REFLECTING ON SOUTH AFRICA'S RECENT JURISPRUDENCE RELATING TO ESTUARIES THROUGH THE LENS OF RIGHTS OF NATURE – IS IT PROVIDING KEY GUIDANCE OR EVIDENCE OF MISSED OPPORTUNITIES?

by
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Abstract

In the past estuaries' mouths were artificially breached in order to protect human proprietary interests. However, the Western Cape High Court, and subsequently the national Supreme Court of Appeal, recently dismissed an application to compel the authorities to protect private property against back-flooding from the Klein River estuary. The High Court of KwaZulu-Natal subsequently dismissed a similar application of the Sugar Planters Limited and two of its shareholders to prevent their low-lying farms adjacent to the St. Lucia estuary from being flooded. These two cases are of current significance as their outcomes at first glance seem to, in accordance with the contemporary global shift to environmental regulation, have favoured nature's interest over that of human beings. Ecocentrism as opposed to the traditional anthropocentric approach that favours human interests supports ecological interests and the rights of nature. Ecocentrists regard humans as part of the whole ecological community on planet earth, and claim that humans must respect nature in its own right. This shift is also reflected in South African laws, among others in the National Water Act 31 of 1998 and the National Environmental Management: Integrated Coastal Management Act 24 of 2008. The latter Act specifically provides regulation for the proper management of estuaries. The extension of interests to be taken into account in legislation and governance ecocentrism holds the potential for conflicts to arise between human and ecological interests. One particular example of such a conflict is the one between human proprietary and ecological interests in estuarine ecosystems. It is the first time since the introduction of NEMICMA that the courts have had to decide on competing human proprietary and ecological interests assumedly by grappling with the more ecocentric provisions provided in the relevant laws. Against this background this dissertation critically reviewed the two recent South African court cases related to estuaries through the lens of rights of nature. To answer the research question of whether the courts applied the more ecocentric approach to environmental regulation as integrated into the laws relevant to estuaries and thus provided guidance how to apply them, this dissertation first unpacked the theoretical background to the shifts in approaches to environmental regulation and then provided evidence of this shift in the South African environmental legal framework relevant to estuaries. After having done so, it critically analysed the two above-mentioned cases and concluded that the courts missed excellent opportunities to focus the discussion on competing human (proprietary) and ecological interest in the context of estuaries.

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List of Abbreviations/Acronyms

Abbott	David Willoughby Abbott
Abbott SCA	David Willoughby Abott v Overstrand Municipality (99/2015) (2016) ZASCA 68
Abbott WCHC HCWC	David Willoughby Abott v Overstrand Municipality (16599/2013)
BID	Background Information Document
CBD	Convention on Biological Diversity of 1982
Constitution	Constitution of the Republic of South Africa (Act No.108 of 1996)
DEA	Department of Environmental Affairs
DEAT	Department of Environmental Affairs and Tourism
DICED	Draft International Covenant on Environment and Development of 2010
DUNCHE	Declaration of the United Nations Conference on the Human Environment of 1972
DWAF	Department of Water Affairs and Forestry
EJ	Earth Jurisprudence
EMP	Estuarine Management Plan
GEF	Global Environmental Facility
GEO5	Global Environment Outlook of 2012
GG	Government Gazette
GN	Government Notice
IMP	Integrated Management Plan for 2011-2016 as approved by the National Minister of Environmental Affairs in terms of WHCA
IWP	iSimangaliso Wetland Park
IWPA	iSimangaliso Wetland Park Authority
IUCN	International Union for Conservation of Nature
IUCNAEL	IUCN Academy of Environmental Law
KZNHC	High Court of KwaZulu-Natal
La Ley	Ley de Derechos de la Madre Tierra, Ley 071 de 2010
MEC	Member of the Executive Council
MPKRE	Management Plan for the Klein River estuary for the period 2010-2015 adopted by a municipal forum in 2010
MSL	Above mean sea-level
NBA	National Biodiversity Assessment 2011
NEMA	National Environmental Management Act No. 108 of 1998
NEMICMA	National Environmental Management: Integrated Coastal Management Act 24 of 2008
NEMP	National Estuarine Management Protocol GN 341 in GG 36432 of 2013
NWA	National Water Act 31 of 1998
NGO	Non-Governmental Organisation
PCEIRNT	People's Convention of Establishment of the International Rights of Nature Tribunal of 2015
SANBI	South African National Biodiversity Institute
SSAB	State of South Africa's Biodiversity 2012
SCA	South African Supreme Court of Appeal
UCOSP	uMfolozi Cooperation of Sugar Planters
UCOSP KZNHC	uMfolozi Sugar Planters Limited v Isimangaliso Wetland Park Authority (7942/2015) (2017) ZAKZDHC
UDRME	Universal Declaration of the Rights of Mother Earth of 2010
UNEP	United Nations Environment Programme
WCHC	Western Cape High Court
WHCA	World Heritage Convention Act of 1999
World Charter	World Charter for Nature of 1982
WPEMPSA	White Paper on Environmental Management Policy for South Africa of 1997
WPNWPSA	White Paper on a National Water Policy for South Africa of 1997
WPSCD	White Paper on Sustainable Coastal Development of 2000

1. Introduction

1.1 CONTEXT

Estuaries are places on the coast where fresh water from the rivers meets seawater from the marine environment. [1] This simple definition says little about their uniqueness and functional complexity.[2] The interaction between rivers and the sea offers a high diversity of unique habitats to numerous terrestrial and marine species of flora and fauna that depend specifically on varying conditions and are adaptable to changes as they naturally happen in estuarine environments.[3] As the rainfall impacts on the river flow, so the sea tides have an influence on the seawater height, which occasionally leads to a mixing of river water and seawater. In their natural state, estuarine ecosystems regulate the salinity, sediment supply and turbidity in and adjacent to estuaries themselves. In doing so, they sustain diverse natural resources. Biodiversity in turn supports the whole productivity of the system.[4] There are 46 different types of estuaries and 291 functional estuaries situated on the South African coast.[5] Each estuary is naturally unique.[6]

Moreover, estuaries are of major importance to humans. They provide food, water and other raw materials, sequestrate carbon, regulate flooding, protect the coastal environment from storm surges and offer safe bathing areas.[7] These environmental, economic and social benefits are reasons why humans often settle near estuaries.[8] Human activities on and around estuarine environments are undisputedly advantageous in many ways for human beings. At the same time human development and presence in general often cause significant pollution and consequent degradation. This human impact threatens not only the existence of dependent species living in and adjacent to estuaries but the entire ecosystem itself.[9]

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[1] Cooper et al "Geomorphology" in *Estuaries* 6; SANBI *State of South Africa's Biodiversity (SSAB)* 26-31.
[2] Baird "Estuaries" in *Estuaries* 269; *National Biodiversity Assessment (NBA)* XV- XVII.
[3] Glavovic *Our Coast* 56-57; *NBA* 50-57.
[4] *NBA* 178; Constanza & Folke "Structure" in *Rights to Nature* 15-17.
[5] *SSAB* 29; *NBA* VI.
[6] Cooper et al "Geomorphology" in *Estuaries 6*; SANBI *SSAB* 29.
[7] *NBA* 9-26.
[8] DEAT *White Paper for Sustainable Coastal Development (WPSCD)* 2.2.2.
[9] 60% of estimated 160 fish species in South Africa are dependent on estuaries. *NBA* 10 &

According to most recent data, 43% of South Africa's estuary ecosystem types, comprising 79% of the national estuarine area, are threatened.[10] Furthermore, 13% of estuaries in South African are under development pressure or substantial habitat modification; a further 13% are under major fishing pressure.[11] Mangroves have been wiped out at 14 estuaries.[12]

Estuaries are often subject to strong conflicts between ecological and human interests. In order to resolve these competing interests, environmental law provides the necessary regulatory framework, which is underpinned by two main philosophical approaches, namely anthropocentrism and ecocentrism.[13] Whereas the anthropocentric approach to environmental regulation focuses more on environmental protection in regard to humans' interests in treating nature as an object, the ecocentric approach acknowledges the intrinsic value of nature to exist, persist and restore itself.[14] Ecocentrism is a holistic approach, promoting not only the conservation of individual things as anthropocentrism does but of whole ecosystems, not least the earth itself.[15] Its most extreme proponents even argue that the anthropocentric institution of property has to be abandoned.[16] Ecocentrism has criticised anthropocentrism for ascribing nature only instrumental or utilitarian value to human beings by promoting property, development and exploitation despite being destructive.[17] It has in the past decade led to the rise of a movement called Earth Jurisprudence, a theory of law that advocates the recognition of the interrelation of humans and nature as an "earth community".[18] Earth Jurisprudence seeks to shift the

46 & 66-84; Morant & Quinn "Influence" in Estuaries 289-293. See further Lamberth & Turpie 2003 *AfrJMarSci* 131-157.

[10] *NBA* 184.

[11] *NBA* 186

[12] *NBA* 187.

[13] Kidd *Environmental Law* 12.

[14] Emmenegger & Tschentscher 1994 *GIELR* 552-576.

[15] Purser et al 1995 *AMR* 1070.

[16] Burdon *Earth* 16-29.

[17] Cullinan *Wild* 51-52; Mason "One in All" in *Exploring* 39-43; Burdon *Earth* 30-31; Rolston 1993 *YJIL* 252.

[18] Cullinan "History" in *Exploring* 13.

legal paradigm from more anthropocentric to more ecocentric views in order to assure ecological sustainability.[19]

This shift has culminated in the recent recognition of so-called "Earth Rights" explicitly in the *Ecuadorian Constitution*[20] and indirectly in the *Bolivian Constitution*,[21] as well as in the *Universal Declaration of the Rights of Mother Earth* (UDRME).[22] These remarkable developments in environmental regulation have not bypassed South Africa: there is evidence of ecocentric elements contained in some domestic environmental laws as well. Some examples of relevance to estuaries are the National Environmental Management Act's (NEMA)[23] duty of care, the recognition of the ecological reserve in the National Water Act (NWA)[24] and most notably the recognition of the interest of the whole community in National Environmental Management Integrated Coastal Management Act (NEMICMA).[25] Because of the lack of an act specifically dedicated to estuaries only – despite the fact that these environments had been of concern due to human pressure since the 1980s – these laws[26] become crucial when dealing with human proprietary and ecological interest in estuarine contexts.

Two recent South African cases illustrate a common practical scenario of competition between human proprietary interests and the ecological interests of species of fauna and flora in and adjacent to estuaries and, which for the first time, may have tested the practicality of the abovementioned ecocentric provisions. The one case relates to the Klein River estuary in the Western Cape province and was a dispute between

[19] Burdon "Earth" in *Wild Law* 17/44.
[20] Constitucion de la Republica de Ecuador of 2008 (Ecuador's Constitution).
[21] Constitucion del Estado Plurinacional de Bolivia of 2009, which resulted in the promulgation of the secondary legislation Ley de Derechos de la Madre Tierra, Ley 071 de 2010.
[22] Universal Declaration of the Rights of Mother Earth of 2010.
[23] No. 108 of 1998.
[24] No. 36 of 1998.
[25] S 2; Cullinan "Earth" in *State* 147.
[26] However, there are other laws such as the Marine Living Resources Act No. 18 of 1998 (MRLA), the National Environmental Management: Biodiversity Act No. 10 of 20014 (NEMBA) and the National Environment Management: Protected Areas Act No 57 of 2003(NEMPA), of relevance to estuaries.

David W. Abbott (Abbott) v the Overstrand Municipality (municipality);[27] the other was a dispute between *uMfolozi Cooperation of Sugar Planters (UCOSP) v the iSimangaliso Wetland Park Authority* (iSimangaliso) regarding the St. Lucia estuary in the KwaZulu-Natal province.[28] In both cases the following situation was the matter in dispute: when estuary's mouth closes naturally, the riverine water fills it up and as a result threatens the adjacent low-lying properties with back-flooding. The St. Lucia area additionally experienced severe droughts previously that threatened the human supply with fresh water.[29] In the past, in such instances, the estuarine mouths were breached artificially. The artificial breaching was *common usus* in respect of 16% of South Africa's estuaries or, put differently, of 62% of South Africa's estuarine habitats.[30] On 20 May 2016 the KZNHC dismissed the application of UCOSP to compel iSimangaliso to artificially breach the St. Lucia river mouth to the sea.[31] Also on 20 May 2016 the SCA upheld the 1 October 2014 decision of the WCHC dismissing a similar application to compel the municipality to protect private property from the flooding of the Klein River estuary.[32] In both cases, the courts seem to have decided in nature's favour, assumedly considering the proprietary interests of the applicants, whilst applying the ecocentric provisions of NEMA, the NWA and specifically the NEMICMA. The St. Lucia case was even acclaimed in the press shortly after the decision as victory for nature,[33] which was somewhat surprising as the court only handed down its full judgement unpacking its legal reasoning on 21 April 2017.[34]

Against this background, this dissertation seeks to review the way the South African courts have recently solved, or tried to solve, two apparent conflicts between human (proprietary) and ecological interests in estuarine environments. Of specific interest is how the courts in practice sought to balance the conflicting interests and specifically

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[27] David Willoughby Abott v Overstrand Municipality (16599/2013) HCWC (*Abbott WCHC*); David Willoughby Abott v Overstrand Municipality (99/2015) (2016) ZASCA 68 (*Abbott SCA*).
[28] Umfolozi Sugar Planters Limited v Isimangaliso Wetland Park Authority (7942/2015) (2017) ZAKZDHC (*UCOSP KZNHC*).
[29] Watson "iSimangaliso" in *TheCitizen* 2016.
[30] Morant & Quinn "Influence" in *Estuaries 292; NBA* 83.
[31] DEA *Minister welcomes judgment* 2016.
[32] *Abbott WCC; Abbott SCA.*
[33] Cullinan *Environmental Rights Win* 2016.
[34] *UCOSP KZNHC.*

whether they applied the relevant more ecocentric provisions contained in South African laws of relevance to estuaries. If they did apply the identified ecocentric provisions, the question arises whether the courts provided guidance to authorities and other legal practitioners confronting issues arising from competing human and ecological interests in solving such disputes. In short, were these cases instructive in how to deal with similar disputes in the future or simply a missed opportunity?

1.2 SCOPE AND PURPOSE

The KZNHC on the one hand, and the WCHC and the national SCA on the other hand, dismissed applications to compel the authorities to breach the respective berms in estuaries of the uMfolozi River and the Klein River in order to protect adjacent private property. Bearing in mind that in the past authorities used to do as requested, especially by the two sugar planters in the St. Lucia area by artificially breaching the estuarine mouths, the aforementioned court decisions seem for the first time to have ruled in nature's interest. Purpose of the dissertation is hence to critically review the way in which the South African courts solved the dispute between the competing human proprietary and ecological species-related interests in the context of estuaries. It specifically analyses whether the courts provided some guidance to governmental authorities and other legal practitioners for the application of the more ecocentric legal provisions relevant to estuaries when required to balance the divergent private proprietary and ecological interests. The very specific purpose is to analyse the degree to which the two cases provide evidence of the continuing shift from anthropocentrism to ecocentrism in South African law and the extent to which it found consideration and understanding in South African jurisprudence forming the lens for the analysis of such cases. Though both cases raise other relevant and interesting legal questions that could be discussed more closely, the main focus of the dissertation is not the general review of the two mentioned cases.

