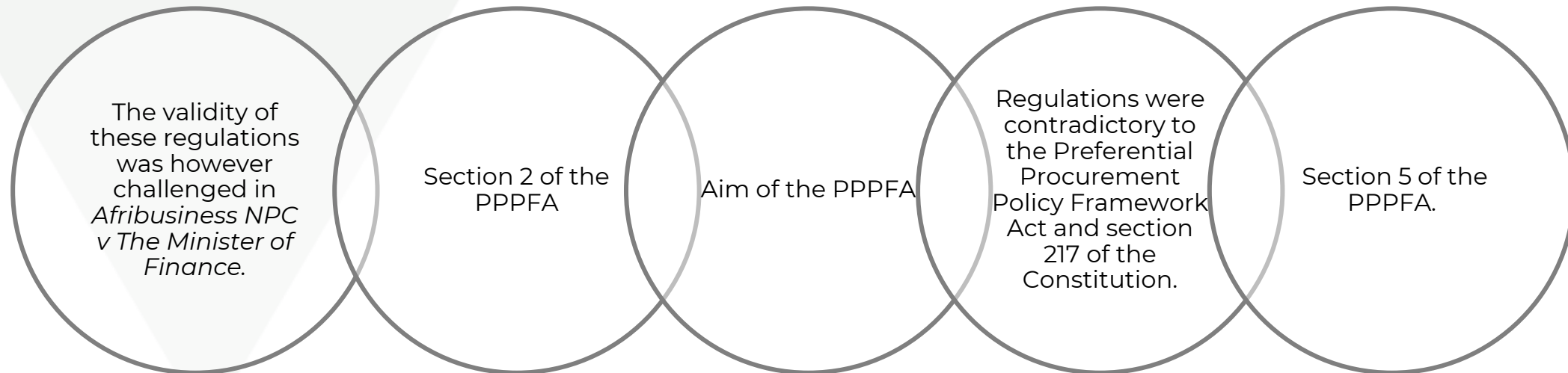
and tenderers subcontracting a minimum of 30% of the tender to a QSE, EME or a cooperative which is at least 51% owned by black people; black women;

black youth; black people with disabilities; black people living in the rural or underdeveloped areas or townships



Jurisprudence

› Jurisprudence: Invalidation of the 2017 PPPFA Regulations (Supreme Court of Appeal).





Invalidation of the 2017 PPPFA Regulations (Constitutional Court): 'Necessary or Expedient'

- › The invalidity of the regulations was confirmed by the constitutional court in *Minister of Finance v Afribusiness NPC* (Rule of Law Project and another as Amici Curiae) (Fidelity Services Group (Pty) Limited and another as Intervening Parties).
 - › Necessary or
 - › Expedient
- › Draft Regulations of 2022



State Procurement and Broad-based Economic Empowerment

The 80/20 and 90/10 system

Section 2(1)(f) of the
Preferential Procurement
Policy Framework Act

Balancing economic reform
and competitive pricing

View on the Constitution and
legislation regulating public
procurement

From the judgments as discussed
above, it does however appear that
where there is a legal dispute as it
relates to state procurement and
black economic empowerment, the
court will likely interpret legislation to
the favour of economic expediency.

Q & A SECTION



The One Environmental System and a discussion on the Shell Judgment

Athi Jara and Thomas Karberg





The NEMA and the EIA Regulations

The National Environmental Management Act

- Introduced the environmental impact management regime
- This includes the environmental impact assessment process.

Section 24(2) of NEMA

- Empowers the Minister responsible for environmental matters to publish listed activities which have an impact on the environment, and which may not commence without an environmental authorisation.

EIA Regulations

- Minister promulgated regulations with the latest version being the Environmental Impact Assessment Regulations (Amended in 2017).
- EIA Regulations, 2014 and three Listing Notices.

