Getting Ahead of the "Game": The Reclassification of Wild Animals Contained in Protected Areas as *Res Publicae*

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Abstract

The common law "escape rule" determines that if a wild animal escapes from its controlled environment and reverts to its natural state of freedom, it is *res nullius* and may be acquired by another party by *occupatio*. To place the owners of game in a more favourable position when their game escapes from its enclosure, the aforementioned common law rule was amended by the *Game Theft Act* 105 of 1991 (GTA). Sections of the *Game Theft Act* 105 of 1991 came under discussion in *Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd (Wildlife Ranching South Africa amicus curiae)* 2016 4 SA 457 (ECG) and later in *Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd t/a Crown River Safari* 2018 4 SA 206 (SCA). Two separate issues came before the courts. First, whether a certificate in terms of section 2(2)(a) of the GTA is a prerequisite for the operation of section (2)(1)(a) of the GTA; and second, whether the common law must be developed to provide that wild animals that are sufficiently contained in a protected area managed by an organ of state charged with the management thereof in terms of relevant nature conservation legislation in order to promote conservation, are *res publicae* owned by such organ of state. Neither one of the cases thoroughly considered the second issue before the court. Therefore, the purpose of this contribution is to investigate the possibility of developing the common law to provide that wild animals that are sufficiently contained in a protected area managed by an organ of state charged with the management thereof in terms of relevant nature conservation legislation in order to promote conservation are *res publicae* owned by such organ of state. In Roman Law *res publicae* were classified as public things that were out of commerce and intended for public use. They are often referred to as state property, but they belong to the entire civil community and their common interests in these things are safeguarded by the state. This proposed development bears some resemblance to the international environmental law principle known as the public trust doctrine. The public trust doctrine determines that a country's sovereign acts as the guardian of the public interest in natural resources by holding them in trust for the benefit of the nation as a whole. The article provides a theoretical analysis of the proposed development of the common law by exploring (a) the significance of biodiversity conservation and protected areas in South Africa; (b) the application of the GTA in the context of protected areas; (c) the concepts of *res nullius*, *res publicae* and the public trust doctrine and (d) the development of the common law in South Africa.

Keywords

Common law; conservation; development of the common law; escape rule; *Game Theft Act*; public trust doctrine; property law classification; protected areas; *res nullius*; *res publicae*; wild animals.

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1 Introduction

In *Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd (Wildlife Ranching South Africa amicus curiae)*[1] the Eastern Cape High Court[2] and later in *Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd t/a Crown River Safari*[3] the Supreme Court of Appeal,[4] mainly dealt with the interpretation of sections 2(1)(a) and 2(2)(a) of the *Game Theft Act*.[5] These sections deal with the ownership of game that escapes from its enclosure and respectively determine that:[6]

> (1) Notwithstanding the provisions of any other law or the common law –
>
> (a) a person who keeps or holds game or on behalf of whom game is kept or held on land that is sufficiently enclosed as contemplated in subsection (2), or who keeps game in a pen or kraal or in or on a vehicle, shall not lose ownership of that game if the game escapes from such enclosed land or from such pen, kraal or vehicle;…[7]
>
> (2) (a) For the purposes of subsection (1)(a), land shall be deemed to be sufficiently enclosed if, according to a certificate of the Premier of the province in which the land is situated, or his assignee, it is sufficiently enclosed to confine to that land the species of game mentioned in the certificate...[8]

The GTA was passed in 1991 after extensive deliberations by the South African Law Commission (SALC) on the modern-day validity and fairness of the common law "escape rule".[9] This so-called "escape rule" provides that if a wild animal escapes from its controlled environment and reverts to its natural state of freedom, the animal becomes a *res nullius* and may be acquired by another party by *occupatio*.[10] In the case of wild animals, possession of the wild animal must be acquired by capturing and exercising physical control over it with the intention of becoming its owner.[11]

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1 *Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd (Wildlife Ranching South Africa amicus curiae)* 2016 4 SA 457 (ECG) (hereafter the court *a quo*-case).

2 Hereafter the court *a quo*.

3 *Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd t/a Crown River Safari* 2018 4 SA 206 (SCA) (hereafter the appeal court case).

4 Hereafter the SCA.

5 *Game Theft Act* 105 of 1991 (hereafter the GTA).

6 Also see s 1 of the GTA for the definition of "game".

7 Section 2(1)(a) of the GTA.

8 Section 2(2)(a) of the GTA.

9 See in general SALC *Acquisition and Loss of Ownership of Game*. The South African Law Commission (SALC) was renamed the South African Law Reform Commission on 17 January 2003.

10 Freedman 2019 *TSAR* 374; Joubert *Romeinse Reg* 143.

11 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 137.

The anticipated purpose of the passing of the GTA was to amend the abovementioned common law rule to place the owners of game in a more favourable position when their game escapes from its enclosure.[12] Accordingly, under section 2 of the GTA an exception is created that protects complying owners against the loss of ownership when game escapes.[13]

The possibility of developing the common law even further in this regard came under discussion yet again in the abovementioned cases. The proposed further development under investigation in the present cases entails that wild animals which are sufficiently contained in a protected area managed by an organ of state charged with the management thereof in terms of relevant nature conservation legislation in order to promote conservation are *res publicae* owned by such an organ of state.[14] In Roman Law *res publicae* were classified as public things that were out of commerce and intended for public use.[15] They are often referred to as state property, but they belong to the entire civil community and their common interests in these things are safeguarded by the state.[16] This proposed development bears some resemblance to the international environmental law principle known as the public trust doctrine. The public trust doctrine encapsulates the sovereign's duty to act as the guardian of the public interest in certain natural resources by holding them in trust for the benefit of the nation as a whole.[17]

The court *a quo* fleetingly considers and subsequently dismisses the necessity to further develop the common law regarding the ownership of wildlife to promote the spirit and objectives of section 24 of the *Constitution of the Republic of South Africa*, 1996.[18] Section 24 of the Constitution reads as follows:

> Everyone has the right—
>
> (a) to an environment that is not harmful to their health or wellbeing; 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 ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Section 24(b) places a constitutional imperative on the state, through its organs, to secure environmental rights through reasonable legislative and other measures aimed at the achievement of the listed objectives under subsection (b)(i)-(iii).[19] In achieving this obligation the state is required not only to develop reasonable

12 Glazewski "Wild Animals, Forests and Plants" para 14.4.1.2.
13 Freedman 2019 *TSAR* 376.
14 Court a *quo*-case para 2.
15 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 26-27.
16 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 26-27.
17 Van der Schyff 2010 *PELJ* 123.
18 *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution). Court a *quo*-case paras 33-35.
19 *HTF Developers (Pty) Ltd v The Minister of Environmental Affairs and Tourism* 2006 5 SA 512 (T) para 17.

legislation to protect the environment but also to actively pursue the achievement of the intended result and to implement balanced and flexible supporting policies and programmes.[20] Moreover, sections 39(2) and 173 of the Constitution provide that the common law must be developed in accordance with the Bill of Rights and in the interest of justice.

There has not been much discussion of these two court cases. Freedman's[21] contribution focussed on the workings of section 2 of the GTA.[22] This contribution does not aim to discuss the GTA in detail but rather intends to use the shortcomings of the cases to illustrate how the common law could further be developed, as it was developed prior to 1994. In South Africa, common law is equal to customary law, which means that the judicial and legislative authorities have the power to develop or curb it in the interest of justice.[23] The courts have done this for many years in terms of judicial precedent (*stare decisis*) subsequent to 1827/1828[24] when the English Law of Procedure was introduced in South Africa.[25] Similarly, after the introduction of the Constitution, South African law is viewed as one system of law, and the courts continued to develop and shape the common law, customary law and modern legislation to uphold the supremacy of constitutional values.[26] These developments in South African law are cross-disciplinary in nature and therefore require a unique collaboration between scholars of seemingly unrelated fields of law (in this instance, environmental law and legal history). The authors are fortunate in this regard to have benefitted immensely from the knowledge, guidance and mentorship of Professor Willemien du Plessis, over the course of many years, which have enriched our engagement with legal research and the many socio-ecological complexities that the law seeks to mediate.

The purpose of this article is to investigate the possibility of further developing the common law to provide that wild animals that are sufficiently contained in a protected area managed by an organ of state charged with the management thereof in terms of relevant nature conservation legislation in order to promote conservation are *res publicae* owned by such an organ of state. To provide some background on the matter, this article briefly discusses the facts of the aforementioned cases and the judgments delivered by the respective courts. The article then provides a

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20 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) paras 42-43.

21 Freedman 2019 *TSAR* 374-382.

22 Also see Freedman 2000 *SAJELP* 137-143; Freedman 2001 *SAJELP* 128-134; Freedman 2022 *TSAR* 581-591.

23 Sections 39(2) and 173 of the Constitution.

24 Resulting from the *Charter of Justice* (1827) and the institution of the Supreme Court at the Cape (1828). See Paterson *Eckard's Principles of Civil Procedure* 1-2; Hosten *et al Introduction to South African Law* 350-354 and 386-388.

25 Paterson *Eckard's Principles of Civil Procedure* 1-2; Hosten *et al Introduction to South African Law* 350-354.

26 Section 8(3) of the Constitution; Hosten *et al Introduction to South African Law* 520-522; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 7 BCLR 687 (CC) para 22; *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44. See the discussion below.

theoretical analysis of the proposed development of the common law by exploring (a) the significance of biodiversity conservation and protected areas in South Africa; (b) the application of the GTA in the context of protected areas; (c) the concepts of *res nullius*, *res publicae* and the public trust doctrine and (d) the development of the common law in South Africa. The following section details the facts of the cases and the legal issues before the courts.

