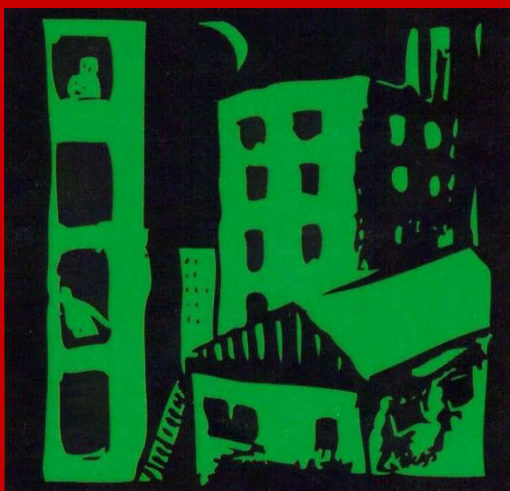


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**The evolving  
developmental role  
of the state as public  
trustee of South  
Africa's natural  
resources and  
property**

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**ABSTRACT**

*Through its environmental laws and policies, the state needs to ensure the ecologically sustainable development and use of South Africa's natural resources, while promoting justifiable economic and social development. Thus, the view that property owners may not use their property in ways that prejudice the community and other peoples' interests in environmental resources must be considered. This corresponds with the acknowledged stance that property, in its widest sense, has a "public or civic or proprietary" aspect to it that transcends individual economic interests, and that private property ownership should be inherently limited for the benefit of*

*society at large. Property is, therefore, intimately bound up with the socio-economic security and well-being of all South African citizens. Since a developmental state actively guides economic development and the use of the country's resources to meet the needs of the people, the developmental role of the state should serve the public interest. In South Africa, though, the public function of property is frequently usurped by the government's developmental-state ambitions and influenced by political and economic considerations that affect the socio-economic fabric of the country. The South African government, as public trustee of the nation's natural resources, must regulate access to and use of natural resources by exercising its stewardship ethic. However, this is not always the case when it comes to critical resources like water and land – a situation that perpetuates the historically imbalanced distribution of wealth in South Africa.*

**Keywords:** public trusteeship and stewardship, property, social and economic development, water use rights.

## 1 INTRODUCTION

The primary authority for the state regulation of access to and beneficial use of water and land is its status as public trustee of the environment.<sup>1</sup> The stewardship responsibility of the state as public trustee includes rights and duties, the latter being owed to both current and future generations of South Africans. This means that the state's environmental stewardship responsibility extends beyond mere perspective and policy.<sup>2</sup> In South Africa, the structural inequalities and systemic exclusion constructed during the colonial-apartheid eras touch on many dimensions, including race, gender, geography, and economy, dimensions which do not operate in isolation. In view of these structural inequalities, the Western concept of environmental stewardship clearly needs to be expanded to include (constitutional) values and collaborative management (policy) approaches<sup>3</sup> in ways that are responsive to the socio-economic context.<sup>4</sup> What is required, therefore, is a context-sensitive stewardship approach that informs policy and statutory interpretation. This is particularly necessary in countries such as South Africa where equitable access to natural resources and their beneficial use by all citizens are constitutional objectives in ensuring the protection and sustainability of the environment for future generations.<sup>5</sup>

<sup>1</sup> Mureinik E "A bridge to where? Introducing the Interim Bill of Rights" (1994) 10(1) *South African Journal on Human Rights* 31; Pienaar JM "Recent land policy: The mechanics of intervention and the Green Paper on Land Reform" (2014) 17(2) *Potchefstroom Electronic Law Journal* 641.

<sup>2</sup> Barnes R *Property rights and natural resources*. Oxford: Hart Publishers (2009) at 156.

<sup>3</sup> Barendse J "A broader view of stewardship to achieve conservation and sustainability goals in South Africa" (2016) 112(5/6) *South African Journal of Science* 28.

<sup>4</sup> Bennett TW & Powell CH "The state as trustee of land" (2000) 16(4) *South African Journal on Human Rights* 607.

<sup>5</sup> Sections 24(b)(iii) and 25(4)(a) of the Constitution of the Republic of South Africa, 1996; Viljoen S & Makama SP "Structural relief: A context-sensitive approach" (2018) 34 *South African Journal of Human Rights* 209.

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A stewardship ethic reposes at the core of public trusteeship in the National Water Act (NWA),<sup>6</sup> as well as landmark case law on natural resource management by the state.<sup>7</sup> In *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism*, the court linked public trusteeship to stewardship ethics in the management of water for future generations.<sup>8</sup> In South Africa, a stewardship ethic is intended to inform the ethical culture of the management of environmental resources held in trust by the state. The duty of care, which is expected of the state in its execution and implementation of administrative decisions, is underwritten by the fact that the Constitution confers on state authorities a stewardship responsibility to protect the exercise of all South Africans' environmental rights for both the present and future.<sup>9</sup>

For this reason, South African non-governmental organisations (NGOs) are adopting a holistic, integrated interpretation of stewardship – a “social-ecological stewardship”<sup>10</sup> – which is better suited to addressing the country's complex socio-economic challenges.<sup>11</sup> This entails a broadening of the “holistic” stewardship narrative and a departure from an exclusive focus on biodiversity so as to incorporate socio-political issues as well, particularly in countries with a legacy of postcolonial land ownership.<sup>12</sup> It is a development which aligns with international interpretations of stewardship, and involves adopting a deliberately wide, context-sensitive approach to post-apartheid South Africa.

In general, a steward is defined as a “person entrusted with the management of another's property”,<sup>13</sup> while stewardship is the “careful and responsible management of something under one's care”.<sup>14</sup> Such general definitions emphasise trust and care, but the stewardship ethic entails more than this. It is one of the dominant terms used to describe “goals, principles and actions” taken to achieve sustainability in natural

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<sup>6</sup> National Water Act 36 of 1998.

<sup>7</sup> *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2006 ZAGPHC 132.

<sup>8</sup> *HTF Developers* (2006) at para 19.

<sup>9</sup> Section 24(b) of the Constitution states: “Everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures ....”

<sup>10</sup> Centre for Complex Systems in Transition, Stellenbosch University “Stewardship of the Earth's Social-Ecological Systems” (CST policy website) <https://www0.sun.ac.za/cst/publication/stewardship-of-the-earths-social-ecological-systems/> (accessed 11 March 2024). A social-ecological stewardship considers “new ways of understanding, reconnecting to and caring for the global ecological system integrating all living beings and their relationships ... [T]his stewardship emerges from the care, knowledge and agency of individuals, communities, organizations and governments. It is a stewardship that proposes that the best way of navigating the complex interactions between people and their environment, and the often-unpredictable and unsustainable outcomes of these interactions, is to support interventions that reinforce and clarify humanity's connectedness.”

<sup>11</sup> Cockburn J et al. “The meaning and practice of stewardship in South Africa” (2019) 115(5/6) *South African Journal of Science* 6.

<sup>12</sup> Barendse (2016) at 21; Viljoen F “The African regional human rights system” in Krause C & Sheinin M (eds.) *International protection of human rights: A textbook* Turku: Åbo Akademi University Institute for Human Rights (2009) 503.

<sup>13</sup> From *Concise Oxford Dictionary of Current English* (1985).

<sup>14</sup> From *Oxford Advanced Learner's Dictionary* (2015).

resource management.<sup>15</sup> Stewardship provides the guiding ethos through which the execution of management policies and statutory interpretation is understood. In essence, “stewardship” describes the ethical qualities that inform the interaction between the public trustee and its regulation of the nation’s natural resources.

