

State custodianship of the nation's mineral and petroleum resources and the *South African Development Trust Act 18 of 1963*: A critical comparison

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Abstract

This dissertation envisages the investigation and determination of the possible correlation between the two phenomena, state custodianship and trusteeship with specific reference to land trusts. Custodianship, as captured in the *Mineral and Petroleum Resources Development Management Act* 28 of 2002, and trusteeship, as embodied in the South African Development Trust legislation, being the *Native Trust and Land Act* 18 of 1936; the *Ingonyama Trust Act* 3 of 1994 as enacted by the KwaZulu Legislature on the 24th of April 1994, amended with the status of a national Act (provincial Act) in 1997, and re-enacted [by the RSA Parliament] as the *KwaZulu-Natal Ingonyama Trust Act* 3 of 1994, and the *National Water Act* 54 of 1956, all confer upon a certain body, the fiduciary obligation to hold, protect and manage certain resources in the interest of a particular designated group of people. The objective of this study is, therefore, to analyse the trust notion as it functioned in terms of the SADT legislation, ITA and the NWA, and compare it to the novel concept of custodianship as it emanates from the MPRDA in order to determine the inherent similarities and differences as well as the implications thereof. This will assist in determining the true nature and impact of the notion of state custodianship as introduced by the MPRDA.

Keywords

State custodianship; Trusteeship; Trust land; Fiduciary duties and rights; South African Development Trust; Kwa Zulu Natal *Ingonyama* Trust

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LIST OF ABBREVIATIONS

ITA	<i>Ingonyama Trust Act 3 of 1994</i>
MPRDA	<i>Mineral and Petroleum Resources Development Act 28 of 2002</i>
NWA	<i>National Water Act 54 of 1956</i>
SADT	South African Development Trust
SANT	South African Native Trust
TBVC	Transkei, Bophuthatswana, Venda and Ciskei

1 Introduction and problem statement

The inauguration of the new political dispensation in South Africa in 1994 initiated a dynamic shift in the ownership, management and development of the country's mineral heritage. This was as implemented by means of the *Constitution*,¹ especially in section 25(7), which provides for the equitable redress or restitution of land to those who were disposed thereof in terms of past racially discriminatory laws and practices. It also led to an overall transformation of the national mineral and mining policies, which then resulted in the enactment of the modern legislation regulating the mineral and petroleum resources of the country.² Of the said legislation, the most significant is the *Mineral and Petroleum Resources Development Act*,³ which was passed by parliament in 2002, and came into operation on 1 May 2004. The Act itself states that it aims:⁴

To make provision for equitable access to and sustainable development of the nation's mineral and petroleum resources; and to provide for matters connected therewith.

The MPRDA⁵ states further that the mineral and petroleum resources of South Africa are the common heritage of all the people of South Africa and the state is the custodian thereof, for the benefit of all South African citizens.⁶ In the same breath, the Act manages to state that amongst its various objectives, it is also striving for the recognition of the internationally acknowledged right of the state to exercise sovereignty over all the mineral and petroleum resources within the Republic.⁷ The promulgation and application of this piece of legislation in South Africa by the state means that the state has actually conferred upon itself the obligation to act as custodian of the country's mineral and petroleum resources for the benefit of all South Africans. If this is so, then it would have the implication that the mineral and petroleum resources have, as a result thereof, been bequeathed to the people of

1 s25(7) of the Constitution of RSA, 1996.

2 Van der Zwan and Nel 2010 *Meditari : Research Journal of the School of Accounting Sciences* 89.

3 *Mineral and Petroleum Resources Development Act* 28 of 2002, hereinafter the MPRDA.

4 Purpose of the Act: *Mineral and Petroleum Resources Development Act* 28 of 2002.

5 *Mineral and Petroleum Resources Development Act* 28 of 2002

6 s3(1) *Mineral and Petroleum Resources Development Act* 28 of 2002.

7 s2(a) *Mineral and Petroleum Resources Development Act* 28 of 2002.

South Africa.⁸ It is such developments that provide evidence that the MPRDA seems to mirror some significant concepts contained in the Freedom Charter. Of the many such concepts⁹ in the Freedom Charter is one that encompasses the principle that the mineral and petroleum resources are the common heritage of all the people of South Africa, and the state is the custodian thereof for the benefit of all South Africans.¹⁰

Although the concept of state custodianship of mineral and petroleum resources is deemed by many to be a novel concept, the idea that the state may act as custodian of natural resources on behalf, and for the benefit, of a designated group is not entirely new to South African jurisprudence. A seemingly similar concept in the form of trusteeship was incorporated in South African legislation for the purpose of furthering the policy of racial segregation in pre-1994 South Africa.

It is trite that segregation between South Africans was in place for a very long time in our country and it was mainly enforced and regulated by means of legislation. From 1913 until the 1990's, government policy that was in place was that black people should not become owners of land in South Africa. This policy was enshrined in the *Natives Land Act*¹¹ and the *Native Administration Act*.¹² The *Natives Land Act*¹³ was promulgated as a means to set aside approximately 7.3-8% (seven point three to eight per cent) of the total South African land area and schedule them as reserves that will accommodate the country's 'native' population.¹⁴ When the Act¹⁵ was finally promulgated and came into force, some of the black farmers were initially exempted from the provisions of the *Natives Land Act*¹⁶ that dispossessed black people of land,

8 Van der Scyff 2010 *Potchefstroom Electronic Law Journal* 122.

9 Other such concepts in the Freedom Charter are that the national wealth of our country, the heritage of South Africans, shall be restored to the people; the mineral wealth beneath the soil, the Banks and monopoly industry shall be transferred to the ownership of the people as a whole; all people shall have equal rights to trade where they choose, to manufacture and to enter all trades, crafts and professions.

10 Yazini 2012 *Africa Insight* 118. The Freedom Charter, 1955 was the statement of core principles of the South African Congress Alliance

11 *Natives Land Act* 27 of 1913.

12 *Native Administration Act* 38 of 1927. This Act was subsequently renamed the Black Administration Act 38 of 1927.

13 *Natives Land Act* 27 of 1913.

14 Kloppers and Pienaar 2014 *Potchefstroom Electronic Law Journal* 682.

15 *Natives Land Act* 27 of 1913.

16 *Natives Land Act* 27 of 1913.

and this ultimately gave rise to the so-called black spot areas within the areas that were designated for white people only.¹⁷

23 years after the *Natives Land Act*,¹⁸ in 1936 to be precise, the segregatious South African land policy was finalised as a result of the enactment of the *Native Trust and Land Act*.¹⁹ The major role that was played by this Act was its provision of the increase in extent of the land that was set aside for the African natives to a total of 13% of the area of the country from the 7.3-8% (seven point three to eight per cent) that had been set aside by the *Natives Land Act*.²⁰ Sections 4, 5 and 6 of the *Native Trust and Land Act*²¹ provided for the transfer of land that had previously been set aside for the natives to a new body that was called the South African Native Trust.²² According to section 4(3) of the *Native Trust and Land Act*,²³ and as explained by the court in the decision of the Constitutional Court in *eThekweni Municipality v Ingonyama Trust*,²⁴ it was initially the Governor-General of the Union, (later the State President) who was employed as trustee, with powers to regulate the management, acquisition and disposal of SADT property, and to also set out the conditions upon which the African natives might reside in the land.²⁵ In essence, it seems as though the trustee was actually managing the land on behalf, and for the benefit, of the natives.

The *Native Trust and Land Act*²⁶ was not the only piece of legislation to create and regulate trusts of this sort. There were other land trusts, managed by a certain body that was known as the trustee or custodian, for the benefit of an identified group of beneficiaries, which were subsequently statutorily created. Amongst such trusts was, for one, the KwaZulu-Natal *Ingonyama* Trust, which was established by the *KwaZulu-Natal Ingonyama Trust Act*.²⁷ The Act nominates the *Ingonyama* to

17 *Ex Parte: Western Cape Provincial Government and others IN RE: DVB Behuising (Pty) Ltd v North West Provincial Government and another* (R) [2000] JOL 6202 (CC) par 91.

18 *Natives Land Act* 27 of 1913.

19 *Native Trust and Land Act* 18 of 1936.

20 *Natives Land Act* of 1913.

21 *Native Trust and Land Act* 18 of 1936.

22 Hereinafter the SANT, which was later renamed the South African Development Trust.

23 *Native Trust and Land Act* 18 of 1936.

24 *eThekweni Municipality v Ingonyama Trust* 2013 (1) SA 564 (SCA).

25 s48(l)(c) and (g) of the *Native Trust and Land Act* 198 of 1963.

26 *Native Trust and Land Act* 18 of 1936.

27 *Ingonyama Trust Act* 3 of 1994. Hereinafter, the ITA.

administer trust land for the benefit of the members of the tribes and communities living on the land.

In 1998, the *National Water Act*²⁸ was promulgated. Like many of the new democratic dispensation legislation, the Act was also enacted in order to change the climate created by the apartheid legislation. The *National Water Act*²⁹ regulates the affairs with regards to natural waters of the republic. In section 3, the Act states that the state acts as the public trustee of the nation's water resources for the benefit of the citizens of South Africa. The principles upon which all these land trusts are mainly based on seem to be similar to those upon which the MPRDA relies upon for its concept of custodianship in section 3 thereof.³⁰ The aforementioned is what led to this study being conducted.

1.1 Research Question

The research question that underpins this study is whether there is a correlation between the two phenomena, namely state custodianship and trusteeship under SADT, ITA and NWA legislation. Custodianship, as captured in the MPRDA, and trusteeship, as embodied in the SADT legislation as well as in the ITA and NWA, both seem to have the effect of conferring upon the state or its agent, the fiduciary obligation to hold, protect and manage certain resources in the interest of a particular designated group.

1.2 Objectives and Methodology

The objective of this study is, therefore, to analyse the trust notion as it functioned in terms of the SADT legislation, the ITA and the NWA, then compare it to the novel concept of custodianship as it emanates from the MPRDA to determine if there are any inherent similarities and differences between the concepts or if they are inextricably linked together. This will assist in determining the true nature and impact of the notion of state custodianship as introduced by the MPRDA. As such, the question to be asked in this regard is to what extent does the concept of state

28 *National Water Act* 54 of 1956.

29 *National Water Act* 54 of 1956. Hereinafter, the NWA.

30 s3 of the *Mineral and Petroleum Resources Development Act* 28 of 2002. The same principles are also found in other natural resource legislation such as the *National Water Act* 36 of 1998, the *National Environmental Management Act* 107 of 1998, and the *National Environmental Management: Biodiversity Act* 10 of 2004.

custodianship, as it features in the *Mineral and Petroleum Resources Development Act*,³¹ and the trust notion, as it functioned in the *South African Development Trust Act*, as well as the KwaZulu-Natal *Ingonyama Trust*, as established by the *KwaZulu Natal Ingonyama Trust Act*³² and the *National Water Act*³³ relate to each other?

In order to answer this question, this study will from the onset be focused on the notion of trusteeship as captured in the different sources. In order to establish as to what led to adoption of public trusteeship and the trust notion into the South African legal jurisprudence, it will in the first place, be necessary to investigate the history of land and minerals as the legislation which governed the land and minerals of the country provides for trusteeship of the said natural resources. The regulation of the affairs related thereto will also be visited. This will also give a descriptive insight regarding the nature and content of the notion as it was applied from that point in time up to the contemporary application thereof by the state. The SADT, ITA and NWA legislation will then be analysed to investigate the nature and implications of the notion of trusteeship as it was embodied in the legislation.

In the discussion of the SADT, the history concerning the legislation that led to the establishment of the trust will be outlined. The nature of the earlier trust, as applied back then, will be highlighted so as to identify the characteristics and to investigate the development thereof, in order to be in a position to compare it with subsequent trusts of its sort. The roles that the trustees of the trust played in the administration of the trust property will also be highlighted, so as to determine the nature of the relationship between the said trustees and the beneficiaries of the trust. The *Ingonyama* trust, as established by the ITA will then be consulted. The application of the principles of the trust according to the legislation will be outlined. The nature and relevant characteristics of the trust will thereafter be identified in order to be in a position to compare it to the other types of trusts and establish whether it falls within the scope of the doctrine of trusteeship. Lastly, the NWA will then be consulted in order to determine the scope of trusteeship thereunder, and to determine as to whether the principles upon which it is based corresponds to those of the abovementioned trusts and the legislation applicable thereto.

31 *Mineral and Petroleum Resources Development Act* 28 of 2002.

32 *Ingonyama Trust Act* 3 of 1994.

33 *National Water Act* 54 of 1956.

The study will thereafter focus its investigation on the second part of the research, being the notion custodianship as found in the *Mineral and Petroleum Resources Development Act*.³⁴ The MPRDA will be analysed to determine the extent and content of state custodianship as embodied therein. The general duties of the state as custodian of the South African people, and the people's rights in terms of the concept of custodianship will be investigated to determine the nature thereof.

The relationship between the state and its subjects then becomes relevant to investigate. The state's general fiduciary obligation towards its subjects will therefore be outlined and explained in order to understand the nature of the duties that the state has towards the citizens and what rights the citizens have against the state in regard of the subject of the doctrine of trusteeship. Special reference will be made herein to the relationship as regards the natural resource legislation as well as the land trust legislation.

The next step is investigating the ownership of the property over which these two phenomena operate. In order to be able to fully understand the contents and application of the concept of custodianship and the notion of public trusteeship, it will then be determined as to with whom ownership of the property concerned vests as the two phenomena both have to do with certain property over which certain rights and responsibilities ensue to different entities in the paradigm.

As the doctrine of public trusteeship, together with that of custodianship, is said to be of foreign origin in South Africa, it thus becomes necessary to establish as to how it is applied in other such jurisdictions. The application of these phenomena in America, India, England, Uganda and Canada will be investigated in order to determine their nature and manner of application so as to determine the similarities thereof with its application in South Africa.

Finally, the characteristics, similarities and differences, if any, of the two phenomena, state custodianship in terms of the MPRDA, and trusteeship as it functioned in terms of both pre- and post-1994 legislation will be compared in order to provide a clear exposition of the answer to the research question.

³⁴ *Mineral and Petroleum Resources Development Act* 28 of 2002.

This research is a preliminary study with its main focus on the South African Development Trust and state trusteeship. There are a number of other concepts that need research of their own in order to fully understand these concepts, but due to the fact that this is only an LLM mini-dissertation, these will only be referred to briefly and indicated as points of further research.

2 Background and history

It is common cause that South Africa suffered a long history of colonisation, racial domination and land dispossession that resulted in the majority of the land being under the ownership of the white minority of the population of the Republic.³⁵ The dispossession was *inter alia* achieved by means of pass laws that guaranteed the control of the free movement of black people; racial classification; the prohibition of intermarriage between whites and people of other races; separate and unequal education systems, health services and civic amenities such as parks, beaches, libraries and public transport; and racially segregated, zoned residential areas as well as workplaces.³⁶ This appalling period of time in our country's history was referred to as the time of 'apartheid'. This so-called apartheid phase is generally accepted to have prevailed from 1948 to 1979, and that is from the time when the National Party came to power in 1948.³⁷ During this time, the colonial and apartheid state confined the indigenous African people to reserves, which were later referred to as homelands. These homelands were created and categorised on the basis of the language and culture of a particular ethnic group.³⁸ These areas that were set aside for the reserves consisted largely of infertile land and areas with very low rainfall patterns, while the more fertile land was allocated to the white minority that were farmers, and they used the lands for commercial agriculture.³⁹

Contrary to what the general belief is, the borders of the homelands allocated for the African communities were in actual fact, fixed by the *Natives Land Act*⁴⁰ and the *Native Trust and Land Act*⁴¹ long before the system apartheid was introduced as an official government policy of the National Party. The legacy of the two Acts, especially the *Natives Land Act*,⁴² has proven to be a pernicious and enduring one,⁴³ as it was intended to pave the ground for a segregationist social order in, what was then, the newly established Union of South Africa.⁴⁴ The Act was passed for the

35 Rugege 2004 <http://ccs.ukzn.ac.za/files/LandreforminSouthAfrica.pdf>.

36 McGregor 2006 *Fundamina : A Journal of Legal History* 92.

37 Loots 1997 *South African Journal of Economic History* 27.

38 Khunou 2009 *Potchefstroom Electronic Journal* 82.

39 Rugege 2004 <http://ccs.ukzn.ac.za/files/LandreforminSouthAfrica.pdf>.

40 *Natives Land Act* 27 of 1913.

