



**REMEDIAL ACTIONS PROPOSED FOLLOWING THE  
CONSTITUTIONAL COURT JUDGMENT ON THE NATIONAL  
ENVIRONMENTAL MANAGEMENT LAWS AMENDMENT ACT,  
2022  
DEFINITION OF “WASTE”**

**PORTFOLIO COMMITTEE ON FORESTRY, FISHERIES AND THE  
ENVIRONMENT**

**21 NOVEMBER 2023**



forestry, fisheries  
& the environment

Department:  
Forestry, Fisheries and the Environment



# PURPOSE

To provide the Portfolio Committee on Forestry, Fisheries and the Environment with a possible way forward following the Constitutional Court judgment in the South African Iron and Steel Institute and Others v Speaker of the National Assembly and others [2023] ZACC 18, on the National Environmental Management Laws Amendment Act, 2022.



# ACRONYMS

AMSA	ArcelorMittal South Africa Limited
AMSA Judgment	Minister of Environmental Affairs and Another V Arcelormittal (Case No 342/2019) [2020] ZASCA 40 Constitutional Court judgment South African Iron and Steel Institute and Others v Speaker of the National Assembly and others [2023] ZACC 18
DFFE	Department of Forestry, Fisheries and the Environment
NEMLAA	National Environmental Laws Amendment Act, 2022 (Act No. 2 of 2022)
NEMA	National Environmental Management Act, 1998 (Act No. 107 of 1998)
Waste Act	National Environmental Management: Waste Act 2008, (Act No. 59 of 2008)



# BACKGROUND

- The National Environmental Management Laws Amendment Bill was assented to on 21 June 2022, signed by the President and gazetted on 24 June 2022.
- The bulk of the provisions of the National Environmental Management Laws Amendment Act, 2 of 2022 (NEMLAA) were brought into effect by Proclamation on 30 June 2023.
- NEMLAA contained, amongst others, a revised definition of “waste” and two newly inserted definitions for the terms “trade in” and “commercial value”, as contained in sections 61(c), (j) and (k), as part of the amendments to the Waste Act.
- These provisions were not brought into effect on 30 June 2023.
- The South African Iron and Steel Institute and Others challenged these three (3) definitions, argued it would have major implications on industry and insufficient consultation was undertaken in the finalisation of these definitions during the Parliamentary process on NEMLAA.



# CONSTITUTIONAL COURT CHALLENGE

- The matter was challenged in the Constitutional Court where it was heard on 21 February 2023 with judgment handed down on 26 June 2023
- The Court found that Parliament has failed to comply with its Constitutional obligation to facilitate public involvement in terms of section 59(1)(a) and 72(1)(a) of the Constitution in respect of the definitions of “waste”, “trade in” and “commercial value”, as well as the transitional provisions contained in section 88 of NEMLAA.
- These provisions were declared invalid and unconstitutional.



# IMPLICATIONS OF CONCOURT JUDGMENT

- The existing definition of “waste” contained in the Waste Act is currently still in effect.
- The judgment in the Minister of Environmental Affairs and Another V Arcelormittal South Africa Limited (Case No 342/2019) [2020] ZASCA 40 still applies.
- Based on this judgment, it is argued that any substance, material or object that is not ‘unwanted, rejected, abandoned, discarded or disposed of’ does not fall within the ambit of the definition of “waste”.
- It is argued that the judgment applies to all holders of waste, regardless if they have been issued with a waste management licence, or not.
- The industry interprets this judgment outside of the context of the factual situation considered in the AMSA judgment, which is of great concern to the Department.



# CONCERNS WITH AMSA JUDGMENT

- The Department has been approached by holders and/or potential holders of waste with views that the substance, material or object which they produce, is not “unwanted, rejected, abandoned, discarded or disposed of”, but re-used, recycled or recovered or to be sold to third parties who use the substance, material or object for environmentally sound purposes (to be subjectively determined by the holders and/or potential holders of waste) and thus is not regarded as waste.
- This argument, in the Department’s view, gives a wider effect to the AMSA judgment than it should.
- The AMSA context and judgment was in respect of waste management operations that had been in existence long before, and therefore predates, section 20 of the Environment Conservation Act, 1989, and the Waste Act .
- The Department argues that the judgment cannot be used by the bulk of the current industry members who have commenced operations after the coming into effect of the Waste Act.



# CONCERNS WITH AMSA JUDGMENT

- Present holders of waste management licences, who intended to apply for exclusions listed in paragraph (b)(i), (iii) or (iv) of the definition of waste, in order to sell the waste to third parties for revenue, may refrain from doing so in reliance on the AMSA judgment and their own wide interpretation of the ruling.
- NEMLAA was an attempt to address these concerns.
- As a result of the ConCourt ruling this failed.
- Amendment of the current definition of waste remains a priority, coupled with the introduction of definitions for “commercial value” and “trade in” as proposed in NEMLAA.





# PROPOSED REMEDIAL ACTIONS

## *Main remedial action proposed to the Portfolio Committee*

- Initiate a new Bill to effect amendments to the current definition of “waste” and new definitions for “commercial value” and “trade in” (either by the Department or the Committee), and transitional provisions.

## *Interim remedial action undertaken by the Department*

- Publish a sections 80(4) and 82 Notice in terms of the Waste Act to address facilities that predates the Environment Conservation Act and the Waste Act.
- The Department has already initiated a process and is currently busy with intergovernmental consultation processes.
- For the sake of regulatory certainty, the Department will seek a declaratory order from the High Court on the extent of the application of the AMSA Judgment.

# INITIATE A NEW BILL

- Either the Committee or the Department initiate and introduce a Bill, as there is no Bill before Parliament to consider or to consult on.
- The Bill will contain the amendments to the current definition of “waste” and new definitions for “commercial value” and “trade in”, as well as transitional provisions.
- Consult on the provisions.
- Consultation can be a lengthy process and the current administration period will be ending soon.



# WASTE ACT NOTICE

- AMSA judgment indicated that the Minister had the option at her disposal to call upon ArcelorMittal in terms of section 80(4) of the Waste Act to apply for a waste management licence.

## **Section 80(4):**

- “A person operating a waste disposal facility that was established before the coming into effect of the ECA and that is operational on the date of the coming into effect of the Waste Act may continue to operate the facility until such time as the Minister, by notice in the Gazette, calls upon that person to apply for a waste management licence”

## **Section 81(2):**

- “The holder of a permit issued in terms of section 20 of the Environment Conservation Act must apply for a waste management licence in terms of this Act, when required to do so by the licensing authority, in writing, and within the period stipulated by the licensing authority”.



# WASTE ACT NOTICE ... CONT...

- Section 82 of the Waste Act provides for transitional provisions regarding listed waste management activities
- “A person who conducts a waste management activity listed in Schedule 1 on the date of coming into effect of this Act, and who immediately before that date lawfully conducted that waste management activity under Government Notice No. 91 of 1 February 2002, may continue with the activity until such time that the Minister by notice in the Gazette directs that person to apply for a waste management licence under this Act”.
- The issuing of the section 80(4), 81(2) and 82 Notices will be expedited to deal with the historical cases of concern.



# RECOMMENDATIONS

- It is recommended that the Department initiates a Bill to address the definition of “Waste”.
- The Bill will be taken through the usual consultation processes before it is introduced in Parliament.
- For regulatory certainty that the Department will seek a declaratory order on the extent of the application of the AMSA Judgment.

# THANK YOU!

Thank You



forestry, fisheries  
& the environment

Department  
Forestry, Fisheries and the Environment  
REPUBLIC OF SOUTH AFRICA

