




**Agreement-based expansion of protected
areas: requirements in terms of South
African Environmental Law**

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"Here is your country. Cherish these national wonders, cherish the natural resources, cherish the history and romance as a sacred heritage, for your children and your children's children. Do not let selfish men or greedy interests skin your country of its beauty, its riches or its romance."

- Theodore Roosevelt -

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ABSTRACT

Protected areas can be defined as "an area of land and/or sea especially dedicated to the protection of biological diversity, and/or natural and associated culture resources and managed through legal or other effective means". In this dissertation, a critical review is made of the establishment and expansion of protected areas. This paper starts by looking at the importance of protected areas to communities and it gives direction on how to conserve South Africa's biodiversity. Reference is made to the *National Environmental Management: Protected Areas Act* 57 of 2003 (NEMPAA), the *National Environmental Management Act* 107 of 1998 (NEMA) and the *National Environmental Management: Biodiversity Act* 10 of 2004 (NEMBA) in highlighting the role of protected areas. In undertaking this, the changing face of protected areas and the concept of contractual agreements to expand existing protected areas and National Parks will be discussed.

The paper also considers South Africa's constitutional framework, and in particular the environmental right, which has largely been responsible for shaping and informing South Africa's contemporary conservation regime. This section is followed by a brief outline of the procedure to be followed to create or expand a protected area. Critical evaluation of the requirements needed to enter contractual agreements to expand a National Park will be performed with a special focus on selected case studies, namely the Richtersveld National Park and the Pafuri Region of the Kruger National Park. Finally, the research will conclude by discussing lessons learnt in entering contractual agreements between landowners and SANParks by looking at the expansion of the Mapungubwe National Park and Heritage Site.

KEYWORDS

Protected Areas, National Parks, Contractual Agreements, Biodiversity, Conservation, Mapungubwe National Park and Heritage Site.

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LIST OF ABBREVIATION

Banjul Charter	African Charter of Human and Peoples Rights
CARA	Conservation of Agricultural Resources Act
CBD	Convention on Biological Diversity
CBNRM	Guidelines for the Implementation of Community Based Natural Resource Management
CCA	Community Protected Areas
CBD Programme of work	Secretariat of the Convention on Biological Diversity Programme of Work on Protected Areas
CEESP	The IUCN Commission on Environmental, Economic and Social Policy of the World Conservation Union
CMWG	The Collaborative Management Working Group
COP	Conference of the Parties
ECOSOC	United Nations Economic and Social Council
EIA	Environmental Impact Assessment
ESTA	Extension of Security of Tenure Act
EWT	Endangered Wildlife Trust
FAO	The Food and Agriculture Organization of the United Nations
GMTFCA	The Greater Mapungubwe Transfrontier Conservation Area
IIED	The Natural Resources Group and the Sustainable Agriculture and Rural Livelihoods Programme of the International Institute for Environment and Development
IUCN	International Union for Conservation of Nature
JIWLP	Journal of International Wildlife and Policy
JSAVA	Journal of the South African Veterinary Association
LCC	Land Claims Courts
London Convention 1900	Convention on the Preservation of Wild Animals, Birds and Fish in Africa

London Convention	Convention Relative to the Preservation of Fauna and Flora in their Natural State
MAB	Man and Biosphere Programme
MDG	Millennium Development Goals
MEC	Member of Executive Council of a Province
NEMA	National Environmental Management Act
NEMBA	National Environmental Management: Biodiversity Act
NEPAD	The New Partnership of Africa's Development
NEMPAA	Natural Environmental Management Protected Areas Act
NPAES	National Protected Areas Expansion Strategy
NWA	National Water Act
PA's	Protected Areas
PELJ	Potchefstroom Electronic Law Journal
Revision Edition Maputo Convention	2003 African Convention on the Conservation of Nature and Natural Resources
SADC	Treaty of the South African Development Community
SAJELP	South African Journal of Environmental Law and Policy
SAJHR	South African Journal on Human Rights
SAJS	South African Journal of Science
SAJWR	South African Journal of Wildlife Research
SAPL	South African Public Law
SONA 2018	State of the Nation Address by President C Ramaphosa 16 February 2018
Stell LR	Stellenbosch Law Review
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UNCED	United Nations Conference on Environment and Development

UNESCO	United Nations Educational Scientific and Cultural Organization
The Watercourses Protocol	Revised Protocol on Shared Watercourses
WCED	World Commission on Environment and Development
WCPA	Global Protected Areas, Programme of World Commission on Protected Areas
WHC	The World Heritage Convention

CHAPTER 1

Agreement-based expansion of protected areas: requirements in terms of South African Environmental Law

1.1 Introduction and problem statement

South Africa is becoming increasingly aware of the importance of the expansion of Protected Areas (PA's). The improvement and the wellbeing of its citizens are becoming a priority. This results in the transformation of the natural environment, which places an ever increasing pressure on natural resources, and in particular on biodiversity.¹ The role of the State, private owners and communities in conservation is becoming increasingly important and the question arises as to the role of each of them in conserving biodiversity in the face of economic pressures and the protection afforded to the expansion of PA's and national parks. Examples thereof are specifically found in the *National Environmental Management Act (NEMA)*² and *the National Environmental Management: Protected Areas Act (NEMPAA)*.³ PA's are vital for life on earth. They safeguard biological and cultural diversity to help to improve the livelihoods of local communities, and bring countless benefits to society in general.⁴

At the 1992 Earth Summit, 117 heads of state and representatives of 178 nations, agreed on a new agenda for sustainable development. This agenda included a bold Convention on Biological Diversity (CBD) which *inter alia* calls on governments to establish systems of PA's and manage these in support of conservation, sustainable use and equitable benefit sharing.⁵ The importance of PA's is emphasised by several international conventions and programmes such as the CBD, the World Heritage Convention (WHC), the Ramsar Convention on Wetlands, the UN Law of the Sea Convention, Man and the Biosphere (MAB), the Programme of the United Nations

¹ Phillips *Economic values of PA's* 3.

² Act no 107 of 1998.

³ Act no 57 of 2003.

⁴ Sandwith *et al Transboundary PA's* vii.

⁵ Phillips *Economic Values of PA's* 3.

Educational Scientific and Cultural Organisation (UNESCO) and the global PA's programme of the World Commission on PA's (WCPA).⁶

The conservation of biodiversity has traditionally been performed in the form of the establishment of national parks and nature reserves. Land use is expanding and intensifying in the unprotected lands surrounding many of the world's PA's. During the 20th century, PA's became a cornerstone of the global conservation strategy. The term "protected area" refers to any area of land or sea managed for the preservation of biodiversity and other natural processes *in situ* though constraining incompatible land uses.⁷ One of the main reasons that PA's are not functioning well may be that human land use is expanding and intensifying on the lands surrounding PA's.⁸ The goals of development, conservation and environmental justice are clearly stated aims enshrined in the South African constitution, national policies and SANParks vision and directive. However, there is evidence that the gap between policy and practice remains problematically large.⁹ Historically, over the past 25 years the techniques deployed in the management of national parks and PA's followed the "fence and fines" approach, which does not consider communities but focusses instead on the maintenance of ecosystems and ecological processes, and gives the impression that PA's alone are capable of reaching the goal of preserving biodiversity, and that the area of land under their protection should be enlarged.¹⁰ The CBD adopted a set of twenty headline targets for biodiversity in the period 2011 to 2020.¹¹ These are known as Aichi Biodiversity Targets.¹² Target 11 is that PA's should protect at least 17% of the world's terrestrial and inland water by 2020.¹³ The need to manage entire landscapes as units is an activity in which social, economic and political imperatives modify scientific prescriptions, sometimes drastically.¹⁴

⁶ Sandwith *et al Transboundary PA's* vii.

⁷ Phillips *Economic values of PA's* 3.

⁸ Hansen and De Fries *Ecological Application* 974.

⁹ Phillips *Economic values of PA's* 3.

¹⁰ Mulder and Coppelillo *Conservation* 36.

¹¹ Bertzky *et al Protected planet report 2012; Tracking progress towards global targets for PA's* 2.

¹² Bertzky *et al Protected planet report 2012* 2.; Decision x/2.

¹³ Bertzky *et al Protected planet report 2012* 2.

¹⁴ Margules and Pressy 2000 *Nature* 244.

South Africa is in a privileged position, as it is regarded as the third most biodiversity diverse country in the world.¹⁵ Although it covers less than 2% of the world's surface, it houses 10% of the world's plant species and 7% of the world's reptile, bird and mammal species.¹⁶

The way in which South Africa applies the principles applicable to ensuring the preservation of its biological resources can be found in all the regulating conservation laws that allow for the designation of more than 25 types of conservation areas.¹⁷ The NEMPAA and the *National Environmental Management: Biodiversity Act* (NEMBA)¹⁸ complement the various local policies and plans that confirm the need to expand the country's conservation areas network.¹⁹

The International Union for the Conservation of Nature (IUCN) has published a series of guidelines for applying PA's Management Categories²⁰ (IUCN Management Guidelines 2008) which identifies four categories of PA's:²¹ governance by government;²² private governance;²³ shared governance; and governance by indigenous peoples and local communities.²⁴

¹⁵ Dept of Environmental Affairs and Tourism White Paper on the Conservation and Use of South Africa's Biodiversity (1997) (published in GN 1095 GG no 18163 dated 28 July 1997 12 of the 18 000 plant species found in South Africa. For example, 80% occur nowhere else in the world.

¹⁶ Endangered Wildlife Trust (EWT) 2002 4.

¹⁷ Natural Legislation for PA's: *National environmental Management: Biodiversity Act* (10 of 2004); *National Environmental Management: PA's Act* (25 of 1999); *National Forest Act* (8 of 1998); *Marine Living Resources Act* (18 of 1998); *Environment Conservation Act* (73 of 1989); *National Environmental Act* (42 of 1980); *Mountain Catchment Areas Act* (63 of 1970); and *Sea Birds and Seals Protection Act* (46 of 1973); Provincial Legislation. *Provincial Parks Board Act (Eastern Cape)* (12 of 2003); *Limpopo Environmental Management Act* (7 of 2003); *Mpumalanga Nature Conservation Act* (10 of 1998); *Transkei Environmental Conservation Decree* (9 of 1992); *KwaZulu-Natal Nature Conservation Act* (29 of 1992); *Nature Conservation Act (Ciskei)* (10 of 1987); *PA's Act (Bophutatswana)* (24 of 1987); *Nature Conservation Ordinance (Transvaal)* (12 of 1983) *Nature Conservation on Conservation Ordinance (Cape)* (19 of 1974); *Bophutatswana Nature Conservation Act* (3 of 1973); *Nature Conservation Ordinance (OFS)* (8 of 1969).

¹⁸ Act 10 of 2004.

¹⁹ Paterson *Bridging the gap between conservation and land reform* 10.

²⁰ IUCN Management Guidelines.

²¹ Dudley *Guidelines for Applying PA Management Categories* 26-32.

²² Under this form of governance, the PA is generally owned and managed by government.

²³ Under this form of governance, the PA is generally owned or managed by a private entity. See further Paterson *Bridging the gap between conservation and land reform* 10; Dudley *Guidelines for Applying PA Management Categories* 26-32.

²⁴ Dudley *Guidelines for applying PA's Management Categories* 26-32.

The last two concepts are important to the establishment of community conservation areas and contractual parks. These areas are also called co-managed PA's, and are defined as

... officially designated PA's where decision making power is shared between state agencies and other parties including indigenous peoples and local communities, and or Non-Government Organisations (NGO's) and individuals or the private sector.²⁵

The Management of PA's should ensure that their natural values are retained in the face of natural dynamics, disturbances from outside, and a variety of valid human uses.²⁶

To accelerate the progress towards Target 11, one of the priority actions is the improvement of the benefits of PA's for conservation of biodiversity and ecosystem services, and the maintenance of those benefits through enhanced planning, governance management, protection and collaboration with relevant stakeholders.²⁷ To expand effectiveness assessment to include more PA's and benefits of PA's.²⁸ PA's are not only critically important for biodiversity conservation but also vital for sustainable development.²⁹ They provide humanity with fundamental ecosystem services³⁰ such as water, food, fuel, medicines and carbon storage. There are places where people can contact the natural world to restore their physical, mental and spiritual health.

This study focusses on how changes in land use enhance the creation of PA's, the expansion of existing PA's and in particular national parks, the effect thereof on biodiversity, and the need to respect the principles of public participation, sustainable development and good governance.

²⁵ Kothari "Collaboratively Managed PA's" 528.

²⁶ Margules and Pressey 2000 *Nature* 243-253.

²⁷ Bertzky *et al Protected Planet Report 2012* 51.

²⁸ Bertzky *et al Protected Planet Report 2012* 51.

²⁹ Margules and Pressey 2000 *Nature* 249.

³⁰ Bertzky *et al Protected Planet Report 2012* 49.

The study uses the Mapungubwe National Park and Heritage Site as an example where SANParks is currently negotiating with private owners and communities to expand the *boundaries of a PA*.

1.2 Research question

The question to be addressed in this dissertation is whether the conclusion of contractual agreements with the purpose of expanding PA's, and in particular national parks, meets the expectations as set out in terms of the South African Environmental law. Consideration will be given to specific aspects such as the reconciliation of the concepts of PA's and governance with each other, the reason for the explosion in the number and extent of PA's; how South African legislation has provided for contractual agreements to accommodate the country's conservation agenda until now, and to what extent land owners' rights will be restricted by the conclusion of a contractual agreement.

1.3 Methodology

In this dissertation the research questions were considered from theoretical and practical perspectives. The legal analysis is based on the current legal norms and principles of conservation, and specifically the importance of expanding PA's, and consists primarily of a literature study. The literature includes textbooks, law journals, legislation, case law and electronic resources related to PA's.

1.4 Overview of the chapters

Chapter 2 focusses mainly on the reasons for the expansion of PA's. PA's are placed in perspective in order to establish their value and their basic role post 2005. What are PA's and what is the legal framework for their expansion? What is their general nature and form? Further, the following topics are discussed in so far as they have bearing on the research question: the development of PA's in South Africa; the benefits and economical values of PA's; international agreements to which South Africa is a signatory; a brief history of PA's and the origin of PA's in South Africa; the expansion of PA's in terms of NEMPAA; and finally land reform as a factor in the

development of PA's. These issues are considered in Chapter 2 (titled "The changing face of PA's").

Chapter 3 of this dissertation relates to the objective nature and form of PA's and the legislation, common law, policies and institutions that must be taken into account when concluding a contractual agreement with a private landowner to expand a PA and specifically a national park (Chapter 3 "Contractual agreement principles, requirements, benefits and incentives for the expansion of PA's in terms of law").

Chapter 4 of this dissertation deals with the way in which administrators must go about implementing a contractual agreement between a landowner and SANParks. The evaluation of the principles set out in Chapter 3 and the challenges of other parks, namely the Richtersveld National Park and the Pafuri region in the Kruger National Park. The challenges concerned are well documented and are central to shaping the country's stance towards contractual parks, although their origin deprives land claims. This dissertation deals with the content of a contractual agreement for the expansion of national parks and specifically the Mapungubwe National Park and Heritage Site between owners of land and SANParks. Some of the conditions of the proposed agreement are discussed. No similar agreement has yet been concluded with SANParks (Chapter 4 "Linking South Africa's conservation legislation and principles into a formal contractual agreement to expand the Mapungubwe National Park and Heritage Site").

Chapter 5 provides an overview of all the preceding chapters and describes the road ahead pertaining to contractual agreements to expand PA's, and in particular national parks. It also makes a series of concrete recommendations towards bringing about a more effective and sustainable regime for contractual national parks. In order for such contractual arrangement to succeed, the key aspects identified international and local scholars in the last two decades must be applied. Such application would help to identify the strengths and weaknesses of specific PA's.

CHAPTER 2

THE CHANGING FACE OF PROTECTED AREAS (PA's)

2.1 Introduction

In the 21st century the identification, establishment, legal regulation, conservation and management of ecologically viable areas has become closely linked to the conservation of biological diversity and to achieving the United Nations Millennium Development Goals.³¹ Target 11 of the Aichi Convention of Biological Diversity³² promotes the expansion of the Global Area Network to cover 17 per cent of all terrestrial land and 10 per cent of coastal and marine areas by 2020.³³

Over the past two centuries South Africa has developed a comprehensive legal framework relevant to PA's.³⁴ They are traditionally considered be operated mainly by government-run enterprises.³⁵ Today increased awareness and acknowledgement of different protected area management categories has resulted in a better understanding of the broad spectrum of benefits offered by PA's.³⁶ This has resulted in an increasing interest and greater involvement by all relevant stakeholders in conservation. In spite of this increased understanding of the role of indigenous reserves,³⁷ private areas³⁸ and community conservation areas in enriching people's lives,³⁹ some governments still do not consider these private areas to be an integral part of their nation's PA networks and governance.⁴⁰

³¹ General Assembly Resolution A/RES 55/2 of 18 September 2000.

³² In decision x/2 of the tenth meeting of the Conference of the Parties held from 18 to 29 October 2010 in Nagoya, Aichi Prefecture, Japan adopted a revised strategic plan for biodiversity, including the Aichi biodiversity target for the 2011-2020 period.

³³ Convention on Biological Diversity date unknown <https://www.cbd.int/sp/elements/default.shtml>.

³⁴ Glazewski *Environmental Law* 12-19.

³⁵ Ervin *et al PA's for the 21st Century* 63.

³⁶ Ervin *et al PA's for the 21st Century* 63. This also includes the recognition of different governance types.

³⁷ Governance by indigenous people and local communities.

³⁸ Declared and run by individual landowners or non-profit organisations, or by profit corporations.

³⁹ Governance by local communities.

⁴⁰ Ervin *et al PA's for the 21st Century* 64.

The emergence of a world-wide conservation movement after the Second World War encouraged the idea of a global framework for PA's.⁴¹ In 1959 the United Nations Economic and Social Council (ECOSOC) recognised that national parks and equivalent reserves are important factors in the wise use of natural resources and that they contribute to the inspiration, culture and welfare of mankind.⁴² While the idea of PA's spread around the world in the twentieth century a number of countries made significant progress in assessing their protected area policy environment.⁴³ For the most, countries have focussed on the development of mechanisms that remove perverse incentives for establishing new PA's.⁴⁴

During the 1970s most of the countries' laws, policies, incentives and legal frameworks affected the establishment and effectiveness of PA's and their expansion.⁴⁵ Key themes for PA's were in general:

- Enabling the policy environment for PA's;⁴⁶
- Management planning networks of PA's;⁴⁷
- PA's threat assessments and restoration;⁴⁸
- PA's governance and participation;⁴⁹
- PA's capacity;⁵⁰
- Sustainable finance;⁵¹
- PA's networks and ecological gap assessments;⁵²
- Connectivity corridors and transboundary PA's.⁵³

Important elements to take into consideration in the establishment, expansion and purpose of PA's are specially that biodiversity conservation should be extended both

⁴¹ Ervin *et al PA's for the 21st Century* 12.

⁴² Resolution 713 of the twenty-seventh (XXVII) session of the Economic and Social Council held on 22 April 1959.

⁴³ Ervin *et al PA's for the 21st Century* 17.

⁴⁴ Ervin *et al PA's for the 21st Century* 17.

⁴⁵ Ervin *et al PA's for the 21st Century* 17.

⁴⁶ Ervin *et al PA's for the 21st Century* 16.

⁴⁷ Ervin *et al PA's for the 21st Century* 32.

⁴⁸ Ervin *et al PA's for the 21st Century* 50.

⁴⁹ Ervin *et al PA's for the 21st Century* 62.

⁵⁰ Ervin *et al PA's for the 21st Century* 72.

⁵¹ Ervin *et al PA's for the 21st Century* 78.

⁵² Ervin *et al PA's for the 21st Century* 86.

⁵³ Ervin *et al PA's for the 21st Century* 98.

conceptually as well as in the practice. All elements of the African landscape must be included, which means that there is a need to increase the awareness of the benefits from the implementation of ecosystems services for the achievement of climate change adaptation and mitigation and the Millennium Development Goals (MDG). A systematic framework incorporating the perspectives of local people in the declaration and management of PA's is important to the expansion of PA's. The logic of such expansion has up to now largely had to do with the creation and maintenance of formally designated PA's. Recently, attention also has been given to promoting conservation activities in buffer zones around PA's. It is crucial that biodiversity conservation be extended even further, beyond buffer zones and PA's, to include all elements of the African landscape and all ecosystems.⁵⁴

This chapter is divided into 3 parts. Part 1 charts a brief assessment and promotion of the governance of PA's. Part 2 addresses the basic role of PA's and the systematic framework which ensures the declaration, expansion and management of PA's and the important elements to take into account. Part 3 presents a brief history of the origin of PA's and the effect of land reform.

2.2 The assessment and promotion of PA governance

Goal 2.1 of the Programme of Work on PA's states that governments should promote equity, benefit sharing and diverse governance types within their PA systems.⁵⁵ A change of thinking is needed about the assessment and promotion of PA governance - one that embraces the widest possible range of protection, governance and conservation options and that looks beyond the categories delineated by the IUCN to include other types and forms of conservation.⁵⁶ To understand why a wider or more holistic view is required, a brief discussion of the bioregional perspective, the value of PA's and the expansion thereof is necessitated.

⁵⁴ Schroeder 1999 *Progress in Human Geography* 365.

⁵⁵ Ervin *et al PA's for the 21st Century* 63. Specific activities under Goal 2.1 include *inter alia* to recognise and promote a broad set of PA governance types and to assess the costs, benefits and impacts of establishing and maintaining PA's.

⁵⁶ Ervin *et al PA's for the 21st Century* 65. "Other types and forms of conservation" are defined as those lands that are managed for multiple objectives that may or may not include biodiversity conservation but still provide conservation benefits.

