

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

Hanri Mostert and Cheri-Leigh Young

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.¹ 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.²

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,³ rendering ownership distribution and access patterns grossly unjust.⁴ Since that

¹ See P. Andrews-Speed et al., *Want, Waste or War?: The Global Resource Nexus and the Struggle for Land, Energy, Food, Water and Minerals*, Oxon: Routledge, 2014.

² M.W. Anderson/V.C. Plaut, “Implicit Bias and the Resilience of Spatial Colourlines” in: J.D. Levinson/R.J. Smith (eds), *Implicit Racial Bias Across the Law*, Cambridge: Cambridge University Press, 2012, pp. 30–31.

³ *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) (hereafter “*Agri SA CC*”) para 70; *Bengwenyama-ya-Maswazi Community v Minister for Mineral Resources* [2014] 4 All SA 539 (SCA) (hereafter “*Bengwenyama*”) para 58; *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (CC) para 98. Also M. Bavinck et al., *Conflicts over Natural Resources in the Global South: Conceptual Approaches*, Oxon: Routledge, 2014, p. 6.

⁴ *Agri SA CC* (*supra* n. 3) para 1; *Zulu v Ethekwini Municipality (Abahlali Basemjondolo Movement South Africa as amicus curiae)* 2014 (8) BCLR 971 (CC) para 43; *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 (8) BCLR 1015 (CC) para 43; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* [2009] JOL 23711 (CC) para 191–197.

watershed moment in 1994, when democracy dawned on South Africa, the legal landscape has changed significantly and radically.⁵ In the preceding negotiations for drafting the Constitution,⁶ including a right to property in the chapter on fundamental rights – a “property clause” – was fiercely debated.⁷ 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.⁸ Subsequently the Constitutional Court emphasised that the right to private property is not constitutionally entrenched only to protect wealth;⁹ it must balance private and public interests in property, in the context of the redistribution of resources.¹⁰ Property law may involve the rules regulating individual holdings, but as a system it is crucial to the collective too.¹¹ 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.¹²

-
- 5 Further: H. Corder/V. Federico, *The Quest for Constitutionalism: South Africa Since 1994*, Farnham: Routledge, 2016, p. 230.
 - 6 Constitution of the Republic of South Africa, 1996.
 - 7 A.J. van der Walt, *Constitutional Property Law* 3 ed, Cape Town: Juta, 2011, p. 3; H. Mostert, “South African Constitutional Property Protection between Libertarianism and Liberalism: Challenges for the Judiciary” 60/2 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* 2000, 295–330.
 - 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.
 - 11 P.M. Gerhart, *Property, Law and Social Morality*, New York: Cambridge University Press, 2014, ix.
 - 12 *ANC v COPE (Association Inc under Section 21)* [2009] JOL 22935 (T) para 5; H. Deegan, *Politics South Africa* 2ed, Oxon: Routledge, 2014, p. 27.