

Assumption: 1.0 hr (01:00)

1. The language of legislation

A. Context

Before we dive into this morass called *'interpretation of the law'*, I wish to state that I am not formally trained in law. Rather, as a user of legislation for over 20 years, I have learnt how to navigate through legislation, mostly so as to not get myself or my client into legal complications – either by being sued or having a process significantly delayed due to missing a requirement.

This short course is thus an overview of some of the aspects I have learnt that allow me to navigate environmental legislation specifically in South Africa without too many mistakes or misinterpretations. As such, given this is only meant to be about an hour long, the intent is not to make you legal experts but rather to give you some pointers and assistance when you encounter the law. If you want, you could refer to this as an *'idiot guide'* allowing you to work your way through a piece of legislation and determine the general *'dos and don'ts'*. Remember, if uncertain always request input from the competent authority of that Act first, or a specialist or legal expert.

I have closed the course out with some additional reading – it is a collection of articles sourced from the internet that deal with key aspects touched on in this course. You are welcome to dive down that rabbit hole and see where it leads you. The chosen articles are sourced from a range of places and only seek to highlight the various considerations going forward.

All I hope is that this short consideration will allow you to (a) write better documents that can be enforced, (b) have an idea of what the law requires of you within a specific scenario, and (c) gets you to investigate further and remember to look for formal interpretations of the law to give strength to your consideration.

B. What is law?

According to the definition as given in the *Oxford Languages Dictionary*:

Law: (noun)

1. the system of rules which a particular country or community recognizes as regulating the actions of its members and which it may enforce by the imposition of penalties.

Similar terms: rules and regulations, system of laws, body of laws, constitution, legislation, code, legal code, charter, jurisprudence, rule, regulation, principle, convention, direction, instruction, guideline, practice

Opposite: anarchy

Law is underpinned by two considerations – *'the letter of the law'*, and, *'the spirit of the law'*. The letter of the law being exactly what is stated in the documentation and links to the definitions, whilst the spirit of the law is more ephemeral and links to the intent or context within which that law is placed. Over time, the letter of the law may be amended or interpreted by formal interpretation guidelines generated by the author of the legislation, or by the law being tested in court and therefor the court's interpretation being imposed by the body of case law.

Before going further, why are we bothering to consider this? Simply, because we need to get a handle on the letter and spirit of the law by considering the intent of that piece of law.

How do you find out the intent of the law? Go to the upfront provision immediately after the title of the Act, as elaborated on by the principles thereafter. Some examples are presented below: these range from the seemingly simple intent of the South African Constitution, to that of the National Environmental Management Act, the National Health Act, and finally, the Occupational Health & Safety Act. Many others

exist, but these serve to prove the point. These upfront summaries are given to provide the reader with a snapshot of what that piece of law was enacted to do.

<p>CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, NO. 108 OF 1996</p> <p>To introduce a new Constitution for the Republic of South Africa and to provide for matters incidental thereto</p>
<p>NATIONAL ENVIRONMENTAL MANAGEMENT ACT, ACT NO. 107 OF 1998</p> <p>To provide for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote co-operative governance and procedures for co-ordinating environmental functions exercised by organs of state; and to provide for matters connected therewith.</p>
<p>NATIONAL HEALTH ACT, ACT NO. 61 OF 2003</p> <p>To provide a framework for a structured uniform health system within the Republic, taking into account the obligations imposed by the Constitution and other laws on the national, provincial and local governments with regard to health services; and to provide for matters connected therewith</p>
<p>OCCUPATIONAL HEALTH AND SAFETY ACT, ACT NO. 85 OF 1993</p> <p>To provide for the health and safety of persons at work and for the health and safety of persons in connection with the use of plant and machinery; the protection of persons other than persons at work against hazards to health and safety arising out of or in connection with the activities of persons at work; to establish an advisory council for occupational health and safety; and to provide for matters connected therewith.</p>

A point to remember – all law within South Africa **must** be read in terms of the Constitution. If there is a conflict, then the Constitution will be the default as the overarching law of the country.

C. Grammar and punctuation

Before we continue, some basic grammar rules need to be gone through first. So back to school quickly ...

First let us dispose of the **punctuation** consideration. Of critical use in legislation is the use of commas vs. semi-colons vs. full stops.