41 *Native Trust and Land Act* 18 of 1936.

42 *Natives Land Act* of 27 1913.

43 Dodson 2013 <http://www.sabar.co.za/law-journals/2013/april/2013-april-vol026-no1-pp29-32.pdf>.

44 Cousins 2005 *Stellenbosch Law Review* 502.

purpose of limiting African land ownership to native reserves, and as a result thereof, the reserves eventually ended up becoming sources of cheap and unskilled labour for the white farmers and industrialists.⁴⁵

Notwithstanding the fact that the Africans were, in numbers, more than their white counterparts, the *Natives Land Act*⁴⁶ still provided for only an aggregate of about 7-8% (seven to eight per cent) of the total land area of the country being allocated for black use only.⁴⁷ The Act dispossessed millions of native South Africans of their ancestral lands, and immediately reduced African access to land by specifically excluding over one and a half million hectares of white owned land rented by Africans, as well as half a million hectares owned and occupied by Africans at the time.⁴⁸ Section 1(1) of the *Natives Land Act*,⁴⁹ *inter alia*, prohibited the purchase, hire, or other acquisition of land or interest in land, by a native, of any land that at the time the Act was promulgated belonged to a white person. It also stated, in the second clause of the section, that it was illegal for a white person to acquire by means of purchase, hire or other acquisition, any land or interest in land that belongs to a native.⁵⁰ As a result thereof, purchases of farms in the Transvaal and Natal slowed substantially until 1918. One of the other consequences was that private ownership of property by Africans was not permitted and the land as well as the improvements thereon was regarded as the property of one or other government body.⁵¹

In 1936, the South African land policy was finalised, and this was achieved with the enactment of the *Native Trust and Land Act*.⁵² The said Act provided for an additional 6% (six per cent) to the area in which native Africans would be authorised to exercise land rights. The Act also provided for the establishment of the South African Native Trust (SANT),⁵³ and further allowed for regulations to prescribe the conditions on which natives could hire, purchase or occupy land held by the said

45 McGregor 2006 *Fundamina : A Journal of Legal History* 90-92.

46 *Natives Land Act* of 1913.

47 Moolman 2000 *Acta Criminologica* 50. The land was increased to 13% at a later stage.

48 Weideman 2004
http://wiredspace.wits.ac.za/bitstream/handle/10539/275/13_chapter1.pdf?sequence=13.

49 s1 of the *Natives Land Act* 27 of 1913.

50 *Natives Land Act* 27 of 1913.

51 Loots 1997 *South African Journal of Economic History* 34. The role of Seceumoud Commission

52 *Native Trust and Land Act* 18 of 1936.

53 Hereinafter SANT, and later renamed the South African Development Trust (SADT).

Trust.⁵⁴ The SANT was essentially a state agency specifically established for the function of administering trust land, and to be administered for the settlement, support, benefit, and material welfare of the natives of the Union.⁵⁵ The key element in these laws, which especially since 1948, were applied in ever greater measures, was that although millions of the African people lived in various rural areas, they could not become legal landowners of neither those areas nor any other land within the country.⁵⁶ The Act abolished individual land ownership by African people and introduced a formal system of trust tenure through the establishment of the South African Development Trust, which was in essence a government body that was responsible for obtaining land in the so-called "released areas" for black settlement.⁵⁷

The policy that originated as a result of the above-mentioned legislation and the trust it created was that the African natives could not become owners of land in South Africa, and this policy was entrenched in legislation since 1913 up until the 1990's. The policy on removals from land, as well as the statutory prohibitions imposed on African natives' right to own land, had very far-reaching consequences to the extent that the livelihood of the African natives was severely and adversely affected.⁵⁸

The *Native Trust and Land Act*,⁵⁹ together with the *Land Act*,⁶⁰ eventually assigned, in total, 13,7% (thirteen point seven per cent) of the land to African people for purposes of permanent residence.⁶¹ Some of this land was already registered in the government as trustee by the 1913 Act, while the final title on the rest of the land was held by the Development Trust,⁶² to which the land was assigned for residence of the African population.⁶³ Sections 4, 5 and 6 had the effect of transferring land that had previously been set aside in the trust by the *Natives Land Act*⁶⁴ to a newly

54 Cousins 2005 *Stellenbosch Law Review* 502.

55 Kloppers and Pienaar 2014 *Potchefstroom Electronic Law Journal* 682.

56 Smith 2004 *Dutch Reformed Theological Journal* 467.

57 Kloppers and Pienaar 2014 *Potchefstroom Electronic Law Journal* 682. The notion of trusteeship only existed informally before the promulgation of the of the Act.

58 Smith 2004 *Dutch Reformed Theological Journal* 467.

59 *Native Trust and Land Act* 18 of 1936.

60 *Natives Land Act* 27 of 1913.

61 Smith 2004 *Dutch Reformed Theological Journal* 466-467.

62 The South African Development Trust.

63 Smith 2004 *Dutch Reformed Theological Journal* 466-467.

64 *Natives Land Act* 27 of 1913.

established statutory body that was called the South African Development Trust.⁶⁵ According to section 4(3) of the *Native Trust and Land Act*,⁶⁶ the Governor General of the Union was appointed as the trustee in terms of the Act. The Governor General, as trustee of the SADT, was entrusted with powers that enabled him to regulate the management, acquisition and disposal of the SADT property, and also to prescribe the conditions upon which African people might occupy such trust land.⁶⁷ As mentioned above, in the homelands, which were the former reserves, the forms of land rights held by the occupants were generally in nature, subservient, permit based or they were held in trust, and the land was generally registered in the name of the SADT or as the property of the government.⁶⁸ Ownership of the trust land thus vested in the trust, and such land was to be acquired by the state for the purpose of occupation by the African natives within the scheduled and released areas.⁶⁹

Black farmers that owned land under the freehold title outside the reserves before 1913 were originally exempted from the provisions of the *Natives Land Act*⁷⁰ that dispossessed African people of land and this gave rise to the so-called black spot communities in the areas that were only designated for white people. During the period between the 1950's and the 1980's, however, the situation changed when the black spot farmers also became victims of further forced removals as the government expelled most of them to homelands. After reclassifying their land the remainder of the said farmers were thereafter confined in the land as tenants of the SADT which, in addition to the reserved land, also purchased farms occupied by white people for the purpose of consolidation and enlargement of areas occupied by Africans.⁷¹

65 The aforementioned SADT.

66 *Native Trust and Land Act* 18 of 1936.

67 s48(l)(c) and (g) of the *Native Trust and Land Act* 198 of 1963.

68 *Ex Parte: Western Cape Provincial Government and others IN RE: DVB Behuising (Pty) Ltd v North West Provincial Government and another* (R) [2000] JOL 6202 (CC) par 91.

69 Bennet and Powell 2000
http://heinonline.org/HOL/Page?handle=hein.journals/soafjhr16&div=39&g_sent=1&collection=journals.

70 *Natives Land Act* of 1913.

71 *Ex Parte: Western Cape Provincial Government and others IN RE: DVB Behuising (Pty) Ltd v North West Provincial Government and another* (R) [2000] JOL 6202 (CC) par 78.

In 1959 when Verwoerd became the Prime Minister of South Africa, the *Promotion of Black Self-Government Act*⁷² was promulgated. The main objective of that Act was the establishment of self-governing African units and it also aimed at advancing the mandate of the 1913 and 1936 land policy. In terms thereof, the African native population was arranged and categorised into national units that were based on language and culture.⁷³ The *Black Administration Act*⁷⁴ set up a separate legal system for the administration of the natives' affairs in the designated areas, and further conferred certain powers upon the traditional leaders. However, these powers that were bestowed upon the traditional leaders in the administration of the natives' affairs were later re-assigned to the President of South Africa in 1961, and thereafter to the homeland governments upon attaining their self-governing status, as well as to the Transkei, Bophutatswana, Venda and Ciskei governments states, upon attaining their independence.⁷⁵

The *Self-Governing Territories Constitution Act*⁷⁶ was promulgated in 1971. The Act provided for the establishment of legislative assemblies, and the executive power vested in executive councils in respect of the homelands.⁷⁷ This Act, in essence, gave authority to the self-governing territories to promulgate legislation for themselves and their citizens; and it also allowed African natives to run their own affairs in their homelands. Amongst these affairs were matters that related to the land and minerals in the different homelands. However, the homelands' governments did not have absolute power and authority to promulgate legislation to regulate as they deem fit, the affairs of the homelands because such legislation was subject to permission by the South African government.⁷⁸

Basically, state ownership of land took different forms wherein the TBVC states and self-governing territories' mineral rights were owned by those states⁷⁹ and territories

72 *Promotion of Black Self-Government Act* 46 of 1959.

73 Khunou 2009 *Potchefstroom Electronic Journal* 85.

74 *Black Administration Act* 38 of 1927.

75 Shabangu and Khalo 2008 *Journal of Public Administration* 330.

76 *Self-Governing Territories Constitution Act* 21 of 1971. The Act was renamed several times, becoming the *Black States Constitution Act* 27 of 1971, then the *National States Constitution Act* 27 of 1971, and finally the *Self-governing Territories Constitution Act* 27 of 1971.

77 Khunou 2009 *Potchefstroom Electronic Journal* 88-89.

78 Khunou 2009 *Potchefstroom Electronic Journal* 89

79 In essence the so called "independence" of the TBVC states had the effect that their governments acquired all rights relating to the land and minerals, hence they became successors in title to the South African government

in terms of the *South African Development and Trust Act*,⁸⁰ which provided for the vesting of these rights in the SADT on behalf of the African natives with the Governor-General of the Union as the trustee of such land with the natural resources thereon. Others were held by the state in trust for traditional communities, like the *KwaZulu-Natal Ingonyama Trust Act*,⁸¹ with the *Ingonyama* as the trustee. It therefore follows that there was a relationship between the state and the African natives, in terms of which, the state had a particular responsibility towards the African natives, who in turn had certain rights against the state with regards to the land held in the SADT.

The discussion that follows concerns the doctrine of trusteeship as it emanated from SADT legislation. In order to comprehensively understand the nature of the doctrine, the SADT legislation and other previous trusts⁸² will be investigated. The circumstances that created the need for the application of the doctrine in that era, together with the development thereof will also be referred to herein.

80 *South African Development Trust Act* 18 of 1963.

81 *KwaZulu-Natal Ingonyama Trust Act* 3 of 1994.

82 Such as the old Natal Native Trust.

3 Trusteeship in terms of the South African Development Trust

Due to the developments created by the *Natives Land Act*⁸³ and the *Land and Trust Act*,⁸⁴ even though the Acts were only a formal codification of the system, substantial areas of South Africa were (and still are)⁸⁵ administered by the state in trust for the benefit of the original inhabitants.⁸⁶ Traditionally, land under indigenous laws and customs of South Africa was generally held in trust and administered by the chiefs on behalf of the people of the tribes.⁸⁷ The land was so held in trust without here being any form of deed or proof to that effect, but it was common cause amongst the communities. Official and written trusts of this type were first established in South Africa at the mission stations in the Cape around the year 1854.⁸⁸ Then later, a more comprehensive form of the trust was established around 1864, which basically entailed that all the interests in the Natal reserves, most importantly the rights to lease, sell or otherwise alienate land, were vested in a certain board of trustees but with a provision that their powers were to be implemented for the support, advancement or well-being of the African population.⁸⁹ In pursuit of the required support and advancement of the natives, a commission headed by Shepstone⁹⁰ was created. After the necessary investigations, research reaching a conclusion, the commission compiled a report that envisaged the education of natives regarding the proper use of the land so that if there are some that so desire, they might eventually be eligible to obtain the right to hold land individually, but in the meanwhile the land that was allocated to them would be held in trust for them.⁹¹ In 1887 when the Zululand was annexed by the British, and thereafter in the next decade incorporated into the Natal, one of the conditions of the annexure was the provision of sufficient land for native reserves, but this was only achieved in 1909 wherein an aggregate

83 *Natives Land Act* of 1913.

84 *Native Trust and Land Act* 18 of 1936.

85 For example, the land held in the Kwa Zulu Natal *Ingonyama* Trust; the *Bafokeng* land in Rustenburg; etc.

86 Bennet and Powell 2000
http://heinonline.org/HOL/Page?handle=hein.journals/soafjhr16&div=39&g_sent=1&collection=journals.

87 Mbao 2002 *Journal for Juridical Science* 90.

88 Bennet and Powell 2000
http://heinonline.org/HOL/Page?handle=hein.journals/soafjhr16&div=39&g_sent=1&collection=journals.

89 Bennet and Powell 2000
http://heinonline.org/HOL/Page?handle=hein.journals/soafjhr16&div=39&g_sent=1&collection=journals.

90 Sir Theophilus Shepstone was the director of Native policy in Natal for over 30 years.

91 Lekhela *An historical survey* 57.

area of close on 4 000 000 acres was vested in the Zululand Native Trust⁹² for the benefit of the natives that were so interested in obtaining the right to hold land individually.

When the Anglo-Boer war came to an end, peace terms were signed by the different colonies in 1902. Thereafter, an inter-colonial commission was created in order to facilitate compliance with the peace terms. This had the effect that the Missionary societies that were granted land totalling 144 192 acres between the years of 1862 and 1867 on behalf of the natives, were stripped of the said land in 1903 and it was thereafter incorporated under the Zululand Native Trust.⁹³

In 1905 Shepstone's commission released another report wherein the statistics of the country were set out. The commission identified certain problems, such as the necessity to regulate the actual purchase of land by natives; the necessity to regulate the purchase of land by white people in areas which were essentially native, and of which, if such land is lost to a native, would propel him to press more upon white farmers' land.⁹⁴ As a result of the aforementioned reasons, *inter alia*, the *Natives Land Act*⁹⁵ was passed, that is when a massive amount of African families eventually ended up losing their farm lands in 1913, and were then squeezed on to two types of land, quitrent⁹⁶ and trust land.⁹⁷ The said trust lands are the focus of this study herein.

From the discussions in the previous paragraphs, it can be derived that the system that incorporated this doctrine of trusteeship has been in place for a very long time. The doctrine, at the beginning operated informally as it was not statutorily provided for nor was it regulated, but it did gain official recognition in the Transvaal after the British occupation, especially in the districts of Rustenburg and Pretoria, where African communities bought quite a large number of farms under both informal and formal trusteeship systems.⁹⁸ In order to secure the natives of land, Shepstone in 1964 induced the Natal administration to form the Natal Native Trust,⁹⁹ where under

92 Lekhela *An historical survey* 62.

93 Lekhela *An historical survey* 61.

94 Lekhela *An historical survey* 75.

95 *Natives Land Act* 27 of 1913.

