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LEGAL REMEDIES FOR GRAND CORRUPTION

South Africa: Public Trust Theory as the basis for Resource Corruption Litigation

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This paper is the sixth in a series examining the challenges and opportunities facing civil society groups that seek to develop innovative legal approaches to expose and punish grand corruption. The series has been developed from a day of discussions on the worldwide legal fight against high-level corruption organized by the Justice Initiative and Oxford University's Institute for Ethics, Law and Armed Conflict, held in June 2014.

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I. Introduction

Africa battles with corruption and South Africa is no exception. South African jurisprudence is, however, not void of legal remedies intended to address corruption. In support of, and in adherence to international instruments aimed at eradicating corruption, several statutes have been promulgated, and the Promotion of Administrative Justice Act 3 of 2000 and the Prevention and Combatting of Corrupt Activities Act 12 of 2004 (PACCA) have been the most prominent. The aim of this note is, however, not to provide an overview of existing anticorruption measures in South African jurisprudence[1] but to focus on ways in which the novel concept of public trusteeship may influence the future course of anticorruption efforts in the country.

Like many African states, South Africa is endowed with a wealth of natural resources, including gold and diamonds, which should go to improving the lives of its citizens, but like many African states, corruption often stands in the way of citizens realizing the full benefit of these resources. This paper reviews how the legal theory of public trust could be used by South African civil society to combat grand corruption involving land and natural resources.

While the analysis is confined to South African statutes and precedents, the same reasoning might well provide a basis for litigation to fight corruption in other African states as well. The theory of public trust derives from the sovereign's duty to act as the guardian of certain interests for the benefit of the nation as a whole. It has its roots in the writings of authors as different as John Locke, Roscoe Pound, and Karl Marx, and its appeal is reflected in its incorporation into the laws of France, Germany, the United Kingdom, and those countries whose legal systems have been influenced by them. In the United States it has been particularly influential, serving as the basis for citizen's suits to vindicate environmental rights. Moreover, Article 21 of the African Charter on Human and Peoples' Rights, to which 53 countries are party, provides that the wealth derived from a nation's resources is for "the exclusive interest of the people . . . [and in] no case shall a people be deprived of it."

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[1] A concise exposition of available legal remedies have been provided by L van Tonder and P Goss 'Effective use of legal remedies for corruption', a paper delivered at the 9th International Anti-Corruption Conference and available at 9iacc.org/papers/day3/ws1/d3ws1_pricewaterhouse.html [14 July 2014].

II. Public-trust theory in South Africa

The creation of a constitutionally recognized environmental right in section 24 of the Constitution laid the foundation for several statutes that incorporate doctrines of public trust into South African environmental and natural resources law.[2] The first instance of public-trust language used in South African law is found in the National Water Act (NWA) 36 of 1998. The preamble to the NWA states that water is a natural resource that belongs to all people. The national government was thereafter appointed as public trustee of the nation's water resources. It is not a coincidence that public-trust language was used in the NWA. The White Paper on a National Water Policy for South Africa very clearly states that the government of the day intended to create a doctrine of public trust:

> To make sure that the values of our democracy and our Constitution are given force in South Africa's new water law, the idea of water as a public good will be redeveloped into a doctrine of public trust which is uniquely South African and is designed to fit South Africa's specific circumstances.

The water law was soon followed by the National Environmental Management Act 107 of 1998 (NEMA), stating in section 2 that the 'environment is held in trust for the people' and the state is appointed as the custodian thereof. In 2004, the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) followed suit by declaring in section 3 that mineral and petroleum resources are the common heritage of all the people of South Africa, with the state the duly appointed custodian thereof for the benefit of all South Africans. In 2008, the concept was applied once again in the National Environmental Management: Integrated Coastal Management Act 24 of 2008 (NEMA: ICM). This Act declares that ownership of coastal public property vests in the citizens of the Republic, and that the state is the public trustee thereof.