- The comma breaks a single sentence into digestible dependent portions, but they combine to form one idea. A comma could be replaced by a conjunction (e.g. and, or, but). *“He went shopping and bought eggs, bread, and milk.”* becomes *“He went shopping and bought eggs and bread and milk.”*
- A semi-colon joins what could otherwise be two separate sentences and thus is used to minimise repetition. The important point is that the sentences, although able to stand alone, are strongly linked. Consider that in the example below the semi-colon could be replaced by a full stop or by the word ‘and’. *“It was the best of times; it was the worst of times.”* (Charles Dickens)
- A full stop separates two sentences that are not easily linked together, but still of relevance to each other and thus within the same paragraph.

If you want to learn more, or to refresh your memory, have a look at some of the reference documents provided at the end of the course.

Moving onto **grammar**. Sentences are normally composed of a subject (the actor), a verb (the action), and the object (that which is acted upon). It is often more complex than that, but that sets the basic context. The issue is that the simple sentence structure above does not impose a requirement for the subject to undertake the action – so along come these useful tools called “**auxiliary verbs**” or “helping verbs”.

It would be fair to state that the need or compulsion to undertake a task from a legal point of view hangs on the nature of that “auxiliary verb”. These helping verbs form the crux of the sentence as they indicate the intent behind the sentence or the action that is required. Is the sentence a comment on something that has already happened? If not, does it relate to the present or future? Is the sentence a suggestion or a command to the reader?

Legislation by its very nature commands. If a document only provides guidance, then it fills the role of a guideline, not a prescriptive item of legislation. As such, the auxiliary verb chosen requires that some action be undertaken, with no loopholes or 'wobble room'. Let us put it this way – if it does not command, how will the law be upheld, and, how will compliance with it thus be ensured?

Auxiliary verbs come with differing levels of strength and/or control. The use of these words will determine how strong the specific statement is. This holds for legislation or for documents that are submitted in terms of that legislation – if a document needs to be complied with, then it needs to 'strong'.

If weak or uncertain terms are used, the document becomes open to being misused and will not serve its required purpose. An example would for instance be an Environmental Management Programme (EMPr) generated as part of an Environmental Impact Assessment. A weak version thereof could lead to a development causing significant environmental degradation. If such a weak document is approved, then proving non-compliance becomes overly complex as the development may still be argued to be within the letter of the law (as approved), but not within the spirit of the law.

In terms of strength of terms, I have included the most common auxiliary verbs used currently in South African law. Note that this is not comprehensive but does consider the main ones you will encounter. Definitions in the second line per word are drawn from the *Oxford Languages Dictionary*.

Aux verb	Example sentence	Function and level of command
can	<i>John can go home.</i>	Shows ability – but allows John choice
	1. Be able to. "They can run fast" be able to through acquired knowledge or skill. "I can speak Italian" have the opportunity or possibility to. 2. Be permitted to. "You can use the phone if you want to"	
may	<i>David may run a marathon.</i>	Grants permission – but again the decision is up to David
	1. Expressing possibility. "That may be true"	
	2. Used to ask for or to give permission. "You may confirm my identity with your Case Officer, if you wish" 3. Expressing a wish or hope.	
might	<i>Susan might come first.</i>	Shows a condition – not definite, remains open to choice
	1. Past tense of "may"	
	2. Used tentatively to ask permission or to express a polite request. "Might I just ask one question?" 3. Used to express possibility or make a suggestion	
must	<i>Andy must go to work.</i>	Shows obligation – no allowance to disobey without consequence
	1. Be obliged to; should (expressing necessity). "You must show your ID card"	
shall	<i>Ben shall do the washing</i>	Shows obligation – but not absolute
	1. (in the first person) expressing the future tense. "This time next week I shall be in Scotland" 2. Expressing a strong assertion or intention. "They shall succeed"	
should	<i>You should read this book.</i>	Shows compulsion – but again the decision is up to you. Fairly strong, but still implies some uncertainty.
	1. Used to indicate obligation, duty, or correctness, typically when criticizing someone's actions. Indicating a desirable or expected state. used to give or ask advice or suggestions. Used to give advice.	
	2. Used to indicate what is probable.	
	3. FORMAL: (expressing conditional mood) referring to a possible event or situation. "If you should change your mind, I'll be at the hotel"; (in the first person) indicating consequence of an imagined event. "If I were to obey my first impulse, I should spend my days writing letters" 4. Used in a clause with 'that' expressing purpose. "In order that training should be effective it must be well planned"	
will	<i>Simon will write the document.</i>	Shows obligation / inevitability – one issue is the timeline (when will it take place).
	1. Expressing the future tense. "You will regret it when you are older" 2. Expressing inevitable events. "Accidents will happen"	

A quick tangent – the form of legal language has modified significantly since the early 20th century. Law tends to now be written in plain English and not in legalese. The terms used are simpler, the language is to the point and does not have a lot of terms no longer used in common language (e.g. for inasmuch). Plain English uses modern definitions for words – if you are not sure, first look at the list of definitions, then look at the context of the word.