2.2.1 *The relevance of Bioregion and biodiversity reserves*

A bioregion perspective is relevant to an understanding the expansion of PA's because the concept of bioregionalism seeks to integrate social, economic and ecological factors. This philosophy holds that the earth consists of contiguous but discrete "organic regions" or "bioregions".⁵⁷ "Bioregionalism" is, broadly speaking, a romantic, egocentric philosophy and a social movement with a deep ecology and ecofeminism flavour that has emerged largely from the North American counter culture since the early 1970's.⁵⁸ The concept of a bioregion was first popularised in the mid 1970's by Peter Berg and Raymond Dassmann of the Planet Drum Foundation, who wished to "pursue research and publish information on the relationship between human culture and the natural processor of the human biosphere".⁵⁹ Wolmer noted that a bioregion is "a place defined by its life forms, its topography and its bio-character rather than by human dictates, a region governed by nature, not legislature".⁶⁰ Conservation biology, by reconceiving "biodiversity reserves", provides a scientific mandate for expanding such areas and for conferring conservation priority status on habitats previously ignored by wilderness preservationists because they were not sufficiently aesthetically pleasing.⁶¹ Biosphere reserves enjoy recognition from a larger body, the United Nations Educational, Scientific and Cultural Organisation (UNESCO). UNESCO has no ultimate authority beyond the ability to disestablish a reserve after an unfavourable 10-year review.⁶² Nonetheless, biosphere reserves seem to have the potential to foster the same ethic of rehabilitation as that advanced by bioregionalists. In theory, bioregions have an organic unity that biosphere reserves may lack.⁶³ Bioregions have no authority whatsoever and are only as good as the popular allegiance they foster.⁶⁴ Thus, in an age when globalisation and consumerism are overtaking nations of citizenship of any description tends to be limited. Numerous initiatives have sought to

⁵⁷ Wolmer *Transboundary Conservation* 2.

⁵⁸ Wolmer *Transboundary Conservation* 2.

⁵⁹ Alexander 2017 *International Journal of UNESCO Biosphere Reserves* 1.

⁶⁰ Wolmer *Transboundary Conservation* 2.

⁶¹ Wolmer *Transboundary Conservation* 4.

⁶² Alexander 2017 *International Journal of UNESCO Biosphere Reserves* 1.

⁶³ Alexander 2017 *International Journal of UNESCO Biosphere Reserves* 1.

⁶⁴ Alexander 2017 *International Journal of UNESCO Biosphere Reserves* 1.

formalise the links between conservation and development.⁶⁵ UNESCO organised the first inter-governmental conference on "the national use and conservation of the biosphere" in 1968. Sustainable development was not yet a fashionable expression.⁶⁶ The Man and Biosphere Programme (MAB) grew out of this conference. MAB was meant to be an interdisciplinary and problem-oriented effort that would address three major functions, namely a conservation function, a development function and a logistics function.⁶⁷ The biosphere reserve concept, which focussed originally on combining research with conservation, is now sometimes seen merely as a way of reconciling conservation with development.⁶⁸ South Africa has developed its own legislation along these same lines to establish national biosphere reserves that do not necessarily belong to the World Network.⁶⁹ This network creates the possibility of developing a global approach to biological diversity conservation, research, monitoring and education as well as promoting experiments in sustainable development and cooperative management.⁷⁰

2.2.2 *The value of PA's*

PA's are increasingly viewed as critical components of a life support system and they are expected to do more – ecologically, socially and economically – than they ever have before.⁷¹ The CBD Programme of Work on PA's was established in 2004, a new set of drivers of change has emerged, promising to again transform societal notions of

⁶⁵ Reid *et al* 2004 *Conservation and Society* 378.

⁶⁶ Batisse 1992 *Environment: Science and Policy for Sustainable Development* 10.

⁶⁷ Alexander 2017 *International Journal of UNESCO Biosphere Reserves*. Each biosphere reserve is intended to fulfil three basic functions which are complementary and mutually reinforcing a conservation function to contribute to the conservation of landscape ecosystems, species and genetic variations; a development function – to foster economic and human development which is socio-culturally and ecologically sustainable; and a logistic function – to provide support for research, monitoring, education and information exchange related to local, national and global issues of conservation and development.

⁶⁸ Batisse 1992 *Environment: Science and Policy for Sustainable Development* 33.

⁶⁹ *National Environmental Management: PA's Act* 57 of 2003 (NEMPAA).

⁷⁰ Section 2 of NEMPAA.

⁷¹ Ervin *et al* *PA's for the 21st Century* 12.

what PA's are and what they should do.⁷² At the Conference of the Parties (COP 10) of the Convention on Biological Diversity (2010) the world's governments resolved to:

... increase awareness of the benefits resulting from the implementation of the programme of work on PA's to health, water, fisheries, industry, tourism and other sectors and the importance of ecosystem services provided by PA's, for the achievement of climate change adaptation and mitigation and the MDG.⁷³

The Food and Agriculture Organisation of the United Nations (FAO) emphasises that the conservation of biological diversity both for food and agriculture and for sustainable use is necessary for providing food, improving people's economic social and environmental conditions and meeting the needs of future generations, in particular those of the rural poor. Ecosystem services are defined as "the benefits provided by ecosystems to humans". Many key ecosystem services are provided by biodiversity, such as nutrient cycling, carbon sequestration, pest regulation and pollination, and sustaining agricultural productivity.⁷⁴ Ecosystem services can include support, provisioning, regulating, and promoting cultural services.⁷⁵

2.2.3 A framework for PA's and the expansion thereof

PA's operate within a specific framework known as "the enabling policy environment".⁷⁶ This environment includes the legal framework that facilitates incentives and other mechanisms that either encourage or inhibit the establishment and effective management of PA's.⁷⁷ The importance of legal frameworks encouraging or inhibiting the establishment of PA's is acknowledged in most countries.⁷⁸ This gives direct effect to Goal 3.1 of the Programme of Work on PA's. Goal 3.1 states that governments

⁷² Ervin *et al PA's for the 21st Century* 12.

⁷³ COP-10 2010 <https://www.cbd.int/sp/elements/default/shtml>.

⁷⁴ Food and Agricultural Organisation of the United Nation date unknown <http://www.fao.org/agriculture/crops/thematic-sitemap/theme/biodiversity/en/>.

⁷⁵ Ecosystems and human wellbeing: a framework for assesment, Millennium Ecosystem Assessment 2003 World resources intitute. Ecosystem services can include supporting (e.g. soil formation, nutrient cycling, primary production;) provisioning (e.g. food, fresh water, fuelwood, fibre, biochemicals, genetic resources) regulating (e.g. climate regulation, disease regulation, water regulation, water purification, pollination) and cultural (e.g. spirutial and religious, recreation and ecotourism, aesthetic inspirational, cultural heritage, educational and sense of place).

⁷⁶ Ervin *et al PA's for the 21st Century* 17.

⁷⁷ Secretariat of the Convention of Biological Diversity; Programme of Work on PA's 18 (hereafter the CBD Programme of Work).

⁷⁸ Ervin *et al PA's for the 21st Century* 17.

should provide an enabling policy, institutional and socio-economic environment for PA's.⁷⁹ The target is to provide a supportive enabling environment for the more effective establishment of PA's and the expansion of existing PA's.

As the global agenda for PA's also develops and changes, the policies that set up the planning of resource utilisation and management must be created or modified to meet these changing expectations.⁸⁰

2.2.4 Role of interested and affected parties

In the 1970s there was a growing belief in the importance of understanding the perspectives of local people.⁸¹ By the 1990s wider conservation objectives were the dominant approach to conservation;⁸² objectives such as encouraging sustainable management and the sustainable use of natural resources.⁸³ As a result, conservation initiatives are typified by increasing levels of local participation⁸⁴ and the promotion of the free expression of their views by all men and women. This includes, amongst other factors, that there should be no discrimination related to gender, ethnicity or social class.⁸⁵ Conservation must be undertaken with decency: without humiliating or harming people.⁸⁶

2.2.5 Concluding remarks

The conservation of biodiversity must be extended so as to include all elements of the African landscape and all ecosystems. Ecosystem services can be supporting,

⁷⁹ CBD Programme of Work 18. Suggested activities giving effect to this goal include *inter alia* to consider governance principles such as the rule of law, engaging in participatory decision-making mechanisms for accountability and equitable dispute resolution institutions and procedures, adopting legal frameworks for establishing and managing PA's, and developing incentives to support the full range of PA's that achieve the objectives of biodiversity conservation, including private PA's and private land.

⁸⁰ Ervin *et al PA's for the 21st Century* 17.

⁸¹ Reid *et al 2004 Conservation and Society* 378.

⁸² Reid *et al 2004 Conservation and Society* 378.

⁸³ Reid *et al 2004 Conservation and Society* 378.

⁸⁴ Reid *et al 2004 Conservation and Society* 378.

⁸⁵ Borrini-Feyerabend *et al Sharing Power* 100.

⁸⁶ Borrini-Feyerabend *et al Sharing Power* 100.

provisioning, regularly and cultural. Wider objectives of conservation are well served by increasing the levels of local participation.

2.3 PA's: the definition, background and basic role of PA's

2.3.1 Definition and important social and economic functions of PA's

The United Nations Conference on Environment and Development (UNCED) defines a protected area as "an area of land and/or sea especially dedicated to the protection of biological diversity, and of natural and associated cultural resources and managed through legal or other effective means" (IUCN 1994).⁸⁷

It is widely recognised that in addition to conserving biological and cultural diversity, many PA's also have important social and economic functions. These include the protecting of watersheds, soil and coastlines, providing natural products for use on a sustainable basis, and supporting tourism and recreation. Many PA's also provide a home to communities of people with traditional cultures and knowledge, and these assets also need protection.⁸⁸

2.4 Basic role of PA's in South Africa post 2005

2.4.1 Introduction

The world's system of PA's has grown exponentially since 1980, particularly in developing countries where the biodiversity is greatest. Concurrently the mission of PA's has expanded from biodiversity conservation to improving human welfare.⁸⁹ During the period 1980-2005 consensus emerged that PA's were essential for maintaining biodiversity.⁹⁰ The commencing date of the NEMPAA was November 1, 2004. The realisation of the goals of conservation requires the framing of strategies for the management of whole landscapes, including areas allocated to both production

⁸⁷ Thomas and Middleton *Guidelines for management planning* 3.

⁸⁸ Thomas and Middleton *Guidelines for management planning* 3.

⁸⁹ Naughton-Treves, Holland and Brandon 2005 *Annual review of Environment and Resources* 219.

⁹⁰ Naughton-Treves, Holland and Brandon 2005 *Annual review of Environment and Resources* 219.

and protection.⁹¹ The basic role of PA's is to separate elements of biodiversity from processes that threaten their existence in the wild.⁹² They must do this within the constraints imposed on them by the large and rapidly increasing numbers of humans in many parts of the world and their attendant requirements for space, materials and waste disposal.⁹³

The extent to which PA's fulfil this role depends on how well they meet two objectives:⁹⁴

- The first is representativeness, referring to the need for reserves to represent, for example, the full variety of biodiversity, ideally at all levels of organisation; and
- The second is persistence. PA's, once established, should promote the long-term survival of the species and other elements of the biodiversity they contain by maintaining natural processes and viable populations and by excluding threats.

To meet these objectives, conservation planning must deal not only with the location of PA's in relation to natural, physical and biological patterns but also with the design of the PA, which includes variables such as size, connectivity, replication, and the alignment of boundaries, including land owned by private owners, and the establishment of transfrontier parks, for example.⁹⁵

A structured systematic approach to conservation planning provides the foundation needed to meet these objectives.⁹⁶

One of the objectives of the NEMPAA⁹⁷ in terms of section 2(d) of the Act is to provide for a diverse and representative network of PA's on state land, private land and communal land, and in marine waters.

⁹¹ Margules and Pressey 2000 *Nature* 243.

⁹² Margules and Pressey 2000 *Nature* 243.

⁹³ Margules and Pressey 2000 *Nature* 243.

⁹⁴ Margules and Pressey 2000 *Nature* 243.

⁹⁵ Margules and Pressey 2000 *Nature* 243.

⁹⁶ Margules and Pressey 2000 *Nature* 243.

⁹⁷ Act 57 of 2003.

Environmental conservation is becoming increasingly important. Examples thereof are specifically found in the *National Environmental Management Act*⁹⁸ (NEMA) and the NEMPAA, which protect the environment and environmental resources. Many of these resources are in the possession of private individuals and form part of private property, however.

2.5 Development of PA's in South Africa

Regarding conservation before 2005, the relevant legislation concerning PA's was based on a traditional, exclusive and state-orientated approach to conservation. Several factors can be cited as the reasons for South Africa's ineffective and out-dated policies regarding conservation up to 2005, namely a lack of political will, the absence of an adequate planning framework, legislative and institutional fragmentation, capacity and resource constraints, and the heavy reliance placed on command-and-control approaches to regulation.⁹⁹

The state's ratification of the provisions of the CBD in 1995 launched comprehensive reforms to bring South Africa's domestic conservation policy in line with South Africa's international obligations regarding conservation. Various policy documents were published in the 1990's, which led to the reforms of 2005, the most important of which were the White Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity¹⁰⁰ and the Report of the Board of Investigation into the Institutional Arrangements for Nature Conservation in South Africa.¹⁰¹ These papers seek to address many of the problems of the pre-2005 era and mark a significant shift in the approach to conservation, namely:

- From pure preservation to conservation and sustainable use;
- From exclusivity to participation and sharing; and
- From fences and fines to individual responsibility.¹⁰²

⁹⁸ Act 107 of 1998.

⁹⁹ Glazewski *Environmental Law* 12-22.

¹⁰⁰ GN 1095 in GG 18163 of 28 July 1997 (White Paper on the Conservation and Sustainable Use of South Africa's Biodiversity) 78.

¹⁰¹ Kumleben, Sangweni and Ledger *Board of Investigation: Report*.

¹⁰² GN 813 in GG 32474 of 3 August 2009 (National Biodiversity Framework); Act 10 of 2004.

- In 1992 Agenda 21 and the CBD were adopted; and Government participated actively in developing the Cartagena Protocol on Biosafety (which it has not subsequently signed); and
- Participated in placing strong emphasis on biodiversity conservation in the New Partnership for Africa's Development (NEPAD); and
- Supported the decision that the use of biodiversity should be an economic strategy for the continent.¹⁰³

The said White Paper establishes South Africa's central policy on biodiversity management, with six main goals and supporting objectives that follow the themes of the CBD, one of its priorities being to "strengthen and rationalise South Africa's protected area system".¹⁰⁴

The conservation goals and objectives of the government of South Africa are contained in the *National Environmental Management: Biodiversity Act* (NEMBA),¹⁰⁵ which regulates a broad range of issues such as threatened and protected ecosystems and species and alien invasive species and bio prospecting. It also describes the country's conservation regime and seeks a more participatory approach to PA's. A well-defined process of expansion of PA's is important. The NEMBA seeks to harmonise the approach for establishing, managing and regulating the nation's PA's. The implementation of the provisions of the NEMBA is further guided by a number of policies and programmes,¹⁰⁶ the most important being the Guidelines for the Implementation of Community-Based Natural Resource Management (CBNRM) in South Africa,¹⁰⁷ the National and Provincial Stewardship programme,¹⁰⁸ the People and Parks National Spatial Biodiversity Assessments,¹⁰⁹ the People and Parks Programme, the National PA's Expansion Strategy,¹¹⁰ the National Spatial Biodiversity

¹⁰³ Wynberg 2002 *SAJS* 234.

¹⁰⁴ Wynberg 2002 *SAJS* 234-235.

¹⁰⁵ Act 10 of 2004.

¹⁰⁶ Glazewski *Environmental Law* 12-22.

¹⁰⁷ Department of Environmental Affairs and Tourism, Guidelines for the Implementation of Community-Based Natural Resource Management (CBNRM) in South Africa (2003).

¹⁰⁸ National Association of Conservancies Stewardship South Africa date unknown www.nacssa.co.za.

¹⁰⁹ Department of Environmental Affairs, Conservation for the People: a Review of the People and Parks Programme (2010).

¹¹⁰ Government of South Africa, National PA's Expansion Strategy for South Africa.

Assessment,¹¹¹ the National South African Natural Biodiversity Institute Strategy and Action Plan,¹¹² the National Biodiversity Framework,¹¹³ the Strategy on Buffer Zones for National Parks¹¹⁴ and the National Co-Management Framework.¹¹⁵

2.5.1 Expanding PA's

The campaign to expand PA's began in earnest at the 1982 World Park Congress in Bali, where delegates recommended that all nations strive to place 10% of their lands under protection.¹¹⁶

The NEMPAA establishes a systematic framework of PA's, which ensures the declaration and management of PA's while providing for co-operative government for state, private and communal land while promoting the sustainable use of PA's for human benefit without losing the ecological character of the areas.¹¹⁷ The Act sets in place eight different categories of PA's.¹¹⁸

Two categories allow for a landowner to be the management authority of a protected area, namely nature reserves and protected environments. The aim of expanding existing PA's is primarily to ensure the long-term conservation of biodiversity assets that are currently poorly conserved, or to provide long-term economic and social benefits. The expansion of existing PA's cannot be seen in isolation without considering their neighbouring landowners and rural communities, and promoting a greater awareness of the biodiversity values of the PA. The establishment of PA's should include the facilitation of the understanding and involvement of neighbouring

¹¹¹ Driver *et al* *Natural Spatial Biodiversity Assessment 2004* 17.

¹¹² Department of Environmental Affairs and Tourism, South Africa's National Biodiversity Action Plan (2005).

¹¹³ GN 813 in GG 32474 of 3 August 2009.

¹¹⁴ GN 106 in GG 35020 of 8 February 2012.

¹¹⁵ National Co-Management Framework (2010) launched at the 4th People and Parks Conference August 2010.

¹¹⁶ Naughton-Treves, Holland and Brandon 2005 *Annual Review of Environment and Resources* 222.

¹¹⁷ Biodiversity Stewardship Guidelines 24 November 2009 5.

¹¹⁸ The types of PA's identified in the NEMPAA are: Special Nature Reserves; National Parks; Nature Reserves; Marine Protected Areas; Protected Forest Areas; Mountain Catchment Areas; Protected Environments; and World Heritage Sites.

land owners and communities in the economic, social and cultural development of the PA as well as the promotion of their biophysical, cultural and tourism values.¹¹⁹

Bioregionalism is the belief that human activities, including environmental and social policies, should be based on ecological or geographical boundaries rather than economic or political boundaries.¹²⁰

The National PA's Expansion Strategy (NPAES) published in 2009 acknowledges that South Africa's PA's network is currently inadequate¹²¹ and aims to provide a strategy promoting the cost-effective expansion of PA's for ecological sustainability and increased adaptation to climate change.¹²²

There are several options for acquiring land that should be considered for the expansion of the protected area network, namely land donations; land purchase; land leasing and land or rights expropriation. These are tabled hereunder for ease of reference.¹²³

Table 2.1: Summary of expansion mechanisms of different land ownership and tenure arrangements¹²⁴

Mechanism	Implementation options	Land ownership and tenure
1 Acquisition of land.	i) Land donation	Private land
	ii) Land purchase	Non-state public land Private land
	iii) Property lease	State (provincial) land Private land State (national) land under communal tenure
	iv) Land expropriation	Private land
2 Negotiation of contract agreements with landowners.	i) Contract nature reserve / contract national park / contract protected environment.	Private land State (national) land under communal tenure Non-state public land

¹¹⁹ Blackmore *Overview of the legal instruments to conserve biodiversity* 19.

¹²⁰ Dictionary.com date unknown <https://www.dictionary.com/browse/bioregionalism/Dictionary.com>.

¹²¹ National Protected Area Expansion Strategy Resource Document (2009) 7.

¹²² National Protected Area Expansion Strategy Resource Document (2009) 1.

¹²³ National Protected Area Expansion Strategy Resource Document (2009) 15-23.

¹²⁴ Table based on National Protected Area Expansion Strategy / Table 25 Resources Document (2009) 70-71.

3 Declaration of public land available for conservation.	i) Allocate unvested / unallocated national state land to the protected area agency.	State (national) land
	ii) Re-allocate national state land from a responsible national organ of state to the protected area agency.	State (national) land
	iv) Lease national state land under communal tenure to the protected area agency.	State (national) land communal tenure
	v) Dispose of provincial state land to the protected area agency	State (provincial) land
	vi) Allocate / sell / lease or contract non-state, public land to the protected area agency.	Non-state public land (local authorities, public entities, government enterprises)
	4 Formalising the protected area status of existing conservation areas.	i) Statutory conservation areas
ii) Non-statutory conservation areas		Non-state public land Private land

The conservation of nature is the duty of the state, community-based organisations and members of the public. Section 24 of the *Constitution* provides that everyone has the right to an environment that is not harmful to their health and wellbeing and to have the environment protected for the benefit of present and future generations. Section 192(1) of the *Constitution*, furthermore, determines that public administration must be governed by democratic values and principles. Accordingly, should a state institution be a party to the agreement, democratic values and principles are to be embedded in an agreement to expand PA's. The establishment of a PA represents one of the many attempts to fulfil the provisions of the *Constitution* relating to conservation.

The principles of sustainable development and good governance must be adhered to. They are legislated in the constitution.

References to examples of environmental conservation are found in the NEMPAA, which regulates the protection and conservation of the environment and environmental

resources, and also provides for public participation and the use of natural resources. The NEMA is South Africa's environmental framework law.¹²⁵

The NEMA specifically states in section 2(4) (viii) that negative impacts on the environment and people's environmental rights should be anticipated or prevented or kept to a minimum and remedied. When the state has to make certain decisions regarding the protection of the environment the principles contained in section 2 of NEMA serve as guidelines for all organs of state and the notion of sustainable development should always be taken into account,¹²⁶ as it forms the centre of the state's environmental principles. The NEMPAA is concerned with the protection of South Africa's biodiversity, but it takes social and cultural considerations into account and makes provision for nature-based tourism.¹²⁷ The NEMPAA is designed to promote the incorporation of private and communal land in the network of PA's, as people sometimes hold private property rights in or adjacent to a PA.¹²⁸ It is clear that a PA should not be considered in isolation and its sole purpose should not necessarily or primarily be ecological protection. Economic, social and cultural considerations, must be respected in the management of the PA.¹²⁹ Accordingly, the expansion of PA's may be argued to lie not only in the physical expansion of territories but also in the expansion of paradigms, as to their role, value and purpose.