96 Which land was located in the part of the area that was not fertile for habitation.

97 Mamashela and Mothokoa 2004 *South African Journal on Human Rights* 624.

98 Feinberg and Bergh 2004 *Kleio* 171.

99 This Natal Native Trust is a descendant of the former Zululand Native Trust.

2 200 000 acres of land, including that which was stripped from the Missionary societies in 1903, were placed for the support, advantage or well-being of the natives of the colony.¹⁰⁰

When Natal introduced its own system of trusteeship, it was different from that of the Transvaal in that the Natal Native Trust entrusted with the ownership of the land on which the African natives lived, and the trust allocated only the right to live on and use the land to the natives as beneficiaries thereof. The norm of the Natal Native Trust was later extended to all of South Africa by means of the *Native Trust and Land Act*.¹⁰¹ This Act made provision for the eventual transfer of 6.2 million hectares of land to the native people's reserves for their use and residence.¹⁰² However, the land was not immediately available, but was rather identified for progressive acquisition by an entity as established by section 4 of the Act,¹⁰³ the South African Native Trust.¹⁰⁴ Trust land was vested in the state agency, being the South African Native Trust, which rented the land to the kraal heads and sometimes individuals, who were then entrusted with the authority to administer the land to the community.¹⁰⁵ This land was to be purchased with the money that was allocated by parliamentary grants, and the trust areas were also to be administered by the South African Native Trust itself.¹⁰⁶ The land that vested in the Trust was held for the exclusive use and benefit of natives.¹⁰⁷ Africans natives were, however, not permitted to purchase the trust land but they could still rent it. Individuals were given 'permission to occupy' the land by means of a certificate of occupation, but the certificate could not be equivalent to a title deed over the land.¹⁰⁸

The *Native Trust and Land Act*¹⁰⁹ further provided that the areas that were previously released for sale in terms of one of the provisions of the 1913 *Natives Land Act*¹¹⁰ could be bought and administered by the said South African Native Trust. Trust

100 Lekhela *An historical survey* 60.

101 *Native Trust and Land Act* 18 of 1936.

102 This is the 13% of land referred to above.

103 *Native Trust and Land Act* 18 of 1936.

104 Dodson 2013 <http://www.sabar.co.za/law-journals/2013/april/2013-april-vol026-no1-pp29-32.pdf>. The trust was later named the South African Development Trust.

105 Mamashela and Mothokoa 2004 *South African Journal on Human Rights* 625.

106 Wittenberg 2003 <http://sticerd.lse.ac.uk/dps/decentralisation/southafrica.pdf>.

107 Anon 2012 http://www.anc.org.za/docs/discus/2012/landpolicyproposals_june2012g.pdf.

108 Mamashela and Mothokoa 2004 *South African Journal on Human Rights* 625.

109 *Native Trust and Land Act* 18 of 1936

110 *Natives Land Act* of 1913.

tenure, which is what the natives were given in terms of the Act,¹¹¹ was a form of tenancy at will, with control of the trust land removed from the hands of the kraal heads and other individuals, and subsequently placed in those of department [NAD] officials.¹¹²

The former reserves were later turned into homelands. The form of land rights in these townships and homelands was generally subservient, permit based or held in trust, and the land was generally registered in the name of the South African Development Trust¹¹³ or as the property of the government.¹¹⁴ The SADT became the owner of land that was to be acquired by the state for occupation by natives. Furthermore, in terms of section 10 of the *Native Labour Locations Act*,¹¹⁵ the procurement of fixed property or any interest in land by the natives was supposed to be for purposes of the employment or residence of the persons concerned; and if ever the Minister was satisfied that the land in question was being utilised for any other purpose than in relation to the residence or for the employment of the person to whom the consent had been given, he could cancel and withdraw such consent.¹¹⁶ It can be concluded herein, that the residents of the townships and the homelands were thus the beneficiaries of tenancy of the trust land for purposes of work and residency in terms of the SADT, and the state, through its organs such as the Minister, was the trustee of the SADT on behalf of the African natives.

By 1939, the trust purchases had increased the African reserves to at least 11.7% of the area of South Africa as a whole.¹¹⁷ Be that as it may, according to section 10(1) of the *Development Trust and Land Act*,¹¹⁸ it was trite that African natives were not permitted to acquire land that exceeded 7, 250 000 (seven and one-quarter million)

111 *Native Trust and Land Act* 18 of 1936.

112 Feinberg and Bergh 2004 *Kleio* 181.

113 The SANT was also later transformed to the South African Development Trust, hereinafter the SADT.

114 *Ex Parte: Western Cape Provincial Government and others IN RE: DVB Behuising (Pty) Ltd v North West Provincial Government and another* (R) [2000] JOL 6202 (CC) par 91.

115 *Native Labour Locations Act* 30 of 1936.

116 Van Reenen *Land* 40.

117 Du Plessis and Pienaar 2010 *Fundamina : A Journal of Legal History : Libellus ad Thomasium : Essays in Roman Law, Roman-Dutch Law and Legal History in Honour of Philip J Thomas* 79.

118 *Development Trust and Land Act* 18 of 1936.

hectares¹¹⁹ in extent despite the fact that the land so acquired was still not enough to meet the demand of land by the natives.¹²⁰

The Governor General was appointed as the trustee of the SADT, and later the Minister of Native Affairs replaced him in the position in terms of the *Development Trust and Land Act*.¹²¹ The trustee had the power to grant, sell, lease, or otherwise dispose of land to the natives, and on such conditions as he deemed fit.¹²² The Governor General was entrusted with such powers as to make regulations, among other things, that prescribed the conditions upon which natives may purchase, hire or occupy land held by the Trust.¹²³ The Governor General further had the power to make regulations providing for the allocation of land held by the trust for the purposes of residence, cultivation, pasturage and commonage of the natives.¹²⁴ Under the 'in trust' system, which was the system brought into force by the Act,¹²⁵ the deeds used to administer the trust land included the phrase, 'to the Minister of Native Affairs in trust for', and quite unfailingly, government officials highlighted that the Minister of Native Affairs, as trustee of the land, was the legal owner, but also that strictly his was merely a formal ownership,¹²⁶ which imposed upon him the responsibility to administer the land for, while also having regard to the best interests of, the African natives. Thus, the state officials affirmed by so phrasing the deeds, although not expressly, that the real owners were the African natives as beneficiaries and on behalf of whom the land was held in trust. It was a formality that the Department insisted on so as to guarantee that any affairs with the property are brought under the supervision of the Department.¹²⁷

Bearing in mind the duties of the trustee of the trust land in terms of the SADT and the other previously mentioned trusts, it can be derived therefrom that such duties were of a particular nature. The nature of the duties of the trustee is also such that

119 Which was the 13% set aside for the natives.

120 Du Plessis and Pienaar 2010 *Fundamina : A Journal of Legal History : Libellus ad Thomasium : Essays in Roman Law, Roman-Dutch Law and Legal History in Honour of Philip J Thomas* 79.

121 *Development Trust and Land Act* 18 of 1936.

122 Anon 2012 http://www.anc.org.za/docs/discus/2012/landpolicyproposals_june2012g.pdf.

123 Anon 2012 http://www.anc.org.za/docs/discus/2012/landpolicyproposals_june2012g.pdf

124 *Ingonyama Trust v Radebe* 2012 JDR 0050 (KZP) par 37.

125 *Development Trust and Land Act* 18 of 1936.

126 Feinberg and Bergh 2004 *Kleio* 184.

127 Feinberg and Bergh 2004 *Kleio* 184-185.

the duties inherently presuppose corresponding rights by the natives as beneficiaries of the SADT.

It has been gathered from the aforementioned that the state actually held the trust land in the SADT for the benefit of the African natives. This means that the system that was used embodied the relevant fiduciary principle, in that the state, as trustee, had discretionary powers in and over the trust land that was reserved for the natives, as beneficiaries thereof. This means that the state had fiduciary obligations towards the natives, who in turn had enforceable fiduciary rights against the state.

4 Trusteeship under the *Ingonyama Trust Act* 3 of 1994

As has already been established, the *Native Land Act*¹²⁸ and the *Development Trust and Land Act*¹²⁹ were the legal instruments used to reserve certain land for the native population of the country, while the rest was allocated to the rest of the population of the country.¹³⁰ At a later stage, the areas so reserved for Africans were divided into homelands in terms of the *Promotion of Bantu Self-government Act*.¹³¹ Amongst the areas reserved for black citizens was the homeland of KwaZulu, for the Zulu nation, which was composed of various tribes under immediate traditional leadership of the Chiefs (*Amakhosi*) and their headmen (*izinduna*), whilst at the head of the nation was the *Ingonyama / Isilo* (the King) who was, during the colonial era, referred to as the Paramount Chief.¹³²

The *Bantu Homelands Constitution Act*¹³³ was the piece of legislation by means of which a government with legislative and executive powers in each homeland was established,¹³⁴ and the Legislative Assembly of the Government of KwaZulu was also established pursuant to this Act. The South African government transferred the land by means of *Proclamation R232* of 1986¹³⁵ to the government of KwaZulu.¹³⁶ The latter was conferred upon with the duty to administer it for the settlement, support, benefit and welfare of the citizens of KwaZulu.¹³⁷ The people of KwaZulu in turn had acquired reciprocal rights in terms of the trust to be enforceable against the trustees of the trust.

All the homelands, including that of KwaZulu, were abolished in April 1994 when South Africa attained democracy, and the areas over which they governed were reincorporated into the greater South Africa as it became a unitary state.¹³⁸ However, the laws passed by defunct homeland parliaments continued in operation until

128 *Black Land Act* 27 of 1913.

129 *Development Trust and Land Act* 18 of 1936.

130 *Ingonyama Trust v Radebe and Others* [2012] 2 All SA 212 (KZP) par 6.

131 *Promotion of Bantu Self-government Act* 46 of 1959.

132 *Ingonyama Trust v Radebe and Others* [2012] 2 All SA 212 (KZP) par 6-7.

133 *Bantu Homelands Constitution Act* 21 of 1971.

134 *eThekweni Municipality v Ingonyama Trust* 2013 (1) SA 564 (SCA) par 4.

135 *Proclamation R232* of 1986.

136 The apartheid regime from time to time released land in order to expand and consolidate KwaZulu Homeland. Ownership of vast pieces of land was finally transferred to the Government of KwaZulu On 24 December 1986 by Proclamation R232 of the Government Gazette no. 10560 by the then National Government.

137 *eThekweni Municipality v Ingonyama Trust* 2013 (1) SA 564 (SCA) par 4.

138 sch 1 of the *interim Constitution Act* 200 of 1993.

repealed or amended by the democratic Parliament or, where appropriate, by a provincial legislature¹³⁹ in terms of the *Interim Constitution*¹⁴⁰ and the final *Constitution*.¹⁴¹ Prior to the first democratic elections, on 24 April 1994, in order to ensure certainty and effective control over all the land in KwaZulu Homeland not privately owned or falling under the ownership of the State, the *KwaZulu-Natal Ingonyama Trust Act*¹⁴² was promulgated.¹⁴³

The purpose of the Act was to create the *Ingonyama* trust, and transfer the land that was then administered by the soon to be abolished Government of KwaZulu to the *Ingonyama* Trust, whose sole trustee was the *Ingonyama*, the Zulu King.¹⁴⁴ The *Ingonyama Trust Act*¹⁴⁵ provided that any land or real right therein, of which the ownership immediately prior to the date of commencement of the Act vested in, or had been acquired by the Government of KwaZulu, shall vest in and be transferred to, and shall also be held in trust by the *Ingonyama* as trustee of the *Ingonyama* Trust.¹⁴⁶ Therefore, under the KwaZulu-Natal *Ingonyama* Trust, the *Ingonyama*¹⁴⁷ was appointed as the sole trustee with the necessary discretionary rights to hold land in title for the benefit, material welfare and social well-being of the members of the tribes and the communities living on the land of KwaZulu Natal.

The Act provided for the Zulu King to be the sole trustee of approximately 3 million hectares of KwaZulu land.¹⁴⁸ The effect of this legislation was that personal permission had to be obtained from the *Ingonyama* for the development, servicing and sale of each individual property under his trusteeship, and many applicants were deprived of access to mortgage loans¹⁴⁹ as they did not own the land in question.¹⁵⁰ The *Ingonyama* Trust was mandated to administer the transferred land “for the benefit, material welfare and social well-being of the members of the tribes and

139 *eThekweni Municipality v Ingonyama Trust* 2013 (1) SA 564 (SCA) par 5.

140 s125 of the *Interim Constitution of RSA*, 1993.

141 s104 of the *Constitution of RSA*, 1996.

142 *KwaZulu-Natal Ingonyama Trust Act* 3 of 1994.

143 *Ingonyama Trust v Radebe and Others* [2012] 2 All SA 212 (KZP) par 10.

144 *eThekweni Municipality v Ingonyama Trust* 2013 (1) SA 564 (SCA) par 6.

145 *KwaZulu-Natal Ingonyama Trust Act* 3 of 1994. The ITA.

146 s3(1)(a) of the *KwaZulu-Natal Ingonyama Trust Act* 3 of 1994.

147 The Chief of the Zulu tribe.

148 Cohen *South African Human Rights Yearbook* 137-138.

149 Same as in the period before 1994.

150 Cohen *South African Human Rights Yearbook* 138.

communities” as contemplated in the¹⁵¹ *KwaZulu Amakhosi and Iziphakanyiswa Act*.¹⁵²

However, in order to alleviate the administrative burden¹⁵³ on the King,¹⁵⁴ the Act was amended by the *KwaZulu-Natal Ingonyama Trust Amendment Act*.¹⁵⁵ One of the changes was the creation of a Board of Trustees, comprising the Zulu King and eight members appointed by the Minister for Rural Development and Land Reform, after consultation with the King, Premier and Chairperson of the House of Traditional Leaders of KwaZulu-Natal.¹⁵⁶ The *Amendment Act*¹⁵⁷ provides that the function of the Trust Board is to administer the affairs of the trust and the trust land on behalf of the members of the tribes and communities falling under its jurisdiction.¹⁵⁸ The effect of the amendment was that the land which remained vested in and owned by the *Ingonyama* Trust fell into one of the two categories: The land which the trust owned and held in trust on behalf of the beneficiaries listed in the schedule to the *Amendment Act*, as represented by the various traditional authorities or leaders; and the remainder of such land, whether it be urban or rural, not specifically connected to any tribe or traditional authority, fell under the sole and exclusive authority and authority of the applicant.¹⁵⁹ Furthermore, the Act provided that trust land shall be subject to national land reform programmes of the South African government, and thereby opening up huge tracts of land for development.¹⁶⁰ The practical effect of this amendment was to eliminate the legislative restrictions that were obstructing the provision of housing in many of the urban areas of the province, and thereby facilitating increased development and delivery in the province.¹⁶¹

Therefore, the Board of trustees as appointed by the *KwaZulu-Natal Ingonyama Trust Act*,¹⁶² to administer the land for the benefit, material welfare and social well-being of the members of the tribes and communities, take up the position of being

151 *eThekweni Municipality v Ingonyama Trust* 2013 (1) SA 564 (SCA) par 6.

152 *KwaZulu Amakhosi and Iziphakanyiswa Act* 9 of 1990.

153 Even more importantly, these were political reasons.

154 *Ingonyama Trust v Radebe and Others* [2012] 2 All SA 212 (KZP) par 12.

155 *KwaZulu-Natal Ingonyama Trust Amendment Act* 9 of 1997.

156 *eThekweni Municipality v Ingonyama Trust* 2013 (1) SA 564 (SCA) par 7.

157 *KwaZulu-Natal Ingonyama Trust Amendment Act* 9 of 1997.

158 Cohen *South African Human Rights Yearbook* 138.

159 *Ingonyama Trust v Radebe and Others* [2012] 2 All SA 212 (KZP) par 14.

160 Cohen *South African Human Rights Yearbook* 138.

161 Cohen *South African Human Rights Yearbook* 138.

162 *KwaZulu-Natal Ingonyama Trust Act* 3 of 1994.

trustees for the benefit of the KwaZulu Natal community. The trustees have discretionary rights over the land and/or legal interests of the community and thus have a fiduciary duty towards the members of the tribes and communities, who in turn have the enforceable fiduciary rights against the former, due to the land falling under trusteeship. The *Ingonyama* Trust displays characteristics that seem to be based on principles which have are similar to those of the SADT and the earlier South African trusts.

5 Pubic trusteeship over South Africa's water resources

The water resources of the country, which were at a point in time, inextricably linked to land according to South African common law,¹⁶³ have also been placed by legislation under a certain type of trusteeship displaying similar characteristics to those of the KwaZulu Natal Ingonyama Trust. Before investigating the nature of the trusteeship under which the water has been placed, a brief overview of the history thereof will be outlined in order to determine as to the conditions that made it necessary for the establishment and application of public trusteeship over South African water resources.