2 Facts and legal questions before the courts

The dispute at hand is concerned with the ownership of a valuable herd of Cape Buffalo. The herd escaped from the Thomas Baines Nature Reserve[27] between December 2010 and February 2011 to the territory of the neighbouring property, the privately owned Medbury Game Reserve.[28]

The Reserve is categorised as a provincial protected area[29] and managed in the public interest by the Eastern Cape Parks and Tourism Agency.[30] The Settlers Dam forms a natural boundary between the Reserve and Medbury, while the remaining part of the Reserve's boundary line is fenced off.[31]

At the time when the herd of buffalo escaped from the reserve a prolonged drought was afflicting the area, which caused the dam's water level to drop to a historic low.[32] The drought compromised the integrity of the natural common boundary between the properties, and it is assumed that the herd of Cape Buffalo escaped from the Reserve using this boundary point. Under normal circumstances the herd would not have been able to cross the dam to the other side.[33] After the drought ended the water in the dam rose to its normal level and the buffalo remained on Medbury's property.[34]

The Agency (the plaintiff) instituted civil action against Medbury (the defendant) in the court *a quo* for the restoration of the ownership of the buffalo.[35] Medbury relied on the common law rule, as introduced above, and claimed ownership of the herd of buffalo by *occupatio*.[36]

The Agency in turn relied on section 2(1)(a) of the GTA as cited above. The Agency argued that even though the buffalo had escaped from the nature reserve's controlled environment, the property was indeed sufficiently enclosed and that the

27 Hereafter the Reserve.
28 Hereafter Medbury. Court a *quo*-case paras 1, 4 and 5.
29 Sections 23-27 of the *National Environmental Management: Protected Areas* Act 57 of 2003 (hereafter NEMPAA).
30 Hereafter the Agency. Court a *quo*-case paras 8-10. See further in general *Eastern Cape Parks and Tourism Agency Act* 2 of 2010.
31 Court *a quo*-case para 11.
32 Court *a quo*-case para 12.
33 Court *a quo*-case para 11.
34 Court *a quo*-case para 12.
35 Court *a quo*-case para 1.
36 Appeal court case para 19.

Agency therefore retained ownership of the escaped animals under the protection of section 2(1)(a) of the GTA.[37]

Medbury contended that the Agency could not rely on section 2(1)(a) of the GTA because it had neglected to apply for a certificate in terms of section 2(2)(a) of the GTA,[38] In which case the GTA could not be relied upon, and therefore the situation necessitated the application of the common law rules of *res nullius* and *occupatio*.

Two separate issues were considered by the court *a quo*.[39] First, whether a certificate in terms of section 2(2)(a) of the GTA is a prerequisite for the operation of section (2)(1)(a) of the GTA; and second, whether the common law must be developed to provide that wild animals that are sufficiently contained in a protected area managed by an organ of state charged with the management thereof in terms of relevant nature conservation legislation in order to promote conservation are neither *res alicuius* nor *res nullius* but rather *res publicae* owned by such an organ of state.[40]

3 Judgments

3.1 Reasoning of the court a quo

Regarding the first issue the court followed the letter of the law in interpreting the GTA and shied away from a broad interpretation.[41] The court interpreted section 2(1)(a) of the GTA as protecting the ownership of game only when the land is sufficiently enclosed.[42] According to the court, section 2(2)(a) of the GTA cogently delineates that land is deemed to be sufficiently enclosed if the Premier of the province (or his/her assignee) issues a certificate confirming that the land is sufficiently enclosed to confine the specific species mentioned in the certificate. The court held that the wording of the GTA is "clear and unambiguous"[43] and that the certificate contemplated in section 2(2)(a) is undoubtedly a prerequisite for protection against the loss of ownership. As a result, protection against the loss of ownership is not automatically extended to any owner who maintains that the property in question was sufficiently enclosed. Such protection is available only to those parties who obtain a supporting certificate. Furthermore, the court held that the certificate is a practical and effective mechanism for averting *ex post facto* investigations into the sufficiency of fencing and thus avoiding disputes regarding the ownership of game.[44] Accordingly, the court decided that section 2(2)(a) does not create a deeming provision that can be rebutted by evidence and that the true

37 Court *a quo*-case paras 16 and 17.
38 Appeal court case para 10.
39 Court *a quo*-case para 2.
40 Court *a quo*-case para 2. Also see Muir 2016 *Stell LR* 136-139.
41 Court *a quo*-case paras 22, 24 and 25.
42 Court *a quo*-case para 25.
43 Court *a quo*-case para 22.
44 Court *a quo*-case para 33.

intention of the legislature was to limit the protection given by section 2 of the GTA to owners who took the trouble to acquire a certificate.[45]

Regarding the second issue, the court opted not to develop the common law. The court found that it was unnecessary to develop the common law under the facts of the present case and that any such development was the responsibility of the legislature.[46] The court clarified its position on this matter by ruling that the Agency's failure to acquire a certificate was a futile attempt to develop the common law without following due process and hence to obtain *ex post facto* protection against the loss of ownership.[47]

3.2 Reasoning of the Supreme Court of Appeal

The SCA found the Agency's argument on the first issue valid and upheld the appeal.[48] In stark contrast to the judgment of the court *a quo*, the SCA unambiguously stated that section 2(2)(a) of the GTA represents a deeming provision.[49] The SCA held that the purpose of section 2(2)(a) was simply to facilitate proof that the land in question was sufficiently enclosed to assist an owner in the exercise of control over the wild animals contained on the land.[50] Therefore, the court interpreted section 2(2)(a) not to be a prerequisite for the operation of section (2)(1)(a) but rather an evidentiary aid to simplify matters in facilitating proof of ownership of game.[51] The SCA warned that when interpreting the aforementioned section, one should not lose sight of the original intended objective of the GTA – namely, to place the owners of game in a more favourable position when their game escapes from its enclosure.[52] The SCA concluded that any other interpretation of the relevant sections of the GTA would be absurd and would defeat its purpose.[53] The parties had agreed that if the SCA decided in favour of the Agency on the first issue before the court, the court need not decide on the second issue.[54]

Given that the court *a quo* dismissed the second issue (the development of the common law) and the SCA missed out on the opportunity to evaluate and weigh in on the issue, the consecutive sections will analyse the possible development of the common law in South Africa to provide that wild animals, that are sufficiently contained in a protected area managed by an organ of state charged with the management thereof in terms of relevant nature conservation legislation in order to promote conservation are *res publicae* owned by such an organ of state.[55]

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45 Court *a quo*-case para 33.
46 Court *a quo*-case paras 33-34.
47 Court *a quo*-case para 35.
48 Appeal court case paras 35-37, 39.
49 Appeal court case paras 35-36.
50 Appeal court case para 35.
51 Appeal court case para 35. Also see Freedman 2022 *TSAR* 590.
52 Appeal court case para 35.
53 Appeal court case para 35.
54 Appeal court case para 38.
55 Court *a quo*-case para 2.

Before the proposed development of the common law can be considered and discussed, it is necessary to briefly discuss the significance of biodiversity conservation and protected areas in the South African context.

4 The significance of biodiversity conservation and protected areas in South Africa

South Africa is viewed as one of the most biologically diverse countries in the world due to its topography, climate, geology, diversity of species, ecosystems and natural and cultural resources.[56] The conservation of wild animals in South Africa, both as an environmental treasure and an economic asset is of the utmost importance in the current environmental setting where biodiversity is under severe pressure due to various anthropocentric threats.[57] According to the South African country profile compiled by the Secretariat of the *Convention on Biological Diversity* (1992),[58] South Africa hosts 10% of the world's plant species and 7% of its reptile, bird and mammal species.[59] Unfortunately, South Africa's rich biodiversity is under constant pressure – with 10% of its birds and frogs, 20% of its mammals and 13% of its plants currently classified as threatened.[60]

Protected areas are a central component of South African conservation efforts.[61] Protected areas are demarcated terrestrial or maritime spaces that are formally acknowledged by law and managed by an organ of state for the long-term purpose of conserving extraordinary ecosystems, biodiversity and cultural values that can be found in the particular area.[62] In a recent account compiled through the joint efforts of Statistics South Africa, the South African National Biodiversity Institute and the Department of Forestry, Fisheries and the Environment,[63] it was found that during the past 120 years the protected area estate has expanded in all provinces and in all biomes across South Africa. In 2020 protected land accounted for 11 280 684 hectares of the South African mainland – roughly the size of Cuba.[64] Nature Reserves made up 44,5% of the total protected area estate, while National Parks contributed 37,4% to the protected area estate. This spreads the remaining 18,1% of the protected area estate across the other categories of protected areas as listed in section 9 of the *National Environmental Management: Protected Areas Act* 57 of

56 GN 1095 in GG 18163 of 28 July 1997 (*White Paper on the Conservation and Sustainable use of South Africa's Biological Diversity*, 1997).

57 SANBI 2019 http://bit.ly/2RkuLBB 12-22.

58 Secretariat of the Convention on Biological Diversity 2022 https://www.cbd.int/countries/profile/?country=za.

59 Secretariat of the Convention on Biological Diversity 2022 https://www.cbd.int/countries/profile/?country=za.

60 Secretariat of the Convention on Biological Diversity 2022 https://www.cbd.int/countries/profile/?country=za.

61 Paterson "Protected Areas" paras 12.5.1-12.5.2. S 9 of the NEMPAA distinguish a system of protected areas with different categories.