1.3 METHODOLOGY AND STRUCTURE

As mentioned above, this dissertation seeks to critically review South Africa's recent court jurisprudence related to estuaries (specifically the Klein River and the uMfolozi River cases) through the lens of rights of nature. This dissertation comprises a desktop study, which draws from a broad base of relevant literature, legislation and case law. It first constructs the theoretical background by drawing on the philosophical developments and their impact on legislation followed by the analysis of evidenced ecocentric elements in the South African legal framework relevant to estuaries. Lastly, the study undertakes the critical analysis of the relevant jurisprudence that, as said above, comprises three decisions in two cases, delivered by the South African courts between October 2014 and May 2016. In both cases, nature's interests appear to have prevailed over human interests in situations where ecological considerations have directly come into conflict with human proprietary interests.

To facilitate this critical review, it is necessary to first understand of the different philosophical approaches underpinning environmental regulation and the recent global shift towards a more ecocentric approach. Also of importance is to reflect on the extent to which South Africa's legal framework of relevance to estuaries mirrors or contains elements of a more ecocentric approach to regulation. Therefore, before critically reviewing the abovementioned cases through the lens outlined above, the dissertation first unpacks the theoretical context in chapter two and considers the two main philosophical approaches to environmental regulation. In respect of both approaches, the dissertation examines their origins and foundations. It examines evidence of the global shift towards a more ecocentric approach to environmental legislation, most recently reflected in the recognition of rights of nature in various international and domestic legal and policy frameworks. This chapter furthermore reflects on some practical challenges legislators and authorities may face in formulating and implementing in practice the ecocentric approach to environmental regulation, and possible proposed solutions to these challenges.

Having unpacked the relevant theoretical context, the second part of the dissertation, contained in chapter three, critically reflects on the extent to which the ecocentric

approach is reflected in the legal framework of South Africa. On account of the fact that the two cases forming the focus of the dissertation dealt with estuaries, the focus of this chapter is on laws of relevance to estuaries such as NEMA, NWA and NEMICMA. In order to analyse the extent to which the recent court decisions provided guidance on the application of the respective regulation examined in chapter three, the third part of this dissertation, contained in chapter four, proceeds to critically review the two court cases mentioned above. Chapter four first presents the facts, arguments and outcomes of the two court cases. It then seeks to critically review the manner in which the courts addressed the two cases and specifically whether they applied the ecocentric elements contained in the relevant legal framework in resolving the disputes between human proprietary and ecological interests. Chapter five sets forth the conclusion.

2. Understanding 'Rights of Nature': Theoretical shifts in approaches to environmental regulation

Laws are generally based on world views, philosophies and ethics.[35] In fact, philosophical theory deals with human's moral attitude towards and their valuation of their environment that gives shape to the expected human behaviour and as such influences current policies and laws.[36] Hence, policies and laws reflect human values and mirror societal ideas.[37] Legislation regarding the human relationship to non-human nature is no exception, since human existence inevitably depends on its natural environment.[38] However, environmental laws, as opposed to other legal fields, emerged only in the 1970s with the recognition of the so-called human-made global environmental crisis. Before that, as a result of absence (or ignorance) of environmental problems, nature had not been regarded as a threat to human existence.[39] Hence, there was no or little reason for humankind to discuss its relationship to the natural environment. Only the acknowledgement of the so-called environmental crisis made serious legal consideration of the environment and the respective regulation necessary. Environmental ethics, a philosophical sub-field, engages with the human (moral) attitude towards nature, underlying the motivation for environmental regulation, and the recognition of nature's values.[40]

This philosophical discussion can be summarised under two broad ethical views founding environmental regulation: anthropocentrism and ecocentrism.[41] Although this theoretical dichotomy in environmental ethics has been criticised as practically

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[35] Biggs & Margil 2010 in *Does Nature Have Rights?* 16; Hanna et al "Property" in *Rights* 1; Horsley "Property" in *Property Rights* 87.
[36] Pojman & Pojman *Environmental Ethics* 5; Carter *Politics* 14; Burdon *Earth* 23.
[37] Burdon "Great Jurisprudence" in *Exploring* 59.
[38] Guth 2008 *VJEL* 432; Hanna & Jentoft "Human Use" in *Rights* 35.
[39] Kidd *Environmental Law* 12; McShane 2009 *Philosophy Compass* 407; Samuelsson 2010 *Environmental Values* 518; Burdon *Earth* 16-17.
[40] Hourdequin *Environmental Ethics* 5.
[41] Palmer "Overview" in *Environmental Ethics* 13-14; Kidd *Environmental Law* 14-16; Purser et al 1995 *AMR*; Kortetmäki 2013 *SATS*.

irrelevant,[42] it is of fundamental importance to understand both lines of argument. The following analysis of their origins and philosophical foundations in the next two sections of this chapter enables the reflection on ecocentric elements in South Africa's environmental law relevant to estuaries. Since the criticism levelled against anthropocentrism helped ecocentrism to evolve, there is an own sub-part devoted to this matter. Another sub-part is dedicated to the international evidence of ecocentrism showing that the mentioned shift has gained real momentum and is currently in process. Part three examines options for entrenching econcentrism in environmental regulation, against which the following chapter four discusses the evidence of the shift from a more anthropocentric to a more ecocentric approach to environmental regulation in the relevant South African legal framework. Both views cover various distinct positions. However, to get an understanding of the motivation for and reasoning of environmental regulation it suffices to distinguish between the two main paradigms only.

2.1. THE TRADITIONAL ANTHROPOCENTRIC APPROACH

2.1.1 Foundations

Anthropocentrism means, as the word stemming from the Greek itself reveals, human-centredness. It places human beings at the centre of planet earth by conferring moral value only to human beings.[43] Anthropocentrism contends that humans, as rational beings, have moral priority over nature.[44] Hence, it regards nature as valueless insofar as it does not have any use or benefit to humans.[45] Reflecting anthropocentrism graphically, one would draw a pyramid depicting the hierarchy between humans and the non-human nature showing that humans are

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[42] Norton 1984 *Environmental Ethics* 132; Minteer & Manning "Convergeance" in Nature in Common 65; Stenmark "Relevance" in *Nature in Common?* 81; McShane 2007 *Environmental Values* 170.

[43] Grey 1998 *Ethics and the Environment* 97; Graham *Lawscape* 27; Samuelsson 2010 *Environmental Values* 524.

[44] Locke "Nature" in *Big Questions*; Burdon *Earth* 44-47; Kant "Indirect Duties" in *Big Questions*.

[45] McShane 2009 *Philosophy Compass* 407-408.

superior, just below God, meaning that human beings have dominion over nature.[46] In other words, nature is treated as an object without any rights capable of possession.[47]

Although environmental law in the classic sense of environmental protection has been only recently recognised as a legal field, some regulation concerning human relationship with the natural environment has been around since the beginning of human existence.[48] As research reveals, especially Western thinking has been thoroughly anthropocentric.[49] It is held, that anthropocentrism has its roots in ancient times and was shaped by philosophers such as Socrates, Plato and Aristotle, upheld by Christian religion[50] and later developed during the Renaissance, shaped and further developed by thinkers such as Aquinas, Descartes, Bacon and Kant.[51] The early regulations concerning the natural environment hence were moulded into anthropocentric world views, which were shaped by historical developments, as human thinking on matters of life generally are.[52]

Especially the scientific revolution, and therewith industrialisation, made human interest in production and (economic) development arise.[53] These developments strengthened and furthered anthropocentric ideas. Nature hence became a lifeless machine, allowed to be used for human satisfaction as given by God.[54] Humankind was allowed to make use of its apparently limitless natural environment for its own satisfaction.[55] Consequently, the environment as such was not seriously subject to but the object of ethical concern.[56] It is argued that attributing nature only instrumental value and separating it from humans finally helped the modern concept of property to emerge. Property in fact promotes rights to land and allows human

[46] Burdon *Earth* 27-37; Keller *Big Questions* 59.
[47] Biggs & Margil 2010 *Does Nature Have Rights? 16.*
[48] Palmer "Overview" in *Environmental Ethics* 10.
[49] Burdon *Earth* 21.
[50] Burdon *Earth* 35-44; Schaab "Beyond Dominion" in *Exploring* 107; White 1967 *Science* 1205-1206; Hourdequin *Environmental Ethics* 57.
[51] Keller *Big Questions* 1-6 & 59-62.
[52] Hourdequin *Environmental Ethics* 11.
[53] White 1967 *Science* 1206.
[54] Descartes "Nonhumans" in *Big Questions* 69.
[55] Kortetmäki 2013 *SATS* 33.
[56] Nash *Rights* 17.

power over nature.[57] Humans became owners of their land with the rights to use it exclusively.[58] Anthropocentrism hence is the promoter of individual well-being.[59]

Allowing unlimited access to natural (economic) resources, environmental protection and restoration were exercised for individual human uses to further human benefit and happiness.[60] More intensive land uses were accepted, necessarily leading to change in and transformation and alteration of the natural environment causing social injustices that again led to changes in views.[61] The new focus was on (public) human rights moving away from individual benefit and pleasure to a more socially-oriented resource allocation. National parks for example were designated to ensure water supply.[62] Social justice discussions then led to land use restrictions.[63] Despite these restrictions, the value of nature was limited to human purposes and environmental protection was generally accepted as being only for human interests.[64]

With the rise of contemporary environmental concern and the consciousness about environmental issues, modern anthropocentrists admitted the arrogant exploitative human use of nature and called for more attention to the state of the planet.[65] However, they denied the upcoming assumption in the 1970s that nature might have interests for moral consideration, since, in their opinion, from a human perspective nature existed for human exploitation and transformation. Moreover, only human beings had the ability to communicate.[66] However, modern anthropocentrist argued for less present but still anthropocentric traditions such as “stewardship” rooted in the

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[57] Graham *Lawscape* 34-38; Burdon *Earth* 22 & 60; Hanna et al “Property“ in *Rights* 1. On the contrary, it is argued elsewhere that environmental law developed from the notion of property and not the latter from anthropocentrism or as a response to modern living problems without any ethical underpinning. See: Coyle & Morrow *Philosophical Foundations* 1-2 & 212-214.

[58] McGillivray & Wightman “Private Rights“ in *Justice* 144.

[59] Merchant *Radical Ecology* 63-64.

[60] Kortetmäki 2013 *SATS* 23; Locke “Nature“ in Big Questions.

[61] Burdon *Earth* 52; Merchant *Radical Ecology* 63; Passmore *Responsibility* 27.

[62] Nash *Rights* 35.

[63] Merchant *Radical Ecology* 70-71; Emmenegger & Tschentscher 1994 *GIELR* 556; Coyle & Morrow Philosophical Foundations 4-5.

[64] Wapner 2009 *JED* 205; Bosselmann “Property“ in *Property Rights* 23; Horsley “Property“ in *Property Rights* 91.

[65] Norton 1984 *Environmental Ethics* 131-132; Beckermann & Pasek “Defense“ in *Big Questions* 87, Kortetmäki 2013 *SATS* 24; Passmore *Responsibility* 3-4; Norton 1984 *Environmental Ethics* 132.

[66] Passmore *Responsibility* 20-30, 107-116, 174-188.

Christian religion and "co-operation with nature" that both denied human despotism. It embraced the notion that humankind should care for the environment and should act as steward of God, holding the duty to protect and cooperate with nature by understanding its complexity as well as making modest and effective use of it.[67] Finally, it was in humanity's own interest to take responsibility for nature and fulfil its obligation of caretaking.[68] It is moreover argued that anthropocentrism was simply inevitable. Thanks to their reason and language, human beings are the ones who developed ethics and wrote laws. Human beings make the respective decisions, which consequently are results of human thinking and therefore inevitably anthropocentric.[69] Even if the anthropocentric view accepted the moral value of other living things, humans' interest in the end had more value because it was long-term oriented.[70]

Summing up, anthropocentrism may on the one hand be seen as a general world view detached from any environmental concerns. Only with the recognition that nature might be finite and that human development was environmentally devastating, more and more regulation concerning the relationship between the natural environment and human beings was created.[71] Therewith, philosophical concern was extended from traditionally giving thought to the relationships among humans only (occasionally affecting the natural environment) to specifically analysing their relationship to their natural environment. In this general development, environmental law was underpinned anthropocentrically, whereas on the other hand anthropocentrism may be seen as the traditional paradigm within the modern philosophical field of environmental ethics.[72]

To finish this part of the first section of chapter two just a few anthropocentric examples in law are worth mentioning: probably the most prominent example is the human rights approach, guaranteeing a healthy environment to any human being and expressly stating the human self-interest at the beginning of a respective law.

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[67] Passmore *Responsibility* 28.34, 185; Merchant *Radical Ecology* 72.
[68] Kortetmäki 2013 *SATS* 27.
[69] Beckermann & Pasek "Defense" in *Big Questions* 86-87; Leib *Human Rights* 27.
[70] Varner *Nature's Interest* 121.
[71] Kidd *Environmental Law* 12-13.
[72] Emmenegger & Tschentscher 1994 *GIELR* 552.