5.1 A brief history

Before colonisation of South Africa by the Dutch in 1652, water rights in the pre-colonial society were regulated in terms of African customary law. Water rights were at that time only common knowledge; they were not disputed among individuals in the communities, in fact, these rights only came up where a community or a tribe felt that another tribe or community was unfairly intruding onto its resources to the former's disadvantage.¹⁶⁴ In the communities water and land was free, but land tenancy was administered by the chief of the tribe, and private ownership was not permitted.¹⁶⁵

The arrival of the Dutch, headed by Jan van Riebeeck, and their resolution to settle at the Cape of Good Hope, invoked the application of Roman-Dutch law. The Roman law acknowledged three categories of water rights, private water which was owned by individuals and the individual having the right to use it; common water which everyone had the right to use without limit or authorisation; and public water that was owned by the state and was subject to state control.¹⁶⁶ In the Roman law, such things as the air, the sea and running water were termed *res omnium communes*, and running water in a river or a natural stream was not owned by anyone, but

163 Adopted from the Roman Dutch and English law.

164 Tewari 2009 <http://www.scielo.org.za/pdf/wsa/v35n5/a19v35n5.pdf>.

165 Tewari 2009 <http://www.scielo.org.za/pdf/wsa/v35n5/a19v35n5.pdf>.

166 Tewari 2009 <http://www.scielo.org.za/pdf/wsa/v35n5/a19v35n5.pdf>.

became private property once taken from the stream during the period of possession.¹⁶⁷

During the apartheid regime, the very first milestone in the scope of water rights history of South Africa was reached with the *Water Act*,¹⁶⁸ which replaced the *Irrigation Act*.¹⁶⁹ The *Water Act*¹⁷⁰ has been welcomed as demonstrating an important piece of legislation in the South African history of water regulation.¹⁷¹ This Act managed to harmonise water regulation in the interests of the economic heavyweights, agriculture, mining and industry. Its main principles were that riparian ownership is a feasible system; however final control of water resources was with the state; and further that strict state control on industrial and groundwater uses was important.¹⁷²

The colonial water rights policy of the apartheid government excluded the Africans who were unable to participate in the land markets freely and whom also did not possess the resources to so participate, where such access was possible.¹⁷³

The *Water Act*¹⁷⁴ was finally repealed by the *National Water Act*¹⁷⁵ in 1998, which effectively repealed over 100 water Acts and related amendments, and further eradicated all previous private and public rights to water.¹⁷⁶

5.2 Trusteeship under the National Water Act

Water, as an instrumental human resource, lies at the core of the environmental disaster that threatens the continual existence of life on our planet as it has been misused and ill-treated to such an extent that it is only by means of innovative intervention that its sustainable protection can be pursued.¹⁷⁷ Prior to 1994, water supply responsibility was disjointed without a national department¹⁷⁸ of government

167 Tewari 2009 <http://www.scielo.org.za/pdf/wsa/v35n5/a19v35n5.pdf>.

168 *Water Act* 54 of 1956.

169 *Irrigation Act* 73 of 1912.

170 *Water Act* 54 of 1956.

171 Tewari 2009 <http://www.scielo.org.za/pdf/wsa/v35n5/a19v35n5.pdf>.

172 *Water Act* 54 of 1956.

173 Tewari 2009 <http://www.scielo.org.za/pdf/wsa/v35n5/a19v35n5.pdf>.

174 *Water Act* 54 of 1956.

175 *National Water Act* 36 of 1998.

176 Tewari 2009 <http://www.scielo.org.za/pdf/wsa/v35n5/a19v35n5.pdf>.

177 Van der Schyff and Van der Walt *South African Journal of Criminal Justice* 297.

178 Water affairs were the responsibility of local governments, and not national..

responsible for its management.¹⁷⁹ The South African legislature has since challenged this conundrum by crafting a novel, far-reaching instrument, the *National Water Act*,¹⁸⁰ that in turn created the ideal milieu within which sustainable and equitable water usage can be controlled for the benefit of all South Africans.¹⁸¹ With the promulgation of the NWA, a complex and dynamic framework for regulating South Africa's scarce water resources was born, and it wiped out the Roman Dutch and English common law base of the country's water law dispensation that had the effect of linking water use rights inseparably with land access.¹⁸² The table for transformation was set with section 3 of the NWA, in which the doctrine of public trusteeship was officially introduced into South African law without great elaboration.¹⁸³

Section 3 of the NWA states that as the public trustee of the nation's water resources the national government should make certain that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of the people of South Africa and in accordance with its constitutional mandate.¹⁸⁴ The Act further states that the Minister is ultimately responsible to make sure that water is allocated even-handedly and that it is used beneficially in the public interest, while still promoting environmental values.¹⁸⁵ In contrast to the previous regime that was based on the Roman Dutch and English common law maxims as referred to above, the NWA is based on the principle that water as a natural resource belongs to all people.¹⁸⁶

The NWA provision that water belongs to all people, together with the subsequent appointment of the public trustee, unwittingly spawn a consideration around the question as to whom the water belongs as a natural resource.¹⁸⁷ This question was

179 Folifac *African Water Journal* 8.

180 *National Water Act* 36 of 1998. Hereinafter, the NWA.

181 Van der Schyff and Van der Walt *South African Journal of Criminal Justice* 297.

182 Van der Schyff and Viljoen *TD: The Journal for Transdisciplinary Research in Southern Africa* 340.

183 Van der Schyff *Potchefstroom Electronic Law Journal* 123.

184 s3(1) of the *National Water Act* 36 of 1998.

185 s3(2) of the *National Water Act* 36 of 1998.

186 Van der Schyff and Viljoen *TD: The Journal for Transdisciplinary Research in Southern Africa* 340.

187 Van der Schyff and Van der Walt *South African Journal of Criminal Justice* 297-298.

considered in the case of *Mostert v The State*¹⁸⁸ where the question arose as to whether a person could be found guilty of the common-law crime of theft where they abstracted water from a river without the necessary permission.¹⁸⁹

Having regard to this, one interpretation might be that the water running through the rivers of the country has always been considered to be *res publicae*, and that the NWA codified this Roman Dutch common law principle, but one must however bear in mind that the NWA regulates water in general and as a natural resource, irrespective of whether such water originates from a river or a spring situate on private land.¹⁹⁰ As a result, such waters are not capable of neither ordinary nor private occupation, cultivation, improvement; and their natural and primary uses are, in their nature, public. South Africa's move to a public rights system from a private rights system is in accordance with the values, spirit and purport of the *Constitution*.¹⁹¹ Section 27(1)(b) thereof guarantees every citizen of the country the right to access to sufficient water, while section 24 provides that 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.¹⁹²

In acknowledging that water is a resource that belongs to all South African citizens, the NWA brought about the policy ideal of establishing a doctrine of public trust by appointing the national government as the public trustee of the water.¹⁹³ Public trusteeship refers to the national government's duty to act as custodian or public trustee¹⁹⁴ of certain interests, water in this case, for the benefit of the people of South Africa.¹⁹⁵ The concepts of custodianship and that of public trusteeship as contained in the NWA are not necessarily new to South African law as the Act

188 *Mostert v The State* 2010 (2) SA 586 (SCA). The court found that it the generally accepted principle is that property must be movable and corporeal, it must belong to someone else and it must be *in commercio* (negotiable) before it can be stolen.

189 Van der Schyff and Van der Walt *South African Journal of Criminal Justice* 298.

190 Van der Schyff and Viljoen *TD: The Journal for Transdisciplinary Research in Southern Africa* 344.

191 *Constitution of RSA*, 1996.

192 *Malzbender et al* http://www.acwr.co.za/pdf_files/08.pdf.

193 Van der Schyff and Van der Walt *South African Journal of Criminal Justice* 297.

194 Although the concepts are not 100% similar, this is in as far as their fiduciary duty is concerned.

195 Van der Schyff and Viljoen *TD: The Journal for Transdisciplinary Research in Southern Africa* 340.

basically confirms the interpretation of the principle that has existed in South Africa's Roman common law that flowing water is common to mankind or *res omnium communes*.¹⁹⁶ However, although the doctrine of public trusteeship shares the abovementioned characteristics with certain of the South African Roman Dutch-common law principles as it relates to the categories of things as well as some Customary Law principles, some of the authors on this issue suggest that its introduction in the NWA should not be regarded as a resurrection of these common law principles.¹⁹⁷ The occurrence of the doctrine is not as a consequence of different principles of our Roman, Roman-Dutch, Indigenous and Customary custom being sewed together in order to create a new South-African cover, but is rather the legislative introduction of a foreign legal doctrine that exhibits similarities with, and also goes beyond the customary and common law principles.¹⁹⁸

In essence, what is actually achieved by means of the application of the public trust doctrine with regards to South African water law is that the dominium in the water resources and the use, together with the enjoyment of these water resources, are disconnected.¹⁹⁹ The dominium over the water resources is acquired by the state and the legal title thereto, as public property, vests in the state and it holds it as trustee, in a purely fiduciary capacity.²⁰⁰ There is, however, a difference in opinion about whether the rights of the state over the resources are not proprietary, but fiduciary in nature.²⁰¹ Be that as it may, the people as a general body in turn acquire the use and enjoyment of the water resources.²⁰² This means that every South African citizen, as beneficiary of the trust, may hold the custodian accountable and acquire judicial protection against infringements or the deterioration of the natural resources.²⁰³

196 Van der Walt and Pienaar *Tydskrif vir die Suid-Afrikaanse Reg* 423.

197 Van der Schyff and Viljoen *TD: The Journal for Transdisciplinary Research in Southern Africa* 342.

198 Van der Schyff and Viljoen *TD: The Journal for Transdisciplinary Research in Southern Africa* 342.

199 Van der Schyff and Viljoen *TD: The Journal for Transdisciplinary Research in Southern Africa* 344.

200 Van der Schyff and Viljoen *TD: The Journal for Transdisciplinary Research in Southern Africa* 344.

201 Van der Schyff *South African Law Journal* 373.

202 Van der Schyff and Viljoen *TD: The Journal for Transdisciplinary Research in Southern Africa* 344-345.

203 Van der Schyff *South African Law Journal* 373.

The doctrine of public trust in the South African law entrusts the overall authority and responsibility over the water resources to the national government of the country, but this has never meant that the government owns²⁰⁴ the water resources.²⁰⁵ The legal nature of the public trust doctrine is not to be inferred from the expression ‘public trust doctrine’ as the word ‘trust’ actually refers to the fiduciary responsibility of the state as sovereign, and is not a suggestion that the trust resemblance was implemented in order to fulfil the necessity to ascertain the owner of the legal title to the resources in which the people of South Africa have a common right.²⁰⁶ Therefore, the government’s activities in relation to the country’s water resources are thus restricted to the areas set out by the NWA in the Act’s objectives and purpose. The South African citizen’s public rights in the public trust property, which means the country’s water resources herein, are determined with reference to, as well as limited by, the provisions contained in the NWA itself.²⁰⁷

It is clear herein, that the public trusteeship, under which the water resources of South Africa have been placed for the benefit of the people, bears similar principles to the trusts as found in the previous legislation in relation to land. Some of the earlier trusts,²⁰⁸ the SADT, the *Ingonyama* trust as well as the public trusteeship of the South African water all consist of trustees who have certain discretionary responsibilities regarding the trust property, be it land, water, or both, towards the trust beneficiaries. As has been established, the beneficiaries thus also have reciprocal rights²⁰⁹ against the trustees of the trust property. It becomes necessary herein to turn to the MPRDA and investigate whether public trusteeship as has been investigated herein, also has similar principles upon which it is based in the regulation of the mineral and petroleum resources of the country.

204 It only held the dominium to the resources for the benefit of the citizens, while the citizens acquired the legal title in respect thereof.

205 Tewari 2009 <http://www.scielo.org.za/pdf/wsa/v35n5/a19v35n5.pdf>.

206 Van der Schyff and Viljoen *TD: The Journal for Transdisciplinary Research in Southern Africa* 345.

207 Van der Schyff and Viljoen *TD: The Journal for Transdisciplinary Research in Southern Africa* 346-347.

208 Such as the South African Native Trusts and others.

209 These rights include the right of the beneficiaries to hold the trustees accountable for maladministration of the trust property.

6 State custodianship under the *Mineral and Petroleum Resources Development Management Act 28 of 2002*

The *Mineral and Petroleum Resources Development Act*²¹⁰ gives effect to section 25(7), which states that communities dispossessed of property as a result of past racially discriminatory laws is entitled to restitution of such property or to equitable redress, and section 25(4)(a) of the *Constitution*²¹¹ which, given South Africa's history of colonialism and apartheid, requires that reform measures be implemented to bring about equitable access to all South Africa's natural resources.²¹² The Act was passed by parliament in 2002 and came into operation on 1 May 2004. It repealed the former *Minerals Act* of 1991.²¹³

The *Minerals Act*²¹⁴ was the biggest step towards a system of exclusive private mineral rights ownership in the history of South Africa, and also attempted a uniform regulation of minerals.²¹⁵ It was basically an attempt to reassert the claims of the private sector over mineral rights by repealing the rights vesting in the state and restoring the common law rights of the holder of the mineral rights.²¹⁶ The MPRDA was enacted in part to eradicate all forms of discriminatory practices in the mining and petroleum industries; and to redress the inequalities of past racial discrimination; and pivotal to achieving these objectives was placing all mineral and petroleum resources in the hands of the nation as a whole and making the state the custodian of the resources on behalf of the nation.²¹⁷

In determining the relevance of the MPRDA, it is essential to trace its background, which is strongly influenced by South African history as the structure of mineral law in South Africa has always been complicated, and heavily influenced by the racial injustices of apartheid.²¹⁸ The MPDRA eradicated the then prevailing dual system of public and private ownership of mineral rights, and substituted it with a system of state custodianship of mineral resources for the benefit of all the inhabitants of South

210 *Mineral and Petroleum Resources Development Management Act 28 of 2002.*

211 S25(4)(a) of the *Constitution of RSA*, 1996.

212 Yazini *Africa Insight* 119.

213 *Minerals Act* 50 of 1991.

214 *Minerals Act* 50 of 1991.

215 Yazini *Africa Insight* 118.

216 Van den Berg *Stellenbosch Law Review* 140.

217 *Minister of Mineral Resources and Others v Sishen Iron Ore Company (Pty) Ltd and Another* 2014 (2) SA 63 (CC) par 10.

218 Yazini *Africa Insight* 117.

Africa.²¹⁹ The enactment of the MPRDA brought an end to the old order's mineral regime by repealing the common law to the extent that its principles were in conflict with the MPRDA, while also repealing the *Minerals Act*²²⁰ and related statutes.²²¹ The MPRDA also includes beneficiation in section 26,²²² which is designed to address the inequalities of the mineral industry and promote sustainable development through the Minister.²²³ The Act introduced a profoundly different system of mineral resource ownership and regulation from that which had previously been in place.²²⁴

It is clear from the preamble of the MPRDA²²⁵ that the purpose of the legislation is, *inter alia*, to acknowledge that South Africa's mineral and petroleum resources belong to the nation and that the state is the custodian thereof.²²⁶ The overarching objective of the Act that can be deduced from the content of section 2, and it provides for the recognition of state sovereignty²²⁷ over all the mineral resources in the Republic.²²⁸ It states that its objectives are, *inter alia*, to recognise the internationally accepted right of state to exercise sovereignty over the entire mineral and petroleum resources within the Republic; to give effect to the principle of the state's custodianship of the mineral and petroleum resources,²²⁹ while promoting equitable access to the *nation's* mineral and petroleum resources to all the people of South Africa and simultaneously expanding opportunities for historically disadvantaged persons to benefit from exploiting the nation's mineral and petroleum resources.²³⁰ Section 3²³¹ which is titled Custodianship of the nation's mineral and petroleum resources, states, *inter alia*, that:

219 Yazini *Africa Insight* 119.

220 *Minerals Act* 50 of 1991.

