

Common law perspectives on the concept of public trusteeship

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LIST OF ABBREVIATIONS

J	Journal
LR	Law Review
MPRDA	<i>Mineral Petroleum Resource Development Act 28 of 2002</i>
NEMA	<i>National Environmental Management Act 107 of 1998</i>
NEM:BD	<i>National Environmental Management: Biodiversity Act 10 of 2004</i>
NEM:ICM	<i>National Environmental Management: Integrated Coastal Management Act 24 of 2008</i>
NWA	<i>National Water Act 36 of 1998</i>
PELJ	Potchefstroom Electroniservices Law Journal
SAJHR	South African Journal on Human Rights
S	Section
ss	Sections
Stell LR	Stellenbosch Law Review
TSAR	Tydskrif vir die Suid-Afrikaanse reg

Opsomming

Titel: Gemeenregtelike perspektiewe rakende die konsep van staatlike voogdyskap.

Die konsep van staatlike voogdyskap of “public trusteeship” word sedert 1998 gevind in wetgewing wat handel oor die omgewing en natuurlike hulpbronne. Hierdie begrip is nuut in die Suid-Afrikaanse reg. Die navorsingsvraag wat hierdie studie onderlê is of die konsep van “public trusteeship” ontwikkel het uit of enigsins verbind kan word met die gemeenregtelike begrippe *res publicae* en *res omnium communes*. Uit die studie word dit duidelik dat *res omnium communes* daardie sake is wat “aan alle mense toegeskryf word, maar aan niemand behoort nie”. *Res publicae* weer, is 'n kategorie van sake wat aan 'n hele burgerlike gemeenskap behoort, en word dikwels verwys na as staatseiendom. Beide hierdie kategorieë van sake is nie vatbaar vir privaat eiendomsbesit nie, hoewel individuele eenhede daarvan wel toegeëien kan word.

'n Studie van die wetgewing waarin die konsep van staatlike voogdyskap in een of ander vorm vervat is, dui sekere algemene kenmerke aan. In die relevante statute word die staat of nasionale regering aangestel as die openbare trustee van 'n spesifieke natuurlike hulpbron of die omgewing. Die staat of nasionale regering staan dus as openbare trustee in 'n fidusiêre verhouding teenoor die publiek. Dit is die openbare trustee se verantwoordelikheid om die hulpbronne te beskerm en te ontwikkel en om op te tree in die belang van die mense van Suid-Afrika. Die onderskeie begunstigdes teenoor wie die fidusiêre verpligting uitgevoer moet word, word in die verskillende wette gedefinieer. Alle partye se regte en verantwoordelikhede word ook in die toepaslike wetgewing uiteengesit.

Die studie het aangetoon dat hoewel daar ooreenkomste in die regsimplikasies van die gemeenregtelike begrippe *res omnium communes* en *res publicae* en die breë konsep van staatlike voogdyskap of openbare trusteeskap aangetref word,

die konsep van staatlike voogdyskap nie vanuit die Suid-Afrikaanse gemenerereg ontwikkel het nie. Dit is 'n nuwe konsep wat slegs binne die woorde van betrokke statute uitgelê en toegepas kan word.

Trefwoorde: *Res publicae*, *Res omnium communes*, Mineraalreg, Waterreg, Biodiversiteit, Omgewing, Geïntegreerde kusbestuur, Mineral law, Water law, Biodiversity, Integrated coastal management, Public trusteeship

1 Introduction

In recent environmental and natural resources related legislation, a new concept has emerged in South African law. The notion of public trusteeship¹ is statutorily incorporated in the *National Water Act*,² *National Environmental Management Act*,³ *National Environmental Management: Integrated Coastal Management Act* 24 of 2008,⁴ the *National Environmental Management: Biodiversity Act* 10 of 2004⁵ and the *Mineral and Petroleum Resource Development Act*.⁶ This concept offers immense research possibilities due to the fact that it is a novel concept in South African law.

The concept of public trusteeship essentially entails that the state or national government acts as the trustee of the environment or certain specified natural resources. As trustee, the state or national government must manage the use and protection of the resource to the benefit of the nation or another statutorily specified beneficiary.⁷ In order to understand the concept and the extent of change that has occurred through the incorporation of the concept of public trusteeship, the origin of this concept needs to be determined. As it is also important to strive to construe a statute in conformity with the common law rather than against it,⁸ except where and so far as the statute is plainly intended to alter the common law,⁹ it is imperative to determine whether the concept of public trusteeship can be aligned with the South African Roman-Dutch based common law.

1 See Chapter 4 of Van der Schyff *The Constitutionality*.

2 36 of 1998.

3 107 of 1998.

4 24 of 2008.

5 10 of 2004.

6 28 of 2002, hereafter the *MPRDA*.

7 Van der Schyff 2010 *PELJ* 122.

8 *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 823; Viljoen *The Public Trust doctrine in South African Water Law* (2009) 6-7.

9 *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 823.

Due to the fact that more than one explanation have been offered in an effort to demystify this concept,¹⁰ this research will focus on whether the concept of public trusteeship originates from the South African Roman-Dutch common law, or can at least be positively linked with similar concepts from the South African common law. The interpretation, application and influence of the concept of public trusteeship on the South African property concept, and the nature and content of rights granted subject to public trusteeship, depend to a large extent on the origin of the concept. The research question that underlies this study is therefore whether the concept of public trusteeship is rooted in common law concepts of *res publicae* and *res omnium communes*, or merely developed ancillary thereto.

In order to answer the research question underlying this dissertation, the discussion will focus on whether the Roman and Roman-Dutch common law concepts, *res omnium communes* and *res publicae*, can be linked to the statutorily introduced concept of public trusteeship. In order to obtain this objective, these two common law concepts will first be analysed where after the discussion will focus on the concept of public trusteeship as created in the different statutes from which it originates. Each of the applicable pieces of legislation will be scrutinised to identify the trustee, the beneficiaries, the trust corpus and reciprocal rights and obligations emanating from the individual statutes. Finally, a comparison will be drawn between the Roman-Dutch common law concepts of *res omnium communes* and *res publicae* and the concept of public trusteeship to determine whether there are any similarities between these concepts.

2 *Res publicae* and *res omnium communes*

Res publicae and *res omnium communes* are those things that could, according to Roman and Roman-Dutch law, not be owned by private entities, for it was not

10 Van der Schyff 2008 *TSAR* 757.

regarded as negotiable.¹¹ For the purpose of this mini-dissertation, it is necessary to state more detailed information on these two concepts of things.

2.1 Res omnium communes

The first category of things that are going to be discussed is the *res omnium communes*. The explanation of this category of things as given by textbook writers is often too cryptic.¹² In general, the focus is not on the fine detail of the concept, but the notion of *res omnium communes* is mostly explained by using examples describing it.¹³ Thus, it is difficult to understand the concept wholly, because most of the textbooks only explain the concept as "*res omnium communes* are those things which by natural law are common to all men, but belongs to no-one",¹⁴ and no further explanations can be found. In an effort to understand the concept, the opinions of different academic writers and commentators on the law will be observed.

The first academic writer's opinion that will be examined closely, is that of Herman Dooyeweerd.¹⁵ Dooyeweerd explains that *res omnium communes* cannot be allotted to a specific person or individual, due to the fact that it is available in abundance. The fact that it is available in abundance leads to the reality that it has no economic value at all and is thus not negotiable. As he regards relative scarcity as an important aspect that attributes to a thing's economic value, he states: "The abundance of a certain substance would clearly render absurd the allocation of that substance to a particular person to the exclusion of all third parties".¹⁶

11 Miller and Pope *Land Title in South Africa* 25.

12 This concept will only be looked at briefly.

13 An example will be where there will be looked at *res omnium communes* or things legally not property. This is because they were incapable of dominium and control. It is important to know how a right is allocated in a space..

14 *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 620.

15 Dooyeweerd *Essays in legal, social and political philosophy* 13; Van der Vyver *History of Law* 283.

16 Van der Vyver *History of Law* 283.

The second academic writer's opinion that needs to be mentioned is that of Hugo de Groot, commonly referred to as Grotius. There seems to be a difference of opinion on Grotius's view whether *res omnium communes* could be owned or not. According to Bovenberg, Grotius held that "a common heritage is indeed a *res omnium communis*, incapable of appropriation".¹⁷ Bovenberg further states "No one could own these things, but they could be used and enjoyed by everyone."¹⁸ Van der Schyff¹⁹, on the other hand, argued that "Grotius did not only assign the use of what he saw as *res communes* to mankind, but awarded ownership of those commodities to mankind as it remained undivided between men."²⁰ Grotius himself stated in his *Institutiones*.²¹

... doch alles wel ingezien zijnde zal men bevinden dat alle die zaken den menscheen toe-behooren, maer tot verscheiden ghebruick. [...everything considered, it would be found that all things belong to humans but for different purposes].