Penalties and offences

- Commencement with a listed activity without an EA is an offence [section 24F of NEMA].
- Administrative fine of up to R5 million may be paid for a rectification application in [section 24G of NEMA].



Previous sets of EIA Regulations and Listing Notices

EIA Regulations	Government Gazette	Effective Dates
EIA Regulations promulgated in terms of the Environment Conservation Act, 1989	GNR 1182 & 1183 Government Gazette No. 18261 on 5 September 1997	08 September 1997 - 09 May 2002
Amendment of the ECA EIA Regulations	GNR 670 and GNR 672 Government Gazette No. 23401 on 10 May 2002	10 May 2002 - 02 July 2006
2006 EIA Regulations promulgated in terms of the NEMA	GNR 385, 386 and 387 Government Gazette No. 28753 on 21 April 2006	03 July 2006 - 1 August 2010
2010 EIA Regulations promulgated in terms of the NEMA	GNR 543, 544, 545 and 546 Government Gazette No. 33306 on 18 June 2010	02 August 2010 - 07 December 2014



Current EIA Regulations (including the 2017 Amendments)

EIA Regulations	Government Gazette	Effective Dates
2014 EIA Regulations promulgated in terms of NEMA	GNR 982, 983, 984 and 985 Government Gazette 38282 on 04 December 2014	08 December 2014 - 06 April 2017
Amended 2014 EIA Regulations promulgated in terms of NEMA	GNR 324, 325, 326 and 327 Government Gazette 40772 on 07 April 2017	07 April 2017 - present

***Department of Environmental Affairs, 20 Years of Environmental Impact Assessment in South Africa*



The One Environmental System ("OES")

The OES is an agreement between the DEA, the DMRE and the DWS which aims to provide greater legal certainty and enhanced efficiency in matters relating to environmental authorisations

It impacts on the NEMA and various other environmental management legislation; the Mineral and Petroleum Resources Development Act No. 28 of 2002, as amended ("MPRDA"); and the National Water Act No. 36 of 1998, as amended ("NWA").

Environmental aspects repealed from MPRDA, instead solely governed by NEMA

DMRE is responsible for issuing EAs in terms of NEMA insofar as they relate to mining

All applications have a 300-day turnaround time

DEA remains the appeal authority



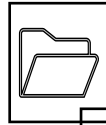
The One Environmental System ("OES")

Environmental management plans/programmes (EMPRs)



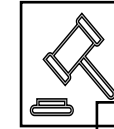
- Plans approved in terms of the MPRDA immediately before 8 December 2014 were deemed to be approved in terms of the NEMA
- All EMPRs that were approved prior to the introduction of the OES system are regarded as EAs for the purposes of compliance with the environmental legal requirements

Applications lodged after the commencement of the OES



- Those under NEMA and the processes prescribed in the EIA Regulations, 2014 for obtaining an environmental authorisation were to be adhered to

Legal implications



- The introduction of the OES has resulted in many legal difficulties, these difficulties were also considered by the court in the Shell case



The Shell Judgment

- › **Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy 2022 JDR 0033 (ECG)**
 - › Interim interdict on 28 December 2021
 - › Shell failed to obtain leave to appeal on 17 February 2022
 - › Main application set down for 30 May 2022

Interdict granted on the following grounds –

- Clear right - no meaningful consultation;
- Irreparable harm - impact of seismic blasting
- No satisfactory remedy – suspension procedure too time-consuming, Mantashe showed bias in favour of Shell

Why is the Shell case important?

- spiritual, religious, historical and economic importance of the sea
- adequate consultation with interested and affected parties



*"What this case is about is to show that had Shell **consulted** with the applicant communities, it would have been informed about those **practices and beliefs** and would then have considered, with the applicant communities, the measures to be taken to **mitigate against the possible infringement** of those practices and beliefs."*



Shell in the Context of the OES

Requirement of
EA and
authorised
EMPr prior to
OES?

