THE INTERPLAY BETWEEN THE PUBLIC TRUST DOCTRINE AND BIODIVERSITY AND CULTURAL RESOURCE LEGISLATION IN SOUTH AFRICA: THE CASE OF THE SHEMBE CHURCH WORSHIP SITE IN TEMBE ELEPHANT PARK IN KWAZULU-NATAL

Andrew Blackmore
THE INTERPLAY BETWEEN THE PUBLIC TRUST DOCTRINE AND BIODIVERSITY AND CULTURAL RESOURCE LEGISLATION IN SOUTH AFRICA: THE CASE OF THE SHEMBE CHURCH WORSHIP SITE IN TEMBE ELEPHANT PARK IN KWAZULU-NATAL*

Andrew Blackmore

This document can be cited as

Andrew Blackmore, Head of the Integrated Environmental Management and Protected Area Planning Section of the Scientific Services of Ezemvelo KZN Wildlife, Honorary Research Fellow in the School of Law, University of KwaZulu-Natal and PhD Candidate, University of Tilburg, Holland. Email: Andy.Blackmore@kznwildlife.com.

Published under a Creative Commons Attribution-NonCommercial-NoDerivs 2.0 License

* This paper is part of a series of papers forming a PhD which is focussed on exploring the significance and scope of the Public Trust Doctrine in the conservation of biodiversity, and management of protected areas in South Africa.
TABLE OF CONTENTS

1. Introduction 3

2. Background to the Tembe Elephant Park and Surrounds 3
   2.1 Biological Significance of the Tembe Elephant Park 3
   2.2 Cultural Significance of the Tembe Elephant Park and Surroundings 5
   2.3 Church of Nazareth Baptists (Shembe Church) 6

3. Analysis and Discussion 7
   3.1 The Public Trust Doctrine 7
   3.2 Public Trust Doctrine in South African Conservation Jurisprudence 8
   3.3 Public Trust Doctrine in South African Heritage Jurisprudence 10
   3.4 The Protected Area and Disturbance 11
   3.5 Protected Areas and Spiritual Sites 12
   3.6 Cultural Heritage 14

4. Conclusion 14
1 INTRODUCTION

Nature reserves with other protected areas comprising less than 6 percent of South Africa’s land mass remain vulnerable to activities and disturbances that conflict with the purpose for which they were established such as isolation of protected areas from neighbouring natural areas or other protected areas, loss and fragmentation of habitat. Protected areas are also subjected to human-induced actions such as recreational and consumptive use of the natural resources, and development of management and tourism related facilities. It is these actions that, either individually or cumulatively, negatively impact the integrity of the protected area and the biodiversity therein, as well as livelihood of those who depend on environmental services like clean water, which are provided by the protected area. Thus it is important to ensure that decisions taken within protected areas do not undermine biological conservation values or the integrity of the protected area.

This paper analyses the establishment of an unauthorised and ad hoc open air Shembe religious site within the Tembe Elephant Park, which is located in northern KwaZulu-Natal, South Africa by using the public trust doctrine.

2 BACKGROUND TO THE TEMBE ELEPHANT PARK AND SURROUNDS

2.1 Biological Significance of the Tembe Elephant Park

South Africa is ranked as the third most biologically diverse country in the world, and contains three ‘Centres of Endemism’ or global ‘Biodiversity Hotspots.’ The Maputaland-Pondoland-Albany Hotspot, within which the Tembe Elephant Park is located, is estimated to contain a minimum of 2500 species of vascular plants, and of these at least 230 species/infraspecific taxa are endemic or near endemic to the region. Other endemics include a mammal (14 at subspecies level), 23 reptiles, three frogs, and eight fresh water fish. In addition, the southern area of the South-eastern African coast Endemic Bird Area overlaps with this Hotspot. This overlapping area contains more than 472 species of birds (approximately...
60 percent of South Africa’s total, and with five species endemic/near endemic to the Hotspot.\textsuperscript{12}

Tembe Elephant Park is located within the core area of the Maputaland-Pondoland-Albany Hotspot and contains rare vegetation types as well as rare plant and animal species.\textsuperscript{13} The park is approximately 30,000 ha\textsuperscript{14} in extent and its northern limit is the international boundary between South Africa and Mozambique, and encompasses a significant representative sample of the endangered Sand Forest\textsuperscript{15} – which is poorly conserved elsewhere in this region.\textsuperscript{16} Sand Forest comprises a wide variety of rare and unusual plant and animal species, including several endemics. Of the total number of plant species endemic to the Maputaland Centre, 30 are associated with Sand Forest and 20 exist solely within this vegetation type.\textsuperscript{17}

Figure 1: Location of the Tembe Elephant Park within the Maputaland-Pondoland-Albany Biodiversity Hotspot.