It is therefore clear that although Grotius held that *res omnium communes* belonged to all men, this is not the same as private ownership, and in this sense it seems that Van der Schyff and Bovenberg's views can be reconciled.

The notion of *res omnium communes* can be traced even further back than the Roman-Dutch era. According to Roman law, the common things (*res omnium communes*) were those things which by natural law were common to all persons, but belonged to no-one.²² It should be noted that it was never the intention to convey that *res omnium communes* constituted the object of a right.²³ Once a "unit" of *res omnium communes* was, however, appropriated, it became property that became part of an individual estate.²⁴ It was, however, also possible to secure or establish exclusive use over a specific portion of *res omnium*

17 Bovenberg *Duke Law & Technical Review* 5.

18 Bovenberg *Duke Law & Technical Review* 9.

19 Van der Schyff *Constitutionality* 92.

20 *Ibid.*

21 Grotius *Inleidinge* 2.1.15.

22 *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 593; Van den Berg 2009 *Stell LR* 150.

23 McDougall *The heavens and the earth: A political history of the space age* 3.

24 Bovenberg *Duke L & Tech Rev* 10.

communes for a limited time,²⁵ subject to the requirement that public use would not consequentially be impeded and the resource is not impaired. The use and enjoyment of *res omnium communes* could be regulated by law and in some instances obtaining a permit was compulsory before an individual could exercise any right with relation to these things.²⁶

2.2 Res publicae

Res publicae denoted a category of things that belonged to the Roman people. It was held subject to public law and the state's rights and claim to the particular thing was ownership.²⁷ It was a public ownership to which the principles of the private law did not apply. Although an individual was not granted any private rights in the property by the state, remedies were available against other private persons who obstructed the individual's right to use the property.²⁸

Public things (*res publicae*) were things that belonged to an entire civil community, and are often referred to as state property.²⁹ When using the latter expression, a distinction should, however, be made between things intended for public use, ie things which directly benefit the members of the community concerned, eg public roads, and things belonging to the state which only indirectly benefit the individual members of the community, such as buildings used merely for administrative purposes.³⁰ Only the former, ie things intended for public use, can be classified as public and therefore as out of commerce.³¹ Although aspects of *res publicae* featured in very early cases, it seems that in *Surveyor-General (Capa) v Estate De Villiers*³² a historical overview of both *res*

25 Rathman *Society for Philosophy and Technology* 3.

26 Van der Schyff *Constitutionality* 90.

27 Van der Schyff *The concept of public trusteeship as embedded in the South African National Water Act, 1998* 27.

28 Van der Schyff *Constitutionality* 89.

29 Kaser *Roman Private Law* (1980) 78; Mbodla *THRHR* 115.

30 Kaser *Roman Private Law* (1968) 81 as well as in Buckland *A manual of Roman Private Law* (1947) 107.

31 *Control of Access to Public Premises and Vehicles Act* 53 of 1985. See Badenhorst, Pienaar and Mostert *Law of Property* 26 as well as Sohm *The Institutes: A Textbook of the History and System of Roman Private Law* 303.

32 *Surveyor-General (Capa) v Estate De Villiers* 1923 AD 588.

publicae and *res omnium communes* was given. The court, referring to the Roman law position, came to the conclusion that "in course of time ... and probably under the influence of the feudal system, this doctrine was modified in Western Europe and the sea-shore came to be regarded as *res publicae*, which vested in the *princeps*".³³

Res publicae essentially means that a certain thing cannot belong to one specific person, but belongs to the community. Van der Vyfer argues that this means that the state eventually became the owner of *res publicae*, but that the public retained its entitlement to use and enjoy those objects destined for general use by members of the community.³⁴

2.3 Concluding res omnium communes and res publicae

It is clear that both these categories of things were withdrawn from the domain of private law. As stated by Van der Schyff³⁵:

Res omnium communes were then said to be those things which are nobody's, which fall under human law. Any individual could take for himself what is enough for himself, but these things could not be *seized wholesale by private persons*

Res publicae were those things in public ownership of many persons falling under the main category of things belonging to somebody. They were differentiated from *res communes* because they had already *begun to be in ownership*.

33 See Badenhorst, Pienaar and Mostert *Law of Property* 26.

34 Van der Vyver *History of Law* (1989) 283. See also *Butgereit & Another v Transvaal Canoe Club* 1988 1 SA 759 (A).

35 Van der Schyff *Constitutionality* 96. Van der Schyff comes to this point at view at relating works of Grotius and Voet. It would seem that Voet and Grotius had a major difference of opinion on this aspect. Grotius *Mare Liberum* Van Deman Magoffin <http://oll.libertyfund.org/Texts/Grotius0110/Freedom/> 11November 2011 on 16 differentiates between the meaning of *res nullius* when things marked out for common use are the subject and when things that are capable of being appropriated eg game and fish are under discussion. In the first instance *res nullius* denotes nothing more than things not susceptible to private ownership. Voet *Commentarius ad Pandectas* 1.8.3. Voet did not qualify the terms "what is enough for himself". Seen in the light of the qualification that follows one can aver that it meant enough to sustain livelihood. This can also be found in Voet *Commentarius ad Pandectas* 1.8.3; 1.8.1, 1.8.8; 1.8.10 acknowledged the existence of another kind of public property namely *res universitatis*.

The important features that can be deduced from this discussion are that both categories of things were excluded from private property holding and destined to benefit either mankind as a whole, or the citizens of a specific country. Now that the common law notions of *res omnium communes* and *res publicae* are placed in perspective, the focus will be on the statutory introduction of the concept of public trusteeship by different statutes.

3 *National Water Act* 36 of 1998

The *National Water Act* 36 of 1998 [hereafter *NWA*] is the first act that was promulgated that contained the notion of public trusteeship which was implemented by the *White Paper on a National Water Policy for South Africa*, 1997. To understand the concept of public trusteeship as embedded in the *NWA*, the focus will be on the aim of the *NWA*, as well as the rights of the state appointed as public trustee over the beneficiaries' interest in the resources.

3.1 The aim and preamble of the NWA

The *NWA* is part of a series of statutes dealing with the country's natural resources. The aim of discussing the *NWA* is to determine how the concept of public trusteeship was introduced into South African law through the *NWA*.³⁶ In the preamble of the *NWA*, it is stated that water is a natural resource that belongs to all people. The main object of the *NWA* is stated in the title, namely "to provide for fundamental reform of the law relating to water resources, to repeal certain laws and to provide for matters connected therewith".

The preamble to the *NWA* recognises that water is a scarce and unevenly distributed national resource which occurs in many different forms which are all part of a unitary, inter-dependent cycle. The *NWA* recognises the basic human needs of present and future generations and the need to protect water

36 The concept of public trusteeship can also be referred to as custodianship. These two concepts are use with the focus on the fiduciary responsibilities of the government.

resources.³⁷ National government, acting through the Minister, is responsible for the achievement of these fundamental principles in accordance with the constitutional mandate for water reform.³⁸

The responsibility of the government for and over the nation's water resources is confirmed in the *NWA*. The ultimate aim of water resource management is to achieve sustainable and equitable use for all water users, as well as to protect the quality of water.³⁹ The *NWA* recognises the need for an integrated management approaches concerning all aspects of water resources.⁴⁰

The *NWA* is aimed at dismantling the existing dispensation relating to control over water and exercise of traditional or common law water rights.⁴¹ The above-mentioned can only be obtained if there are certain parties acting on behalf of the nation. In this discussion the focus will be on the rights and obligations of all the relevant stakeholders.⁴² The different responsibilities of the stakeholders have to be scrutinised before a conclusion can be drawn as to the role, responsibilities and implications of the concept of public trusteeship as it features in the *NWA*.

3.2 Fiduciary responsibilities

In the *NWA*, the national government is appointed as the trustee of the nation's water resources.⁴³ The nature of the public trustee's responsibilities provides guidelines from which the inherent characteristic of public trusteeship can be extracted. The word "trustee" as used in this context is not the same as when the word is used in terms of a Trust Deed as provided in trust legislation.⁴⁴ In the

37 Van der Schyff and Viljoen 2008 *The Journal for Transdisciplinary Research in Southern Africa* 340.

38 See the preamble of the *NWA*.

39 Pienaar and Van der Schyff *The reform of water rights in South Africa* 183-184.

40 Van der Schyff *The concept of public trusteeship as embedded in the South African National Water Act 1998* 11.

41 In this context stakeholders refer to the 'government' and the water users.

42 See part 2 of the *NWA*.

43 S 3(1) of the *NWA*.

44 With reference to Trust law, the trustee has a legal title to the trust property for the benefit of the beneficiaries. The legislation that will be looked at only provide the public trustee with a fiduciary responsibility.

NWA, the word is used to indicate the fiduciary responsibility attributed to the national government when dealing with the nation's water resources. It is clear from the *NWA* that the public trustee has an overwhelming fiduciary responsibility to deal with water as natural resource in the public interest.⁴⁵ The aim of managing, protecting and conserving the country's water resources is to ensure that all South Africans gain the benefit.⁴⁶ The state or government acquires no proprietary interest in the nation's water resources.

