



PROFESSIONAL REASSESSMENT OF THE SCOPE OF WASTE: PROPOSED AMENDMENTS TO THE REGULATIONS REGARDING THE EXCLUSION OF A WASTE STREAM OR A PORTION OF A WASTE STREAM FROM THE DEFINITION OF WASTE.

Abstract

In April 2025, the South African Department of Forestry, Fisheries and the Environment (“DFFE”) published proposed amendments to the Regulations regarding the Exclusion of a Waste Stream or portion of a Waste Stream from the Definition of Waste, 2018 (“Draft Regulations”)¹. The Draft Regulations aim to refine the process for excluding certain waste streams from the statutory definition of “waste”. Various industries submitted legal and policy responses to the Draft Regulations. This article explores the constitutional, regulatory, and practical implications of the Draft Regulations and raises critical questions about their legal validity and alignment with judicial precedent².

1. Introduction

The regulation of waste in South Africa is governed by the National Environmental Management: Waste Act, 59 of 2008 (“NEM:WA”). The NEM: WA provides a mechanism for the exclusion of certain waste streams from the scope of regulatory oversight, particularly where such materials are intended for subsequent use after “re-use”, “recycling”, or “recovery”. In April 2025, the DFFE released proposed amendments to the Waste Exclusion Regulations, 2018, calling for public comment³.

¹ Department of Forestry, Fisheries and the Environment, *Proposed Amendments to the Regulations regarding the Exclusion of a Waste Stream or a portion of a Waste Stream from the Definition of Waste, 2018* (Draft Regulations, Government Gazette 52454, GN 6102, dated the 4th of April 2025).

² The views in this article are based on comments submitted by the South African Iron and Steel Institute (“SAISI”). See further n22 and n23 and references cited therein.

³ See n1 above.

This article examines the implications of these proposed amendments for the future of environmental regulation in South Africa. The focus is placed on the alignment (or misalignment) of the Draft Regulations with the legal definition of “waste,” constitutional jurisprudence, and the administrative burden imposed on industry.

2. Legal Context and Judicial Precedent

2.1 Current Legal Definition of Waste

Under section 1 of NEM:WA, “waste” is defined as any material that is:

“...unwanted, rejected, abandoned, discarded or disposed of, or that is intended or required to be discarded or disposed of... whether or not such substance... can be reused, recycled or recovered...”

However, crucially, NEM:WA also provides that materials cease to be “waste” once they have been “re-used”, “recycled”, or “recovered”, once excluded under section 74 of the Act or is excluded from the definition of “waste”.⁴⁵

⁴ Section 1 of the NEM:WA defines “waste” as –

- (a) *“any substance, material or object, that is unwanted, rejected, abandoned, discarded or disposed of, or that is intended or required to be discarded or disposed of, by the holder of that substance, material or object, whether or not such substance, material or object can be re-used, recycled or recovered and includes all wastes as defined in Schedule 3 to this Act; or*
 - (b) *any other substance, material or object that is not included in Schedule 3 that may be defined as a waste by the Minister by notice in the Gazette,*
- but any waste or portion of waste, referred to in paragraphs (a) and (b), ceases to be waste –*
- (i) *once an application for its re-use, recycling or recovery has been approved or, after such approval, once it is, or has been re-used, recycled or recovered;*
 - (ii) *where approval is not required, once a waste is, or has been re-used, recycled or recovered;*
 - (iii) *where the Minister has, in terms of section 74, exempted any waste or a portion of waste generated by a particular process from the definition of waste; or*
 - (iv) *where the Minister has, in the prescribed manner, excluded any waste stream or portion of a waste stream from the definition of waste”.*

⁵ Department of Environmental Affairs, *Waste Exclusion Regulations, 2018* (Waste Exclusion Regulations, Government Gazette 41777, GN 715, dated the 18th of July 2018). The purpose of the Waste Exclusion Regulations, 2018 only provides for the exclusion of beneficial and permitted subsequent uses for materials once “re-used”, “recycled” or “recovered”. This interpretation is not aligned with the definition of “waste” and thereby extends the definition of “waste” beyond the “end-of-waste” criteria, provided for in the NEM: WA.

2.2 The Minister of Environmental Affairs and Others v ArcelorMittal South Africa Ltd – “ArcelorMittal Case”⁶

In the ArcelorMittal Case, the Supreme Court of Appeal (“SCA”) clarified the following aspects regarding the interpretation of the definition of waste:

- Any substance, material or object that is not “*unwanted, rejected, abandoned, discarded or disposed of*” does not fall within the ambit of the definition.

This conclusion was assessed in context of the submissions made by First Respondent in the initial application to the High Court of South Africa, Gauteng Division, Pretoria in the ArcelorMittal Case.⁷⁸

- Any substance, material or object that has been recycled or recovered ceases to be waste once recycled or re-used.