Applicants = EA
required prior
to the OES

Relevant for
main
application (30
May 2022)

Applicants
Environmental
concerns
inadequately
address by
EMPr, NEMA
better suited for
protection

Court =
Applicants have
"prospects of
success"

Shell in context



The Importance of meaningful consultation

Maccsand

- MPRDA, NEMA and Land Use Planning Ordinance ("LUPO")
- Zoning
- MPRDA vs LUPO?
- LUPO and the MPRDA have different objects
- MPRDA does not enjoy a special preference where it conflicts with other laws
- Criticism of Maccsand

Bengwenyama

- Community – 2 farms in Limpopo
- Genorah Resources Proprietary Limited
- Prospecting rights
- Consultation process was fatally flawed – box-ticking exercise
- Consultation must be meaningful and genuine

Maledu

- Itereleng Bakgatla Mineral Resources Proprietary Limited ("IBMR")
- Prospecting right
- Surface Lease Agreement ("SLA")
- Interim Protection of Informal Land Rights Act No. 31 of 1996 ("IPILRA")
- Applicants protested
- Respondents failed to establish that the applicants had had a reasonable opportunity to participate in the SLA
- Importance of proper consultation with affected communities, informal rights in terms of IPILRA

Xolobeni

- Transworld Energy and Mineral Resources SA Proprietary Limited ("TEM")
- IPILRA
- Bengwenyama
- Bhe and Richtersveld
- "broader protection in terms of IPILRA than the protection afforded to common law owners"
- consent as opposed to consultation



Conclusion

- › In context = Shell judgment is merely the latest episode in a long line of cases
- › **Importance of proper consultation**
- › **Informal land rights**
- › **Spiritual, religious and cultural connections with land and the ocean**
- › Stakeholders should be aware of this **emerging jurisprudence**

Q & A SECTION



Coffee break

See you in 10 mins



The relevance of land use zoning and the interplay with mining and environmental law