Although the notion of public trusteeship as it emanates from the *NWA* does not aim at creating a legal trust, an analogy can be drawn with the fiduciary responsibility attributed to trustees. The trustee holds, controls and administers the property.⁴⁷ The trustee does so not for his own benefit, but for the benefit of the people of South Africa.⁴⁸ The trustee must act in accordance with his fiduciary responsibility that resonates from the *NWA*, which defines the public trustee's interest. Throughout the *NWA* the Minister's duties as public trustee is dealt with in detail. The trustee owes a fiduciary duty to the beneficiaries, who are the "beneficial" owners of the trust property.⁴⁹ The trustee has legal title to the trust property, but the beneficiaries have equitable title to the resources.⁵⁰

The trustee's responsibilities are set out in Section 2 of the *NWA*. These responsibilities are to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account various factors.⁵¹ The Minister's actions as public trustee of the nation's

45 Van der Schyff and Viljoen 2008 *The Journal for Transdisciplinary Research in Southern Africa* 344; Van der Schyff *The concept of public trusteeship as embedded in the South African National Water Act 1998* 11.

46 Van der Schyff *The concept of public trusteeship as embedded in the South African National Water Act 1998* 11; Pienaar and Van der Schyff *Water Rights in South Africa* 183-184.

47 Du Toit *South African Trust Law* 6.

48 Du Toit *South African Trust Law* 6.

49 Van der Schyff *The concept of public trusteeship as embedded in the South African National Water Act 1998* 14.

50 Van der Schyff and Viljoen 2008 *The Journal for Transdisciplinary Research in Southern Africa* 344; Van der Schyff *The concept of public trusteeship as embedded in the South African National Water Act 1998* 11.

51 S 2 provide the factors that must be taken is account is: (a) meeting the basic human needs of present and future generations; (b) promoting equitable access to water; (c)

water resources are confirmed in Section 3.⁵² Section 3 specifically provides that the state, as trustee, has the power to "regulate the use of, flow and control of all water in the Republic".

Chapter 4 of the *NWA* sets out the public trustee's duties for regulating water use. Water use is defined broadly, and includes taking and storing water. The Minister is obliged to develop a system to classify the nation's water resources and to determine the class and resource quality, as well as to limit the amount of water that a responsible authority may allocate.⁵³ The Minister, as public trustee of the nation's water resources, is given general powers.⁵⁴ Section 63 deals with powers of the Minister that may not be delegated.⁵⁵

Only the Minister can make a regulation, authorise a water management institution to expropriate under Section 64(1) of the *NWA*, or appoint a member of the governing board of a catchments management agency, or appoint a member of the Water Tribunal. The Minister may also recover all costs incurred in connection with the expropriation.⁵⁶ Since the Minister has the responsibility to manage the nation's water resources, it means that the Minister also fulfils the functions of a catchments management where such an agency has been established but is not functional.⁵⁷

redressing the results of past racial and gender discriminations; (d) promoting the efficient, sustainable and beneficial use of water in the public interest; (e) facilitating social and economic development; (f) providing growing demand for water use; (g) protecting aquatic and associated ecosystems and their biological diversity; (h) reducing and preventing pollution and degradation of water resources; (i) meeting international obligations; (j) promoting dam safety; (k) managing floods and droughts; Pienaar and Van der Schyff *The reform of water Rights in South Africa* 183; Van der Merwe 2011 *SABI Magazine* 22.

52 Pienaar and Van der Schyff *Water rights in South Africa* 183-184.
53 See s 21 of the *NWA*.
54 See Chapter 6 of the *NWA*.
55 Powers of the Minister that according to s 63 that may not be delegated, namely the power: (a) to make a regulation; (b) to authorize a water management institution to expropriate under s 64(1); (c) to appoint a member of the governing board of a catchments management agency; (d) to appoint a member of the water tribunal.
56 S 63(2) of the *NWA*.
57 S 72 of the *NWA*.

Certain powers of the public trustee may, according to Section 75, be delegated to an official by name, to the holder of an office in the department or to a water management institution. Members of the governing board can be elected or nominated by the different water user groups for appointment by the Minister. The Minister may also of his or her own accord appoint further members. The Minister, for good reason, may also remove these members.⁵⁸

The powers and disestablishment of water associations are dealt with in Chapter 8. An interested person would usually establish a water user association following a proposal to the Minister, but such an association may also be established on the Minister's own initiative. Water associations must act within the framework of national policy and standards. The Minister may exercise control over these associations by giving them directives or by temporarily taking over their functions under particular circumstances.⁵⁹

Chapter 9 empowers the Minister to set up advisory committees. The Minister may also amend the functions of an advisory committee or disestablish it.⁶⁰ The Minister may furthermore establish bodies to implement international agreements. Section 104-105 deals with the governance, powers and duties of these bodies, which are determined by the Minister in accordance with the relevant international agreement. The Minister is given the power to establish and operate government waterworks in the public interest, and the Minister must satisfy certain procedural requirements before constructing a government waterworks.⁶¹

It is clear from this discussion that the national government's duties and responsibilities as flowing from the *NWA* are all focused on protecting the nation's interest in the country's water resources. Every chapter of the *NWA* is a

58 S 83 of the *NWA*.

59 See s 94 for an exposition of the powers of the association.

60 See s 99(f) of the *NWA*.

61 In *Joubert and Others v Benede – Blyderivier Watergebruikersvereniging and Other* 2007 4 SA 80 (HHA) the court provided one of the duties of the state acting as public trustee, namely that it is the states duty to ensure that the right amount of water is released from the waterwork; *Schulzer* 2007 *De Rebus* 44.

building block in this process. This *NWA* is binding on all organs of state⁶² and although the applicable Minister may delegate responsibility, the national government will always be held accountable as public trustee.

3.3 Trust beneficiaries

Although, as already stated, public trusteeship should not be confused with or equated with the trust as legal figure, certain of the characteristics that underlie a fiduciary relationship are similar. Therefore the trust can be used to explain underlying principles of public trusteeship. In Trust law the beneficiary of a trust is the party who derives a benefit from the creation of a trust by the founder and from the administration of trust property by the trustee. With relation to Water law, the extent of a beneficiary's interest depends on the wording of the *NWA*. The *NWA* is clear on this point. The country's water resources must be held in public trust for the people, the beneficial use of water resources must serve the public interest and the water must be protected as the people's common heritage.⁶³ The people and their needs must be placed in the forefront of the Minister's concern. The *NWA* creates the framework within which all decisions relating to the nation's water resources must be taken.

In the *NWA* the public right to water, as well as the extent of the responsibilities and rights of role players, are founded. Individual interest must be measured against public interest.⁶⁴ The factors that any decision-making authority has to take into consideration when these two interests are balanced are multiple. The legislator listed some of these factors in Section 2 of the *NWA*.⁶⁵ It is important

62 Dugard 2008 *SAJHR* 595

63 S 2 of the *National Water Act* 36 of 1998.

64 Van der Schyff *The concept of public trusteeship as embedded in the South African National Water Act 1998*, 45-46.

65 (a) meeting the basic human needs of present and future generations;
(b) promoting equitable access to water;
(c) redressing the results of past racial and gender discrimination;
(d) promoting the efficient, sustainable and beneficial use of water in the public interest;
(e) facilitating social and economic development;
(f) providing for growing demand for water use;
(g) protecting aquatic and associated ecosystems and their biological diversity;
(h) reducing and preventing pollution and degradation of water resources;

to note that two very recent decisions of the North-Gauteng High Court⁶⁶ indicated that each scenario will determine the amount of factors that should be taken into account when decisions regarding water use allocations are made, and that none of the listed factors are more important than others.

3.4 Trust corpus

The *NWA* declared that all water is held in trust by the state, who allocates the rights.⁶⁷ The trust *corpus* is the property that is held for the benefit of the beneficiary. The trust *corpus*⁶⁸ that is administered by the Minister as public trustee is the nation's water resources.⁶⁹ All the water, namely ground water and water that was previously owned by private owners are now classified as part of the trust *corpus*.

4 *National Environmental Management Act* 107 of 1998

The *National Environmental Management Act* [hereafter *NEMA*], is regarded to be the framework act for all environmental legislation.⁷⁰ The concept of public trusteeship is also mentioned in the *NEMA* and therefore it is important to discuss the *NEMA*. The discussion is structured to give an overview of the aims of the *NEMA*, what the obligations are of the state as public trustee, who the beneficiaries are and what the trust *corpus* comprises.

-
- (i) meeting international obligations;
 - (j) promoting dam safety."
 - (k) managing floods and droughts, and for achieving this purpose, to establish suitable institutions and to ensure that they have appropriate community, racial and gender representation.