12 ibid.
13 ibid.
14 Declaration as a nature reserve in accordance with section 23 of the National Environmental Management: Protected Areas Act 57 of 2003, Extraordinary Provincial Gazette of KwaZulu-Natal, No 83 of 30 August 2012.
15 In Mozambique this forest type is known as “licuati forest”.
The park was set aside by the late iNkosi (Chief) Msimba Tembe, to establish a secure sanctuary for the last naturally occurring population of African elephant (*Loxodonta africana*) in KwaZulu-Natal, primarily to protect life and property of the local people from damage and injury by the free roaming elephants. iNkosi Msimba also envisioned to protect the largest population of Livingstone’s Suni (*Neotragus moschatus*) in Southern Africa, as well as other naturally occurring fauna and important vegetation types – including the endangered Sand Forest.\(^\text{19}\)

Initially, the protected area’s northern border was left open allowing elephants to continue their normal migratory patterns into Mozambique.\(^\text{20}\) At that time, poaching for meat and ivory and the recent civil war in Mozambique were the key threats to the elephant roaming in the coastal. Elephant were killed or injured by the military for ivory, or were injured or killed by landmines during this war.\(^\text{21}\) The then KwaZulu Department of Conservation made a decision in 1989 to elephant proof the northern South African - Mozambique boundary to confine the resident elephant in the protected area. The purpose was to make the existing population serve as a seed population to restock the southern Mozambique areas on the establishment of the Usuthu-Tembe-Futi Transfrontier sub-Conservation Area. This was a sub-component of the broader Lubombo Transfrontier Conservation Area.\(^\text{22}\) The containment of the elephant within, and the subsequent expansion of, the Tembe Elephant Park has resulted in significant impacts on the vegetation therein, and particularly on the sensitive Sand Forest. This has prompted research on the concern\(^\text{23}\) and the conservation agency took steps to slow or halt the rate of increase in the number of elephant.\(^\text{24}\)

### 2.2 Cultural Significance of the Tembe Elephant Park and Surroundings

South Africa, including the Maputaland region in which the Tembe Elephant Park is located, is a culturally diverse country. The park and surrounding areas have been recorded as containing stone flakes and stone tools that date back to between 300,000 and 1.7 million years BP.\(^\text{25}\) The archaeological record also indicates an array of early and late Iron Age pottery, grinders and ceramic fragments – the oldest of which date back to first Bantu-speaking agriculturists that entered KwaZulu-Natal from Eastern Africa approximately 1600 years ago.\(^\text{26}\) The cultural significance of the area is also related to a fusion of Tonga, Swazi, and Zulu cultures there – overlain by an influx of refugees during the 1815 Zulu Wars and later during the Mozambican War (1975-1992).\(^\text{27}\) The area has also evolved culturally and economically as a ‘frontier life style’, following the division of the Mabudu chiefdom in the British South Africa and Portuguese Mozambique nations by the 1875...
MacMahon Award. This award supported most of Portugal’s claims over those of Great Britain. The boundary was not, however, put into effect until 1888, when a joint boundary commission comprising the United Kingdom, Portugal, Swaziland, and the South African Republic was established to resolve the remaining boundary disputes between Mozambique, Swaziland and South Africa. In respect of the Mozambique/Natal boundary, the resolution of the commission was recorded in Article III of an Anglo-Portuguese Treaty of 11 June 1891 which states that ‘Great Britain engages not to make any objection to the extension of the sphere of influence of Portugal, south of Delagoa Bay, as far as a line following the parallel of the confluence of the River Pongolo with the River Maputo to the sea-coast’.

Despite this history and concomitant political separation, local communities continued to traverse the border on a daily basis and formally exchange produce and other goods at the weekly border market at KwaPuza. Thus this area a cultural identity which is dissimilar to the Portuguese-influenced Tonga in the north and the Zulu nation to the south.

2.3 Church of Nazareth Baptists (Shembe Church)

Religious events within protected areas are common, and in some cases they are actively encouraged – such as church services, weddings, celebrations of religious holidays and memorial services. While most of these events make use of existing facilities such as chapels and picnic spots, others take place in natural areas and occasionally in areas classified as ‘wilderness’. The latter category, in accordance with the permissions granted, may not result in any significant damage or the use of vehicles off the established road network. Furthermore, protected areas in KwaZulu-Natal, and elsewhere, contain spiritual sites such as graves of various ancestors and leaders and sacred rock art paintings and etchings. Many sites are still visited and used by people for cultural and spiritual reasons.