Given the close relationship between societal needs and the environment, understandings of the stewardship ethic have evolved to include contextual concerns about social justice and democracy and hence provide a deeper ethical basis for human responsibility for and care of nature’s resources. International interpretations of the stewardship ethic indicate that resource management narratives and ideologies are increasingly integrated with understandings of the systemic relationship between humans and nature.<sup>16</sup>

## 2 EXTREME INEQUALITY AND ECONOMIC INCLUSIVE DEVELOPMENT

Extreme inequality continues to undermine inclusive economic growth in many Southern African nations, with the African political elite inheriting an almost intact colonial administrative system complete with laws, attitudes and traditions.<sup>17</sup> To counter the inherited inequalities of resource distribution, there has been a surge in non-binding international land and resource instruments that impose limits on absolute and private property rights over natural resources, while formally, governments remain the authority in making and enforcing rules on property.<sup>18</sup>

South Africa’s stewardship ethic recognises that inequality is manifested in unemployment and poverty, largely due to monopolistic control of economic wealth.<sup>19</sup> In fact, as part of its drive towards transformative economic development, South Africa has set out its developmental goals in the National Development Plan 2030 (NDP). An increase in private-sector participation is highlighted as a goal in the NDP, and in 2017, it was stated that certain “trade-offs” were to be expected.<sup>20</sup> The budget review noted that, with the increased focus on the growth of the private sector, it would be essential for there to be regulatory authorities that are effective in “curbing the power of monopolies”.<sup>21</sup> From this statement, one can deduce that the “trade-off” for increased growth of the private sector may be a limitation on social development, which

<sup>15</sup> Barendse (2016) at 21.

<sup>16</sup> Cockburn et al. (2019) at 1.

<sup>17</sup> Kibet E & Fombad C “Transformative constitutionalism and the adjudication of constitutional rights in Africa” (2017) 17 *African Human Rights Law Journal* at 351. See also Musendekwa M et al. “Beyond land redistribution: A case for stewardship in land reform” (2021) 9(1) *Journal of Land and Rural Studies* 84; Oloka-Onyango J “Beyond the rhetoric: Reinvigorating the struggle for economic, social and cultural rights in Africa” (1995) 26(1) *California Western International Law Journal* 1.

<sup>18</sup> Alonso-Fradejas A “The resource property question in climate stewardship and sustainability transitions” (2021) 108(105529) *Land Use Policy* 6; Adams M “Reforming communal rangeland policy in Southern Africa: Challenges, dilemmas and opportunities” (2013) 30 *African Journal of Range and Forage Science* 91.

<sup>19</sup> Werner W “Tenure reform in Namibia’s communal areas” (2015) 18 *Journal of Namibian Studies* 67.

<sup>20</sup> National Treasury (2017) *Budget Review* at 1; Van Dijk HG & Croukamp PA “The social origins of the developmental state: Reflections on South Africa and its local sphere of government” (2007) 42(7) *Journal of Public Administration* 673.

<sup>21</sup> National Treasury (2017) at 1.

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previously received considerable investment. Nevertheless, it is widely accepted that it is the protected concentration of private property in the hands of a few that undermines political, social, and cultural development, to the detriment of the most vulnerable.<sup>22</sup> Therefore, while the NDP seems promising in many respects, if not carefully monitored, it could leave the most vulnerable members of society behind, prejudicing *their* future generations and merely widening existing inequalities.<sup>23</sup>

The balancing of potential trade-offs between social and economic dynamics will require a context- and purpose-sensitive interpretative approach that demands a more evolved stewardship ethic on the part of the state. A stewardship ethic that is conscious of social justice and willing to ensure that the freedoms that make life meaningful are not seriously undermined by statutory (regulatory) interventions. The central position should be the advancement rather than the restriction of economic freedoms for previously disadvantaged groups.<sup>24</sup> Therefore, any legislation or other measure implemented by the state in the exercise of its fiduciary duties as public trustee of the environment must be reasonable<sup>25</sup> within a particular context. It is a constitutional expectation of South Africans for its state to recognize the importance of an ethical management culture that acts on behalf of present and future generations. Should state authorities not exercise their powers with the requisite stewardship ethic in the management, protection, and conservation of natural resources, this would point to a failed state or, even more so, a failed constitutional developmental state, one which does not meet the reasonable standard of care expected of a public trustee.

### 2.1 Democratising property rights

The stewardship ethic of the constitutional era is embedded in a uniquely South African public trusteeship which is based on altruistic values and aimed at long-term environmental sustainability.<sup>26</sup> The stewardship ethic supports democratic principles of public participation that demand the involvement of interested and affected parties through consultation and collaboration and in this way ethical stewardship is attuned with the Bill of Rights. South Africa's democratic principles and constitutional values can be found in the provisions of natural resource laws such as the NWA and National Environmental Management Act (NEMA).<sup>27</sup> The legislative intent is clearly for the South African stewardship ethic to be infused with the democratic principles and constitutional values on which the country's democracy has been built. Public

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<sup>22</sup> Govender J "Social justice in South Africa" (2016) 16(2) *Civitas Porto Alegre* 244.

<sup>23</sup> Etebari M "Trickle-down economics: Four reasons why it just doesn't work" (2003) available at [https://www.faireconomy.org/trickle\\_down\\_economics\\_four\\_reasonskle-Down](https://www.faireconomy.org/trickle_down_economics_four_reasonskle-Down) (accessed 9 September 2022).

<sup>24</sup> Njoya W *Economic freedom and social justice: The classical ideal of equality in racial diversity* Palgrave Macmillan (2021) at 192–193.

<sup>25</sup> Sections 24(b) and 25(5) of the Constitution.

<sup>26</sup> *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management* 2007 (6) SA 4 (CC) at para 44.

<sup>27</sup> Sections 21 and 24 of NEMA.

participation<sup>28</sup> is a means by which the nation holds state actors accountable for the proper exercise of stewardship of the country's natural resources, and lies at the heart of democracy. It may be necessary, therefore, to have sanctions that could be imposed on a steward that fails to meet its stewardship duties. That being said, Barnes warns that there should also be limits to public engagement in decisions about the use and management of natural resources.<sup>29</sup> For the sake of state efficacy, trustee accountability, and democracy, a careful balance must be struck between the exercise of state regulation, public participation, and private property ownership.

An interesting theory in contemporary (resource) property law frames land, water, and other natural resources as property rights. Followers of this theory in its most extreme form believe that there is a human right to all these forms of property. Nevertheless, international efforts to overcome the current social and ecological "crisis of inequalities" have given rise to new and more transformative responses, resulting in two major international breakthroughs in the democratisation of resource rights. The first was when, in 2010, the United Nations (UN) recognised the human right to water and sanitation, which illustrates the growing strength of human rights claims relating to resources. The second occurred in 2018, when the UN recognised the right to land and other resources as a substantive human right.<sup>30</sup> In this fashion, the international community has reaffirmed that stewardship exercised by states should be based on values of altruism and on long-term benefits.<sup>31</sup>

In this regard, one could say that the objectives contained in the South African Constitution are altruistic and forward-thinking, given their emphasis on progressive realisation, and are aimed at securing long-term benefits in the environment for generations to come. The Constitution places a stewardship responsibility on the state to secure the sustainable development and use of natural resources, while promoting justifiable economic and social development.<sup>32</sup> This should be read in tandem with the property clause, which confirms that equitable access to land and all of South Africa's natural resources is in the public interest.<sup>33</sup> The state, therefore, is mandated to take reasonable legislative and other measures to ensure that *all* citizens gain equitable access to land.<sup>34</sup>

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<sup>28</sup> Currie I et al. *The new constitutional and administrative law. Vol 1* Cape Town: Juta (2001) at 87–90: "Participatory democracy means that individuals or institutions must be given the opportunity to take part in the making of decisions that affect them."

<sup>29</sup> Barnes (2009) at 162.