2.5.2 Progress with the expansion of PA's in South Africa

Considerable headway has been made in expanding and consolidating South Africa's PA's. Over 155 000 hectares of land have been added to the terrestrial PA system since 1994.¹³⁰

Notable efforts have also been made to expand conservation efforts outside PA's by establishing biosphere reserves, and several World Heritage Sites have been declared.

¹²⁵ Du Plessis and Du Plessis "Striking the sustainability balance" 439.

¹²⁶ Du Plessis and Du Plessis "Striking the sustainability balance" 439.

¹²⁷ Du Plessis and Du Plessis "Striking the sustainability balance" 442.

¹²⁸ Du Plessis and Du Plessis "Striking the sustainability balance" 442.

¹²⁹ Du Plessis and Du Plessis "Striking the sustainability balance" 442-443.

¹³⁰ Wynberg 2002 *SAJS* 237.

Private landowners have become increasingly important in managing South Africa's biodiversity. Some 16 million hectares are under private conservation management in the country.¹³¹ The expansion of PA's in South Africa is due to make a meaningful contribution to South Africa, according to the recent State of the Nation Address (SONA 2018) delivered by President Cyril Ramaphosa, through the realisation of its four goals, which are equitable economic development through wildlife tourism; expansion of the blue and green economy as a form of radical socio-economic development; youth education and employment; and ensuring public entity efficiency and sustainable funding.¹³²

2.5.3 Benefits of the expansion of PA's in South Africa

Irreplaceable elements of the nation's biodiversity should be conserved in PA's in areas of high conservation value in terms of their biophysical assets, or it can support ecological processes.¹³³ Such an area would *inter alia* contain indigenous plant or animal communities, habitats or landscapes that are important for the conservation of South Africa's fauna and flora, and geological, archaeological and paleontological features worthy of increased conservation protection.¹³⁴ These irreplaceable elements should be considered for inclusion into the existing PA networks, or be subject to a management agreement that recognises biodiversity conservation as its primary goal.¹³⁵ South Africa is famous for the intimate relationship between its people and the natural environment. The legacy of this relationship has been indelibly imprinted onto the topography of the landscape and the culture of its people through language, religious expressions, rights and rituals, and the development of indigenous knowledge of the benefits to be derived from living in and with the environment.¹³⁶

The expansion of PA's may add a great deal of historical and cultural value to the South African tourist industry.¹³⁷ It would facilitate the conservation of history and culture;

¹³¹ Wynberg 2002 *SAJS* 238.

¹³² South African National Parks – Annual Performance Plan. Financial year 2018/19 9.

¹³³ Blackmore *An overview of the legal instruments to conserve biodiversity* 15.

¹³⁴ Blackmore *An overview of the legal instruments to conserve biodiversity* 15.

¹³⁵ Margules, Pressey and Williams 2002 *Journal of Biosciences* 309.

¹³⁶ Blackmore *An overview of the legal instruments to conserve biodiversity* 15.

¹³⁷ Blackmore *An overview of the legal instruments to conserve biodiversity* 16. The IUCN recognises the relation between human activity and biodiversity by describing PA's as areas of land, coast and

conserve in the long-term sedentary artefacts related to the land's history and culture; consolidate or promote the historical or cultural value of the expanded area; and enable the inclusion of important biodiversity elements in the protected area.¹³⁸ Economics was and still is an important consideration in the development of many PA's. The economic impact of tourism in PA's emphasise their community, regional and national importance.¹³⁹ Bioregionalism appears to be beneficial in various ways. Its theoreticians argue that it is necessary to look at logical rather than global approaches, attempting to find a suitably realistic method to tackle major environmental problems.¹⁴⁰ The concepts of community and locality play a key role when it comes to evaluating the aims and scope of bioregionalism.¹⁴¹

The establishment of the well-planned PA, including its expansion, has the benefit of preserving biodiversity, culture and archaeology and has the possibility of promoting local and international tourism. It should also contribute to economic stability for the region, which includes the potential to develop commercial ventures (e.g. hunting, tourism, lodges etc.).¹⁴²

2.5.4 Sustainable utilisation

The primary objective of Category VI IUCN PA's is "to protect natural ecosystems and use natural resources sustainably, when conservation and sustainable use can be mutually beneficial."¹⁴³ Category VI PA's, uniquely in the IUCN system, have the sustainable use of natural resources as a means to achieve nature conservation together and in synergy with other actions more common to the other categories, such as protection. It aims to conserve ecosystems and habitats, together with the associated cultural values and natural resource management systems. Category VI PA's do conserve biodiversity particularly at an ecosystem and landscape scale, but the

sea, as appropriate, where the interaction of people and nature over time has produced an area of distinct character with significant aesthetic, cultural and/or ecological value, and often with high biological diversity. Safeguarding the integrity of this traditional interaction is vital to the protection, maintenance and evolution of such an area.

¹³⁸ Blackmore *An overview of the legal instruments to conserve biodiversity* 15-16.

¹³⁹ Eagles, McCool and Haynes *Sustainable Tourism in PA's* 9.

¹⁴⁰ Waissbluth 2016 <https://dialnet.unirioja.es/descarga/articulo/6365043.pdf>.

¹⁴¹ Waissbluth 2016 <https://dialnet.unirioja.es/descarga/articulo/6365043.pdf>.

¹⁴² Blackmore *An overview of the legal instruments to conserve biodiversity* 18.

¹⁴³ PA Categories – IUCN PA categories system.

aim would not be to protect them strictly from human interference.¹⁴⁴ Many of the IUCN PA categories allow for the sustainable utilisation of natural resources.¹⁴⁵ Sustainable use suggests that wild living resources can be used in a way that will not endanger the continued survival of the species in question, while all of humanity depends on the indirect use of ecosystem services.¹⁴⁶ However, the direct extractive use of wild living resources is opposed by those people who complain about the killing and collecting of certain species on ethical or moral grounds.¹⁴⁷ Furthermore, many are concerned that the extractive use of many wild living resources has been and continues to be biologically unsustainable.¹⁴⁸ Article 2 of the CBD defines the sustainable use as the use of components of biological diversity as use in a way and at a rate that does not lead to the long-term decline of biological diversity, which thereby maintains its potential to meet the needs and aspirations of present and future generations.¹⁴⁹ The CBD definition clarifies three common confusions about sustainable use, namely that it is only about consumptive use, that is necessarily about creating incentives, and that it turns use into a conservation tool.¹⁵⁰ The conservation community can follow one of two paths. It can either try to stop use or it can work to introduce the means to deliver sustainable use and if possible, incentive-driven conservation.¹⁵¹ Furthermore, proponents agree that this form of commercial exploitation is a legitimate way of raising the money required to fund conservation measures.¹⁵² This philosophy of sustainable utilisation is central to the South African government's wildlife conservation policy. It underpins claims by the hunting fraternity that killing animals for sport contributes to their conservation and it forms the basis of arguments that legalising the international trade in products such as elephant ivory and rhino horns will reduce poaching.¹⁵³

¹⁴⁴ PA Categories – IUCN PA categories system.

¹⁴⁵ Wilson-Späth 2016 *Africa Geographic* 1.

¹⁴⁶ Hutton and Leader-Williams 2003 *Oryx* 215.

¹⁴⁷ Hutton and Leader-Williams 2003 *Oryx* 215.

¹⁴⁸ Hutton and Leader-Williams 2003 *Oryx* 215.

¹⁴⁹ CBD 1992 Article 2.

¹⁵⁰ Hutton and Leader-Williams 2003 *Oryx* 216.

¹⁵¹ Hutton and Leader-Williams 2003 *Oryx* 223.

¹⁵² Wilson-Späth 2016 *Africa Geographic* 1.

¹⁵³ Wilson-Späth 2016 *Africa Geographic* 1. Opposing opinions about these issues were expressed in the case *Kruger v Minister of Water and Environmental Affairs* [2016] 1 A11 SA 565 (GP) para

2.5.5 Economic values of PA's

The direct use values of a PA are values obtained from the direct use of PA activities such as recreation, natural resource harvesting, hunting, education and research. These activities can be commercial, meaning that they are traded on a market (e.g.: tourism and research) or non-commercial, meaning that there is no formal or regular market on which they are traded (e.g.: fuel wood collection and informal grazing).¹⁵⁴

The indirect use values of a PA are values derived from the indirect users of the PA. Indirect users are largely comprised of the PA's ecological functions such as watershed protection, breeding habitat for migratory species, climate stabilisation, and carbon sequestration,¹⁵⁵ and the development, expansion, management and promotion of a system of sustainable national parks that conserves biodiversity and heritage assets through engaging in innovation and following best practice, for the just and equitable benefit of current and future generations.¹⁵⁶

2.5.6 International agreements

A number of international agreements endorsed by South Africa have a direct or indirect impact on PA's. Examples are those conventions with the primary purpose of the establishment of PA's. These include UNESCO's Convention Concerning the Protection of the World Cultural and Natural Heritage, (which obliges parties to designate and protect world heritage sites), the Convention on Wetlands of International Importance Especially as Waterfowl Habitat, and the Ramsar Convention, which obliges parties to designate wetlands of international significance.¹⁵⁷

South Africa is also a party to the Treaty of the South African Development Community, (SADC) which, *inter alia*, requires the country to achieve the objective of the

1, wherein animal rightists aired their belief that animals have the same right to life and liberty as human beings, and that man has no right to "use" animals in any way.

¹⁵⁴ Phillips *Economic values of PA's* 12.

¹⁵⁵ Phillips *Economic values of PA's* 12.

¹⁵⁶ Mission of SANParks date unknown https://www.sanparks.org/parks/kruger/conservation/scientific/key_issues/plans/adaptive/pdfs/chapter_02.pdf.

¹⁵⁷ Glazewski *Environmental Law* 12-14.

"sustainable utilisation of natural resources and effective protection of the environment" (Article 5 [g]).¹⁵⁸

The IUCN suggests that the main purposes of PA's can be summarized as:

- Scientific research;
- Wilderness protection;
- Preservation of species and generic diversity;
- Maintenance of environmental services;
- Protection of specific natural and cultural features;
- Tourism and recreation;
- Education; and
- Maintenance of culture and tradition.¹⁵⁹

The CBD is the most important legal instrument addressing and supporting PA's, with 187 parties (signatory states). The establishment of PA's and the importance of PA's and the expansion thereof are emphasised repeatedly.

2.6 Brief history of PA's

2.6.1 The early origins

PA's are cultural phenomena and have a long history. The concept of PA's has existed for at least several thousand years in the form of private and commercial game reserves and spiritual areas. Some historians claim that areas were specifically set aside in India for the protection of natural resources over two millennia ago.¹⁶⁰ Examples of these include royal decrees in South Asia, sacred graves in Africa, and restricted "taboo" areas in the Pacific.¹⁶¹

PA's were first formally established as reserves in the 16th century, to prevent the extinction of individual iconic species such as the bison and chamois in some European

¹⁵⁸ Blackmore 2017 *SAJWR* 11.

¹⁵⁹ Mulongoy and Chape *PA's and biodiversity* 16.

¹⁶⁰ Eagles McCool and Haynes *Sustainable tourism in PA's* 5.

¹⁶¹ Ervin *et al PA's for the 21st Century* 9.

countries.¹⁶² National parks emerged in the late 19th century: in the mid–1800s PA's began to be established in the form of national parks. Yellowstone was the first national park established in the United States, in 1872.¹⁶³ Several emerging national parks were established in countries like the British Colony of New South Wales in 1866, Canada in 1885, and New Zealand in 1894. There were common features to these emerging national parks. First, they were created by government action. Second, the areas set aside were generally large and contained relatively natural environments. Third, the parks were made available for all people. Thus, from the very beginning, park visitation and tourism were central pillars of the national parks movement.¹⁶⁴

The evolution of societal views toward PA's over the past 150 years can be characterised by three distinct models: the classic model, the modern model, and an emerging post-2010 model.¹⁶⁵

In the classic model, PA's were generally viewed as existing independently from their surrounding landscape. Instead of being considered as part of an integrated and comprehensive land use plan, PA's were often viewed as isolated "jewels in the crown", developed in an *ad hoc* manner, and located in areas with low economic and ecological value.¹⁶⁶

2.6.2 The emerging "modern" PA model

As a "modern" PA model began to emerge in the 1970s, the attention paid to major PA themes in management effectiveness, PA network design, governance and sustainable finance began to reflect changing views of PA's. The acknowledgement of the importance of local communities and the recognition of governance models formed significant elements.

In the modern model, PA's are established for scientific, economic and cultural reasons. The emerging model requires that PA's support ecosystem services and promote

¹⁶² Dixon and Sherman *Economics of PA's* 9.

¹⁶³ Dinica 2016 *Policy Quarterly* 50-59.

¹⁶⁴ Eagles, McCool and Haynes *Sustainable tourism in PA's* 5.

¹⁶⁵ Ervin *et al PA's for the 21st Century* 9.

¹⁶⁶ Ervin *et al PA's for the 21st Century* 9.

climate change adaptation, resilience and mitigation.¹⁶⁷ The establishment of an effective PA network is essential for the effective management of PA's¹⁶⁸ and the evolution of societal views towards PA's.

Nearly every country has adopted PA legislation and designated sites for protection.¹⁶⁹

In modern design, planners began to run national parks and fully PA's networks more systematically.¹⁷⁰

The drivers of change behind the modern model of PA's included increased scientific sophistication, the awareness of human rights, a greater move toward democratisation, the role of civil society, and technological advances.¹⁷¹ PA's began to be viewed more as social enterprises and were managed with the needs of local communities in mind, and new forms of PA's such as community–conserved areas were created and/or recognised.¹⁷²

2.6.3 A brief history of PA's on the African Continent

2.6.3.1 The 1900 London Convention

The initiative for a convention to conserve nature and natural resources on the African continent was pioneered by the colonial powers¹⁷³ through the Convention on the Preservation of Wild Animals, Birds and Fish in Africa signed on 19 May 1900 (the "London Convention of 1900").¹⁷⁴ The agreement aimed at preventing the uncontrolled massacre of wild animals and ensuring the conservation of diverse wild animal species.¹⁷⁵ The Convention also set up a selective mechanism for the protection of "useful" or rare and endangered wild animal species and the sufficient reduction of "pest" species.¹⁷⁶ It also encouraged signatories to engage in the creation of

¹⁶⁷ Ervin *et al PA's for the 21st Century* 10.

¹⁶⁸ See Chapter 2 para 2.6.1 above under "The Early Origins".

¹⁶⁹ Ervin *et al PA's for the 21st Century* 7.

¹⁷⁰ Van der Linde *et al Beyond boundaries* 3-4.

¹⁷¹ Ervin *et al PA's for the 21st Century* 9.

¹⁷² Ervin *et al PA's for the 21st Century* 10.

¹⁷³ Belgium, France, Germany, Italy, Portugal, Spain and the United Kingdom.

¹⁷⁴ Kurwijila, Töper and Steiner *An introduction to the African Convention* 3.

¹⁷⁵ Preamble of the London Convention of 1900.

¹⁷⁶ Articles 11(1), 11(13) and 11(15) of the London Convention of 1900.

"reserves".¹⁷⁷ The convention never entered into force because most of its signatories did not notify it.¹⁷⁸

2.6.3.2 The 1933 London Convention

Following the failure of the London Convention of 1900, an international congress on the protection of nature was held in Paris in 1931 to propose the convening of an international conference for the adoption of a new text. On 8 November 1933 the Convention Relative to the Preservation of Fauna and Flora in their Natural State (the "London Convention") was adopted. The London Convention was the very first binding legal instrument to provide for the creation of African PA's such as national parks and nature reserves.¹⁷⁹

2.6.3.3 The Algiers Convention of 1968

The important effect of international agreements on the development of national PA's, is demonstrated by the 1968 African Convention on the Conservation of Nature and Natural Resources (the Algiers Convention),¹⁸⁰ which had an important influence on the development of PA's in Africa. The fundamental principle of PA's in the Convention is incorporated in the national environmental system for South Africa, and a salient example is section 24 of the *Constitution*.¹⁸¹

2.6.3.4 The Maputo revision of 2003

The Algiers Convention was replaced by the 2003 African Convention on the Conservation of Nature and Natural Resources (the Revised Maputo Convention), which came into force in 2016.¹⁸² Since South Africa is a signatory, it would serve as a guiding policy for the country. The Maputo Convention stresses the critical

¹⁷⁷ Kurwijila, Töper and Steiner *An introduction to the African Convention* 3.

¹⁷⁸ Kurwijila, Töper and Steiner *An introduction to the African Convention* 3.

¹⁷⁹ Kurwijila, Töper and Steiner *An introduction to the African Convention* 3.

¹⁸⁰ African Convention on the Conservation of Nature and Natural Resources 15 September 1968 4.

¹⁸¹ *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution).

¹⁸² Lubbe 10 September 2017 <https://the-conversation.com/africas-ambitious-new-biodiversity-laws-come-with-teeth-will-protect-people-too-83109>.

importance of PA's for the long-term conservation of species and their habitats.¹⁸³ In article II the convention spells out three objectives which correspond to key elements of a sustainable development approach: the achievement of ecologically sound, economically sound, and socially acceptable development policies and programmes.¹⁸⁴

One of the biggest drawbacks of the Algiers Convention was that it had no power to enforce laws.¹⁸⁵ By establishing both a Conference of Parties as well as a secretariat for its implementation and administration, the Maputo Convention can enforce its provisions.¹⁸⁶

2.6.3.5 Concluding remarks

Over the past century African nations have established an extensive network of PA's. There are more than 1100 national parks and related reserves in sub-Saharan Africa, of which 36 are designated World Heritage Sites.¹⁸⁷ Since 1970 the total PA coverage in Africa almost doubled, and now includes 3,06 million km² of land and marine habitats.¹⁸⁸ PA's currently cover 15.9% of the total land surface.

2.7 Origin of South Africa's PA's

The origin of South Africa's PA's regime can be found in the colonial forestry reserve laws dating back to 1888. Conservation legislation evolved out of the Cape Colony and was based on the principles of Roman Dutch Law. Inspired by the fear of land erosion and deforestation, legislation for the protection of fauna was promulgated in the Cape Colony in the 1820s. In order to counter the massive slaughter of wild animals for food, to make space for agriculture, and to protect elephants and buffalos,

¹⁸³ Blackmore 2017 *SAJWR* 8.

¹⁸⁴ Kurwijila, Töper and Steiner *An introduction to the African Convention* 5.

¹⁸⁵ Lubbe 2017 <https://the-conversation.com/africas-ambitious-new-biodiversity-laws-come-with-teeth-will-protect-people-too-83109>.

¹⁸⁶ Lubbe 2017 <https://the-conversation.com/africas-ambitious-new-biodiversity-laws-come-with-teeth-will-protect-people-too-83109>.

¹⁸⁷ Newmark 2008 *Frontiers in Ecology and the Environment* 321.

¹⁸⁸ Newmark 2008 *Frontiers in Ecology and the Environment* 321.

the Cape Colony Act for the Preservation of Game was promulgated in 1886 and became the first conservation legislation in Africa.¹⁸⁹

The enactment of a comprehensive national and provincial legal framework for PA's began as late as in the 1970s with the promulgation of the *National Parks Act* and a series of provincial conservation ordinances.¹⁹⁰ South Africa has 518 state owned and 1 098 privately owned and formally gazetted terrestrial PA's¹⁹¹ and 24 marine PA's.¹⁹²

2.8 Land reform

With the advent of South Africa's constitutional democracy, the government realised that land reform was a key mechanism to achieve both political and socio-economic transformation. The Government initiated a comprehensive land reform programme,¹⁹³ but the land reform policy has little to say about the types of land use and production to be promoted and whether these should differ from existing patterns in the commercial farming sector. This is being recognised increasingly as a crucial gap and an area in which a new policy is needed.¹⁹⁴ South Africa's land reform programme is contained in the White Paper on South African Land Policy.¹⁹⁵ Its three main components are land restitution, land redistribution, and land tenure reform. Land restitution is directly relevant to conservation areas, and 150 of the 79696 land claims lodged during the first claim period are related to PA's. The kinds of PA's in respect of which the land claims were lodged are diverse and include national parks, nature reserves, wilderness areas and world heritage sites.¹⁹⁶

On 2 May 2007 the Minister of Agriculture and Land Affairs and the Minister for Environmental Affairs and Tourism approved and signed an inter-ministerial Memorandum of Agreement on land claims in PA's, which included a restitution process and an operational protocol to be followed for the settlement of land claims against

¹⁸⁹ Child *Parks in Transition* 5-6.

¹⁹⁰ Glazewski *Environmental Law* 12-19.

¹⁹¹ Department of Environmental Affairs: National Register of PA's and Spatial Data 23 May 2012.

¹⁹² Department of Environmental affairs: State of Management of South Africa's Marine Protected Areas 8.

¹⁹³ Glazewski *Environmental Law* 12-22.

¹⁹⁴ Hall 2009 <http://www.plaas.org.za/sites/default/files/publications-pdf/AC2.pdf> 24.

¹⁹⁵ Department of Land Affairs White Paper on South African Land Policy (1997).

¹⁹⁶ Department of Environmental Affairs Status of Land Claims in PA's 20 August 2013.

PA's. The Memorandum of Agreement sets principles that must be followed when dealing with claims in PA's.¹⁹⁷ According to Blessing Mphela, a land claims commissioner, the Commission on Restitution of Land Rights has admitted that it faces various challenges and setbacks in finalising the land claims, including land owners' disputing the validity of the claims, exorbitant land prices, claims referred to the LCC, family disputes and boundary disputes.

These claims are extensive and could have a significant impact on South Africa's established PA's network and the Government's role as trustee in terms of Section 2 of the NEMBA.

¹⁹⁷ National Co-Management Framework 2014 https://www.news.uct.ac.za/images/archive/daily_news/2014/National%20Co-Management%20Framework.pdf.

CHAPTER 3

CONTRACTUAL AGREEMENT PRINCIPLES, REQUIREMENTS, BENEFITS AND INCENTIVES FOR THE EXPANSION OF PA'S IN TERMS OF LAW

3.1 Introduction

This paper having distilled the importance of the creation and expansion of PA's and *inter alia* discussed the objective nature and form of PA's in Chapter 2, Chapter 3 considers the manner in which South Africa's legal framework provides the mechanisms for the creation and expansion of PA's.