One word that is not used as much in legal parlance these days is ‘shall’. A common word in older English usage, the definition in modern English is more blurred and not a firm obligation to undertake a task as it was when used in legal documentation previously. As it has fallen out of that usage, the word ‘shall’ is more commonly replaced with the word ‘must’. In an act it is taken as being strong, but if you are drafting a document for use with the public or contractors, it is best to stick with ‘must’ and ‘will’.

When reading legislation, the critical terms are the **conjunctions**, so ‘and’, ‘or’, ‘including’, and ‘excluding’. Pay very careful attention to the use thereof. This is discussed further in **Section E** below.

Finally **list indentation** – or clauses and sub-clauses. If a phrase falls below another and is indented, then it is reliant on that first phrase. So, in this case, the hierarchy is Activity 4, then Sub-Activity (i) through (v), then finally, if (ii) is applicable, as modified by the sub-clauses a. and/or b.

4. The development and related operation of facilities or infrastructure for the concentration of animals in densities that exceed –
- (i) 20 m² per large stock unit and more than 500 units per facility;
 - (ii) 8 m² per small stock unit and;
 - a. more than 1,000 units per facility excluding pigs where (b) applies; or
 - b. more than 250 pigs per facility excluding piglets that are not yet weaned;
 - (iii) 30 m² per crocodile and more than 20 crocodiles per facility;
 - (iv) 3 m² per rabbit and more than 500 rabbits per facility; or
 - (v) 250 m² per ostrich or emu and more than 50 ostriches or emus per facility.

D. How to read legislation

A quick consideration on how to read legislation – it really is all in the ‘and’, ‘or’, ‘including’, ‘excluding’, ‘does’, ‘does not’, and so on, phrases! To put it simply, if you do not get the relationship of those actioning words correctly, you will either miss a critical combination or you will be wasting your time worrying about something that you do not need to worry about. Always take the time to work through the wording carefully as often a seemingly innocuous combination of words can change the meaning totally.

Some examples are given below to show how to read the legislation.

The **first example** is taken from the Constitution, this highlights the importance of looking at words used carefully. It is interesting point to note that there is not a single ‘or’ between sections of the Constitution, only ‘and’. The only place that ‘or’ is found is within lists inside of a section. And then specifically with respect to the terminology used and nuances of the terms in Section 24: (a) the right is not limited to citizens, (b) it is multi-generational, and (c) the environment is holistically considered – if from a slightly anthropomorphic viewpoint (i.e. the environment serves humans). This is only one section of the Constitution, but it highlights how to look at the Constitution as an entity.

Environment

24. Everyone has the right –
- (a) to an environment that is not harmful to their health or well-being; and
 - (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

The **second example** relates to sub-clauses within the same section as a clause you are working with. For example, careful of clauses such as this one in the Major Hazard Installation (MHI) Regulations in terms of the Occupational Health & Safety Act:

- *Sub-regulation 3 (5): Subregulations (1), (2) and (3) shall not apply to rolling stock in transit*

In the **third example** below drawn from the current Environmental Impact Assessment Regulations (2014, as amended 2017) – the **red** text applies to all sub-clauses. For the main activity to be triggered any of the sub-activities (in **blue**, (i) – (v)) must be relevant – note the ‘or’ between Sub-Activity (iv) and (v). For sub-activity (ii), an additional requirement is imposed dependent on whether the proposal involves pigs or other types of small stock units (in green, a. or b.). Note that this specific activity is riddled with conjunctions – so work it out carefully.

To play this one out. If you for instance intend to develop a piggery, with all operational and infrastructural requirements included, that will say include 300 weaned pigs (defined as small stock units), at a density of more than 1 animal per 8 m² of that facility (e.g. 300 pigs in 2,000 m² facility), then you need environmental authorisation.