62 Section 2 of the *Convention on Biological Diversity* (1992); Dudley and Stolton 2007 bit.ly/3YtPlzn 9.

63 Stats SA 2021 https://bit.ly/3Y3BhwI 14-16.

64 Stats SA 2021 https://bit.ly/3Y3BhwI 14-16.

2003.[65] Organs of state such as South African National Parks (SANParks) and various provincial conservation management authorities fulfil the role of custodians responsible for supervising the conservation, management and administration of protected areas (in various forms) in South Africa.[66] South Africa also boasts an impressive number of privately owned nature reserves that formally form part of the Register of Protected Areas of South Africa.[67]

With this abundance of biodiversity and protected areas comes the major responsibility to manage, conserve and protect. Cognisant of its voluntary commitments to the international and African regional environmental law framework and answering its constitutional mandate in terms of section 24 of the Constitution, the South African government has exhibited a great commitment to biodiversity conservation and protected areas by enacting sundry legislation to this effect.[68] The most prominent sectoral legislation in this regard includes the *National Environmental Management: Biodiversity Act* 10 of 2004[69] and the NEMPAA.[70] Furthermore, most matters specifically relating to the conservation and management of wild animals (ordinary game) are described and regulated according to detailed systems of administration contained in the four provincial ordinances dating back to the South African political dispensation pre-1994.[71]

The abovementioned environmental laws that regulate conservation in South Africa do not pay special consideration to the protection of the ownership of wild animals found in protected areas managed by organs of state. Instead, in South Africa, as

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65 The NEMPAA. Stats SA 2021 https://bit.ly/3Y3Bhwl 14-16.

66 Section 54 of the NEMPAA. Paterson "Protected Areas" paras 12.7.1.5 and 12.8.1. For a detailed list of the provincial conservation authorities, see Paterson "Biological Diversity" 546-547.

67 See in general GN 731 in GG 40402 of 4 November 2016 (*Norms and Standards for the Inclusion of Private Nature Reserve in the Register of Protected Areas of South Africa*). A private nature reserve is an area which is in communal ownership or privately owned by a landowner that has been declared as a nature reserve in terms of ss 12 and 23(5) of the NEMPAA and furthermore designated as a private nature reserve in terms of s 25 of the NEMPAA. For a detailed account of privately owned protected areas in South Africa see De Vos *et al* 2019 *Conservation Letters* 1-10.

68 Conservation is a functional area of concurrent national and provincial legislative competency in South Africa. Refer to Schedule 4 of the Constitution. See in general Müller "Environmental Governance" 69; Rumsey "Terrestrial Wild Animals" 394; GN 749 in GG 18894 of 15 May 1998 (*White Paper on Environmental Management Policy for South Africa, 1997*); Paterson "Biological Diversity" 544.

69 *National Environmental Management: Biodiversity Act* 10 of 2004 (hereafter the NEMBA). According to the preamble of the NEMBA, it deals with matters relating to the management and conservation of biodiversity and addresses among other matters (a) the protection of threatened and protected species and ecosystems; (b) trade in endangered species; (c) the sustainable use of indigenous biological resources; (d) combatting alien and invasive species; and (e) bioprospecting and equitable benefit sharing arising from indigenous biological resources.

70 According to the preamble of the NEMPAA, it was enacted to provide for the establishment, protection, conservation, management and record keeping of protected areas in South Africa.

71 For a detailed list of the provincial conservation legislation, see Paterson "Biological Diversity" 546-547. Attempts have been made to amend or repeal these laws to concur with the modern provisions found in the NEMBA and NEMPAA, but doing this only leads to a more complicated legislative position.

briefly explained above, the ownership of wild animals is determined by the provisions of section 2 of the GTA or alternatively by the "escape rule" as set out in the common law. Accordingly, the application of the GTA in the context of protected areas managed by an organ of state needs further consideration. The following section analyses the application of the GTA in the context of protected areas managed by an organ of state.

5 Application of the GTA in the context of protected areas managed by an organ of state

The aim of the GTA is to regulate the ownership of game in certain instances.[72] These instances include when game escapes from land that is sufficiently enclosed, game theft and wrongful and unlawful hunting, catching and taking into possession of game.[73]

"Game" in the context of the GTA refers to

> all game *kept or held for commercial or hunting purposes*, and includes the meat, skin, carcass or any portion of the carcass of that game.[74]

Glazewski[75] and Freedman[76] point out that in the context of the GTA not all wild animals are regarded as "game" and that "game" refers solely to wild animals that are held by owners for commercial or hunting purposes.

A close reading of the definition of "game" in the context of the GTA reveals that the legislature (in all likelihood, unintentionally) created a test for the application of the GTA. This test asks if the wild animals in question are kept or held for commercial or hunting purposes. If the wild animals in question are kept or held for commercial or hunting purposes, section 2 of the GTA will apply if these wild animals were to escape from their enclosure and regain their natural state of freedom. If, however, the wild animals in question are kept or held for any other purpose (e.g. conservation or scientific purposes), section 2 of the GTA will not apply if the wild animals escape from their enclosure.[77] Instead the rules of the common law will apply.[78] This interpretation of the definition of "game" raises certain concerns about the application of the GTA in the context of protected areas managed by an organ of state.

In a recent report the Department of Forestry, Fisheries and the Environment[79] explains that different conservation models are applied to protected areas managed

72 Preamble of the GTA.
73 See the preamble, ss 2 and 3 of the GTA. See in general the discussion on this matter by Freedman 2022 *TSAR* 581-591.
74 Section 1 of the GTA. Own emphasis added.
75 Glazewski "Wild Animals, Forests and Plants" para 14.4.1.2.
76 Freedman 2000 *SAJELP* 141-142.
77 Freedman 2000 *SAJELP* 141-142.
78 Freedman 2000 *SAJELP* 141.
79 DFFE 2020 https://bit.ly/3Yu8VLX 137-138.

by organs of state versus nature reserves or game farms managed by private landowners:

> [South Africa] pursues a public conservation model on public lands, where the management of national parks, protected, and conservation areas provides public goods and *emphasises unpriced conservation values as well as public access* and economic impact. South Africa is [also] a world-leader in conservation on non-state land, where it promotes conservation by devolving property and resource use rights, to ensure that wildlife is an economically competitive land-use option that can displace (i.e. rewild) less ecologically desirable land-use options.[80]

It can be concluded from this that the main difference between the public and private conservation models is that they pursue different aims and intentions. The public conservation model, which is enforced in protected areas by organs of state, strives to conserve the integrity of a particular ecosystem or biodiversity for its unpriced intrinsic value to provide communities with public access to natural resources for various uses or aesthetic enjoyment. The intrinsic value of such ecosystems or biodiversity may be measured or influenced by various considerations such as (a) their "complexity, diversity, spiritual significance, wildness, beauty, or wondrousness";[81] (b) the threatened status of an ecosystem or species; or (c) the irreplaceable role of keystone species in different ecosystems.[82] The private conservation model, on the other hand, is applied to private or communal property where landowners attach commercial value to the biodiversity found in the borders of private nature reserves for the purposes of game hunting and eco-tourism. The private conservation model, coupled with its heightened potential economic benefits, elevates conservation and game farming to a highly remunerative land-use option for landowners compared for example to commercial agricultural farming.

Drawing from the explanation above, one may argue that if the GTA's intention is to regulate the ownership of wild animals kept or held for commercial or hunting purposes,[83] the GTA's application is restricted to the protection of ownership of wild animals owned by private parties which aim to achieve some form of financial gain from the keeping or holding of the wild animals.[84] This interpretation suggests that protected areas managed by organs of state may be excluded from the prospective protection against the loss of ownership of wild animals that the GTA provides. This is because, as explained above, one may argue that protected areas managed by organs of state do not keep or hold wild animals for commercial or hunting purposes but rather for their unpriced intrinsic value to the benefit of all South Africans.[85]

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80 DFFE 2020 https://bit.ly/3Yu8VLX 137-138. Own emphasis added.

81 Sandler 2012 https://www.nature.com/scitable/knowledge/library/intrinsic-value-ecology-and-conservation-25815400.

82 See in general Ghilarov 2000 *Oikos* 408-412; Capmourteres and Anand 2016 *Ecosphere* 1-19.

83 Refer to the definition of "game" in s 1 of the GTA.

84 Assuming that commercial purposes are synonymous with financial gain.

85 DFFE 2020 https://bit.ly/3Yu8VLX 137-138.

The argument that protected areas do not hold or keep wild animals for commercial or hunting purposes may be taken further by considering the status of protected areas more broadly. Generally, protected areas are managed by SANParks and various provincial conservation authorities as appointed by the minister.[86] These conservation management authorities are listed respectively as national or provincial public entities in terms of schedules 3A and 3C of the *Public Finance Management Act* 1 of 1999 (PFMA). According to the definitions of "national public entity" and "provincial public entity" contained in section 1 of the PFMA, these entities must be established by either national or provincial legislation and be fully or substantially funded either from the National or Provincial Revenue Fund or by way of a tax, levy or other money imposed in terms of legislation. Paterson[87] explains further that protected areas are mostly not financially self-sufficient and depend almost entirely on state funding and, to a lesser extent, on donor funding. More recently the Minister of Forestry, Fisheries and the Environment, in answering internal questions at the National Assembly, communicated that any funds generated by protected areas are internalised towards the management of protected areas and that protected areas declare no profit from these activities.[88] Protected areas are also exempt from municipal rates and taxes.[89] During deliberations held in 2003 on the then *Local Government: Municipal Property Rates Bill*,[90] SANParks took the following stance on the matter:

> SANParks is an organ of state, and the State receives all income derived by SANParks. SANParks declares no profit and is limited in its function to a statutory mandate. As a result, no part of a national park is used for business purposes (assuming that "business" by definition entails the intended making of a profit). While commercial transactions are required (and authorised by statute) for SANParks to fulfil its statutory function, those transactions are for the benefit of the State. In view of the foregoing, no part of a national park is used for business purposes … On the other hand, SANParks is required to make national parks accessible to the nation and [is] authorised to charge fees for doing so … In addition, to make national parks accessible to the people of South Africa, it is necessary to provide accommodation and related products and services. Without these, it would not be possible for SANParks to fulfil its mandate. Any income derived from the provision of these services are received by SANParks as an organ of State and used for purposes specifically authorised by statute. While commercial transactions are required (and authorised by statute) for SANParks to fulfil its statutory function, those transactions are for the benefit of the nation. The national economy benefits from the allure that South Africa's national parks have for international tourists, while the provincial and local economies within which national parks are situated benefit directly from their proximity to national assets.[91]

86 Section 38 of the NEMPAA. For a detailed list of the provincial conservation authorities, see Paterson "Biological Diversity" 546-547.