PA's have been used for decades in South Africa as a valuable tool for conserving the nation's natural and cultural heritage.¹⁹⁸ In spite of the extended and extensive use of this system, numerous flaws were identified in the legal framework that provided for the identification and declaration of the majority of these areas.¹⁹⁹ These flaws significantly undermined the effective functioning of South Africa's PA regime. In an effort to overcome these challenges the South African government revised the country's national conservation regime at the beginning of 2003. The NEMPAA is one of the new laws that emerged from this reform process.²⁰⁰ Prior to 2000, planning was wholly inadequate in South Africa's conservation sector, and the country's PA's network accordingly arose in a largely *ad hoc* manner. No general conservation strategy or coherent planning framework existed for identifying, declaring and managing areas of national natural and cultural significance.²⁰¹ The explicit objectives of the NEMPAA reflect a clear attempt to overcome the above challenges and give effect to the state's commitments under various international instruments of relevance

¹⁹⁸ Paterson *Legal Framework for PA's* 5. See Chapter 2 para 2.4.

¹⁹⁹ Paterson *Legal Framework for PA's* 5. Flaws like a profusion of laws, the lack of coordination, inadequate planning, and a failure to link conservation necessities with the need of local residents.

²⁰⁰ Paterson *Legal Framework for PA's* 5.

²⁰¹ Geach and Peart "Land, resource use and desertification in South Africa" 19. The NEMA does not refer to biodiversity other than to note in principle 3a: "Sustainable development requires the consideration of all relevant factors including the following: (i) that the disturbance of ecosystems and loss of biological diversity is avoided, or, where it cannot be altogether avoided, is minimised and remedied ...".

to PA's.²⁰² These objectives include: providing for a representative network of PA's on state, private and commercial land; the promotion of the sustainable utilisation of PA's for the benefit of the people; and promoting local community and landowners participation in the management of PA's.²⁰³ The absence of a coherent national conservation strategy meant that conservation concerns were not satisfactorily integrated into broader policies and programmes.²⁰⁴ The NEMPAA must be read, interpreted and applied with the NEMBA (among other regulations), which prescribes a comprehensive array of planning tools.²⁰⁵

Notwithstanding the fact that the prescriptive objectives have been set up for natural resources, the development and implementation of PA's is a difficult task, in particular when such development is faced with challenges. The NEMPAA provides a workable and equitable legal framework for South Africa. Its components include policy and planning, the establishment of PA's, and the vested interests of individuals.²⁰⁶ Many of the environmental resources adjacent to existing PA's in South Africa are in the hands of private land owners. The state is consistently confronted with the issue of how such land must be regulated for environmental purposes. Regulatory measures of land for the purpose of environmental conservation are allowed insofar as they are legitimate, necessary and not arbitrary or unfair.²⁰⁷ The White Paper on Environmental Management Policy²⁰⁸ makes a few statements regarding the regulation of the conservation of land, the sustainable use of biodiversity, and the recognition of property rights in the *Constitution*, and acknowledges that valuable elements of biodiversity are often found in private ownership.²⁰⁹ The White Paper maintains, however, that the state always has the authority to control private property and that

²⁰² Paterson *Legal Framework for PA's* 5. International environmental instruments such as the convention on Biological Diversity, the Durban Accord and the Durban Action Plan.

²⁰³ Paterson *Legal Framework for PA's* 5.

²⁰⁴ Paterson *Legal Framework for PA's* 7.

²⁰⁵ Paterson *Legal Framework for PA's* 15. Planning tools for ecosystems and species include the prescription of a national biodiversity framework (sections 38 and 39 NEMBA) the declaration of bioregions and associated bioregional plans (section 40 and 41 NEMBA); the identification of threatened and protected ecosystems and species (section 52 of NEMBA); and the preparation of biodiversity management plans (sections 43 and 45 NEMBA).

²⁰⁶ Paterson *Legal Framework for PA's* 5.

²⁰⁷ Du Plessis 2011 *TSAR* 512.

²⁰⁸ White Paper on Environmental Management Policy – Department of Environment Affairs and Tourism July 1987.

²⁰⁹ Du Plessis 2011 *TSAR* 524.

through deprivation and expropriation the state is able to regulate properties to adhere to sound principles of conservation and biodiversity use.²¹⁰

Conservation of biodiversity through the mechanism of PA's alone is insufficient. Previously the network of PA's did not optimally incorporate a representative sample of all ecosystems and hot spots of natural and cultural significance.²¹¹ Many PA's were constituted on land marginal for agriculture, under the guise of conservation, when in reality they had been established solely for recreation and tourism purposes.²¹² Several sectoral policies and pieces of legislation can be adduced relevant to the ownership of private land that may be considered as important for conservation, and have a direct impact on land use and environmental management. Some of these pertain, for instance, to catchment management and water pollution,²¹³ to preventing and combatting veld, forest and mountain fires,²¹⁴ to soil conservation,²¹⁵ and to cultural resources, which include archaeological, historical and certain natural resources.²¹⁶

The consolidated Environmental Implementation and Management Plan²¹⁷ acknowledges that the *Constitution* guarantees compensation in the event of expropriation, but denies that this protects property *per se*.²¹⁸ The implementation plan states²¹⁹ that a landowner has certain obligations set by the state in respect of land use in the interest of sound environmental management.²²⁰ In considering the topic of the expansion of PA's through the incorporation of land owned by private landowners and/or communities, the verdict of the court in the case *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape*²²¹ needs to be considered. Davis J ruled as follows:

²¹⁰ Du Plessis 2011 *TSAR* 524.

²¹¹ Paterson *Legal Framework for PA's* 6.

²¹² Department of Environmental Affairs and Tourism Annual Report 2009/10 8.

²¹³ *Water Act* 36 of 1998.

²¹⁴ *National Veld and Forest Fire Act* 101 of 1998.

²¹⁵ *Conservation of Agricultural Resources Act* (CARA) 43 of 1983.

²¹⁶ *National Heritage Resources Act* 25 of 1999.

²¹⁷ Du Plessis 2011 *TSAR* 512.

²¹⁸ Du Plessis 2011 *TSAR* 524-525.

²¹⁹ Du Plessis 2011 *TSAR* 524.

²²⁰ Du Plessis 2011 *TSAR* 524.

²²¹ 2007 4 SA 26 (C).

[O]wnership in South Africa can no longer be characterised as an absolute and individualistic right without any qualification attached thereto ... [I]n our constitutional democracy an increased emphasis had been placed upon the characteristic of ownership such that entitlements can only be exercised in accordance with the social function of law and in the interest of the community in the exercise of entitlements have been increasingly emphasised. A balance must be struck between the protection of ownership and the exercise of entitlements of the owner regarding third parties on the one hand, and the obligation of the owner to the community on the other.²²²

The court in this instance viewed the restriction of cultural preservation legislation as "deprivation" and it is clear from the decision that it was in this instance at least "non arbitrary".²²³

The *Qualidental Laboratories* case dealt with the conservation of cultural history structures in terms of the *National Heritage Resources Act*.²²⁴ The principles applied should also be applied to land to be added to existing PA's, required for the protection of cultural heritage areas, biodiversity, archaeology, and paleontological heritage.²²⁵ The reasoning behind this argument is that references to biodiversity conservation and cultural and heritage resources are littered throughout NEMPAA. For example, section 2 sets the objectives of the Act, section 17 the purposes for which PA's can be established, and sections 20, 23 and 28 prescribe the selection criteria for sites worthy of protection.²²⁶ Identification of cultural heritage sites is regulated mainly by the *National Heritage Resources Act*, but unfortunately no clarity is provided on how the provisions may reconcile with the provisions of NEMPAA, because the *National Heritage Resources Act* also describes a PA's regime.²²⁷ The *National Heritage Resources Act* provides for the declaration of heritage sites (Section 27), PA's (section 28), heritage areas (section 29), and archaeological and paleontological sites (section 35).²²⁸

The awareness of nature conservation has increased dramatically in the 21st century, and with so much land which is needed for conservation in the hands of private

²²² 2007 4 SA 26 (C) 37A-E.

²²³ Du Plessis 2011 *TSAR* 524.

²²⁴ Act 25 of 1999.

²²⁵ Du Plessis 2011 *TSAR* 524.

²²⁶ Du Plessis 2011 *TSAR* 524.

²²⁷ Paterson 2007 *SAPL* 15.

²²⁸ Paterson 2007 *SAPL* 15.

owners,²²⁹ the state is facing challenges on how such land should be regulated for conservation. An example is the park consolidation programme of the Mapungubwe National Park and World Heritage Site, in which land that is in the possession of private landowners is in the process of being incorporated into the core area of the Mapungubwe National Park.²³⁰ Protracted talks between SANParks and landowners have been conducted since 1995 but with few results. Chapter 4 hereinafter will fully deal with this topic. The state may apply regulatory measures if such measures are legal, necessary and fair, and it depends on how well they meet the objectives.²³¹

Section 8(1) of the *Constitution* provides that it binds the legislature, the executive, the judiciary "and all the organs of State".²³² It may be necessary to note, here, that "law" in this chapter has to be broadly interpreted so as to include statutory law, common law and customary law.

Chapter 3 will focus mainly on the principles laid down in the *Constitution*, environmental legislation and common law that must be taken into account when establishing and expanding PA's for the purposes of the conservation of biological diversity, and will compare environmental protection with the protection offered to landowners and communities. An important aspect that will be considered is what would be a reasonable and fair manner of transforming land in the hands of private land owners and communities into PA's through contractual agreements, taking into account the fundamental rights contained in section 24 of the *Constitution*. The benefits and incentives to a contractual agreement, as well as the essentialia of a valid agreement, will be discussed below.

3.2 Constitutional rights

3.2.1 Environmental rights

The *Constitution* guarantees the observance of democratic values, which include *inter alia* human dignity, the advancement of human rights and freedoms, constitutional

²²⁹ See Chapter 2 para 2.5.2.

²³⁰ Mapungubwe National Park and World Heritage Site – Management Plan 2013-2018 30.

²³¹ See Chapter 2 para 2.5.1 and also Chapter 4 para 4.3.1.

²³² Section 8(1) of the *Constitution*.

supremacy, and the rule of law.²³³ In addition, substantive environmental rights are protected by Section 24 of the *Constitution*.²³⁴ Section 24 reads as follows:

Everyone has the right:

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

Section 7 (2) of the *Constitution* provides that:

The state must respect, protect, promote and fulfil the rights in the Bill of Rights;

If section 7(2) is read with section 24 it is clear that everyone must respect these rights in South Africa and the state has an additional obligation towards its fulfilment.²³⁵ The provisions listed in section 24 of the *Constitution* must be borne in mind when reading the provisions of the NEMPAA, in particular that the State, through various organs of state, must implement the legislation applicable to PA's, must act "as trustee of PA's", and must implement the NEMPAA in partnership with the people.²³⁶ The state has a fiduciary duty to act and must act responsibly and in agreement with the objectives of the establishment or expansion of PA's.²³⁷ The expansion or establishment of a PA must contribute to achieving the objectives of the NEMPAA.²³⁸ In particular, the state must "provide for a representative network of PA's on state land, private land and communal land".²³⁹

²³³ Section 1 of the *Constitution*.

²³⁴ Kotze and Du Plessis 2010 *Journal of Court Innovation* 158.

²³⁵ Section 3 of NEMPAA.

²³⁶ Blackmore 2015 *SAPL* 364.

²³⁷ Section 2(d) of NEMPAA.

²³⁸ Blackmore 2015 *SAPL* 364.

²³⁹ Section 18(2) of NEMPAA.

3.2.2 Concluding Remarks

In this paragraph the relevance of the relevant rights enshrined in the Constitution of the Republic of South Africa 1996 is determined and specially the environmental rights and how it fits and its relevance in the expansion or creation of PA's.

3.3 Specific environmental management acts

3.3.1 National Environmental Management: Protected Areas Act (NEMPAA)

The legal position around the expansion of PA's is currently primarily regulated in terms of the NEMPAA and the regulations promulgated in terms of the NEMPAA.²⁴⁰ The main objective of the NEMPAA is to provide for the declaration and management of PA's.²⁴¹ The declaration of an expansion of a national park must be effected by notice in the Government Gazette.²⁴² The term "management", when used in relation to a PA, includes the control, protection, conservation, maintenance and rehabilitation of the PA with due regard to the use and extraction of biological resources and benefit-sharing activities in the area in a manner consistent with the *National Environmental Management Biodiversity Act (NEMBA)*.²⁴³ The NEMPAA describes a broad spectrum of possibilities for which an area may be declared to be a PA. Section 17(h) provides for the "sustainable use of natural and biological resources", and section 17(k) "to contribute to human, social, cultural, spiritual and economic development". The NEMPAA contains specific detailed criteria which must be met before an area can be declared a Special Nature Reserve,²⁴⁴ a National Park,²⁴⁵ a Nature Reserve,²⁴⁶ or a Protected Environment.²⁴⁷ Comprehensive consultation and public participation

²⁴⁰ GN R99 in GG 35021 of 8 February 2012.

²⁴¹ Section 2(a) of NEMPAA.

²⁴² Section 1 of NEMPAA "declare".

²⁴³ Section 1 of NEMPAA "management".

²⁴⁴ Section 18(2) of NEMPAA.

²⁴⁵ Section 20(2) NEMPAA.

²⁴⁶ Section 23(2) NEMPAA.

²⁴⁷ Section 28(2) NEMPAA.

procedures are prescribed in order to promote open, transparent, participatory and cooperative governance.²⁴⁸

The NEMPAA explicitly states that the effective implementation of its provisions requires the conclusion of partnerships, regardless of whether they are with private landowners or local communities.²⁴⁹

A declaration of private land as a PA or the incorporation thereof into a PA, as a National Park or in any of the other categories may be initiated by the Minister, or the relevant provincial MEC, or the owners of the land individually or collectively.²⁵⁰ A landowner must consent to a written agreement entered into with the Minister or relevant provincial MEC.²⁵¹ Extensive provision is made in the NEMPAA for the involvement of all relevant role-players, namely the organs of state, communities, landowners and beneficiaries affected by the proposed declaration to expand a national park,²⁵² and a comprehensive public participation procedure involving proper notice and comment procedures²⁵³ and including oral hearings must take place.²⁵⁴ These agreements must be recorded in notarial deeds and registered against the title deeds of the private land.²⁵⁵ The final step in the completion process is to publish a formal notice in the Government Gazette.²⁵⁶ An important component to contribute to the success of the PA is neighbour relations.²⁵⁷ A programme to encourage the development and maintenance of good relations with neighbours must be created²⁵⁸ and the neighbours must have the opportunity to provide inputs where relevant into decisions relating to the management of the PA²⁵⁹ and where relevant enter into a co-

²⁴⁸ Paterson *Legal Framework for PA's* 17.

²⁴⁹ Section 3(b) of NEMPAA.

²⁵⁰ Section 35(1) NEMPAA.

²⁵¹ Paterson *Legal Framework for PA's* 17.

²⁵² Section 31 of NEMPAA states that the Minister is compelled to consult with all national organs of state, MECs, local authorities and any lawful occupier with a right in land in any part of the area affected.

²⁵³ Sections 33 and 34 of NEMPAA.

²⁵⁴ Section 33(3) of NEMPAA.

²⁵⁵ Section 35(1)(b) of NEMPAA.

²⁵⁶ Section 23(3) of NEMPAA.

²⁵⁷ NEMPAA – Norms and standards for the management of PA's in South Africa para 10.1
GN 362 in GG 39678 of 31 March 2016.

²⁵⁸ NEMPAA – Norms and standards for the management of PA's in South Africa para 10.1(a)(ii)
GN 362 in GG 39678 of 31 March 2016.

²⁵⁹ NEMPAA – Norms and standards for the management of PA's in South Africa para 10.1(a)(v)

management agreement with neighbouring communities.²⁶⁰ In the case where parties do not want to conclude agreements, the NEMPAA offers a variety of possibilities to acquire private land or communal land. A discussion of these provisions, however, falls outside the scope of this dissertation.²⁶¹

The PA must have an approved management plan in place that is consistent with the objectives of the NEMPAA.²⁶² The purpose of the PA must be reflected in the management plan²⁶³ and an expansion plan must form part of the management plan.²⁶⁴ Once the expansion of a national park is constituted, the Minister must assign its management to a management authority.²⁶⁵ The consent of the owner is not generally required prior to the management authority's being appointed, as the identity of the management authority is dealt with in the written agreement providing for the incorporation of the private land.²⁶⁶ A management authority is required to prepare and submit a comprehensive management plan to the Minister for approval within 12 months of its establishment.²⁶⁷ Public consultation with the relevant municipalities, organs of state, local communities and interested parties must precede the submission. The Minister must in writing assign the management of a national park to SANParks.²⁶⁸

The criteria that the management authority²⁶⁹ must comply with and the object and the content of the management plan²⁷⁰ are dealt with in NEMPAA. Management arrangements for the land will be negotiable between the landowner and the management authority²⁷¹ and the NEMPAA also provides for management bodies to

GN 362 in GG 39678 of 31 March 2016.
²⁶⁰ NEMPAA – Norms and standards for the management of PA's in South Africa para 10.1(a)(vi); GN 362 in GG 39678 of 31 March 2016.
²⁶¹ Section 80 of NEMPAA.
²⁶² NEMPAA – Norms and standards for the management of PA's in South Africa para 11.1 GN 362 in GG 39678 of 31 March 2016.
²⁶³ NEMPAA – Norms and standards for the management of PA's in South Africa para 11.1(a)(i) GN 362 in GG 39678 of 31 March 2016.
²⁶⁴ NEMPAA – Norms and standards for the management of PA's in South Africa para 11.1(a)(vi) GN 362 in GG 39678 of 31 March 2016.
²⁶⁵ Section 38 of NEMPAA.
²⁶⁶ Paterson 2007 *SAPL* 25.
²⁶⁷ Section 39 of NEMPAA.
²⁶⁸ Section 38 (1) (aA) of NEMPAA.
²⁶⁹ Section 40 of NEMPAA.
²⁷⁰ Section 41(1) of NEMPAA.
²⁷¹ Biodiversity Stewardship Guidelines 24 November 2009 para 2.3.2.

set their own rules to regulate their activities.²⁷² SANParks is presently in a co-management relationship in respect of three community contractual parks: Richtersveld and Kgalagadi Transfrontier Parks and the Makuleke sector of the Kruger National Park.²⁷³ Section 42 of the NEMPAA provides for the co-management of the PA "with another organ of state, a local community, an individual or other party", and provides for the delegation of duties by the management authority to other parties to the agreement.²⁷⁴ In many cases, the landowner might be in the best position to manage the land.²⁷⁵

3.3.2 National Environmental Management Act (NEMA)

The NEMA creates a fundamental legal framework to give effect to the environmental rights guaranteed in section 24 of the *Constitution*.²⁷⁶ It makes provision for reasonable decision making and reaffirms the state's trusteeship of the environment on behalf of the country's inhabitants.²⁷⁷ The core environmental principle is the promotion of ecologically sustainable development.²⁷⁸ The NEMA provides a framework of principles that must be applied to everything that may affect the environment and its biodiversity.²⁷⁹ It also enunciates a set of guiding principles that must be followed by the state throughout the Republic of South Africa regarding the use of the environment.²⁸⁰ The general framework for environmental management and the implementation thereof are contained in the principles of the NEMA,²⁸¹ and further serve as the guide for decision making.²⁸² In general terms, the guidelines should not as a matter of course be applied as hard and fast rules in every case.²⁸³ The adoption of policy guidelines by state organs to assist decision makers in the exercise of their discretionary powers has long been accepted as legally permissible

²⁷² Section 52 of NEMPAA read with regulation 8 of NEMPAA regulations.

²⁷³ SANParks Annual Reports 2015/16 7.

²⁷⁴ Kidd *Environmental Law* 118; s 42 of NEMPAA.

²⁷⁵ Biodiversity Stewardship Guidelines 24 November 2009 para 2.3.2.

²⁷⁶ Van der Linde and Feris *Compendium of SA Environmental Legislation* 45.

²⁷⁷ Kidd *Environmental Law* 118; s 42 of NEMPAA.

²⁷⁸ Van der Linde and Feris *Compendium of SA Environmental Legislation* 45.

²⁷⁹ Van der Linde and Feris *Compendium of SA Environmental Legislation* 45.

²⁸⁰ Blackmore 2015 *SAJELP* 89.

²⁸¹ Section 2(1)(a) of NEMA.

²⁸² Section 2(1)(b) of NEMA.

²⁸³ Section 2(1)(c) of NEMA.

and eminently sensible.²⁸⁴ The NEMA emphasizes that the environmental principles should "serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of the Act or any statutory provision concerning the protection of the environment".²⁸⁵ Any organ of state that makes a decision that may lead to the degradation of the environment (including its biodiversity) must apply all of the environmental principles, and only in exceptional circumstances may the principles be set aside.²⁸⁶ All organs of state need to apply the environmental principles set out in section 2(1) of the NEMA as a framework for decision-making. Sections 2(2) to 2(4) of the NEMA are applicable to every person who does something that may have an impact on the environment. Section 2(4)(b) requires that environmental management must be integrated, acknowledging that all elements of the environment are linked and inter-related, and the effect of decisions on all aspects of the environment and all people in the environment must be taken into account by pursuing the selection of the best practicable environmental option.²⁸⁷ Environmental management must be for the benefit of the people and serve their physical, psychological, developmental, cultural and social interests equitably.²⁸⁸ Where the expansion of a PA is contemplated, this principle sets the basis for the conclusion of a fair and reasonable contractual agreement in terms of the NEMPAA between an organ of state and private landowners.²⁸⁹

The preamble to the NEMA provides that everyone has the right to have the environment protected for the benefit of present and future generations. The contents of a contractual agreement must therefore strive to achieve a balance between the current landowners and their successors in title. The access to national resources must be fair and reasonable.

²⁸⁴ *Johannesburg Town Council v Norman Anstery and Co* 1928 AD 335 at 340; *Computer Investors Group Inc v Minister of Finance* 1979 1 SA 879 (T) at 898 D – E quoted in the *Minister of Environmental Affairs and Tourism v Scemenatic Fourteen (Pty) Ltd* 85/2004 22 March 2005 (SCA) 17, *MEC for Agriculture, Conservation, Environmental and Land Affairs v Sasol Oil (Pty) Ltd* 2006 5 SA 483 (SCA) para 19.