The development and related operation of facilities or infrastructure for the concentration of animals in densities that exceed –

- (i) 20 m² per large stock unit and more than 500 units per facility;
- (ii) 8 m² per small stock unit and;
 - a. more than 1,000 units per facility excluding pigs where (b) applies; or
 - b. more than 250 pigs per facility excluding piglets that are not yet weaned;
- (iii) 30 m² per crocodile and more than 20 crocodiles per facility;
- (iv) 3 m² per rabbit and more than 500 rabbits per facility; or
- (v) 250 m² per ostrich or emu and more than 50 ostriches or emus per facility.

Let’s take it a step further for the **fourth example**. A pair of relevant scenarios is presented with one that fits and another that does not. Some may seem totally ludicrous, but they are drawn from real scenarios I’ve encountered ... if with some tweaking, so as to prove a point. Apologies as they are environmental given that is my personal speciality, but the lessons learnt will apply for any legislation.

Legislation	Scenario and example of items that fit or don't fit
<p>Definition: “associated structures, infrastructure and earthworks” means any structures, infrastructure or earthworks, including borrow pits, that is necessary for the development and functioning of a facility or activity</p>	<p>A borrow pit site has been identified, it can be reached by the existing farm road, but as the farmer has a high value pomegranate orchard next to the road and a watercourse is on the other side of that road, the mining vehicles are very likely to damage the trees that overhang the road, the road cannot be widened, and surfacing the road so that the trees won't be covered in dust is not viable. A new road serving the borrow pit only that does not compromise farm works has been identified. The road will only serve the borrow pit as it does not link any other facilities or activities outside of that borrow pit and its works. The road is thus part of the borrow pit development and is associated infrastructure. So read the linked activities carefully to see if it triggers. FALLS WITHIN DEFINITION OF ASSOCIATED INFRASTRUCTURE</p> <p>A road over more than 1 km is required to link to a new mine. The road acts as a link across a large farming area as that serves the mine best, but it will also reduce travel time by at least thirty minutes between a nearby village and the local town which has a clinic and school servicing the area. The road thus does not only serve the mine as it does link other facilities and activities outside thereof. The only part dedicated to the mine is a short access road off this new road of less than 1 km. The road is not part of the mine development and its associated infrastructure, only the short access road is functionally part of the proposed development itself and considered to be associated infrastructure. So the definition only applies to the access road. Note that this scenario will be split into “the mine and access road” vs “the main road” applications. MAIN ROAD DOES NOT FALL WITHIN DEFINITION OF ASSOCIATED INFRASTRUCTURE</p>
<p>Listing Notice 1, Activity 19: The infilling or depositing of any material of more than 10 m³ into, or the dredging, excavation, removal or moving of soil, sand, shells, shell grit, pebbles or rock of more than 10 m³ from a watercourse; but excluding where such infilling, depositing, dredging, excavation, removal or moving –</p> <p>(a) will occur behind a development setback;</p> <p>(b) is for maintenance purposes undertaken in accordance with a maintenance management plan;</p> <p>(c) falls within the ambit of activity 21 in this Notice, in which case that activity</p>	<p>A family wants to develop a house on their smallholding on the edge of town overlooking the local river. They want to have a deck and braai area running down to the edge of the river (as one does!), so the footings will effectively be in the banks of the watercourse and they need to do some backfilling to level the area that the deck will sit over and to support the house's foundations. The smallholding for planning reasons falls within the urban planning zone forming part of the Regional Spatial Development Framework (RSDF) – not the urban edge or area, that's another concept – and as such a development setback of 40 m has been set for the watercourse within this town. The development is at least partially “in front” of the setback, and the chances that the foundations and footprint clearance will lead to removing more than 10 m³ of material between the setback line and the bank of the river is guaranteed, let alone the fact that material will be taken from the river bank itself. A note of clarification – “behind” vs “in front of” a setback line. If you are between the river bank and the setback line, you are “in front of” the setback line; however, if the setback line is between you and the river bank, you are “behind” the setback. An application will need to be lodged in terms of this activity – plus a few other activities. ACTIVITY IS TRIGGERED</p>

Legislation	Scenario and example of items that fit or don't fit
<p>applies;</p> <p>(d) occurs within existing ports or harbours that will not increase the development footprint of the port or harbour; or</p> <p>(e) where such development is related to the development of a port or harbour, in which case activity 26 in Listing Notice 2 of 2014 applies.</p>	<p>A fishing company wants to develop a new warehouse serving their boats within East London's harbour. This harbour is within the Buffalo River. Given the steepness of the topography and the need to move the fish optimally from the boats, the only viable site is within a few metres of the river but does still fall within the declared harbour area. The proposed development footprint was previously developed as a now derelict warehouse.</p> <p>This development is excluded from the activity specifically as it falls within the harbour area and does not increase the footprint thereof.</p> <p>ACTIVITY IS NOT TRIGGERED</p>

In summary – look carefully in the specific clause you are working with, at the ones up the hierarchy from it, and watch out for modifiers at the end of the section in which the clause is in. I promise it does get easier with practice.