Refilwe Moitse



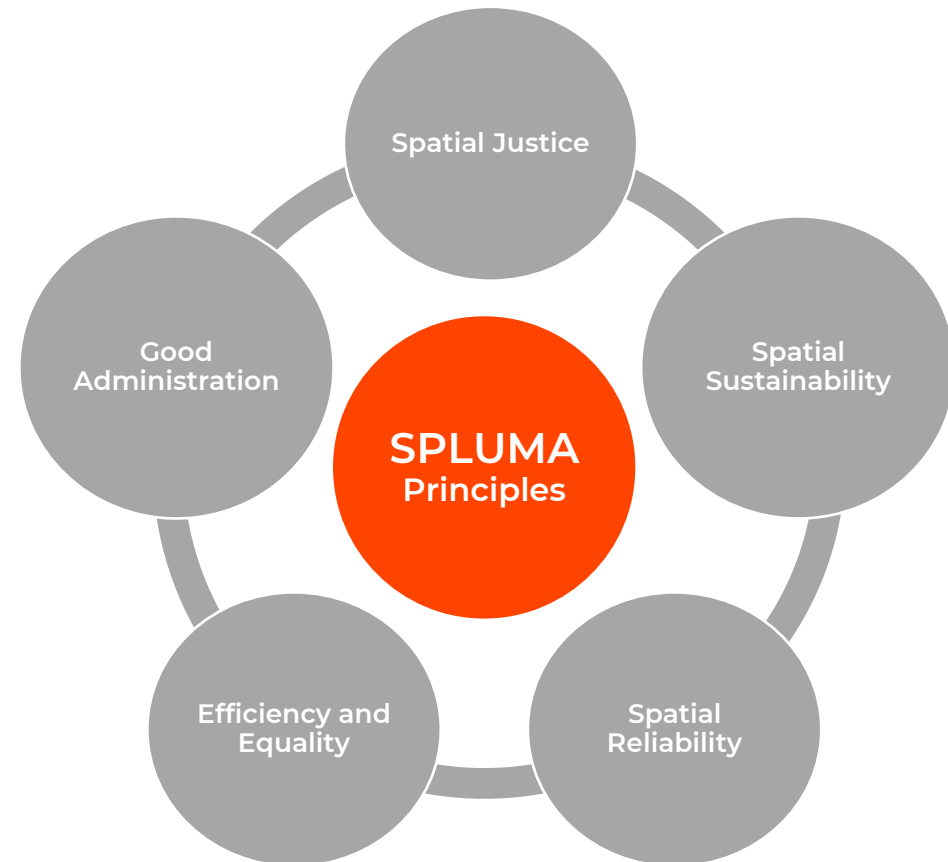


Legislative framework

› Spatial Planning and Land Use Management Act, No. 16 of 2013 ("SPLUMA").

› Application:

- › entire RSA;
- › enacted in terms of section 155(7) of the Constitution of the Republic of South Africa, 1996 ("the Constitution") - municipal planning and section 44(2) of the Constitution - provincial planning; and
- › except as provided for by SPLUMA, no other legislation may provide for any legislation inconsistent with SPLUMA.





RELEVANT PROVISIONS OF SPLUMA VIS-À-VIS LAND USE

- › **Preamble: enforces the State's obligations to realise the imperatives envisaged in –**
 - › section 24 of the Constitution
 - › section 25 24 of the Constitution
 - › section 26 24 of the Constitution
- › **Section 24(2)(b) of SPLUMA**

AMENDMENT OF LAND USE SCHEME AND REZONING

- › **Section 28 –**
 - › amendment of land use scheme and rezoning by municipality;
 - › prior to amendment, municipality must undertake a public participation process;
 - › after consultation, Minister of Land Reform and Rural Development ("**Minister**") must provide guidance to provinces and municipalities
 - › amendment to the land use scheme may only be authorised by the municipal council.

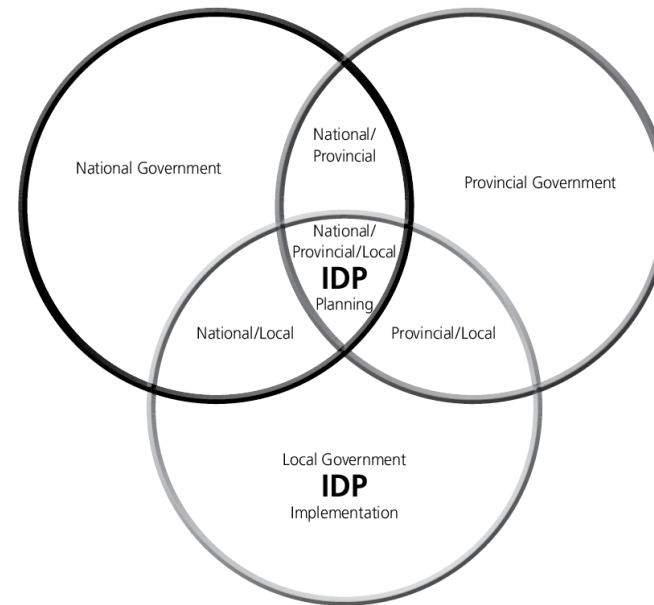


Inter-governmental framework

› Section 29 –

- › consultation with other arms of state regarding co-operation;
- › conclusion of an agreement to define scope; and
- › Municipal Planning Tribunal may act as authority.

› e.g: Rezoning of property to –



A mining area

- › Mineral and Petroleum Resources Development Act No. 28 of 2002
- › Department of Mineral Resources and Energy
- › National Water Act No. 36 of 1998
- › Department of Water and Sanitation

Agricultural property

- › Subdivision of Agricultural Land Act No. 70 of 1970
- › Department of Agriculture, Land Reform and Rural Development



Alignment of authorisations

- › Section 30 –
 - › Integrated authorisation v separate authorisations.
 - › Integrated authorisation –
 - › compliance with all pieces of applicable legislation
 - › specifies provisions in terms of which it has been granted; and
 - › relevant authorities have authorised it
 - › Municipality may regard an authorisation that was granted in terms of another piece of legislation and meets all the requirements of SPLUMA as an authorisation in terms of SPLUMA.