Although all the statutes mentioned above function in their own spheres (with the exception of national law on environmental management, which provides the framework for all legislation related to the environment), they display a number of common characteristics. One of the most important is that a fiduciary responsibility pertaining to a particular natural resource will be imposed on the state or national government with the sole aim of protecting intergenerational interests. Although a specific minister is appointed in each law to act on behalf of the government or the state, it is either the state or the entire national government that bears the responsibility of public trusteeship. Despite the fact that specific functions may be delegated to subordinate structures or functionaries in terms of these statutes, the public trustee or custodian ultimately will remain accountable for the resource assigned to it.

[2] E van der Schyff 'Stewardship doctrines of public trust: Has the eagle of public trust landed on South African soil?' 2013 SALJ 369-389 380.

The public trustees' responsibilities are set out in the particular acts as the fiduciary responsibility to protect and preserve the specific resource and to manage resource use in a sustainable and equitable manner for the benefit of current and future users and stakeholders.

A particular class or category of citizens or stakeholders who are the beneficiaries of the state's fiduciary responsibility towards a particular resource is also identified in each act. The national water law unequivocally states that 'water is a natural resource that belongs to all people'. The National Environmental Management Act states that the 'environment must be protected as the people's common heritage'. The mineral and petroleum development law affirms that 'South Africa's mineral and petroleum resources belong to the nation' and coastal management act that 'the ownership of coastal public property vests in the citizens of the Republic'. Although different terms have been used to identify the beneficiaries under the different statutes—namely 'all people', 'the people', 'the nation', 'the citizens of the Republic'—it is submitted that the South African nation as a whole will be the beneficiary under all these statutes. Although the 'nation' has no legal personality, the term has been used as a collective noun to denote a community of people associated with a particular territory. This community of people has shared interests in the sound management of the particular natural resource that is the subject matter of the particular Act. In conjunction with the constitutional declaration in section 24 that the environment should be protected for the benefit of current and future generations, all these statutes specifically include future generations as stakeholders (and thus as beneficiaries).

The Constitutional Court recently held that the scheme of the mining and petroleum resource law abolished private ownership of mineral rights and vested the ownership of mineral and petroleum resources in the nation.[3] It also held that the law vested all minerals in the state.[4] It is submitted that this apparent contradiction in actual fact contextualises the property-rights regime within which not only mineral and petroleum resources, but all the country's natural resources are managed. By acknowledging that ownership of a resource simultaneously vests in both the nation and the state, the existence of a public trust has been confirmed. It is submitted that the statutory doctrines of public trust fundamentally acknowledges that the nation's mineral and petroleum resources (as well as its other natural resources) vest in the state as the legal entity representing the nation.[5]

[3] *Minister of Mineral Resources and Others v Sishen Iron ore Company (Pty) Ltd and Another* 2014 (2) SA 603 (CC) para 16, 65.

[4] *Minister of Mineral Resources and Others v Sishen Iron ore Company (Pty) Ltd and Another* 2014 (2) SA 603 (CC) para 63.

[5] Because this paper does not deal specifically with the property-rights regime whereby the country's natural resources are regulated, the discussion will not dwell on this aspect.

III. Public trusteeship as a basis for an action for damages by civil society

Although the statutory creation of doctrines of public trust did not introduce new or novel legal remedies through which corruption can be addressed, they strengthen and support existing legal remedies in appropriate circumstances.

In South African jurisprudence, civil litigation for damages would most likely be founded on either a delictual claim (a civil claim under South Africa's law of delict) for damages or a claim for constitutional damages.[6] Where an act of corruption constitutes an infringement of a constitutionally entrenched fundamental right, 'appropriate relief' may be obtained through the provisions of section 38 of the Constitution.[7] Constitutional damages will be regarded as a particular manifestation of appropriate relief. In theory, any person whose fundamental rights have been infringed may claim constitutional damages, and in *Fose v Minister of Safety and Security*[8], the Constitutional Court held that it would be 'strange if damage could not be claimed ... for loss occasioned by the breach of a right vested in the claimant by the Supreme law'. The constitutional remedy should, however, aim to vindicate the infringement of a constitutional right, to affirm constitutional values, and deter future violations of fundamental rights. It is not primarily aimed at providing compensation.