66 *The Guguleto Family Trust v Chier Director, Water Use Department of Water Affairs & Forestry and the Minister of Water Affairs* Case no A566/10 and *Goede Wellington Boerdery (Pty) Ltd V Atwell Sibusiso Makhanya N.O and the Minister of Water and Environmental Affairs* Case no 56628/2010.

67 Winstanley 2007 *De Rebus* 68.

68 Trust *corpus* refers to the trust property held for the benefit of the people.

69 Van der Schyff *The concept of public trusteeship as embedded in the South African National Water Act 1998*, 62.

70 Badenhorst and Mostert 2007 *TSAR* 478; Kotzé and Bosman 2006 *Obiter* 129.

4.1 The aim and preamble of NEMA

The main object of the *NEMA* is "to provide for cooperative environmental governance by establishing a framework for decision-making on matters affecting the environment,⁷¹ institutions that will promote cooperative governance and procedures for coordinating environmental issues exercised by organs of state, and to provide for matters connected therewith".⁷²

The preamble of the *NEMA* states that due to the fact that many inhabitants of South Africa live in an environment that is harmful to their health and well-being, the state must respect, protect, promote and fulfil the social, economic and environmental rights. Wealth and resources must be equally distributed and sustainable development must be ensured with everyone's right to have the environment protected.

The aims and principles of the *NEMA* are given in Section 2. It is set out in this section that the actions of all organs of state that may affect the environment is subject to the provisions of the *NEMA*.⁷³ The *NEMA* serves as a framework and guideline, which any organ of state must follow when taking any decision in terms of the *NEMA*.⁷⁴ The *NEMA* develops a framework for integrating good environment management and should ensure that organs of state maintain the principles guiding the exercise of functions.⁷⁵ Section 2(2) provides that people and their needs must be placed at the forefront of its concern. Relevant factors must be taken into consideration to ensure sustainable development,⁷⁶ and all elements of the environment must be taken into account where decisions are made regarding the environment.⁷⁷ Equitable access to environmental resources must be ensured, as well as human well-being by categories of persons

71 Gunn 2007 *Obiter* 39-40; Glazewski *Environmental Law in South Africa* 18.

72 Viljoen *South African Water Law* 106.

73 S 2(a) of the *NEMA*.

74 See ss 2(c) and (d).

75 Field 2004 *SALJ* 772.

76 See ss 2(4)(i)-(viii).

77 S 2(4)(b).

disadvantaged by unfair discrimination.⁷⁸ The state is conferred the duty of public trustee of the nation's interests relating to the environment.⁷⁹

4.2 Fiduciary responsibilities

The *NEMA* is clear on the aspects that the environment is held in a public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.⁸⁰ The nature of the state's responsibility is purely fiduciary. The sole aim of managing, protecting and conserving the environment and applicable natural resources is to ensure that all South Africans gain the benefit.⁸¹

The *NEMA* gives a number of management principles relating to the environment as natural resource in Chapter 1. These principles can be seen as an embodiment of the state's fiduciary responsibility in relation to the environment.

One of the state's duties as public trustee is given in Section 11(1), where it is stated that every national department listed in Schedule 1 and 2 of the *NEMA* may prepare a consolidated environmental implementation and management plan.⁸² The purpose of environmental implementation and management plans is to coordinate and harmonise the environmental policies, to give effect to the principle of cooperative government, to secure the protection of the environment, to prevent unreasonable actions and to enable the Minister as public trustee to monitor the achievement of a sustainable environment.⁸³ Sections 13 and 14 deal with the content of environmental implementation and management plans, which is not of great importance.

The public trustee must also act in accordance with Chapter 4 of the *NEMA*, which deals with fair decision-making and conflict management. In this chapter

78 See s 2(4)(d) of the *NEMA*.

79 See s 2(4)(g) of the *NEMA*.

80 See s 2(4)(o) of *NEMA* together with s 3 of the *MPRDA*.

81 Du Plessis 2010 *Stell LR* 280.

82 S 11(5)-(8) of *NEMA*.

83 S 12(a)-(e) of *NEMA*.

the focus is on the Minister's duties as the public trustee.⁸⁴ The Minister must refer any disagreement or appeal to be conciliated or be referred for arbitration.⁸⁵ Chapter 5 of the *NEMA* deals with the general objectives. The purpose of this chapter is to promote the application for appropriate environmental management tools in order to ensure the integrated environmental management of activities.⁸⁶ The Minister must implement the integrated environmental management in accordance with the *NEMA*.⁸⁷

The public trustee must take reasonable measures to remedy the situation if a person fails to comply with the *NEMA*.⁸⁸ The Minister may recover all cost incurred as a result. The statute contemplated under Section 32(2) of the Constitution governs access to information held by the state. The Minister as public trustee may enter into environmental management cooperation agreements with any person or community for the purpose of promoting compliance with the principles laid down in the *NEMA*.⁸⁹ As part of the Minister's duties as the public trustee, as stated in Section 2(4)(o) of the *NEMA*, together with Section 3 of the *MPRDA*, state land may be disposed of, as long as it is in the interest of the public.⁹⁰

When the public trustee does not act in the interest of the public, or where he or she does not comply with the *NEMA* or act in accordance with any of his or her duties, any affected person may bring an appeal against a decision taken by any person acting under a power delegation to him or her.⁹¹ The *NEMA* is binding on the state, except insofar as any criminal liability is concerned, and neither the state nor any other person is liable for any damages or losses caused by the

84 Where the duties of the Minister are given, the Minister is referred to as any Minister, MEC or Municipal Council.

85 See ss 17(a) and (b) and s 19 of *NEMA*.

86 S 23 of *NEMA*.

87 S 24 deals with the implementation.

88 See s 28 as well as 28(7) of *NEMA*; Field 2004 *SALJ* 775.

89 S 35(1)-(3); Field 2004 *SALJ* 772.

90 See s 37 of *NEMA*.

91 S 43 of *NEMA*.

exercise of any power or the performance of any duty under the *NEMA* or the failure to exercise any power.⁹²

4.2 Trust beneficiaries

As stated above, the beneficiary is the party who derives a benefit from the creation of a trust. Here we do not deal with a legal trust, but with the fiduciary responsibility that exists towards a beneficiary. The beneficiary's interest must be protected and the public trustee must act in the interest of the beneficiary. The beneficiaries in terms of the *NEMA* are clearly identified. In the *NEMA* it is stated that the "environment must be protected as the people's common heritage." Environment justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to be unfair. The beneficiary's basic human needs must be pursued and special measures may be taken to ensure access thereto.⁹³

The NEMA as species of public trust legislation is not aimed at promoting individual interest. It is the communal interest of the public as a whole that are advanced. Therefore it is deduced that a single person or legal entity cannot claim the benefits stated in the *NEMA* purely for himself or herself if the claim is not moulded from within the public interest. The beneficiary under the *NEMA* is the people in their collective sovereign capacity.⁹⁴

4.4 Trust corpus

The trust *corpus* comprises the assets that fall within the public trustee's authority. If one looks at the definition of "environment" as set out in the *NEMA*, "environment" means the following:

- ... the surroundings within which humans exist and that are made up of -
- i. the land, water and atmosphere of the earth;
- ii. micro-organisms, plant and animal life;

92 See s 48 and 49 of *NEMA*.

93 S 2(4)(d) of *NEMA*.

94 Van der Schyff *International Property*.

- iii. any part or combination of (i) and (ii) and the interrelationships among and between them; and
- iv. the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.

The totality of the environment as a resource falls under the authority of the public trustee.⁹⁵

The principle of custodianship is therefore also embodied in the *NEMA* and the state's fiduciary responsibility towards every citizen of the country, even unborn generations yet to come, should be taken into account when any decisions affecting the environment must be made.

5 *National Environmental Management: Biodiversity Act* 10 of 2004

The *National Environmental Management: Biodiversity Act*⁹⁶ also forms part of public trust-legislation, because here certain species and ecosystems must be protected within the framework of the *NEMA* for the benefit of the public.⁹⁷ The definition of biological diversity has in recent years developed to a more comprehensive topic and has also grown to become an increasingly important subject for environmental law purposes.⁹⁸ Here, the discussion will also focus on the aim and preamble of the *NEM:BD*, the beneficiaries under the *NEM:BD* and the identification of the trust *corpus*. The public trustee's obligations will also be considered.