²⁸⁵ Section 2(1)(c) of NEMA.

²⁸⁶ Blackmore 2015 *SAJELP* 89.

²⁸⁷ CSIR 2006 www.waternet.co.za/policy/le_nema.html.

²⁸⁸ Section 2(2) of NEMA.

²⁸⁹ Blackmore 2015 *SAJELP* 99.

3.3.3 *The National Environmental Management Biodiversity Act (NEMBA)*²⁹⁰

The state is appointed as the trustee of South Africa's biological diversity.²⁹¹ The NEMBA regulates a broad range of issues relevant to biodiversity conservation namely:

- It provides for the declaration of threatened and protected ecosystems and species;²⁹²
- It regulates species and organisms posing potential threats to biodiversity, such as alien species,²⁹³ invasive species²⁹⁴ and genetically modified organisms, and;²⁹⁵
- It also seeks to regulate the vexed issues of bio-prospecting access²⁹⁶ and benefit sharing.²⁹⁷ This can be achieved through permitting schemes²⁹⁸ which must be preceded by benefit-sharing agreements.²⁹⁹ In 2009 the Department of Environmental Affairs and Tourism published the National Biodiversity Strategy and Action Plan.³⁰⁰ It aims to establish a framework and plan of action for the conservation and sustainable use of South Africa's biodiversity and the equitable sharing of benefits derived from this use.³⁰¹ This holds real potential for landowners intending to incorporate their land in a PA to contribute to biodiversity

²⁹⁰ Act 10 of 2004.

²⁹¹ Section 3 of NEMBA.

²⁹² Chapter 4 of NEMBA.

²⁹³ Section 1 of NEMBA.

²⁹⁴ Section 1 of NEMBA.

²⁹⁵ Section 65–69 (alien species and sections 70–77 (invasive species) of NEMBA.

²⁹⁶ Section 1 of NEMBA – Bio-prospecting is defined as "any research on, or development or application of, indigenous biological resources for commercial or industrial exploitation, and includes – (a) the systematic search collection or gathering of such resources or gathering of such resources or making extractions from such resources for purposes of such research, development or application, (b) the utilisation for purposes of such research or development of any information regarding any traditional uses of indigenous biological resources by indigenous communities, or (c) research on, or the application development or modification of any traditional uses for commercial or industrial exploitation."

²⁹⁷ Chapter 6 of NEMBA.

²⁹⁸ Section 81 of NEMBA.

²⁹⁹ Section 84 of NEMBA.

³⁰⁰ GN 813 in GG 32474 of 3 August 2009.

³⁰¹ Paterson *Legal Framework for PA's* 137.

management by way of a biodiversity management plan for an ecosystem,³⁰² indigenous species³⁰³ or migratory species³⁰⁴ in need of protection.

No agreements of this nature have been concluded to date. The principles as laid down in the NEMBA must be adhered to in the contractual agreement between landowners and SANParks to expand a national park.

3.3.4 Conservation of Agricultural Resources Act

The objects of the *Conservation of Agricultural Resources Act* (CARA)³⁰⁵ must be taken into consideration when entering into a contractual agreement for the expansion of a national park:

The objects of this Act are to provide for the conservation of the natural agricultural resources of the Republic by the maintenance of the production potential of land, by the combatting and prevention of erosion and weakening or destruction of the water sources and by the protection of the vegetation and the combatting of weeds and invader plants.³⁰⁶

3.3.5 National Heritage Protection

The *National Heritage Resources Act*³⁰⁷ stipulates that the Minister or the MEC of a province, may declare a PA with the consent of the landowner,³⁰⁸ and it provides for the establishment of an area of land surrounding the national heritage site to ensure the protection of such a site.³⁰⁹ Regulations may be made by a heritage resources authority providing for the safekeeping of the site.³¹⁰

The inclusion of land with a high historical and/or cultural value in the expansion of PA's must make provision for the conservation of that history or culture, to protect and

³⁰² Section 52 of NEMBA.

³⁰³ Section 56 of NEMBA.

³⁰⁴ Section 43(1)(c) of NEMBA.

³⁰⁵ Act 43 of 1983.

³⁰⁶ Section 3 of CARA.

³⁰⁷ Act 25 of 1999.

³⁰⁸ Section 28 of Act 25 of 1999.

³⁰⁹ Section 28(1) of Act 25 of 1999.

³¹⁰ Section 28(5) of Act 25 of 1999.

conserve historical and cultural values in the long term, and include important biodiversity elements requiring strict conservation or protection.³¹¹

3.3.6 World Heritage sites

A world heritage site:

...is in any place in South Africa what identifies to be concluded in the World Heritage List or the tentative list in the Republic and as such is proclaimed in the Gazette to be declared as a Heritage Site in terms of the *World Heritage Convention Act 49 of 1999*.³¹²

This Act gives effect to the World Heritage Convention of 1972 and makes the convention part of South African law.³¹³ The most distinguishing element of a world heritage site is that the power to determine such a site does not lie with the Minister but with the World Heritage Committee.³¹⁴ In terms of the NEMPAA the management authority of a nature reserve and world heritage site may permit the establishment of a commercial activity, or an activity aimed at raising revenue on such a site,³¹⁵ or the development, construction or farming to be performed in such an area.³¹⁶

To date, South Africa is home to eight of the world's heritage sites, and the Mapungubwe National Park and Heritage Site which forms part of this dissertation, is one of them.

3.3.7 Land claims

National parks and other PA's in South Africa face a number of land claims lodged with the Commission for the Restitution of Land Rights in terms of the *Restitution of Land Rights Act 22 of 1994* as amended. SANParks has endorsed the restitution process in its policies and strategies and supports the government in the quest to correct past imbalances of land ownership brought about by the apartheid laws of land ownership.

³¹¹ Blackmore *Overview of the legal instruments to conserve biodiversity* 17.

³¹² Section 1 of Act 49 of 1999.

³¹³ Van Wyk *Planning Law* 263.

³¹⁴ Blackmore *Overview of the legal instruments to conserve biodiversity* 95.

³¹⁵ Section 50(1) of NEMPAA.

³¹⁶ Section 50(5) of NEMPAA.

Should a person who claims land within a PA managed by SANParks be awarded the land, a consistent process will be followed to evaluate the possible uses of the land.³¹⁷

As far as land claims against national parks are concerned, there are four primary organs of state involved as respondents – the Department of Land Affairs, (acting as first respondent) on behalf of the state, the Department of Environmental Affairs (the department responsible for conservation issues), the Department of Public Works (in whose name all state land is registered) and SANParks (as the manager of the land).³¹⁸

The role of the different organs of state with regard to land claims and conservation areas require clarification and better co-ordination.³¹⁹ The South African government should become more active in the development of a uniform, national approach to land claims where conservation areas are affected.³²⁰ Essential to its approach would be elements such as the restriction of land rights, the protection of the conservation status of the land, joint management, and an agreement on tourism ventures.³²¹

The *Constitution* allows the national government to legislate on matters that require "uniform norms and standards". The settlement of land claims in conservation areas is one such field where national guidance is required.³²²

*3.3.8 Water: The Objectives of the Revised Protocol on Watercourses and the National Water Act (NWA)*³²³

Water may surely be regarded as the most precious resource in the South African Development Community (SADC)³²⁴ and its sustainable management is of critical

³¹⁷ South African National Parks Co-ordinated Policy Framework Governing Park Management Plans – July 2006 26.

³¹⁸ De Villiers *Land claims and national parks* 14-15. The Department of Environmental affairs should ideally be representing the conservation "voice", but unfortunately it is not playing its expected leadership role. It has been proposed that it should in consultation with on land claims affecting conservation areas in which the options are spelt out.

³¹⁹ De Villiers *Land claims and national parks* 74 (options available like the restoration of title, alternative land or monetary compensation).

³²⁰ De Villiers *Land claims and national parks* 77.

³²¹ De Villiers *Land claims and national parks* 77.

³²² De Villiers *Land claims and national parks* 78.

³²³ Act 36 of 1998.

³²⁴ Lubbe *A legal appraisal of the SADC* 221.

importance in particular for biodiversity conservation.³²⁵ The main objective of the Revised Protocol on Shared Watercourses (the Watercourse Protocol) is to "foster closer co-operation for the judicious, sustainable and coordinated management, protection and utilisation of shared water courses".³²⁶ The main purpose of the Watercourses Protocol is to enable harmony between the members of the SADC in respect of water management in the region.³²⁷ As the Mapungubwe National Park and Heritage Site adjoins the Limpopo River, that forms the international boundary with Botswana and Zimbabwe, it is important that the Watercourses Protocol's principles be taken into account.

The NWA calls for the uniform protection of all significant water resources, and emphasizes water sustainability and the principles of water resources management.³²⁸ The NWA defines water use in section 21 very broadly, by covering seven types of water uses.³²⁹ The use of water areas and the pollution of water sources in a nature reserve, are dealt with in the regulations provided by the NEMPAA.³³⁰

As various water courses are found in PA's it is important that the contents of the NWA should be respected in the concluding an agreement for expanding existing PA's.

3.3.9 Extension of Security of Tenure Act (ESTA)³³¹

Section 26 of the *Constitution* protects everyone from being-

Evicted from their home or have their home demolished without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

³²⁵ Lubbe *A legal appraisal of the SADC* 221.

³²⁶ Article 2 of *Watercourses Protocol*.

³²⁷ Lubbe *A legal appraisal of the SADC* 221.

³²⁸ Tewari 2009 *Water SA* 704.

³²⁹ Tewari 2009 *Water SA* 704. Abstracting water from a water resource [s 21(a)]; Storing water [s 21(b)]; All aspects of waste disposed which impact water resources [s 21(f)-(h)]; Removing discharging or disposing of water found underground [s 21 (i)]; Making changes to the physical structure of watercourses [ss 21(c) and (j)]; Some activities such as stream flow reduction activities (ss 36, 37(1) and 38(1)); and Water for recreational use [s 21(k)].

³³⁰ GN R99 in GG 35021 of 8 February 2012. Regulations 28-32.

³³¹ Act 62 of 1997.

Section 8 of the ESTA deals with circumstances under which the right of residence may be terminated. In terms of this section, the termination must be on "any lawful ground", and must be just and equitable "having regard to all relevant factors".³³²

The factors set out in section 8(1) of the ESTA make it clear that fairness plays an important role when a contractual agreement is concluded to expand a PA. Employees who reside on the land concerned, have permanent residence on the land in question. The constitutional court ruled in the *Molusi* case that the ESTA requires that the two opposing interests of the landowner and the occupier need to be taken into account.³³³

The court ruled further that eviction without compliance with ESTA would not only render the occupants homeless but would also frustrate the aims of ESTA in respect of security of tenure.³³⁴ If it is a requirement that no employees of the landowner may reside in a national park, then the court's ruling and the principles of ESTA must be respected.

*3.3.10 National Veld and Forest Fire Act*³³⁵

The purpose of this Act is to prevent and combat veld, forest and mountain fires.³³⁶

In terms of section 14 of the Act, where land or any part of it coincides with the border of the Republic of South Africa and is subject to a risk of veld fire, the landowner must prepare and maintain a firebreak on his or her land or as close as possible to that border.³³⁷

Any person who lights, uses or maintains a fire in the open air, or lights or uses or maintains a fire that spreads, and fails to inform the neighbours of the threatening fire, is guilty of an offence.³³⁸

³³² *Molusi v Voges* 2016 ZACC para 8.

³³³ *Molusi v Voges* 2016 ZACC para 8.

³³⁴ *Molusi v Voges* 2016 ZACC para 6.

³³⁵ Act 101 of 1998.

³³⁶ Section 1(1) of Act 101 of 1998.

³³⁷ Section 14 of Act 101 of 1998.

³³⁸ Section 25 of Act 101 of 1998 and Guide to interpretation and implementation of the *National Veld and Forest Fire Act* (Version 3) 6 January 2005. A legal duty exists not to negligently cause harm to a neighbour, particularly by allowing a fire to spread from one's property to that of one's

3.3.11 Fences

The principles of boundary fences are laid down in the *Fencing Act*.³³⁹ The general common-law principles in South African law regarding neighbours' rights and obligations with regard to fences confirm that both neighbours acquire ownership rights in a fence.³⁴⁰ In relation to any land in respect of which it is the owner, the state has all the rights, obligations and duties conferred or imposed on the owner of land.³⁴¹

3.3.12 Concluding remarks

South Africa's extensive conservation regime of relevance to the expansion or creation of PA's has been traversed in paragraph 3, and South Africa's legal framework of relevance to the creation or expansion of PA's has been discussed. The matters discussed include the provisions enabling landowners and communities to enter into contractual agreements with SANParks to expand national parks under the NEMPAA; to fulfil the general framework for environmental management and the implementation thereof as contained in the principles of the NEMA;³⁴² and to enter into biodiversity management agreements with government authorities under the NEMBA.³⁴³ Further, several acts which include *inter alia* the CARA,³⁴⁴ ESTA,³⁴⁵ the *National Veld and Forest Fire Act*,³⁴⁶ the *Fencing Act*,³⁴⁷ the *World Heritage Act*,³⁴⁸ the *National Heritage Resources Act*³⁴⁹ and the NWA³⁵⁰ which have sought the implementation of the

neighbour. "If a reasonable person would have done no more that was actually done, there is no negligence" – Scott JA in *Gouda Boerdery BK v Transnet* 2005 5 SA 490 (SCA) para 13-14.

³³⁹ Act 31 of 1963.

³⁴⁰ Van der Walt *The Law of Neighbours* 87.

³⁴¹ Section 32 of the *Fencing Act* 31 of 1963.

³⁴² Chapter 3 para 3.3.2 s 2(1)(a) of NEMA.

³⁴³ Chapter 3 para 3.3.3.

³⁴⁴ Chapter 3 para 3.3.4.

³⁴⁵ Chapter 3 para 3.3.9.

³⁴⁶ Chapter 3 para 3.3.10.

³⁴⁷ Chapter 3 para 3.3.11.

³⁴⁸ Chapter 3 para 3.3.6.

³⁴⁹ Chapter 3 para 3.3.5.

³⁵⁰ Chapter 3 para 3.3.8.

expansion or creation of PA's and the exceedingly diverse institutions tasked with doing so.³⁵¹

The country's legal framework of relevance to the expansion or creation of PA's sits somewhat uncomfortably between the conservation domain and the rights of individuals and communities.³⁵²

3.4 Other rights and principles

3.4.1 Sustainable development principles

In section 1 of NEMA, sustainable development is defined as "the integration of social, economic and environmental factors into planning, implementation and decision making so as to ensure that development serves present and future generations."³⁵³

Sustainable development requires that environmental management must be integrated³⁵⁴ with environmental justice,³⁵⁵ and that environmental impact assessments (EIA) should address the social, economic and environmental impacts of development activities. The NEMA takes social and cultural considerations into account and makes provision for economic benefits to be derived from conservation e.g. for nature-based tourism.³⁵⁶ PA's must *inter alia* promote the objective of the "sustainable utilisation of PA's for the benefit of people, in a manner that would preserve the ecological character and loss of biological diversity of those areas are avoided."³⁵⁷ An important principle to remember is that PA's should not be considered in isolation, and it should not be thought that their sole purpose is the protection of the ecology. Sustainable development has been included in section 24 of the *Constitution*.³⁵⁸ Section 24(b)(iii) explicitly states that social and economic aspects must be factored

³⁵¹ Due to the limited scope of this dissertation, it is not possible to deal with each and every aspect of possible elements regarding the conclusion of a contractual agreement to expand a PA, such as the provisions contained in the *Game Theft Act* 105 of 1991 and in particular game poaching.

³⁵² Paterson *Bridging the gap between conservation and land reform* 161.

³⁵³ Kidd 2008 *SAJELP* 86.

³⁵⁴ Section 2(4)(b) of NEMA.

³⁵⁵ Section 2(4)(c) of NEMA.

³⁵⁶ Section 2(4)(i) of NEMA.

³⁵⁷ Section 2(4)(a) of NEMA.

³⁵⁸ Also see Chapter 3 paras 3.2.1 and 3.2.2.

into the way in which the environment is protected, and states that this must be done in a balanced way to ensure that development is sustainable in the future, and not just in the present.³⁵⁹

In the case of *Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*,³⁶⁰ the court made it clear that the NEMA compels environmental authorities to consider socio-economic factors as an integral part of their environmental responsibility.³⁶¹ While this is not the place to consider in detail what the best definition of sustainable development is,³⁶² most notions of sustainable development, incorporate the principles of inter- and intergenerational equity, as well as the principle of integration: that is, the integration of environmental, economic and social objectives.³⁶³

The principle of integration leads to the idea of the "three pillars" of sustainable development – economic, social and environmental.³⁶⁴ Sustainable development regards the economic, environmental and social legs as being equally important. None of them ought to be regarded as a primary consideration.³⁶⁵ The three-pillar view of sustainable development is the view that is reflected in South African legislation.³⁶⁶

If a contractual agreement is entered into between the organs of the State and private landowners for the expansion of existing PA's, such an agreement must be tested against the requirements of sustainable development. Although the concept of sustainable development is relatively new to South African law,³⁶⁷ as early as in 1971 a Southern Rhodesian decision recognised that the principle of inter-generational

³⁵⁹ Also see Chapter 3 paras 3.2.1 and 3.2.2.

³⁶⁰ 2007 6 SA 4 (CC).

³⁶¹ Kidd 2008 *SAJELP* 86.

³⁶² Kidd 2008 *SAJELP* 86.

³⁶³ Kidd 2008 *SAJELP* 86-87.

³⁶⁴ Kidd 2008 *SAJELP* 87.

³⁶⁵ Kidd 2008 *SAJELP* 87.

³⁶⁶ Kidd 2008 *SAJELP* 87.

³⁶⁷ Feris 2008 *SAJHR* 39.

equity can have the effect of limiting other rights, such as property rights. In *King v Dykes*³⁶⁸ the court asserted -

The idea which prevailed in the past that ownership of land conferred the right on the owner to use his land as he pleased is rapidly giving way in the modern world to the more responsible conception that an owner must not use his land in a way which may prejudice his neighbours or the community in which he lives, and that he holds his land in trust for future generations.

Legislation dealing in such matters as town and country planning, the conservation of natural resources, the prevention of pollution and regulations designed to ensure that proper farming practices are followed, all bear eloquent testimonies to the existence of a more civilised and enlightened attitude towards the rights conferred by ownership of land. Development which meets the needs of the present generation without compromising the ability of future generations to meet their own needs.

In other words, development can be just but it could also be unjust, whether sustainable or not.

3.4.2 *The environment and human rights*

Human rights are based on core principles like dignity, fairness, equality, respect and autonomy.³⁶⁹ There is a need to obtain guidance from the Court to show how the challenges of competing rights regarding the acquisition of rights such as property rights may be met. Rights are things to which one is entitled, and can lay claim either legally, or morally.³⁷⁰

The Stockholm Declaration on the Human Environment in 1972, which can be described as the "environmental counterpart of the 1948 Universal Declaration of Human Rights", is relevant in that it determines the fundamental rights with regard to the environment.³⁷¹

It provides:

Man has the fundamental right to freedom, equality and adequate conditions of life in an environment where equality permits a life of dignity and well-being... Man

³⁶⁸ 1971 3 SA 540 (RA) 545G-H.

³⁶⁹ Thomas *Introduction to conservation* 3.

³⁷⁰ Thomas *Introduction to conservation* 3.

³⁷¹ Glazewski 2017 *SAJHR* 169.

... bears a solemn responsibility to protect and improve the environment for future generations.³⁷²

The African Charter of Human and Peoples Rights (the Banjul Charter), which was adopted by the Organisation of African Unity in 1981, contains an environmental protection provision that determines: "All people shall have the right to a generally satisfactory environment favourable to their development."³⁷³

Since the American and French Revolutions the focus on human rights has developed dynamically. The extent of human rights has been expanded to include a generation of what have been termed "People's or Solidarity Rights". The essence of these rights is that they cannot be executed by individuals, but by groups. Environmental Rights fall in this category and for convenience's sake are called "green rights", because of the importance of environmental issues where public interests are weighed against the interest of individuals.³⁷⁴ Green rights must be carefully taken into account when drafting an agreement for the expanding of a PA. Although there are obligations to protect the environment, the fundamental rights of human beings must be respected, a fair balance must be maintained between individual private interests and public interest. Environmental protection should not be considered to limit development as some may see it, but rather to incorporate environmental criteria into development projects.³⁷⁵

Human rights entail both rights and obligations.³⁷⁶ The State (the duty bearer) assumes obligations and duties to protect and to fulfil human rights (of the rights holders).³⁷⁷ At the individual level, the bearers of human rights should also respect the human rights of others.³⁷⁸

In environmental decision making, section 33 of the *Constitution* comes into play. It states that "everyone has the right to administrative action that is lawful, reasonable

³⁷² Glazewski 2017 *SAJHR* 169.

³⁷³ Glazewski 2017 *SAJHR* 171.

³⁷⁴ Glazewski 2017 *SAJHR* 172.

³⁷⁵ Glazewski 2017 *SAJHR* 172.

³⁷⁶ Thomas *Introduction to conservation* 3.

³⁷⁷ Thomas *Introduction to conservation* 3.

³⁷⁸ Thomas *Introduction to conservation* 3.

and procedurally fair",³⁷⁹ and "Everyone has the right to life".³⁸⁰ These rights ultimately protect people against risks, hazards and actions that would put human life in jeopardy.³⁸¹

3.4.3 Neighbour law

Professor Susan Scott defines ownership as the most comprehensive real right a legal subject can have to his/her thing, which entitles him/her to do as he/she pleases with the thing, subject to the limitations of the law and specifically neighbour law.³⁸² In the case *Regal v African Super Slate (Pty) Ltd*³⁸³ the court ruled that an owner can use his/her property as he/she likes, but in cases of contiguous land such freedom is obviously untenable, and both owners' rights have to be limited.³⁸⁴

The emphasis of ownership falls on the absoluteness of ownership, as formulated in *Gien v Gien*.³⁸⁵ The foundation of neighbouring owners' relationship is reasonableness.³⁸⁶ In law, "nuisance" refers to conduct causing "actual or potential damage, discomfort or injury to neighbours".³⁸⁷ The idea that nuisance matters are decided on the basis of normal use and reasonableness was already decided in *Holland v Scott*,³⁸⁸ where the court ruled that the "excessive and unreasonable" use of land is an indication that there may be a possible action of nuisance.