The Church of Nazareth Baptists (known as the Shembe Church) was founded by the Zulu healer-prophet Isaiah Shembe (1870-1935) in the early 20th Century, following a revelation and covenant on Nhlangakazi mountain in central KwaZulu-Natal. The followers of this religion revere Isaiah Shembe as an African ‘messiah’. According to Shembe lore, God conferred on him the founding principles (mixture of Zulu tradition and Christianity) of the Church, and extraordinary powers to heal the sick, to interact with and command animals, and to communicate with the universe and spiritual beings. Over time, the Shembe Church has become a prominent religion in KwaZulu-Natal and beyond, with over six million followers.

33 Wilderness is defined as an area “for the purpose of retaining an intrinsically wild appearance and character or capable of being restored to such and which is undeveloped and roadless, without permanent improvements or human habitation” (Section 1, National Environmental Management: Protected Areas Act 2003).

34 For example, the graves of King Shaka’s ancestors in the eMakhosini Ophathe Heritage Park, KwaZulu Natal, and Rhodes’s burial place in the Matopos National Park Zimbabwe.

35 Many of the rock art shelters in the Ukhahlamba-Drakensberg Park World Heritage Site are considered to be shrines or reliquaries of San ancestors, which are still revered in local San communities.

36 The presence of this living heritage within protected areas was the key objective requiring the incorporation of the provision in sub-section 4(3) that provides for co-management and harmonises the management of cultural resources.

37 Now the site of an annual pilgrimage for the Shembe Church, on the first Sunday of the New Year.

ANALYSIS AND DISCUSSION

3.1 The Public Trust Doctrine

The common law public trust doctrine is considered to have its origins in the Justinian Institutes of Roman law.\textsuperscript{41} The public trust doctrine was evolved in the context of the public rights over submerged land under navigable waters. Resultantly, the submerged land under navigable waters was considered as a common property. This concept of common property, and therein public rights, were subsequently incorporated into the Magna Charta and became a part of English common law, where the Crown held these lands for the benefit of its subjects.\textsuperscript{42}

The recognition of the importance of the doctrine in safeguarding the public interest has been advanced in the United States of America since its debut in \textit{Illinois Central Railroad Company v Illinois}.\textsuperscript{43,44} Further, the role of the doctrine in environmental decision-making has been advanced by various scholars. For example, in his seminal article, \textit{The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention}, Joseph Sax introduced the concept of using the public trust doctrine as a tool for judicial protection of natural resources. He argued that the "central substantive thought" in public trust

---

\textsuperscript{39} South Africa, Act 57 of 2003. Hereafter referred to as NEMPA.
\textsuperscript{40} South Africa, Act 25 of 1999.

The Shembe Church traditionally use open-air places of worship that typically comprise a mown-grassed area, with white-painted rocks placed in a circle to demarcate the ceremonial site.

Recently, conservation staff working with the Tembe Elephant Park, who are also members of the Shembe Church, cleared an area of approximately 400 m\textsuperscript{2} of potentially sensitive vegetation to establish a place of worship near to their accommodation within the protected area. The establishment of the place of worship triggered a question whether such action was in accordance with the purpose and conservation use of the protected area. Furthermore, given the process followed in identifying the site and its use thereafter, the Shembe staff asserted that the site constituted a heritage site in terms of the National Heritage Resources Act, 1999, and as such, senior management were both duty bound and legally bound to ensure that the site was retained and protected for worship.

The objectives of this paper are threefold. These are to evaluate:

a) The role and significance of the Public Trust Doctrine in protected area management with particular reference to the establishment of the Shembe worship site.

b) Whether the establishment of a Shembe worship site within a protected area is in accordance with the provisions of the South African National Environmental Management Protected Areas Act\textsuperscript{39} and the Regulations thereto;

c) Whether such a site qualifies as heritage site in terms of the National Heritage Resources Act, 1999.\textsuperscript{40}

---


\textsuperscript{43} 146 US 387 (1892).

litigation is “when a state holds a resource which is available for the free use of the general public, a court will look with considerable scepticism upon any government conduct which is calculated either to reallocate that resource to more restricted uses or to subject public uses to the self-interest of private parties.” Some commentators have described the doctrine as a principle that defines the purpose of government to promote the interests of the general public rather than to redistribute public goods from broad public uses to restricted private benefit. There is no limitation placed on the nature of the term ‘public’. For this reason, the term ‘public’ not only includes the current generation as beneficiary of the trust but also future generations. The state, therefore – through its administrative organs, for example the conservation agency – has a duty to administer, protect, manage, and conserve the resource not only for the current generation, but also has an affirmative duty or obligation to preserve the resource for future generations. Should it be shown that the state’s actions are inconsistent with the public trust, the mandate of the organ of state undertaking the trust function ought to be withdrawn. Thus, the Public Trust Doctrine represents a legal tool that enables or empowers citizens to fight unsustainable use of resources that should be protected for the common good. These resources were determined to include biodiversity and ecosystem services as was argued in National Audubon Society v Superior Court (the Mono Lake case) and elsewhere.