5.1 *The aim and preamble of the NEM:BD*

To understand the extent of the concept of public trusteeship as created in the *NEM:BD*, it is necessary to focus on the aim and statements made in the

95 Van der Schyff *The concept of public trusteeship as embedded in the South African National Water Act 1998* 62.

96 Hereafter the *National Environmental Management: Biodiversity Act* will be referred to as *NEM:BD*.

97 Clelland 2009 *Without Prejudice* 13; Bowman *The Biodiversity Concept in International Law* 47.

98 It is also referred to as "an umbrella term for the degree of nature's variety". See further *The Biodiversity Concept in International Law* 5-31.

preamble of the act. The preamble of the *NEM:BD* clearly indicates that the management and conservation of South Africa's biodiversity must be provided for within the framework of the *NEMA*. There should also be protection for species and ecosystems that warrant national protection.⁹⁹ Sustainable use of indigenous biological resources and the fair and equitable sharing of benefits arising from bio-prospecting involving indigenous biological resources should be developed.¹⁰⁰

The meaning of the word “biodiversity” or “biological diversity” must be considered to have a clearer perceptive of the *NEM:BD* vision. It means the variability among living organisms from all sources, including terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part, and also includes diversity within species, between species and of ecosystems.¹⁰¹

The objects of the *NEM:BD* within the frame of the *NEMA*, are to provide for the management and conservation of biological diversity within the Republic and of components of such biological diversity. Provision are also made for the use of indigenous biological resources in a sustainable manner and the fair and equitable sharing among stakeholders. The *NEM:BD* also provides for cooperative governance in biodiversity management and conservation, as well as for a South African National Biodiversity Institute to assist in achieving the objectives of the *NEM:BD*.¹⁰²

The *NEM:BD* finds application within the Republic and is binding on all organs of state, including national and local spheres of government, as well as in the

99 White Paper on the conservation and sustainable use of South Africa's biological diversity GN 1095 of 28 July 1997.

100 Found in the Preamble of the *NEM:BD*.

101 S 1 of the *NEM BD*.

102 See s 2 of the *NEM:BD*.

sphere of provincial government. Specific provision in the *NEM:BD* should be read in conjunction with any applicable provisions of the *NEMA*.¹⁰³

The *NEM:BD* must be read with all applicable provisions of the *NEMA* and Section 2 of the *NEMA*.¹⁰⁴ Section 3 of the *NEM:BD* provides that in fulfilling the rights contained in Section 24 of the Constitution, the state through its organs that implement legislation applicable to biodiversity, must manage, conserve and sustain South Africa's biodiversity and its components and genetic resources, and implement the *NEM:BD* to achieve the progressive realisation of those rights.

The South African National Biodiversity Institute is established by the *NEM:BD*. The Institute is a juristic person, and the institute must monitor and report regularly to the Minister.¹⁰⁵ The Institute is governed by a Board consisting of members not fewer than seven, and the Minister must determine the number of members to be appointed. The Board takes all decisions in the performance of the duties and exercise of powers of the Institute.¹⁰⁶

5.2 Fiduciary responsibilities

The concept of public trusteeship is ingrained firmly in the *NEM:BD*. The appropriate authority's role and responsibility is clearly defined in the *NEM:BD*.¹⁰⁷ According to Section 33, the Minister have the authority of acting with the approval of the Cabinet member responsible for the administration of the land, and may, by notice in the *Gazette*, declare any state land described in the notice as a national botanical garden or part of an existing national botanical garden as already stated. The Minister must monitor all exercise and performance by the Institute of its powers and duties.¹⁰⁸

103 This is in accordance with the sovereignty principle as captured in the CBD whereby the State is held to be the trustee of biological diversity.

104 See s 6 of the *NEM:BD*.

105 See ss 10 and 11 of the *NEM:BD*, where further requirements are provided.

106 S 13 of the *NEM:BD* as well as in s 14 where provided that a member must be a fit and proper person and that the member must have appropriate qualifications and experience.

107 See s 28(1) of the *NEM:BD*.

108 See s 35(1) of the *NEM:BD*.

The Minister must prepare and adopt a national biodiversity framework within three years of the date on which the *NEM:BD* takes effect. He must monitor implementation of the framework, must review the framework at least every five years, and may, when necessary, amend the framework.¹⁰⁹ The Minister may enter into agreements, and must review the biodiversity management plan.¹¹⁰ The Minister, in monitoring the matter, must make information available to the public.¹¹¹

As Section 3 of the *NEM:BD* provided, when fulfilling the rights contained in Section 24 of the Constitution, the state through its organs that implement legislation applicable to biodiversity must manage, conserve and sustain South Africa's biodiversity and its components and genetic resources, and implement the *NEM:BD* to achieve the progressive realisation of those rights. It is clear from Section 5 of the *NEM:BD* discussed above, that the public trustee must govern the resources in terms of the *NEM:BD* so that the interests of the public as beneficiary is protected.

5.3 Trust beneficiaries

The beneficiaries of the *NEM:BD* are clearly identified. The beneficiary in the *NEM:BD* is the local community, which includes the people living or having rights or interests in a distinct geographical area.¹¹² A beneficiary who feels aggrieved, or a permit holder whose permit has been cancelled,¹¹³ may lodge an appeal with the Minister against the decision within 30 days after having been informed of the decision.¹¹⁴ According to Sections 94(2) and (3), the Minister must either consider and decide the appeal or redirect the appeal, or designate a panel of persons to consider and decide the appeal.

109 S 38(1) of the *NEM:BD*.

110 See ss 46 and 47 of the *NEM:BD*.

111 S 49 of the *NEM:BD*.

112 See the definition of local community.

113 S 82(2) of the *NEM:BD*. See Glazewski *Environmental Law* 279.

114 S 94(1) of the *NEM:BD*.

There are many benefits in the conservation of biological diversity where a platform has been created through South Africa's legislative framework to enable indigenous people and local communities to benefit from biodiversity prospecting and the conservation of our biological resources. The public trustee must also make regulations relating to the monitoring of compliance with and enforcement of norms and standards.¹¹⁵

5.4 Trust corpus

The trust *corpus* comprises of the assets or things that fall within the public trustee's authority. According to Section 3 of the *NEM:BD*, the trust *corpus* must be managed, conserved and sustained. Section 1 of the *NEM:BD* contains an indication of what falls under the meaning of biodiversity. As stated previously, biodiversity means the variability among living organisms from all sources including terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part and also includes diversity within species, between species and of ecosystems.¹¹⁶

In this sense biodiversity is not a single tangible thing but a living system.¹¹⁷ Species and ecosystems fall under the trust *corpus* that must be protected by the public trustee. Species includes a kind of animal, plant or other organism that does not normally interbreed with individuals of another kind.¹¹⁸ Ecosystems mean a dynamic complex of animal, plant and micro-organism communities and their non-living environment interacting as a functional unit.¹¹⁹

The *NEM:BD* confirms the country's interest in its own biological resources and confirms the state's sovereignty over resources found within its own borders. It further recognises the important role of traditional communities

115 See s 97(1) of the *NEM:BD*.

116 S 1 of the *NEM:BD*.

117 See the preamble of the *NEM:BD*.

118 See the preamble of the *NEM:BD* and the definition of species.

119 See the preamble of the *NEM:BD* and the definition of ecosystems.

and peoples when it comes to conservation and the benefits that should also be allocated to such communities.

After dissecting the provisions of the *NEM:BD*, it may be said that its provisions, together with the implementation of the national biodiversity framework, have now to a great extent addressed previous legal and administrative constraints that hampered conservation efforts and benefit sharing in South Africa in the past. One can only hope that the implementation of these provisions is done effectively. This will prove to be one of the greatest challenges to all role players involved.¹²⁰

6 *Mineral Petroleum Resource Development Act 28 of 2002*

The principles of mineral law as rooted in common law were changed after the implementation of the *Mineral Petroleum Resource Development Act 28 of 2002* [hereafter the *MPRDA*] in 2004.¹²¹ The aim of the *MPRDA* and the state's responsibilities lay down the changes that mineral law in our country has undergone.¹²² Here the focus will also be on the state's responsibilities as public trustee over the people of South Africa's mineral resources.¹²³

6.1 *The aim and preamble of the MPRDA*

The *MPRDA* was promulgated to provide for equitable access to and sustainable development of the nation's mineral and petroleum resources.¹²⁴ The *MPRDA* provides a dispensation which entirely replaces the former as created by the *Mineral Act*,¹²⁵ and vests the state, as opposed to private property owners, with custodianship of South Africa's resources.¹²⁶ The state has done away with the

120 Van der Schyff *International Property*.

121 *Agri SA v Minister of Minerals and Energy (Centre for Applied Legal Studies as amicus cauria)* 2011 3 All SA 296 (GNP); Badenhorst 2009 *TSAR* 606-607.

122 Visser, Cottle and Mettler 2003 *Law, democracy & development* 44.

123 *Mineral Development Bill* of 2000; Badenhorst and Malherbe 2001 *TSAR* 462-478.

124 S 24(b)(iii) of the Constitution of the Republic, 1996; Badenhorst and Moster 2007 *TSAR* 469.

125 *Mineral Act* 50 of 1991.

126 *Van Rooyen v Minister of Minerals and Energy* 2010 1 SA 104 (GNP).

legal notion of private ownership of mining and mineral rights and the state, in granting prospecting benefits or permits, is not dealing with the mineral resources of the public as a holder of common law rights.¹²⁷ The new mineral law dispensation introduced a system, with the state acting as the public trustee, as the basis for regulatory control over minerals and mining.¹²⁸ It is also clear that "the only way to acquire new rights is to obtain them from the state".¹²⁹ It is important to look at the meaning and effect of Section 3 of the *MPRDA* to have a better understanding of what the public trustee's duties and the rights of the people of South Africa are.