The principle has also been established that delictual and statutory remedies often vindicate the infringement of fundamental rights, and despite the fact that constitutional relief and delictual remedies are not concurrent, the applicable delictual remedy may at the same time be the appropriate constitutional remedy. In fact, case law not only supports the idea that constitutional damages will not be awarded where a plaintiff has already succeeded with a delictual claim for damages,[9] but indicates that constitutional damages might only be awarded in the appropriate circumstances as appropriate relief where no statutory remedies are applicable or

[6] The reader should note that damages may also be claimed, *inter alia*, in administrative-law proceedings, enrichment actions, and where a contract has been breached.

[7] Constitution of the Republic of South-Africa, 1996 section 38**:** Enforcement of rights: Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are: (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members.

[8] *Fose v Minister of Safety and Security* 1997 (3) SA 786.

[9] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC). *Gxbeka v MEC for Health* 2005 JOL 13458 TK confirmed that a court will not allow constitutional damages if it boils down to a duplication of general damages.

adequate common-law remedies exist.[10] In support of this approach, the Supreme Court of Appeal stated that where the lawgiver has legislated statutory mechanisms for securing constitutional rights, they must be used.[11] Hence, before constitutional damages are claimed for the violation of a fundamental human right brought about by an act of corruption,[12] a plaintiff must ensure that no delictual[13]or statutory remedies are available to address the violation.

The simple question addressed in this paper is therefore: to what extent does public trust theory support the institution of common-law damages claims based on acts of corruption. If the requirement stated by the Supreme Court of Appeal in Jayiya were to be considered, the question can be rephrased: Can a statutory doctrine of public trust be regarded as a 'legislated statutory mechanism' to assist citizens in instituting delictual claims for damages caused by corruption?

IV. Elements of a civil claim for damages

To succeed with a civil claim for damages, a plaintiff has to prove that loss was caused by a wrongful act or omission committed with the necessary degree of fault with a clear causal link between the conduct and the damages suffered. These elements constitute the *facta probanda*, or facts to be shown, of a claim. However, before a plaintiff can even consider instituting an action for damages, it must be clear that he has the necessary standing, or *locus standi*, to do so. In *Gross v Pentz*[14] Harms JA stated that locus standi concerns the sufficiency and directness of interest in litigation and that that sufficiency and interest depends on the particular facts of each individual case. It is submitted that every citizen in the country obtained sufficient and direct interest in those resources statutorily cloaked with the doctrine of public trust. If the decision of the Constitutional Court in *Minister of Mineral Resources v Sishen Iron ore Company (Pty) Ltd*[15] were to be used as a yardstick, the citizens of the country acquired a public-property interest in the particular natural resources encapsulated within the statutory doctrines of public trust. This public-

[10]*Jayiya v MEC for Welfare* 2004 (2) SA 611 (SCA). In, amongst others, *S v Mhlungu* 1995 (3) SA 867 (CC), *Motsepe v Commissioner for Inland Revenue* 1997 (6) BCLR 692 (CC), and *Minister of Education v Harris* 2011 (11) BCLR 1157 (CC), the subsidiarity principle was laid down. This principle determines that 'where it is possible to decide any case civil or criminal, without reaching a constitutional issue, that is the course which should be followed.'

[11]*Jayiya v MEC for Welfare* 2004 (2) SA 611 (SCA).

[12] It is submitted that the mere act of corruption is an infringement of the right to just administrative action contained in section 33 of the Constitution.

[13] The South African delictual remedies are also referred to as common-law remedies because they derive from the Roman-Dutch-based common-law heritage of the South African legal system.

[14]*Gross and Others v Pentz* 1996 (4) SA 617 632 B-C.

[15]*Minister of Mineral Resources and Others v Sishen Iron ore Company (Pty) Ltd and Another 2014* (2) SA 603 (CC) para 63.

property interest establishes locus standi for citizens to approach the court in appropriate circumstances, and may thereby be regarded as additional and supplementary to section 38 of the Constitution and section 32 of the National Environmental Management Act.[16]

After *locus standi* has been established, a plaintiff must prove all the *facta probanda* of the remedy. As stated above, in cases where an action based on monetary loss (an aquilian action under South Africa's Roman-Dutch influenced legal system) is used to claim damages, the elements of the cause would be conduct, wrongfulness, causality, fault and damages. Public trust theory will assist in establishing the element of wrongfulness, particularly in those circumstances where it is asserted that an omission by an organ of state is the conduct causing the loss. This may typically be relevant for scenarios where: (i) an act of corruption was committed by a state official, (ii) the act is deemed to be outside the scope of the official's employment, and (iii) it is clear that the relevant organ of state failed to take the necessary steps to create an environment wherein corruption is not only not tolerated but actively prevented.