3.2 Public Trust Doctrine in South African Conservation Jurisprudence

Whilst the courts in the United States of America continue to debate whether the Public Trust Doctrine extends from the use of and access to waterways to biodiversity, the environmental right in section 24 of the Bill of Rights in the Constitution of the Republic of South Africa consolidated 1500 years of common law and two centuries of American case laws by making explicit that the Public Trust Doctrine in South Africa’s jurisdiction recognises current and future generations as beneficiaries of a trust duty of the state. The Bill of Rights in South Africa’s Constitution grants to everyone a right to, inter alia, have the “environment protected for the benefit of present and future generations through reasonable legislative and other measures” by “preventing pollution and ecological degradation, promoting conservation”, and finally securing “ecologically sustainable development and use of natural resources while promoting justifiable economic and social development”. The re-codification of this ‘environmental right’ into the preamble of the National Environmental Management Act makes this statute the key framework conduit to fulfil this right. The NEMA openly state the application of the Public Trust Doctrine and characterises it in a

46 Redmond, The Public Trust in Wildlife (n. 41) 250.
48 Redmond, The Public Trust in Wildlife (n. 41) 259.
50 The withdrawal of a Public Trust mandate within a South African protected area context is dealt with in detail below.
52 The Millennium Ecosystem Assessment (www.maweb.org) defines Ecosystem Services as ‘the benefits people derive from ecosystems’.
series of operating principles that guide any organ of state that exercises any function that concerns the protection of the environment. These include: placing people and their needs at the forefront of decision making by avoiding disturbances to the ecosystem, the loss of biological diversity and sites that constitute the nation's cultural heritage; uses of ecosystems are within resilience levels; impacts on people's environmental rights are to be avoided or made good. The Doctrine is further operationalised in the NEMA by giving protection to whistle-blowers who act in good faith to protect the environment. The NEMA also grants any person or group of persons – who believe that a decision taken by the state or the actions taken by a private party are, inter alia, harmful to either the environment or people's environmental rights or contrary to any statutory provision that provides for the protection of the environment – the right to approach the courts for remedies. This locus is granted not only if the relief is sought “in that person's or group of persons' own interest” – but is extended to include “the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings [for example future generations]; in the public interest; or in the interest of protecting the environment”. The NEMA further grants the court the discretion not to award costs where a person or persons have reasonably acted in pursuance of protecting the environment. Removing the deterrent of costs enables the public to bring legal action to safeguard the environment and therein ensuring the integrity of the public trust entity for current and future generations.

Within the framework of NEMA, the title to section 3 of the National Environmental Management Biodiversity Act declares the state as the sole trustee of biodiversity and in so doing endeavours to bring into South African biodiversity legislation the common law provisions of the Public Trust Doctrine. The provisions of this section, however, do not state the Doctrine, but reaffirm the rights contained in section 24 of the Constitution. As discussed herein above, these provisions are synonymous with the duties imposed on the state by the Doctrine, in that a mandatory duty is placed on all organs of state who apply, inter alia, these two statutes to fulfil the environmental right by managing, conserving and sustaining South Africa's biodiversity, and act as a trustee of protected areas in the Republic of South Africa. Section 3 of both NEMBA and NEMPA further places a duty on the state to implement the Act to achieve progressive realisation of environmental rights in the Constitution. Given that both the NEMBA and NEMPA are specific environmental management legislation established within the terms of NEMA, the application of this legislation must be guided by the NEMA principles. Furthermore, NEMBA provides a series of tools to give effect to the Public Trust Doctrine by: (a) a national biodiversity framework that provides for a co-ordinated and uniform approach to biodiversity management by, inter alia, organs of state in all spheres of government and ensuring that representative and viable samples of South Africa's biodiversity are conserved; and (b) in defining bioregions of the country and developing management plans thereto as well as supplementary biodiversity plans for the conservation of either an ecosystem or for a specific species.