The *MPRDA* stated in the preamble that mineral and petroleum are the common heritage of all the people of South Africa, with the state the duly appointed custodian thereof for the benefit of all South Africans.¹³⁰ Section 3(1) goes further and provides that the state is appointed as trustee for the benefit of all South Africans.¹³¹ Uncertainty originates when reference is made to "trustee of the nation's minerals".

The above-mentioned concept does not fall in the established or contemporary concepts of *res omnium communes* or *res publicae*.¹³² The significance of Section 3 of the *MPRDA* for the people of South Africa is that the legislature incorporated the foreign concept of public trusteeship to provide for equitable access to and sustainable development of the nation's mineral resources.¹³³

127 *DeBeers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd* OPD 13-12-2007 case no 3215/06, here it was stated that minerals are not *res publicae*; Franklin and Kaplan *Mining and Mineral Laws* 29-35; Badenhorst and Shone 2008 *Obiter* 29-45; Van den Berg 2009 *Stell LR* 139-151.

128 In *Elandrand Gold Mining Company Limited v JF Uys* 1995 SA 93 (T) the definition of minerals are given.

129 Mostert *et al Principles of the law or Property* 268.

130 *Agri SA v Minister of Minerals and Energy (Centre for Applied Legal Studies as amicus curia)* 2011 3 All SA 296 (GNP); Badenhorst and Mostert 2003 *Stell LR* 383; Van der Schyff 2008 *TSAR* 760.

131 Mostert *et al Principles of the Law or Property* 269; Badenhorst and Mostert 2007 *TSAR* 475.

132 Badenhorst and Mostert 2003 *Stell LR* 383; Badenhorst and Mostert 2007 *TSAR* 476-477.

133 Van der Schyff *Constitutionality* 284.

The South African Mining industry accepts the concept that the state is the trustee of the minerals of the land, but the emphasis must fall on the fact that the rights already vested in the owners and holders must be protected by the state as public trustee.¹³⁴ The state must ensure that all South Africans enjoy an environment that is not harmful to their health or well-being.¹³⁵ In *Agri SA v Minister of Minerals and Energy (Centre for Applied Legal Studies as amicus cauria)*¹³⁶, the court examined the provisions of the *MPRDA*, and provided that the *MPRDA* allows the state, as public trustee of mineral resources, to grant prospecting or mining rights to persons who apply for them. The Minister's powers and duties regarding the grant or refusal of a prospecting right are set out in Section 17 of the *MPRDA*.

6.2 Fiduciary responsibilities

The state is appointed as the custodian of the nation's mineral resources. With this appointment the state is empowered to grant various rights to minerals and petroleum against payment of a fee or consideration.¹³⁷ The duty imposed on the Minister of Minerals and Energy is to ensure the sustainable development of South Africa's mineral resources within a framework of national environmental policy, norms and standards, whilst promoting economic and social development.¹³⁸ The Minister of Minerals and Energy may grant different kinds of right to minerals.¹³⁹

The term "right to minerals" is used in order to distinguish these rights from mineral rights in terms of the common law and statutory law of the old order.¹⁴⁰ The Minister is empowered to suspend or cancel reconnaissance permission, prospecting right, mining right, mining permit or retention permit to minerals

134 Badenhorst and Mostert 2007 *TSAR* 476-477.

135 Gunn 2006 *Environmental Law* 1.

136 *Agri SA v Minister of Minerals and Energy (Centre for Applied Legal Studies as amicus cauria)* 2011 3 All SA 296 (GNP).

137 Badenhorst, Pienaar and Mostert *Law of Property* 672; Van den Berg 2009 *Stell LR* 139.

138 Badenhorst, Pienaar and Mostert *Law of Property* 675; s 3(3) of the *MPRDA*.

139 Van den Berg 2009 *Stell LR* 139.

140 S 3(3) of the *MPRDA* and as to the discussion in Badenhorst, Pienaar and Mostert *Law of Property* 675.

under prescribed circumstances.¹⁴¹ Suspension or cancellation can only take place if the prescribed procedure is followed.¹⁴²

The Minister must grant his consent if the applicant is capable of complying with the obligations, terms and conditions of the right.¹⁴³ Another fiduciary responsibility of the Minister is to facilitate assistance to any historically disadvantaged person to conduct prospecting or mining activities.¹⁴⁴ The Minister must also grant the right if the community can prove that the right would be used to contribute towards its development and social upliftment.¹⁴⁵

The state as custodian must act according to the provisions of the *MPRDA*. The emphasis is placed on the state's duty to protect the environment for benefit of present and future generations.¹⁴⁶ This brings about equitable access to the country's minerals for the people of South Africa. Emphasis must also be placed on the state's fiduciary responsibility and regulatory functions, to acknowledge and protect the nation's minerals and resources.

According to Badenhorst, where resources are held by the state, the state act as the custodian over the resources and have fiduciary duties to fulfil. The resources must be held in a trust by the state for the benefit and use of the general public.¹⁴⁷ The property in the trust may not be sold; it must be made available for use by the general public and the property must be maintained for a particular use.¹⁴⁸

141 See s 47(1) of the *MPRDA*; *Holcim v Prudent Investors* 2010 ZASCA 109.

142 As discussed in Badenhorst, Pienaar and Mostert *Law of Property* 691; *Norgda v The Minister of Minerals and Energy of South Africa* 2011 ZASCA 49.

143 Du Plessis, Olivier and Pienaar 2009 *SAPR* 436.

144 S 11(2) of the *MPRDA*.

145 Du Plessis, Olivier and Pienaar 2009 *SAPR* 436.

146 Badenhorst and Mostert 2007 *TSAR* 476.

147 Glazewski *Environmental Law* 464-468.

148 [http:// www.lead-journal.org/content/07195.pdf](http://www.lead-journal.org/content/07195.pdf) 199/18 November 2011.

The state holds the mineral resources as custodian only and all actions of the state that relate to mineral activities can, and should, constantly be scrutinised to ensure that they are indeed beneficial to the nation.¹⁴⁹

6.3 Trust beneficiaries

In the *MPRDA* it is affirmed that "South Africa's mineral and petroleum resources belong to the nation". It is thus clear that the South African nation as a whole is the beneficiary under the *MPRDA*. The *MPRDA* is not aimed at promoting individual interest. It is the communal interest of the public as a whole that are advanced.¹⁵⁰ Therefore it is deduced that a single person or legal entity cannot claim the benefits of public trust-legislation if the claim is not moulded from within the public interest.

Although the view is held by some that ownership of the country's mineral resources is vested in the state through the state acting as the public trustee, the people of South Africa can truly regard mineral resources as their common heritage.¹⁵¹

6.4 Trust corpus

As stated above, the *MPRDA* deals with the country's mineral and petroleum resources as a whole, but then determines how specific resource units can be. It is the natural resource as a whole that constitutes the object of public trusteeship and the distinguishable resource units that forms the objects of private use rights in statutory public property.

149 Van der Schyff *Constitutionality* 270.

150 Badenhorst and Mostert 2007 *TSAR* 476-477.

151 *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Fetanemoloi v The Minister of Energy and Other* Case no 254/05.

7 *National Environmental Management: Integrated Coastal Management Act 24 of 2008*

In 2008 the concept of public trusteeship was once again applied in the *National Environmental Management: Integrated Coastal Management Act 24 of 2008*.¹⁵² In the *NEM:ICM* it is unequivocally stated that the ownership of coastal public property vests in the citizens of the Republic and that the state is the public trustee thereof.¹⁵³ In the *NEM:ICM* the state is appointed the public trustee of coastal public property. The state's responsibilities and the obligations as trustee will be looked at. The focus will be on the aim and preamble of the *NEM:ICM*, who the beneficiaries are and what the trust *corpus* is, and the public trustee's obligations will also be examined.

7.1 *The aim and preamble of the NEM:ICM*

The aim of the *NEM:ICM* is to establish a system of integrated coastal and estuarine management in the Republic, to maintain the natural attributes of coastal landscapes and seascapes, and to ensure that development and the use of natural resources within the coastal zone is socially and economically justifiable and ecologically sustainable.¹⁵⁴

The preamble of the *NEM:ICM* states that everyone has the constitutional right to have the environment, including the coastal environment, protected for the benefit of present and future generations.

