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A recent WRC project studied the concept of Public Trusteeship as embedded in the National Water Act.

The new vision for water management

With the promulgation of the National Water Act 36 of 1998 (NWA), South Africans witnessed the birth of a new legal concept in South African natural resources jurisprudence. The concept of public trusteeship that initially emerged in the *White Paper on a National Water Policy for South Africa* was formally entrenched in Sections 2 and 3 of the NWA. The *White Paper* had stated: "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. In its role of guardian of our Nation's water resources, national Government will keep the right to influence the country's economic and social development – for the benefit of present and future generations – through the responsibility for determining the proper use of the nation's water resources."

The reality is, however, that increasing competition between various water users and the inability to meet growing demands due to the natural scarcity of fresh water resources threaten to hamper water reform aimed at addressing equity and redress issues. The question that arises is whether the doctrine of public trust, as incorporated in the NWA, also referred to as the concept of public trusteeship, is rising to the occasion.

Accordingly, the concept of public trusteeship as it is found in the NWA has been re-examined in a broader context and thereafter analysed in order to determine:

- (a) The roles, responsibilities and obligations of all players in decentralised water management and governance; and
- (b) The legal implications that the doctrine holds and how the doctrine of public trust as embodied in the NWA can effectively be used to balance seemingly opposing demands on water resources and support water reform aimed at addressing equity and redress issues.

Concept of public trusteeship contextualised

The concept of public trusteeship encapsulates a sovereign's fiduciary responsibility to hold the environment and certain natural resources in trust for current and future generations. This concept, with its strong philosophical foundations, has been incorporated in numerous foreign legal regimes and is a universally recognised concept. Albeit not formally recognised as legal doctrine in South African common law, the concept nevertheless demonstrates striking similarities with certain common law constructs with which it should not, however, be confused. It remains a brand new statutorily-created concept in South African law.

The purpose of introducing a concept of public trusteeship to South African law is indicated in the policy documents relevant to water as natural resource and the environment. In these, the government is seen to have accepted its fiduciary responsibility and acknowledged that certain resources cannot be dealt with in contemporary private law relationships. The universally accepted doctrine of public trust has provided a perfect mechanism to curb private rights in public property while avoiding the tragedy of the commons. As the research has revealed, the concept of public trusteeship is a flexible tool that can be utilised together with other resource-governing regimes and property regimes. In revolving around the concept of public trusteeship, the NWA changed South Africa's water law dispensation in its totality.

Effect on the roles, responsibilities and obligations of role-players in decentralised water resources management and governance

Owing to the fact that the concept of public trusteeship in respect of the nation's water resources has been statutorily introduced to the South African water law dispensation, its meaning and consequences need to be found within the wording of the NWA. An analysis of section 3 of the NWA, which entrenches the concept of public trusteeship, has revealed the identity of the public trustee, its mandate and obligations, the identity of the trust *corpus* (i.e., the assets or property – water – that are held

by the trustee on behalf of the beneficiary), the identity of the beneficiary under the public trust and the extent of the beneficiary's right.

With regard to the identity of the public trustee of the nation's water resources, it is the National Government who is appointed as such, with the Minister of Water Affairs the designated agent of National Government. It can therefore be assumed that every functionary of National Government must constantly determine how his/her department's activities impacts on the nation's water resources and ensure that these resources are not detrimentally affected by any decisions or actions of the National Government. It is therefore not solely the actions or omissions of the Minister of Water Affairs that could be responsible for the Government not effectively executing its fiduciary responsibility as public trustee.

The concept of public trusteeship directly influences the roles and responsibilities of all role players by providing the criteria against which all decisions that can potentially impact on the nation's water resources must be measured. These criteria originate from the mandate and obligations conferred on the National Government as public trustee.

The public trustee's mandate and responsibilities also determine the extent of the beneficiary's interest in the nation's water resources. Although decentralised water governance is aimed at bringing water management closer to the people, it does not diminish the public trustee's overarching responsibility towards protecting, using, developing, conserving, managing and controlling the nation's water resources in a sustainable and equitable manner, for the benefit of all persons in accordance with its constitutional mandate.

The attributes of public trusteeship are irrevocably ingrained in all powers, obligations and functions that cascade from the public trustee at the highest management level through to management institutions at the local level of water management. For this reason all actions taken or refrained from, and all decisions that may impact on the nation's water resources, must promote sustainable and equitable use in the public interest while promoting environmental values. Throughout the NWA provisions are aimed at including the public in decision making processes, ensuring the balancing of the interests of all stakeholders and promoting the public interest.

Doctrine of public trusteeship: An efficient tool to reach the objectives of the NWA

The doctrine of public trust as embodied in the NWA may be used effectively to balance seemingly opposing demands on water resources and support water reform aimed at addressing

equity and redress results of past racial and gender discrimination. Through the application of the concept of public trusteeship, water as natural resource has been completely removed from the sphere of private property. The severely limited and burdened *dominium* of the totality of the water resources in the country has been awarded to the state, but the people as a collective entity have been awarded right of use and enjoyment thereto.

This right of use and enjoyment awarded to the people as collective entity does not mean that individual *personae* have an unrestricted right to access and use. The state is encumbered with the responsibility of regulating access to and use of South Africa's water resources in the interest of the public at large. Although the state was awarded the legal title in water, this title is simultaneously restricted to the scope set down in the NWA and burdened with the immense fiduciary responsibility of striving towards the achievement of the purposes of the NWA.

Poverty alleviation will be a natural consequence of the application of the provisions of the NWA as the "need to redress the results of past racial and gender discrimination" is explicitly stated as one of the factors that determines the extent of the public interest in the nation's water resources. The NWA promotes the improvement of the living conditions of the poor by prescribing that water use for reasonable domestic use, gardening and animal watering should be allowed without a licence. It also provides for the alleviation of poverty by providing access to water to emerging farmers. The public interest cuts so deep that the NWA allows for the curtailment of existing lawful water uses and the revision of licences if it would promote the purposes of the NWA.

In conclusion

The concept of public trusteeship sets the goal and in a certain sense describes a utopia-like vision to be realised through the implementation of the NWA. Unfortunately in the broken reality called 'Now', legal mechanisms are only as effective as the people steering them. It is imperative that the Minister of Water Affairs, together with the National Government, embrace their role as guardian of the nation's water resources and start living up to the obligations created in the NWA. The people of the country should also rise and challenge the public trustee to fulfil its duties as set out in the NWA.

Further reading:

To obtain the report, *The Concept of Public Trusteeship as Embedded in South Africa's National Water Act, 1998* (Report No: KV 263/10) contact Publications at Tel: (012) 330-0340; Fax: (012) 331-2565; E-mail: orders@wrc.org.za; or Visit: www.wrc.org.za