87 Paterson *Legal Framework for Protected Areas* 10, 36-38.

88 DFFE 2023 https://www.dffe.gov.za/sites/default/files/parliamentary_updates/pq2341of2023_stateownedtouristsites.pdf.

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

90 The *Local Government: Municipal Property Rates Bill* was ascended into law as the *Local Government: Municipal Property Rates Act* 6 of 2004.

91 SANParks 2003 https://static.pmg.org.za/docs/2003/appendices/030513sanparks.htm.

As explained in the quotation above, SANParks (and, by implication, other conservation management authorities of protected areas) are authorised by legislation to conduct commercial transactions in protected areas to contribute to the accessibility of these areas to the nation (and international tourists). The financial benefit that is derived from these commercial transactions is internalised by the state to fulfil its constitutional mandate to promote conservation.[92] The purposes for the declaration of protected areas are listed in section 17 of the NEMPAA,[93] while the statutory functions of SANParks are listed in section 55 of the NEMPAA.[94] Section 55(3) of the NEMPAA states further that the powers awarded

92 See s 24(b)(ii) of the Constitution.

93 Section 17 of the NEMPAA reads as follows: "The purposes of the declaration of areas as protected areas are - (a) to protect ecologically viable areas representative of South Africa's biological diversity and its natural landscapes and seascapes in a system of protected areas; (b) to preserve the ecological integrity of those areas; (c) to conserve biodiversity in those areas; (d) to protect areas representative of all ecosystems, habitats and species naturally occurring in South Africa; (e) to protect South Africa's threatened or rare species; (f) to protect an area which is vulnerable or ecologically sensitive; (g) to assist in ensuring the sustained supply of environmental goods and services; (h) to provide for the sustainable use of natural and biological resources; (i) to create or augment destinations for nature-based tourism; (j) to manage the interrelationship between natural environmental biodiversity, human settlement and economic development; (k) generally, to contribute to human, social, cultural, spiritual and economic development; or (l) to rehabilitate and restore degraded ecosystems and promote the recovery of endangered and vulnerable species."

94 Section 55(1) and (2) of the NEMPAA reads as follows: "(1) South African National Parks must - (a) manage all existing national parks and any kind of protected area listed in section 9, assigned to it by the Minister in terms of Chapter 4 and section 92, in accordance with this Act and any specific environmental management Act referred to in the National Environmental Management Act; (aA) manage world heritage sites assigned to it by the Minister, in accordance with all national cultural heritage legislation as may be applicable to and required for proper management and protection of such world heritage sites, provided that the South African National Parks' authority to enforce such legislation are provided for in a written instrument of delegation issued by the Minister to this effect under and in terms of such legislation; (aB) manage any other protected areas, which are not protected areas referred to in subsection 55 (1) (a), and as may be assigned to it by the Minister, in accordance with the provisions of all national environmental legislation as may be applicable to and required for the proper management and protection of such other protected areas, provided that the South African National Parks' authority to enforce such legislation are provided for in a written instrument of delegation issued by the Minister to this effect under and in terms of such legislation; (aC) participate in such further international, regional and national environmental, conservation and cultural heritage initiatives identified by the Minister from time to time, and then only on such terms and conditions as the Minister shall in writing provide. (b) protect, conserve and control those national parks and other protected areas, including their biological diversity; and (c) on the Minister's request, advise the Minister on any matter concerning— (i) the conservation and management of biodiversity; and (ii) proposed national parks and additions to or exclusions from existing national parks; and (d) on the Minister's request, act as the provisional managing authority of protected areas under investigation in terms of this Act. (2) South African National Parks may in managing national parks, or any other kind of protected area assigned to it by the Minister - (a) manage breeding and cultivation programmes, and reserve areas in a park as breeding places and nurseries; (b) sell, exchange or donate any animal, plant or other organism occurring in a park, or purchase, exchange or otherwise acquire any indigenous species which it may consider desirable to reintroduce into a specific park; (c) undertake and promote research; (d) control, remove or eradicate any species or specimens of species which it considers undesirable to protect and conserve in a park or that may negatively impact on the biodiversity of the park; (e) carry out any development and construct or erect any works necessary for the management of a park, including roads, bridges, buildings, dams, fences, breakwaters, seawalls, boathouses, landing

to SANParks may be exercised only to the extent that those powers are consistent with the purpose for which the protected area was declared. Therefore, one may argue that even though protected areas managed by organs of state exercise some forms of commercial activities,[95] these activities are all undertaken in furtherance of the conservation mandate.[96] For these reasons protected areas are not viewed as commercial entities which keep and hold wild animals for commercial purposes and financial gain, but rather for the pursuit of conservation.

Consequently, if the GTA does not regulate the ownership of wild animals that are kept or held in protected areas for conservation purposes, the common law rule (that was found unsatisfactory by the SALC in 1990) would still apply. As far back as 1974 Van der Merwe and Rabie[97] had already commented on the unsatisfactory consequences of the common law "escape rule" in the context of biodiversity conservation:

> In die lig van … die feit dat toestande vandag verskil van dié van die Romeinse tyd toe die beginsel dat wilde diere *res nullius* is, gegeld het, het 'n hersiening van dié beginsel nodig geword. Met die grootskaalse uitroeiing en gevolglike vermindering van die eens ryke erfenis van wilde diere in die wêreld in die algemeen en in Suid-Afrika in die besonder, kan die beginsel dat wilde diere steeds as *res nullius* beskou moet word, nie meer aanvaar word nie. Aangesien wilde diere 'n nasionale bate is wat deur die staat ten behoewe van die hele gemeenskap bewaar word, behoort eiendomsreg daaroor in beginsel aan die staat toegesê te word.[98]

Van der Merwe and Rabie thus expressed their present-day disinclination towards the Roman law classification of wild animals as *res nullius*. The writers went further by underlining the supposed profound influence of conservation and the concerning

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stages, mooring places, swimming pools, oceanariums and underwater tunnels; (f) allow visitors to a park; (fA) make, set penalties for, and enforce traffic rules in such national parks, special nature reserves, protected environments, world heritage sites or other protected areas assigned to it by the Minister; (g) take reasonable steps to ensure the security and wellbeing of visitors and staff; (h) provide accommodation and facilities for visitors and staff, including the provision of food and household supplies; (i) carry on any business or trade or provide other services for the convenience of visitors and staff, including the sale of liquor; (j) determine and collect fees for - (i) entry to or stay in a park; or (ii) any service provided by it; (k) authorise any person, subject to such conditions and the payment of such fees as it may determine, to (i) carry on any business or trade, or provide any service, which South African National Parks may carry on or provide in terms of this section; and (ii) provide the infrastructure for such business, trade or service; (l) by agreement with - (i) a municipality, provide any service in a park which that municipality may or must provide in terms of legislation; or (ii) any other organ of state, perform a function in a park which that organ of state may or must perform in terms of legislation; or (m) perform such other functions as may be prescribed."

95 Section 55(2) of the NEMPAA.

96 Section 55(3) of the NEMPAA.

97 Van der Merwe and Rabie 1974 *THRHR* 47.

98 Own translation: In the light of ... the fact that the situation today differs from that of Roman times, where wild animals were regarded as *res nullius*, a reconsideration of this principle has become necessary. With the large-scale eradication and consequent loss of the once-rich heritage of wild animals in the world in general and in South Africa in particular, the principle that wild animals must still be regarded as *res nullius* can no longer be accepted. Wild animals are a national asset which should, in principle, be assigned to the ownership of the state to be conserved for the benefit of all members of the community.

levels of biodiversity loss when reconsidering the development of the common law "escape rule". If the common law rule were still to be applied to wild animals found in protected areas managed by organs of state, no strides would in fact have been made to place protected areas in a more favourable position, as was intended by the SALC in 1990, regarding the protection of the ownership of escaped wild animals.

Realising the shortcoming, it seems that concerns about the application of the GTA in the context of protected areas are shared by the Department of Forestry, Fisheries and the Environment. In the *National Environmental Management Laws Amendment Act* 2 of 2022 (NEMLAA) the legislature has recently attempted to provide some extended protection of ownership to organs of state charged with the conservation of faunal biological resources. Section 45 of the NEMLAA proposes to amend section 3 of the NEMBA by stating that:

> [t]he Minister may, by notice in the Gazette, specify the species and the circumstances under which the State remains the custodian of faunal biological resources that escape from land under its control.[99]

The implication of this proposed amendment would be that protected areas (land under the control of the state) are removed from the ambit of the GTA. The result of this amendment would be that organs of state charged with the management of protected areas would be afforded similar or somewhat more comprehensive protection of their ownership over wild animals as was afforded to owners who keep or hold wild animals for commercial or hunting purposes in terms of the GTA. This power to be vested in the minister in terms of the proposed amendment of the NEMBA may still be flawed since protected areas may still be susceptible to loss of the ownership of wild animals by accident or misadventure in instances where the Minister had not yet published a notice to this effect in the Gazette or such notice is not detailed enough.