221 Yazini *Africa Insight* 119.

222 s26 of the *Mineral and Petroleum Resources Development Management Act* 28 of 2002.

223 Yazini *Africa Insight* 119.

224 According to *Agri SA v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) at par 68, ownership of the rights to the mineral and petroleum resources does not vest in the state, only custodianship in respect thereof does. The mineral and petroleum resources belong to the nation of South Africa, and as such ownership vests in them

225 *Mineral and Petroleum Resources Development Management Act* 28 of 2002.

226 Van der Schyff *Tydskrif vir die Suid-Afrikaanse Reg* 758.

227 This principle is similar to that which applies in respect of the water in terms of the NWA and land in terms of the SADT and ITA.

228 Van der Schyff *Tydskrif vir die Suid-Afrikaanse Reg* 758.

229 s2(a)-(b) of the *Mineral and Petroleum Resources Development Management Act* 28 of 2002.

230 Van der Schyff *Tydskrif vir die Suid-Afrikaanse Reg* 758.

231 s3 of the *Mineral and Petroleum Resources Development Management Act* 28 of 2002.

the mineral and petroleum resources are the common heritage of all the people of South Africa and the state is the custodian thereof for the benefit of all South Africans; and as the custodian of the nation's mineral and petroleum resources, the state, acting through the Minister, may grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right; and in consultation with the Minister of Finance, prescribe and levy, any fee payable in terms of this Act.²³²

The new legislative framework does not contain any provisions specifically addressing the issue of ownership of the minerals, apart from stating that it is the common heritage of the people of South Africa, and judging by the different interpretations of this section it can be inferred that there is uncertainty regarding ownership of the unsevered minerals.²³³ By stating that mineral and petroleum resources are the common heritage of all the people of South Africa²³⁴ and appointing the state as the custodian thereof for the benefit of all South Africans²³⁵ has created a stir in the legal fraternity. "All the people of South Africa" cannot become the owner of mineral and petroleum resources as they are not a legal subject.²³⁶ It can thus be concluded that in effect ownership of the mineral and petroleum resources of the country have been vested in the state as custodian thereof. This could be interpreted on the basis of the state being the legal personification of the citizens of South Africa, or alternatively on the state having been appointed as the owner of mineral and petroleum resources in its capacity as public trustee.²³⁷ It has been accepted that after severance of the mineral and petroleum resources ownership is attained by the holder of the prospecting right, mining right, exploration right or production right.²³⁸ It could be concluded that the literal meaning of s 3(1) of the MPRDA is that ownership of minerals *in situ* is vested in the state, but the state only owns such minerals in its capacity as custodian for the

232 S3(1)-(2)(b) of the *Mineral and Petroleum Resources Development Management Act* 28 of 2002.

233 Van den Berg *Stellenbosch Law Review* 140.

234 s3 of the *Mineral and Petroleum Resources Development Management Act* 28 of 2002.

235 s3 of the *Mineral and Petroleum Resources Development Management Act* 28 of 2002.

236 Van der Vyver *De Jure* 133.

237 Van der Vyver *De Jure* 133.

238 Van den Berg *Stellenbosch Law Review* 140.

benefit of the people of South Africa.²³⁹ This particular type of state ownership is thus encumbered by a custodial duty.²⁴⁰

By the appointment of the state as custodian of the mineral and petroleum resources of the country for the benefit of the citizens, the Act invoked and applied the notion of custodianship, which has to do with the public law. This represents a dramatic break with the *Minerals Act*,²⁴¹ which acknowledged mineral rights as independent rights to be dealt with in the private sector.²⁴² This therefore means that the state, in its capacity as custodian, has obligations towards the people of South Africa with regards to the mineral and petroleum resources, and they in turn have enforceable rights against the state in this regard to hold the state accountable, where the state does not carry out its obligations in terms hereof.

Having regard to the right of a landowner to the mineral and petroleum resources in his land, it would seem that declaring all mineral and petroleum resources as the common heritage of all the people of South Africa was the application of the model of expropriation.²⁴³ It should be noted that the taking away of property does not always necessarily constitute expropriation, but should one prefer to describe expropriation in contradistinction to deprivation bearing in mind the wording of section 25 of the *Constitution*,²⁴⁴ then rendering defunct the ownership of a landowner of the mineral and petroleum resources in his land falls evenly within the confines of section 25(2).²⁴⁵ Divesting the landowner of his common-law right of ownership of the mineral and petroleum resources within his land was evidently intended to further a public purpose as well as to be in the public interest within the meaning of expropriation²⁴⁶ as per the *Constitution*,²⁴⁷ as it states that for purposes of expropriation, 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.²⁴⁸ At first glance it seems that the nationalisation of the mineral and petroleum resources

239 Badenhorst *South African Law Journal* 656.

240 Badenhorst *South African Law Journal* 656.

241 *Minerals Act* 50 of 1991.

242 Van den Berg *Stellenbosch Law Review* 140.

243 Van der Vyver *De Jure* 132.

244 *Constitution of RSA*, 1996.

245 Van der Vyver *De Jure* 132.

246 Van der Vyver *De Jure* 132-133.

247 *Constitution of RSA*, 1996.

229 s25(4)(a) of the *Constitution of RSA*, 1996.

is a demonstration of the application of expropriation within the confines of section 25(2) of the *Constitution*.²⁴⁹ Van der Vyver concurs therewith, and is of the opinion that since acquisition of the right taken is a component of expropriation as concluded by the Court in *Agri South Africa v Minister of Mineral and Energy*,²⁵⁰ then the state as custodian of such rights taken will fill the space.²⁵¹ The court, in the same case was concerned with the question as to whether the MPRDA necessitates expropriation, as contended by Van der Vyver, or deprivation in terms of section 25(1).²⁵² It was stated therein that the expropriation necessitates state acquisition of property in the public interest and it should always be accompanied by compensation, whereas deprivation refers to sacrifices that those holders of private property rights may have to make without compensation.²⁵³ The court further stated that deprivation within the ambit of section 25 comprises extinguishing a right that was previously enjoyed, and expropriation is only a subdivision thereof.²⁵⁴ Although there is an intersection and no bold line of differentiation between sections 25(1) and 25(2), there is more required to establish expropriation. Section 25(1) is concerned with all property and all deprivations, including expropriation itself, even though further requirements must be complied with in order for deprivation to constitute expropriation. These requirements are:²⁵⁵

- (i) compulsory acquisition of rights in property by the state, (ii) for a public purpose or in the public interest, and (iii) subject to compensation.

Van der Vyver only dealt with expropriation as far as the divesting the landowner of his ownership of the mineral and petroleum resources within his land, and stated that it was evidently intended to further a public purpose as well as to be in the public interest.²⁵⁶ He did not consider the other requirements for deprivation to rise up to the level of expropriation, and it is for this reason that his opinion cannot be supported.

249 *Constitution of RSA*, 1996. Van der Vyver *De Jure* 133.

250 *Agri SA v Minister of Minerals and Energy* 2013 (4) SA 1 (CC).

251 Van der Vyver *De Jure* 133.

252 s25(1) of the *Constitution of RSA*, 1996.

253 *Agri SA v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) par 48.

254 *Agri SA v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) par 48.

255 *Agri SA v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) par 67.

256 Van der Vyver *De Jure* 132-133

In order to prove expropriation, the claimant must establish that the state has attained the core content of what they were deprived of, not necessarily the same rights that were lost, but there would have to be substantial similarity between what was lost by the claimant and what was acquired by the state.²⁵⁷

The custodianship of the mineral and petroleum resources is, according to the MPRDA, vested in the state on behalf of the people of South Africa.²⁵⁸ The critical question is therefore whether the deprivation; the acquisition of custodianship; and the authority to grant others what could formerly have been granted only by holders, means that the state has attained ownership of the rights to these mineral and petroleum resources.²⁵⁹ The court answered this question in the negative, and further stated that unlike in the case where the state acquires land for state projects such as road infrastructure, the state did not acquire any mineral rights at the inauguration of the MPRDA.²⁶⁰ The state, as the custodian of these resources, is not supposed to be a co-contender for the right to mine or prospect for the minerals, and is only a facilitator through which broader and equitable access to mineral and petroleum resources of the country can be realised.²⁶¹ There can thus be no expropriation in the situation where the deprivation does not result in property being acquired by the state.²⁶²

The state's fiduciary role and fiduciary responsibilities are accentuated by declaring the state as custodian in the Act from as early as section 2.²⁶³ The fiduciary responsibility tied together with the bequest to the nation are the two most important characteristics of the public trust doctrine, a foreign doctrine from the Anglo American trust doctrine, first officially mentioned in the South African context in relation to water law,²⁶⁴ in the *National Water Act*.²⁶⁵ But, as seen above with the South African Development Trust and other trusts, the practical application of the public trust doctrine is not necessarily novel in South Africa.

257 *Agri SA v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) par 48.

258 s3 of the *Mineral and Petroleum Resources Development Management Act* 28 of 2002.

259 *Agri SA v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) par 68.

260 *Agri SA v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) par 68.

261 *Agri SA v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) par 68.

262 *Agri SA v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) par 59.

263 s2(a) of the *Mineral and Petroleum Resources Development Management Act* 28 of 2002.

264 Van der Schyff *Tydskrif vir die Suid-Afrikaanse Reg* 760.

265 *National Water Act* 36 of 1998.

As has been established herein, it is clear that public trusteeship as found in the various trust legislation and as identified in the practical application of the trusts, corresponds to custodianship as found in the MPRDA. The state, as custodian of the trust property, acts as trustee of the property for the benefit of the beneficiaries of the trust. It thus becomes necessary to investigate the nature of the responsibilities of the state towards the citizens under this doctrine of trusteeship as it emanates from SADT legislation and other forms of trust in South Africa regarding natural resources pre 1994, and as it corresponds with custodianship under the MPRDA post 1994. Because the beneficiaries of the trust also bear corresponding rights thereto, such corresponding rights of the citizens against the state will also be discussed.

7 State's general fiduciary obligation towards its subjects

7.1 The general obligation to act as custodian

The nature of normal obligation on a state towards the citizens has to be determined in order to be able to thoroughly understand the nature of the responsibilities of the state towards the citizens as beneficiaries under both the notion of trusteeship and the concept of custodianship under the MPRDA.

The *Constitution of RSA*, 1996²⁶⁶ denotes a social contract between the state and its citizens, thus operating like a performance manual that controls, instructs and directs the state in its actions.²⁶⁷ These duties that are imposed on the state, form an essential foundation of the *Constitution* which must be complied with in order to ensure the legitimacy of the *Constitution* and the realisation of its democratic objectives and ideals.²⁶⁸ Section 24 of the *Constitution*²⁶⁹ confers upon the authorities a stewardship responsibility whereby the present generation is constituted as the custodian or trustee of the environment for the benefit of future generations.²⁷⁰ In South Africa, the concept of stewardship has not been thoroughly defined by our courts, but from its ordinary meaning it can be gathered that it displays certain unique characteristics such as, *inter alia*, a duty towards the environment; the duty to conserve resources; the duty to protect and preserve resources; and a duty towards other people, including future generations, in respect of the resources.²⁷¹

As a result of the nature of the duties imposed on the state towards its citizens, the former thereby has discretionary powers over the assets and/or legal interests of the latter, and it is in these types of scenarios where a fiduciary relationship emerges.²⁷² In addition to the aforementioned, a fiduciary relationship is further characterised by the fact that the beneficiary is peculiarly vulnerable to the fiduciary's power in the sense that it is unable, either as a matter of fact or law, to exercise the entrusted

266 *Constitution of RSA*, 1996. Hereinafter, the Constitution.

267 Malhebre and Van Eck *Tydskrif vir die Suid-Afrikaanse Reg* 212.

268 Malhebre and Van Eck *Tydskrif vir die Suid-Afrikaanse Reg* 212.

269 s24 of the *Constitution of RSA*, 1996.

270 *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism & others* [2006] ZAGPHC 132 para 19.

271 Van der Schyff *South African Law Journal* 371.

272 Leib, Ponet and Serota 2012 <http://heinonline.org>.

power.²⁷³ The state is thus the fiduciary, and has a fiduciary obligation towards the citizens, whom are the beneficiaries in this matter as they are also peculiarly vulnerable to the state's power as the custodian of their legal interests. Even with the abovementioned characteristics of a fiduciary relationship between the state and its citizens the concept of fiduciary obligation is still not clearly defined nor is it even capable of precise definition. The reason for this is mainly that the definition will always depend on the nature of the particular fiduciary's responsibilities in the particular setting.²⁷⁴

The notion that government keeps power in trust for its citizenry dates back to Plato, Aristotle, and Cicero: sovereign institutions were thought to hold citizens' interests in a public trust, constrained by fiduciary standards.²⁷⁵ As was the case even then, the consequence of conceiving the state as fiduciary is that everyone subject to state power, regardless of civil or political status, is a beneficiary of an overarching fiduciary obligation that manifests itself as the rule of law.²⁷⁶ The fiduciary's power is, however, purposive in that it is held or conferred for limited purposes, such as furthering exclusively the equitable interests of a trust's beneficiary.²⁷⁷ The Constitution was designed as "the fiduciary law of public power," delimiting governmental authority and directing it to the benefit of the citizen-beneficiaries.²⁷⁸ As for the beneficiaries, they are peculiarly vulnerable in that, once in a fiduciary relationship, they generally are unable to protect themselves or their entrusted interests against an abuse of the fiduciary power by the state.²⁷⁹ Owing in part to the beneficiary's vulnerability and the fiduciary's discretionary power, and in part to the expertise the fiduciary often holds, the fiduciary relationship must be founded on a substantial degree of trust or confidence.²⁸⁰

273 Criddle and Fox-Decent Unknown http://www.yale.edu/yjil/files_PDFs/vol34/Criddle_Fox-Decent.pdf

274 Van der Merwe *Without Prejudice* 37. See also *Hoffer v Kevitt* 1998 1 SA382 (SCA)

275 Leib, Ponet and Serota Unknown <http://heinonline.org>.

276 Evan Fox-Decent Unknown <http://people.mcgill.ca/files/evan.foxdecent/FiduciaryNatureStateLegalAuthority.pdf>

277 Criddle and Fox-Decent Unknown http://www.yale.edu/yjil/files_PDFs/vol34/Criddle_Fox-Decent.pdf.

278 Leib, Ponet and Serota 2012 <http://heinonline.org>

279 Criddle and Fox-Decent Unknown http://www.yale.edu/yjil/files_PDFs/vol34/Criddle_Fox-Decent.pdf.

280 Leib, Ponet and Serota 2012 <http://heinonline.org>.

The idea that the state is a fiduciary of the people subject to its powers draws on the general constitutive characteristics of fiduciary relationships as referred to earlier,²⁸¹ as the state's legislative and executive branches all assume discretionary power of an administrative nature over the people affected by its power.²⁸² The minimal substantive content of the state's fiduciary obligation to its citizens is compliance with the *jus cogens*, an obligation that remains in place whether or not the state has ratified a convention that signals a commitment to such norms.²⁸³

7.2 The obligation in terms of both the notions of custodianship and trusteeship

The primary principle on which the notion of trusteeship, as found in the SADT, is founded is that state governments must manage and protect certain natural resources, such as land, for the sole intergenerational benefit of their citizens.²⁸⁴ *Prima facie*, it appears that the word "trust" refers to the fiduciary responsibility of the sovereign rather than to the legal nature of the doctrine of trusteeship.²⁸⁵ The state thus realises the duty imposed on it by honouring the restraint on alienation and protecting the public's right of use. As such, every citizen, as a beneficiary of the trust, is able to hold the trustees liable and acquire judicial protection against infringements or deterioration of the particular natural resources held in trust. This was the position in terms of the SADT regarding the concerned land.