Both the NEMBA and the NEMPA provide for monitoring of the achievement of aims and objectives of the legislation. While NEMBA requires any person, organisation or organ of state involved in biodiversity conservation to report regularly to the Minister, who in turn reports to Parliament on the trends and conservation status of biodiversity, the Act is silent

\[64 \text{Section } 2(1).\]  
\[65 \text{Section } 2(2).\]  
\[66 \text{Section } 2(3).\]  
\[67 \text{Subsections } 4(a)(i) \text{ and } (iii).\]  
\[68 \text{Subsections } 4(a)(vi).\]  
\[69 2(4)(a)(vii).\]  
\[70 \text{Section } 32(1).\]  
\[71 \text{Section } 32(1) \text{ (a) to (c).}\]  
\[72 \text{Section } 32(2).\]  
\[73 \text{South Africa, Act } 10 \text{ of } 2004. \text{ Hereafter referred to as 'NEMBA'.}\]  
\[74 \text{Section } 3(a).\]  
\[75 \text{Section } 3(a).\]  
\[76 \text{See the definition of Specific Environmental Management Acts, section } 1 \text{ of NEMA.}\]  
\[77 \text{Section } 38.\]  
\[78 \text{Section } 39(1)(a).\]  
\[79 \text{Section } 39(1)(c).\]  
\[80 \text{See sections 38 and } 39.\]  
\[81 \text{Section } 43.\]  
\[82 \text{See Section } 49.\]
on accountability and responsibility for the measured trends and conservation status of South Africa’s biodiversity. NEMBA is also silent on the action or actions to be taken should the responsible organ of state fail to meet its predetermined indicators that are set in place to ensure that the environmental right has been achieved and the provisions of the Public Trust Doctrine observed. In contrast, section 3 of the NEMPA specifically mandates the state to explicitly “act as the trustee of protected areas in the Republic” and to achieve the progressive realisation of the environmental right enshrined in the Constitution.83 This Act provides for the establishment of indicators against which monitoring of the performance of management authorities in achieving the objectives of the Act takes place and hence the application of the Public Trust Doctrine occurs.84 The Act also provides for the state to undertake corrective intervention where a management authority of a protected area fails to perform its duties, or under-performs.85 The state may also terminate, if needed, a management authority’s mandate to manage the protected area and assign another organ of state the mandate of the management authority.86 In case the actions of the conservation authority are inconsistent with the provision of public trust duties – by failing to adequately accomplish the requirements of NEMPA – the state may withdraw the mandate of the conservation authority.

3.3 Public Trust Doctrine in South African Heritage Jurisprudence

In contrast to NEMPA and NEMBA, and in particular NEMA, the National Heritage Resources Act (NHRA) follows a perplexing approach to the Public Trust Doctrine in conserving heritage resources – in that Section 5(1)(b)87 levies a ‘moral responsibility’ on the public ‘to act as a trustee’. In the absence of clarification in the Act, the term ‘to act’ must assume a colloquial meaning, namely to behave in a specified way or to perform or play the part of. Thus the Act appears to set in place the exact antithesis to that contemplated by the Doctrine. This is done by confusing the roles and responsibilities of the state and the public by assigning a trust responsibility on the beneficiary of the trust and restricting the state’s obligation solely to the management of heritage resources. It further appears to provide a dais for the state to relinquish its trust obligations in conserving heritage resources for current and future generations.

The question arises as to the nature of the ‘moral responsibility’ and whether it is fundamentally different from that contemplated by the Public Trust Doctrine, and whether it includes a fiduciary obligation on the public as a trustee. Common law pertaining to trusts requires any trust obligation to be clearly defined and this should spell out the uses to which the trust object is to be, or may not be applied. Likewise, a libellous breach of duty by a trustee needs to be clearly defined – particularly when such a breach could result in a significant loss in the trust object (viz. South Africa’s heritage resources). The NHRA is, however, silent on the moral duties the public are mandated to assume and thus the concept of ‘morality’ must assume a common understanding. Traditionally, a ‘moral responsibility’ is interpreted as deserving of, inter alia, blame, reward, or punishment for an act or omission – in accordance with one’s moral obligations.88 It is a common tendency, therefore, to presume that a person’s responsibility is dependent on whether that person has fulfilled a set of objectives and justifiable requirements or values on being responsible. Values are, however, considered subjective, vary across individuals and cultures, and are in many ways aligned with belief and belief systems – and thus the morals and values of an individual may not necessarily equate to those of a broader society. This is particularly relevant in a country like South Africa with its diverse cultural heritage. The individual trustee’s conduct, therefore, by either acting or, importantly, not reacting to a detrimental use of a heritage resource, risks being contra bonos mores and inadvertently non-compliant with the trust provision of the Act. This observation is particularly relevant given the NHRA’s all-encompassing and far