Therefore, the development of the common law regarding the ownership of wild animals in protected areas managed by organs of state must be revisited and reconsidered. The following section will initiate this conversation by re-examining the concepts of *res nullius*, *res publicae* and the public trust doctrine.

6 *Res nullius*, *res publicae* and the public trust doctrine

In order to correctly frame both the problem at the root of this matter and the possible solution, a focussed discussion of the relevant common law principles and terms is necessitated. "*Res nullius*" is the term used to classify property belonging to no one or property that was never the object of ownership – in this case, wild animals in their natural state of freedom – but which is capable of being privately owned.[100] An

99 Section 45 of the NEMLAA.

100 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 32; Joubert *Romeinse Reg* 162; Hall *Maasdorp's Institutes* 8th ed 6-7; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 148; Van Warmelo *Inleiding tot die Studie van die Romeinse*

additional term to be understood is "*res publicae". Res publicae* is the term used to classify property belonging to the state but ultimately intended to benefit and be used by the public.[101] As indicated, the public trust doctrine is part of South African environmental law and can be regarded as a contemporary version of *res publicae.*

These three core principles and terms are discussed below.

6.1 The common law concepts: res nullius *and* res publicae

In terms of Roman property law animals, are broadly divided into three categories.[102] The first is wild animals (or animals that are wild by nature – *ferae bestiae*).[103] Ownership of a wild animal is acquired by way of *occupatio*.[104] In order to retain ownership over these wild animals, the owner must ensure that the animal remains under his/her physical control.[105] Ownership of a wild animal is extinguished when such a wild animal regains its natural state of freedom or *in naturalem libertatem se receperit*.[106] When a wild animal escapes its confinement and reverts to the aforementioned natural state of freedom, the wild animal is

Reg 113, 124-125; Thomas *Textbook of Roman Law* 166-167; Du Plessis *Borkowski's Textbook on Roman Law* 157, 196-198. In this contribution the focus is on wild animals and game. Other things can also be categorised as *res nullius*, but that issue is beyond the scope of this contribution.

101 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 25-29; Hall *Maasdorp's Institutes* 8th ed 6-7; Van der Merwe *Sakereg* 24; Schulz *Classical Roman Law* 340-341; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 122-123; Van Warmelo *Inleiding tot die Studie van die Romeinse Reg* 112; Thomas *Textbook of Roman Law* 129; Du Plessis *Borkowski's Textbook on Roman Law* 156-157. *Res publicae* can be regarded as the ancient origin of the public trust doctrine.

102 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 32; Joubert *Romeinse Reg* 143; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 148-149; Van Warmelo *Inleiding tot die Studie van die Romeinse Reg* 113, 124-125; Thomas *Textbook of Roman Law* 166-167; Du Plessis *Borkowski's Textbook on Roman Law* 157, 196-198.

103 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 32; Joubert *Romeinse Reg* 143; Schulz *Classical Roman Law* 361-362; Hall *Maasdorp's Institutes* 10th ed 30-33; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 148; Van Warmelo *Inleiding tot die Studie van die Romeinse Reg* 113, 124-125; Thomas *Textbook of Roman Law* 166-167; Du Plessis *Borkowski's Textbook on Roman Law* 157, 196-198.

104 Joubert *Romeinse Reg* 143; Schulz *Classical Roman Law* 361; Hall *Maasdorp's Institutes* 10th ed 30-33; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 135,147; Van Warmelo *Inleiding tot die Studie van die Romeinse Reg* 113, 124-125; Thomas *Textbook of Roman Law* 166-167; Du Plessis *Borkowski's Textbook on Roman Law* 157, 196-198. *Occupatio* is an original form of acquisition by taking into possession, with the intention of becoming the owner, a corporeal thing which is susceptible to ownership (*res in commercio*) but belongs to no one. The rule is formulated as follows: *res nullius cedit primum occupanti*. (Own translation: Property, belonging to no one, yield to the first occupier).

105 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 32; Joubert *Romeinse Reg* 162; Schulz *Classical Roman Law* 361-362; Hall *Maasdorp's Institutes* 10th ed 30-33; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 148; Van Warmelo *Inleiding tot die Studie van die Romeinse Reg* 113, 124-125; Du Plessis *Borkowski's Textbook on Roman Law* 157, 196-198.

106 Joubert *Romeinse Reg* 171-172; Hall *Maasdorp's Institutes* 10th ed 31; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 148; Van Warmelo *Inleiding tot die Studie van die Romeinse Reg* 113, 124-125; Thomas *Textbook of Roman Law* 166-167; Du Plessis *Borkowski's Textbook on Roman Law* 157, 196-198.

classified as *res nullius,* and ownership of that wild animal may be acquired by way of *occupatio.*[107]

The second category is wild animals domesticated to habitually return to their owner.[108] In these cases the owner does not lose his/her ownership when the animals are out of his/her physical control but remains the owner for as long as the animals retain the *animus revertendi* or the intention to return.[109] If the animal no longer returns to the owner and loses the *animus revertendi*, the animal reverts to a state of *res nullius* and is susceptible to ownership by way of *occupatio*.[110]

The third and final category is domestic animals (*non est fera natura*).[111] These animals remain the property of the owner wherever they may go.[112] Confinement and/or physical control is not required to retain ownership.

In terms of these three categories, it is clear that for as long as the owner of a wild animal can confine or physically control the wild animal, the owner retains ownership of the animal, but when it escapes or regains its natural state of freedom, it reverts to *res nullius*.[113]

This position was deemed unsatisfactory by the SALC, and steps were taken to strengthen the position of the owners of wild animals by providing additional protection in the form of the GTA.[114] The specification in the GTA that "game" refers

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107 Schulz *Classical Roman Law* 361-362; Joubert *Romeinse Reg* 162; Van Warmelo *Inleiding tot die Studie van die Romeinse Reg* 113, 124-125; Thomas *Textbook of Roman Law* 166-167; Du Plessis *Borkowski's Textbook on Roman Law* 157, 196-198.

108 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 32-33; Joubert *Romeinse Reg* 162; Van Warmelo *Inleiding tot die Studie van die Romeinse Reg* 113, 124-125; Thomas *Textbook of Roman Law* 166-167; Du Plessis *Borkowski's Textbook on Roman Law* 157, 196-198.

109 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 32-33; Joubert *Romeinse Reg* 162; Van Warmelo *Inleiding tot die Studie van die Romeinse Reg* 113, 124-125; Thomas *Textbook of Roman Law* 166-167; Du Plessis *Borkowski's Textbook on Roman Law* 157, 196-198.

110 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 32-33; Schulz *Classical Roman Law* 361-362; Joubert *Romeinse Reg* 162; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 135, 147; Van Warmelo *Inleiding tot die Studie van die Romeinse Reg* 113, 124-125; Thomas *Textbook of Roman Law* 166-167; Du Plessis *Borkowski's Textbook on Roman Law* 157, 196-198.

111 Joubert *Romeinse Reg* 162. Animals without a wild nature (own translation). Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 148-149; Van Warmelo *Inleiding tot die Studie van die Romeinse Reg* 113, 124-125; Du Plessis *Borkowski's Textbook on Roman Law* 196.

112 Joubert *Romeinse Reg* 162; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 148-149; Van Warmelo *Inleiding tot die Studie van die Romeinse Reg* 113, 124-125; Du Plessis *Borkowski's Textbook on Roman Law* 196.

113 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 32-33; Schulz *Classical Roman Law* 361-362; Hall *Maasdorp's Institutes* 10th ed 31; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 148; Van Warmelo *Inleiding tot die Studie van die Romeinse Reg* 113, 124-125; Thomas *Textbook of Roman Law* 166-167; Du Plessis *Borkowski's Textbook on Roman Law* 157, 196-198.

114 As discussed above.

solely to wild animals that are held by owners for commercial or hunting purposes[115] creates an imbalance between the rights enjoyed by private owners of wild animals and the state agencies charged with the conservation of wild animals.[116] Private owners of game benefit from the artificial extension of their confinement and physical control of the wild animals or game by way of a certificate in terms of the GTA.[117] This benefit is not awarded to those organs of state charged with the management of protected areas in terms of relevant nature conservation legislation in order to promote conservation.

This imbalance was, as mentioned above, probably unintended, but the consequences remain severe and far-reaching.[118] In order to provide sufficient protection and support to the national conservation effort, some intervention or development is required.

This goal could be achieved by the judiciary or the legislature through the simple expediency of reclassifying the subjects of conservation efforts. Reclassifying these animals as *res publicae* would remove the inherent risks[119] resulting from the common law escape rule and would promote the conservation efforts of the state. The aforementioned reclassification would not be alien to South African law since the concepts of *res publicae* and the public trust doctrine are already firmly rooted in South African law. It would, therefore, not require much conceptual adaptation of the law.[120]

The term *res publicae* encompass property owned by the state for the use and benefit of the public.[121] In this instance the state is designated as the owner purely for the sake of convenience and such ownership should not be compared to ownership in the ordinary private law sense since the ownership entitlements do not

115 Section 1 of the GTA; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 32.

116 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 32.

