

# Environmental Law

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SOUTH AFRICA

Big step towards greater protection of South Africa's mega-biodiversity



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## Big step towards greater protection of South Africa's mega-biodiversity

South Africa is considered to be one of the world's few megadiverse countries and contains high levels of endemism. The National Environmental: Biodiversity Act 10 of 2004 (NEMBA) was brought into effect 20 years ago, but despite the measures provided for in the NEMBA, the well-publicised exploitation of South Africa's biodiversity has raged on. It therefore comes as no surprise that various legislative steps have now been initiated to introduce more progressive and diverse measures to protect and ensure the sustainable use of South Africa's rich biodiversity. These steps culminated in the publication of the Biodiversity Bill by the Minister of Forestry, Fisheries and the Environment (Minister) on 24 May 2024, inviting the public to submit comments on the bill on or before 23 July 2024.

Once the Biodiversity Bill is enacted it will repeal the NEMBA and will prevail over any other national legislation relating to biodiversity.

### **Duty of care, sustainable use and well-being of biodiversity**

NEMBA currently makes restricted use of the duty of care principle insofar as its application is limited to the context of managing alien and invasive species, and the Minister is further empowered to make regulations regarding the duty of care to threatened or protected species. The duty

of care envisaged by the Biodiversity Bill is afforded a similar significant status to the corresponding duties of care that are championed by section 28 of the National Environmental Management Act 107 of 1998 and section 19 of the National Water Act 36 of 1998. Considering the new importance given to the duty of care principle in the Biodiversity Bill, it is welcome to note that the principle has been defined and that the definition echoes the duty of care concepts as provided for in the abovementioned special environmental management acts. By definition, the duty of care as envisaged by the Biodiversity Bill will place a legal duty on people to take reasonable measures to prevent, minimise and remedy harm to biodiversity.

The term "*sustainable use*" under NEMBA has generally been interpreted and applied in a manner that is contrary to the goals and objectives of the NEMBA. The sustainable use concept has therefore been more clearly and broadly defined in an attempt to prevent the exploitation of South Africa's biodiversity so as to ensure healthy ecosystems, with improved benefits that are fairly and equitably shared for present and future generations.

Another notable departure from NEMBA is the inclusion of a definition for "*well-being*" that seeks to ensure humane practices, actions, and activities towards wild animals, the inclusion of which could have implications for activities related to intensive breeding, selling of wild animals and trophy hunting, to name but a few. Of particular interest are the legislative powers afforded to the Minister in terms of the Biodiversity Bill to publish a national list of species and associated regulations that will require additional consideration to promote well-being and humane practices, actions and activities when dealing with wild animals.

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Some of the other key focus points of the Biodiversity Bill include enhancing and developing biodiversity planning tools, promoting the fair and equitable sharing of benefits from bio-prospecting and indigenous knowledge, and implementing appropriate responses. This includes responses to the mitigation of environmental degradation and climate change impacts, which are not provided for in the NEMBA. The Biodiversity Bill does not provide any additional context as to what will be considered appropriate responses to climate change impacts, and it is therefore assumed that climate change specific regulations will be promulgated once the Biodiversity Bill is brought into effect.

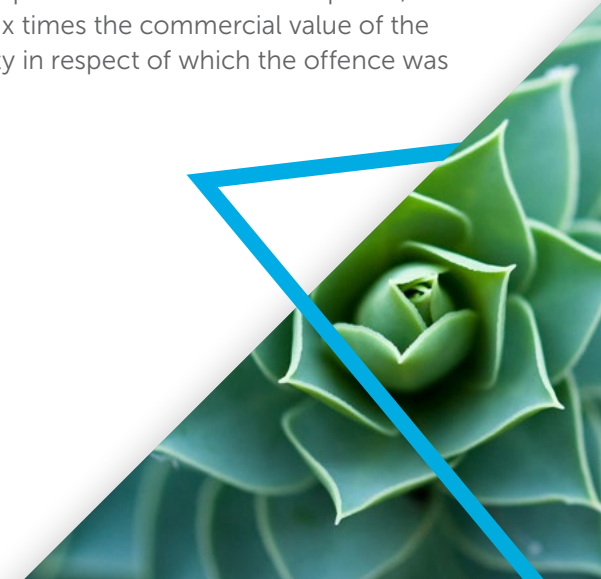
### **Obligations of the South African National Biodiversity Institute**

The Biodiversity Bill sets out additional functions of the South African National Biodiversity Institute (Institute) with the aim of better realising the goals of the Biodiversity Bill. The Institute will be required to develop national biodiversity indicators, which will assist with assessing and monitoring the status and trends of biodiversity. The Institute must also establish and maintain a national biodiversity information system as part of its function to co-ordinate and promote the management of biodiversity information in South Africa. A national ecosystem classification system must further be developed, co-ordinated and maintained by the Institute. These additional functions of the Institute are geared towards improving the implementation and management of the Biodiversity Bill, which will ultimately assist with conserving South Africa's rich biodiversity resources. The role of the Scientific Authority that is responsible for regulating international trade in species is also strengthened through the new Biodiversity Bill.