Another example is the safeguarding of the environment through careful planning and management for the benefit not only of present but also of future human generations. [73] The concept supporting the intergenerational dimension in environmental protection is the notion of (weak) sustainable development, which would limit human development, whilst taking predominantly economic and social factors into account. [74] To ensure sustainable development the concept of stewardship established the duty, mostly on landowners or authorities, to protect the environment in general and originally to protect the burgeoning scarcity of natural resources for the benefit of the whole human community.[75] This meant that the respective present generations should protect the environment in a way that future generations could enjoy it in a way to meet their societal needs.[76]

2.1.2 Criticism

Anthropocentrism has been sharply criticised by many writers as the driving force of the actual environmental crisis.[77] Most of them make anthropocentrism responsible for the current ecological state of planet earth, reflected in deforestation, , land degradation, biodiversity loss, water and air pollution and climate change resulting in changes in ecosystems that affect human well-being and threaten human life negatively. [78] It is even argued that the anthropogenic change and irreversible destruction of the planet earth and its environment introduced a new geological epoch – the anthropocene.[79]

Long before environmental law was developed, first critics loudly pointed out how little was needed actually for life. In the middle of the 19th century industrialisation

[73] Emmenegger &Tschentscher 1994 *GIELR* 552-564; *Declaration of the United Nations Conference on the Human Environment of 1972* (DUNCHE), principle 1.
[74] Emmenegger & Tschentscher 1994 *GIELR* 565-566; Rühs & Jones 2016 *Sustainability* 4. *Rio Declaration on Environment and Development of 1992*, principle 1.
[75] Barritt 2014 *Journal of Environmental Law* 4-9; Van der Schyff "South African Natural Resources" in *Property Rights* 332-333; Brown 1984 *Ecology L.Q.* 499-525; Wood 2009 *Environmental Law* 80; Koons "Principles" in *Exploring* 51-52; Van der Schyff 2010 *PER/PELJ* 126-127.
[76] UN *Our Common Future*; Brown 1984 *Ecology L.Q.* 524; Purser et al 1995 *AMR* 1074.
[77] Horsley "Property " in *Property Rights* 90; Leib *Human Rights* 27.
[78] Millenium *Ecosystems* 1-24; UNEP *Geo5* ch 1.
[79] Kotze "Reimagining" in *Scientific Contributions* 3.

caused not only hope for better lives but also scepticism behind the uncontrolled economic growth.[80] Later it was warned that there was no technical solution for the unregulated use of natural resources resulting from the wrong assumption that they were infinite. This uncontrolled use of common goods (land and other natural resources) might in fact lead to their overuse and depletion of the respective resources that finally might threaten human life.[81] Humankind's devastating and destructive attitude towards its environment resulting from the belief that human beings were independent and superior to the rest of nature has been criticised as being simply arrogant.[82]

A new wave of criticism was raised approximately in the 1990s. Now retrospectively, anthropocentrism has been criticised for having facilitated industrialisation with the result of uncontrolled human expansion and economic growth as well as exploitation of resources.[83] Anthropocentric attitudes that human beings are entitled to exploit natural resources for their own benefit independently of the rest of nature were a myth and initiated wrong responses to environmental issues. The human decision to further human well-being was identified as the cause of today's earth status.[84] This anthropocentrically-promoted progress specifically was criticised as responsible for the altering and degradation of planet earth in such a manner and magnitude that had never been seen before. The term "sickness of the biosphere" is used to describe the situation.[85] It is held that humankind has overshot earth's capacities simply because of anthropocentrically-driven economic growth and material (over-) consumption.[86]

Humankind is accused of being ignorant of ecological rules and natures's beauty,[87] which is also referred to as human short-sightedness.[88] It is held that human inability to recognise that humankind is just a part of the natural environment was the cause

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[80] Alexander "Property" in *Property Rights* 117-127.
[81] Hardin 1968 *Science* 1243-1248; Bosselmann "Property" in *Property Rights* 24-25.
[82] Carson *Silent Spring* 261.
[83] Berry *Evening* 6-12.
[84] Bugge "Fundamental" in *Rule* 4-8.
[85] Burdon *Earth* 17-19.
[86] Cullinan *Wild* 41-48; Purser et al 1995 *AMR* 1069; Leopold *Sand County* 240-243.
[87] Bosselmann "Grounding" in *Rule* 76; Berry *Dream* 13-21 & 205.
[88] Hanna & Jentoft "Human Use" in *Rights* 38.

of the miserable state of affairs.[89] It is further held that by ignoring the wholeness of the environment and the interdependence between resources the crisis is even more accelerated.[90] The well-being of each individual part of the earth is namely dependent on the well-being of the planet itself.[91] Without listening carefully to nature's language and taking care of it, humankind is threatening its own and existence, that of other species and even the planet itself.[92]

A very specific criticism levelled in this context is the one against the anthropocentric concept of property.[93] The institution of property – originally a social invention guaranteeing a right against other persons regarding and not describing the relationship between humans and the environment –[94] is identified as one of the driving forces of the current environmental crisis.[95] It is held that the notion of a world created through human anthropocentric philosophy and law – also called the homosphere – was wrong in defining nature as property (only supporting consumerism).[96] The homosphere is pointedly accused of failing the environment.[97] The argument is that the fact that property separates humans from nature makes the environment the object of satisfaction of human needs: but in reality human individuals did not live in a "vacuum".[98] Property rights in particular supported human domination over nature. Furthermore, by ignoring the devastating effects consequent upon the free exercise of inherent rights, the notion of property made environmental law even more necessary.[99] Hence, the notion of property is sometimes even believed to be incompatible with environmental law as such: which is why it is argued that it should be abolished.[100] Ecocentrists hold that parts of nature cannot be reduced to property since all nature is regarded as a common heritage of life,

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[89] Berry *Evening* 21-44.
[90] Wood 2009 *Environmental Law* 83.
[91] Berry "Rights" in *Exploring* 228.
[92] Berry *Evening* xiii-xiv.
[93] Burdon *Earth* 27.
[94] Freyfogle "Taking" in *Property Rights* 45; Graham *Lawscape* 135.
[95] Horsley "Property" in *Property Rights* 87.
[96] Cullinan *Wild* 48-72; Cullinan "Governing" in *State* 3/12.
[97] Bosselmann *Earth* 117.
[98] Burdon *Earth* 27-28.
[99] Burdon *Earth* 64-65.
[100] Cullinan *Wild* 122 &163.

elsewhere referred to as the global commons.[101] The criticism levelled against anthropocentrism urges "human intimacy" with the earth.[102]

Humankind's own-centredness has been criticised as useless since human laws are able to facilitate environmental change but not at the same time effect necessary ecological changes to prevent harm.[103] The so-called traditional conservation movements are criticised as failing in their goals since they are led purely anthropocentrically.[104] Moreover, it is held that the anthropocentric natural resource management in fact legalised environmental damage. Despite set limits, the respective permit systems in fact allow the use and exploitation of natural resources in question.[105] Overregulation, authorities' discretion and permit systems failed in their primary goal of environmental protection but made destruction all the more possible despite mitigation measures.[106] The fight against pollution and resource depletion was not enough to overcome the environmental crisis.[107] Specifically, modern land uses are made responsible for the remarkable environmental change.[108] Hence, governments failed in their mandate to stop the environmental threat.[109]

It is believed that because humankind has misunderstood the universe's own rules only a new world view, a new rule of law accepting of nature's intrinsic rights might help to save the planet.[110]

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[101] Mason "Principles" in Exploring 42, Bosselmann *Earth* 109.
[102] Berry *Dream* xii-11.
[103] Bosselmann *Two Worlds* 139-141; Bosselmann "Grounding" in *Rule* 85-86; Leib *Human Rights* 27.
[104] Naess "Shallow" in *Environmental Ethics* 129; Leopold *Sand County* xviii; Leopold "Ecocentric Ethics" in *Environmental Ethics* 224- 231.
[105] Wood 2009 *Environmental Law* 44.
[106] Wood 2009 *Environmental Law* 52-60.
[107] Naess "Shallow" in *Environmental Ethics* 130-131.
[108] Lobley & Winter "Introduction" in *What is Land For?* 1.
[109] Cullinan *Wild* 85.
[110] Cullinan *Wild* 79.

2.2 THE CONTEMPORARY ECOCENTRIC APPROACH

2.2.1 Foundations

Opposed to anthropocentric views, ecocentrism is an ethical standpoint of environmental ethics putting emphasis on the earth-centeredness.[111] It acknowledges an intrinsic value of nature, focusing not only on human beings but also on the environment itself.[112] Ecocentrism emerged approximately with the introduction of environmental law in the 1970s.[113] Its emergence could be seen in two ways. On the one hand it could be seen as a logical (not to say natural) step-by-step development within environmental ethics by turning away from human beings being concerned only with their relation to land to taking nature into moral consideration as well.[114] This was a move away from taking into account present and future human generations to finally having regard to any other life-form or part of nature itself.[115] These developments were also described as taking nature's rights seriously.[116] On the other hand, ecocentrism could be seen as the direct result of the above-outlined criticism levelled against anthropocentrism.[117] In fact, ecocentrism might potentially develop from a contemporary approach to environmental ethics to a modern world view in general (as opposed to anthropocentrism developing from a general world view to the traditional standpoint in environmental ethics).[118]

With the emergence of ecology/biology and therewith the growth of knowledge about human understanding of nature, claims for extension of moral consideration from human-centeredness to more eco-centeredness increased. Humankind, should include its interaction with nature into its moral concern.[119] Ecocentrists generally acknowledge that nature has value and therefore the right at least to exist

[111] Burdon *Earth* 23.
[112] Kidd *Environmental Law* 15.
[113] Minteer "Unity" in *Nature in Common?* 3.
[114] Emmenegger & Tschentscher 1994 *GIELR* 547-548
[115] Nash *Rights* 4; Stone *Trees* 1.
[116] Emmenegger & Tschentscher 1994 *GIEL*R in general.
[117] Burdon 2012 *AustlJLegPhil* 30; Rolston 1993 *YJIL* 262; Leopold *Sand County* 251; Greene "Cosmology" in *Exploring* 126.
[118] Cullinan *Wild* 79.
[119] Nash *Rights* 4 & 64; Leopold *Sand County* 189 & 238; Burdon *Earth* 74.

independently from the worth human accorded to it.[120] The call for respect for nature hence originates from the acknowledgement that the environment has inherent value by its own nature or simply because of its pure existence. Human respect for nature should find expression in the protection and promotion of nature's good.[121]

Parallel to anthropocentric predominance as early the beginning of the 20th century it was scientifically recognised that humankind was just part of one bigger interdependent community, which was dependent on a healthy and sound biosystem.[122] The acknowledgement that life as such carries value led to the acceptance that animals and plants as living things have value too. Moreover, it is recognised that plants, like animals, are self-maintaining and reproductive systems.[123] This is the reason why first claims for respect for nature accord value to individual living things such as animals and plants "only".[124] This community of human beings, animals and plants is called the Earth's Community of Life. It does not allow a separation of humankind and the remaining living environment.[125]

The recognition that living nature pursues its own values and purposes makes human beings responsible for their living environment. The fact that human beings might threaten identified natural value correlatively causes the human obligation to care about it.[126] Hence, all living things are to be encompassed in human moral consideration regardless of any ability to reason. Simply their inherent values are reason enough to regard all living species as equal and morally important.[127] As a result there is no space for humankind's superiority any more. On the contrary, humankind is asked to respect earth's individual organisms by *inter alia* not causing harm to the members of Earth's Community of Life, respecting their inherent freedom rights and not interfering in their habitat.[128]

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[120] Nash *Rights* 10-11.
[121] Taylor *Respect* 13 & 71.
[122] Nash *Rights* 37-39.
[123] Rolston 1993 *YJIL* 264.
[124] Palmer "Overview" in *Environmental Ethics* 18; Keller *Big Questions* 12; Emmenegger & Tschentscher 1994 *GIELR* 578.
[125] Taylor *Respect* 44.
[126] Rolston 1993 *YJIL* 262-263.
[127] Emmenegger & Tschentscher 1994 *GIELR* 578.
[128] Taylor *Respect* 172-192.

Aldo Leopold (Leopold) then paved the way for a more holistic approach, resulting in an expansion from considering individual living things to whole ecosystems, requiring inanimate things and whole ecosystems to be valued also.[129] According to Leopold, all parts of the land (including everything on, over or in the earth, meaning soil, water, plants and animals) must cooperate, not compete with each other since, in his words:

> "A thing is right when they tends to preserve the natural integrity, stability and beauty of the biotic community. It is wrong when it tends otherwise".[130]

Leopold promoted love toward earth and distracted thinking, or tried to do so, from anthropocentrism, because human beings are part (and not conquerors) of their natural environment: they belong to the respective community that has to preserve earth's vitality.[131] The complex interconnectedness of each individual part of nature was similarly pointed out elsewhere, adding that ecosystems are as vital as animals and plants.[132] The crux of the theory is that ecosystems deserve moral consideration as well, as they are able to support themselves as living organisms do. Finally, there was only one earth that deserved respect and love to make its community of human beings, animals and the rest of earth's nature flourish.[133]

In fighting against the anthropocentrically induced and the increasingly frightening environmental crisis for the sake of the earth's well-being, Earth Jurisprudence (EJ) emerged. It is a contemporary global environmental movement promoting an emerging theory of law that reflects an ecocentric philosophy.[134] Wild Law gives practical effect to it.[135] EJ has its roots in Leopold's writings and seeks to convince humankind to take care of the whole earth community in order to save existence in general.[136] Its proponents argue that only by understanding the universe's rules can

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[129] Palmer "Overview" in *Environmental Ethics* 20; Leopold *Sand County* xix; Leopold "Ecocentric Ethics" in *Environmental Ethics* 223.
[130] Leopold *Sand County* 189.
[131] Leopold *Sand County* 190-240.
[132] Naess "Shallow" in *Environmental Ethics* 130-131.
[133] Rolston 1993 *YJIL* 266-268; Leopold *Sand County* 224.
[134] Cullinan "Earth" in *State* 13; Burdon "Earth" in *Wild Law* 19/44.
[135] Burdon 2011 *IUCNAEL* 5; Cullinan "Earth" in *State* 145; Cullinan *Wild* 13. However, the terms Earth Jurisprudence and Wild Law (*op cit*) are often used interchangeably.
[136] Leopold *Sand County*; Cullinan "Governing" in *State* 3-4/12; Cullinan "Earth" in *State* 145.

human beings find the way back into the wider earth community.[137] They call for a new human consciousness regarding the universe.[138] To ensure survival, proponents of EJ call for a new paradigm and system of law.[139]

EJ is based on the idea that the universe followed the rule of law of the Great Jurisprudence. This means that the universe, namely the earth, was primarily a self-regulating system and as such had its own way of responding when its rules are breached.[140] Survival is only possible within earth's functioning ecosystems. It is the well-being of the planet that mattered to secure existence of the members of the earth community, and that at all times required a holistic view.[141] Proponents of EJ argue further that all subjects of the universe constitute a sacred community pursuing (spiritual) peace.[142] This whole living community is interconnected and dependent.[143] As all of them, including humans, originate from the universe itself they all are part of nature and as such are rights-holders. Rephrased, nature got its so-called earth rights from its origin, the universe.[144] Hence all nature consists only of subjects that all have the basic right to existence, to habitat as well as to fulfil their own role on and as part of the planet earth. Gaia, the personification of the earth, is a living organism that is capable of communicating its needs in a way that human beings understood,[145] not lastly based on Christopher Stone's claim for legal standing for nature, EJ now demands rights for all of nature.[146]

2.2.2 International evidence of ecocentrism

As shown above, ecocentrism is a strong ethical movement (predominantly developed over the last three decades) calling for radical changes in law and

[137] Cullinan *Wild* 89-115.
[138] Burdon 2011 *IUCNAEL* 5, Burdon "Earth" in *Wild Law* 23/44; Cullinan *Wild* 22; Burdon *Earth* 105; Mason "Principles" in *Exploring* 36.
[139] Mason "Principles" in *Exploring* 36; Koons "Principles" in *Exploring* 45.
[140] Koons "Prinicples" in *Exploring* 45-47.
[141] Cullinan *Wild* 113; Emmenegger & Tschentscher 1994 *GIELR* 578.
[142] Berry *Dream* 42 & 221; Berry *Sacred* 152.
[143] Cullinan "Governing" in *State* 3-4/12.
[144] Cullinan *Wild* 109-116.
[145] Lovelock *Gaia* 116.
[146] Stone *Trees* 8-11; Cullinan "Governing" in *State* 3-4/12.

governance. Ecocentrism has clearly left its mark in legal practice on the international as well as on national level. The next two sub-sections explore evidence of ecocentrism on the international level: first the international instruments and second foreign domestic laws, aiming to show that the theoretical shift in philosophy is gaining real momentum even in practice, giving a sense of the direction taken in legislation. The following chapter three is dedicated to evidence of ecocentrism at the South African level.