117 Section 2 of the GTA.

118 As is evidenced by the cases mentioned.

119 Though the fencing certificate in terms of the GTA provides extended protection to game owners, it can be argued that it is not suitable for conservation purposes. In order for the fencing certificate to provide the required protection, positive action by all the various agencies would be required. Game owners must apply for these certificates and then ensure that all of the possible species of biodiversity are included on the certificate, and this must be kept up to date whenever there is a change. This burden and risk factor could easily be removed if the wild animals and biodiversity were reclassified as recommended.

120 See below. Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 25-29; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 122-123.

121 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 25-29; Van der Merwe *Sakereg* 24; Schulz *Classical Roman Law* 340-341; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 122-123; Van Warmelo *Inleiding tot die Studie van die Romeinse Reg* 112; Thomas *Textbook of Roman Law* 129; Du Plessis *Borkowski's Textbook on Roman Law* 156-157.

vest in the state to the exclusion of others but in the public at large.[122] In this context the state functions as a trustee and is entrusted with certain fiduciary duties.[123]

Examples of *res publicae* from the Roman and Roman-Dutch law are harbours, public roads and public buildings.[124] Van der Merwe[125] makes the claim that South African law already acknowledges national parks as *res publicae.* This claim is logical if the definition of *res publicae*[126] is applied to the way national parks or protected areas already function – they are owned and managed by the state for the use and benefit of the public.[127] It is also accepted that certain components of the natural environment are inherently considered to be *res omnium communes* and *res publicae*,[128] like public rivers and the sea.[129]

If protected areas and the biodiversity found in protected areas were to be classified as *res publicae*, it would be no great leap to extend such a classification to the biodiversity, including wild animals, found in protected areas. This could provide the same protection to organs of state charged with the management of protected areas to promote conservation that the GTA provides to private owners of game.[130]

Reclassifying wild animals held or kept for conservation purposes by an organ of state charged with the management of protected areas in terms of relevant nature conservation legislation in order to promote conservation as *res publicae* would

122 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 25-29; Van der Merwe *Sakereg* 24; Schulz *Classical Roman Law* 340-341; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 122-123; Van Warmelo *Inleiding tot die Studie van die Romeinse Reg* 112; Thomas *Textbook of Roman Law* 129; Du Plessis *Borkowski's Textbook on Roman Law* 156-157.

123 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 25-29; Van der Merwe *Sakereg* 24; Schulz *Classical Roman Law* 340-341; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 122-123; Van Warmelo *Inleiding tot die Studie van die Romeinse Reg* 112; Thomas *Textbook of Roman Law* 129; Du Plessis *Borkowski's Textbook on Roman Law* 156-157.This is comparable to the public trust doctrine, as discussed below.

124 Van der Merwe *Sakereg* 24; Schulz *Classical Roman Law* 340-341; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 122-123; Van Warmelo *Inleiding tot die Studie van die Romeinse Reg* 112; Thomas *Textbook of Roman Law* 129; Du Plessis *Borkowski's Textbook on Roman Law* 156-157.

125 Van der Merwe *Sakereg* 24.

126 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 25-29; Van der Merwe *Sakereg* 24; Schulz *Classical Roman Law* 340-341; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 122-123; Van Warmelo *Inleiding tot die Studie van die Romeinse Reg* 112; Thomas *Textbook of Roman Law* 129; Du Plessis *Borkowski's Textbook on Roman Law* 156-157.

127 Schulz *Classical Roman Law* 340-341.

128 *Res omnium communes* is property belonging to all (owned by all), and *res publicae* is property owned by the state to the benefit of all.

129 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 25-29; Van der Merwe *Sakereg* 24; Schulz *Classical Roman Law* 340-341; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 122-123; Van Warmelo *Inleiding tot die Studie van die Romeinse Reg* 112; Thomas *Textbook of Roman Law* 129; Du Plessis *Borkowski's Textbook on Roman Law* 156-157.

130 Section 1 of the GTA.

support the state in its conservation responsibilities and would ensure that the state could not relinquish these rights by accident or misadventure.[131]

The concept of *res publicae* is regarded as the ancient origin of the public trust doctrine, which will be discussed in the following section.

6.2 The public trust doctrine in South African biodiversity law[132]

The premise of the public trust doctrine is that the government, fulfilling the role of fiduciary or custodian, holds certain natural resources in trust because of their public nature, significance or scarcity, for the use and to the benefit of all its citizens.[133] Consequently, a fiduciary duty is placed on the government to protect and manage these natural resources in a responsible manner, whilst the citizens may hold the government accountable for performing its duty in safeguarding their rights to use and enjoy the benefits of the resources held in trust.[134]

Considerable strides have been made in the development of modern interpretations of the public trust doctrine, which is traditionally restricted to waterbodies.[135] A possible point of departure for rationalising the modern development of the doctrine is that

> [t]he public trust doctrine - like all common law principles - should not be considered fixed or static, but should be moulded and extended to meet changing conditions and needs of the public it was created to benefit.[136]

131 Van der Schyff *Constitutionality of the Mineral and Petroleum Resources Development Act* 112-113.

132 The purpose of this discussion is not to provide an encyclopaedic description and in-depth analysis of the public trust doctrine. A discussion of this magnitude falls out of the ambit of this study and a myriad of scholars has already undertaken it. The main aim of this discussion is to highlight the fact that the concept of the public trust features prominently in the South African environmental legislation pertaining to biodiversity conservation and protected areas and hence provides a practical recourse for the development of the common law in South Africa. Refer to Sax 1970 *Mich L Rev* 473-474; Van der Schyff 2010 *PELJ* 122-159; Van der Schyff 2013 *SALJ* 369-389; Freedman "Conservation" 273-290; Van der Schyff and Viljoen 2008 *Journal for Transdisciplinary Research in Southern Africa* 339-354; Viljoen *Public Trust Doctrine*; Viljoen 2019 *VRÜ* 172-194; Van der Schyff *Concept of Public Trusteeship* 3-8, 17-45; Viljoen 2020 *J Energy Nat Resources & Envtl L* 391-408; Van Aswegen *Different Modes of Public Participation* 6-29; Viljoen *Water as Public Property* 183-195; Blackmore 2018 *SALJ* 631-641.

133 Glavovic 1988 *SALJ* 529.

134 Kidd *Environmental Law* 11.

135 The traditional public trust doctrine mainly descends from 19th century American law where land submerged by water (tidelands), land adjacent to water, waters used in navigation, other water resources such as underground water and water-related commerce are held by the sovereign in trust for the benefit of all citizens. The citizens (as beneficiaries) have the right of the use and enjoyment of these water resources and hold the sovereign (as the trustee) accountable to protect the water resources accordingly. The development of the traditional public trust doctrine has been given significant consideration in American legal literature and jurisprudence and further discussion on these aspects in this instance would be superfluous. See Van der Schyff 2010 *PELJ* 122-159; Viljoen *Public Trust Doctrine* 33-53.

136 *Borough of Neptune City v Borough of Avon-by-the-Sea* 61 NJ 296 (1972) 309.

Modern interpretations "proclaim conservationist principles"[137] and expand the public trust doctrine to change with the needs of society and apply to natural resources in various environmental settings.[138]

The public trust doctrine finds expression in South African environmental law by forming part of the guiding environmental management principles contained in the *National Environmental Management Act* 107 of 1998.[139] According to section 2(4)(o) of the NEMA

> the environment is held in public trust for the people, the beneficial use of the environmental resources must serve the public interest and the environment must be protected as the people's common heritage.

Section 1 of the NEMA defines the "environment" as

> the surroundings within which humans exist and that are made up of- (i) the land, water and atmosphere of the earth; (ii) micro-organisms, plant and animal life; (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.

The public trust doctrine is further refined in the context of biodiversity and protected areas under section 3 of the NEMBA and section 3 of the NEMPAA respectively. Section 3 of the NEMBA describes the "State's trusteeship of biological diversity" in the following manner:

> In fulfilling the rights contained in section 24 of the Constitution, the state through its organs that implement legislation applicable to biodiversity, must –
> (a) manage, conserve and sustain South Africa's biodiversity and its components and genetic resources; and
> (b) implement this Act to achieve the progressive realisation of those rights.

Section 3 of the NEMPAA appoints the state as the trustee of protected areas by determining that:

> In fulfilling the rights contained in section 24 of the Constitution, the State through the organs of state implementing legislation applicable to protected areas must –
> (a) act as the trustee of protected areas in the Republic; and
> (b) implement this Act in partnership with the people to achieve the progressive realisation of those rights.

The combined reading of the abovementioned sections reveals that South African environmental law has adopted a wide interpretation of the public trust doctrine by incorporating the whole of the environment under the protection of the public trust. To date, the South African courts have not yet had the opportunity to interpret and

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137 Van der Schyff *Constitutionality of the Mineral and Petroleum Resources Development Act* 131.