7.2 *Fiduciary responsibilities*

The state's responsibilities as public trustee include the regulation, management, protection, conservation and rehabilitation of the coastal environment, coastal zone and coastal resources. It also includes the monitoring and enforcing of

152 Hereafter referred to as *NEM:ICM*.

153 Kidd 2009 *Annual Survey of South African Law* 395.

154 See the Preamble of the *NEM:ICM*.

compliances with laws and policies that regulate human activities within the coastal zone.¹⁵⁵

The object of the *NEM:ICM* is to determine the coastal zone of the Republic, to provide, within the framework of the *NEMA*, for the coordinated and integrated management of the coastal zone by all spheres of government in accordance with the principles of cooperative governance. It is also to preserve, protect, extend and enhance the status of coastal public property as being held in trust by the state of behalf of all South Africans. Furthermore, it is to secure equitable access to the opportunities and benefits of coastal public property and to give effect to the Republic's obligations in terms of international law regarding coastal management and the marine environment.¹⁵⁶

The state's duties are clearly stipulated in the *NEM:ICM*. The state's duty to fulfil environmental rights in coastal environment is stated in Section 3 of the *NEM:ICM*. Section 3 provides that in fulfilling the rights contained in Section 24 of the Constitution of the Republic of the South Africa, the state, through its functionaries and institutions implementing the *NEM:ICM*, must act as the trustee of the coastal zone,¹⁵⁷ and must in implementing the *NEM:ICM*, take reasonable measures to achieve the progressive realisation of those rights in the interests of every person.¹⁵⁸

Further responsibilities of the state can be dedicated to municipalities with regards to coastal land.¹⁵⁹ An area can be declared by the Minister to be a special management area.¹⁶⁰ The Minister must also determine and adjust coastal boundaries of coastal public property, coastal protection zones, as well as coastal access land.¹⁶¹ The Minister may review coastal management

155 See the definition of Coastal Management in s 1 of Chapter 1 of the *NEM:ICM*.

156 See s 2 of the *NEM:ICM*.

157 See s 2(a) of *NEM:ICM*.

158 S 2(b) of *NEM:ICM*.

159 S 20 of the *NEM:ICM* stipulates the responsibilities of Municipalities.

160 See s 23(1) of the *NEM:ICM*.

161 This can be found in s 27 of the *NEM:ICM*, stating that where the Minister determine coastal boundaries, he must take into account the nature of the shoreline, natural

programmes, and he must repair structures of coastal zones. An organ of state that is responsible for implementing national, provincial or municipal legislation that regulates the planning or development of land, must apply legislation in relation to land in the coastal protection zone in a way that gives effect to the purpose for which the protection zone is established.¹⁶²

The Minister may grant environmental authorisation in the interest of the whole community and the people of South Africa. Section 64 of the *NEM:ICM* provides that if an application for an environmental authorisation is referred to the Minister in terms of Section 63, the Minister may issue or authorise the other relevant competent authority to issue the environmental authorisation.¹⁶³

Because the nation as an entity with no legal personality is represented by the state, the state holds the natural resource on behalf of the nation. The state is not the owner in the sense that it has absolute power and dominium over this resource to the exclusion of the rights of those who have the beneficial interest therein. The state's rights toward the resource is moulded and limited by provisions ascribed to it in the *NEM:ICM*.

7.3 Trust beneficiary

The ownership of coastal public property vests in the citizens of the Republic and coastal public property must be held in trust by the state on behalf of the citizens of the Republic. This means that the collective interest of the community is determined by prioritising the collective interest in coastal public property of all persons living in the Republic over the interests of a particular group or sector of society.¹⁶⁴ The interests of future generations in inheriting coastal public property and a coastal environment characterised by healthy and productive ecosystems and economic activities that are ecologically and socially sustainable, must be

movement in high water mark, and the erosion and accretion of the seashore. It can also be found in ss 28 and 29 of the *NEM:ICM*.

162 S 62(1) of the *NEM:ICM*.

163 See s 64(1) of the *NEM:ICM*.

164 Definition of "interests of the whole community".

taken into account.¹⁶⁵ Section 2 provides that the coastal zone of the Republic be preserved, protected, extended and enhanced on behalf of all South Africans, including future generations.¹⁶⁶

7.4 Trust corpus

The trust *corpus* consists of the coastal public property, which includes the following: coastal waters, land submerged by coastal waters, including land flooded by coastal waters, any island, the seashore, the seashore of a privately owned island within the coastal zone, and any admirable reserve owned by the state. It also includes any state-owned land declared to be coastal public property and any natural resources on or in the coastal public property.¹⁶⁷

8. Conclusion

The research question that inspired this study was whether the concept of public trusteeship, as it emanated from different pieces of natural resource-related legislation, is rooted in common law concepts of *res publicae* and *res omnium communes*, or merely developed ancillary thereto.¹⁶⁸

The following became clearer after the research was concluded. The concept of *res omnium communes* can be explained as “*res omnium communes* are those things which by natural law are common to all men, but belongs to no-one”, and no further explanations can be found.¹⁶⁹ Dooyeweerd’s explanation of this concept revolved around the fact that the things classified as *res omnium communes* were available in abundance and thus it could not be allotted to a person. Hugo de Groot argued that *res omnium communes* belonged to all men, but that this ownership was not the same as private ownership.¹⁷⁰

165 See s 1 of the *NEMA:ICM* where the definition of “interests of the whole community” is given.

166 S 2 of the *NEMA:ICM*.

167 See s 7 of the *NEMA:ICM* for a broader description of which property is included in Coastal public property.

168 See par 1 *supra*.

169 See par 2.1 *supra*.

170 See par 2.1 *supra*.

Res publicae on the other hand, denoted a category of things that belonged to an entire civil community, and are often referred to as state property.¹⁷¹ Here the opinion of Van der Vyfer stated that it meant that the state eventually became the owner of *res publicae*, but that the public retained its entitlement to use and enjoy those objects destined for general use by members of the community.¹⁷²

After the common law concepts of *res omnium communes* and *res publicae* had been studied, it was clear that although both categories of things denote things that cannot be privately owned, and which belong to either the whole of mankind or a specific civil community, no specific indications of a fiduciary relationship that obliged the state to manage, protect or administer any of the things to the benefit of current and future generations were found.

With reference to the public trust legislation that was considered, the following can be stated: In all the pieces of legislation studied, either the state or the national government is appointed as the public trustee or custodian¹⁷³ of a specific natural resource or the environment as a whole.¹⁷⁴ It is the public trustee's responsibility to protect and develop these natural resources and to act in the interest of the people of South Africa.¹⁷⁵

The fiduciary responsibility that fall on the public trustee is set out in every piece of legislation, but the golden thread woven through all these pieces of legislation is that the public trustee must act in the interest of the people of South Africa, and that the resources should be protected, but that no private right vests in the public or the state.

The beneficiaries are also defined in each Act. The *NWA* indicated the nation of South Africa¹⁷⁶ as beneficiary of the country's water resources.¹⁷⁷ The *NEMA*

171 See par 2.2 *supra*.

172 See par 2.2 *supra*.

173 See par 3.1

174 See par 3.4, 4.4, 5.4, 6.4 and 7.4 *supra*.

175 See par 3.2, 4.4, 5.4, 6.4, 7.4 *supra*.

176 See par 3.3 *supra*.

177 See par 3.3, 4.3, 5.3, 6.3, 7.3 *supra*.

indicated that the beneficiaries of the environment are the people of South Africa in their collective sovereign capacity. In terms of the biodiversity as provided in the *NEM:BD*, the local community where the species are found is the beneficiary thereof. The local community includes the people living or having rights or interests in a distinct geographical area.¹⁷⁸ Under the *MPRDA* it is clear that the South African nation as a whole is the beneficiary as “South Africa’s mineral and petroleum resources belong to the nation”.¹⁷⁹ In terms of the coastal public property as found in the *NEM:ICM*, trust *corpus* vests in the citizens of the Republic.¹⁸⁰

This dissection of the public trust legislation highlighted the immense fiduciary responsibility of either the state or national government in relation to a statutorily determined beneficiary. The fact that no private property rights could be acquired in the different natural resources as a whole is also clear. It is on this point that the statutorily created concept of public trusteeship might share similarities with both the concepts of *res omnium communes* and *res publicae*. The distinguishing factor is, however, the fiduciary responsibility attributed to the state or national government through public trust legislation. Thus, to answer the research question, it should be stated that the concept of notion of public trusteeship did not develop from the South African common law, but is a new concept that is statutorily introduced. It is, however, not in conflict with the common law concepts of *res omnium communes* and *res publicae*.