If an agreement is drafted to expand an existing PA such as a national park managed by SANParks in terms of the NEMPAA, the principles of neighbour law must be respected, as decided in the case of *Gien v Gien*,³⁸⁹ with specific reference *inter alia* to the principles of reasonableness and fairness.³⁹⁰ What is the essence of the common law of nuisance in the light of the *Gien v Gien* case? It lies in the principle *maxim sic*

³⁷⁹ Section 33 of the *Constitution*.

³⁸⁰ Human life is protected in s 11 of the *Constitution*.

³⁸¹ Du Plessis and Du Plessis "Southern African Perspectives" 282.

³⁸² Scott 2005 *Stell LR* 376.

³⁸³ 1963 1 SA 102 (A).

³⁸⁴ Van der Walt *The Law of Neighbours* para 33.

³⁸⁵ 1979 2 SA 1113 (T).

³⁸⁶ Scott 2005 *Stell LR* 376.

³⁸⁷ Mostert "Nuisance" 256.

³⁸⁸ *Holland v Scott* 1882 307 (EDC) 332.

³⁸⁹ 1979 2 SA 1113 (T) 1116-1118.

³⁹⁰ See Chapter 3 para 3.2.

utere tuo aliennum non laedas, which means, use your own property in such a manner as not to injure that of another.³⁹¹ An owner's rights of use extend only to the extent that there is a duty not to extend that limit and not to use the property in a way that infringes the rights of a neighbour. If the limit is exceeded, it is an unlawful conduct than can be stopped by an interdict.³⁹²

The Dutch Law frequently defines and circumscribes the ambits of both individual and public interest.³⁹³ In the Dutch Law, recent cases define activities that should be tolerated because they are in the public interest: for instance, the development of a nature reserve, or normal commercial activities preventing the outbreak of cattle disease.³⁹⁴ If it were possible to show that the proposed development to expand a PA operation was in the public interest, then the landowner would be required to endure the nuisance in the public interest. It is the state's constitutional obligation to respect, protect, promote and fulfil the rights in the *Constitution*³⁹⁵ and the courts' duty to promote the spirit, purport and objects of the *Constitution*.³⁹⁶

3.4.4 Concluding remarks

In paragraph 4, the recognition afforded to relevant rights and principles additional to the Constitution and Environmental Acts. What is noteworthy in this regard is that while the common law and the principles of sustainable development and human rights play a significant role in the context of land administration,³⁹⁷ their role in the context of conservation is yet to be fully realised.³⁹⁸

The significant goal is the security of ecologically sustainable development and the use of natural resources while promoting justifiable economic and social development.³⁹⁹

³⁹¹ 1979 2 SA 1131 (T) 1121A-C.

³⁹² 1979 2 SA 1131 (T) 1121.

³⁹³ Mostert "Nuisance" 283.

³⁹⁴ Mostert "Nuisance" 283.

³⁹⁵ Section 7(2) of the *Constitution*.

³⁹⁶ Section 39(2) of the *Constitution*.

³⁹⁷ Section 39(3) of the *Constitution*. The Bill of Rights does not deny the existence "of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

³⁹⁸ Paterson *Bridging the gap between conservation and land reform* 124.

³⁹⁹ Robinson 2015 *PELJ* 143.

The nature of human rights is such that they not exist in isolation, and in terms of the NEMPAA specific human rights must be taken into account in connection with the possible expansion of PA's:

- Cultural rights most often refer to the rights of traditional and indigenous peoples to pursue activities that are important to their cultural identity.⁴⁰⁰
- Development is recognised as a human right but it must be in line with the broader set of environmental and equity issues and should not put other human rights at risk. Also, it must "meet the needs of the present generation without comprising the ability of future generations to meet their own needs."⁴⁰¹
- People have the right to obtain information on request and to be informed of planned projects, developments or other initiatives which will affect them, their environment or natural resources, and they have the right to administrative action.⁴⁰²
- The *Constitution* guarantees their right to defend their rights in court.⁴⁰³ Section 32 of the *Constitution* provides for the right to access to information, also known as the "right to know".⁴⁰⁴
- The right of participation and consultation may be interpreted as the right to take part in arriving at decisions, and can vary from a simple consultation to full participation attending to all aspects of the particular proposed project.⁴⁰⁵

There is also a risk that people's human rights might be negatively affected by the establishment of PA's. Examples of where this might happen include:

⁴⁰⁰ Thomas *Introduction to conservation* 13.

⁴⁰¹ Our Common Future (1987) Oxford. Also commonly referred to as "The Brundtland report"; s 24(b) of the *Constitution*.

⁴⁰² Thomas *Introduction to conservation* 13.

⁴⁰³ Section 34 of the *Constitution*.

⁴⁰⁴ Section 32(1)(a) and (b) of the *Constitution*.

⁴⁰⁵ Van der Bank and Van der Bank 2014 *IJEPS* 674-675.

- Where decisions on the establishment of a PA are made without consulting the landowners or traditional or customary owners.⁴⁰⁶
- Where benefits from conservation - tourism, hunting, game capturing - are not shared with the landowners and communities.⁴⁰⁷

As far as neighbour law is concerned, legislative or judicial intervention may be required to ensure that various rights in the *Constitution* are properly promoted, protected or fulfilled:⁴⁰⁸ equality,⁴⁰⁹ human dignity,⁴¹⁰ privacy,⁴¹¹ freedom of movement⁴¹² and residence,⁴¹³ an environment that is not harmful to people's health or wellbeing,⁴¹⁴ property,⁴¹⁵ and housing.⁴¹⁶ In terms of regulation 53(2) of the NEMPAA, no person in a nature reserve may "intentionally obstruct, disturb, interrupt or annoy any other person engaged in the proper use of the nature reserve".⁴¹⁷

3.5 Benefits and incentives to enter a contractual agreement

3.5.1 Increased revenue potential

An important source of the motivation to expand a PA is to enhance its attractiveness. The unique beauties of certain tourist attractions such as the Mapungubwe National Park and Heritage Site offer archaeological and natural interests, and the promotion of one aspect can lead to the economic growth of others. For example, there may be a need to establish a camp that creates a unique and enjoyable experience. This might promote tourism and encourage tourists to return later. The expansion of a PA could lead to the establishment of a camp having a special character, where, for instance, only basic facilities are available. Income could be generated in various ways such as

⁴⁰⁶ Thomas *An Introduction to Conservation and Human Rights for Bird Life Partners* 13.

⁴⁰⁷ Thomas *An Introduction to Conservation and Human Rights for Bird Life Partners* 13.

⁴⁰⁸ Van der Walt *Law of Neighbours* 397.

⁴⁰⁹ Section 9 of the Constitution.

⁴¹⁰ Section 10 of the Constitution.

⁴¹¹ Section 12 of the Constitution.

⁴¹² Section 14 of the Constitution.

⁴¹³ Section 21 of the Constitution.

⁴¹⁴ Section 24 of the Constitution.

⁴¹⁵ Section 25 of the Constitution.

⁴¹⁶ Section 26 of the Constitution.

⁴¹⁷ Also see Chapter 3 para 3.3.1; NEMPAA – Norms and standards for the management of PA's in South Africa para 11.1(a)(i).

by operating tourist lodges, selling curios, performing jobs,⁴¹⁸ engaging in game capturing, and preparing meals and refreshments for visitors.

3.5.2 Incentives

Surely one of the most significant reforms in the South African environmental regime in the past decade has been the shift towards an incentive-based approach to environmental regulation. This has taken place mostly experienced in the biodiversity sector, where several instances have recently been implemented in order to specifically encourage private and community landowners to voluntarily engage in environmental activities and practices in South Africa.⁴¹⁹ These incentives take the form of tax deductions and exemptions. They are not defined in any environmental legislation itself but rather in tax legislation such as the *Income Tax Act* 58 of 1962 and the *Local Government: Municipal Property Rates Act* 2004.⁴²⁰

In terms of the *Municipal Property Rates Act* 2004 no assessment rates may be levied on those parts of a special nature reserve, national park or nature reserve, within the meaning of the NEMPAA, which are not developed or used for commercial, business, agricultural or residential purposes.⁴²¹

Incentives in terms of the *Income Tax Act* are also granted to landowners who undertake development opportunities on their land in the interest of the conservation of biodiversity.⁴²²

The incentives defined in the *Income Tax Act* 58 of 1962 are generally differentiated to the extent that a landowner is willing to voluntarily apply limitations on his land, the duration of such initiatives, and any costs incurred in the management of the land in the interest of the conservation of biodiversity.⁴²³

⁴¹⁸ Phillips *Economic values of PA's* 12.

⁴¹⁹ Paterson *Legal Framework for PA's* 35.

⁴²⁰ Paterson *Legal Framework for PA's* 36.

⁴²¹ Section 17(1)(e) of *Local Government Municipal Property Rates Act* 6 of 2004.

⁴²² Paterson *Legal Framework for PA's* 35; s 18A of *Income Tax Act* 58 of 1962.

⁴²³ Paterson *Legal Framework for PA's* 35.

3.5.3 Concluding remarks

The creation of tourist facilities will lead to the economic growth of other sectors of the economy.⁴²⁴ The government has introduced significant incentives to draw private and communal land into the PA regime, which is essential in a nation with such a high percentage of private and communal land ownership.⁴²⁵

3.6 *Essentialia of a valid agreement*

A valid contract is an agreement between parties that complies with the prescribed requirements and is recognized "by law". All contracts are agreements but all agreements are not contracts. For an agreement to be enforceable in law, it must contain the essential elements of a valid contract.⁴²⁶

The *naturalia* of a contract are those terms which are automatically included in a contract by operation of law, unless expressly excluded by the parties.⁴²⁷ The parties include these terms in their agreement in order to satisfy their mutual wishes.⁴²⁸

Fouché defines a contract as: "an agreement between two or more persons which has to comply with certain requirements in order to be legally enforceable".⁴²⁹

In this context, the NEMPAA created specific formalities for the conclusion of a contractual agreement as follows:

- A contract must be in writing - Section 35(3)(a) of the NEMPAA.
- A contract must be notarially executed and registered against the title deeds of the particular land property - Section 35(3)(b) of NEMPAA.

⁴²⁴ Chapter 3 para 3.5.1.

⁴²⁵ Chapter 3 para 3.5.2; Paterson *Legal Framework for PA's* 41.

⁴²⁶ Fouché *Legal Principles of Contracts and Commercial Law* 35.

⁴²⁷ Fouché *Legal Principles of Contracts and Commercial Law* 35.

⁴²⁸ Fouché *Legal Principles of Contracts and Commercial Law* 36.

⁴²⁹ Fouché *Legal Principles of Contracts and Commercial Law* 36.

3.7 Expansion of PA's by way of a contractual agreement

In South Africa national parks provide an important way in which the national PA network can be expanded by the inclusion of land that cannot be bought. A new philosophy prevails, which combines conservation interests with private interests, through partnerships with landowners.⁴³⁰ Any land that is either privately owned or state owned that is managed by an agreement reached between the owner (state or private) and SANParks and is legally specified in a contract will constitute part of a "contractual national park", the boundaries of which and the identification ownership are established by contract.⁴³¹

Contractual national parks allow for multiple land use strategies and the involvement of local people.⁴³² They are defined as follows:

Any land that is either privately owned or state owned that is managed by an agreement reached between the owner (state or private) and the National Parks Board and is legally specified in a contract will constitute part of a 'contractual national park' and whose boundaries of which its identification, ownership and status are established by contract.⁴³³

Central to the idea of a contractual national park is the drawing up of a joint management agreement in which the rights and responsibilities of landowners and the conservation authority that manages the land are laid out.⁴³⁴

Clearly defined contracts are needed that accurately account for and equitably attribute the short- and long-term costs and benefits and, crucially, the rights and responsibilities of all parties.⁴³⁵

⁴³⁰ De Villers *Land claims and National Parks* 61. A number of national parks have been established or extended on this basis – for instance the Richtersveld, Cape Peninsula (Table Mountain), West Coast, Tsitsikama, Cape Agulhas and Skilpad National Parks.

⁴³¹ Magome and Murombedzi "Sharing South African National Parks" 378-379.

⁴³² Reid *et al* 2004 *Conservation and Society* 378.

⁴³³ Reid *et al* 2004 *Conservation and Society* 378-379.

⁴³⁴ Reid *et al* 2004 *Conservation and Society* 378.

⁴³⁵ Grossman and Holden date unknown <https://conservation-development.net/Projekte/Nachhaltigkeit/CD1/Suedafrika/Literatur/PDF/Grossmann.pdf>.

Contractual national parks are becoming increasingly popular in South Africa as a model through which it is hoped that biodiversity, conservation, and social and development objectives can be met.⁴³⁶

The value that private owners can add to conservation management, their contribution to conservation management and biodiversity conservation, and their contribution to attempts to keep pace with international developments⁴³⁷ are recognised in the NEMPAA,⁴³⁸ which provides for co-management agreements.

3.8 Concluding remarks

The perceptions and expectations surrounding contractual parks vary from the negative to the positive. It is in particular the views of the landowners and communities affected by the conclusion such agreements that will ultimately determine the reception of such agreements.⁴³⁹ Negative perceptions arise from the experience of how national parks and other conservation areas have been proclaimed in the past, in terms of which proclamations communities have in many cases been removed from their land. Some of the negative perceptions include the notion that the needs of plants and animals are given priority over human needs,⁴⁴⁰ a scares rescue as is used in a productive manner for conservation.⁴⁴¹ Widespread suspicion prevails that new or expanded national parks will limit the landowners and communities agricultural grazing land and restrict their usage rights, and that the introduction of wild animals such as lion, cheetah, leopard, elephant and hippopotamus may threaten their lives and property.⁴⁴² Some possible benefits that could be described in order to curry favour with communities and landowners include:

- The increase in the number of employment opportunities;
- The stimulation of rural economic development by the outsourcing of services;

⁴³⁶ Magome and Murombedzi "Sharing South African National Parks" 118.

⁴³⁷ Spenceley, Snyman and Eagles *Guidelines for tourism partnerships* 20 and 28.

⁴³⁸ Section 42 of NEMPAA.

⁴³⁹ De Villiers *Peaceparks* 94.

⁴⁴⁰ De Villiers *Peaceparks* 94.

⁴⁴¹ De Villiers *Peaceparks* 95.

⁴⁴² De Villiers *Peaceparks* 96.

- The authorisation of the utilisation of natural resources such as the collection of wood; tourism, hunting and capturing of game; The fact that the use of agricultural land for conservation will be more beneficial from a financial and employment perspective.⁴⁴³

3.9 Summary

The broad constitutional legal framework of potential relevance to the creation and expansion of PA's has been briefly discussed in this chapter. Five broad areas were canvassed. The first was the array of environmental rights enshrined in the *Constitution*. The second was the country's comprehensive legal framework pertaining to the conservation of the country's natural resources. Until 2005, the legal framework was largely founded on the traditional exclusionary and state-centred approach to conservation.⁴⁴⁴ However, the commencement of the NEMA, the NEMPAA and the NEMBA has accumulatively signalled a shift towards a more inclusive, participatory people-centred approach to conservation.⁴⁴⁵ The third was the recognition afforded to the common law and certain principles like sustainable development and human rights. The role of common law in the context of conservation is yet to be fully realised.⁴⁴⁶ The fourth was the importance of the increasing of the revenue potential and the introduction of incentives to incorporate private land into PA's. The final area discussed in this chapter was the expansion of PA's by way of a contractual agreement and the possible benefits that can be offered to win communities and landowners over to assenting to the closure of a contractual park agreement.⁴⁴⁷

⁴⁴³ De Villiers *Peaceparks* 96.

⁴⁴⁴ Paterson *Bridging the gap between conservation and land reform* 125.

⁴⁴⁵ Paterson *Bridging the gap between conservation and land reform* 125.

⁴⁴⁶ Paterson *Bridging the gap between conservation and land reform* 124.

⁴⁴⁷ Chapter 3 paras 3.5 and 3.7.

CHAPTER 4

LINKING SOUTH AFRICA'S CONSERVATION LEGISLATION AND PRINCIPLES INTO A FORMAL CONTRACTUAL AGREEMENT TO EXPAND THE MAPUNGUBWE NATIONAL PARK AND HERITAGE SITE

4.1 Introduction

The focus of this chapter is on how the Mapungubwe National Park and Heritage Site can be developed as a contractual national park. In particular, the chapter analyses tactics and strategies for entering contractual agreements to expand and consolidate the Mapungubwe National Park and Heritage Site. Entering into contractual agreements with private landowners and communities would be an important aspect of the consolidation of the Mapungubwe Park.

The chapter highlights that bio-regionalism in Mapungubwe is dependent on acquiring land as well as the willingness of private landowners and communities to be part of Mapungubwe and to participate therein. The chapter focuses also on the contents of a proposed contractual agreement, and a co-management agreement between SANParks and private landowners or communities.

The paper will also look at the contents of a contractual agreement as described for the Mapungubwe National Park and World Heritage Site. Tentative "lessons" are briefly discussed, bearing in mind that these are emerging and dynamic models with short histories.

4.2 Locality of Mapungubwe National Park and World Heritage Site

The process of establishing Mapungubwe National Park and Heritage Site has a long and complex history dating back as far as 1922. In 1983 and 1984 respectively, the archaeological sites K2 and Mapungubwe Hill (as its southern terrace) were declared national monuments in terms of the former *National Monuments Act 28* of 1969.⁴⁴⁸ An agreement signed in June 1995 between the provincial government of the Northern

⁴⁴⁸ Selier *et al* 2016 *JIWLP* 122.

Province (renamed the Limpopo Province) promised to make available the property, Greeffswald, then part of the Vhembe nature reserve, to be declared a national park in terms of the *National Parks Act*.⁴⁴⁹ In 2003 Mapungubwe National Park and National Heritage Site was designated as a National and World Heritage Site.⁴⁵⁰ The current national park consists of land managed by SANParks under contract with landowners, and contractual land not declared but managed by SANParks as part of the park.⁴⁵¹ There are presently no management agreements.⁴⁵² 12703,31 hectares of privately owned land are not presently managed by SANParks within the core area of the park.⁴⁵³ In terms of the park's consolidation programme, the objectives are to incorporate in to the park the state/communal land (Den Staat farm 27/1) and private land (Samaria 1 and 2, Hackthorn, Machete, Bismarck), the Mapungubwe Private Nature Reserve and the Venetia Limpopo Nature Reserve.⁴⁵⁴

The proposed Greater Mapungubwe Transfrontier Conservation Area (GMTFCA) is a trans-boundary park between Botswana, South Africa and Zimbabwe, with the present core area covering 2 573 km², centred on the confluence of the Shashe and Limpopo rivers, and including land in Botswana, the Mapungubwe National Park and World Heritage Site, and land in Zimbabwe.⁴⁵⁵ Land use and ownership within and surrounding the GMTFCA are unusually diverse and include contractual partners, private and communal land owners, land claimants, private tourism operators, game farms, and subsistence and commercial farmers.⁴⁵⁶

⁴⁴⁹ Act 57 of 1976 (amended).

⁴⁵⁰ SANParks, Mapungubwe National Park and World Heritage Site Management Plan for the Period 2013–2018 3.

⁴⁵¹ SANParks, Mapungubwe National Park and World Heritage Site Management Plan for the Period 2013–2018 2.

⁴⁵² SANParks, Mapungubwe National Park and World Heritage Site Management Plan for the Period 2013–2018 2.

⁴⁵³ SANParks, Mapungubwe National Park and World Heritage Site Management Plan for the Period 2013–2018 3.

⁴⁵⁴ SANParks, Mapungubwe National Park and World Heritage Site Management Plan for the Period 2013–2018 30, 31.

⁴⁵⁵ Selier *et al*/2016 *JIWLP* 111.

⁴⁵⁶ Selier *et al*/2016 *JIWLP* 111.



Figure 4.1: Farms and Nature Reserves to be included regarding the proposed expansion of Mapungubwe National Park and Heritage site ⁴⁵⁷

4.3 Essential elements of the conclusion of contractual agreements

4.3.1 Planning

Thorough planning is the underlying foundation for the success of the establishment of PA's and Contractual National Parks.⁴⁵⁸ Before the contractual agreement is concluded, the area's environmental, social and political situations must be properly understood.⁴⁵⁹ The relevant investigations must be divided between the role players.⁴⁶⁰ Role players may include state institutions, local communities, adjacent landowners, non-state institutions and third parties with potential commercial interests

⁴⁵⁷ Berry and Cadman *Dongola to Mapungubwe* 55.

⁴⁵⁸ Paterson *Bridging the Gap between Conservation and land Reform* 95.

⁴⁵⁹ Borrini-Feyerabend *et al Sharing Power* 146-187.

⁴⁶⁰ Elken, Bennun and Boyd "PA design and systems planning" 37-44.

in the area.⁴⁶¹ The different interests and reasons for the conclusion of the agreement must be understood, and a "vision of the desired future" produced jointly by all the actors concerned⁴⁶² and the different values, interests and motivations of the stakeholders must be understood for the establishment of a contractual agreement.⁴⁶³

The NEMPAA explicitly states that its effective implementation requires partnerships regardless of whether they are with private landowners or local communities.⁴⁶⁴ Provision has been made for the incorporation of state, community and private land into all four types of PA's, as contained in the NEMPAA.⁴⁶⁵ However, the effective implementation of the planning framework across state, communal and private land may hinge upon the introduction of incentives aimed at inducing these parties to participate in the system.⁴⁶⁶ The NEMPAA seems to be a comprehensive governance regime that promotes public participation, integration, consistency and accountability.⁴⁶⁷

4.3.2 Consultation and negotiations

Consultations to ensure the possible expansion of existing PA's and national parks must be based on a top-down process of co-option and consultation, discussions, thinking, the exchange of views, and peoples attempts to persuade one another.⁴⁶⁸ It is important that the outcomes of purposeful consultations and negotiations should not harm people, should provide benefits to the communities and people directly concerned, and cover a range of issues from participation to gender fairness.⁴⁶⁹ "[A]nd that is the task in hand – [it] was never going to be a quick job."⁴⁷⁰

⁴⁶¹ Paterson *Bridging the Gap between Conservation and land Reform* 92.