138 Sax 1970 *Mich L Rev* 473-474.

139 *National Environmental Management Act* 107 of 1998 (hereafter the NEMA). As environmental framework legislation the NEMA is firmly rooted in the expectations of s 24 of the Constitution and provides national environmental management principles which serve as a general framework to guide the interpretation, administration, implementation and decision making of environmental management in South Africa. S 2(1) of the NEMA. Glazewski "Nature and Scope of Environmental Law" para 1.4.6.

provide an exposition on the doctrine.[140] Provisionally, features of the doctrine can be extrapolated from the legislation cited above.[141]

The immense scope of the public trust doctrine in the South African context is illustrated by expanding its application to the conservation of biodiversity and protected areas.[142] The overarching purpose of the doctrine is to safeguard all environmental resources as the common heritage of all citizens.[143] The *corpus* of the trust is the whole of the environment[144] which, among other natural resources, encompasses biodiversity, including all its components[145] and protected areas, including the biodiversity found in those areas.[146]

The "state" is appointed as the trustee of the public trust,[147] which refers to organs of state at the national, provincial and local spheres of government.[148] An "organ of state" is regarded as any state department, administration, functionary or institution exercising a power or performing a function in terms of the Constitution or exercising a public power or performing a public function in terms of any other legislation.[149] According to the observation of Van der Schyff,[150]

> [t]he state is regarded as the trustee of property impressed with the public trust doctrine, and the legislature is charged with the task of *managing the trust*. As such, an affirmative duty is imposed on the legislature to act in all circumstances in which action is necessary, be it to preserve or promote that which is held in trust. The judiciary is to *act as a watchdog of the trust*, and existing precedents have indicated that the judiciary would go beyond form to substance to ensure that the legislative authority fulfils its duty in administering the trust.[151]

Van der Schyff provides an original delineation of the respective roles and responsibilities of the legislature and judiciary towards the public trust corpus. One could add to the quoted observation above that any other concerned organs of state act as the workforce that ensures the daily operational management and supervision of the natural resources held in trust by the state. Different state departments, statutory authorities and provincial conservation agencies fulfil the role of custodians responsible for supervising the conservation, management and administration of matters relating to biodiversity and protected areas in South

140 Van der Schyff 2010 *PELJ* 124.
141 Also see in general the approach of Noeth *Common Law Perspectives* 5-9, 16-25.
142 Freedman "Conservation" 282. The public trust doctrine is also incorporated in s 12 of the *National Environmental Management: Integrated Coastal Management Act* 24 of 2008 and s 3 of the *National Water Act* 36 of 1998.
143 Section 2(4)(o) of the NEMA and the definition of "environment" in s 1 of the NEMA.
144 Section 2(4)(o) of the NEMA and the definition of "environment" in s 1 of the NEMA.
145 Section 3 of the NEMBA. Also refer to the definition of "biological diversity" or "biodiversity" in s 1 of the NEMBA.
146 Sections 3 and 17(c) of the NEMPAA. Also refer to the kinds of protected areas listed in ss 9 and 12 of the NEMPAA.
147 Section 2(4)(o) of the NEMA and s 3 of the NEMPAA.
148 Section 40(1) of the Constitution. Freedman "Conservation" 286.
149 Section 239 of the Constitution. Also see s 1 of the NEMBA and s 1 of the NEMPAA.
150 Van der Schyff 2010 *PELJ* 144.
151 Own emphasis added.

Africa.[152] Various sections in the NEMA, NEMBA, NEMPAA and other provincial environmental legislation impose obligations to be fulfilled and duties to be performed by organs of state in fulfilling their role as the trustees of the public trust. Ultimately, with special reference to biodiversity and protected areas, the trustee is required to manage, sustain, conserve, preserve and protect biological resources and protected areas.[153]

According to Freedman[154] the public trust doctrine also imposes a residual duty on the trustee in the form of a "continuous supervisory duty" to conserve, sustain and protect public trust resources. Some argue that the doctrine may also function as a principle of interpretation or a valuable tool to expand sovereign authority, whereby it continually construes and justifies positive legislative and administrative action taken by the trustee in order to perform its enforcement duties to safeguard the environment.[155] One could argue further that the duties and obligations of the trustee must always be interpreted in a manner that promotes the overarching purpose of public trusteeship – namely, to "manage, conserve and sustain South Africa's biodiversity".[156]

All South African citizens are the beneficiaries of the public trust.[157] As beneficiaries, citizens have the benefit of public access, -use and -enjoyment of the environmental resources held in trust,[158] but also to have these resources protected for future generations[159] and to keep organs of state (as trustees) accountable for their actions and the performance of their duties.

Matters relating to ownership and the alienation of the corpus of the trust cannot be deduced from the sections cited above. Blackmore[160] describes the separation between private property and the trust entity as follows:

> The public trust doctrine grants a pre-existing title in favour of the government as trustee – to regulate the use of biodiversity on private property. The application of the doctrine, therefore, provides specifically for the protection of existing public rights where there is a potential for the irreversible loss of the country's biodiversity. It would thus be incorrect to assume that private property rights take precedence over public interests. Such an assumption is likely to result in a private gain from the unsustainable destruction of biodiversity, a shrinkage of the trust entity, and an ongoing cost borne by the public. The exercising of the common-law public trust doctrine – either directly or indirectly through the application of environmental principles – cannot be regarded as a deprivation of private property...

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152 Section 54 of the NEMPAA. Also see Paterson "Protected Areas" paras 12.7.1.5 and 12.8.1; Paterson "Biological Diversity" 544-547.

153 Preamble of the NEMBA. Refer to the definition of "management" in s 1 of the NEMPAA and s 17 of the NEMPAA.

154 Freedman "Conservation" 288.

155 Araiza 2012 *UC Davis L Rev* 697; Freedman "Conservation" 289; Van der Schyff 2010 *PELJ* 143.

156 Section 3 of the NEMBA.

157 Section 2(4)(o) of the NEMA.

158 Section 2(4)(o) of the NEMA.

159 This benefit functions on the intersections between the public trust doctrine and the principle of intergenerational equity. See Slobodian 2020 *Geo Envtl L Rev* 582.

160 Blackmore 2015 *SAJELP* 114.

The writer explains that the state's responsibilities are limited to the role of a fiduciary of common property and cannot encroach on the domain of private ownership.[161] Although it cannot encroach on the domain of private ownership, this does not mean that private property rights are superior to the fiduciary obligations of the public trust doctrine, namely, to protect common property and to safeguard public rights and interests in natural resources. Such misconceptions may lead to unjustified enrichment and the irretrievable loss and destruction of the natural resources held in trust.

Blackmore[162] explains further that the natural resources held in trust cannot be alienated or irreversibly lost by the trustee.[163] Rhul and McGinn,[164] Casey[165] and van der Schyff[166] agree that alienation would be justified only when the said alienation prioritised the rights and interests of the beneficiaries. One could add that unwarranted alienation would be particularly questionable since the trustees (organs of state) are legislatively obliged to fulfil their responsibilities toward the corpus of the trust, namely to "manage, conserve and sustain South Africa's biodiversity".[167]

This discussion illustrates how the Roman law classification of *res publica*e already forms part of the South African environmental and conservation context through the incorporation of the public trust doctrine in the NEMA, NEMBA and NEMPAA.

Following below is a brief discussion regarding the development of the common law in South Africa.

7 Development of the common law in South Africa: possibility and barriers

Sections 173 and 39(2) of the Constitution[168] are dedicated to the development of the common law. Section 173 of the Constitution[169] provides the following: "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to … to develop the common law, taking into account the interests of justice." Section 39(2) provides the following: "[W]hen developing the common law …, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." These two sections attempt to ensure that certain undesirable aspects of the pre-constitutional era, entrenched in the common law as a form of judge-made law, are not perpetuated under our fledgling constitutional democracy.

161 Also see Blackmore 2018 *Bothalia* 4.
162 Blackmore 2018 *Bothalia* 4.
163 Blackmore 2018 *Bothalia* 4.
164 Rhul and McGinn 2020 *Ecology LQ* 119.
165 Casey 1984 *Nat Resources J* 814.
166 Van der Schyff 2010 *PELJ* 128.
167 Section 3 of the NEMBA.
168 Section 8 of the Constitution regulates the horizontal application of the Bill of Rights.
169 Section 176 of the Constitution.

The discussion below will focus on the possibility of developing the common law, the barriers to the further development of the common law and a brief conclusion.

The development of the common law by the judiciary raises a concern regarding the separation of powers doctrine. State functions must be classified as legislative, executive or judicial, and each of these functions is to be performed by different branches of government.[170] Developing the common law may be seen as "making law", and that function rests with the legislature. The legislature is best suited to perform the function of law-making as it is tasked with representing the *mores* of a democratic society.[171]

The judiciary is best suited to interpret and apply the law in order to take the developing *mores* of society into account. Common law is judge-made law.[172] The courts develop the common law incrementally as a natural result of the rules of precedent.[173] The legislature is bound by law to follow particular processes in the making of law, which generally takes a long time, and it may be in the interest of justice to have a system that is more responsive. Sections 39(2) and 173 of the Constitution foresee this possibility, understanding that the courts have the inherent power to develop the common law and make provisions for this development.[174] In certain instances a rule in the common law is changed entirely, which also constitutes a development of the common law,[175] and in these instances the dividing line between the obligations of the judiciary and the legislature can become difficult to determine.[176]

Section 39(2) fulfils a dual function: first, to ensure that there are guidelines in place to manage the development of the common law and second, to ensure that the values enshrined in the Constitution are infused in the common law.[177] In *Carmichele* the court stated that "where the common law deviates from the spirit, purport and objects of the Bill of Rights, the courts have an obligation to develop it by removing that deviation"[178] and "under the Constitution, there can be no question that the obligation to develop the common law with due regard to the spirit, purport and objects of the Bill of Rights is an obligation which falls on all of our courts[,] including this one". This emphatic statement by the court has created some dissenting views on the matter. Fagan[179] argues against this view by stating that the

170 Ramosa 2009 *SACJ* 365-367.
171 Ramosa 2009 *SACJ* 367.
172 Fagan 2010 *SALJ* 612.
173 *K v Minister of Safety and Security* 2005 9 BCLR 835 (CC) para 16. Which is undoubtedly the case in private law matters.
174 Ramosa 2009 *SACJ* 368.
175 *K v Minister of Safety and Security* 2005 9 BCLR 835 (CC) para 16. See below.
176 Section 8(3) of the Constitution; Hosten *et al Introduction to South African Law* 520-522; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 7 BCLR 687 (CC) para 22; *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44. See the discussion below.
177 *K v Minister of Safety and Security* 2005 9 BCLR 835 (CC) para 17.
178 *Carmichele v Minister of Safety and Security* 2001 10 BCLR 995 (CC) para 33.
179 Fagan 2010 *SALJ* 618. See Fagan 2012 *SALJ* as auxiliary to the 2010 article.