2.2.2.1 International instruments

The breakthrough of ecocentric values did not come about by itself. It needed a couple of development stages before acknowledging fundamental rights of the earth and its members in a quasi-legal instrument.[147] Hence, first the anthropocentric views dominated international environmental instruments:[148] they then were influenced anthropocentrically and ecocentrically, in parallel[149] and more recently ecocentric ideas broke through more concretely.[150] Keeping the purpose of this dissertation in mind the remainder of this sub-part shall focus on ecocentric elements, leaving out purely anthropocentric instruments.

Although predominantly still being anthropocentric,[151] the *World Charter* recognises the interconnectedness and dependence of all nature and requires it to be respected.[152] Human use of natural resources must not compromise the integrity of other parts of nature.[153] It recognises that every life form is unique regardless of its value to humankind and also as that human well-being depends on one of natural

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[147] Emmenegger & Tschentscher 1994 *GIELR* 568.
[148] E.g. *The Rio Declaration on the Environment of 1992; DUNCHE*. Fischer "Jurisprudential" in *Wild Law* 17. However, DUNCHE's principle four imposed the responsibility on humans to protect natural resources without explicitly mentioning any beneficiaries. Hence, it is not clear whether nature was regarded as a subject and therefore a possible beneficiary of the human duty. Since principle six is dedicated to the protection of ecosystems as such, a slight underlying ecocentric influence could be assumed.
[149] E.g. *World Charter for Nature* of 1982 (World Charter).
[150] Fischer "Jurisprudential" in *Wild Law* 15-23.
[151] Arts 6-7.
[152] Arts 1-3.
[153] Arts 3-4.

systems Nature must be able to renew itself and its limits must be respected.[154] The World Charter itself perceives nature as a subject (at least grammatically); however, without explicit own legal rights by putting the duty of care on humankind. Remarkably, the World Charter does not use the term environment but nature, probably to show the continuing shift in ethics and demonstrating the unity of humankind and nature.[155] Similar to the World Charter, the Earth Charter Movement, born at the World Commission on Environment and Development,[156] created the Earth Charter[157] that acknowledges that the earth is the home of the community of life dependent on a vital biosphere.[158] It emphasises respect and care for this community and points out the importance of the integrity of the earth's ecosystems that sustain life.[159]

Despite the above-mentioned development, the later Biodiversity Convention[160] and the *Draft International Covenant on Environment and Development*[161] are still anthropocentrically oriented. However, they both recognise the intrinsic value of nature and its importance for the biosphere.[162] Especially *DICED* has a very integrated approach, combining the two very distinct approaches to environmental regulation.[163] It states that nature as a whole deserves and has to be respected and safeguarded with its integrity maintained.[164] At the same time it wants, in pursuing a sustainable world, human needs to be respected as well.[165] *CBD* emphasises the new ecocentric approach in its preamble, focuses on biodiversity conservation and makes biodiversity the principal beneficiary of the respective provisions.[166] Both

[154] Arts 6-10.
[155] Emmenegger & Tschentscher 1994 *GIELR* 569.
[156] Earth Charter Initiative *What?*
[157] Not formally recognised.
[158] Earth Charter, Preamble.
[159] Principles 1-2.
[160] United Nations Convention on Biological Diversity of 1992 (CBD).
[161] Draft International Covenant on Environment and Development of 2010 (DICED).
[162] CBD, preamble; DICED, preamble.
[163] Fischer "Jurisprudential" in *Wild Law* 30-32.
[164] DICED, art 2.
[165] DICED, art 4.
[166] Emmenegger & Tschentscher 1994 *GIELR* 568; Fischer "Jurisprudential" in *Wild Law* 29. Examples are found in CBD art 8(a), (b) and (d) that provide for protected areas and promote sensitive natural systems, habitats and maintenance of viable species.

examples show that nature is primarily accepted as a subject with own values, but at the same time still remaining an object of human use limited by the notion of sustainable development. Keeping in mind that international instruments generally are more general by establishing general principles and objectives and less substantive obligations, evidence of ecocentrism in *CBD* and *DICED* might be regarded as a huge step in the development toward rights for nature.[167]

The most recent and most ecocentric examples in international instruments are the *UDRME* accompanied by the *People's Convention of Establishment of the International Rights of Nature Tribuna*l.[168] *UDRME* is the result of the World's People Conference on Climate Change and the Rights on Mother Earth in Bolivia in 2010.[169] By signing this document the world's people and nations recognised that they are just a part of a community of interrelated and interdependent beings. This community consists of ecosystems, species of fauna and flora and all other natural parts of the mutual living source of life, the Mother Earth.[170] *UDRME* recognises fundamental claims of Mother Earth and all its beings.[171] They especially have the right to habitat to be able to play their role on planet earth and the right to well-being.[172] To live in harmony with Mother Earth *UDRME* further obliges humankind to show respect toward its natural environment.[173] This means specifically that humankind has to act accordingly, to establish further appropriate norms, promote their implementation and enforcement and to defend the just-mentioned rights as well as continuously learning about how to live harmoniously with earth and spread the respective knowledge. Humankind should ensure protection, conservation and restoration of the integrity of the whole system of Mother Earth.[174] Cases alleging violations of rights granted and breaches of obligations imposed in *UDRME* shall be handled by the International

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[167] Fischer "Jurisprudential" in *Wild Law* 13.
[168] People's Convention of Establishment of the International Rights of Nature Tribunal of 2015 (PCEIRNT).
[169] Calling to the General Assembly of the United Nation for adoption UDRME, preamble.
[170] UDRME, preamble, arts 1(1)-(3) & 4(1).
[171] UDRME, art 2. Such rights are the right to existence and health, the right for regeneration, identity, integrity and the right to life sustaining resources.
[172] UDRME, art 2(2)-(3).
[173] UDRME, art 3(1).
[174] UDRME, art 4.

Rights of Nature Tribunal.[175] An Earth Defender is mandated to investigate and initiate the respective cases and make the representations before the tribunal.[176]

2.2.2.2 Foreign domestic laws

On domestic level practice has shown a couple of possible ways in which ecocentric thought has been incorporated into law. The latest examples are the explicit recognition of nature's rights. Ecuador recognised in its Constitution that Mother Earth called Pacha Mama has rights. Bolivia on the other hand recognises the rights of nature through a separate legal act, the *Ley de Derechos de Madre Tierra*.[177] La Ley is specifically dedicated to the rights of Earth, la madre tierra or Mother Earth, and their enforcement.[178] It provides for a Defender of Mother Earth's rights.[179]

Both, Ecuador's Constitution and La Ley acknowledge that humankind is just a part of Mother Earth.[180] Mother Earth is regarded as one dynamic life system consistent with an interconnected life community. In Bolivia it is considered as sacred.[181] Both laws basically recognise that the planet has the right to existence, care and regeneration and restoration of its life cycles. Mother Earth has the right to biodiversity and water as well as to clean air in order to safeguard its life cycles, and the rights to maintenance and restoration.[182] Mirroring these explicitly recognised rights of Mother Earth, the respective laws oblige all human beings or communities to defend them.[183] The state of Bolivia is even obliged to politicise the people of Bolivia as having the duty to actively respect and promote them.[184]

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[175] Established by the PCEIRNT to further develop Earth Jurisprudence; PCEIRNT, art 2(a)-(b).
[176] PCEIRNT, art. 5.
[177] *Ley de Derechos de Madre Tierra of 2010* (La Ley).
[178] La Ley, art 1.
[179] La Ley, art 10.
[180] Ecuador's Constitution, preamble & ch 7 & arts 71-72.
[181] La Ley, arts 3 & 5.
[182] La Ley, art 7.
[183] Ecuador's Constitution, art 71.
[184] La Ley, art 8-9.

Then, in Bolivia Mother Earth is characterised as being a subject of public interest.[185] In Ecuador the promotion of environmental conservation, ecosystem protection, biodiversity, the prevention of environmental damage and the recovery of degraded natural spaces are in public interest.[186] Incentives shall create awareness of and attract ecosystem protection.[187] These laws are basically saying that human beings may benefit from their natural environment as long as they fulfil their own duties and respect nature's rights by preserving a healthy environment and using its resources ra sustainably.[188] La Ley in this context focuses on principles such as living in harmony with its natural environment, the primacy of the interest of the whole community, the guarantee of regeneration of Mother Earth as well as respect and defence of its rights and the principle of no marketability of life systems.[189] In the case of colliding human and ecological conflicts, the conflict should be resolved in a way that does not harm the life systems irreversibly.[190]

In the United States nature's rights have been granted in municipal ordinances that have been fought for by indigenous people, especially to protect local ecosystems.[191] Also initiated by indigenous people, the Whanganui Iwi, was a case in New Zealand regarding the Whanganui River that resulted in litigation against the government. The case was closed by an agreement[192] that recognised the river as a legal entity with its own legal standing.[193] It provides for the appointment of two guardians, representatives and defenders of the river's interests.[194] Their mandate is *inter alia* the protection of the health and well-being of the river.[195]

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[185] La Ley, art. 5.
[186] Ecuador's Constitution, arts. 14 & 400.
[187] Ecuador's Constitution, arts. 71-73.
[188] Ecuadors's Constitution, arts. 74 & 83.
[189] La Ley, art. 2.
[190] La Ley, art 6.
[191] Cullinan "Governing" in *State* 8; Cullinan "If Nature Had" in *Exploring* 234.
[192] Agreement "*TutouWhakatupua" betwenn* Whanganui Iwi and The Crown of 30.08.2012.
[193] ciphs 1.2, 1.6 & 2.1.
[194] ciph 2.18.
[195] ciph 2.21.

2.3 OPTIONS FOR ENTRENCHING THE ECOCENTRIC IN ENVIRONMENTAL REGULATION

Changing ethical perspectives in such a radical way as advocated by ecocentrism and EJ seems an ambitious venture that requires transformation of society and governance.[196] The radicality lies in the change of perception of nature from being an object serving human needs to accepting nature as a subject following its own purposes, resulting in the legal acceptance of nature on its own.[197] Assigning nature any intrinsic value in philosophy and ethics means acknowledging that its interests require appropriate consideration.[198] As mentioned above, ecocentrists hold that the notion of property calls for reconceptualisation or even abolishment.[199] However, since humankind naturally has to access the environment it is believed that an institution regulating human access and use of nature will always be required. Hence, it is argued that private property should respond directly to the object or thing over which it is exercised and remain flexible, since the relationship is defined by the respective thing itself over which property was exercised.[200] Since the thing over which property might be exercised is affected by any proprietary activity, the thing itself shapes the use, rights and responsibilities.[201] In their view, humankind, or rather the whole community should focus on responsibilities towards instead of rights to land.[202] It should rather be focused on the relationship between members of the earth community, which might be limited by government and/or community norms, instead of focusing on individual interests.[203]

This discussion around the concept of property, the human relationship to land, actually shows that humankind in fact has to go back to the roots of the earth's story and factually reconceptualise law and governance in general.[204] Although this transformation seems – from the anthropocentric point of view – impossible, it is

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[196] Berry *Dream* 48; Cullinan "Governing" in *State* 4/12.
[197] Emmenegger &Tschentscher 1994 *GIELR* 576.
[198] Emmenegger &Tschentscher 1994 *GIELR* 584.
[199] Cullinan *Wild Law* 128, 157-159; Burdon *Earth* 17-28; Graham *Lawscape* 2-5.
[200] Burdon *Earth* 132-153.
[201] Taylor & Grinlinton "Property" in *Property Rights* 5; Burdon *Earth* 130.
[202] Cullinan *Wild Law* 162-163.
[203] Burdon *Earth* 140.
[204] Cullinan *Wild Law* 140.

argued that it would be accepted since the two paradigms basically have mutual interests, namely the use of land with its resources without threatening their availability.[205] However, against this background, the purpose of the following section is in particular to analyse and to show the options for entrenching ecocentrism into the narrower field of environmental regulation. It is therefore up to humankind to become (more) conscious about its intrusive activities and to understand natural processes in order to be able to give nature's interest content in its legal system that follows the rules of the great law.[206] This analysis should support and facilitate the later, more specific analysis of evidenced ecocentric elements in South African environmental law relevant to estuaries. It starts by commenting on the nature's rights approach reflected in recognised legal rights of nature and the duties on human side mirroring them. It then comments on legal objectives and principles through which respect for nature shall be promoted and ensured by human beings, especially governmental officers, the respective decision-makers and other legal practitioners and ending with comments on ecocentric governance.

One way to consider the philosophically accepted nature's interests in law is to explicitly recognise nature's rights as such, to accept nature's legal standing and to give nature standing in legal and political processes. Moreover, this requires also that its respective representatives are made available as shown above in the examples of Ecuador and Bolivia.[207] Another way is to alternatively or in parallel impose duties and responsibilities on human beings, enabling them to protect nature's interests by laws protecting nature's rights, reflecting nature's right not to be used by human beings.[208] Although both approaches finally accord legal rights to nature, the former seems to treat nature rather as an object than a subject, which is why it is argued

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[205] Bosselmann "Property" in *Property Rights* 24.
[206] Berry *Dream* 42.
[207] Bugge "Fundamental" in *Rule* 8-12; Taylor *Respect* 256-260.
[208] Koons "Principles" in Exploring 49-50; Emmenegger & Tschentscher 1994 *GIELR* 572. Laitos "Rules of law" in *Rule* 214-216;PCEIRNT, art 2(c)-(d). To promote and observe humankind's duty to respect and protect the intrinsic values of all nature a special institution might be a possibility to established (see for example the International Rights of Nature Tribunal above).

that the latter approach is preferable, since, by its nature, it is easier to adopt in an anthropocentrically guided world.[209]

Another (less direct) ecocentric approach in recognising nature's interests legally is the definition of environmental protection as being in public (human) interests.[210] Because the recognition of human rights generally implies public interests,[211] so does the human environmental right.[212] Though environmental protection has been recognised as being in the public interest, imposing duties on government to protect the environment,[213] in practice collisions with human (proprietary) interests have mostly been understood and resolved in favour of humans' social and economic interests.[214] This is not surprising because that approach is ultimately anthropocentric and the environment is defined by human beings. However, it is held that by shifting the approaches to environmental regulation, the factual content of the public interest – historically human well-being – would naturally change over time into earth's well-being.[215] In this case it is suggested the term of "the interests of the whole community" be used instead of the term of the public interest.[216]

The explicit recognition of nature as a legal subject that pursues its own interests, limits its own rights as well as human rights.[217] Drawing from the argument that human proprietary rights made environmental law necessary, it can be said that the recognition of nature as a legal subject basically impedes humankind's destructive activities on the environment.[218] The escalation of ecological interests to rights hence requires no longer just the balancing of divergent human, but additionally also

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[209] Taylor *Respect* 223-224; Emmenegger & Tschentscher 1994 *GIELR* 573-575; Bugge "Fundamental" in *Rule* 9.
[210] Constitution, s25(1); Cullinan *Wild Law* 158; Glazewski "Bill of Rights" in *Environmental Law* 5.3.1.
[211] Glazewski "Bill of Rights" in *Environmental Law* 5.2.3.2.
[212] For example Constitution, s 24.
[213] Graham *Lawscape* 161-170.
[214] S 24(b) (iii); Horsley "Property" in *Property Rights* 91; Taylor & Grinlinton "Property" in *Property Rights* 9.
[215] Bosselmann "Property" in *Property Rights* 27; Freyfogle "Taking" *Property Rights* 51.
[216] Cullinan *Wild Law* 181.
[217] Cullinan *Wild Law* 118. One example referred to is that humans should be able to dam a river only to the extent that they respected its right to flow.
[218] Cullinan *Wild Law* 116-119.