With regards to South Africa's mineral resources, a subject matter that is currently governed by the MPRDA, it is said that ownership thereof cannot legally vest in the nation because the nation has no legal personality enabling it to acquire or hold ownership in that sense.²⁸⁶ The MPRDA as such then proceeded to describe the state as custodian of the said mineral resources for the benefit of the nation in order to emphasise the state's fiduciary role and fiduciary responsibilities in this regard. When discussing the state's role as custodian of mineral and petroleum resources, it

281 Namely, the discretionary power of an administrative nature and vulnerability.

282 Criddle and Fox-Decent Unknown http://www.yale.edu/yjil/files_PDFs/vol34/Criddle_Fox-Decent.pdf.

283 Criddle and Fox-Decent Unknown http://www.yale.edu/yjil/files_PDFs/vol34/Criddle_Fox-Decent.pdf.

284 Van der Schyff *South African Law Journal* 372.

285 Van der Schyff *Potchefstroom Electronic Law Journal* 129.

286 Van der Schyff *Tydskrif vir die Suid-Afrikaanse Reg* 760. This position is still a subject amongst legal academics.

is therefore important to look at the powers as well as the duties granted to the state in regard rather than trying to define custodianship. This has the implication that the sovereign rights of nation states over the environmental resources are not proprietary, but fiduciary' in nature.²⁸⁷

As mentioned above, the concept of fiduciary obligation has not been accurately defined in South Africa. In fact, it has often been erroneously used interchangeably with the concept of good faith²⁸⁸ by our courts, for example in *Ferguson v Sapref Pension Fund*,²⁸⁹ as well as by academics.²⁹⁰ A fiduciary duty, in essence, imposes upon its bearer, a duty to act in the best interest of the person or persons to whom the duty is owed.²⁹¹ Common law fiduciary duties have been developed over time by our courts,²⁹² and there are also fiduciary duties which have been established through legislation.²⁹³ Fiduciary duties arise as a consequence of a fiduciary relationship existing between the concerned parties. Therefore in case of the SADT, since the state in administration of land, had the duty to act in the best interests of the African natives, such duty constituted a fiduciary duty. The MPRDA, by appointing the state as custodian of the mineral and petroleum resources and the people of South Africa as beneficiaries thereto,²⁹⁴ it also conferred a fiduciary duty upon the state and to act on behalf and for the benefit of citizens with regards to the resources of the country. The citizens were also conferred upon fiduciary rights against the state with regards to the natural resources. It follows that the relationship between these parties was fiduciary in nature, and the beneficiaries therefore acquired fiduciary rights against the state. In regard to the SADT, this was of course regulated by the earlier apartheid legislation concerning land, until ultimately by the *South African Development Trust Act*.²⁹⁵

287 Van der Schyff *South African Law Journal* 373.

288 The concepts of good faith (*bona fides*) and utmost good faith (*ubrimae fidei*) were already used in Roman law.

289 *Ferguson v Sapref Pension Fund & others* [2002] 6 BPLR 3572 (PFA) par 9, court held that "The duty to act in good faith therefore does not equate to a duty to act reasonably ..., and it is not a fiduciary duty..."

290 Marumoagae *Potchefstroom Electronic Law Journal* 558.

291 Marumoagae *Potchefstroom Electronic Law Journal* 558-559.

292 *Robinson v Randfontein Estates Gold Mining Co Ltd* 2 1921 AD 168.

293 s 9 of the *Trust Property Control Act* 57 of 1988.

294 s 3 of the *Mineral and Petroleum Resources Development Act* 28 of 2002

295 *South African Development Trust Act* 198 of 1963.

Be that as it may, neither the SADT legislation, the ITA, water resource legislation nor the MPRDA has explicitly dwelt on the issue of ownership of the trust land or the natural resources of the country. It thus becomes necessary herein, to investigate as to with whom ownership of the trust property actually vests.

8 Ownership of the trust property

As has been highlighted before, the MPRDA states that the mineral and petroleum resources are the common heritage of all the people of South Africa and the state is the custodian thereof for the benefit of all South Africans,²⁹⁶ but the Act does not seem to identify who the owner, in the true sense, of the said mineral and petroleum resources is. The definition of ownership is essential in directing whether, in the instance where a mining right, prospecting right, production right, exploration right, or mining permit has been granted it means that the holder of the right should have an action for damages or a vindicatory action against an unlawful third party.²⁹⁷

The courts have had a difficult time in providing clarity on the issue of ownership. In *De Beers Consolidated Mines Limited v Ataquia Mining (Pty) Ltd*²⁹⁸ the court did not make a ruling on ownership of the mineral and petroleum resources *in situ*, except to state that:

the MPRDA leaves no doubt that mining rights in respect of minerals which have not been mined, have been taken out of private hands, and that such rights vest in the custodianship of the state.

In *De Beers Consolidated Mines Limited v Regional Manager, Mineral Regulation Free State Region, Department of Minerals*²⁹⁹ without elaborating any further in the discussion, the court stated that since 1 May 2004 the state is vested with the custodianship and control of all mineral resources that belong to the nation. In the case of *Joubert v Maranda Mining Company (Pty) Ltd*³⁰⁰ it was stated that when the MPRDA came into effect the state became custodian of all minerals in the whole of the Republic of South Africa. In *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*³⁰¹ a possible change in ownership as a result of the MPRDA of minerals was raised but not decided upon by the Constitutional Court. Only two different circumstances were mentioned, namely, the ownership of unsevered minerals as they reside in custody of the state, or ownership of the land as well as

296 s 3(1) of the *Mineral and Petroleum Resources Development Act* 28 of 2002.

297 Marumo *Without Prejudice* 50.

298 In *De Beers Consolidated Mines Limited v Ataquia Mining (Pty) Ltd* [2009] JOL24502 (O) par 67

299 *De Beers Consolidated Mines Limited v Regional Manager, Mineral Regulation Free State Region, Department of Minerals* [2009] JOL 23667.

300 *Joubert v Maranda Mining Company (Pty) Ltd* 2010 (1) SA 198 (SCA) par 2.

301 *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 CC par 40.

surface rights and what is below it in all the fullness that the common law allows,³⁰² however, section 4(2) of the MPRDA provides that where the common law is inconsistent with the MPRDA, the MPRDA shall prevail.³⁰³ The court in the case of *Minister of Mineral Resources v Sishen Iron Ore Company (Pty) Ltd*,³⁰⁴ finally shed some light on the issue of ownership of the minerals. The court specifically held that the private ownership of minerals by the concerned companies could not continue because the MPRDA has vested all minerals in the state.³⁰⁵ The court went on further to state that:³⁰⁶

The MPRDA did away with mineral rights or rights to minerals which, before its coming into operation, were drawn from the common law, were privately held and were exploited only if so authorised by the state. Under the aegis of the MPRDA no rights related to mining and petroleum resources may be allocated purely on private law. Only their custodian, the state, may (subject to the requirements of the MPRDA) grant exploration rights; prospecting rights; mining rights and production rights

This means that ownership of the mineral resources by private individuals is not possible anymore, and such ownership has been vested in the people of South Africa while the state manages the resources for the benefit of the people in line with its duty as custodian. In an attempt to explain the content of vesting ownership of the minerals in the state and the nation, the reference to mineral resources in the MPRDA has been said to be a broad reference to the minerals collectively in South Africa, the collective wealth thereof thus being the resource which belongs to the nation, as opposed to the minerals as such.³⁰⁷ It has also been maintained that the common law position that ownership of the mineral and petroleum resources vests in the landowner remains intact, and that to hold otherwise would mean that ownership of the land on which the resources emanate would be lost in favour of the owner of

302 *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 CC par 63.

303 Badenhorst *De Jure* 620.

304 *Minister of Mineral Resources and Others v Sishen Iron Ore Company (Pty) Ltd and Another* 2014 (2) SA 603 (CC).

305 *Minister of Mineral Resources and Others v Sishen Iron Ore Company (Pty) Ltd and Another* 2014 (2) SA 603 (CC) par 63 Sishen and AMSA, the concerned companies, were holders of the common-law mineral rights and mining licences in terms of which mining was carried out until the MPRDA came into operation.

306 *Minister of Mineral Resources and Others v Sishen Iron Ore Company (Pty) Ltd and Another* 2014 (2) SA 603 (CC) par 85.

307 Marumo *Without Prejudice* 50.

the minerals.³⁰⁸ As a result of the provisions of the MPRDA,³⁰⁹ only the state as custodian of the mineral and petroleum resources is responsible for the granting of rights and permits regarding prospecting or mining of the minerals. According to this view, where no such right or permit has been authorised by the state in relation to prospecting or mining of the mineral and petroleum resources concerned, the owner of the land is thus the owner of such minerals *in situ*.³¹⁰ However, such ownership by the landowner is unenforceable against unlawful miners of the said resources as he does not have, at his disposal, a vindictory action or action for damages against the illegal miners since he is not authorised to deal with the minerals without obtaining the necessary right or permit granted in terms of the MPRDA from the state.³¹¹ This line of thought is clearly flawed. Section 3(1) of the MPRDA clearly abolished the common law maxim that the owner of the land is also owner of the unsevered minerals in such land.

Researchers on this topic are of the view that when questions are asked that relate to the ownership of the property that falls under the public trust doctrine, one must immediately be aware of the limitations of language.³¹² The term of ownership is said to be intrinsically linked to the South African private property, which is at odds with the spirit of the MPRDA because the MPRDA is considered to have eradicated the dual system of public and private ownership of mineral rights that was in force, and substituted it with a system of state custodianship of mineral resources for the benefit of all the inhabitants of South Africa.³¹³ In addition thereto, the South African legal system provides that only legal persons, that is natural and/or juristic persons can acquire and hold property as owners thereof.³¹⁴ Be that as it may, it is furthermore true that ownership cannot legally vest in the nation because the nation does not have the requisite legal personality enabling it to acquire or hold ownership.³¹⁵ The use of the term custodianship with regards to the state's authority over the mineral and petroleum resources of the country has been said to be a

308 Marumo *Without Prejudice* 50.

309 s 3(1) of the *Mineral and Petroleum Resources Development Act* 28 of 2002.

310 Marumo *Without Prejudice* 50.

311 Marumo *Without Prejudice* 50.

312 Van der Schyff and Viljoen *TD : The Journal for Transdisciplinary Research in Southern Africa* 343.

313 Yazini *Africa Insight* 119.

314 Van der Schyff and Viljoen *TD : The Journal for Transdisciplinary Research in Southern Africa* 343.

315 Van der Schyff *Tydskrif vir die Suid-Afrikaanse Reg* 760.

misnomer, since the MPRDA strives to achieve more than only custodianship of the minerals, it also seeks to achieve the actual vesting of mineral and petroleum resources in the state.³¹⁶ The challenge with custodianship is that the custodian is supposed to hold the property not for himself, but on behalf of other persons.³¹⁷

The Constitutional Court in *Agri SA v Minister of Minerals and Energy*³¹⁸ the question of ownership of minerals was left open, and it was instead decided that the state actually acquired the substance of the property rights of the previous holder of common law mineral rights upon commencement of the MPRDA.³¹⁹ The court explained that from on the interpretation of sections 3 and 5 of the MPRDA, the Minister is entrusted with the power to confer rights, the contents of which were considerably the same as, and in some respects, indistinguishable to, the contents of common law mineral rights.³²⁰ The fact that the competencies of the state are jointly referred to as custodianship was regarded as inconsequential by the court.³²¹

As custodian of the natural resources, the state incurs certain duties and responsibilities towards the people of South Africa. The state, through the Minister of mineral resources, is tasked with ensuring that the objectives of the MPRDA are met.³²² As has already been said above, the nature of the relationship between the state as custodian and the South African people as beneficiaries as regards the trust property is one of a fiduciary nature. Stated differently, a trustee or custodian inhabits a fiduciary position or holds the trust property in a fiduciary capacity.³²³ The word 'trust' herein, refers to the fiduciary responsibility of the state as the sovereign,³²⁴ and it is the said fiduciary responsibility as created in the Act that sheds light on the question of ownership of the country's mineral resources.³²⁵ Through the statutorily created public trust,³²⁶ the state's activities with regards the country's resources are constrained to the sphere created by the objectives and purpose of

316 Marumo *Without Prejudice* 51.

317 Marumo *Without Prejudice* 51.

318 *Agri SA v Minister of Minerals and Energy* 2011 All SA 296.

319 *Agri SA v Minister of Minerals and Energy* 2011 All SA 82-94.

320 *Agri SA v Minister of Minerals and Energy* 2011 All SA 82.

321 Badenhorst *De Jure* 620.

322 Mkhize *De Rebus* 58.

323 Du Toit *Stellenbosch Law Review* 471.

324 Van der Schyff and Viljoen *TD: The Journal for Transdisciplinary Research in Southern Africa* 345.

325 Van der Schyff *Tydskrif vir die Suid-Afrikaanse Reg* 760.

326 Although this term is not specifically referred to in the MPRDA.

the Act, and in addition thereto, an obligation is formed through which the government is compelled by the Act to see to it that the said objectives are pursued,³²⁷ and if not, the citizens as beneficiaries of the trust may enforce their rights in regard thereto and hold the government accountable. The state is thus tasked with the fiduciary responsibilities of, *inter alia*, acknowledging that South Africa's mineral and petroleum resources belong to the nation and that the state is the custodian thereof, as well as affirming the state's obligation to protect the environment for the benefit of present and future generations.³²⁸

The role of the state in the public trusteeship system thus becomes clear, and it can be safely said that since the state's participation is regulated and limited by the Act, it can be concluded that the state does not carry out its fiduciary responsibilities in the capacity of owner of the resources. What the state is required to do in terms of the Act is to only fulfil its responsibilities through the management and control of the property in terms of the MPRDA, and it cannot be released from that duty by a transfer of the property except only when a public interest is being promoted or where the alienation does not substantially prejudice the public interest in the natural resources that are left over.³²⁹ The beneficiaries in terms of the system are, however, permitted to exercise ownership rights as regards the trust property, and this has been the status quo since from the application of the system of public trusteeship in South Africa. For example, during the 20th century numerous Africans that owned farms in the Pretoria and Rustenburg Magisterial Districts were at liberty to act like owners in respect of the land that was under the system of public trusteeship, and this was because the trusteeship system did not interfere with their ownership rights.³³⁰ They exercised their inherent rights to approve, disapprove, or defer contracts; they contracted debts and raised money to pay off their obligations among themselves.³³¹ The state could not exercise such rights, and in fact, as far as can

327 Van der Schyff and Viljoen *TD : The Journal for Transdisciplinary Research in Southern Africa* 345.

328 *Mineral and Petroleum Resources Development Act* 28 of 2002.

329 Van der Schyff *Tydskrif vir die Suid-Afrikaanse Reg* 763.

330 Bergh and Feinberg *Kleio* 187. There was a clear distinction between land use rights and land alienation/disposal rights

331 Bergh and Feinberg *Kleio* 187.

be determined, the Minister exercised little, if any, control or influence over who lived on a farm or whether the owners raised crops or cattle or both.³³²

From the aforementioned, it can be concluded that this doctrine of public trusteeship is only the legal vehicle for transporting the concept that mineral resources are the common heritage of the nation irrespective of the fact that the nation is not an entity clothed with legal personality.³³³ The state thus only acts as custodian of the mineral and petroleum resources on behalf and for the benefit of the South African people. It therefore implies that ownership of the trust property vests in the state, but for the benefit of the beneficiaries thereof. The state only holds the resources in its capacity as custodian or trustee for the benefit of the people.