<sup>30</sup> Alonso-Fradejas (2021) at 6–7.

<sup>31</sup> Barendse (2016) at 21.

<sup>32</sup> Section 24(b)(iii) of the Constitution states: "Everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that – secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

<sup>33</sup> Section 25(4)(a) of the Constitution states: "[T]he public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources ... ."

<sup>34</sup> Section 25(5) of the Constitution states: "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."

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However, while the stewardship ethic has been infused into South Africa's natural resource laws by virtue of the public trusteeship conferred to the state in statutes such as the NWA and NEMA, this should by no means be taken to imply that the South African public accepts the theory that all natural resources constitute property to which everyone has an unqualified basic human right.<sup>35</sup> Colonial-apartheid history has shown that the dismantling or reconstruction of property rights, supported by political ideology and legislative interventions, can be an effective long-term means of controlling socio-economic conditions in a country.<sup>36</sup> Consequently, if legislative interventions are not embedded in, and interpreted with due regard for, constitutional values, basic human rights and democratic principles, then political influence on the law can have destructive results.<sup>37</sup> To counter this, the stewardship ethic must form an intrinsic part of the way in which the state interprets and implements statutes and policies. In South Africa, this means that administrative actions taken by the state must be based on the kind of stewardship ethic which is informed by and consistent with the Constitution.

While the constitutional duty of public trusteeship lies with the state, its stewardship ethic requires that the public participate in the formation and interpretation of legislation that will directly shape and give expression to public interests, such as the powers of the state in natural resource property relations. The conscious manifestation of the stewardship ethic in public trusteeship is significant for the restructuring of the property rights system in South Africa. It allows for efficacy and accountability through greater public participation, promotes structural transformation with due regard to contextual realities of systemic inequalities and discriminatory practices, and is therefore crucial to achieving a democratised property law regime.<sup>38</sup>

### 3 THE THEORETICAL FOUNDATIONS OF PUBLIC TRUSTEESHIP

The concept of public trust or public trusteeship is found in many international property regimes and is far from new in legal philosophy. The public trust doctrine and its stewardship characteristics compel the state to act as the "guardian" of public

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<sup>35</sup> Section 39(1) of the Constitution states: "When interpreting the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law."

<sup>36</sup> Zirker OL "This land is my land: The evolution of property rights and land reform in South Africa" (2003) 18 *Connecticut Journal of International Law* 621; Cousins B & Hall R "Rights without illusions: The potential and limits of rights-based approaches to securing land tenure in rural South Africa" (2011) *Working paper 18 Institute for Poverty, Land and Agrarian Studies* 2.

<sup>37</sup> Bennett TW "African land – a history of dispossession" in R Zimmerman and D Visser D (eds) *Southern Cross: Civil and common law in South Africa* Oxford University Press (1996) 65.

<sup>38</sup> Albertyn C "Contested substantive equality in the South African Constitution: Beyond social inclusion towards systemic justice" (2018) 34(3) *South African Journal on Human Rights* 467: "Participation is linked to the constitutional value of (participative) democracy at all levels of life and asks whether conditions are such that people can participate fully in social, economic, and political life, across the public/private divide? And does everyone have a roughly equal say in political, social, and economic institutions, regardless of wealth, property, class, power, and privilege."

interests and form the core of many foreign legal constructs of public trusteeship.<sup>39</sup> The public trust doctrine was used in the English legal system to limit the powers of the sovereign by preventing exclusive rights to hunt or fish in certain areas from being granted to noblemen.<sup>40</sup> The earliest tenet of the public trust doctrine was that the sovereign's power to grant exclusive rights in a resource should be curtailed because the sovereign held the resource "in trust for the benefit of the public" as a whole.<sup>41</sup>

Similarly, the public trust doctrine was used by 18<sup>th</sup> century English courts to prohibit private property rights in tidelands and navigable waters and to confer fiduciary rights and duties on the sovereign to ensure public access for the benefit of all the people.<sup>42</sup> From its inception, the public trust doctrine was aimed at balancing the public's right to access and use the resource against the need to protect it, as well as limiting the ability to alienate the public interest in a resource belonging to the people. Hence, all natural resources must benefit all the people and their descendants.

Likewise, the public trust doctrine in the United States (US) recognises that certain public uses ought to be specifically protected and, in doing so, makes a clear distinction between private ownership title and public rights that recognises that the state is the trustee of the public rights in certain natural resources.<sup>43</sup> American jurisprudence has extended its scope of public trusteeship to include a broad range of environmental resources.<sup>44</sup>

Central to the application of the public trust doctrine in the US is the presumption that the sovereign may not part with any portion of the public trust asset, and that whatever title the grantee may receive remains burdened by the public trust. Accordingly, the state lacks the power to diminish public trust rights when trust property is conveyed to private parties. Thus, when a private party acquires property burdened with the public trust, it acquires only the "use" thereof.<sup>45</sup> It is a well-established principle in American case law that ownership of property that is held in the public trust by the state is prohibited. This is underpinned by the understanding that to permit private ownership would result in the state's alienation, or *abdication*, of its

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<sup>39</sup> Van Aswegen ME *Different modes of public participation in a public trust regulatory model* (LLM thesis, North-West University, 2019) at 7.

<sup>40</sup> Tewari DD "A detailed analysis of evolution of water rights in South Africa: An account of three and a half centuries from 1652 AD to present" (2009) 5(5) *Water SA* 703.

<sup>41</sup> Young CL *Public trusteeship and water management: Developing the South African concept of public trusteeship to improve management of water resources in the context of South Africa* (PhD thesis, University of Cape Town, 2014) at 149.

<sup>42</sup> Sand P "The rise of public trusteeship in international environmental law" (2013) 44(1/2) *Environmental Policy and Law* 210.

<sup>43</sup> Van der Schyff E "Unpacking the public trust doctrine: A journey into foreign territory" (2010) 15(5) *Potchefstroom Electronic Law Journal* 126.

<sup>44</sup> Sand (2013) at 211.

<sup>45</sup> Van der Schyff (2010) at 129.



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public trustee duties in a manner that would be inconsistent with the public trust doctrine.<sup>46</sup>

Joseph L Sax is credited for most of the development of the American public trust doctrine. To Sax, the public trust doctrine means that governments' principal purpose is to promote the interests of the general public, and not to redistribute public goods from broad public uses to restricted private benefit.<sup>47</sup> The central idea is that when the state holds a resource which is available for free (common) use by the general public, a court must regard with considerable scepticism any government conduct which is calculated either to reallocate that resource to more restricted uses, or to subject public uses to the self-interest of private parties.<sup>48</sup> Thus, the inalienability of certain natural resources from the public trust relationship is a foundational principle of the public trust doctrine. One can surmise that the ideal public trusteeship is one where natural resource management is subject to responsibilities of stewardship care that do not result in the exclusion, absolute control, and alienation of public trust assets.

### 3.1 Public trusteeship in African legal systems

Public trusteeship has found its way into African legal systems through the historical roots of the common law, statutory enforcement, and case law development by the judiciary.<sup>49</sup> It can be said that Africa has embraced the doctrine of public trust, which is significant given the continent's colonial history of exploitation of natural resources. If properly applied, the public trust doctrine enables African nations to hold their states accountable for the fulfilment of their fiduciary duties to protect, conserve and preserve the environment for the benefit of present and future generations. The public trust doctrine is flexible enough to encourage the promulgation of laws that include every aspect of a country's natural and cultural environment. Through the imposition of statutory public trusteeship, African states are seizing the opportunity to codify the extent of the state's regulatory control over natural resources and the entitlements of statutory use rights holders, subject to the limitations (parameters) of their public trust doctrine<sup>50</sup> and constitutional limitations and values.<sup>51</sup>

In South Africa, the public trust envisaged in the *White Paper on Water Policy* as legislated in the NWA is not a revival of the trust tenure system imposed under the South African Development Trust (SADT) during the apartheid era. The SADT was a

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<sup>46</sup> *Illinois Central Railroad v Illinois* 146 U.S. 387 (1892); Van der Schyff E *The concept of public trusteeship as embedded in the South Africa National Water Act* (1998) Report KV 263/10 to the Water Research Commission at 11.