ecological interests, in a just and fair manner.[219] Since any human action impacting on nature also has an inherent human interest, taking nature's interests into account implies a conflict of interests between human and the respective ecological interests. The potential collision of human and ecological interests also results in the key, and possibly the most difficult question of how to weigh the colliding interests applying the ecocentric paradigm.[220] Similar challenges arise despite that the more ecocentric approach to environmental legislation focuses on the direct or indirect (through the redefinition of the term public interest or by imposing duties on humans) acknowledgment of nature's legal rights. Both approaches require the identification of the relevant human and ecological interests. This will guide the governmental officers and other legal practitioners in defining the respective rights of human beings and nature and/or human duties toward nature (when planning or taking decisions).[221]

The balancing of the identified interests depends on which ecocentric standpoint one chooses to follow:[222] Either one focuses on the position of the Earth's Community of Life members, or on the earth's community as understood by EJ. Hence, following from the above analysis crucial for the ecocentric approach to environmental legislation is the human definition of the environment itself. The former ecocentric standpoint namely defines the environment as encompassing the living nature whereas the latter defines the environment more broadly, encompassing ecosystems and the rest of the non-living nature. Both standpoints abandon the idea that humankind is separate from its natural environment, which is why the term nature seems to be more appropriate then the term environment. The redefinition of the environment and the abovementioned term of public interest are just a few examples of entrenching ecocentrism in environmental legislation by amending and/or further developing legal tools already known from the traditional anthropocentric approach. Other such examples are the amendment, redefinition or addition of objectives of and/or principles in a law. They are usually found at the beginning of the respective

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[219] Bugge "Fundamental" in *Rule* 8; Taylor *Respect* 264.
[220] Taylor *Respect* 259-260.
[221] Emmenegger & Tschentscher 1994 *GIELR* 581-584; Cullinan *Wild Law* 184.
[222] Emmenegger & Tschentscher 1994 *GIELR* 586.

acts and guide the governmental decision maker and other legal practitioners in exercising their mandate, particularly in planning and/or granting permits.[223]

Probably the best-known ecocentric principle developed from anthropocentrism is the notion of stewardship. The ecocentric notion of stewardship factually turns into a duty of care that obliges human beings to preserve and respect the earth and its resources for the benefit of the whole planet and *nota bene* not for human's well-being only.[224] In ecocentric thinking, environmental resources are to be shared amongst all earth's members and not reserved for the one-sided exploitation of humans.[225] Ecocentrism holds that since humankind has the capacity to understand nature and its processes in their totality, it also has the responsibility to hold nature in trust, not only for future human generations but for the sake of harmony on earth.[226] Modern ecocentrists also describe this human responsibility toward nature as planetary trusteeship.[227] Environmental regulation hence must focus on the protection of whole ecosystems offering habitat to endangered species instead of only on the safeguarding of endangered individual species of fauna and flora – using the macro- instead of the traditional micro lense.[228] Similar principles, such as the one of precaution and prevention are applied for the sake of the whole, and not only of the human, community. It does not need further explanation that both benefit from their application.

Not less prominent is the example of the objective of ecologically sustainable development. Ecocentrism's ultimate goal is ecological or strong sustainability as opposed to the anthropocentric goal of sustainable development (also called the weak sustainability).[229] Since humankind currently lives at a tipping point of the earth's capacities, it seems wrong to pursue the goal of sustainable development any longer, as it only considers social and economic issues ignoring overall ecological well-being. Humankind must live within and respect the planetary boundaries as set

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[223] Cullinan *Wild Law* 181.
[224] Koons "Principles" in *Exploring* 52; Bosselmann *Earth* 117-136.
[225] Cullinan *Wild Law* 110.
[226] Koons "Principles" in *Exploring* 51.
[227] Bosselmann *Earth Governance* 109.
[228] Mason "Principles" in *Exploring* 41-44.
[229] Burdon "Earth" in *Wild Law* 19-20/44; Alexander "Wild Law" in *Wild Law* 2-3/50; Koons "Principles" in Exploring 51; Bosselmann *Earth* 3-8; Rühs & Jones 2016 *Sustainability* 4.

by the Great (universal) Law, which helps scientists understand and define the earth's limits.[230]

In pursuing ecologically sustainable development from an Earth's Community of Life perspective, humans are, in life-threatening emergency situations not caused by themselves allowed to harm nature.[231] The principles to be followed in regulating the relationship between human beings and its natural environment are then essentially the same as in the case of balancing human interests against each other - self-defence, the principle of proportionality or of minimum wrong and the principle of distributive justice.[232] More holistic views on the other hand promote the principle of wholeness that is based on the principle of interconnectedness and interdependence.[233] Any part of the earth's ecosystem has its role to play and thereby limits and balances others' essential rights. Hence, human beings must in certain cases find alternatives to satisfy their own needs, or even step back to keep the universe in harmony. This rule applies even more for non-basic human interests.[234] However, in practice injustices are sometimes unavoidable, which is why applying the principle of restitutive (and not retributive) justice any damage caused is restored and by applying the principle of reintegration restored to the earth community.[235]

Of no less significance it is the adaption of the so-called (community) ecological governance.[236] Ecocentrism requires more holistic organisations, which focus more on communities as part of the one big earth community than on individuals, and allow holistic reflection on matters arising.[237] It is argued that nature does not know or respect any human-made administrative borders, which requires cooperation and integration between diverse governmental departments as well as between government and other people.[238] This is why the bio-regional approach to

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[230] Maloney "Ecological Limits" in *Wild Law* 12-36/83.
[231] Taylor *Respect* 264-265.
[232] Koons "Principles" in *Exploring* 47; Taylor *Respect* 269-292.
[233] Mason "Principles" in *Exploring* 42; Koons "Principles" in *Exploring* 50-51.
[234] Cullinan *Wild Law* 120-121.
[235] Taylor *Respect* 292; Mason "Principles" in *Exploring* 43.
[236] Mason "Principles" in Exploring 43; Cullinan *Wild Law* 170.
[237] Cullinan *Wild Law* 170.
[238] Bugge "Fundamental" in *Rule* 17-19.

environmental governance finds support. It is argued that bio-regional communities pay more attention to the structure of the earth and to the interdependence of all its parts, thereby promoting more stability and cooperation.[239] Since nature has no voice to express its perception of its purpose and felt or experienced rights and wrongs, it cannot defend its interests and rights in the human legal system.[240] Hence, to make the ecological community work, it is the human duty to observe, understand and follow the earth's rules. Only human beings are able to do so.[241] Admitting that the task of observation and identification is not easy and becomes even more difficult as potential environmental problems[242] are not easily predicted, it is important to secure knowledge gained by indigenous people living close to and with nature. Furthermore, since humankind is rather part of nature than a separate entity, nature's processes have economic and social effects and *vice versa*. This requires interdisciplinary approaches to the identification of the diverse relevant interests.[243]

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[239] Cullinan *Wild Law* 173.
[240] Emmenegger & Tschentscher 1994 *GIELR* 584; Bugge "Fundamental" in *Rule* 11.
[241] Berry *Dream* 44-47.
[242] Which reveal nature's interests most accurately since only effects of human activities are really measurable.
[243] Bugge "Fundamental" in *Rule* 10-21.

3. Reflection on ecocentric elements in South Africa's contemporary legal framework relevant to estuaries

Based on the theoretical analysis of shifting approaches to environmental regulation from anthropocentrism to ecocentrism in the previous chapter, the following chapter identifies ecocentric elements in the South African contemporary environmental legal framework. The focus is on legislation of relevance to estuaries. Though there are many laws of affecting estuaries in South African environmental law,[244] this chapter specifically analyses the laws relevant to estuarine management and their provisions potentially influencing decision-making processes when required to balance private proprietary against ecological interests in the respective environment. This is why this analysis namely focuses on NEMA, the environmental framework law, the NWA, as of relevance to water resources management,[245] and NEMICMA as concerning the management of the coastal environment of which estuarine ecosystems *per definitionem* form part.[246]

A specific practical scenario of conflicting human proprietary interests and ecological interests is when estuarine mouths are artificially breached. This is generally the case when the estuarine mouth closes naturally, is filled up by riverine water and as a result threatens the adjacent low-lying properties with back-flooding and consequent damage.[247] The human proprietary interests, which are worldwide mostly recognised in form of a human right, since they support human needs for social and economic development and as places for healthy habitation,[248] seem obvious. Though human use of and interaction with nature is inevitable (satisfaction of human needs can only be found in the environment itself), inconsiderate human intrusion into ecological spheres potentially impedes nature's inherent basic interests that

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[244] NEMBA; NEMPA; Sea-Shore Act No. 21 of 1935; MLRA; Spatial Planning and Land Use Management Act No 16 of 2013; Provincial Land Use Planning Acts and respective Municipal Ordinances.
[245] NWA, s 1. Per definitionem including estuaries.
[246] NEMICMA, s 1.
[247] Morant & Quinn "Influence" in *Estuaries 292; NBA* 83.
[248] Glazewski "Bill of Rights" in *Environmental Law* 5.3.1. In South African legislation, property is protected by section 25 of the Constitution.

finally may lead to serious environmental problems.[249] Related to estuaries, this means the potential threat of the functioning of the respective estuarine ecosystem aiming to fulfil its role in the bigger earth system.[250] The ecological interests in question are the existential interests of the species living in and adjacent to estuaries in a functioning estuarine system; and the estuary's interests in the natural coexistence of river water and seawater in order to continuously offer habitat to all these species;[251] the estuary's interest in biodiversity, since biodiversity itself supports the productivity of the whole system,[252] an interest in the respective river in the rainfall and the sea, and the relevant species in the river flow and the seawater at changing tidal heights.[253] The individual rights might change from estuary to estuary.[254]

The scenario described has been the basis of two recent court cases in South Africa, which are object of the analysis in the subsequent chapter. The identification of ecocentric elements in the laws potentially relevant to estuarine management is hence of fundamental importance to enable the analysis of the contemporary South African jurisprudence reflecting the extent to which the elements described impacted on the relevant decisions. Chapter three reflects on how they did so. In the event of them not having done so, the following analysis will reflect on why they did no, and had they dones o, how could they shifted the outcomes of the cases.

3.1 DEFINITION OF NATURE

As pointed out in chapter two, the way a society defines the environment reveals its philosophical approach to environmental regulation.[255] Although not the focus of this

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[249] Burdon *Earth* 17; UNEP *Geo5* xviii.
[250] Cullinan *Wild Law* 166.
[251] Emmenegger & Tschentscher 1994 *GIELR* 582; Cullinan *Wild Law* 114-118.
[252] *NBA* 178; Constanza & Folke "Structure" in *Rights* 15-17.
[253] *NBA* 178; Cullinan *Wild Law* 114-116. As the rainfall impacts the river flow, the sea tides have an influence on the seawater height, which occasionally leads to a mixing of river water and seawater in order to regulate salinity, sediment supply and turbidity in and adjacent to estuaries.
[254] Cooper et al "Geomorphology" in *Estuaries 6*; *SSAB* 29.
[255] Emmenegger &Tschentscher 1994 *GIELR* 569.

chapter, it is necessary to advert to the Constitution, since it is fundamental to all law in South Africa. The environmental right does not define the environment explicitly.[256] Nevertheless it suggest what is understood under the term and shapes its meaning in further laws based on it. The Constitution first suggests a human-centred approach by guaranteeing everyone the right to a sound environment as being the basis for for human benefit.[257] The Constitution thereby implies that human beings are the primary beneficiaries of environmental regulation.[258] However, in mentioning the objective of ecological sustainability,[259] the Constitution implies at the same time that there are ecocentric views underpinning South African environmental law, shaping also the definition of the environment. This becomes even more evident when reading the White Paper on Environmental Management Policy for South Africa (WPEMPSA). The WPEMPSA defines the environment as the habitat of human beings and other organisms. Hence, it implies the acceptance that there are species other than humankind dependent on the same environment, and enhances these other species to a level with human beings.[260]

Despite these constitutional ecocentric elements and the ones in WPEMPSA, NEMA as the primary South African environmental Act and framework legislation, reverts to a rather anthropocentric definition by clearly separating humankind from the rest of nature. Being anthropocentrically oriented,[261] it defines the environment as the surrounding of human beings, meaning the land, water and the atmosphere as well as micro-organisms, plants and animals, any part or combination therof, including their interrelationships.[262] The NWA does not contain any definition of the environment. NEMICMA refers to NEMA.[263] None of these Acts use the term nature for the natural environment.

[256] Constitution, s 24.
[257] Constitution, s 24(a)-(b)(i).
[258] Constitution, s 24(a); Glazewski “Bill of Rights“ in *Environmental Law* 5.2.2.1.
[259] Constitution, s 24(b)(iii).
[260] DEAT *WPEMPSA* 10-16.
[261] DEAT *WPEMPSA* 10.
[262] NEMA, s 2.
[263] NEMICMA, s 1.

3.2 NATURE'S INTERESTS

The most ecocentric characteristic is probably the recognition of nature's interests and the elevation of these interests to rights in the human-made legal system. Again starting with the constitutional environmental right, it is to say that it commences anthropocentrically. However, it also obliges the State to secure ecologically sustainable development as well as the ecologically sustainable use of raw materials.[264] The Constitution hence implies that environmental law in South Africa is partially ecocentrically underpinned. Though the Constitution does not mention any ecological interests explicitly (and consequently any ecological rights), by mentioning the ecological aspect of sustainability it does imply that the natural environment follows its own rules and therefore has inherent value and interests on its own.

Probably as consequence of the own definition of the environment, NEMA does not mention nature's interests as such. However, by stating that any person or a group is enabled to seek relief in respect of any breach or threatened of breach of any provisions of NEMA or a specific environmental management Act or any other Act concerned with environmental protection or the use of natural resources in human public interest,[265] it indirectly accepts nature's interest. The same applies to any breach or threatened breach of any duty resting on an organ of state.[266] NEMA therewith turns environmental protection into public interest. Though again not accepting nature's legal rights explicitly, it can be said that NEMA at least indirectly implies that nature has its own interests that need human regard, especially in the context of arguing for a broader definition of the environment, referring not only to NEMA but also to the Constitution and the WPNWPSA.