83 Section 3(a) and (b).
84 See Section 43.
85 Section 44(1).
86 Section 44(2).
87 “[E]very generation has a moral responsibility to act as trustee of the national heritage for succeeding generations and the State has an obligation to manage heritage resources in the interests of all South Africans” (own emphasis).
reaching definition of cultural resources. 89 Despite this risk, the Act – and particularly the principles for management of heritage resources 90 – is silent on the requirements to determine whether a trustee has acted in a ‘moral’ acceptable manner and hence brings into question whether such obligation is legally binding. The Act is, however, explicit on the duties and responsibilities to be undertaken by the state – for example ‘rights, duties and exemptions of state and supported bodies’ and ‘protection and management of heritage resources’ 91 and so on. These are predominantly those duties conventionally exercised by the trustee in accordance with the Public Trust Doctrine. The Act, therefore, appears to remove the trusteeship duties already conferred to the public, and reassigns the conventional trusteeship responsibilities to the state. This affirmation is further supported by the requirement that the state is to be treated as a trustee by any individual who intends to undertake a development activity that may impact on any component of a heritage resource – by way of an application to the heritage authority. 92 Thus the intention of a ‘trustee’ in section 5(1)(b) must be profoundly different from that contemplated in the Public Trust Doctrine.

It is recognised that a significant proportion of heritage objects, 93 as with items of biodiversity, are in private ownership, and it is likely – given the large number that may occur in South Africa – that relatively few of these have been formally protected. 94 It is thus incumbent on the owner of the heritage resource to recognise it as a heritage object, and then apply the conditions of NHRA to ensure that its integrity is not lost. Thus, it may appear that the intention of the Act with respect to moral trusteeship conferred on the public may extend no further than a requirement of the legal owner of the heritage object to safeguard that object so as to accomplish the purposes of the Act as expressed in the long title: namely to ‘empower civil society to nurture and conserve their heritage resources so that they may be bequeathed to future generations’. Whilst the Act enables the public to request the Minister or relevant member of the Executive Council 95 to declare the object as being of ‘special national significance’, 96 part of the ‘national estate’, 97 or ‘worthy of conservation’, 98 the Act fails to confer any power or legal authority 99 to the owner of the heritage object and thus falls short of providing meaningful fulfilment of the ‘empowerment’ envisioned in the long title of the Act. This observation is underscored by the absence of any provision in the Act that would enable delegation of powers or duties to a private owner of a heritage object.

3.4 The Protected Area and Disturbance

It is unlikely that the conservation agency would locate staff accommodation in a sensitive portion of the protected area, as this would potentially be in conflict with the purpose of establishing the protected area. Likewise it is unlikely that the clearing and levelling of the worship site of 400 m² (an insignificant portion of the 300 km² protected area) near or within an area designated for staff accommodation, would make a significant impact on the integrity of the protected area. Thus it could be argued that such disturbance is likely to be insignificant – warranting no further consideration by conservation authorities.

Alternatively, it may be argued that cumulatively, together with the impacts associated with elephants, tourism 100 and management infrastructure, the impact of the worship site is potentially significant at a habitat, vegetation type or protected area scale. The incremental accumulation of impacts is described by American economist Alfred E Kahn in his essay 101 regarding a...
impacts on the natural environment) are very low-
percentage contributors, the small size is taken by the
authority as an excuse to exempt them from regulation.
They conclude that ‘[i]f too many are exempted, public
goods are imperilled’.107 In addition to exemption, a
significant proportion of environmental degradation
is in one way or another positively granted by way of
a decision or other authorising mechanism.108 Thus,
by way of this reasoning, it is argued that each decision
taken by the conservation authority requires
consideration of the public trust duties of that
authority.

Further, and importantly, it is a consideration for the
conservation agency that allowing one religious group
to establish a worship site by clearing the natural areas,
may prompt others to do the same. Likewise, the
followers of the Shembe Church (or other religions
for that matter) may argue that they need to be given
the same opportunity in other protected areas.