⁴⁶² Borrini-Feyerabend *et al Sharing power* 4.

⁴⁶³ Kothari 2006 *Parks* 5-7.

⁴⁶⁴ Section 3(b) NEMPAA.

⁴⁶⁵ Paterson 2007 *SAPL* 16; s 18(3) (Special Nature Reserves); s 20(3) (National Parks); s 23(3) (Nature Reserves) and s 28(3) (Protected Nature Reserves).

⁴⁶⁶ Paterson 2007 *SAPL* 17.

⁴⁶⁷ Paterson 2007 *SAPL* 23.

⁴⁶⁸ Berkes *The Problematique of Community-based Conservation* 6.

⁴⁶⁹ Borrini-Feyerabend *et al Sharing power* 5-6.

⁴⁷⁰ Mukamuri, Manjengwa and Anstey *Beyond Proprietorship* 9.

The negotiation and planning process must propagate the idea that there should be a harmony of interests between people and SANParks.⁴⁷¹ During the consultation and negotiation process an open dialogue must be promoted. Conflict-resolution processes must be developed and used whenever necessary, and there must be respect among the parties involved.⁴⁷²

4.3.3 Role players

The role players may include state institutions, local communities, adjacent landowners, non-state institutions and third parties with potential commercial interests in the area.⁴⁷³ The different interests involved in the conclusion of the agreement must also be understood, and everyone must clearly know where they stand with one another.⁴⁷⁴

4.3.3.1 Land owners, community and SANParks

The registered owners and the community, who are the registered owners of the land or hold certain rights over the land which forms part of the core area of the Mapungubwe National Park and Heritage Site, could enter into an agreement with SANParks to incorporate their land into the national park and could impose certain rights and restrictions on the use of the land.⁴⁷⁵

4.3.3.2 Beneficiary

The Landowners and communities would certainly benefit as a result of the conclusion of an agreement. The benefits must be contained in the contractual agreement.⁴⁷⁶

⁴⁷¹ Steenkamp and Uhr *The Makuleke land claim* 25.

⁴⁷² Beltran and Phillips *Indigenous and Traditional Peoples* 10-11.

⁴⁷³ Paterson *Bridging the gap between conservation and land reform* 92.

⁴⁷⁴ Borrini-Feyerabend *et al Sharing power* 4.

⁴⁷⁵ Paterson 2010 *SAJELP* 114.

⁴⁷⁶ Paterson *Bridging gap between conservation and land reform* 115.

4.3.4 *The agreement*

The agreement must set out who is entitled to exercise these rights, define *inter alia* the nature of the rights, impose conditions/restrictions on the exercise of these rights, clarify the rights/benefits according to each party, spell out the obligations/costs to each party, and prescribe the duration of the agreement.⁴⁷⁷

4.3.5 *The potential for co-operation*

The contractual, national park model can work well with private landowners if various principles were to be honoured. Possibly the most important among these are the following. First, the officials of SANParks would have to treat the private landowners with respect, because private ownership is often considered as superior to all other forms of ownership. Second, the private landowners would be registered individuals, conservancies (groups of individual landowners) or corporate bodies. At any given time, SANParks would know exactly whom they were dealing with. Third, the private landowners would share both the management costs of the contract national parks and the benefits accruing therefrom.⁴⁷⁸

4.3.6 *Declaration*

The conclusion of the contractual agreement would not be the end of the process. In order to implement the principle of transparency, procedures would have to be followed to ensure that all stakeholders are properly informed and given the opportunity to participate in making the decision to proclaim a contractual park.⁴⁷⁹ The procedure must include at least the formal publication of a notice in the relevant national and/or local newspaper in terms of which the public is invited to comment.⁴⁸⁰

⁴⁷⁷ Paterson 2010 *SAJELP* 114.

⁴⁷⁸ Magome and Murombedzi "Sharing South African National Parks" 130.

⁴⁷⁹ Lausche *Guidelines for PA's legislation* 52-62, 124-125, 139, 188-190; Paterson *Bridging the gap between conservation and land reform* 99.

⁴⁸⁰ Lausche *Guidelines for PA's legislation* 52-62, 124-125, 139, 188-190; Paterson *Bridging the gap between conservation and land reform* 99.

Full and clear details must be provided of the boundaries of the intended contractual area⁴⁸¹ and provision must be made for formal commentary by the relevant stakeholders.⁴⁸² Doing this would be a clear indication that the consultation process was genuine. It would ensure that all stakeholders were properly consulted⁴⁸³ and participated in modifying the proposed operational rules. Provision would have to be made to amend the formal declaration of the area by means of promulgation in terms of the NEMPAA.⁴⁸⁴ The relevant agreement would have to be registered against the title of the land to ensure that it constituted long-term protection, and similar processes would have to be prescribed for the deproclamation or amendment of the contractual agreement.⁴⁸⁵

4.4 Challenges from other parks

South African policy makers have experimented with the closure of community PA's (CCAs) over the past two decades. Examples are the Richtersveld National Park and the Pafuri region in the Kruger National Park. The relevant case studies reflect South Africa's legal framework that includes the settlement of community land claims in PA's. Under the apartheid regime, in an attempt to expand national parks, SANParks entered into agreements with politically powerful private landowners. The contracts entered into were not meant to benefit disadvantaged people.⁴⁸⁶ This resulted in the unequal treatment of private and communal landowners in their contracts with the state.⁴⁸⁷ One is tempted to say that a new form of "ecological apartheid" emerged in South Africa, and this prevented landowners and communities from reaching their full potential in regard to resource utilisation.⁴⁸⁸

⁴⁸¹ Lausche *Guidelines for PA's legislation* 52-62, 124-125, 139, 188-190;

Paterson *Bridging the gap between conservation and land reform* 99.

⁴⁸² Paterson *Bridging the gap between conservation and land reform* 100; s 18 of NEMPAA.

⁴⁸³ Ostrom *Governing the Commons* 93; Paterson *Bridging the gap between conservation and land reform* 100.

⁴⁸⁴ Paterson *Bridging the gap between conservation and land reform* 100; s 18 of NEMPAA.

⁴⁸⁵ Paterson *Bridging the gap between conservation and land reform* 100; s 18 of NEMPAA.

⁴⁸⁶ Grossman and Holden date unknown <https://conservation-development.net/Projekte/Nachhaltigkeit/CD1/Suedafrika/Literatur/PDF/Grossmann.pdf>.

⁴⁸⁷ Grossman and Holden date unknown <https://conservation-development.net/Projekte/Nachhaltigkeit/CD1/Suedafrika/Literatur/PDF/Grossmann.pdf>.

⁴⁸⁸ Grossman and Holden date unknown <https://conservation-development.net/Projekte/Nachhaltigkeit/CD1/Suedafrika/Literatur/PDF/Grossmann.pdf>.

4.4.1 Richtersveld National Park

In terms of the contractual agreement, the National Parks Board (NPB) (currently SANParks) undertook to pay an escalating fee of R0,50 per ha. per year rental to the Richtersveld Trust, to be divided annually to finance local development projects.⁴⁸⁹ Local residents should be given preference when job opportunities were available "and [SANParks] undertook to establish an indigenous nursery with profits according to the Trust".⁴⁹⁰

A Management Planning Committee was formed and drew up a management plan.⁴⁹¹ SANParks appointed a head of the Park and Staff.⁴⁹² The first draft of the Management Plan failed to gain acceptance.⁴⁹³ The second version of the management plan was eventually notified in 2002, and it described the management planning committee,⁴⁹⁴ which was meant to be a real co-management committee. It also clearly allocated tourism concession rights to the community and decided the day-to-day conservation management of SANParks under the control of the joint management committee.⁴⁹⁵

A number of factors that have affected the success of the agreements have emerged. They include the awareness of the people that they do not want to be merely co-opted, but demand full rights to increasingly enforce the agreement.⁴⁹⁶ SANParks, however, its their skills and resources, remains the dominant partner.⁴⁹⁷ Major disputes relating to rules on the number of livestock in the park have arisen. There have been

⁴⁸⁹ Grossman and Holden date unknown <https://conservation-development.net/Projekte/Nachhaltigkeit/CD1/Suedafrika/Literatur/PDF/Grossmann.pdf>.

⁴⁹⁰ Grossman and Holden date unknown <https://conservation-development.net/Projekte/Nachhaltigkeit/CD1/Suedafrika/Literatur/PDF/Grossmann.pdf>.

⁴⁹¹ Grossman and Holden date unknown <https://conservation-development.net/Projekte/Nachhaltigkeit/CD1/Suedafrika/Literatur/PDF/Grossmann.pdf>.

⁴⁹² Grossman and Holden date unknown <https://conservation-development.net/Projekte/Nachhaltigkeit/CD1/Suedafrika/Literatur/PDF/Grossmann.pdf>.

⁴⁹³ Grossman and Holden date unknown <https://conservation-development.net/Projekte/Nachhaltigkeit/CD1/Suedafrika/Literatur/PDF/Grossmann.pdf>.

⁴⁹⁴ Grossman and Holden date unknown <https://conservation-development.net/Projekte/Nachhaltigkeit/CD1/Suedafrika/Literatur/PDF/Grossmann.pdf>.

⁴⁹⁵ Grossman and Holden date unknown <https://conservation-development.net/Projekte/Nachhaltigkeit/CD1/Suedafrika/Literatur/PDF/Grossmann.pdf>.

⁴⁹⁶ Grossman and Holden date unknown <https://conservation-development.net/Projekte/Nachhaltigkeit/CD1/Suedafrika/Literatur/PDF/Grossmann.pdf>.

⁴⁹⁷ Grossman and Holden date unknown <https://conservation-development.net/Projekte/Nachhaltigkeit/CD1/Suedafrika/Literatur/PDF/Grossmann.pdf>.

overgrazing and soil erosion.⁴⁹⁸ Although SANParks top management has expressed support for the principle of effective co-management, it is not visible on the ground.⁴⁹⁹

4.4.2 *The Pafuri Region of Kruger National Park*

A contractual agreement was reached between the Makuleke Community Property Association and the Minister of Environmental Affairs and Tourism in respect of land returned to the Makuleke people in terms of a settlement agreement reached between SANParks and the Makuleke people and ratified by the LCC in 1998.⁵⁰⁰ In terms of the settlement agreement, ownership and title were returned to the Makuleke people⁵⁰¹ on condition that the land would be used for conservation purposes for ninety-nine years.⁵⁰² The community then leased the land to SANParks for 50 years, provided that the agreement could be cancelled after 25 years.⁵⁰³ The Makuleke may use their land, subject to the following conditions:

- No mining or prospecting may be undertaken.
- No part of the land may be used for residential or agricultural purposes.
- The land will be used solely for conservation.
- A servitude must be granted to SANParks to ensure that it can perform its obligations in terms of the agreement.
- SANParks will be offered the right of first refusal, should the land be offered for sale.⁵⁰⁴

Under these strict conditions the Makuleke are entitled to commence developments on their land with limited harvesting of abundant wildlife species only.⁵⁰⁵ The Makuleke

⁴⁹⁸ Grossman and Holden date unknown <https://conservation-development.net/Projekte/Nachhaltigkeit/CD1/Suedafrika/Literatur/PDF/Grossmann.pdf>.

⁴⁹⁹ Grossman and Holden date unknown <https://conservation-development.net/Projekte/Nachhaltigkeit/CD1/Suedafrika/Literatur/PDF/Grossmann.pdf>.

⁵⁰⁰ Grossman and Holden date unknown <https://conservation-development.net/Projekte/Nachhaltigkeit/CD1/Suedafrika/Literatur/PDF/Grossmann.pdf>.

⁵⁰¹ Grossman and Holden date unknown <https://conservation-development.net/Projekte/Nachhaltigkeit/CD1/Suedafrika/Literatur/PDF/Grossmann.pdf>.

⁵⁰² Reid *et al* 2004 *Conservation and Society* 387.

⁵⁰³ Magome and Murombedzi "Sharing South African National Parks" 116.

⁵⁰⁴ Magome and Murombedzi "Sharing South African National Parks" 115.

⁵⁰⁵ Magome and Murombedzi "Sharing South African National Parks" 115.

agreement provides that day-to-day conservation activities in the Makuleke Region are to be undertaken by SANParks, while tourism activities are supposed to benefit the community. Some commercial trophy hunting has already occurred and lodges are being built.⁵⁰⁶ A Joint Management Board, with equal representation from both parties, is supposed to be responsible for the day-to-day management of the reclaimed land, and decisions are supposed to be taken by consensus.⁵⁰⁷

4.4.3 Lessons learned from the agreements of other parks

- SANParks is the management authority in the Makuleke region, because it has control over the wildlife, which is the key resource that can make a difference to the lives of the Makuleke. Control over wildlife is, indeed, the greatest source of conflict between the representatives of the Makuleke and SANParks.⁵⁰⁸
- The co-management agreements of the Richtersveld and Kruger National Park are the result of unequal negotiations between relatively disadvantaged community representatives and sophisticated and advantaged officials of SANParks.⁵⁰⁹ They are like chefs with quite different ideas and menus, and different powers to cook them.⁵¹⁰
- The lease fee paid into the community trust fund of the Richtersveld is not linked to either the management costs of the Richtersveld or to the income generated by tourists.⁵¹¹
- Concessions for trophy hunting in the Makuleke region were given, after strong objections from the management of SANParks, who argued that hunting should not take place in a national park. To this, the Makuleke responded that it was appropriate in a contract entered into by a national park. The hunt took place.⁵¹²

⁵⁰⁶ Reid *et al* 2004 *Conservation and Society* 387.

⁵⁰⁷ Magome and Murombedzi "Sharing South African National Parks" 116.

⁵⁰⁸ Magome and Murombedzi "Sharing South African National Parks" 116.

⁵⁰⁹ Magome and Murombedzi "Sharing South African National Parks" 116.

⁵¹⁰ Magome and Murombedzi "Sharing South African National Parks" 119.

⁵¹¹ Magome and Murombedzi "Sharing South African National Parks" 119.

⁵¹² Magome and Murombedzi "Sharing South African National Parks" 119.

- Clearly defined contracts are needed that accurately account for and equitably attribute short- and long-term costs and benefits, and crucially the rights and responsibilities of the parties.⁵¹³
- There must be a clear understanding of both the letter and the spirit of the contractual agreements by all concerned.⁵¹⁴ There must be a willingness to devolve authority and the embracing of the principle and ethic of co-management at local park level.⁵¹⁵
- Permanent residence within a national park is hardly acceptable, according to the traditional concept of such a park. Because of changing conditions, a more flexible approach has already been taken by SANParks. Practical circumstances may sometimes justify a total exclusion of human residence - for example, the type of animals in an area. In other instances, such as the Richtersveld, permanent human residence could well be a characteristic of them.⁵¹⁶
- Rushed processes and negotiations due to political pressure also seem to present a recurring problem, and this must be guarded against where possible.⁵¹⁷

4.5 Legal framework for a contractual park agreement between the landowners with SANParks in the Mapungubwe National Park and Heritage Site

4.5.1 Introduction

The content of the agreement must be consistent with the country's broad conservation objectives and obligations as defined in the related Acts and policies, and

⁵¹³ Grossman and Holden date unknown <https://conservation-development.net/Projekte/Nachhaltigkeit/CD1/Suedafrika/Literatur/PDF/Grossmann.pdf>.

⁵¹⁴ Grossman and Holden date unknown <https://conservation-development.net/Projekte/Nachhaltigkeit/CD1/Suedafrika/Literatur/PDF/Grossmann.pdf>.

⁵¹⁵ Grossman and Holden date unknown <https://conservation-development.net/Projekte/Nachhaltigkeit/CD1/Suedafrika/Literatur/PDF/Grossmann.pdf>.

⁵¹⁶ De Villiers *Land claims and national parks* 83.

⁵¹⁷ Grossman and Holden date unknown <https://conservation-development.net/Projekte/Nachhaltigkeit/CD1/Suedafrika/Literatur/PDF/Grossmann.pdf>.

must establish common objectives and commitments to the protection of the natural and cultural heritage of the area.⁵¹⁸

Furthermore, the common objectives and involvement of the parties must be described in respect of the area concerned, their rights of discretion and their obligations, their access to management and to the natural resources in the area, and the anticipated land tenure and management regime.⁵¹⁹

The landowners adjacent to the Mapungubwe National Park and Heritage Site wish to share with SANParks the future responsibility for managing the contractual park. In order to protect their responsibilities,⁵²⁰ they would therefore take on the role of owners and part co-managers/part delegates. In terms of section 38 (a A) of the NEMPAA the management of Mapungubwe National Park and Heritage Site is assigned to SANParks. Central to the idea of a contractual national park is the drafting of a joint management agreement explaining the rights and responsibilities of the landowners and the conservation authority (SANParks).⁵²¹

4.5.2 Summary of important conditions of the contractual agreement and a brief discussion of the contents of the proposed conditions of the contractual agreement

- **Parties**

Full details of the parties involved.⁵²²

Proper resolutions of legal entities.

Full details of any interested parties.⁵²³

- **The common vision and set of Principles**

The common vision and set of principles stated at the outset of the written agreement must be gathered from the body of the agreement, read together

⁵¹⁸ Beltran and Phillips *Indigenous and Traditional Peoples* 7; also see Chapter 3 para 3.3.

⁵¹⁹ Fabricius and Collins 2007 *Water Policy* 89; also see Chapter 4 para 4.3.

⁵²⁰ SANParks, Mapungubwe National Park and World Heritage Site Management Plan for the Period 2013–2018 30-31.

⁵²¹ Paterson *Bridging the gap between conservation and land reform* 104; s 38 of NEMPAA.

⁵²² Full details, which include the full names, identity numbers and marital status of private persons, and in the event of a company, close corporation or trust, its registration number.

⁵²³ Chapter 4 para 4.3.3.

with the numerous documents annexed thereto.⁵²⁴ The principles as defined in the several environmental management acts⁵²⁵ must be clearly defined and agreed upon. The contractual agreement must also be based on the principles – to respect human rights in the context of PA governance;⁵²⁶ to effectively integrate long-term economic, environmental, social and cultural considerations;⁵²⁷ to respect the rights of neighbours and to use the land in such a manner as not to injure the rights of another;⁵²⁸ and to enhance the conservation of biodiversity and national heritage.⁵²⁹ A possible vision could be defined as follows: "To protect the natural environment and the people and wildlife that depend on it by linking environmental security rights and social needs".

- **Access**

Access to the land of the landowners must at all times occur through an entrance to the park, mutually agreed by the parties.

SANParks must guarantee access to the park to the landowners, their guests, paying visitors and staff.

SANParks must undertake to respect the privacy of the landowners at all times.

- **Income and Expenditure**

The yield from all income-generating activities excluding gate fees must accrue to the landowners.

After five years, the joint management committee (JMC) of the Mapungubwe National Park and Heritage Site must review the financial position of SANParks and the landowners pertaining to their respective activities, and decide whether the landowners should contribute from their income to management expenses.

SANParks must be responsible for the maintenance of all facilities that are solely required for its conservation functions.

⁵²⁴ Paterson *Bridging the gap between conservation and land reform* 288.

⁵²⁵ Chapter 3 paras 3.2.1; 3.3.1-3.3.11.

⁵²⁶ Chapter 3 para 3.4.2.

⁵²⁷ Chapter 3 para 3.4.1.

⁵²⁸ Chapter 3 para 3.4.3.

⁵²⁹ Chapter 3 paras 3.2.1, 3.3.3, 3.3.5 and 3.3.6.

The same applies to the Landowners in respect of infrastructure for tourism and other commercial activities.

In the case of shared infrastructure, a ratio for the cost of establishment and maintenance must be determined by the JMC.⁵³⁰

- **Deadlock, breach and cancellation**

Conflict regarding the implementation of the contractual agreement is highly probable given the conflicting agendas of the negotiating parties.⁵³¹ It is therefore essential that the contractual agreement make provision for procedures of this nature and the creation of a true synergy between the competing parties. Sources of disagreement are to be aired and dealt with through transparent dispute procedures.⁵³² It is essential to make provision that when a conflict arises a mechanism is in place to address the disputes. This can be done by putting in place systems for conflict resolution that are easily accessible at local level, and including acknowledged arbitrators and facilitators.⁵³³ The landowners and communities do not want to be locked into an agreement where SANParks could constantly oppose or undermine their commercial activities, while SANParks could not afford to be managing an area as a contractual national park if activities were conducted that were against the letter and spirit of a contractual park.⁵³⁴ Therefore, without making it too easy, it must be provided that, should the rights of either party be "fundamentally breached" in a manner that is not "practically possible to remedy", the matter will be referred to mediation – and if agreement is not reached the contract may be cancelled.⁵³⁵ To elaborate the mediation process, either party may declare a deadlock and either party must have the right to refer the matter to mediation.⁵³⁶ If the parties fail to resolve a dispute, it must be referred to arbitration. The decision of the arbitrator must be binding.⁵³⁷

⁵³⁰ De Villiers *Land claims and national parks* 69-70.

⁵³¹ Paterson *Bridging the gap between conservation and land reform* 288.

⁵³² Paterson *Bridging the gap between conservation and land reform* 288.

⁵³³ Fabricius and Collins 2007 *Water Policy* 93.

⁵³⁴ De Villiers *Land claims and National parks* 71.

⁵³⁵ De Villiers *Land claims and national parks* 71.

⁵³⁶ De Villiers *Land claims and national parks* 74.

⁵³⁷ De Villiers *Land claims and national parks* 72.

- **Duration and Special Circumstances for early Termination and Periodic Review**

The contractual agreement must be of a satisfactory duration with provision for periodic review, adaptation where necessary, and amendment. Such flexibility and adaptability are important for the establishment of social engagement and experimentation.⁵³⁸ Provision must be made for the renewal or termination of the agreement on notice of either party.⁵³⁹ These processes would provide valuable opportunities for the parties to review and re-negotiate their agreement where necessary. A fair term would be 50 years. This would allow either party to renew the agreement with a further period of 50 years, or a shorter period. Either party must be entitled to withdraw from the agreement, subject to a 5-year notice period, before the expiration of 20 years, and either party must be entitled to give 12 months' notice to terminate the agreement after 20 years.