### **Other noteworthy amendments**

Some critical amendments are included in the Biodiversity Bill to improve the implementation of biodiversity management provisions and to better protect species and ecosystems. Some of these amendments include the revision of the sections relating to bio-prospecting and making provision for wildlife trafficking. While NEMBA only makes provision for the declaration and management of national botanical gardens, the Biodiversity Bill will allow for the declaration of both national botanical gardens and zoological gardens.

Like NEMBA, the Biodiversity Bill retains the stringent penalties for the commission of listed offences insofar as any person found guilty of an offence could be liable to a fine not exceeding R10 million, or imprisonment of up to 10 years, or both. However, in a marked departure from the penalties provision of the NEMBA, the Biodiversity Bill has included a specific penalty provision which could be applicable in circumstances where members of the state or a syndicate have been found guilty of an offence. In such instances a fine of up to R20 million can be imposed, or a fine equal to six times the commercial value of the specimen or activity in respect of which the offence was



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committed, whichever is greater. A prison sentence not exceeding 20 years can also be imposed or alternatively a person can be liable to both a fine and imprisonment. The inclusion of this penalty could have significant implications for those employees of the state who are found guilty of committing biodiversity crimes as well as for members of poaching syndicates.

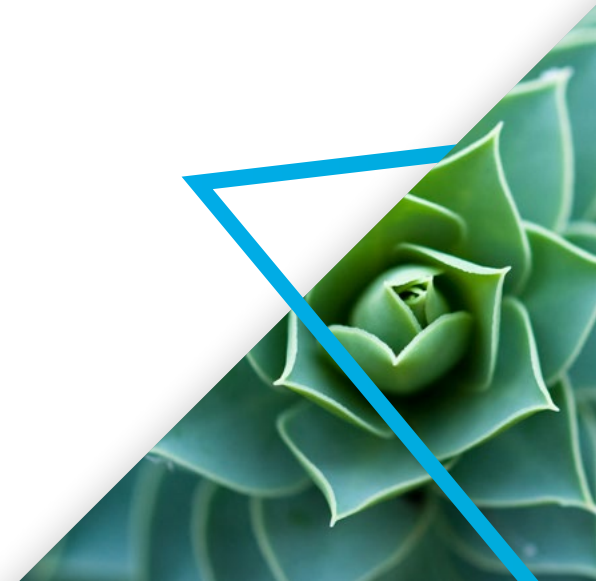
### Transitional arrangements

The Biodiversity Bill makes provision for numerous transitional arrangements to facilitate the crossover from NEMBA. Plans, programmes and regulations made in terms of NEMBA must be regarded as being adopted in terms of the Biodiversity Bill and will remain valid until amended or repealed. National botanical gardens that have been declared under NEMBA will not be affected and there is clear mention that the Pretoria Zoo is deemed to be a national zoological garden in terms of the Biodiversity Bill. Furthermore, all bioregional plans must be regarded as spatial biodiversity plans and any authorisations such as permits granted in terms of NEMBA will remain valid until revoked, cancelled or expired. Applications for permits that have not been finalised before the enactment of the Biodiversity Bill will be dealt with in terms of the provisions of NEMBA, but will be considered as permits issued under the Biodiversity Bill.

### Conclusion

The Biodiversity Bill seeks to provide South Africa's rich biodiversity with the comprehensive protection it deserves while ensuring that the abundance of biodiversity that we have been blessed with is restored where required and allowed to thrive for the benefit of current and future generations. The publication of the Biodiversity Bill for public comment is timely as it coincides with World Environment Day on 5 June 2024, with this year's theme highlighting the need to restore land, reverse the effects of desertification and ensure drought resilience. By improving the legislative provisions to restore, protect and enhance our biodiversity, South Africa will certainly be recognising and advocating the implementation of this year's World Environment Day theme.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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