Constitution does not expressly impose the obligation to develop the common law, but it does recognise that every court has the power to develop the common law and provides that if the court decides to develop the common law, they must do so with regard to the spirit, purport and objects of the Bill of Rights.

In *K v Minister of Safety and Security* the court identified the various ways in which the common law may be developed. The court can develop the common law (i) by changing a rule altogether; (ii) by introducing a new rule; or (iii) by determining whether or not a new set of facts falls within or beyond the scope of an existing rule. When the court decides to develop the common law in one of the aforementioned ways, the development must be done with regard to the spirit, purport and objects of the Bill of Rights.[180]

The issue at hand is that the common law "escape rule" can hamper the conservation efforts of the state since the state can lose ownership of those natural resources they are mandated to conserve and protect. In this instance, the court could, if it so wished, have changed the common law escape rule altogether. The court would then have had to decide that exercising its discretion is appropriate to promote the spirit, purport and object of section 24 of the Constitution. The second option available to the court was to create an entirely new rule dedicated to promoting the state's conservation efforts. This newly created law could have created a separate rule regarding the ownership and retention of ownership of wild animals that are the subject of conservation efforts by the state. The third option, and possibly the least intrusive option, could have been to merely determine that when the common law escape rule is read with the public trust doctrine and the various environmental and conservation statutes, it is possible to conclude that the law already provides for the distinction between wild animals that are held or kept for commercial purposes on the one hand and wild animals that are not held or kept for commercial purposes.[181] A reclassification of wild animals as *res publicae*, for example, would therefore not only be possible but it would be already part of our law and, as a result, deciding in those terms could not overstep the bounds of judicial discretion.

Both the judiciary and the legislature are able to develop the common law. If the court decides that it is appropriate, desirable and in the interest of justice to develop the common law, it must do so with due consideration to the spirit, purport and object of the Bill of Rights.[182]

In matters regarding the conservation of natural resources such as the Cape Buffalo, it would be appropriate to develop the common law and provide a practical and positive solution, since the law already makes provision for conservation.

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180 *K v Minister of Safety and Security* 2005 9 BCLR 835 (CC) paras 14-18.

181 See the discussion on the close reading the GTA above.

182 The separation of powers doctrine, for example.

8 Discussion and concluding remarks

The intended purpose of this article was to investigate the possibility of further developing the common law to provide that wild animals that are sufficiently contained in a protected area managed by an organ of state charged with the management thereof in terms of relevant nature conservation legislation in order to promote conservation are *res publicae* owned by such organ of state.

Background information on the matter was gathered from two consecutive court cases that dealt with the ownership of a valuable herd of Cape Buffalo that escaped from a protected area in the Eastern Cape. What followed was a cumbersome debate on the conditions for the application and the correct interpretation of section 2 of the GTA versus the application of the common law "escape rule" in the alternative, bearing in mind that the initial intended purpose of the GTA was to amend the common law "escape rule" to place the owners of game in a more favourable position when their game escapes from its enclosure. The central factor that contributes to this need is rooted in the contemporary importance of promoting the conservation of biodiversity. Neither one of the court cases thoroughly considered the possibility of further developing the common law in this regard. Even though the SCA's interpretation of section 2(2)(a) of the GTA significantly simplified the purpose and necessity of a certificate of enclosure as a means to retain ownership over escaped wild animals, it may possibly not be the last word on the matter in the future.

The analysis in this article on the possibility of developing the common law revealed that the abundance of biodiversity and the sheer size of protected areas in South Africa gives rise to the present-day legal significance of property rights in wild animals found in protected areas and warrant an in-depth conversation on the legislation that protects these rights. Whilst South African environmental laws do not pay special consideration to the protection of the ownership of wild animals found in protected areas managed by organs of state, the focus must be placed on revisiting the development of the common law to place protected areas managed by organs of state in a more favourable position when wild animals escape from these areas.

The necessity to revisit the development of the common law is highlighted by the discussion on the application of the GTA in the context of protected areas. A close interpretation of the definition of "game" in section 1 of the GTA demonstrated that protected areas managed by organs of state are excluded from the prospective protection against the loss of ownership of wild animals that the GTA provides. This is because, as explained above, protected areas managed by organs of state do not keep or hold wild animals for commercial or hunting purposes but rather to prioritise and ensure biodiversity conservation.

This shortcoming of the GTA compelled the need to re-examine the concepts of *res nullius* and *res publicae*, which revealed that *res publicae* may be regarded as the

ancient origin of the public trust doctrine in Roman law and can be used to further the conservation efforts of South African protected areas.

When analysing South African environmental law it was found that the public trust doctrine features prominently in South African environmental legislation pertaining to biodiversity conservation and protected areas and hence provides a practical recourse for the development of the common law in South Africa. One could argue that section 2(4)(o) of the NEMA (including section 3 of the NEMBA and section 3 of the NEMPAA) intends that all wild animals sufficiently contained in a protected area and managed by an organ of state should be classified as a *sui generis* form of *res publicae* to be held in trust by the state for the benefit and enjoyment of the people of South Africa. Hereby an unambiguous mandate and inseparable obligation is placed on relevant organs of state to hold the environment and all its various components in trust for the use and benefit of present and future generations as their common heritage. Furthermore, according to section 24 of the Constitution, it is required of organs of state as trustees of the public trust to actively pursue the management, conservation and protection of biological resources and protected areas by taking positive legislative and administrative action when performing their enforcement duties. This inalienable responsibility to protect these public rights should be regarded as of paramount importance and should not be viewed as subordinate or inferior to the protection of private rights.

Both the protected area as well as the biological resources found in the protected area could easily be reclassified as *res publicae* either by the courts' development of the common law or by legislative intervention.[183] This could be a simple yet effective way not only to support the state in its conservation obligations but also to ensure that these obligations are adhered to.

It could be argued that the responsibility to develop the common law vests in the legislature, as commented by the court *a quo,* but the scope of the envisioned development would be limited, and since the concepts of *res publicae* and the public trust doctrine are already firmly rooted in law, this would not amount to law-making. The envisioned development of the common law would therefore simply give practical effect to the public trust doctrine contained in our law.

When considering the possibility of further developing the common law to provide that wild animals that are sufficiently contained in a protected area managed by an organ of state charged with the management thereof in terms of relevant nature conservation legislation in order to promote conservation are *res publicae* owned by such an organ of state; the following concluding findings are made:

183 As indicated above, the argument can be made that the land area of protected areas (and not necessarily the biological resources thereon) is already considered *res publicae*.

(a) A close reading of the definition of "game" in section 1 of the GTA reveals that protected areas are indeed excluded from the application of the GTA and the protection that it provides.

(b) In the alternative to the application of the GTA, the application of the common law "escape rule" is found to be unsatisfactory and irreconcilable with contemporary biodiversity conservation priorities.

(c) One could argue that because biodiversity conservation is a priority, the tools provided by past generations such as the Romans could be used to repurpose special classifications like *res publicae* for matters of contemporary interest such as biodiversity conservation.

(d) The classification of wild animals which are sufficiently contained in a protected area managed by an organ of state charged with the management thereof in terms of relevant nature conservation legislation in order to promote conservation as *res publicae* is not improbable.

(e) *Res publicae* is viewed as the ancient foundation of the public trust doctrine.

(f) The public trust doctrine, and by implication the concept of *res publicae*, features prominently in the South African environmental legislation pertaining to biodiversity conservation and protected areas.

(g) The developments contemplated here could be a catalyst for rigorous future scholarly debate, which might also lead to robust judicial interpretation and legislative intervention where necessary.

(h) Both the judiciary and the legislature are responsible for the development of the common law and are charged with the obligation to infuse the common law with the values enshrined in the Constitution and the Bill of Rights.

(i) These cases pose unique challenges to the judiciary, which should not be hamstrung when they make decisions in this regard. Similarly, the legislature should ensure that they provide the courts with the necessary tools to give effect to the spirit, purport and object of section 24 of the Constitution.

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List of Abbreviations

DFFE	Department of Forestry, Fisheries and Environment
Ecology LQ	Ecology Law Quarterly
Geo Envtl L Rev	Georgetown Environmental Law Review
GTA	Game Theft Act 105 of 1991
J Energy Nat Resources & Envtl L	Journal of Energy and Natural Resources Law
Mich L Rev	Michigan Law Review
NEMA	National Environmental Management Act 107 of 1998
NEMBA	National Environmental Management: Biodiversity Act 10 of 2004
NEMLAA	National Environmental Management Laws Amendment Act 2 of 2022
NEMPAA	National Environmental Management: Protected Areas Act 57 of 2003
Nat Resources J	Natural Resources Journal
PELJ	Potchefstroom Electronic Law Journal
PFMA	Public Finance Management Act 1 of 1999
SACJ	South African Journal of Criminal Justice
SAJELP	South African Journal on Environmental Law and Policy
SALC	South African Law Commission
SALJ	South African Law Journal
SANBI	South African National Biodiversity Institute
SCA	Supreme Court of Appeal
Stats SA	Statistics South Africa
Stell LR	Stellenbosch Law Review

THRHR	Tydskrif vir Hedendaagse Romeins-Hollands Reg / Journal of Contemporary Roman-Dutch Law
TSAR	Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law
UC Davis L Rev	University of California, Davis Law Review
VRÜ	Verfassung und Recht in Übersee