- **Retention of ownership**

The ownership of the land of the landowners must not be transferred to SANParks and nothing must entitle SANParks to require transfer or ownership of the land during the contractual period.

- **ESTA and other land claims**

The landowners and SANParks must agree to use their best endeavours and to do everything reasonably required of them to facilitate the reaching of a lawful agreement with the existing lawful occupiers of the land owned by landowners and communities in terms of ESTA.⁵⁴⁰

Any land claims made against the properties in terms of the *Restriction of Land Rights Act 22* of 1994 must be settled to the reasonable satisfaction of the landowners, communities and SANParks within an agreed period of say 3 years after the date of signature of the contractual agreement.⁵⁴¹

- **Pre-emptive rights**

⁵³⁸ Paterson *Bridging the gap between conservation and land reform* 95.

⁵³⁹ Paterson *Bridging the gap between conservation and land reform* 288.

⁵⁴⁰ Chapter 3 para 3.3.9.

⁵⁴¹ Chapter 3 para 3.3.7.

During the duration of the contractual agreement the landowner must not alienate, transfer, cede or encumber the land to any person other than a person or body without first offering the land to SANParks.

- **Management–Co-manage / Part delegate**

If the present landowners in the core area of the Mapungubwe National Park and Heritage Site prove their capacity and ability to strategically manage a PA, SANParks must delegate certain powers, rights and responsibilities to the landowners. This means that the main costs are to be carried by the landowners but they also receive the benefits.⁵⁴² For certain tasks where the landowners do not yet have enough capacity, a third party may be hired, for example to make a tourism facility, or conduct trophy hunting and game capturing.⁵⁴³ The conservation part can be managed via the JMC by SANParks, and the economic aspects like tourism can be controlled by the landowners.⁵⁴⁴ The JMC may, in time, employ its own staff, but initially it will make use of SANParks and the landowners to provide a secretariat, while SanParks acts as its executive organ.⁵⁴⁵ The JMC will be responsible for the overall management of the contractual Park. The parties will have equal representation on the JMC, and decisions are to be made by consensus. The day-to-day operations will remain the responsibility of SANParks, as appointed by the State, and it is upon the discretion of SANParks to delegate certain powers, use, benefit-sharing and rules and regulations.⁵⁴⁶ In the contractual agreement the rights of use, benefit-sharing, and the rules and regulations for the proper administration of the contractual park must be explicit.⁵⁴⁷ A complete and detailed management plan must be drafted as soon as possible after the formal approval of the agreement. The plan must provide for clearly defined objectives for both conservation and economical benefits and be subject to review from time to time. While national interest are served by a contractual park, they must be in balance with the interests of the owners of land

⁵⁴² De Koning 2009 *Africanus* 5-17.

⁵⁴³ De Koning 2009 *Africanus* 5-17.

⁵⁴⁴ De Koning 2009 *Africanus* 11.

⁵⁴⁵ De Villiers *Land claims and national parks* 64.

⁵⁴⁶ De Koning 2009 *Africanus* 16.

⁵⁴⁷ GN R 99 in GG 35021 of 8 February 2012.

and communities.⁵⁴⁸ When considering the potential benefits, focus should not merely be on economic benefits such as employment opportunities, levies, gate fees, tourist concessions, game capturing and hunting.⁵⁴⁹ Rather, the notion of benefits must be more widely defined and "encompass the meaning of land, culture, social and symbolic relations".⁵⁵⁰ In order to protect its interests, the landowner/community would therefore take on the role of the owner and co-manager.⁵⁵¹ The JMC must further conclude commercial/concession agreements with the landowners/communities to undertake, *inter alia*:

- Commercial developments and activities.⁵⁵²
- To use biological resources in a sustainable manner.⁵⁵³
- To share the benefits of small-scale agriculture, hunting, game capturing, and medicinal plant collection for spiritual and cultural purposes.⁵⁵⁴
- To accommodate paid guests and tourists;
- To erect a lodge and buildings for the accommodation for visitors, and to provide other services for visitors;
- To prepare meals and refreshments for visitors.

- **Consequences of termination**

In the event of the agreement being terminated, SANParks shall procure the de-proclamation of the land upon which the park is situated at its cost.

- **Mining and Prospecting**

No mining and or prospecting may take place in or on the land, pursuant to Section 48 of the NEMPAA.

- **Expropriation**

⁵⁴⁸ De Villiers *Land claims and national parks* 87.

⁵⁴⁹ Paterson *Bridging the gap between conservation and land reform* 106-107.

⁵⁵⁰ Paterson *Bridging the gap between conservation and land reform* 107.

⁵⁵¹ Paterson *Bridging the gap between conservation and land reform* 228-230.

⁵⁵² Chapter 4 para 4.5.2 *Income and Expenditure*.

⁵⁵³ Paterson *Bridging the gap between conservation and land reform* 107.

⁵⁵⁴ Paterson *Bridging the gap between conservation and land reform* 107.

SANParks shall not take any steps whatsoever to promote or achieve expropriation of the land or any portion thereof during the existence of the agreement.

- **World Heritage Site and CBD**

The land of the landowners forms part of a World Heritage Site and the CBD is also relevant. This is an overarching agreement specifically addressing biodiversity conservation and the sustainable use of an ecosystem. Species whose habitat is situated in the World Heritage Site must benefit from the protection regime imposed by the CBD. SANParks must establish measures to minimise the uncontrolled movement of domestic cattle in the area to prevent the spread of diseases such as foot and mouth disease (FMD) or bovine TB.⁵⁵⁵ FMD is economically important because it is trade sensitive, and a lack of efficient control could lead to trade embargoes and potentially contaminated products.⁵⁵⁶ SANParks must hire livestock rangers to shepherd Zimbabwean cattle out of the Mapungubwe National Park and Heritage Site. Indications of heavy overgrazing and accelerated soil erosion relating to Zimbabwean cattle and elephants, particularly in the vicinity of the Limpopo River, are having a definitive impact on biodiversity in the area. The Mapungubwe National Park and Heritage Site showcases the cultural history of the 1100 year old Kingdom of Mapungubwe.⁵⁵⁷ SANParks must strive towards ensuring the delicate balance necessary to all objectives within this World Heritage Site to protect an integrated natural system into the indefinite future.⁵⁵⁸

- **Establishment of an institution**

It is suggested that the landowners and communities adjacent to the Mapungubwe National Park and Heritage Site establish an appropriate institution

⁵⁵⁵ Carnie 19 January 2018 <https://www.dailymaverick.co.za/article/2018-01-19-sanparks-plans-to-shoo-zim-cattle-out-of-mapungubwe-national-park/>.

⁵⁵⁶ Dyason 2010 *JSAVA* 201.

⁵⁵⁷ Carnie 19 January 2018 <https://www.dailymaverick.co.za/article/2018-01-19-sanparks-plans-to-shoo-zim-cattle-out-of-mapungubwe-national-park/>.

⁵⁵⁸ Carnie 19 January 2018 <https://www.dailymaverick.co.za/article/2018-01-19-sanparks-plans-to-shoo-zim-cattle-out-of-mapungubwe-national-park/>.

in which to cooperate with respect to the establishment, operation, and management of the Park and its proposed expansion.⁵⁵⁹

- **Consultation in connection GMTFCA sharing**

Landowners who own land in the proposed transfrontier park area must be a party to the negotiations and the agreement regarding the conclusion of the GMTFCA agreement.

- **Fences**

The Limpopo river-line fence is essentially a so-called red-line veterinary fence, and, like the misused military fence, is in a state of disrepair.

As a part of establishing the GMTFCA, which would enhance the ecological viability of the ecosystem, these fences must be removed to allow the free movement of animals.⁵⁶⁰ The removal of the fences would make it possible for the natural environment to be damaged by elephants and herds of between 50 and 250 cattle from Zimbabwe, which might destroy the gallery forest and other plants and trees in the park. The chances are that tourists would not return if the cattle issue is not resolved. SANParks must take full responsibility for the potential damage.

4.5.3 Concluding remarks

It is important to assess critically the extent to which South Africa's legal framework reflects general adherence to the essential elements identified by international scholars as theoretically underpinning the successful creation of contractual parks, in the context of the discussion in Chapter 4 of the challenges experienced in other South African parks discussed. What should be very evident from the analysis of the challenges of the other parks is that the management of South Africa's parks has not really excelled at its tasks.⁵⁶¹ The planning process which precedes the establishment of a park, while frequently protracted, often fails to create an adequate, objective and

⁵⁵⁹ Possible institutions include a trust (*Trust Property Control Act 57 of 1998*) a non-profit company (*Companies Act 71 of 2008*) and a private company (*Companies Act 71 of 2008*).

⁵⁶⁰ Carnie 19 January 2018 <https://www.dailymaverick.co.za/article/2018-01-19-sanparks-plans-to-shoo-zim-cattle-out-of-mapungubwe-national-park/>.

⁵⁶¹ Paterson *Bridging the gap between conservation and land reform* 335.

informed platform for subsequent negotiations over the precise nature of land tenure management and access, use and benefit sharing. The consultation and negotiation process itself is in turn often undermined by problems associated with identifying relevant stakeholders and ensuring parity in their capacity and resources to participate in the process.⁵⁶²

The contractual agreement must cater for the three main components of PA governance. Regarding land tenure, it must clearly define the land tenure rights in the contractual agreement.⁵⁶³ Regarding management, a heavy reliance must be placed on the co-management/part delegate option. Finally, regarding access, use and benefit schemes, the establishment of the park must deliver significant tangible and intangible benefits to landowners and communities, and a proper mechanism must be established to resolve conflicts.⁵⁶⁴ Problems have been noted both in relation to the implementation of these schemes and the extent to which the limited benefits which accrue to them are distributed in an equitable and accountable manner.⁵⁶⁵

It is a major concern that SANParks shows a lack of open and accountable decision making. Special efforts will have to be made by SANParks to ensure that the letter and spirit of such agreements, namely joint management and consultation, are adhered to.⁵⁶⁶ There are significant challenges within South Africa's domestic legal framework related to contractual park agreements; in particular challenges faced by policy makers in giving domestic effect to the elements of the contracts. These suggest the strengths and weaknesses of the existing legislation and the need for future legislative reform to provide for the more effective domestic implementation of these elements.⁵⁶⁷ A management style must be developed to facilitate consultative and inclusive rather than exclusive and segmental decision making.⁵⁶⁸ In the interest of good neighbourliness, SANParks must consult with persons and communities adjacent

⁵⁶² Paterson *Bridging the gap between conservation and land reform* 335.

⁵⁶³ Paterson *Bridging the gap between conservation and land reform* 335.

⁵⁶⁴ Chapter 4 para 4.5.2 Deadlock, breach and cancellation.

⁵⁶⁵ See Chapter 4 para 4.4.3; Paterson *Bridging the gap between conservation and land reform* 336.

⁵⁶⁶ De Villiers *Land claims and national parks* 87.

⁵⁶⁷ Paterson *Bridging the gap between conservation and land reform* 336.

⁵⁶⁸ De Villiers *Land claims and national parks* 76.

to the national parks to ensure that their views are taken into account by management where possible.⁵⁶⁹

4.6 Concluding summary

It is necessary to ask if the proposed draft contractual agreement complies with the principles as set out in Sections 2(2)–2(4) of the NEMA. The answer is in the affirmative. The draft agreement addresses the following principles in terms of Sections 2(2)–2(4) of the NEMA:

- Section 2(1)(a) – the basic needs of persons are respected, protected and promoted;
Chapter 4 para 4.5.2 – the common vision and set of principles is incorporated;
- Section 2(1)(b) – the environmental and implementation plans are formulated;
Chapter 4 para 4.5.2 – the common vision and set of principles is incorporated;
- Section 2(1)(c) – SANParks is required to exercise its functions concerning the protection of the environment;
Chapter 4 para 4.5.2 – Management – Part Co-Management / Part Delegate
- Section 2(2) – the environmental management must place people and their needs at the forefront of its endeavours;
Chapter 4 para 4.5.2 – Income and Expenditures and Management – Part Co-Management / Part Delegate;
- Section 2(3) – the agreement must reflect the "three pillars idea" and provide that development must be socially, environmentally and economically sustainable:
Chapter 4 para 4.5.2 – the common vision and set of principles and Management – Part Co-Management/Part Delegate;
- Section 2(4)(a)(iii) – the disturbance of landscapes and sites that constitute the nation's cultural heritage is avoided;

⁵⁶⁹ De Villiers *Land claims and national parks* 75.

Chapter 4 para 4.5.2 – the World Heritage Site and CBD, Fences and Mining and Prospecting Claims.

- Section 2(4)(f) – the participation of all interested and affected parties in environmental governance must be promoted;
Chapter 4 para 4.5.2 – Particulars of names of parties involved; Chapter 4 para 3.1 Planning; Chapter 4 para 3.2 Consultation and Negotiations and Chapter 4 para 3.3 Role Players.
- Section 2(4)(g) – decisions must take into account the interests, needs and values of all interested and affected parties;
Chapter 4 para 4.5.2 – access; income and expenditure; retention of ownership; expropriation; management – part co-management/part delegate; establishment of constitution and consultation in connection GMTFCA sharing; ESTA and other claims; deadlock, breach and cancellation; and duration and termination.
- Section 2(4)(i) – the social, economic and environmental impact must be considered, assessed and evaluated and decisions must be appropriate in the light of such consideration and assessment;
Chapter 4 para 4.5.2 – the common vision and set of principles; and management – part co-management/part delegate.
- Section 2(4)(o) – the environment is to be held in 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;
Chapter 4 para 4.5.2 – the common vision and set of principles; Fences; and World Heritage Site and CBD.

CHAPTER 5

CONCLUSION

5.1 Introduction

The main questions to be answered in this dissertation are whether the conclusion of a contractual agreement is an effective tool to use in expanding PA's and what the contents of such an agreement should contain. In order to answer those questions, certain other questions must be considered and answered.⁵⁷⁰ Firstly, how to reconcile the concept such as PA's and their management? Secondly, what principles should govern the implementation of the agreement? Thirdly, what judicial and common law principles must be taken into account when concluding an agreement for the expansion of a national park? Fourthly, what constitutes a contractual agreement and why would such an agreement be considered relevant? Fifthly, how has the legal framework governing the conclusion of contractual agreements been implemented to date? Sixthly, was the implementation of the legal framework successful, and to what extent did it contain the elements identified by international and local scholars as forming an integral part of such a contractual agreement? Finally, how can South Africa's legal regime be improved to align the agreement with the relevant principles and policies? Before answering the last question the preceding questions will be answered briefly.

5.2 A brief overview

Chapter 2 (titled "The changing face of PA's") began with a consideration of broad contextual and largely theoretical issues relating to PA's, tried to identify what is understood by the term "PA's", and described how numerous initiatives have sought to formalise links between conservation and development. It was reported that PA's are usually regarded as predominantly government-run enterprises. Various matters pertaining to PA's were presented and discussed, such as a brief historical review of the emergence of PA's, an analysis of different kinds of PA's, and analysis of different kinds of governance of PA's. In Chapter 3 (titled "Contractual agreement principles,

⁵⁷⁰ Chapter 1 para 1.1.

requirements, benefits and incentives for the expansion of PA's in terms of law ") the focus was on the relevant principles contained in the *Constitution* and most notably on the environmental guidelines in terms of Section 24 thereof; and also on the relevant environmental conservation laws which are applicable to the expansion of PA's. Furthermore, the common law and other relevant principles like Sustainable Development and Human Rights were discussed and the point was made that the said principles still play a role in the context of conservation.⁵⁷¹ The conclusion of a contractual agreement to expand an existing PA must be addressed in accordance with the applicable legislation, and specifically the principles as defined in Section 2 of the NEMA.⁵⁷² The agreement must further also comply with the requirements of the common law and the principle of sustainable development. There are also several advantages and incentives if a contractual agreement is concluded for the expansion of PA's.⁵⁷³

Chapter 4 (titled "Linking South Africa's conservation legislation and principles into a formal contractual agreement to expand the Mapungubwe National Park and Heritage Site") acknowledges the valuable guidance of international and local scholars in the matter of entering into a contractual agreement to expand a national park. Perhaps the most problematic aspect of doing so is the co-management concept. The concept proposed for the possible conclusion of a contractual agreement to expand the Mapungubwe National Park and Heritage Site is that of owners/co-managers. The current relevant legal framework provides for the implementation of such a form of governance. Unfortunately, SANParks is of the opinion that it has to manage the entire park itself.⁵⁷⁴ Several inherent problems in the management of other parks were pointed out, *inter alia* in the Richtersveld National Park and the Pafuri Region of the Kruger National Park.⁵⁷⁵ The relevant founding agreements and the intensive research undertaken into the history and background of these parks underpin the analysis of of

⁵⁷¹ Chapter 3 para 3.4.1 and 3.4.2.

⁵⁷² Chapter 3 para 3.3.

⁵⁷³ Chapter 3 para 3.5.

⁵⁷⁴ Policy Context: SANParks Mandate and Values https://www.sanparks.org/parks/Kruger/conservation/scientific/key_issues/plans/adaptive/pdfs/chapter_02.pdf.

⁵⁷⁵ Chapter 4 para 4.4.

the situation in those parks, the analysis of which shows that the content and handling of the contractual agreements in those cases is far from ideal.

5.3 Critical summary of the current legal position

A narrow array of governance for promoting contractual national parks is a more favourable route for the relevant role players to follow in promoting contractual network parks. The planning phase preceding the conclusion of the contractual agreement is currently inadequate and fails to establish an appropriate objective platform for subsequent negotiations on the specific content of the agreement, including the management, access, use, and benefit-sharing arrangements. The consultation and negotiation process is often undermined by problems that are associated with the relevant role players, and it is important to ensure that there is equality in their positions as participants in the negotiations. What emerged clearly from the analysis of South Africa's current conservation regime is that it provides for an intensive planning process, as indicated by the case studies. It is clear that steps must be taken to improve the planning process for concluding contractual agreements. The content of conservation planning is often well developed but in some aspects it has kept not pace with developments in conservation and must adopt contemporary national, provincial, regional and local conservation planning networks. Steps must also be taken to ensure that the implementation of the statutory conservation processes is transparent and participatory in nature.⁵⁷⁶ There is scope for the improvement in the consultation and negotiation process.⁵⁷⁷ Consideration must be given to drafting a set of guidelines, which should be followed by the negotiators, instead of leaving the process to the discretion of the role players. Clear specific principles that must be followed during the negotiations should be laid down. The case studies provide examples of "a clash of local, regional, national and even international interests".⁵⁷⁸ The latter clash of interests may be linked with transboundary park initiatives. A general procedure must be laid down and followed during the negotiation of agreements, which must take place in an open and inclusive

⁵⁷⁶ Section 33 of NEMPAA.

⁵⁷⁷ See Chapter 4 para 4.4.3 and Chapter 4 para 4.3.2.

⁵⁷⁸ Walker *Landmarked* 110.

manner. The owners of own land in a transfrontier park must be parties to the negotiations regarding the conclusion of the transfrontier park agreement. Provision must also be made for the owners to be properly represented on the management of the park.⁵⁷⁹ These prescriptions must be met during negotiations for the closure of the GMTFCA agreement. It should also be noted that the parties must be capacitated to participate equally in negotiation processes for the conclusion of agreements for the establishment of either a contractual national park or a transfrontier park. Long-term commitments are based on mutual respect and trust.⁵⁸⁰

The terms and conditions arising from the negotiations must be clearly and comprehensively defined and recorded. From the case studies concerned, it appears that several confusing clauses have been unfair, which have led to unhappiness and the application and implementation of the agreement must be clearly defined. South Africa's conservation regime make theoretical provision and provides the necessary flexibility to accommodate the concept of contractual national parks. Various mechanisms are available to ensure that decision making can take place in an openly transparent manner. The case studies have clearly shown that the function and coordination between the parties in such situations is far from ideal.⁵⁸¹

The contractual agreement in question must include *inter alia* the following provisions: the identifying details of the parties; the vision and principles; the respective rights and obligations of the parties; the institutions created to manage the property; any access use; benefit-sharing arrangements; the duration and termination of the agreement; issues pertaining to land claims; employees' rights in terms of ESTA; the provision of continuous monitoring, reporting and review;⁵⁸² and a declaration that the agreement complies with the key elements contained in the national legal regime and those identified by international schools that provide for public participation.⁵⁸³

⁵⁷⁹ Paterson *Bridging the gap between conservation and land reform* 355; Chapter 4 para 4.5.2.

⁵⁸⁰ Chapter 4 para 4.3.2.

⁵⁸¹ Chapter 4 para 4.4.3.

⁵⁸² Chapter 4 para 4.5.2.

⁵⁸³ Chapter 4 para 4.3.6.

5.4 In final conclusion

As things stand at the moment, the legal agreements that underpin the establishment of South Africa's contractual national parks are unsatisfactory,⁵⁸⁴ although encouraging progress has been made, and lessons are being learnt. The drivers of change are themselves subject to constant change, a fact which suggests that the principles and processes pertaining to negotiating the kinds of agreements under consideration in this analysis, too, must constantly be subjected to review.⁵⁸⁵ Inherent in the content and background of legal policies and structures is a diverse array of legal tools for the marketing and promotion of contractual parks as a key mechanism for balancing the country's conservation agenda. In the light of the potential for co-operation discussed above, the conclusion may be reached that the contractual national park model can work well with private landowners, but that there are a number of shortcomings in the present system that require revision.⁵⁸⁶

⁵⁸⁴ Grossman and Holden date unknown <https://conservation-development.net/Projekte/Nachhaltigkeit/CD1/Suedafrika/Literatur/PDF/Grossmann.pdf>.

⁵⁸⁵ Grossman and Holden date unknown <https://conservation-development.net/Projekte/Nachhaltigkeit/CD1/Suedafrika/Literatur/PDF/Grossmann.pdf>.

⁵⁸⁶ Chapter 4 para 4.5.3.

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