<sup>47</sup> Huffmann JL "Trusting the public interest to judges: A comment on the public trust writings of Professors Sax, Wilkinson, Dunning and Johnson" (1986) 63(3) *Denver University Law Review* 582.

<sup>48</sup> Blackmore AC "Getting to grips with the public trust doctrine in biodiversity conservation: A brief overview" (2018) 48(1) *Bothalia - African Biodiversity and Conservation* 3.

<sup>49</sup> Van der Schyff (1998) at 12. See, for example, Nigeria's Land Use Act of 1978; article 237(2)(b) of the Constitution of Uganda of 1995; and Uganda's Land Act 16 of 1998.

<sup>50</sup> Brown CN "Drinking from a deep well: The public trust doctrine and Western water law" (2006) 34 *Florida State University Law Review* 12.

<sup>51</sup> Section 36(1) of the Constitution; Kibet & Fombad 2017 at 342; Nwabueze B "Constitutional democracy in Africa" 50(2) (2003) *Journal of African Law* 36.

statutory form of “supervised” trust (land) tenure based on the patriarchal paternalistic assumption that black land tenure was an economic failure, and effectively removed the option of private ownership rights from “non-whites”. This, of course, was to justify the economic and political motivations behind the apartheid government’s control of natural resources.<sup>52</sup> Such statutory trusteeship is vastly different from the constitutionally purposive basis of public trusteeship in the NWA. For example, in *Lindiwe Mazibuko v City of Johannesburg* 2009 ZACC,<sup>53</sup> the Constitutional Court noted that the achievement of equality would not be accomplished while water was abundantly available to the wealthy but not to the poor.

Considering South Africa’s socio-economic crisis,<sup>54</sup> the public trusteeship construct has the potential to achieve the transformative objectives of the Constitution, but this will depend ultimately on the state’s responsiveness to reform and the South African courts’ willingness to interpret statutes in their social and economic context.<sup>55</sup>

#### 4 THE INALIENABILITY OF WATER AS A PUBLIC TRUST ASSET

The extent to which statutory public trusteeship appears in a country’s property regime typically varies, with each jurisdiction adapting its existing property regimes accordingly. The statutory rights and duties afforded to the public trustee are adapted to meet the regulatory needs of each natural resource. Different pieces of legislation incorporate the regulatory role of the state as public trustee, and each identifies the natural resource that is to be protected for intergenerational access and beneficial use while remaining under the state authority’s fiduciary control.<sup>56</sup> States’ fiduciary accountability for the sustainable management of natural resources is universally recognised in international environmental law.<sup>57</sup> In fact, it is the fiduciary *dominium* entrenched in the right of the public or the beneficiary to access and use that implies the fiduciary responsibility of the state to protect such resource.<sup>58</sup> The public trustee is cloaked with a fiduciary responsibility in respect of certain specified natural resources,

<sup>52</sup> Atkinson D “Patriarchalism and paternalism in South African ‘Native Administration’ in the 1950s” (2009) 54(1) *Historia* 269: “The apartheid state emphasised differences in a manner that was discriminatory in order to justify economic and political exclusion.”

<sup>53</sup> *Lindiwe Mazibuko v City of Johannesburg* 2009 ZACC 28 at para 2.

<sup>54</sup> Sibeko B “South Africa’s never-ending crisis” (2021) at <https://www.ips-journal.eu/topics/economy-and-ecology/south-africas-never-ending-crisis-5331/> (accessed 14 October 2022).

<sup>55</sup> Edigheji O “Constructing a democratic developmental state in South Africa: Potentials and challenges” (2010) *Human Sciences Research Council Press* 1: “A lesson that was learnt from the 20th century developmental states was that the state must be one of the ‘institutional keystones’ needed to bring about economic success. This is becoming clearer, as the idea that globalisation and neoliberal policies are beneficial to the development of developing countries is not supported by the evidence anymore. In fact, the evidence spawned from the recent global economic crisis suggests quite the contrary, that unregulated markets are ‘unworkable and unsustainable in the long run’ and an increased role of the state is essential.”

<sup>56</sup> Van Aswegen (2019) at 29.

<sup>57</sup> Sand (2013) at 218; Du Plessis A “The readiness of South African law and policy for the pursuit of sustainable development goal” (2017) 21 *Law, Democracy and Development* 239.

<sup>58</sup> Van Aswegen (2019) at 9; *Martin v Waddell’s Lessee* 41 US 367 (1842); *Knight v United States Land Association* 142 US 161 (1891).

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a responsibility which must be exercised on behalf of the people.<sup>59</sup> This is the one characteristic at the heart of public trusteeship which is intrinsically part of any state's property system. As Sand puts it, "The sovereign rights of nation-states over certain environmental resources are not proprietary, but *fiduciary*."<sup>60</sup>

Thus, certain natural resources, whether earmarked for public or private use, are defined as being part of "inalienable public trusts", while the state, as public trustee, has a fiduciary duty to protect these natural resources.<sup>61</sup> At the same time, every citizen, as a beneficiary of the public trust asset, has a corresponding right to hold the state accountable for the proper stewardship of the natural resource which is held in trust for their common benefit.

### 4.1 The statutory scope of public trusteeship in the NWA

Section 24 of the Constitution confers on the state a public trusteeship obligation in respect of South Africa's environment, namely to protect and conserve it in the public interest; accordingly, it vests in the state, as trustee, the necessary power to regulate access to and use of the resource for the benefit of present and future generations.<sup>62</sup> The Constitution requires that the state do so through reasonable legislative and other measures;<sup>63</sup> hence, the origins of South Africa's public trusteeship responsibility imposed on the state lie in the Constitution.<sup>64</sup> In South Africa, this has been achieved through the enactment of legislation such as the NWA and NEMA.

The fiduciary responsibility vested in the state is to ensure that the public interest in the natural resource is maintained and protected in line with the legislated scope of public trusteeship under the NWA.<sup>65</sup> In so doing, South Africa not only conserves the natural resource for future generations<sup>66</sup> but simultaneously gives effect to the intended reforms to bring about equitable access to all South Africa's natural resources.<sup>67</sup> In this way, the beneficial use of natural resources can be safeguarded through the mechanism of public trusteeship.

However, the extent of such protection is often dependent on the wording of the statute and the extent of the powers granted to the state to enforce protections in terms of the doctrinal principle of inalienable natural resources. This is the case because public trusteeship is not uniformly or automatically adopted into all statutes pertaining to South Africa's natural resources. The lack of uniformity in legislation and content with regard to the legal construct of public trusteeship can lead to misinterpretation as well as undermine the efficacy of public trusteeship principles and foundational

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<sup>59</sup> Van der Schyff (1998) at 8.

<sup>60</sup> Van Aswegen (2019) at 13.

<sup>61</sup> See Sand P "Sovereignty bounded: Public trusteeship for common pool resources" (2004) 4(1) *Global Environmental Politics* 48.

<sup>62</sup> Van Aswegen (2019) at 3.

<sup>63</sup> Section 24(b) of the Constitution.

<sup>64</sup> Van Aswegen (2019) at 19. See also Van der Schyff (2016) at 246.

<sup>65</sup> Sand (2004) at 50.

<sup>66</sup> Section 24(b) of the Constitution.