Conduct, whether an act or omission, is wrongful if it either infringes a legally recognized right of the plaintiff or constitutes the breach of a legal duty owed by the defendant to the plaintiff. It has been established in case law that breach of a duty recognized in law for the purposes of liability is per se wrongful.[17] This is of particular importance in founding liability in cases where no infringement of a right is evident. The existence of a legal duty to act is a conclusion of law reached after all the circumstances of a case have been considered.[18] As legal duties may originate from the Bill of Rights or the common law,[19] it is submitted that the statutory doctrines of public trust established a legal duty that rests on the respective trustees and custodians of natural resources to ensure that the resources will be managed for the benefit of the nation. This would include the duty to ensure that the necessary mechanisms have been provided as this would deter and prevent corruption, and to implement appropriate measures to identify and remove corrupt officials. The fiduciary responsibility assigned to public trustees and custodians of specific natural resources entrenches this legal duty.

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[16]*National Environmental Management Act* 106 of 1998, hereafter referred to as NEMA. Section 32 allows any person or group of persons to seek appropriate relief in respect of any breach of, *inter alia*, 'any statutory provision concerned with the protection of the environment' in the public interest and in the interest of the protection of the environment.

[17]*Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597; *Administrateur, Natal v Trust Bank van AfrikaBpk* 1979 3 SA 824 (A) 833; *Osborne Panama SA v Shell & BP SA Petroleum Refineries (Pty) Ltd* 1982 4 SA 890 (A) 901; *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A) 797; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) 769; *Minister of Law & Order v Kadir* 1995 1 SA 303 (A) 317.

[18]*Carmichele v Minister of Safety & Security* 2001 1 SA 489 (SCA).

[19]*Knop v Johannesburg City Council* 1995 2 SA 1 (A).

It is further submitted that where acts of corruption have been committed in the execution and during the course of a state official's employment, the relevant public trustee or custodian may be held vicariously liable for the harm or loss occasioned by such corruption.

A plaintiff will only succeed with a claim for damages if a loss has indeed been suffered as a result of corruption. Actual loss and the existence of corruption are questions of fact, and the doctrines of public trust cannot be employed to prove that these elements exist. A strong, and I would argue compelling, argument can be made that the fiduciary duties of state officials dealing with the country's natural resources, and the public-property interest acquired by citizens of the country establish an imperative to conduct transparent transactions in relation to the relevant resource. This claim opens the door to acquire evidence that may assist in proving corruption.

But claims for damages are not the only legal remedies by means of which civil litigation may be instituted. An interdict—a court order restraining a person, or an organ of state, from continuing with or committing wrongful conduct—is another. There are three primary requisites for an interdict. The applicant must show (i) a clear right, (ii) the wrongful invasion or threatened invasion of a right through which harm[20] will be caused, and (iii) the absence of another suitable remedy.[21] It is noteworthy that fault is not a requisite for granting an interdict.[22] Here, public trust theory can assist by establishing in appropriate instances the existence of a clear right. Whether an applicant has a clear right, is a matter of substantive law that must be proved on a balance of probabilities.[23] If one uses the statutory doctrine of public trust, as created in the Mineral and petroleum Resources Development Act[24] as an example, it is clear that the state is custodian of the mineral and petroleum resources that are the common heritage of all the people of South Africa, for the benefit of all South Africans.[25] Thus, where an Act expressly states that a particular resource must be used, managed and protected for the benefit of all South Africans, it would seem

[20] If an interim interdict is applied for, imminent irreparable harm must be proven. This is, however, not a requirement for granting a final interdict: *Hydro Holdings (Edms) Bpk v Minister of Public Works* 1977 (2) SA 778 (T); *Mbaba v Mbaba* (474/12) [2013] ZASCA 137 (27 September 2013).