178 See par 5.3 *supra*.

179 See par 6.3 *supra*.

180 See par 7.3 *supra*.

9 Bibliography

9.1 Literature

B

Badenhorst and Malherbe 2001 *TSAR*

Badenhorst PJ and Malherbe M "The constitutionality of the Mineral Development Draft Bill 2000" 2001 *TSAR* 462-478

Badenhorst and Mostert 2007 *TSAR* 469-493

Badenhorst PJ and Mostert H "Artikel 3(1) and (2) van die Mineral and Petroleum Resources Development Act 28 of 2002: 'n herbeskouing" 2007 *TSAR* 469-493

Badenhorst, Pienaar and Mostert *Law of Property*

Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's Law of Property* 5th ed (Butterworths Durban 2006)

Badenhorst and Shone 2008 *Obiter*

Badenhorst PJ and Shone RW " 'Minerals', 'Petroleum' and 'Operations' in the Mineral and Petroleum Development Act 28 of 2002: A geologist as devil's advocate for a change?" 2008 *Obiter* 29

Badenhorst and Mostert 2003 *Stell LR*

Badenhorst PJ and Mostert H "Revisiting the transitional Arrangements of the *Mineral and Petroleum Resources Development Act 28 of 2002* and the Constitutional property clause: An analysis in two parts" 2003 *Stell LR* 377-400

Bovenberg *Duke Law & Technical Review*

Bovenberg *Duke Law & Technical Review*

Bowman *The Biodiversity Concept in International Law*

Bowman G *The Nature Development and Philosophical Foundations of the Biodiversity Concept in International Law* TAXtalk 2010

Buckland *A manual of Roman Private Law*

Buckland WW *A manual of Roman Private Law* 2nd ed (University Press Cambridge 1947)

C

Clelland 2009 *Without Prejudice*

Clelland S "Biodiversity Act Amendments: environmental law" 2009 *Without Prejudice* 13

D

Dooyeweerd Essays in legal, social and political philosophy

Dooyeweerd H Essays in legal, social and political philosophy (Lewiston NY E Mellen 1996)

Dugard 2008 *SAJHR*

Dugard J "Rights, regulation and resistance : the Phiri Water Campaign : current developments" 2008 *SAJHR* 590-599.

Du Plessis 2010 *Stell LR*

Du Plessis A "Local Environmental Governance" and the role of local government in realising section 24 of the South African Constitution" 2010 *Stell LR* 280

Du Plessis, Olivier and Pienaar 2009 *SAPR*

Du Plessis, Olivier and Pienaar "A new dispensation for communal land and minerals" Jaartal *SAPR* 436

Du Toit *South African Trust Law*

Du Toit *South African Trust Law Principles and Practice*

F

Field 2004 *SALJ*

Field TL "Realizing the National Environmental Act's potential to bring polluters to book" 2004 *SALJ* 772-784

Franklin and Kaplan *Mining and Mineral Laws*

Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (Durban Butterworths 1982)

G

Glazewski *Environmental Law*

Glazewski J *Environmental Law in South Africa* 2nd ed (Durban Butterworths 1998)

Gunn 2006 *Environmental Law*

Gunn A "Environmental Legislation – Interesting Times" 2006 *Environmental Law* 1-6.

Gunn 2007 *Obiter*

Gunn A "The legal duty to consider the effect of dams on water resources in South Africa Civil engineering" 2007 *Obiter* 39-40

K

Kaser *Roman Private Law*

Kaser M *Roman Private Law* 2nd ed (Butterworths Durban 1968) – Translation by Dannenbring R

Kaser *Roman Private Law*

Kaser M *Roman Private Law* (Pretoria University of South Africa 1980)

Kidd 2009 *Annual Survey of South African Law*

Kidd M "Environmental law" 2009 *Annual Survey of South African Law* 393-439

Kotzé and Bosman 2006 *Obiter*

Kotzé JL and Bosman C A "Legal Analysis of the proposed waste discharge system in terms of the South African Environmental and water law framework" 2006 *Obiter* 129

M

Mbodla 2001 *THRHR*

Mbodla N "Res publicae: a South African perspective" 2001 *THRHR* 115-123

McDougall *The heavens and the earth: A political history of the space age*

McDougall W *The heavens and the earth: A political history of the space age* 2000

Mostert *et al Principles of the Law or Property*

Mostert *et al The Principles of the Law or Property in South Africa*

Miller and Pope *Land Title in South Africa*

Miller DL and Pope A *Land Title in South Africa* 2000

P

Pienaar and Van der Schyff *Water Rights in South Africa*

Pienaar GJ and Van der Schyff E *The reform of water Rights in South Africa*

R

Rathman *Society for Philosophy and Technology*

Rathman D *Society for Philosophy and Technology*

S

Schulzer 2007 *De Rebus*

Schulze H "The Law Reports: Water" 2007 *De Rebus* 44

Sohm *Textbook of the History*

Sohm R *The Institutes: A Textbook of the History and System of Roman Private Law* (Oxford Clarendon Press 1907)

V

Van den Berg 2009 *Stell LR*

Van den Berg HM "Ownership of Minerals under the new legislative framework for mineral resources" 2009 *Stell LR* 139-158

Van der Merwe 2011 *SABI Magazine*

Van der Merwe F "Water use and water transfers - Part 2 : water law" 2011 *SABI Magazine* 15-24

Van der Schyff *The concept of public trusteeship as embedded in the South African National Water Act, 1998*

Van der Schyff E *The concept of public trusteeship as embedded in the South African National Water Act, 1998*

Van der Schyff *Constitutionality*

Van der Schyff E *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* (LLD thesis North-West University Potchefstroom 2006)

Van der Schyff and Viljoen 2008 *The Journal for Transdisciplinary Research in Southern Africa*

Van der Schyff E and Viljoen G "Water and the Public trust doctrine – a South African perspective" 2008 *The Journal for Transdisciplinary Research in Southern Africa* 340

Van der Schyff *PELJ*

Van der Schyff E "Unpacking the Public Trust Doctrine: A Journey into foreign territory" 2010 *Potchefstroom Electronic Law Journal* 122.

Van der Schyff 2008 *TSAR*

Van der Schyff E "Who 'owns' the country's mineral resources? The possible incorporation of the public trust doctrine through the Mineral and Petroleum Resources Development Act" 2008 *TSAR* 760

Van der Schyff "International Property"

Van der Schyff E "International Property" (Unpublished paper delivered at the Lawyers Colloquium held at UNISA 25-28 September 2010 Pretoria)

Van der Vyver 1989 *History of Law*

Van der Vyver JD "The etatisation of public property" *Essay on the History of Law* (ed Visser DP) 1989

Viljoen *South African Water Law*

Viljoen G *The Public Trust Doctrine in South African Water Law* (LLM Dissertation North-West University Potchefstroom 2009)

Visser, Cottle and Mettler 2003 *Law, democracy & development*

Visser D, Cottle J and Mettler E "Realising the right of access to water: pipe dream or watershed?" 2003 *Law, democracy & development* 44

W

Winstanley 2007 *De Rebus*

Winstanley T "Water law : a practical approach to resource management and the provision of services, by H Thompson : book review" 2007 *De Rebus* 68.

9.2 Case Law

A

Agri SA v Minister of Minerals and Energy (Centre for Applied Legal Studies as amicus curia) 2011 3 All SA 296 (GNP)

B

Butgereit & Another v Transvaal Canoe Club 1988 1 SA 759 (A)

D

DeBeers Consolidated Mines v Regional Manager, Mineral Regulation Free State Region: DME (High Court of South Africa Orange Free State Provincial Division) 1690/2007

E

Elandsrand Gold Mining Company Limited v JF Uys 9915 SA 93 (T)

F

Fetanemoloi v The Minister of Energy and Other Case no 254/05

G

Goede Wellington Boerdery (Pty) Ltd v Atwell Sibusiso Makhanya N.O and the Minister of Water and Environmental Affairs Case no 56628/2010

The Guguleto Family Trust v Chief Director, Water Use Department of Water Affairs & Forestry and the Minister of Water Affairs Case no A566/10

H

Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products 2004 1 All SA 636 (E) 652

Holcim v Prudent Investors 2010 ZASCA 109

J

Joubert and Others v Benede-Blyderivier Watergebruikersvereniging and Other 2007 4 SA 80 (HHA)

M

Mostert v The State [2009] ZASCA 171

N

National Audubon Society v Superior Court of Alpine County 33 Cal 3 d 419

Norgda v The Minister of Minerals and Energy of South Africa 2011 ZASCA 49

S

S v Mostert and Another 2010 1 SACR 223 (SCA)

Setlogelo v Setlogelo 1914 AD 221 at 227

South African Shore Angling Association and Another v Minister of Environmental Affairs 2002 5 SA 511 (SE)

Surveyor-General (Cape) v Estate De Villiers 1923 AD 588

V

Van Rooyen v Minister of Minerals and Energy 2010 1 SA 104 (GNP)

9.3 Legislation

C

Constitution of the Republic, 1996

M

Mineral Act 50 of 1991

Mineral and Petroleum Resources Development Act 28 of 2002

Mineral Development Bill of 2000

N

National Environmental Management Act 107 of 1998

National Environmental Management: Biodiversity Act 10 of 2004

National Environmental Management: Integrated Coastal Management Act 24 of 2008

National Water Act 36 of 1998

W

White Paper on A National Water Policy for South Africa (1997)

White Paper on the conservation and sustainable use of South Africa's biological diversity GN 1095 of 28 July 1997

Government Gazette

W

White Paper A Mineral and Mining Policy for South Africa GN 2359 in GG 19344 20 October 1998

9.4 Unpublished papers

V

*Van der Schyff International Property Lawyers Colloquium held at UNISA, 2010
Property Lawyers Colloquium held at UNISA, 2010*