<sup>67</sup> Section 25(4)(a) of the Constitution.

purposes. Consequently, specific fiduciary duties or powers granted to the state as trustee may differ depending on the statute and the natural resource.<sup>68</sup>

The reason for the inconsistency in the fiduciary content of public trusteeship when adopting different statutes is unclear. This inconsistency, however, could be indicative of the legislature's uncertainty as to the ever-evolving regulatory role of the state as public trustee of natural resources. What is clear, though, from public trusteeship statutes such as the NWA is the legislature's intention to create a legal construct that statutorily entrenches the state's fiduciary duties and stewardship responsibility in respect of the identified resource and to centralise the state's control over the resource for the purpose of fundamental change. It is commonsense that the inclusion of public trusteeship in a statute reflects the recognition that the identified resource cannot be dealt with exclusively through contemporary private law relationships.<sup>69</sup> Trying to do so may irreversibly alienate the public trust asset from the public trusteeship relationship. Public trusteeship demands of the state, as public trustee, that it be accountable to the nation and, thus, represent future resource beneficiaries. In this regard, when grappling with the question of whether the legislative output of the (post-apartheid) state was equal to the challenges already entrenched in society, a high-level report revealed that the ills of the past were being reproduced in post-apartheid society despite extensive legislative reform.<sup>70</sup>

The public trust doctrine had a profound influence on South Africa at the end of apartheid in 1994. It ushered in a statutory regime-change in respect of water with the enactment of the NWA and incorporation of public trusteeship of the state.<sup>71</sup> The NWA has been described as "a new water law premised on the idea of water as a public good".<sup>72</sup> As a result, South Africa's water law changed from water that is privately owned to a wholly centralised system of water use regulation by the state as public trustee of it as a natural resource belonging to the nation.<sup>73</sup> Importantly, the centralisation of regulatory authority over natural resources is integral to the developmental state model. As such, the preamble to the NWA recognises that water is a scarce and unevenly distributed national resource that belongs to all people, and that the discriminatory laws and practices of the past prevented equal access to water use.<sup>74</sup>

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<sup>68</sup> Blackmore (2018) at 3.

<sup>69</sup> Van der Schyff (1998) at 38.

<sup>70</sup> Presidential Report *High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) at 31.

<sup>71</sup> Section 3(1) of the NWA states: "As the public trustee of the nation's water resources the National Government ... must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate."

<sup>72</sup> Department of Water Affairs *White paper on a national water policy* (1997).

<sup>73</sup> Viljoen G "The transformed water regulatory regime of South Africa [Discussion of South African Association for Water User Associations v Minister of Water and Sanitation [2020] ZAGPPHC 252 (19 June 2020)]" (2022) 33 (2) *Stellenbosch Law Review* 317. See also section 24(b) of the Constitution; Van der Schyff (1998) at 38.

<sup>74</sup> See the Preamble of the NWA.

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However, the efficacy of public trusteeship in the NWA is not always above reproach. Moreover, pre-constitutional notions of “trusteeship” as a legal construct can rightly serve as a cautionary tale about the consequences of excessive bureaucratic state *dominium* over natural resources and property.<sup>75</sup> At the time of its inception, the NWA was applauded for its transformative nature and comprehensive objectives. Yet, more than two decades later, many argue that the statute has done little to bring about the just and equitable allocation of water use rights as promised. Indeed, access to both land and water in South Africa continues to be largely unequal and concentrated in the hands of a privileged few, with these disparities remaining highly skewed along racial lines.

Unequal distribution of water use remains largely unchanged despite the enactment of the regulatory mechanism that is public trusteeship. Some attribute the lack of fundamental change to the strong neoliberal flavour of these new emerging policies and statutes,<sup>76</sup> the NWA included. However, most analyses of the redistribution of water resources identify weak state implementation and enforcement<sup>77</sup> as the main reason why water remains rooted in historical and locally specific patterns of water use that persistently reflect (pre-constitutional) power relations.

A case in point is provided by the party arguments and judicial interpretations that eventually overturned the High Court decision in *South African Association for Water User Associations v Minister of Water and Sanitation*.<sup>78</sup> The Constitutional Court decision has raised concern about the status of equitable water distribution in post-apartheid South Africa. This concern relates to the evolving developmental role of the state, as public trustee, and the interpretation afforded to public trusteeship in the NWA. The section that follows highlights the implications of recent case law on the regulation of water resources, and how the interpretation of the public trusteeship role of the state directly affects efficacy in promoting inclusive economic and social development.

### **4.2 South African Association for Water User Associations v Minister of Water and Sanitation (71913/2018) [2020] (High Court decision)**

The central issue in this matter is whether a water use entitlement obtained in terms of the NWA is transferrable to a third party, and if so, whether a fee may be charged by the water use holder for the water use entitlement.<sup>79</sup> Up until 2018, the Department of

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<sup>75</sup> Presidential Advisory Panel on Land Reform and Agriculture *Final report of the Presidential Advisory Panel on Land Reform and Agriculture* (2019) at 67.

<sup>76</sup> Lahiff E et al. *Land redistribution and poverty reduction in South Africa: The livelihood impacts of smallholder agriculture under land reform*. Report 36, Programme for Land and Agrarian Studies, University of the Western Cape (2008) at 5. Terreblanche S *A history of inequality in South Africa 1652–2002*. Scottsville: University of Natal Press (2003) at 422.

<sup>77</sup> Liebrand J et al. “The deep waters of land reform: Land, water and conservation area claims in Limpopo Province, Olifants Basin, South Africa” (2012) 37(7) *Water International* 773 at 775.

<sup>78</sup> *South African Association for Water User Associations v Minister of Water and Sanitation* (71913/2018) [2020]; *CJ Lotter N.O and others v The Minister of Water and Sanitation and others* 42072/2018 [2020]; *FGJ Wiid and others v The Minister of Water and Sanitation and others* (90498/2018) [2020]. Collectively referred to as the High Court decision. The Court heard three separate applications wherein the applicants sought a declaratory order for a proper interpretation of section 25 of the NWA.

<sup>79</sup> *South African Association for Water User Associations* (2020) at para 36.

Water and Sanitation (the public trustee) had allowed private trading in water use rights by water use holders. However, it subsequently issued a circular providing that the NWA does not allow trading in water, and on this basis new applications were declined.<sup>80</sup> The decline of applications for water licences resulting from private transactions entered into by water use holders and third parties led to litigation in the High Court, the Supreme Court of Appeal, and eventually the Constitutional Court in *Minister of Water and Sanitation v South African Association for Water Users Associations* (CC decision).<sup>81</sup>

When faced with the interpretative question of whether applications for water use licences that stem from private trading are permissible in terms of section 25 of the NWA, the High Court held that private transactions cannot be applied to water, which is regulated under the statutory *public* trust framework of the NWA. Consequently, there is no authority in the NWA that permits the holders of water use entitlements to sell their water use to third parties; to accept such a notion would result in the privatisation of a natural resource to which *all* persons must have access.<sup>82</sup>

The High Court confirmed that the NWA imposed an obligation on the state to allocate water equitably for the beneficial use of the public and not the private interest. Highlighting disparities in wealth and the ongoing monopolisation of access to and use of water by a privileged class, the Court held that the sale of water use entitlements in private agreements discriminates against those who cannot afford to pay the amounts unilaterally determined by water use holders and buyers. This serves to maintain the monopoly of access to water resources by predominantly white commercial irrigation farmers, who are financially well resourced.<sup>83</sup> These practices, the Court stated, frustrate equal access and keep historically disadvantaged persons out of the agricultural sector.<sup>84</sup>

The High Court clearly identifies that the real issue at play is not the grammatical meaning of section 25 but rather the permissibility of trading in water. It concludes that trading in water use entitlements is not permissible, as it is at variance with the purpose of the Act, which is “to ensure that the nation’s water resources are protected, used, developed, conserved, managed, and controlled in ways which take into account amongst other factors ... redressing the results of past racial and gender discrimination”.<sup>85</sup>

The High Court decision adheres strictly to the tenets of the public trust doctrine and transitional-property-regime purpose of the NWA, and, furthermore, adopts a contextual and purposive approach in its judgement. Unfortunately, it also exposes the fact that the poor construction of section 25(1) and 25(2) of the NWA, coupled with

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<sup>80</sup> *South African Association for Water User Associations* (2020) at para 9.

