Natural Resources as “Regulated Property”: The Challenges of Resource Stewardship in South Africa

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I Introduction

The problem with natural resources – land, minerals and water – is that they are finite, but must be shared by an ever-increasing number of users. The main challenge is to find equitable ways to share such resources, so that the interests of all users are served more-or-less acceptably. This challenge befalls the state: it is the institution that must manage natural resources, on behalf of all its people, determining ways of socially acceptable use. Therefore, natural resources epitomise the idea of regulated property, and the state often finds itself in the role of a steward – a custodian or public trustee – thereof. The government determines how (and how much) money is spent on the improvement of infrastructure and services, the distribution of resources, and ultimately the nature and content of water and land use and mineral exploitation.

In South Africa, pressure to balance the use of natural resources equitably is exacerbated by the country’s mired political past, which intentionally excluded vast swathes of the population from land, minerals and water, rendering ownership distribution and access patterns grossly unjust. Since that
watershed moment in 1994, when democracy dawned on South Africa, the legal landscape has changed significantly and radically. In the preceding negotiations for drafting the Constitution, including a right to property in the chapter on fundamental rights – a “property clause” – was fiercely debated. The compromise that eventually emerged from negotiations entrenches the right of ownership, provides constitutional justification for the expropriation of property, and renders land and other natural resource reform imperative. Subsequently the Constitutional Court emphasised that the right to private property is not constitutionally entrenched only to protect wealth; it must balance private and public interests in property, in the context of the redistribution of resources. Property law may involve the rules regulating individual holdings, but as a system it is crucial to the collective too. The legal system attempts to balance the rights of ownership against the needs of society through constitutional reforms. Other clauses in the Bill of Rights, such as the right to dignity (Section 10), the right to equality (Section 9), and the right of access to sufficient food and water (Section 27), provide further justification for a reimagining of the system of property rights.

An intensive overhaul of the legislative terrain followed. Sentiments echoing the 1955 Freedom Charter’s statement that “The People Shall Share in the Country’s Wealth” are evident in new laws governing natural resources.

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8 Constitution, s 25.
9 Agri SA CC (supra n. 3); Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape 2015 (6) SA 125 (CC) para 50.
10 First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC) para 49–50; Agri SA CC (supra n. 3) para 91; Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government & Housing in the Province of Gauteng 2005 (2) BCLR 150 (CC) para 81.