

Shepstone & Wylie ATTORNEYS

Readers may recall that we previously advised that the *National Port Authority Act 12 of 2005*, ("the NPA Act") came into effect on the 26th of November 2006, providing for the transfer of all assets and liabilities of the "old" NPA, which was a division of Transnet Limited, on a date to be Gazetted, to a new corporate entity to be registered as the National Port Authority (Pty) Limited, which is to take over all functions of the old division within the ports of South Africa, but excluding the operations of the terminals, which remains with SAPO. However, the company has apparently not as yet been formed. The NPA Act provided for this eventuality by decreeing that until its incorporation the "old" authority would for all purposes be deemed to be the "new" authority !

One of the implications of this is highlighted by the provisions of the *Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002* ("the Act"). Although this Act came into effect in November 2002, the NPA Act effected an amendment to the former legislation in including the National Ports Authority Limited in the definition of an "organ of state", but again with a savings provisions to include "... and any entity deemed to be the National Ports Authority" in terms of the NPA Act (i.e. now still the "old" NPA a division of Transnet).

In terms of the Act claimants must notify the Organ of State against whom they have a claim, within 6 months from the date upon which their claim arose, giving them notice that they intend instituting legal proceedings and setting out the facts giving rise to the claim. If a claimant fails to give that notice, they are precluded from instituting action against that organ of state, unless given leave to do so by the courts. The Act then provides that a claimant may not serve a process of court on the entity before the expiry of 30 days after the Notice has been served.

The NPA Act provides that as from the date of the vesting of all assets (the date still to be Gazetted) in any existing litigation by or against NPA as a division of Transnet, as at the Gazetted date, the National Ports Authority (Pty) Ltd is to be substituted as the party in place of Transnet. The Act also provides that the Minister can on a date after the incorporation of the "Pty" company, take steps to convert the company into a public company, to be styled "National Ports Authority Limited".

Arguably, the affect of the above provisions read together could be that any claimants who have claims against the "old" National Port Authority (as a division of Transnet), whether as the deemed successor under the NPA Act, or in its old guise, but where action has not yet been commenced, must give notice of intention to claim to the National Port Authority of South Africa as a division of Transnet Limited (as the deemed new authority under the NPA Act), before Friday the 25th May 2007 to get within the six month period from the date when the NPA in whatever form, became included as an "organ of state" under Act 40 of 2002.

The situation is however not free from doubt. If any readers have claims that fall into the above category, it would be safest not to take a chance on how the inter relationship of the two Acts is to be interpreted by the Courts – if in doubt, give notice of claim before Friday 25th May 2007.

We understand notice must be given to the NPA by addressing a fax to the CEO of the NPA, Mr Khomotso Phihlela at fax number 011 3519007 or e-mail khomotsop@npa.co.za with a copy to the legal advisor Mr Peter Balfour on e-mail peterba@npa.co.za .