<sup>81</sup> *Minister of Water and Sanitation v South African Association for Water Users Associations* [2023] ZACC 09.

<sup>82</sup> *South African Association for Water User Associations* (2020) at paras 42–43.

<sup>83</sup> *South African Association for Water User Associations* (2020) at para 44.

<sup>84</sup> *South African Association for Water User Associations* (2020) at para 45.

<sup>85</sup> Section 2 of the NWA; *South African Association for Water User Associations* (2020) at paras 36, 42 and 47.

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contradictory wording in the National Water Policy, presented an opportunity for a strict grammatical interpretative challenge to the theoretical foundations of the public trust doctrine in South Africa, in particular the presumption of inalienable public trust assets.<sup>86</sup> However, the matter raised clear constitutional issues, and leave to appeal was granted. The matter came before the Constitutional Court on 23 August 2022.

### 4.2.1 Arguments made by the public trustee

The greater part of the parties' arguments and the Constitutional Court decision centres on the interpretation afforded to the second part of section 25(1) of the NWA. The wording of the latter deals with the intended circumstances under which the public trustee may permit the "use of some or all the water for a different purpose, or ... allow the use of some or all of the water on another property in the same vicinity for the same or similar purpose".<sup>87</sup>

The public trustee contends that the wording contemplates the temporary use of water for the same or similar purpose on another property in the same vicinity by the water use holder, and not a third party. The argument made is that "the section refers to use 'on another property' and says nothing about use 'by another person or third party' other than the water use holder".<sup>88</sup> Furthermore, the heading under which the section falls is entitled "transfer of water use authorisations", which refers to the transfer of water authorisation from one property to another, rather than from an authorised water user to a third party. In addition, the fees charged for water use are significantly less than the large amounts involved in water trading,<sup>89</sup> indicating that such transactions are not contemplated by the NWA. But perhaps the most fundamental, and poignant, argument made by the public trustee is that its interpretation is the one that is most "in harmony" with the provisions of the NWA.<sup>90</sup>

In support of the latter argument, the public trustee contextualises the Act's rationale with the explanation that "very wealthy farmers, who are largely white, have created an enclave within which a scarce national natural resource is being traded (amongst each other), thus perpetuating the imbalances of the past", a situation that infringes on the right to equality.<sup>91</sup> As such, an interpretation of section 25(1) and 25(2) that sanctions private trading in water use is contra-indicated and at odds with the purpose of the NWA, which is, among other things, to redress the legacy of past racial and gender discrimination.<sup>92</sup> The public trustee supports its interpretation by highlighting that whereas the predecessor to the NWA, the Water Act of 1956, made specific provision for trading in water use, the legislature enacting the NWA

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<sup>86</sup> Van der Schyff (2010) at 129; *Illinois Central Railroad v Illinois* 146 U.S. 387 (1892).

<sup>87</sup> Section 25(1) of the NWA.

<sup>88</sup> *South African Association for Water User Associations* (2020) at paras 2, 23 and 34.

<sup>89</sup> *Minister of Water and Sanitation v South African Association for Water Users Associations* [2023] ZACC 09 at paras 9 and 37.

<sup>90</sup> *South African Association for Water User Associations* (2020) at para 9.

<sup>91</sup> *Minister of Water and Sanitation* (2023) at para 14.

<sup>92</sup> Section 25(1) of the NWA.

intentionally moved away from such private practices, which is why the Act does not contain a similarly express provision.<sup>93</sup>

#### 4.2.2 *The Constitutional Court decision*

The Constitutional Court provides a succinct grammatical interpretation of the relevant sections of the NWA and limits its contextual and purposive considerations to the statute. It is, therefore, not only the outcome of the Constitutional Court decision but also its interpretative approach that stands in stark contrast with that of the High Court decision. The latter is almost entirely embedded in the transformative constitutional intent of the water regime change and the public trust doctrine, whereas the former assigns greater weight to a grammatical and holistic reading of the statutory provisions. The Constitutional Court reaches the conclusion that, while the NWA does not expressly allow for trading in water use entitlements, it does not expressly prohibit “trading” in water use entitlements between water use holders and third parties either. The Court maintains that if section 25(1) is read holistically with other sections in the Act, then the grammatical interpretation of the wording offered by the public trustee does not make grammatical sense.

For example, a holistic reading with section 29(2) appears to acknowledge that it is lawful in terms of the NWA to enter a private transaction for the use of water by another person and that, when this is done, it is for such an arrangement to include payment in compensation. Both sections 26(1)(l) and 29(2) refer to “transactions” and “compensation”. The Constitutional Court reasoned that section 29(2) allows the conditional obligation to pay compensation by a licence-holder and that such conditional payment is consonant with an interpretation that a transfer under section 25(2) may be subject to a condition that, upon the successful licence application by a third party, the latter will be liable to pay a fee to the erstwhile licence-holder.<sup>94</sup> The Court held that it can therefore be deduced from the wording that the Act envisaged that “money may change hands”.<sup>95</sup>

The Constitutional Court concluded that section 25 of the Act gives substantive meaning to the procedural aspect of payment in sections 26(1)(l) and 29(2). Furthermore, it stated that “without a clear prohibition against trading in water use entitlements, private persons must surely be perfectly entitled to trade”.<sup>96</sup> To emphasise the implications of the legislature’s omission or silence in the Act on the matter, the Constitutional Court distinguished between the legal constraints imposed on private persons and on organs of state. In so doing, it referred to the English case of *Somerset County Council* and pointed out that while both public organs of state and private persons are subject to the rule of law, the principles that govern them are different: private persons can do anything they choose provided it is not prohibited by the law, whereas the actions of organs of state must be justified by positive law.<sup>97</sup>

<sup>93</sup> *South African Association for Water User Associations* (2020) at paras 14 and 43.

<sup>94</sup> *Minister of Water and Sanitation* (2023) at paras 14, 31 and 32.

<sup>95</sup> *Minister of Water and Sanitation* (2023) at para 34.

<sup>96</sup> *Minister of Water and Sanitation* (2023) at para 36.

<sup>97</sup> *Minister of Water and Sanitation* (2023) at para 36.



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In response to the argument as to the large amounts involved in the trading of water use entitlements, the Constitutional Court highlighted that this is determined by market forces.<sup>98</sup> This statement, however, is eerily reminiscent of debates around the “willing-seller, willing-buyer” model of land redistribution. The latter is a model that relies heavily on competitive market forces for agricultural land owned predominantly by white commercial farmers, and it has been identified as one of the primary causes of a failing land reform programme.<sup>99</sup> Similarly, under the NWA, the state is expressly acknowledged as having the overall responsibility as the national government to enable the equitable allocation of water resources for the benefit of *all* users.<sup>100</sup>

It is only in the epilogue of its decision that the Constitutional Court addresses the public trustee's concern that “water, a scarce national resource, is largely in the hands of advantaged white farmers”. The Constitutional Court said that while it understands that the public trustee has to seek to redress the injustice of disproportionate enjoyment of water use entitlements, the current wording of the NWA does not afford the state the power to prevent the transfer of water use entitlements in this manner; as such, the state lacks the statutory right to redress the injustice in this way.<sup>101</sup>

### 4.2.3 *The significance of the Constitutional Court decision*

South Africa's public trusteeship is analogous with international law principles in that it must give impetus to the constitutional objectives in the NWA, likewise, the stewardship ethic also forms part of the development or evolution of a distinctly South African public trusteeship.<sup>102</sup> Recent case law in regard to the regulatory role of the state as public trustee of water resources is significant. It reveals the public trustee struggling to exercise stewardship in a context-sensitive and purposive way that reflects both an awareness of prevailing inequalities and a desire for social justice that extends beyond the confines of the NWA.<sup>103</sup> Indeed, the stewardship ethic goes beyond mere morals: it speaks to the underlying values that are intended to guide national goals, policy, and practice. The public trustee should attempt to respond appropriately in the interests of the entire nation on whose behalf and for whose benefit the resource is held, rather than only in the interests of a segment of society or minority group.