E. How is an Act laid out?

An Act is usually made up of the following:

Gazette number	If the version you have is a Government Printer version of the Act, the gazette number will be at the top of the page. The Gazette number is for the gazette edition within which the statute was originally printed, it will also show the page numbers of that gazette.
Act name and number	Title indicating how the Act will be referred to, e.g. National Environmental Management Act, Act No. 107 of 1998 The Act number is given sequentially as each Act is signed into operation by the President (i.e. enacted). This is irrespective of the specific area of control per Act. The gazette number reflects their position within the gazette edition, as such Acts may appear "out of order".
Long title	This is a short summary of the content of the Act (or statute)
Preamble	This may be included or not. If included, it helps to set the context of the statute in terms of background and intent. The titles and preamble (if present) should be read within the context of the applicable sections of the Constitution. A suggestion – read through the Constitution, it is simple enough to understand as a whole and it makes it clear what the intent of all current legislation intends.
Enacting provision	This is a short phrase indicating who the legislator or responsible authority is for the statute.
Table of contents	To assist the user only. The table may show chapter headings, with the Sections of the document included accordingly. Chapters (and Parts) serve to make working through the document easier but they are not strictly speaking legally binding (guidance only). You will note that the Section numbers starting from the Definitions (Section 1) run through the document without breaking and do not "re-set" per chapter. e.g. Chapter 1: Interpretation; Chapter 2: Legal nature and rights and duties of municipalities
Definitions	The terminology as specifically applicable to the document at hand – you might get for instance: <i>"risk assessment" means the process contemplated in regulation 5.</i> A separate interpretation section may be included as well.
Principles	The principles give the context within which the statute operates, with Acts generated since the mid-90s this usually starts by cross-linking to the Constitution.
Sections	The sections may be grouped into chapters and vary according to the Act but may include: <ul style="list-style-type: none"> • Institutions • Fair decision making and conflict management

	<ul style="list-style-type: none"> • Implementation processes • International obligations and agreements • Compliance and enforcement • Cooperation agreements (for linkages to other Acts and other organs of state) • Administration of Act • General and transitional provisions
General and transitional provisions	These are usually only included if the Act at hand is repealing another Act in entirety or to a large degree, that could include a previous iteration of the same Act.
Short title	The 'handle' that the Act will be known by (included in General and transitional provisions)
Commencement date	The date that the statute is active from. If required – a phased activation of parts of the Act, and potentially deactivation of the previous Act, may be included.
Schedules	These provide auxiliary information to the statute and may for instance include legislation, e.g. National Environmental Management: Waste Act includes 3 schedules linked to (1) waste management activities requiring a waste management licence, (2) laws repealed or amended, and (3) defined wastes

An oddity ... the main numbering in an Act as referred to as a Section (or sub-section), whilst in a gazetted regulation the main numbering is referred to as a Regulation (and sub-regulation).

And finally, this may seem silly but, whenever you refer to a section of legislation make sure that you present the numbering correctly – the level within the hierarchy is related to how the item is numbered. I've given examples of how Acts (Sections) or Regulations (Regulation) are set out, and then for amusement, how an Appendix to a Schedule may be numbered. Always remember to check before submitting something as the difference between a '1.' and a '(1)' is very, very different.