NEMICMA then provides for the most concrete acknowledgement of nature's interests in South African environmental legislation by introducing the notion of the interests of the whole community. The whole community is particularly understood as consisting of the collective of all South Africans, the future South African generations and other living organisms that, as part of the coastal environment, are dependent on

[264] Constitution, s 24(b)(iii).
[265] NEMA, s 32.
[266] NEMA, s 32(1)(e).

it.[267] NEMICMA specifically requires the interests not only of human beings but also of other living organisms to be taken into account when making relevant decisions.[268] This is the case when authorities, in fulfilling their mandates, are for example managing activities on or in coastal waters,[269] when they must restrict access to coastal public property,[270] when asked to issue an environmental authorisation for coastal activities.[271] The artificial breaching of an estuary berm might potentially induce such decisions, since estuaries are by definition part of coastal waters, as such are part of coastal public property, and the artificial breach of an estuary mouth will trigger an environmental authorisation.[272]

NEMICMA provides that the collective interests must be prioritised over the ones of a group of society.[273] It provides a long-term perspective by including the interests of future generations in inheriting coastal public property. It furthermore seeks a coastal environment consisting of healthy and productive ecosystems as consequence of economic activities that are ecologically and socially sustainable.[274] Against this background, NEMICMA requires the interests of other living organisms to be adequately taken into account.[275] Despite these guidelines, NEMICMA is silent on how to weigh the interests of present against future human generations and especially on how to weigh the interests of other living organisms when specifying the interests of the whole community. However, NEMICMA as opposed to NEMA does literally acknowledge interests of natural (living) entities other than human beings, although not affording them legal rights. By using the term whole community, NEMICMA deliberately ignores human superiority over nature by implying that there is something else having interest and therefore potentially holding rights, specifically with relevance to estuarine environments, creating wholeness together with human beings. It obliges governmental authorities explicitly to take such interests lastly

[267] NEMICMA, s 2.
[268] NEMICMA, s 2.
[269] NEMICMA, s 21(a).
[270] NEMICMA, s 13(2)(c).
[271] NEMICMA, ss 63(2)(g) & 64(1)(a); the authorities may in the interest of the whole community grant or may not issue an environmental authorisation.
[272] NEMICMA, ss 1 and 7; GN 983 in *GG 38282* of 2014-12-04.
[273] NEMICMA, s 1.
[274] NEMICMA, s 1.
[275] NEMICMA, s 2.

shaping rights into account when they potentially might be threatened in given situations.

The NWA aims to achieve the same, but in a different way, by introducing the so-called reserves.[276] It provides on the one hand for the basic human needs and on the other hand for the ecological reserve. The former serves – as the term itself suggests – basic human needs such as food and water and hygiene, whereas the latter concerns the water needed by aquatic ecosystem.[277] The reserves aim to ensure the adequate allowance for each component in both quantity and quality, varying on the previously determined class of any relevant water resource.[278] They describe the extent to which human private and public property rights might be exercised without compromising nature's interest and rights. The introduction of the water reserves for the benefit of all water users, which might be human beings to meet their basic needs or any aquatic and associated ecosystem with biological diversity,[279] is underpinned by the acceptance of nature's interests (eg estuarine interests in water for a functioning ecosystem) resulting in the right to satisfy its needs. Authorities vested with water management powers are consequently obliged to give effect to determined reserves when fulfilling their mandate in terms of the NWA.[280]

It is held that the NWA is the first environmental act worldwide favouring water needs of aquatic ecosystems and human basic needs over other water uses by providing legal protection for relevant water resources.[281] The reserves identify the basic human and the ecological needs of a water resource and therewith inform governmental authorities in exercising their mandates. For example, the artificial opening of an estuarine mouth constitutes such water use that potentially might threaten human basic water needs as well as elementary water needs of an estuary and its fauna and flora. Such water use would hence require a permit in accordance with NWA.[282] When dealing with water use authorisations and licence the respective

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[276] NWA, ch 3, part 3.
[277] Day "Rivers" in *Environmental* 862.
[278] NWA, part 3, s 16.
[279] NWA, preamble & ss 1(1) & 2(2)(a-g).
[280] NWA, s 18.
[281] Day "Rivers" in *Environmental* 857-860.
[282] NWA, ss 1 and 21(c).

authority should, according to the above, be informed by the determined reserves about the water need of the estuary in question as the base for its decision.

It is important to briefly consider the background of these regulations: The creation of the water reserves was partly the consequence of the new regime in the South African environmental legal framework, as indicated in the first parts of this chapter that made the review of the existing water law necessary.[283] In particular the former right to use water simply because of land ownership along rivers was abolished.[284] On the other hand, the recognition that water was a limited resource and that the existing human water use provisions within these natural boundaries were inappropriate made a revision and new solutions necessary.[285] In accordance with the above-mentioned recognitions the NWA states that water is a rare resource occurring in many forms as part of one interdependent system – reflecting ecocentric thinking.[286]

3.3 ECOLOGICAL STEWARDSHIP & DUTY OF CARE

As argued in the previous chapter, the notion of stewardship understood ecologically considers human beings as the planet's trustees. Humankind, equipped with reason, holds the responsibility for the well-being of its natural environment which itself holds intrinsic rights. Humankind hence has the moral duty to take care of nature – another way of accepting nature's rights. The Constitution implies it imposing negative obligations on the State not to harm the environment in a way that has negative impact on the health and the well-being of humans.[287] It further obliges the State to protect the environment through adequate measures.[288] Although it is argued that this part of the Constitution is socio-economic in nature,[289] nature might also be beneficiary of this provisions. This is why - bearing in mind the philosophical and

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[283] DEAT *WPNWPSA* 3.
[284] DEAT *WPNWPSA* 5.
[285] DEAT *WPNWPSA* 2-3.
[286] NWA, preamble.
[287] Humby 2016 *SAJHR* 222.
[288] Constitution, s 24(b).
[289] Humby 2016 *SAJHR* 220.

ethical backgrounds – it can be argued that the Constitution implies at least the moral duty to take ecological interests into account while exercising other rights.[290]

In seeking to provide for comprehensive protection of water resources, the NWA also imposes the duty on the respective Minister to develop a water classification system.[291] He has the duty to determine by notice the class and the resource quality objectives for significant water resource.[292] Besides the fact that the respective notice must *inter alia* name the geographical area for the application of the resource quality objectives and the requirements for achieving them, the notice may also relate to topics such as the above-mentioned reserve, instream flow, water level, presence and concentration of particular substances in the water, the characteristics and quality of the respective water resource and the instream and riparian habitat, characteristics and distribution of the respective biota and the regulation or prohibition of upstream land-based activities which may affect the quantity of or quality of the resource, all relevant to identify ecological interest.[293] The Minister hence can take a more ecocentric approach when dealing with water resource protection. The extent he makes use of this discretion influences and informs decisions concerning water use authorisations or licences.[294] These duties of the respective governmental authorities are a result of the government's trusteeship of South Africa's water resources.[295] The government is entrusted with the protection of water resources while promoting environmental values, thereby adopting the more ecocentric characteristics.[296]

NEMICMA aims to preserve and protect the so-called coastal public property.[297] The State is entrusted with the respective mandate on behalf of all present and future South African generations.[298] It hence appears that NEMICMA's stewardship provisions are rather anthropocentrically oriented. A closer look reveals that

[290] Glazewski "Bill of Rights" in *Environmental Law* 5.3.4.
[291] NWA, s 12.
[292] NWA, s 13(1).
[293] NWA, s 13(2).
[294] NWA, s 27.
[295] NWA, s 3.
[296] NWA, s 3(1-2).
[297] NEMICMA, s 2(c).
[298] NEMICMA, ss 2(c) & 3.

NEMICMA nevertheless contains ecocentric characteristics: it namely aims to promote coastal conservation and the maintenance of its natural state.[299] NEMICMA emphasises starkly the protection and securing of the sensitive coastal environment and the functioning of ecosystems. Therefore it promotes the extension and enhancement of the status of coastal public property,[300] enabling the respective Minister to declare state-owned land as coastal public property and even to acquire land for this purpose.[301] The State must ensure that activities in and on coastal public property are in the interest of the whole community.[302] By introducing the notion of coastal public property NEMICMA deviates from the idea of human private property over natural resources – a clearly ecocentric conception. As a result, it shapes the State's duty in respect of nature's interest not to generally favour human proprietary interests. NEMICMA then finally picks up NEMA's duty of care provision and repeats the principle specifically for the coastal environment.[303]

Despite the fact that NEMA's definition of the environment separates human beings and its natural environment and so implies a more anthropocentric approach, it does contain a duty of care, extending the idea of ecocentric stewardship to the private sector. Taking into account that the primary beneficiary of a direct obligation to take care of and respect the environment is the environment itself, the respective provisions may be interpreted as being ecocentric, since they emphasise the general preservation of the environment rather than conservation for human purposes.[304] NEMA's duty of care therefore requires any human being who does, has or may cause significant environmental degradation to take reasonable measures to prevent environmental harm.[305] This may even mean stopping the relevant activity (eg the breaching of an estuarine berm).[306] In cases of legally authorised actions that cannot reasonably be avoided the harm has to be minimised and restored.[307] This duty of care encompasses the respective landowner or even the person in control of or with

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[299] NEMICMA, preamble.
[300] NEMICMA, s 2(c).
[301] NEMICMA, ss 8(b)(d) & 9(1).
[302] NEMICMA, s 12.
[303] NEMICMA, s 58.
[304] Preston "Internalizing" in *Wild Law* 35/70.
[305] NEMA, s 28(1).
[306] NEMA, s 28(2)(c)
[307] NEMA, s 28(1).

the right to use the land.[308] Similar to NEMA's duty of care, the NWA also imposes the duty on landowners etc. to take all reasonable measures to prevent water pollution from occurring, continuing or recurring.[309] Such measures might be *inter alia* cessation, modification, remediation of the respective effects or any disturbance to the bed and banks of watercourses.[310]

3.4 ECOLOGICAL SUSTAINABLE DEVELOPMENT

The recognition that limitless human economic and social development actually was causing the planet's degradation urged the consideration of environmental aspects in human activism. The drafting of the environmental legal framework for South Africa, which gives effect to the constitutional environmental right, was particularly led by the new vision of human beings living in harmony with nature and its ecological cycles. Acknowledging the interdependency between society and the natural environment the goal to be pursued was in fact environmentally sustainable development to meet ecological and human needs.[311] Accordingly it is held that the Constitution itself promotes the so-called strong sustainability model, also known as ecological or environmental sustainability, requiring the just and fair balancing of social, economic and ecological interests.[312]

Despite these developments NEMA uses the anthropocentric term sustainable development. It requires development to serve humans' present and future generations by putting their interests at the forefront of environmental management, not mentioning any ecological beneficiaries.[313] NEMA wants – under the principle of sustainable development – environmental factors to be integrated in planning implementation and environmental management. It then requires development to also be environmentally sustainable.[314] Sustainable development in terms of NEMA *inter alia* requires the avoidance, minimisation and remediation of ecosystem

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[308] NEMA, s 28(2).
[309] NWA, ch 3 part 4, s 19(1).
[310] NWA, s 19(2).
[311] DEAT *WPEMPSA* 13.
[312] *Fuel Retailers v Director-General: Environmental Management* 2007 6 SA 4 (CC).
[313] NEMA, ss1 & 2(2).
[314] NEMA, s 2(3).

disturbances and biodiversity losses. It further requires the consideration of consequences of the use and exploitation of non-renewable natural materials and of the use and exploitation of renewable materials and the respective ecosystems so that their integrity is not jeopardised.[315] NEMA's understanding of sustainable development in fact means environmental sustainability requiring environmental preservation and urging humankind to respect the earth's limits wherever possible.[316] The NWA and NEMICMA as specific environmental management Acts do not mention environmental sustainability as a separate principle. This however, does not mean that it has no significance for these acts. Sustainability in the context of the NWA's concept of sustainable water uses is understood in terms of environmental sustainability, meaning that water resources must remain able to recover from human uses.[317] Against the background, the fact that the NWA accepts water users other than just humans does not surprise. NEMICMA wants natural resources within the demarcated coastal zones to be used in an environmentally sustainable manner.[318]

3.5 ECOLOGICAL GOVERNANCE

As seen in the previous chapter, ecocentrism means a radical change of perspective in philosophy that causes radical changes in law and challenges in legal practice. It is hence crucial to make the necessary and adequate changes in governance to facilitate the whole process. NEMA, as the environmental framework law, therefore generally requires from the governmental side environmental management to be integrated from the governmental side. This requires that the effects of decisions on the environment are considered adequatly. It furthermore requires best practicable options to be pursued.[319] This requirement is based on the recognition that the natural environment follows the principles of interconnectedness and interrelatedness, and thereby reflects ecocentric thinking.

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[315] NEMA, s 2(3)-2(4)(a)(i, ii, v-vi).
[316] Montani 2007 *TheFederalist* ciph3.
[317] NWA, DEAT *WPNWPSA* 21.
[318] Ss 1& 2(b); see definition of coastal zone in NEMICMA.
[319] NEMA, s 2(4)(b).

In order to ensure governance through the macro lense, NEMA then encourages all interested parties to participate in environmental governance and seeks to take their knowledge-based interests into account in decision-making.[320] Though at first glance NEMA seems more anthropocentrically oriented, it does emphasise that aquatic ecosystems require specific human attention and thereby shows that a shift is in progress to a more holistic approach to environmental management.[321] Read with the provisions in NEMICMA requiring the interests of the whole community to be considered and the provisions of the ecological reserve in the NWA this shift to more ecocentrism becomes clearer. As such, not only human but also ecological interests are to be heard in environmental governance and given the necessary considerations. NEMA finally makes the inter-governmental coordination and harmonisation of policies, legislation and actions relating to the environment compulsory,[322] facilitating a more holistic approach to environmental protection. Speaking in the context of NWA and NEMICMA this potentially means that the human basic and the ecological reserves shall inform authorities in defining the interest of the whole community.