The Constitutional Court decision was inclined toward a grammatical interpretation and the fact that the NWA did not expressly prohibit the private trading or sale of water use rights (i.e. the alienation of public trust assets) led to the downfall of the state's argument. The omission weakened the protective presumption against the alienation of public trust assets and, consequently, the public trustee's power to optimally control access to and use of water in the hands of third parties with the

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<sup>98</sup> *Minister of Water and Sanitation* (2023) at para 35.

<sup>99</sup> Du Plessis (2014) at 799; Du Plessis (2018).

<sup>100</sup> Preamble of the NWA.

<sup>101</sup> *Minister of Water and Sanitation* (2023) at para 39.

<sup>102</sup> Alonso-Fradejas (2021) at 6.

<sup>103</sup> *Lotter NO and Others v Minister of Water and Sanitation and Others* (725/2020) [2021] ZASCA 159 at para 1. According to the SCA, the issues “involve the interpretation of s25 of the NWA within the broader context of the statute”.

capital means to continue to trade and accumulate the public trust asset. To be clear, the public trustee's power is weakened, but not eliminated: this does not amount to a complete abdication of the public trust duty in respect of water. After all, the approval for the issuance of the water use license to third parties is still in the hands of the public trustee.<sup>104</sup> However, it is unlikely that a party seeking to challenge the issuance of a water use license on the basis of future inequitable distribution, or exclusionary outcomes would be successful after the CC decision.

The impact of the decision on the stewardship ethic which is intended to inform a culture of trusteeship in the management of water held on behalf of all South Africans is concerning. It would be questionable to argue that the outcome of the Constitutional Court decision endorses the attunement to issues of social justice and democracy that is associated with a socially conscious stewardship ethic; it would be equally questionable to say that it promotes inclusive economic growth. Ironically, the decision is significant because it echoes South Africa's historical past rather than moving away from it: it was the reinstatement of the *dominus fluminis* under apartheid that allowed the state to retain regulatory control over rivers and waterbodies yet simultaneously permit white irrigation farmers to trade privately in water use between one another to the exclusion of others.<sup>105</sup> It would seem that the more things change, the more they stay the same.

## 5 CONCLUSION

Every country may decide to what degree it adopts the foundational principles of the public trust doctrine, including the presumption against alienation of public trust assets. This decision is often influenced by property dynamics, and may differ depending on the nature of the natural resource and the political model involved. South Africa can be described as a democratic constitutional state that embeds altruistic values or purposes into its transformative statutes, such as the NWA, with the intent of dismantling existing structural inequalities. In addition, the inclusion of a public trusteeship mechanism in the NWA was an intentional response to the country's socio-economic context. However, the extent to which the mechanism reflects the foundational principles of the public trust doctrine is ultimately determined by the express provisions in the statute.

The Constitutional Court decision shows that the NWA failed to give full grammatical expression to the presumption against alienation of public trust assets – a presumption which is critical to the basis for water reform and the very purpose of the water-regime change. It is essential, then, that the doctrinal nature and extent of public trustee powers to administer public trust assets be expressed and not simply implied or left to judicial interpretation. The Constitutional Court decision limited the interpretation of public trusteeship to the express content of the regulating statute, its words, its context, and its purpose – all of which was confined to the statute itself. This makes transformative constitutional interpretation challenging, as it often requires reference to social and economic rights-based reasoning and justification that extends beyond the provisions of a statute.

<sup>104</sup> *Lotter* (2021) at paras 59 and 60.

<sup>105</sup> The Water Act 54 of 1956 promoted separate development for different races and represented a fundamental policy shift towards regulating water for use in mining, irrigation, and manufacturing industries. See also Dugard (1989) at 97–99.

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### BIBLIOGRAPHY

#### **Books**

- Barnes R *Property rights and natural resources* Oxford: Hart Publishers (2009)
- Changuion L & Steenkamp B *Omstrede land: Die historiese ontwikkeling van die Suid-Afrikaanse grondvraagstuk, 1652–2011* Pretoria: Protea Boekhuis (2011)
- Currie I, De Waal J, De Vos P, Govender K & Klug H *The new constitutional and administrative law Volume 1* Cape Town: Juta (2001)
- Edigheji O *Constructing a democratic developmental state in South Africa: Potentials and challenges* Human Sciences Research Council Press (2010)
- Giliomee H *Afrikaners: A concise history* Cape Town: Tafelberg (2020)
- Njoya W *Economic freedom and social justice: The classical ideal of equality in racial diversity* Switzerland: Palgrave Macmillan (2021)
- Terreblanche S *A history of inequality in South Africa 1652–2002* Scottsville: University of Natal Press (2003)
- Van der Schyff E *Property in minerals and petroleum* Cape Town: Juta (2016)

#### **Chapters in books**

- Bennett TW “African land – a history of dispossession” in Zimmerman R & Visser D (eds) *Southern Cross: Civil and common law in South Africa* Oxford: Oxford University Press (1996)
- Du Plessis E “How the determination of compensation is influenced by the disjunction between the concepts of ‘value’ and ‘compensation’” in Hoops B et al. (eds) *Rethinking expropriation law III: Fair compensation*. The Hague: Eleven International (2018)
- Viljoen F “The African regional human rights system” in Krause C & Sheinin M (eds) *International protection of human rights: A textbook* Turku: Åbo Akademi University Institute for Human Rights (2009)

#### **Journal articles**

- Adams M “Reforming communal rangeland policy in Southern Africa: Challenges, dilemmas and opportunities” (2013) 30(1–2) *African Journal of Range and Forage Science* 91–97
- Albertyn C “Contested substantive equality in the South African Constitution: Beyond social inclusion towards systemic justice” (2018) 34(3) *South African Journal on Human Rights* 441–468
- Alonso-Fradejas A “The resource property question in climate stewardship and sustainability transitions” (2021) 108(105529) *Land Use Policy* 1–10
- Atkinson D “Patriarchalism and paternalism in South African ‘Native Administration’ in the 1950s” (2009) 54(1) *Historia* 262–280
- Barendse J “A broader view of stewardship to achieve conservation and sustainability goals in South Africa” (2016) 112(5/6) *South African Journal of Science* 21–35
- Bennett TW & Powell CH “The state as trustee of land” (2000) 16(4) *South African Journal on Human Rights* 601–622