The Court concluded that the NEM:WA definition of “*waste*” is “*clear and unequivocal*,” and that the beneficial / subsequent use of any materials is not regarded as “*waste*” in terms of the NEM:WA.⁹

2.3 The South African Iron and Steel Institute and Others v The Speaker of the National Assembly & Others - “Constitutional Matter”¹⁰

The interpretation followed in the ArcelorMittal case was affirmed in the Constitutional Matter. The Constitutional Court (“CC”) dealt with two important aspects:

⁶ *The Minister of Environmental Affairs & Others v ArcelorMittal South Africa Limited* SCA Case No: 342/ 2019, 17 April 2020).

⁷ *ArcelorMittal South Africa Limited v Minister of Environmental Affairs & Others* (86171/2016, GP, 8 June 2018), Founding Affidavit of Adriana Cecilia Taljaard, paras 123-127.

⁸ In context with the content of (n7) above, it will be against the purpose and objectives of the NEM:WA to use the concept of “*sale*” as a sole subjective indicator of the intention of the “*holder of the waste*”.

⁹ See above (n6) at [41] – “*Far from being obscure, the definition is clear and unequivocal. On a fair reading thereof, it becomes readily apparent 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. Similarly, any substance, material or object that has been recycled or recovered, in this instance from the BOFSDS, ceases to be waste once recycled or re-used*”.

¹⁰ *The South African Iron and Steel Institute & Others v The Speaker of the National Assembly & Others* CCT Case No: 240/ 2022, 26 June 2023.

- The CC reiterated and echoed the SCA's ruling in the ArcelorMittal case and acknowledged that “recycled”, “recovered” and “re-used” materials, i.e. beneficially used materials are not classified as “waste” in terms of the NEM: WA and as a result, the provisions of the NEM:WA do not find application to these materials.^{11 12}
- The CC ruled that the proposed amendments to the definition of “waste” introduced in Parliament to include the beneficial / subsequent use of “recycled”, “re-used” or “recovered” materials as part of the definition of “waste” without proper public consultation were unconstitutional.¹³¹⁴

3. Summary of the Draft Regulations

The purpose of the Waste Exclusion Regulations, 2018, is to –

- (a) *“Prescribe the manner in which a person or a category of persons may apply to the Minister for the exclusion of a waste stream or a portion of waste stream for beneficial use from the definition of waste;*
- (b) *exclude permitted uses of a waste stream or a portion of waste stream from the definition of waste; and*
- (c) *promote diversion of waste from landfill disposal to its beneficial use”.*¹⁵

The Draft Regulations propose substantial changes to the Waste Exclusion Regulations, 2018, to include (but not limited to) the following:

¹¹ See above (n10) at [12] – “The Supreme Court of Appeal held that the existing definition of “waste” is ‘clear and unequivocal’. On a fair reading, the Supreme Court of Appeal held ‘it becomes readily apparent 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’. The Court further held: ‘any substance, material or object that has been recycled or recovered...ceases to be waste once recycled or re-used’.

¹² See above (n10) at [13] – “The Supreme Court of Appeal confirmed that finished products, by-products and co products of manufacturing processes, which a manufacturer intends to sell to customers are not ‘waste’. The Department of Environmental Affairs (Department) chose not to appeal the AMSA judgment”.

¹³ See above (n10) at [34] – “Significantly, it was the Department’s case that the definition introduced by way of the “E-list” changes were in part designed to counteract the Supreme Court of Appeal’s decision in AMSA. Up to and including the “D” version of the Bill, the AMSA decision would have remained applicable, despite the superficial adjustments to the definition of “waste”. The “F” version, by contrast, swept the AMSA decision aside, since the Supreme Court of Appeal’s reasoning would no longer be justified by the revised wording of the definition. It is idle, in the circumstances, for the respondents to contend that the late change in definition was not material”.

¹⁴ See above (n10) at [36] – “The effect of this amendment of the definition of waste was that a vast range of products, co-products and by-products that were never regulated as waste before, would now be subject to the onerous requirements of the Waste Act, with significant consequences including new regulatory requirements that have cost implications”.

¹⁵ See n(5) above.

- Transfer of **public consultation obligations** from the authorities to the applicant¹⁶;
- Introduction of **“trial project” registration**, enabling preliminary use prior to full exclusion¹⁷;
- Minimum application criteria that include **beneficiary lists**, and **public participation reports**¹⁸;
- Mandatory **annual audits and reporting** on job creation, SMME support, and volumes diverted from landfill¹⁹;
- Provisions for **suspension, revocation, and transfer** of exclusion authorisations²⁰;
- **Penalties** including imprisonment for specified non-compliances²¹.