[21] The *locus classicus* stating the requirements for an interdict is *Setlogelo v Setlogelo* 1914 AD 221 227. See also *Nienaber v Stuckey* 1946 AD 1049 at [1053]–[1054]; *Bankorp Trust Bpk v Pienaar* 1993 (4) SA 98 (A) 109; *Motswagae and Others v Rustenburg Local Municipality and Another* 2013 (3) BCLR 271 (CC), 2013 (2) SA 613 (CC); *Wishart and Others v Blieden NO and Others* [2013] 1 All SA 485 (KZP) at [50]; *Pilane and Another v Pilane and Another* 2013 (4) BCLR 431 (CC) at [40]–[45].

[22] *Free State Gold Areas Ltd v Merriespruit (OFS) Gold Mining Co Ltd 1961* (2) SA 505 (W); *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A); *Hawker v Life Offices Association of SA supra* 780; *Elida Gibbs (Pty) Ltd v Colgate-Palmolive (Pty) Ltd*(1) 1988 (2) SA 350 (W) 353; *R & I Laboratories (Pty) Ltd v Beauty Without Cruelty International (SA Branch)* 1990 (3) SA 746 (C) 753–755.

[23]Berg River Municipality v Zelpy 2065 (Pty) Ltd 2013 (4) SA 154 (WCC) at [43].

[24] S 28 of the Mineral and Petroleum Resources Development Act 28 of 2002, hereafter referred to as the MPRDA.

[25]S 3 of the MPRDA.

unconstestable that a definite and clear right vests 'in all South Africans' to insist on the beneficial management of the resource in accordance with the aims of the Act.[26] An act, or imminent act of corruption, would impact negatively on this right and cause harm or injury. It is therefore submitted that the particular construction of the doctrine of public trust in the relevant law will determine whether citizens will be awarded such a definite and clear right. Accordingly, it follows that section 24 of the Constitution and section 32 of National Environmental Management Act jointly create such a right in matters concerning the environment.[27]

V. Conclusion

Public trusteeship embodies the notion that the state is the custodian or trustee of a particular natural resource, but only on behalf of the people. Public trust theory should therefore essentially foster a notion of entitlement amongst the citizens of South Africa. It is a fact that the incorporation of the notion of public trusteeship has fundamentally altered the property-rights regime according to which the country's mineral and petroleum resources in particular had been regulated.[28] As a result, the concept does not appeal to proponents of private property rights. However, it is that once the extent of the acquired public interest has been truly grasped and the lamentations of what is perceived to have been lost have died down, public trust theory will reach its full potential. Once it has been understood that natural resources like water, minerals and the ocean's riches are not reserved for the exclusive use of a privileged few but statutorily bequeathed to the whole nation (including future generations), it might awaken an unprecedented civil responsibility that could fuel civil action aimed at eradicating corruption that detrimentally influences the use, management and protection of these resources.

It is submitted that civil society's reluctance to engage with government is currently the major stumbling block that prevents more civil litigation resulting from corruption. This reluctance may be attributed basically to three main reasons. The first reason is the absolute private-property regime within which natural-resource exploitation had been regulated under the apartheid regime – people have to be educated to grasp the fact that they have a real interest in the nation's natural resources and that it should not be exploited by a particular group based on their skin color only. Secondly, it is submitted that the majority of the South African population has to date been overwhelmed to such an extent by the joy of political victory that a blind eye has been turned on systemic corruption. The third reason is the practical reality that litigation is costly and that companies rarely sponsor litigation against the

[26] S 2 of the MPRDA.

[27] M Kidd 'Public interest environmental litigation: recent cases raise possible obstacles' 2010 13(5) PER/PELJ 27 – 46.

[28] *Xstrata SA v SFF Association* 2012 (5) SA 60 (SCA) 62 B-D.

state through which they themselves can be exposed. An additional factor may also be that citizens feel so completely overwhelmed by poor service delivery and an 'apparent' tolerance of corruption' that they lose confidence in both the government and the courts, and therefore withdraw from the public sector in order to fend for themselves in their own small secluded living spaces.

Despite these hurdles it is submitted that public-trust theory has a supportive role to play in combatting corruption regarding the use and allocation of South Africa's natural resources. It is hoped too that the doctrines that underlie it will serve to provoke similar responses in other African states.

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