- Blackmore AC "Getting to grips with the public trust doctrine in biodiversity conservation: A brief overview" (2018) 48(1) *Bothalia – African Biodiversity and Conservation* 1-8
- Brown CN "Drinking from a deep well: The public trust doctrine and Western water law" (2006) 34 *Florida State University Law Review* 1-49
- Cockburn J, Cundill G, Shackleton S & Rouget M "The meaning and practice of stewardship in South Africa" (2019) 115(5/6) *South African Journal of Science* 1-10
- Cousins B & Hall R "Rights without illusions: The potential and limits of rights-based approaches to securing land tenure in rural South Africa" (2011) *Working paper 18 Institute for Poverty, Land and Agrarian Studies*
- Dugard J "Racism and repression in South Africa: The two faces of apartheid" (1989) 2 *Harvard Human Rights Journal* 97-100
- Du Plessis A "The readiness of South African law and policy for the pursuit of sustainable development goal" (2017) 21(1) *Law, Democracy & Development* 239-262
- Du Plessis E "Silence is golden: The lack of direction on compensation for expropriation in the 2011 Green Paper on Land Reform" (2014) 17(1) *Potchefstroom Electronic Law Journal* 798-831
- Govender J "Social justice in South Africa" (2016) 16(2) *Civitas Porto Alegre* 237-258
- Huffmann JL "Trusting the public interest to judges: A comment on the public trust writings of Professors Sax, Wilkinson, Dunning and Johnson" (1986) 63(3) *Denver University Law Review* 565-584
- Kibet E & Fombad C "Transformative constitutionalism and the adjudication of constitutional rights in Africa" (2017) 17(2) *African Human Rights Law Journal* 340-366
- Liebrand J, Zwarteveen MZ, Wester P & Van Koppen B "The deep waters of land reform: Land, water and conservation area claims in Limpopo Province, Olifants Basin, South Africa" (2012) 37(7) *Water International* 773-787
- Mureinik E "A bridge to where? Introducing the Interim Bill of Rights" (1994) 10(1) *South African Journal on Human Rights* 31-48
- Musendekwa M, Tinarwo M, Chakauya R & Chakauya E "Beyond land redistribution: A case for stewardship in land reform" (2021) 9(1) *Journal of Land and Rural Studies* 1-14
- Nwabueze B "Constitutional democracy in Africa" 50(2) (2003) *Journal of African Law* 198-201
- Oloka-Onyango J "Beyond the rhetoric: Reinvigorating the struggle for economic, social and cultural rights in Africa" (1995) 26(1) *California Western International Law Journal* 1-71
- Pienaar JM "Recent land policy: The mechanics of intervention and the Green Paper on Land Reform" (2014) 17(2) *Potchefstroom Electronic Law Journal* 641-669
- Sand P "Sovereignty bounded: Public trusteeship for common pool resources" (2004) 4(1) *Global Environmental Politics* 47-71
- Sand P "The rise of public trusteeship in international environmental law" (2013) 44(1/2) *Environmental Policy and Law* 210-218

## THE EVOLVING DEVELOPMENTAL ROLE OF THE STATE AS A PUBLIC TRUSTEE OF SOUTH AFRICA'S NATURAL RESOURCES

Sax JL "The public trust doctrine in natural resource law: Effective judicial intervention" (1970) 68(3) *Michigan Law Review* 475-565

Tewari DD "A detailed analysis of evolution of water rights in South Africa: An account of three and a half centuries from 1652 AD to present" (2009) 35(5) *Water SA* 693-710

Van der Schyff E "Unpacking the public trust doctrine: A journey into foreign territory" (2010) 15(5) *Potchefstroom Electronic Law Journal* 122-189

Van Dijk HG & Croukamp PA "The social origins of the developmental state: Reflections on South Africa and its local sphere of government" (2007) 42(7) *Journal of Public Administration* 664-675

Viljoen G "The transformed water regulatory regime of South Africa [Discussion of South African Association for Water User Associations v Minister of Water and Sanitation [2020] ZAGPPHC 252 (19 JUNE 2020)]" (2022) 33(2) *Stellenbosch Law Review* 308-320

Viljoen S & Makama SP "Structural relief: A context-sensitive approach" (2018) 34 *South African Journal of Human Rights* 209-230

Werner W "Tenure reform in Namibia's communal areas" (2015) 18 *Namibia 25 Special Issue Journal of Namibian Studies* 67-87

Zirker OL "This land is my land: The evolution of property rights and land reform in South Africa" (2003) 18 *Connecticut Journal of International Law* 621-641

### **Constitutions**

Constitution of the Republic of South Africa, 1996

Constitution of the Republic of Uganda of 1995

### **Legislation**

Michigan Environmental Protection Act, 1970

National Environmental Management Act 107 of 1998

National Water Act 36 of 1998

Nigeria's Land Use Act of 1978

Water Act 54 of 1956

Uganda Land Act 16 of 1998

### **Case law**

*CJ Lotter N.O. and others v The Minister of Water and Sanitation and others* 42072/2018 [2020]

*FGJ Wiid and others v The Minister of Water and Sanitation and others* (90498/2018) [2020]

*Fuel Retailers Association of Southern Africa v Director-General: Environmental Management* 2007 (6) SA 4 CC

*HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2006 ZAGPHC 132

*Illinois Central Railroad v Illinois* 146 U.S. 387 (1892)

*Knight v United States Land Association* 142 US 161 (1891)

*Lindiwe Mazibuko v City of Johannesburg* 2009 ZACC 28

*Lotter NO and Others v Minister of Water and Sanitation and Others* (725/2020) [2021] ZASCA 159

*Martin v Waddell's Lessee* 41 US 367 (1842)

*Minister of Water and Sanitation v South African Association for Water Users Associations* [2023] ZACC 09

*South African Association for Water User Associations v Minister of Water and Sanitation* (71913/2018) [2020]

### **Reports**

Department of Water Affairs (1997) *White Paper on a National Water Policy*

Lahiff E, Maluleke T, Manenzhe T & Wegerif M (2008) *Land redistribution and poverty reduction in South Africa: The livelihood impacts of smallholder agriculture under land reform*. Report 36, Programme for Land and Agrarian Studies, University of the Western Cape

National Treasury (2017) *Budget Review*

Presidential Advisory Panel on Land Reform and Agriculture (2019) *Final report of the Presidential Advisory Panel on Land Reform and Agriculture*

Presidential Report (2017) *High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change*

Van der Schyff E (1998) *The concept of public trusteeship as embedded in the South Africa National Water Act*. Report KV 263/10 to the Water Research Commission

### **Theses**

Van Aswegen ME *Different modes of public participation in a public trust regulatory model* (LLM thesis, North-West University, 2019)

Young CL *Public trusteeship and water management: Developing the South African concept of public trusteeship to improve management of water resources in the context of South Africa* (PhD thesis, University of Cape Town, 2014)

### **Internet sources**

Etebari M "Trickle-down economics: Four reasons why it just doesn't work" (2003) available at [https://www.faireconomy.org/trickle\\_down\\_economics\\_four\\_reasonskle-Down](https://www.faireconomy.org/trickle_down_economics_four_reasonskle-Down) United for A Fair Economy (accessed on 9 September 2022)

Parliament of Republic of South Africa "The National Development Plan unpacked" available at [https://www.parliament.gov.za/storage/app/media/Pages/2019/august/30-08-2019\\_ncop\\_committees\\_strategic\\_planning\\_session/docs/The\\_National\\_Development\\_PlanSimplified.pdf#:text=The%20National%20Development%20Plan%20%28NDP%29%20offers%20a%20longterm,what%20we%20want%20to%20achieve%20by%202030.%20](https://www.parliament.gov.za/storage/app/media/Pages/2019/august/30-08-2019_ncop_committees_strategic_planning_session/docs/The_National_Development_PlanSimplified.pdf#:text=The%20National%20Development%20Plan%20%28NDP%29%20offers%20a%20longterm,what%20we%20want%20to%20achieve%20by%202030.%20) (2019) (accessed on 25 July 2022)

Sibeko B "South Africa's never-ending crisis" (2021) available at <https://www.ips-journal.eu/topics/economy-and-ecology/south-africas-never-ending-crisis-5331/> Economy and Ecology (accessed on 14 October 2022)