332 Bergh and Feinberg *Kleio* 188.

333 Van der Schyff *Tydskrif vir die Suid-Afrikaanse Reg* 760.

9 The doctrines of public trusteeship and custodianship in foreign countries

The *Mineral and Petroleum Resources Development Act* states in section 3, that the mineral and petroleum resources are the common heritage of all people in South Africa, and that the state is the custodian thereof for the benefit of all South Africans.³³⁴ It has been stated that the mineral and petroleum resources are subject to the public trust doctrine,³³⁵ and it has also been said that the doctrine of public trusteeship, as demonstrated in the South African legislation, encapsulates the sovereign's fiduciary duty to act as the guardian of certain interests for the benefit of the nation as a whole.³³⁶

Public trusteeship has been said to be a foreign phrase in South African law.³³⁷ In the extraction of the essence of this doctrine of public trusteeship, it thus becomes necessary to turn to the foreign legal systems where it is applied as a fragment of the common law of the jurisdictions.³³⁸

9.1 The Anglo-American doctrine of public trust

Van den Berg has made the submission that there was uncertainty as to whether the case law,³³⁹ NEMA³⁴⁰ and the *National Water Act*³⁴¹ all refer to the Anglo-American doctrine of public trust or whether the concept is being applied without any consideration being given to the Anglo-American public trust doctrine.³⁴² He further provided that some legal academics argue that reference is made to the American idea of public trust, while others are disinclined to admit that the American public trust doctrine found its way into South African law.³⁴³ Academics such as Van der

334 s3 of the *Mineral and Petroleum Resources Development Act* 28 of 2002.

335 Van den Berg Stellenbosch Law Review 146.

336 Van der Schyff *Potchefstroom Electronic Law Journal* 123.

337 Van der Schyff *South African Law Journal* 370.

338 Van der Schyff and Viljoen *TD : The Journal for Transdisciplinary Research in Southern Africa* 342.

339 See the case of *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products* 2004 2 SA 393 (E) par 418, where the court found that the environment is held in public trust and the state is custodian thereof. Also see *South African Shore Angling Association and Another v Minister of Environmental Affairs* 2002 5 SA 511 (SE) par 525, which was also concerning the environment.

340 *National Environmental Management Act* 107 of 1998.

341 *National Water Act* 36 of 1998.

342 Van den Berg Stellenbosch Law Review 146.

343 Van den Berg Stellenbosch Law Review 146.

Schyff are the ones that hold the former view. Van der Schyff found that the principle of public trusteeship manifests clearly in the Anglo-American public trust doctrine.³⁴⁴

One can refer to the said Anglo-American public trust doctrine in this regard, a notion also found in the French jurisprudence wherein, a clear distinction is made between *le domain public* and *propriété*.³⁴⁵ It is private ownership and the concept that is applicable in German jurisprudence, wherein a particular category of property can be detached from the realm of private property altogether; or in which a particular category of property rights can be converted into public-law rights for the sake of additional effective control.³⁴⁶ The interpretation of the doctrine was carried over into American law from the English common law, together with its Roman roots.³⁴⁷ As a result thereof, whenever the phrase 'public trust doctrine' is used in the American legal literature, it either refers to a common-law doctrine or to a statutory doctrine that is incorporated in constitutional or statutory law.³⁴⁸ The public trust doctrine was originally established in the American legal system as a response to the aspiration to determine the ownership of the beds of navigable waters.³⁴⁹ The said navigable water beds were held in trust by the states.³⁵⁰ The American common-law doctrine basically established the state's dominium and authority over the soils under tide water, defining it as a fiduciary dominium whilst simultaneously confirming the public's right of access for the identified uses of fishing, commerce and navigation.³⁵¹

As previously stated, in America the scope of the traditional public trust doctrine was limited only to water-related resources, such as the great lakes and the sea, navigable waters within the streams and rivers, and oil beneath the waters; but the trust was later extended to the parklands as well.³⁵² The doctrine was traditionally intended to protect the common rights of access to the water resources for commercial purposes,³⁵³ but the focus thereof later changed to environmental

344 Van der Schyff *South African Law Journal* 374.

345 Van der Schyff *Potchefstroom Electronic Law Journal* 124.

346 Van der Schyff *Potchefstroom Electronic Law Journal* 124.

347 Van den Berg *Stellenbosch Law Review* 147.

348 Van der Schyff *South African Law Journal* 375.

349 Van der Schyff *Potchefstroom Electronic Law Journal* 125.

350 Van den Berg *Stellenbosch Law Review* 147.

351 Van der Schyff *South African Law Journal* 375.

352 Van den Berg *Stellenbosch Law Review* 147.

353 Fishing, for example.

protection.³⁵⁴ The doctrine of public trusteeship essentially recognises that certain resources are so fundamental for the well-being of the community that they are said to neither be susceptible to private ownership nor to unhampered state ownership.³⁵⁵

The very first federal court decision confirming the public trust doctrine occurred in 1842 when the American Supreme Court in *Martin v. Waddell*³⁵⁶ found that the public held a conjoint right to fish in tidal and navigable tidal waters of New Jersey because they, as well as their underlying lands, were owned by the state for the common use by the people.³⁵⁷

Interesting enough, although the state was permitted to exercise their dominium over the resources in a way that would guarantee freedom in the use of the property subject to the doctrine,³⁵⁸ the use of the lands that were subject to the public trust doctrine could be modified or altered.³⁵⁹ These resources were thus owned by the state, but the state was not the owner thereof in the ordinary private law sense of the concept but by a title totally different in character from that which the state may hold in land that is intended for sale.³⁶⁰ In its traditional, American common-law formulation, the public trust doctrine is best understood as an easement that members of the public hold in common.³⁶¹ This easement of the public burdens the state's ownership of the resources with the fiduciary responsibility inherent to the public trust.³⁶² What this actually means is that property or resources that are subject to the public trust doctrine fall in the sphere where private and public law overlap and the title of the said property vests in the state as custodian, or trustee, with the nation as beneficiary.³⁶³

9.2 Indian doctrine of public trust

The Indian courts have explicitly applied the doctrine of public trust in three recent cases, the most important one being *M.C. Mehta v Kamal Nath and others*.³⁶⁴ The

354 Van den Berg *Stellenbosch Law Review* 148.

355 Van der Schyff *South African Law Journal* 376.

356 *Martin v. Waddell* 1842 (41) US 367 (USSC).

357 Anonymous 2010 http://www.fw.msu.edu/documents/ptd_10-1.pdf.

358 The kind of use that is consistent with the public interest.

359 Van der Schyff *Potchefstroom Electronic Law Journal* 127.

360 Van der Schyff *South African Law Journal* 376.

361 Van der Schyff *Potchefstroom Electronic Law Journal* 130.

362 Van der Schyff *South African Law Journal* 379.

363 Van den Berg *Stellenbosch Law Review* 148-149.

364 *M.C. Mehta v Kamal Nath and others* 1997 1 (SCC) 388.

Indian Supreme Court applied the public trust doctrine in relation to the preservation and protection of the natural resources, in particular, the River Beas. In this case, the State Government approved lease of riparian forestland to a certain private company for commercial purpose of building a motel at the bank of the River Beas.³⁶⁵ A report published in a national newspaper alleged that the motel management hampered the natural flow of the river in order to direct its passage and to protect the motel from future floods, thus the Supreme Court *suo motu* initiated an action grounded on the newspaper because the facts disclosed, if proved to be true, would be a serious act of environmental degradation.³⁶⁶ The court stated that.³⁶⁷

Our Indian legal system, which is based on English common law, includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources, which are by nature meant for public use and enjoyment. The public at large is the beneficiary of the seashore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership. As rivers, forests, minerals and such other resources constitute a nation's natural wealth. These resources are not to be frittered away and exhausted by any one generation. Every generation owes a duty to all succeeding generations to develop and conserve the natural resources of the nation in the best possible way. It is in the interest of mankind. It is in the interest of the nation. Thus, the Public Trust doctrine is a part of the law of the land.

The court further went on to rule that there is no justifiable reason to rule out the application of the public trust doctrine in all of the ecosystems of India.³⁶⁸

9.3 The English public trust doctrine

As early as 1865, in the case of *Gann v Free Fishers of Whitstable*,³⁶⁹ the English House of Lords defined the concept of public trust over the natural resources. The court held that the bed of all navigable rivers where the tide flows, and all bays or arms of the sea, is vested in the Crown by law.³⁷⁰ However, the ownership of the crown

365 Unknown 2012 <http://www.elaw.org/node/1360>.

366 Kapoor Unknown <http://www.legalserviceindia.com/articles/ptdoc.htm>.

367 *M.C. Mehta v Kamal Nath and others* 1997 1 (SCC) 388.

368 Kapoor Unknown <http://www.legalserviceindia.com/articles/ptdoc.htm>.

369 *Gann v Free Fishers of Whitstable*, House of Lords, 3 March 1865, 11 E.R. 1305 (1865) 11 H.L. Cas. 192.

370 Kameri-Mbote 2007 <http://www.lead-journal.org/content/07195.pdf>.

was for the advantage of the subject, and as such, cannot be used in any way that may derogate from, or impede on the right of navigation, which by law belongs to the subject of realm.³⁷¹ This imposed a fiduciary duty of care and responsibility upon the sovereign as the custodian of the resources placed in the public trust.

In further expanding on the doctrine of public trust, the English common law differentiated between property that was susceptible to transfer to private individuals, which encapsulates the public's trust rights stretching from fishing and navigation, to more comprehensive rights like recreation; and the property that was held in trust for the public by the sovereign, which encompasses the proprietary rights for possession and use of the property by the public.³⁷²

9.4 The public trust doctrine in Uganda

In Uganda, the public doctrine was referred to in attempting to protect the Mariba forest from government actions. It was held that the government is trustee that holds Mabira forest for the benefit of the citizens of Uganda.³⁷³

This is demonstrated by the doctrine of public trust which necessitates preservation and protection of forests held in trust by the government. Part xiii of the National Objective Principles of Policy of the *Constitution*³⁷⁴ provides that the state shall protect the vital natural resources of the country such as land, water, minerals, wetlands, fauna and flora on behalf and for the benefit of the citizens of Uganda.³⁷⁵ The public trust doctrine as applied herein thus, in effect, limits the power of the state to considerably modify the nature of a public resource.

Ugandan researchers on this topic have referred to Sax where he stated that the fiduciary duty as regards the trustee-beneficiary relationship necessitates three main limits upon the trustee.³⁷⁶ The first one being that property held in the trust may not be used for a public purpose, but should rather be kept available for the general

371 *Gann v Free Fishers of Whitstable, House of Lords*, 3 March 1865, 11 E.R. 1305 (1865) 11 H.L. Cas. 192.

372 Kameri-Mbote 2007 <http://www.lead-journal.org/content/07195.pdf>.

373 Masumba 2007 <http://www.africanconservation.org/in-focus/uganda-where-public-trust-doctrine-applies-on-mabira>.

374 *Constitution of the Republic of Uganda*, 1995.

375 Part xii of the National objective Principles of Policy of the *Constitution of the Republic of Uganda*, 1995.

376 Masumba 2007 <http://www.africanconservation.org/in-focus/uganda-where-public-trust-doctrine-applies-on-mabira>.

public to use; the second one being that the property may not be sold under any circumstances; and the last one is that the property must be retained only for certain types of uses.³⁷⁷ Therefore, the doctrine can be used, in Uganda, against or by the state to protect the resources subject to the trust in the same manner as in India, hence the Indian Supreme Court held in *M.C. Mehta v Kamal Nath and others*³⁷⁸ that the public trust doctrine is principally based on the principle that certain resources such as air, sea and forests are of such great significance to the people as a whole that it would be entirely unwarranted to make them subject to private ownership.³⁷⁹ As they are a gift of nature, these resources must be made freely available to the general populace irrespective of the status they may hold.³⁸⁰ The doctrine thus burdens the government with the duty to safeguard the resources that are subject to the trust for the enjoyment of the public.³⁸¹

9.5 The Canadian public trust doctrine

The Canadian public trust doctrine will only be deliberated upon briefly as the mini-dissertation does not allow much room for further elaboration. In Canada, common or public property is referred to as assets of the “Crown” as part of the British common wealth, of which the reigning British monarch is the symbolic head of state.³⁸² Most of the provincial legislation regarding public lands and wildlife describe ownership as being vested in His/Her Majesty in the right of the Province, which nowadays implies that the said lands and wildlife are held in trust for the benefit of the people of Canada. The *Nova Scotia Wildlife Act*,³⁸³ for example, stipulates, in reference to ownership of wildlife that:

the property in all wildlife situate within the Province, while in a state of nature, is hereby declared to be vested in Her Majesty in right of the Province and no person shall acquire any right or property therein otherwise than in accordance with this Act and the regulations.

377 Masumba 2007 <http://www.africanconservation.org/in-focus/uganda-where-public-trust-doctrine-applies-on-mabira>.

378 *M.C. Mehta v Kamal Nath and others* 1997 1 (SCC).

379 *M.C. Mehta v Kamal Nath and others* 1997 1 (SCC) 388.

380 Masumba 2007 <http://www.africanconservation.org/in-focus/uganda-where-public-trust-doctrine-applies-on-mabira>.

381 Masumba 2007 <http://www.africanconservation.org/in-focus/uganda-where-public-trust-doctrine-applies-on-mabira>.

382 Anonymous 2010 http://www.fw.msu.edu/documents/ptd_10-1.pdf.

383 *Nova Scotia Wildlife Act* 1989.

Certain territories in Canada have explicitly incorporated the concept of public trust into legislation that relate to natural resources. The *Northwest Territories Environmental Rights Act*³⁸⁴ recognises the need:

to protect the integrity, biological diversity, and productivity of the ecosystems in the Northwest Territories” and the “right to protect the environment and the public trust.”

The Yukon’s *Environment Act*³⁸⁵ that came into operation in 1991, states that the government is a trustee of the public trust to protect the natural environment from actual or likely impairment.³⁸⁶

Within the Canadian trust relationship the trustee, or custodian, manages assets that belong to others, and the trustee must therefore be accountable to the beneficiaries thereof.³⁸⁷ The public trust doctrine requires accountability of government for its activities in the management of the publicly owned assets. The public has legal rights, as beneficiary of the trust, to enforce accountability upon the government, as custodian of the trust assets, typically by means of litigation and less commonly through elections or ballot initiatives.³⁸⁸

It is clear from the above, that the doctrine of public trust as applied in the foreign jurisdictions, displays similar characteristics to the public trust doctrine as applied in South African legislation, from the SADT legislation to the NWA, as well as all the other Acts regarding the natural resources placed under the public trust doctrine for the benefit of the South African people, and being managed by the state³⁸⁹ as trustee thereof.

384 s6 of the *Northwest Territories Environmental Rights Act* 1990.

385 *Environment Act* 1991.

386 Anonymous 2010 http://www.fw.msu.edu/documents/ptd_10-1.pdf.

387 Anonymous 2010 http://www.fw.msu.edu/documents/ptd_10-1.pdf.

388 Anonymous 2010 http://www.fw.msu.edu/documents/ptd_10-1.pdf.

389 Or the *Ingonyama* in case of the ITA.

10 The notions of state custodianship and trusteeship

As has already been established, the new legislative framework, by means of section 3(1) of the MPRDA, separated mineral and petroleum rights from the private sphere and positioned them under the custodianship of the state by *inter alia* providing that the mineral and petroleum resources of South Africa are the common heritage of the nation and that the state is custodian thereof.³⁹⁰ By vesting all the mineral and petroleum resources in the nation, the MPRDA dispensed with the notion of mineral rights or rights to minerals which before 1 May 2004 were only held by private persons in their personal capacities³⁹¹ and legal entities. The natural resources are now held by the state as custodian thereof in trust for the benefit of the South African community.

In answering the question as to what custodianship is, emphasis should be placed on the authority and power that characterise state control and management of mineral and petroleum resources of the country, as it is stated in the Act that the state is appointed as custodian of the resources. It will therefore be more productive to focus on the powers granted to the state when discussing the state's role as custodian, rather than trying to define custodianship itself.³⁹² These powers are set out in section 3(2)(a) of the MPRDA, and it is said that they should be exercised with the intention to promote equitable access to, and socio-economic development of, mineral and petroleum resources in an ecologically sustainable manner.³⁹³ In order to be able to understand the mechanism that the legislature employed, it becomes imperative to highlight the fact that the state's fiduciary role and fiduciary responsibilities are emphasised in the Act by describing the state as custodian.³⁹⁴ The said fiduciary responsibilities together with the endowment of the resources to the South African citizens are the most important features of the public trust doctrine. As mentioned above, the doctrine is said to be a foreign doctrine³⁹⁵ that saw its first official mention in the South African context with reference in the *National Water*

390 Van den Berg *Stellenbosch Law Review* 145.

391 *Minister of Mineral Resources and Others v Sishen Iron Ore Company (Pty) Ltd and Another* 2014 (2) SA 63 (CC) par 10.