A section, as written out below, is referred to as follows: **S 24 (b) (ii)**

The Constitution

24. Everyone has the right – (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that – (ii) promote conservation.

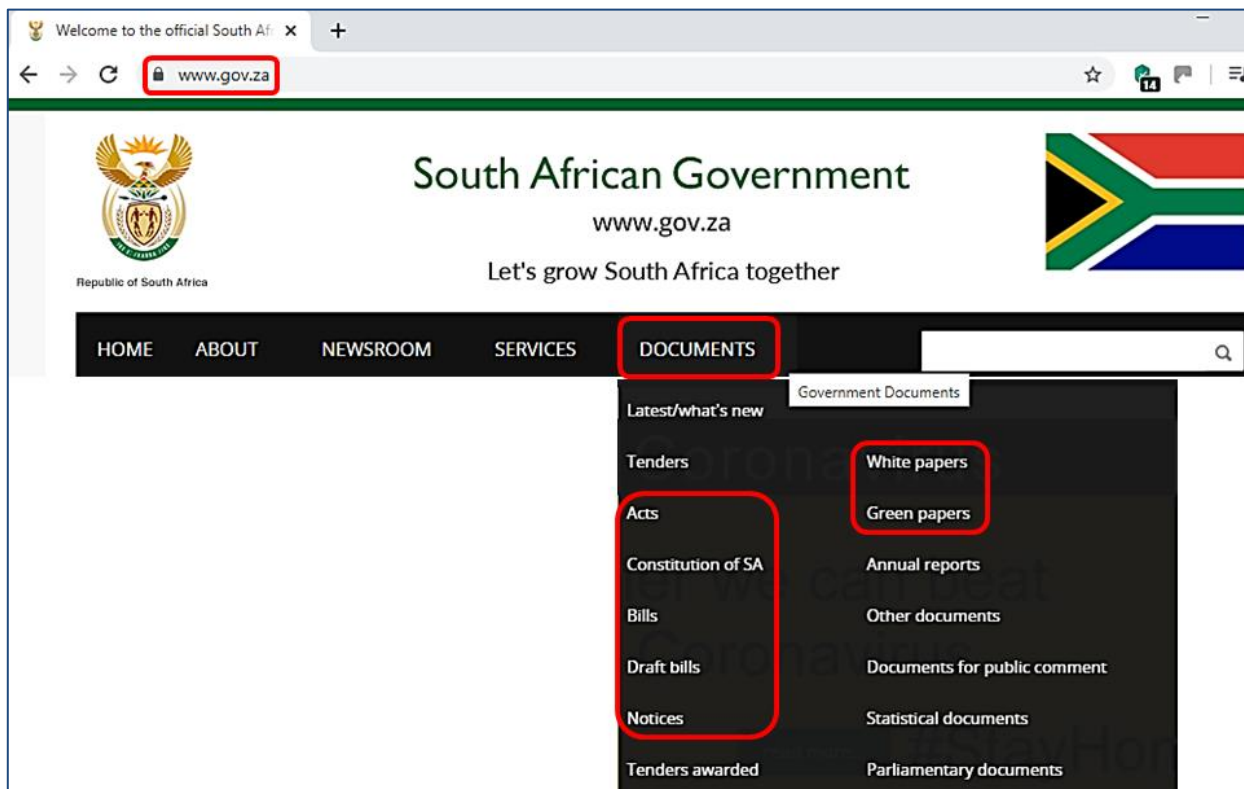
<i>Chapter 1</i>		<i>Chapter (not included in any legal referencing)</i>	
	<i>Part 1</i>	<i>Part (not included in any legal referencing)</i>	
1.			Section / Regulation
	(1)		Sub-section / Sub-regulation
		(a)	

Example of the numbering within a schedule – Government Notice Regulation (GNR) 324 of 6 April 2017, Schedule 3, Appendix 1, Activities as per the following hierarchy:

1.				Activities (within Schedules)
	a.			Sub-activities
		i.		
			(aa)	

F. Resources

For legislation, I default to the following useful site. This is the main South African government site: <https://www.gov.za>. It almost always has documents uploaded from the government printer before the information is loaded to the specific Department's sites.



G. Conclusion

I hope you have gained some value out of this course. The topic is complex – but I am hoping that I have made it a little less confusing.

Do please check back on the CPD portal as I will be rolling out more similar short courses in the next while. These will also carry a portion of a CPD point for those who are registered and thus will accumulate towards your required points.

If you wish to contact me to request that a specific topic be covered in these short courses, please do not hesitate to do so.

H. What's next?

You now get to prove what you have gathered and taken in from the course. The information is tested in the form of an **online quiz**.

The quiz should take no more than **10 – 15 minutes** to complete, but no limit has been set on the quiz.

The questions vary in type, with some “yes / no”, and multiple choice – so please read each question carefully and give it due attention. It is recommended that you do not treat this as an “open book” test. All information you need to consider is presented in the question – you need to prove that you understood the procedures and nuances as presented through the course. If only to yourself and no-one else.

Proceed when you are ready – and GOOD LUCK!