The above-mentioned principles of governance are to be applied by all organs of state, regardless of the sphere of government.[323] To ensure ecological governance NEMA provides for respective planning tools such as environmental implementation and management plans.[324] In order to promote integrated and environmentally sustainable and sound management the relevant Minister is entitled to provide guidelines on development, content and use of voluntary organisation or sector based instruments and the respective circumstances under which they might be considered.[325] Such instruments must integrate environmental considerations, provide for the implementation of best environmental practice, promote progressive

[320] NEMA, s 3(f)(g).
[321] NEMA, s 2(4)(r).
[322] NEMA, s 4(l).
[323] NEMA, ss 1 & 2(1) read with Constitution, s 239.
[324] NEMA, s 12.
[325] NEMA, s 23A(1).

adoption of environmentally sound technology or promote sustainable consumption and production.[326]

As mentioned above, the new water law is characterised by the recognition that water itself forms a natural and self-regulating system following its own rules resulting in the recognition that humankind is not the only water user. Hence, the authorities are generally obliged to take a more holistic approach to environmental protection, more specifically water resource protection, which focuses on whole aquatic ecosystems including all their parts. This entails respecting the so-called water cycles instead of focusing simply on the availability and quality of water itself. It is the healthy functioning of the whole system that gives the resource the ability to recover from natural phenomena such as droughts, floods and human uses.[327] The importance of a naturally functioning aquatic ecosystem is even indirectly emphasised in allowing the respective Minister to preliminarily determine a class of water or resource quality objectives and water reserves.[328] In order to ensure integrated water governance the water reserves are to be taken into account in relevant planning. The national water resource strategy must provide for the requirements of the reserves[329] and the catchment management strategy again must consider the requirements of the water reserves.[330] Hence, determined water reserves are the subject of continuous examination as the planning tools are to be reviewed regularly, which allows flexibility and adaption of naturally inherent changes in ecological needs.[331]

NEMICMA was literally enacted to provide for integrated coastal and estuarine management.[332] The State especially has the obligation to ensure its adequate use, management, protection, conservation and enhancement in the interest of the whole community.[333] Recognising the ecological importance of estuaries for human beings and other living organisms, NEMICMA specifically dedicates a chapter to estuaries

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[326] NEMA, s 23A(2).
[327] DEAT *WPNWPSA* 6.3.2.
[328] NWA, s 14.
[329] NWA, s 6(1)(b).
[330] NWA, s 9(a).
[331] NWA, ss 5(3) & 8(3).
[332] Preamble.
[333] NEMICMA, s 12(a).

and their management.[334] It requires a National Estuarine Management Protocol (NEMP)[335] and estuarine management plans (EMPs) for individual estuaries.[336] Both are intended to support the more holistic and ecocentric approach in governance underpinning NEMICMA. Whereas NEMP must *inter alia* elaborate a strategic vision and objectives to achieve effective estuarine management and set the respective standards and minimum requirements for the EMPs, the EMP must correspond with to the NEMP, embracing the coastal programmes of all spheres.[337] NEMICMA furthermore requires coordination and alignment with other statutory plans and programmes such as for example the environmental implementation or environmental management plan in terms of NEMA, or provincial or municipal land development plans throughout the governmental spheres.[338] Consequently the NEMP was published in 2013 with the general goal to provide guidance for the EMPs, which again should achieve more harmony between ecological processes and human activities, providing for balanced utilisation of the respective resources.[339]

NEMP's strategic objectives show more ecocentric ideas. These objectives are *inter alia* the use of estuaries and their resources without compromising their ecological integrity and the functioning of their systems, the securing of the maintenance and restoration of the natural interactions between estuaries, them and their catchments and other systems and the achievement of the overall estuarine biodiversity targets.[340] The outlined standards for the estuarine management require best practices based on the concept of ecological sustainability. They require estuarine management to avoid, minimise or mitigate significant negative impacts that *inter alia* include reduced water flow and loss of habitat and species. NEMP requires estuarine management to be based on scientific findings or on the precautionary principle.[341] It further requires EMPs to *inter alia* list objectives and activities which at least address the conservation and utilisation of natural resources, social issues, land-use and

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[334] NEMICMA, ch 4.
[335] GN 341 in *GG 36432* of 2013-5-10.
[336] NEMICMA, s 33-34; DEA *Guide to ICMA* 34.
[337] NEMICMA, s 33-34.
[338] NEMICMA, s 51-52.
[339] GN 341 in *GG 36432* 10.
[340] GN 341 in *GG 36432* 3.
[341] GN 341 in *GG 36432* 12.

infrastructure planning and development, water quality and quantity, climate change, or other activities appropriate to maintain and or improve the estuarine conditions.[342]

3.6 SOME REFLECTIONS

The above analysis proves that South African environmental law – despite NEMA's anthropocentric definition of the environment – does show evidence of the shift in approaches to environmental regulation. In fact, there are several provisions reflecting ecocentric elements in laws with specific relevance to estuarine management despite the anthropocentric definition of the environment in NEMA.

NEMA sets a starting position for a more holistic and integrated environmental management. It at least repeats the goal of ecologically sustainable development from the Constitution and provides for the duty of care, thereby implying the recognition of ecological interests and rights. Recent philosophical and scientific developments seem to have further impacted on the newer environmental management laws. The NWA introduces the ecological reserve that ensures the availability of water for users other than human beings such as estuarine ecosystems and their biodiversity. NEMICMA moreover introduces the interests of the whole community to be considered when managing the coastal environment. It literally acknowledges that nature has its own interests, though limited to living organisms as opposed to the NWA that also acknowledges the interests of other natural entities such as ecosystems.

All these provisions potentially inform governmental action when dealing with human proprietary and ecological interests. Drawing from the ecocentric argument that all environmental problems are basically caused by the anthropocentric notion of property that made regulation necessary, it can be concluded that these provisions limit and reshape the human proprietary rights while enhancing ecological interests. They devalue human proprietary interests. However, most provisions do not give clear guidance in how to balance the respective interests against each other, they

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[342] GN 341 in *GG 36432* 15.

are not specific enough and leave space for interpretation at the discretion of the authorities.

4. Reviewing relevant recent South African jurisprudence

After having unpacked the ecocentric characteristics of the South African legal framework with potential relevance to the management of estuaries, chapter four seeks to analyse and review the two mentioned recent South African court cases, namely *Abbott v Overstrand Municipality* and *uMfolozi Cooperation of Sugar Planters Ltd v the iSimangaliso Wetland Park Authority.* In both cases the applicants asked authorities for protection of their properties in form of either a dwelling or farmland from backflooding as a result of filling up with water of a closed estuarine mouth. In question was *inter alia* the legality of the artificial breaching of the berm built up with sediment from the vlei, potentially impeding ecological interests of estuarine fauna and flora and the entire ecosystems. Hence, in both cases, the (legal) question of particular interest was how to balance the competing private proprietary and ecological interests.

Chapter four reflects on the extent to which the outlined provisions in chapter three impacted on the courts' decisions. Of specific interest is whether the courts grappled with the ecocentric principles and whether the judgements reflect the nature rights thinking as the outcomes suggest. If they did, it seeks the analyse how they influenced the respective decisions and whether they gave guidance on how to interpret and apply the respective provisions. If they did not, the question is why not; and ecocentric principles could have influenced them. The analysis in chapter four overshadows out other legal issues such as the discussion about dispute of facts, competences, requirements of declaratory relief, requirements of established practices and the interpretation of agreements *et al*.

4.1 OVERVIEW OF FACTS AND ARGUMENTS

4.1.1 Abbott v Overstrand Municipality

The Klein River estuary is situated next to Hermanus in the Western Cape province.[343] Under natural river flows it seasonally opens and closes its river mouth.[344] During closed-mouth periods, a sandberm separates the river from the sea. In order to clear this sediment the berm must be breached, either by the hydrological power in the vlei itself eroding the berm or artificially by human beings.[345] The fresh water subsequently cleans the water in the estuary.[346] The natural hydrological breach usually happens at levels exceeding 3-3.5m above mean sea-level (MSL). Occasionally, in order to preserve flora and fauna in the lagoon, the artificial breach of the berm might be required.[347]

During the 19th century people began settling along the estuary. To prevent these properties from being flooded, berms used to be artificially breached, first by workers using spades and later by using bulldozers.[348] In 2010 an informal municipal forum adopted a management plan for the Klein River estuary for the period 2010-2015 (MP). This MP stated that in the absence of any crisis conditions the berm might be breached only at a height of 2.6m MSL, preferably at even higher levels. The flooding of low-lying properties would not satisfy these requirements.[349] The Klein River estuary provides many ecosystem services to the region and the entire South African coast. Because of its biodiversity and conservation value – it is on position five of the most important South African estuaries– it must be maintained as a healthy and functional estuary.[350]

In 1982, Abbott bought property situated on a river bank of the Klein River estuary. He got the building plans approved for the house built in 1989. His property allegedly was flooded in 2008. The municipality rejected requests to take any steps against the

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[343] *Abbott SCA* para 1.
[344] *Abbott WCHC* paras 2-4.
[345] *Abbott SCA* paras 2-5.
[346] *Abbott WCHC* para 7.
[347] 5.
[348] 6.
[349] 14-17.
[350] 1.

flooding on Abbott's property.[351] In July 2014, Abbott wanted the court to review and set aside the respective decision and that it be remitted to the municipality for reconsideration.[352] This reconsideration should include the consideration of possible steps to be taken to protect his property from being flooded as a result of the failure to artificially breach the berm of the Klein River mouth in general or when the water level in the estuary exceeded 2.1m MSL. Abbott sought a direction that the municipality take reasonable steps to prevent his house from flooding.[353] In the alternative, Abbott sought a declaration that an established practice existed to breach the berm whenever the low-lying properties were threatened with being flooded. The court was asked to declare that a departure from the established practice was allowed only in the case of the municipality taking other necessary steps to prevent flooding of his property.[354]

Abbott's arguments were principally based on his complaint that his property had been flooded because the municipality failed to take adequate steps, eg the breaching of the estuary's mouth, to protect his property from damage as consequence of the rise of water level in the Klein River. In his opinion, such steps were *inter alia*.[355] Abbott claimed that it was common practice to breach the berm when the water in the estuary exceeded the mark of 2.1m MSL according to a policy he was told about at the time of the land purchase. Abbott contended further that since the adoption of the MP in 2010 he experienced repeated floods.[356] Abbott argued that, with the adoption of the MP the municipality adjusted the water level at which the berm might be breached artificially. Therefore, the alleged damage suffered was the municipality's fault and responsibility.[357]

The municipality argued that there was no causality between the damage suffered and the alleged floods. It claimed that the non-breach of the berm in the estuary's mouth was not causally linked to Abbott's alleged damage. Moreover, the

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[351] *Abbott WCHC* para 10; *Abbott SCA* 1 & 13.
[352] *Abbott SCA* para 6.
[353] 7.
[354] *Abbott WCHC* para 2.
[355] 13.
[356] 9.
[357] 18.

municipality contended that there had never been any action undertaken to protect riparian property. The municipality used only to undertake measures to protect property adjacent to the vlei and only against wave incursions caused by wind and wave action.[358] In the municipality's view, Abbott proceeded against the wrong respondent and was the author of his own misfortune by having built his house closer to the flood line than he was authorised to do.[359]

4.1.2 uMfolozi Sugar Planters Ltd v iSimangaliso Wetland Park Authority

The St. Lucia estuary is situated within the iSimangaliso Wetland Park (park). On account of its outstanding examples of five ecosystems, its geographical diversity, its exceptional biodiversity and threatened species of fauna and flora that find habitat in the park, it was recognised as a World Heritage Site in 2010.[360] The area has also been known for its sugar cane farming since 1911. Sugar cane farming is economically important to South Africa because of the employment created and the production of sugar for domestic use and export.[361] There are five rivers flowing into the St. Lucia estuary. One of them is the uMfolozi River. Whereas the St. Lucia and the uMfolozi River mouths were naturally combined until the 1950s, the uMfolozi River was then artificially altered for agricultural reasons. This alteration led to a separate river mouth for the uMfolozi River, so that the fresh water then flowed directly into the sea.[362] When the respective estuarine mouth closes the water flows back on to the adjacent agriculturally relevant farmland. To avoid flooding of the respective farms, it was practice up until 2010 to breach this new uMfolozi River mouth.[363]

iSimangaliso is the responsible authority for the park.[364] In 2008 it commenced with the Global Environmental Facility project (GEF) within the World Heritage project, which was founded by the World Bank to investigate and propose a medium- to long-

[358] 13.
[359] 21.
[360] *UCOSP KZNHC* para 2.
[361] 1-5.
[362] 21(2-5).
[363] 21(6).
[364] 6.

term solutions for the restoration of the ecological and hydrological health of the park, the St. Lucia estuary and Lake. Thereby iSimangaliso found that the artificial separation of the two river mouths was detrimental to the park, and set out to restore the previous situation.[365] Hence, iSimangaliso has set out the management strategy for the park first in a Background Information Document (BID), which recognised the backflooding on to the adjacent farms as a necessary consequence of the restoration. It did so too in the Integrated Management Plan for 2011-2016 (IMP), which was approved by the National Minister of Environmental Affairs in terms of the World Heritage Convention Act (WHCA)[366]. iSimangaliso started to restore the St. Lucia estuary to its original form as naturally as possible in 2011.[367]

In January 2015 the region was hit by a severe drought that led to the closure of the restored mutual mouth of the St. Lucia and the uMfolozi rivers. Subsequent rains caused the accumulation of water in the uMfolozi basin that caused backflooding of the agricultural land on the uMfolozi floodplain,[368] which was why uMfolozi Sugar Planters Limited, a company that provides maintenance of communal drainage and flood protection infrastructure to reduce the effects of periodic flooding on the uMfolozi floodplain, and two of its shareholders (together referred to as UCOSP) in August 2015 first sought urgent interdictory relief for an order that iSimangaliso opened or allowed UCOSP to open the uMfolozi estuary. UCOSP contended that the uMfolozi River mouth must be opened immediately otherwise the sugar cane farms would suffer harm, since some of them were already flooded and others were at imminent risk of being flooded. UCOSP argued that it firstly had the right to breach the mouth based on the Water Use Certificate issued by the Department of Water Affairs (DWAF) in 2012; secondly that iSimangaliso was ignoring the constitutional principle of cooperative governance; and thirdly that there already existed an established practice to breach the uMfolozi river mouth artificially.[369]

UCOSP then sought the main declaratory relief that iSimangaliso had failed to develop and/or implement the statutory policies, protocols, procedures, rules and

[365] 8.
[366] No 49 of 1999.
[367] *UCOSP KZNHC* paras 9-10.
[368] 4-13.
[369] 8.1.

plans in terms of the relevant regulatory framework specific to the management of the uMfolozi mouth directly impacting on the adjacent farmland.[370] During the process UCOSP amended its legal request to demand that iSimangaliso proceed with the respective EMP according to the timetable set out during its developing process; that iSimangaliso thereby take account of its obligation to prevent and drain down backflooding of the farmland; and finally that until the finalisation of the EMP the interim agreement should remain in place. UCOSP contended that iSimanagaliso failed to comply with the NEMP in not developing the respective EMP. According to UCOSP this failure was the reason for *ad hoc* decisions with regard to the opening of the uMfolozi River mouth instead of taking well-reasoned and rational decisions.[371] UCOSP submitted further that the purpose of the coastal protection zone as provided for in NEMICMA was the protection of land adjacent to coastal property and that had to be taken into account by iSimangaliso in its estuarine management policies.[372] UCOSP argued that the proper implementation of the GEF had the effect of preventing the backflooding of the farms. Hence iSimangaliso failed to comply with its obligations to remove the dredge spoil.[373] UCOSP furthermore claimed that iSimangaliso failed to develop a cooperative relationship and agreement with it.[374]

In October 2015 the parties agreed *ad interim* that iSimangaliso would breach the uMfolozi mouth to prevent the backflooding on the farmlands whenever the trigger level reached 1.2m MSL.[375] In December 2015 and March 2016 USCOP sought two further urgent applications alleging that iSimangaliso had not respected the interim agreement.[376] UCOSP finally sought the declaration that iSimangaliso was in breach of the mentioned agreement and failed twice to act accordingly, arguing that iSimangaliso's interpretation of the interim agreement was absurd and unsustainable.[377] These applications were decided with the main application.