While it is assumed that the intention of the DFFE is to enhance regulatory clarity and accountability, the Draft Regulations impose procedural obligations that may be more onerous than those under the waste management licensing process.

4. Legal and Policy Critique

4.1 Misalignment with Existing Legal Framework

Based on the interpretation of the current definition of “waste” provided by the SCA (ArcelorMittal Case) and the CC (Constitutional Matter) judgments, materials that is “re-used”, “recovered” or “recycled” cease to be a waste once sold and used for an identified subsequent use. The subsequent use / beneficial use of such materials therefore does not fall within the ambit of the definition of “waste” and the provisions of the NEM: WA is not applicable. Therefore, a regulatory process to “exclude” the subsequent / beneficial use is unnecessary. The process prescribed in the Waste Exclusion Regulations, 2018, and further refined in the Draft Regulations, is therefore not aligned with the interpretation of the definition of “waste” as determined by the SCA and CC.

¹⁶ See above (n1) section 3.

¹⁷ See above (n1) section 4.

¹⁸ See above (n1) section 5.

¹⁹ See above (n1) section 8.

²⁰ See above (n1) section 9.

²¹ See above (n1) section 10.

4.2 Premature Regulation Without a Revised Definition

The Iron and Steelmaking Slag Working Group Committee (“SLAGCOMM”), established by the South African Iron and Steel Institute (“SAISI”) provided comments on the Draft Regulations²².

The SAISI SLAGCOMM noted the DFFE’s intention to introduce a new definition of “waste”, based on the outcome of the Constitutional Matter, but has not yet formally introduced a revised definition of waste to Parliament. Although public input was invited during 2024 on six proposed definitions, no update has been adopted. Consequently, the Draft Regulations are premature and may contradict current legal definitions²³.

4.3 Lack of Transitional Provisions

The Draft Regulations do not provide for transitional arrangements, raising concerns about the regulatory uncertainty and compliance burdens for existing users and processors. The SAISI SLAGCOMM argues that this could result in irrational or unenforceable regulatory requirements²⁴.

4.4 Regulatory Overreach

The SAISI SHECOMM warns that the proposed regime blurs the line between exclusion and licensing. Rather than excluding materials from the scope of the Act, the Draft Regulations appear to extend NEM:WA oversight into areas already regulated by sector-specific laws (e.g., mining, construction, and industrial by-products). This may lead to double regulation and legal uncertainty²⁵.

²² The South African Iron and Steel Institute (“SAISI”), *Proposed amendments to the Regulations regarding the Exclusion of a Waste Stream or a portion of a Waste Stream from the Definition of Waste, 2018* (to the Director General: Department of Forestry, Fisheries and the Environment, 20 June 2025)(on file with the author).

²³ The South African Iron and Steel Institute (“SAISI”), *Waste Act Amendment Bill 2024: Proposed definitions of Waste tabled by the Department: Forestry, Fisheries and the Environment (“DFFE”) in terms of the National Environmental Management: Waste Act 59 of 2009 (“NEMWA”)*(to the Department of Forestry, Fisheries and the Environment, 10 October 2024)(on file with the author).

²⁴ See (n22) above.

²⁵ See (n22) above.

5. Broader Implications for Industry and Policy

The following aspects reflect wider concerns among industrial sectors regarding:

- **Regulatory overreach** and compliance fatigue.
- **Legal uncertainty** due to inconsistent interpretations of the definition of “waste”.
- **Economic disincentives** to recycling and beneficial use due to regulatory overreach and compliance fatigue.
- **Constitutional risks** in fast-tracking regulation without public consultation or legal clarity.

These issues speak to a fundamental tension in South African environmental law: balancing environmental protection with legal certainty and economic feasibility.

6. Recommendations and the Way Forward

The SAISI SLAGCOMM proposed that:

1. **No new regulations** should be finalised **until the definition of “waste” is lawfully revised** since the Waste Exclusion Regulations, 2018 does not find application to the current definition of “waste” as provided for in the NEM: WA.
2. The DFFE should provide **clear transitional provisions** to protect existing operations.
3. The DFFE should engage further with industry on how to achieve the goals of **diversion and beneficial use** without unnecessary duplication or procedural burdens.

Until these concerns are resolved, the Draft Regulations may remain subject to judicial review, legal challenge, or ineffective implementation.

7. Conclusion

The Draft Regulations, while ostensibly aimed at promoting circular economy principles, may unintentionally create new layers of bureaucracy for materials that are no longer legally defined as waste. The submissions made underscore the need for regulatory clarity, legal

alignment, and genuine public engagement. For environmental governance to be effective, regulation must be consistent with both the law and industrial realities. The DFFE now faces the task of reconciling its policy goals with constitutional obligations and judicial precedent.

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