392 Van den Berg *Stellenbosch Law Review* 145. It is important to define custodianship as well, but the mini-dissertation does not allow much room for further elaboration on this point.

393 Van den Berg *Stellenbosch Law Review* 145.

394 Van der Schyff *Tydskrif vir die Suid-Afrikaanse Reg* 760.

395 Of which it really is not, but was informally applied in trusteeship land before 1994.

Act.³⁹⁶ The *National Water Act* aims to redistribute water rights to previously disadvantaged people and communities by the introduction and application of a public trust doctrine to South African natural resources law. The Act provided that the people of South Africa are the beneficiaries of the water, as the trust property, and the state was appointed as trustee thereof for the benefit of people. Thereafter followed the *National Environmental Management Act*³⁹⁷ and the *Mineral and Petroleum Resources Development Act*,³⁹⁸ as well as other Acts.³⁹⁹ The Acts each ingrained this novel concept of public trusteeship more firmly into the South African jurisprudence.⁴⁰⁰ With the promulgation of these pieces of legislation, the state has been charged with the responsibility to take up the role of either the trustee or custodian of a specific natural resource or the environment, depending on the applicable piece of legislation. The environment or the particular natural resource, on the other hand, has been bequeathed to the nation of South Africa⁴⁰¹ but with ownership thereof vesting in the custodian for the beneficiaries of the trust.

The ITA, which established the KwaZulu-Natal *Ingonyama* trust, also provided for the vesting of land in the trust for the benefit of the people of KwaZulu Natal. The Act appointed the *Ingonyama* as trustee of the trust land for the benefit of the people. The type of trust established herein displays similar principles as reflected by the MPRDA in bequeathing the mineral and petroleum resources of the country to the South African citizens as well as those of the NWA in putting the water under public trusteeship and employing the state as trustee thereof, for the benefit of the citizens of South Africa.

The MPRDA has, as its policy, the objective of giving effect to the principle of the state's custodianship of the nation's mineral resources. This *inter alia* tasks the state with the duties of promoting equitable access of the nation's mineral resources to all the people of South Africa, as well as expanding the opportunities for historically disadvantaged persons to enter the mineral industry and to benefit from the exploitation of the nation's resources.⁴⁰² This fiduciary duty of the state is similar to

396 *National Water Act* 36 of 1998.

397 *National Environmental Management Act* 107 of 1998.

398 *Mineral and Petroleum Resources Development Act* 28 of 2002.

399 Such as the *National Environmental Management: Biodiversity Act* 10 of 2004.

400 Van der Schyff *Potchefstroom Electronic Law Journal* 122.

401 Van der Schyff *Potchefstroom Electronic Law Journal* 122.

402 Badenhorst *South African Law Journal* 661.

the one incurred by the state in its position as trustee of the water resources of the country in terms of the NWA, as well as the *Ingonyama* in administration some of the KwaZulu Natal land for the benefit of the community. The SADT as it operated, displayed similar principles in that the land was administered by the state through its designated organs in terms of the SADT legislation, for the benefit of the African natives. The state thus had fiduciary responsibilities towards beneficiaries of the trust, who in turn had reciprocal fiduciary rights against the state in connection with the trust property.

The public trust doctrine is an internationally recognised instrument that encapsulates the concept of ownership of public resources and the dimension of the fiduciary responsibility of the state as expressed in the Act.⁴⁰³ The public trust doctrine forms part of the Anglo-American law,⁴⁰⁴ and the word trust, as it is used in Anglo-American jurisprudence in relation to the public trust doctrine, must be interpreted to refer to the fiduciary responsibility attributed to the state as custodian or trustee of the public trust through the working of the doctrine, rather than to the legal nature⁴⁰⁵ of the doctrine.⁴⁰⁶

As stated above, the foundational principle on which the notion of public trusteeship is based is that state governments must manage and protect certain natural resources for the sole intergenerational benefit of their citizens.⁴⁰⁷ Basically, the concept of public trusteeship, as it is embodied in South African legislation, including the *South African Development Trust Act*,⁴⁰⁸ encapsulates the sovereign's duty to act as guardian of certain legal interests for the benefit of the nation as a whole or a specified group of people within the Republic.⁴⁰⁹ The essential elements that form the components necessary for this doctrine are natural resources; used by a specific community of citizens; destined to be protected for intergenerational access; and which are placed under the custodial or fiduciary control of a state authority.⁴¹⁰ This state authority is thereby burdened with the duty of ensuring that the resources are

403 Van der Schyff *Tydskrif vir die Suid-Afrikaanse Reg* 760.

404 Van den Berg *Stellenbosch Law Review* 146.

405 As important as it is to determine what the legal nature of the doctrine is, this mini-dissertation does not provide room for further discussion and elaboration thereon.

406 Van der Schyff *Tydskrif vir die Suid-Afrikaanse Reg* 760.

407 Van der Schyff *South African Law Journal* 372.

408 *South African Development Trust Act* 198 of 1963. Which was repealed in the 1990's.

409 Van der Schyff *Potchefstroom Electronic Law Journal* 123.

410 Van der Schyff *South African Law Journal* 374.

used, managed and protected according to the public interest in order to guarantee intergenerational access and use.⁴¹¹ This citizens as beneficiaries have the right to enforce this duty and hold the state accountable where it does not comply with its obligations in this regard.

The idea of public trust in the South African law gives the overall responsibility and authority to the national government of the country,⁴¹² but this, however, does not mean that the government owns the water resources.⁴¹³ It only refers to the national government's duty to act as custodian or trustee of certain interests for the benefit of the South African citizens.⁴¹⁴ The literal meaning of s 3(1) of the MPRDA is that ownership of minerals *in situ* is vested in the state, but the state only gets to own such minerals as a custodian for the benefit of the people of South Africa.⁴¹⁵ This is the same with regards to the ITA, the NWA as well as the SADT and the preceding informal trusts. This means that the state ownership is thus encumbered by a custodial duty. However, as stated above, when questions are asked that relate to the ownership of property falling under the public trust doctrine, one must immediately be mindful of the restrictions of language, and as such, the use of the word ownership is therefore not recommended when dealing with property falling under the public trust doctrine.⁴¹⁶

As pointed out above, the legal nature of the public trust doctrine is not to be inferred from the phrase public trust doctrine as the word trust refers to the fiduciary responsibility of the sovereign and is not an indication that the trust analogy was adopted to satisfy the need to identify the owner of the legal title to the resources in which the people have a common right.⁴¹⁷ Any act of the state that is not in line with the spirit, purport and objectives of the public trusteeship will thereby be regarded

411 Van der Schyff *South African Law Journal* 374.

412 Or the *Ingonyama*, in case of the ITA.

413 Tewari *Water SA* 703.

414 Van der Schyff, and Viljoen *TD: The Journal for Transdisciplinary Research in Southern Africa* 340.

415 Badenhorst *South African Law Journal* 656. The true ownership thus vests in the people of South Africa.

416 Van der Schyff, and Viljoen *TD: The Journal for Transdisciplinary Research in Southern Africa* 343. The limited real rights referred to in the MPRDA mean that the holders thereof have certain rights in the land of another, being the surface land owner in this regard. They may only act within the limits of the prospecting rights, mining rights, exploration right or production right granted in terms of the Act.

417 Van der Schyff, and Viljoen *TD: The Journal for Transdisciplinary Research in Southern Africa* 345.

ultra vires.⁴¹⁸ If the government is found to be recalcitrant or noncompliant, the public's right of user as created by the doctrine creates judicially enforceable rights held in common by all the people of the country.⁴¹⁹ This also means that the state can only fulfil its responsibilities through the management and control of the property and it cannot be released from that duty by a transfer of the property.⁴²⁰ Every citizen, as a beneficiary of the trust, may hold the trustees accountable and obtain judicial protection against encroachments or the deterioration of the natural resources. However, it should be bore in mind that the sovereign rights of nation states over certain environmental resources are not proprietary, but fiduciary.⁴²¹

In summary, it is clear that the public trust as encapsulated in South African legislation confers upon the trustee the same duties as the custodian in the MPRDA. It can also be seen from the approach of custodianship from its fiduciary responsibilities towards the citizens of South Africa, in connection with the resources, that it is inextricably linked to the public trust doctrine and trusteeship as found in other legislation, such as the SADT legislation,⁴²² NWA, ITA, and other such legislation that confers upon a certain entity, the sovereign, the responsibility to administer trust property for the benefit of the beneficiaries. All these principles, on which the doctrine of public trusteeship and custodianship are based, have similar characteristics and implications. These principles are also in line with the doctrines as applied in foreign countries.

418 Beyond its inherent powers.

419 Van der Schyff, and Viljoen *TD: The Journal for Transdisciplinary Research in Southern Africa* 345-346.

420 Van der Schyff *Tydskrif vir die Suid-Afrikaanse Reg* 763.

421 Van der Schyff *South African Law Journal* 373.

422 Which has been repealed.

11 Conclusion and recommendations

The research question *in casu* was to what extent does the concept of state custodianship, as it features in the *Mineral and Petroleum Resources Development Act*,⁴²³ and the trust-notion, as it functioned in the *South African Development Trust Act*, as well as the KwaZulu Natal *Ingonyama Trust*, from the *KwaZulu Natal Ingonyama Trust Act*⁴²⁴ and the *National Water Act*⁴²⁵ relate to each other? In providing the answer thereto, the history and background concerning the two phenomena was explored. Thereafter, trusteeship as emanating from SADT legislation together with the surrounding circumstances that led to the adoption of the notion were discussed. Trusteeship in terms of other land trusts such as the Kwa Zulu-Natal *Ingonyama Trust*. As the water resources of the country were also placed under trusteeship, it became necessary to visit the relevant water legislation as well. With regards to custodianship, the MPRDA was visited and outlined in order to determine the function and application of the phenomena with regards to the mineral and petroleum resources of the country. It then became necessary to identify the nature of the relationship between the state and the beneficiaries of the trust with regards to the trust property. It was then determined as to with whom between the relevant entities does ownership of such trust property vest. Having explored all those aspects, it thus became relevant to determine as to how the doctrine of public trust, which encompasses the phenomena, is applied in other jurisdictions as compared to South Africa. The phenomena were then discussed in detail and with reference to all that has been gathered in the discussion. The following is a summary of the study with the conclusion.

From the aforementioned, it can be gathered that previously state ownership of land took different forms. Previously, the state held the land that was in the native reserves in trust for the Africans. Later, when the reserves were expanded and divided into the TBVC states and self-governing territories, their land rights were owned by those states and territories in terms of the *South African Development and Trust Act*,⁴²⁶ which provided for the vesting of these rights in the South African Development Trust on behalf of the African natives, while others were held by the

423 *Mineral and Petroleum Resources Development Act* 28 of 2002.

424 *Ingonyama Trust Act* 3 of 1994.

425 *National Water Act* 54 of 1956.

426 *South African Development Trust Act* 198 of 1963.

state in trust for traditional communities, like the *KwaZulu-Natal Ingonyama Trust Act*⁴²⁷ of 1994. The land that vested in the South African Development Trust was held for the exclusive use and benefit of natives⁴²⁸ who could, however, not purchase the trust land but could only rent it.

The *Kwa Zulu Ingonyama Trust Act*⁴²⁹ created the *Ingonyama* Trust, and transferred the land that was then administered by the government of KwaZulu to the former, whose sole trustee was the *Ingonyama*, the Zulu King.⁴³⁰ It stated that any land or real right therein, of which the ownership immediately prior to the date of commencement of the Act vested in, or had been acquired by the Government of KwaZulu, shall vest in and be transferred to, and shall be held in trust by the *Ingonyama* as trustee of the Ingonyama Trust for and on behalf of the members of the tribes and communities and the residents of KwaZulu Natal.⁴³¹

The *National Water Act*⁴³² in section 3 placed the water resources under the public trusteeship, for the benefit of the people of South Africa. The state is entrusted with the function of trusteeship in that it has to administer the water, as trust property, for the benefit of the beneficiaries.

The preamble and section 2 of the MPRDA state that the objectives of the Act are, *inter alia*, to recognise the internationally accepted right of state to exercise sovereignty over the entire mineral and petroleum resources within the Republic;⁴³³ to give effect to the principle of the state's custodianship of the mineral and petroleum resources, etc.⁴³⁴ Section 3 further states, *inter alia*, that the mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans. It is clear therefrom that the state's fiduciary responsibilities and fiduciary role are accentuated by describing the state as custodian in the Act from as early as section 2.⁴³⁵

427 *KwaZulu-Natal Ingonyama Trust Act* 3 of 1994.

428 Anon 2012 http://www.anc.org.za/docs/discus/2012/landpolicyproposals_june2012g.pdf.

429 *KwaZulu-Natal Ingonyama Trust Act* 3 of 1994. Which was amended in 1997 and renamed.

430 *eThekweni Municipality v Ingonyama Trust* 2013 (1) SA 564 (SCA) par 6.

431 s3(1)(a) of the *KwaZulu-Natal Ingonyama Trust Act* 3 of 1994.

432 *National Water Act* 36 of 1998.

433 s2(a) of the *Mineral and Petroleum Resources Development Management Act* 28 of 2002.

434 s2(b) of the *Mineral and Petroleum Resources Development Management Act* 28 of 2002.

435 s 2(a) of the *Mineral and Petroleum Resources Development Management Act* 28 of 2002.

From the aforementioned, it can safely be concluded that the MPRDA has, as a policy, the objective of giving effect to the principle of the state's custodianship of the nation's mineral resources, which inter alia tasks the state with the duties of promoting equitable access of the nation's mineral resources to all the people of South Africa,⁴³⁶ while the foundational principle on which the notion of public trusteeship is based is that states must manage and protect certain natural resources for the sole intergenerational benefit of their citizens.⁴³⁷ This principle has been seen in the SADT, the NWA and the *Kwa* ITA. The state and the *Ingonyama* were appointed by legislation as trustees of land and water for the benefit of the beneficiaries by managing and administering the trust property on behalf and for the benefit of the beneficiaries.

The duty of the state towards the citizens of the country thus plays a very important role in identifying the relationship between custodianship and the public trust doctrine. As has been established above, the nature of the responsibilities of the state in relation to the public trust are fiduciary in nature, and the beneficiaries' corresponding rights are also fiduciary in nature. The state, as such, holds the property of the public trust as capacity as trustee, and not as owner thereof. It can thus be concluded that there is a clear correlation between the concept of state custodianship, as it features in the *Mineral and Petroleum Resources Development Act*, and the trust-notion, as it functioned in the *South African Development Trust Act*,⁴³⁸ as well as the *KwaZulu-Natal Ingonyama Trust Act*⁴³⁹ and the *National Water Act*.⁴⁴⁰ Custodianship, as captured in the MPRDA, and trusteeship, as embodied in the SADT legislation, the ITA and the NWA, as well as other trusts in foreign jurisdictions, confer upon the state, the fiduciary obligation to hold, protect and manage certain resources in the interest of a particular designated group, being the people of South Africa. The state bears the fiduciary duty, while the people of South Africa bear the fiduciary rights in terms of such resources. Custodianship thus refers to the role, powers, function and duties of the trustee in the public trust doctrine.

436 Badenhorst *South African Law Journal* 661.

437 Van der Schyff *South African Law Journal* 372.

438 *South African Development Trust Act* 198 of 1963.

439 *KwaZulu-Natal Ingonyama Trust Act* 3 of 1994.

440 *National Water Act* 36 of 1998.

Due to the limitations of the LLM mini-dissertation a number of very important aspects of this research have not been fully discussed herein, and were only briefly referred to. A further study on such aspects, like the definition of custodianship and the legal nature of the doctrine of public trust should be conducted.

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