Jurisprudence

MACCSAND (Pty) Ltd V City Of Cape Town & Others 2012 (4) SA 181 (CC)

Facts

- › In 2008, Maccsand (Pty) Ltd ("Maccsand") was awarded a mining right under the MPRDA.
- › The area in which mining was to commence was zoned in terms of the Land Use Planning Ordinance 15 of 1985 ("LUPO") as a public open space and some as rural, near a residential area.
- › In February 2009, Maccsand commenced mining in terms of their mining permit. The City of Cape Town instituted interdict proceedings restraining Maccsand from mining until the property was rezoned.
- › The rezoning of the property was undertaken prior to Maccsand being granted a mining right.

Maccsand

- › LUPO could not apply to land use of mining purposes because LUPO regulated a municipal function.

Western Cape High Court:

- › Rejected Maccsand's argument that mining is exclusively regulated by national government and not by local government.

Supreme Court of Appeal:

- › Holder of a mining right or permit cannot proceed to mine unless permitted to do so by LUPO.

Constitutional Court:

- › Mining cannot take place in circumstances where the mining area has not been rezoned to allow for mining, despite compliance with all the requirements of the MPRDA.
- › Unless land has been rezoned, no mining can take place.
- › MPRDA does not trump any piece of legislation, but instead, should be reconciled with other applicable legislation, including provincial legislation, to the extent that they overlap.
- › Government ought to seek to discharge their mandates without contravention of other applicable legislation.
- › If not possible, courts should be approached to resolve these conflicts.



Jurisprudence

Mtunzini Conservancy v Tronox KZN Sands (Pty) Ltd 2013 JDR 0026 (KZD)

Facts

- › 1998 - Tronox KZN Sands (Pty) Ltd ("Tronox") granted old order mining right.
- › 2013- NGO brings an interdict application to stop mining operations pending approval from municipality.
- › issues: whether the Town Planning Ordinance, No. 27 of 1949 ("TPO") required Tronox to obtain rezoning.
- › Tronox commenced mining prior to requirement for rezoning.
- › Tronox was however granted a converted mining right in respect of its old-order mining right in July 2008.

Tronox

- › The amendment of the TPO, which required consent for non-agricultural purposes, was promulgated in 1992, and the only authority required to mine was as required by the Minerals Act.
- › The TPO was furthermore amended in 2008 to include mining as an activity that required provincial planning authorisation.
- › When Tronox commenced mining, the TPO therefore did not require planning approval for mining.
- › The amendment of the TPO, which required consent for non-agricultural purposes, was promulgated in 1992, and the only authority required to mine was as required by the Minerals Act.

Court:

- › Took into account the regulation of a mining authorisation in terms of the Minerals Act, which provides that the provisions of the Act are only subject to other national legislation related specifically to the mining industry.
- › The Minerals Act adequately caters for physical and environmental controls, and therefore a holder of a mining right needs no further consent or permissions.

Q & A SECTION



The impact of National State of Disaster on evictions

Boitumelo Moti





Introduction

- › On 15 March 2020, the President declared a National State of Disaster and subsequently announced a nationwide lockdown with effect from 26 March 2020.
- › In implementing the lockdown, regulations were published, in terms of section 27(2) of the Disaster Management Act No. 57 of 2002, to provide for, inter alia, the limitation of movements of persons for the duration of the lockdown.
- › These regulations placed a limitation on certain basic rights and freedoms of South Africans



EVICCTIONS AND THE NATIONAL STATE OF DISASTER

Alert level 5

- › On 16 April 2020, the government promulgated COVID-19 regulations to prohibit evictions during Alert Level 5 of the lockdown.
- › Regulation 11 - strict moratorium on evictions from residential property during alert level 5
- › Evictions strictly prohibited for the duration of the National State of Disaster.
- › No recourse for property owners, particularly at the peak of unlawful occupation of property in South Africa.