3.5 Protected Areas and Spiritual
Sites

The NEMPA provides 12 purposes for which
protected areas may be declared,109 of which the
majority (nine) are directly related to the conservation
of biodiversity.110 The remaining three are focussed
on the provision of ecosystem services,111 tourism112
and ‘generally, to contribute to human, social, cultural,
spiritual […] development’ (own emphasis).113 Whilst
it may be argued that the establishment of a Shembe
worship site within a protected area is prima facie in
compliance with this purpose, the reading of this

102 WE Odum, ‘Environmental Degradation and the
103 RF Fuggle and MA Rabie (eds), Environmental Concerns in
South Africa: Technical and Legal Perspectives 93 (Juta and
Company Ltd 1983).
104 ibid.
105 Dave Owen, ‘Critical Habitat and the Challenge of
Regulating Small Harms’ (2012) 64 Fla. L. Rev. 141, 142.
106 Other protected areas might be vulnerable to other
religious groups wanting to create similar facilities to
further their spiritual wellbeing – citing the Tembe
case as a precedent.
107 KM Stack and MP Vandenbergh, ‘The One Percent
108 M Wood, ‘Advancing the Sovereign Trust of
Government to Safeguard the Environment for Present
and Future Generations (Part I): Ecological Realism
and the Need for a Paradigm Shift’ (2009) 39/1
Environmental Law 25, 43.
109 Section 17.
110 Included herein is the management of the
‘interrelationship between natural environmental
biodiversity, human settlement and economic
development’, which speaks directly to the ultimate
purpose of the Tembe Elephant Park as a protected
area.
111 Section 17(j).
112 Section 17(g).
113 Section 17(l).
purpose of a protected area must be undertaken within the context of the intention of the Act, which is characterised by the long title of the Act, namely: ‘the protection and conservation of ecologically viable areas representative of South Africa’s biological diversity and its natural landscapes and seascapes’. The relationship between biodiversity and spiritual enrichment has been well recognised as one of the key benefits of protected areas.\(^{114}\) This has been recognised in the Convention of Biodiversity.\(^{115}\) The relationship has also been recognised in various African multilateral agreements providing for the conservation of biodiversity.\(^{116}\) The emergent benefit that arises from the relationship between biodiversity and spiritual enrichment that protected areas provide, however, is dissimilar if not unrelated to the establishment of a worship site by the Shembe staff members. In the latter case, there appears to be no prerequisite, save for convenience, for the Shembe worship site to be located in a location typical of the indigenous character of the area. Furthermore, it appears to be uncommon for protected areas to be used for the establishment of worship sites.\(^{117}\) Dudley \(et\ al\) explored various ways in which faith and protected areas interact – with two principal values emerging. The first was the direct protection of sacred species and sites, and the second the influence of nature on follower’s beliefs.\(^{118}\) The World Wildlife Fund (WWF) expanded this research from 100 to 300 protected areas\(^{119}\) and failed to demonstrate that protected areas are either traditionally or occasionally selected to establish new places of worship – but rather continued to emphasise the importance of the establishment of protected areas to protect the existing and well established spiritual sites. Furthermore, the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage recognises the importance of cultural and spiritual heritage within protected areas.\(^{120}\) While the Convention has adopted a wide definition of cultural heritage,\(^{121}\) this recognition\(^{122}\) does not extend to include protected areas as being desirable for the establishment of new places of worship.

Whilst the purposes of establishing a protected area in the NEMPA includes contributing ‘to human, social, cultural, spiritual and economic development’,\(^{123}\) it is unlikely that this objective embraces the concept of clearing areas of natural vegetation for the establishment of a place of worship. The activity undertaken by the Shembe staff would thus be deemed incompatible with the purpose of establishing the Tembe Elephant Park. This notion is further supported by the Regulations to the Act, in that the establishment and use of the Shembe worship site may be considered an offence,\(^{124}\) as it is mandatory for authorisation to be obtained from the Management Authority in order to, \( \text{inter alia} \), ‘intentionally disturb any species or specimen in a nature reserve’,\(^{125}\) ‘cut, damage, remove or destroy or be in possession of any plant or any part thereof’,\(^{126}\) or ‘pick parts of, or cut, chop off, uproot, damage or destroy, any specimen in a nature reserve’,\(^{127}\) or undertake an organised cultural event or special activity in a nature reserve.

\(^{114}\) P Seligmann \(et\ al\), Centers for Biodiversity Conservation: Bringing Together Science, Partnerships, and Human Well-being to Scale up Conservation Outcomes 13 (\textit{Conservation International} 2007).

\(^{115}\) Preamble to the Convention.

\(^{116}\) See, for example, the characterisation of protected areas in Annex 2 of the African Convention on the Conservation of Nature and Natural Resources.


\(^{118}\) Liza Higgins-Zogib, The Spiritual Dimension of Protected Areas: Overlooked and Undervalued Quoted in Protected Areas in Today’s World: Their Values and Benefits for the Welfare of the Planet 50 (Secretariat of the Convention on Biological Diversity, Technical Series 6 2008).

\(^{119}\) ibid 119.