Alert levels 4 to 1

- › Evictions from residential property permissible during alert levels 4 to 1.
- › Applications in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE") or Extension of Security of Tenure Act No. 62 of 1997 ("ESTA"), heard by courts.
- › However, Regulations placed stringent requirements on persons seeking to evict unlawful occupiers.

Court rulings/Judgement

- › Courts may suspend execution of eviction orders until the uplifting of the national state of disaster, unless a court is of the opinion that it is not just or equitable to suspend or stay the execution of an eviction order.
- › Factors considered by the courts in deciding whether eviction is just or equitable –
 - › public interest – access to residence, protection of health, avoidance of unnecessary movements or gatherings;
 - › any restrictions on movement;



EVICCTIONS AND THE NATIONAL STATE OF DISASTER

- the impact of the disaster on the parties;
- the prejudice to property owner vs prejudice to unlawful occupier;
- prejudice to unlawful occupier in ability to access legal services;
- immediate access to an alternative place of residence and basic services;
- measures to protect health of any person in the process of a relocation;
- harm to others or a threat to life and;
- Reasonable steps to consider alternative arrangements, such as payment arrangements



A court could request a report from the responsible member of the executive regarding the availability of emergency accommodation or quarantine or isolation facilities pursuant to the Regulations.



The courts' application of the regulations

Inconsistency on approach

Most courts automatically suspended eviction orders, notwithstanding that the existence of factors.

A majority of the courts suspended eviction orders until the lifting of the National State of Disaster unless exceptional circumstances (such as a threat to life).



Unlawful deprivation of rights

- Right to property in South Africa is a fundamental right contained in the Bill of Rights, the cornerstone of democracy in South Africa.
- Section 25 of the Constitution – No deprivation of property except in terms of law of general application.
- No law may permit arbitrary deprivation of property.

- Section 25(2) provides an exception to the general rule - property may be expropriated only in terms of law of general application for a public purpose or in the public interest; and subject to compensation.
- Section 36 of the Constitution- the rights contained in the Bill of Rights are not absolute and can be limited –
 - the limitation must apply to all people and not just one person or group;
 - the limitation must be reasonable and justifiable in an open and democratic society; and
 - the limitation must be based on human dignity, equality and freedom

- Section 36 of the Constitution specifically provides that when limiting rights all relevant factors must be taken into account, including:
 - the nature of the right;
 - the importance of the purpose of the limitation; and
 - the nature and extent of the limitation.

Unlawful deprivation of rights

- › Section 37(4) of the Constitution – any legislation derogating from the Bill of Rights must be strictly required by the emergency; and
- › Section 27(3)(a) of the Disaster Management Act - regulations must only be exercised to the extent that it is necessary for the purposes of assisting and protecting the public.
- › Have the National State of Disaster Regulations, particularly pertaining to evictions, gone beyond the ambit of sections 36 and the 37(4) of the Constitution, as well as section 27(3)(a) of the Disaster Management Act?
- › A balancing act – on the one hand, rights of property owners, on the other rights of illegal occupiers and the impact of the pandemic on such occupiers.

Current status of evictions

- › The National State of Disaster has been lifted as from 5 April 2022.
- › Transitional Regulations pertaining to the management of the COVID-19 pandemic in terms of 27(2) of the Disaster Management Act, 2002, have been published to provide for transitional matters.
- › Transitional Regulations will automatically lapse on 5 May 2021.
- › Following the lifting of the National State of Disaster, evictions are now permissible and normal processes should be followed in terms of PIE or ESTA for the eviction of unlawful occupiers.

Q & A SECTION





THANK YOU

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