\(^{121}\) Cultural Heritage is defined by UNESCO as “oral traditions, performing arts, social practices, rituals, festive events, knowledge and practices concerning nature and the universe or the knowledge and skills to produce traditional crafts” (see www.unesco.org).

\(^{122}\) The same is reflected by the IUCN in their recognition of cultural heritage in protected areas. See the IUCN-WCPA Cultural and Spiritual Values Specialist Group http://www.iucn.org/about/work/programmes/gpap_home/gpap_people/gpap_tilcepa/gpap_spiritual/ Accessed 25 July 2014 and, generally, Dudley (n 117).

\(^{123}\) Regulation 54.

\(^{124}\) Regulation 33(1)(c).

\(^{125}\) Regulation 33(1)(g).

\(^{126}\) Regulation 33(1)(j).

\(^{127}\) Regulation 33(1)(j).
Management of protected areas must be in accordance with the protected area management plan.128 This plan sets in place the foundation adaptive management framework for the protected area129 based on an approach130 which excludes matters relating to human-induced disturbance other than the management of extractive harvesting of plant and animal resources.131 The plan does, however, refer to the need for compliance with the conservation agency’s internal operational policies, of which the Integrated Environmental Management Policy applies.132 This operational policy requires the protected area management to ‘avoid or reduce any adverse effects’, having undertaken or caused to have undertaken an appropriate impact assessment where adverse environmental impacts on natural or visitor environments are anticipated. Thus it is likely that the notion of a Shembe worship site within the bounds of the protected area would need to be made known to the conservation authority in order for a principled decision to be taken in an open and transparent manner.

3.6 Cultural Heritage

The National Heritage Resources Act133 views South Africa’s heritage as ‘unique and precious’, and that it cannot be renewed. It is also seen as contributing to defining the county’s cultural identity, and thus lies ‘at the heart of [of South Africa’s] spiritual well-being, and affirms the country’s diverse cultures, and in so doing shape [South Africa’s] national character’.134 The question arises is whether the establishment of a Shembe Church of Nazareth worship site in the middle of a nature reserve in South Africa constitutes cultural heritage – as claimed by those who created the site. The Act defines living heritage as ‘intangible aspects of inherited culture’ which may include cultural tradition, oral history, performance, ritual, popular memory, skills and techniques, indigenous knowledge systems, and the holistic approach to nature, society and social relationships.135 In order to qualify, the worship site must have exceptional qualities that would be determined by a heritage assessment, and to be of special provincial and national significance.136

Other than being a roughly circular area of cut grass, the Shembe worship site is devoid of cultural artefacts or objects. The practicing of the Shembe religion at that site – in a manner comparable to countless other similar worship sites in South Africa – cannot be argued as being a unique or reasonably exceptional oral tradition in order for it to qualify as a living heritage site. Thus the claim that the Shembe worship site within Tembe Elephant Park qualifies to the contrary is without substance.

4 CONCLUSION

The establishment of a Shembe Church of Nazareth Baptists worship site within the Tembe Elephant Park without permission from the Management Authority is in conflict with the National Environmental Management: Protected Areas Act. Furthermore, given its recent establishment and the absence of extraordinary or significant heritage objects or traditional oral history, the site cannot reasonably be considered protected in terms of the National Heritage Resources Act. Had permission been sought, the Management Authority would have been required to consider the application in terms of the purpose of the establishment of the protected area, the provisions of the management plan, and various operational policies that may be in force. This consideration – together with an assessment of the cumulative human-induced disturbances within the protected area – would be required to determine whether the duty of trust to safeguard the protected area and the biodiversity

---

128 Section 40(1)(b) of the NEMPA.
130 Section 6.5.1 at 46.
131 Section 6.7 at 51.
134 Preamble of the Act.
135 Section 1.
136 Section 27(a) and (b).
therein would be compromised. The cumulative impacts of seemingly small, anthropogenic disturbance pose a threat to the integrity of protected areas and thus risk undermining the conservation agencies’ ability to give effect to their trusteeship obligations. The fate of the Shembe worship site lies in the hands of the operational policies and practices of the conservation agency.

It is further concluded that South Africa’s biodiversity, and particularly the protected area legislation, embraces the contemporary understanding of the Public Trust Doctrine. South Africa’s heritage legislation, however, appears to have confused the roles of the state and the public, and in so doing renders application of the doctrine to the conservation of heritage resources problematic.
LEAD Journal (Law, Environment and Development Journal) is jointly managed by the School of Law, School of Oriental and African Studies (SOAS) - University of London
http://www.soas.ac.uk/law
and the International Environmental Law Research Centre (IELRC)
http://www.ielrc.org