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[370] 8-11.
[371] 53.
[372] 63.
[373] 86.
[374] 36.
[375] 11.
[376] 12.
[377] 1-17.

iSimangaliso, on the other hand, denied UCOSP's allegations. It pointed out that the alleged backflooding was simply a natural process in which humankind should not interfere.[378] It further contended that by granting the urgent application UCOSP and/or the court would violate its restorative policy and management efforts practised since 2012.[379] iSimangaliso referred to all its undertakings made to fulfil its legal obligations.[380] Artificial breaching would only serve the interests of the adjacent farmers.[381] iSimangaliso held that it followed the objectives and the time frame as had been set out in the IMP,[382] which identified the park as a key priority area that was to be re-established and managed as one open and integrated ecological area in the IMP. With regard to the EMP, it contended that there was no time frame for its publication.[383] It wanted to publish the EMP once it had worked out the medium- to long-term plans.[384] iSimangaliso pointed out that its conduct was in accordance with NEMICMA, which required the interest of the whole community to be taken into account when managing the Lake St. Lucia estuary.[385] iSimangaliso was obliged to on the one hand protect the sensitive coastal environment and on the other hand to secure the natural functioning of the relevant dynamic coastal systems.[386] iSimangaliso finally stated that even if the dredge spoil was removed the backflooding would occur.[387] iSimangaliso then indicated that the water-use licence presented by UCOSP did not extend to the river mouth. It was of the opinion that UCOSP did not itself protect its farms adequately from being flooded.[388] iSimangaliso claimed that USCOP had been aware of all its efforts to fulfil its statutory obligations since at least 2011, as it participated in the respective public consultation processes.[389] It then denied being in contempt of the interim agreement. It was of the

[378] 8.2.
[379] 11.
[380] 38-39.
[381] 40.
[382] 42.
[383] 55.
[384] 54.
[385] 59.
[386] NEMICMA, ss7A (b-c) and 12; *UCOSP KZNHC* para 59.
[387] *UCOSP KZNHC* paras 84-91.
[388] 10.
[389] 37.

opinion that it acted as required by the law and in respect of the situation prevailing at that time.[390]

4.2 OVERVIEW OF THE OUTCOMES

4.2.1 Abbott v Overstrand Municipality

The case regarding the Klein River estuary was dealt with before the Western Cape High Court (WCHC) and then the Supreme Court of Appeal (SCA). Both courts dismissed the case, but on different grounds. The WCHC sought first to resolve the disputes of fact. It had to be established first whether the raising of the artificial breach level of the estuary in the MP from 2.1m to 2.6m MSL was causally linked to the flooding and as a result thereof to the alleged damage experienced to Abbott's property.[391]

The WCHC concluded that according to the reports filed by the municipality, Abbott's property could be flooded at a certain water level regardless of the breaching of the berm and the estuarine mouth's condition. Because Abbotts's property was situated in the upper reaches of the Klein River it was naturally more exposed to flooding throughout the year. Hence, effective flood protection for land in the upper reaches demanded more complex measures all through the year rather than the artificial opening of the estuary mouth from time to time.[392]

The WCHC hence dismissed Abbott's application because of the lack of evidence of causality between the alleged damage suffered on his property and the change of level for the breach of the berm in the new MP. There were numerous other possible factors which could have caused the damage to his house.[393] It further held that in the event of there being a practice established to breach the berm in order to protect private property at certain levels, this practice existed only with regard to the erfs adjacent to the vlei and not to property adjacent to the river banks. In any event,

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[390] 13.
[391] *Abbott WCHC* para 26.
[392] 33-41.
[393] 52-55.

property protection was exercised only against wind and wave action and not against the threat of backflooding.[394]

The SCA took a different route in reaching the same conclusion as the WCHC, dismissing the case on the more formal ground that the municipality was not the competent authority to apply to for protection against flooding for properties adjacent to estuaries. In the SCA's view the municipality had no estuarine management competences thus far.[395] The SCA made cleart that the relief sought by Abbott was not in relation to the breach of the berm. He had sought the direction that the municipality take adequate measures to protect his property from being flooded.[396] The SCA made it clear that Abbott's application was for review of the municipality's failure to take a decision to prevent his property of being damaged by floods. Consequently, the SCA held that Abbott first had to show that the municipality was legally obliged to take steps to prevent damage to his house and or property as a result of floods.[397]

In finding whether the municipality in general held the legal duty to protect private property, the SCA concluded that so far, no power or duty to manage or control the Klein River estuary and to take any measures to protect riparian properties had been assigned to the municipality.[398] The court also declined to invoke the doctrine of legitimate expectation. It commented that even if it were to uphold the existence of such a doctrine, that Abbott failed to establish the respective factual basis for its invocation. He failed to prove that there existed a practice to breach the berm at a level of 2.1m MSL to protect property at river banks as opposed to properties adjacent to the vlei.[399]

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[394] 45-56.
[395] *Abbott WCHC* para 25-27.
[396] *Abbott SCA* para 9.
[397] 13.
[398] 30.
[399] 33.

4.2.2 uMfolozi Sugar Planters Ltd v iSimangaliso Wetland Park Authority

The KZNHC first dealt with numerous disputes of fact. It noted that the decision taken was based on relevant statutes and reports and other documents filed by USCOP. The KZNHC held that the onus was on UCOSP to show that iSimangaliso failed to comply with statutory obligations and that this failure specifically caused the wrong management of the uMfolozi River mouth.[400] The court then stated that UCOSP itself conceded that the only question to be answered was whether iSimangaliso had fallen short of its statutory and regulatory obligations, and that it was not necessary to discuss all the other issues and arguments raised in the process.[401] Since UCOSP alleged that iSimangaliso made contradictory statements with regard to the estuarine management plan − first that it had already implemented it and then that it only was in the process of developing the plan − the KZNHC based the judgement on that issue, especially as it was the basis of the amendment of the main relief sought by UCOSP.[402]

The KZNHC basically accepted iSimangaliso's argument and found that there was no reason to hold that iSimangaliso had not complied with its statutory obligations.[403] The KZNHC found that there was no merit in UCOPS's allegation that iSimangaliso failed to develop the required EMP or establish any cooperation.[404] On the contrary, iSimangaliso was able to show that it was on course.[405] It finally dismissed UCOSP's main application on the gorund that it did not discharge its onus of proof. It dismissed UCOSP's main application owing to lack of evidence in support of its allegations.[406] Consequently UCOSP had to bear the costs for the urgent application and the main application.

The KZNHC held further that UCOSP could not show any scientific reason to act as sought in the interim relief. UCOSP could not reasonably argue for the need for the artificial breach of the uMfolozi River mouth or the respective removal of the dredge

400 *UCOSP KZNHC* para 29.
401 31.
402 33-34.
403 42.
404 75.
405 80-81.
406 20 and 99-109.

spoil.[407] The KZNHC then stated that UCOSP could not rely on custom to breach the uMfolozi River mouth, concluding that it followed from UCOSP's own argument that it was aware that the alleged custom might be superseded by the relevant statutes. It held further that UCOSP was aware of the fact that iSimangaliso in future might breach the mouth but such artificial interference would become necessary only if based on the statutory objectives.[408] Hence, the KZNHC also discharged the relief as set out in the consent order.[409] In the KZHC's view there was no practical relevance in the relief sought by UCOSP, not least because it failed itself to develop a proper solution for flood protection.[410] The KZNHC also dismissed the two contempt applications. It held that iSimangaliso showed good reasons not to breach the mouth, but directed each party to bear its own costs, since the parties did not find proper and enforceable consensus on the interim order issued on 15 October 2015.[411]

4.3 ANALYSIS OF THE CASES THROUGH THE ECOCENTRIC LENS

4.3.1 Consideration of ecocentric elements

4.3.1.1 Abbott v Overstrand Municipality

Since the Abbott case was decided on factual and formal matters, it did not really address the ecocentric provisions outlined in chapter three. Since the WHCH dismissed Abbott's application on factual grounds, the WHCA had no reason for any further elucidation. Likewise, there was principally no reason for the SCA to address the provisions outlined in chapter three reflecting more ecocentric thinking when concluding that Abbott failed to prove that the municipality had the competence and duty to make the decision to breach the estuarine berm. However, with regard to the purpose of the dissertation, it is worth mentioning the few potentially ecocentric thoughts in the SCA's judgement as it made reference to NEMICMA. The SCA, by holding that under NEMICMA's provisions as set forth in its chapter four, the

[407] 97-98.
[408] 137-139.
[409] 20.
[410] 105-108.
[411] 201-202.

municipality might be authorised to administer estuaries in future, the SCA allowed itself (consciously or not) to add some ecological thoughts regarding estuarine management as such. It stated that according to an estuarine specialist artificial breaching of the berm of an estuary at lower than natural breaching levels reduced the volume and duration of water-flow out to sea with resultant increased sedimentation in the vlei, causing an adverse effect on the ecology there. Therefore, to protect the estuarine ecology, artificial breaching of the berm at higher levels was in general to be preferred.[412] The SCA thereby implied that an artificial breach in certain cases even might be necessary for and in the interest of the estuarine environment. The SCA added that – in its words – in the specific Klein River case there were many players (government, private parties) making decisions about the mouth's management. This "collaboration" resulted in the MP approved by the respective provincial authority in 2010. Due to subsequent droughts this plan was revised in 2013 to allow the breach even if the water did not reach the level of 2.6m MSL. It emphasised that the reason for this provisions was to avoid ecological and not economic damage.[413]

4.3.3.1 uMfolozi Sugar Planters Ltd v iSimangaliso Wetland Park Authority

The KZNHC solved the case in the context of disputes of facts. It first examined UCOSP's allegation whether iSimangaliso had admitted not to have had estuarine management plans in process and that did not want to maintain a cooperative relationship with UCOSP.[414] The KZNHC obviously held that large sections of iSimangaliso's allegations remained undisputed by UCOSP, which was why it predominantly accepted iSimangaliso's version of the facts. It hence concluded that there was no failure on iSimangaliso's part to comply with legal requirements regarding policies and plans it had to develop.[415] The KZHNC concluded that the management plan iSimangaliso was implementing, namely the IMP, and the respective component of the GEF, were in accordance with the WHCA and the

[412] Taylor *Respect* 2.
[413] *UCOSP KZNHC* para 30.
[414] 35-36.
[415] 18.

objectives of NEMP.[416] The court in its findings indeed adopted some of the outlined provisions reflecting ecocentric thinking.

The KZNHC came to the conclusion that iSimangaliso's management of the park was based on the relevant IMP, which again was based on the WHCA, and the BID. In developing and implementing the IMP, iSimangaliso acted at the same time in accordance with NEMICMA and the NEMP. The IMP also seeks to restore and maintain optimum estuarine functions. This entails allowing fresh water to flow and the uMfolozi and the St. Lucia river mouths to combine naturally, as well as the continuous review of the salinity and water levels and taking of actions by way of adaptive management.[417] Since the IMP and the BID were consistent with the principles of the NEMP, they moreover provided for a rational and lawful basis for estuarine management in the park *ad interim*.[418] As even the Minister of Environmental Affairs did not feel the need to complain about iSimangaliso's approach, there was nothing wrong in it taking time for its development.[419]

The KZNHC held that as iSimangaliso correctly stated, there was no date foreseen in the NEMP for the publication of EMPs. It found that the NEMP wanted EMPs to achieve more harmony between natural processes and human activities.[420] It thereby implied – and in this case justifiably bearing in mind that the park is a world heritage site that must be managed in accordance with international obligations – that it was rather due to the legal and geographical complexity of the matter that iSimangaliso needed a certain amount of time to fulfil its legal obligation to develop and publish an EMP properly. In its opinion, iSimangaliso's papers showed the complexity of the restoration.[421] The whole process of studies and the subsequent works as well as the tender processes needed time and had to be funded. The respective plans moreover needed approval.[422] It then specifically pointed out that NEMP's strategic objectives were not to compromise the functioning of estuaries but to maintain the ecological

[416] 57.
[417] 22-25.
[418] 54-57.
[419] 61.
[420] 55.
[421] 71-76.
[422] 71-81.

interactions between ecosystems.[423] The purpose of the restoration project was not the prevention of backflooding onto adjacent properties but the natural flowing of fresh water from the river to the estuary. Importantly the uMfolozi River had always been the source of fresh water for the St. Lucia estuary.[424] Against this background the KZNHC hence rejected UCOSP's contention that iSimangaliso was not in a position to take reasonable estuarine management decisions just because it did not have an EMP.[425]

The court obviously found it important to mention some of the provisions of the BID, probably to ascertain what the implementation of the restoration-process meant in practice and/or to try to clarify iSimangaliso's obligation to take into account the interest of the whole community without preferring some over others as required by NEMICMA and specifically protect sensitive coastal systems as well as to secure the natural functioning of dynamic coastal systems.[426] In seeking to restore the environment in the park the BID proposes that in certain cases spillways are allowed to use to ensure that sediment-free water reaches the estuary. It further proposes that cane lands below and close to sea level should be appropriated and allowed to be converted into wetlands.[427] It is questionable whether human beings might accept the appropriation of land and their respective activities (as long as not for the satisfaction of human basic needs) in and adjacent to estuaries as it is human choice to settle and exploit the respective environmental areas.[428] The BID specifically points out that it was proved that farming and the artificial mouth management are disturbing and have extremely adverse impacts on the natural estuarine ecosystems in the park and the affected fauna and flora. This is the reason why artificial breaching of estuarine mouths will not happen automatically in future.[429]

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423 56.
424 67-71.
425 64.
426 59.
427 48-49.
428 Taylor *Respect* 2.
428 *UCOSP KZNHC* para 30.
428 57.
428 61-62.
428 65.
429 39-40.

The KZNHC commented briefly on the coastal zone in terms of NEMICMA[430] because UCOSP argued that its purpose was the protection of adjacent land. The court corrected UCOSP's allegations, holding that the coastal protection zone was established for enabling the use of land adjacent to coastal public property. It stated that the coastal protection zone played a significant role in the protection of coastal ecosystem in order *inter alia* not only protect ecological integrity but also to protect the economic and social value of the coastal public property and its integrity.[431]

With regard to UCOSP's complaint that iSimangaliso did not respect the principle of cooperative governance as required by the NEMP[432] the court touched on the topic of ecological governance. It concluded that UCOSP had been consulted from the beginning and the respective cooperative relationships started to be established.[433] The KZNHC found that UCOSP was aware at any and all times of iSimangaliso's restitution plans and strategies and was duly informed of any outcome of undertaken studies underpinning the plans and strategies.[434] It hence had every opportunity to participate. Though not clear in which context the court commented on iSimangaliso's duty to take the interest of the whole community into account, it shall be commented on here in the context of ecological governance. The consideration of interests of the whole community implies a holistic approach to governance. The KZNHC stated that *in casu* the collective community contained 640 000 people, 12 traditional authorities, 12 land claimants, five local municipalities, two district municipalities, subsistence users, NGOs, residents and business owners around the park.[435] iSimangaliso in its view hence had complied with the relevant principle of NEMCMA. It is noted that the court referred to the collective community in the context of a document relating to social and economic and not the ecological values of the St. Lucia restoration project. It hence might be questionable whether iSimangaliso and the KZNHC understood the term that requires the interests of other living organisms to be taken into account properly. It might be questionable whether

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[430] S. 17.
[431] *UCOSP KZNHC* para 63; NEMICMA, s. 17.
[432] NEMP, ciph. 3.2.3 that requires estuarine management to be exercised in cooperation with all governmental spheres as well as *with the private sector (*own emphasis).
[433] *UCOSP KZNHC* para 45.
[434] 99.
[435] 60.

iSimangaliso considered the ecological interests (at least related to this specific document).

In dealing with the required artificial breach of the estuarine mouth and the removal if the dredge spoil, the KZNHC first made it clear that it was UCOSP's own responsibility to protect its property from being flooded.[436] Hence the alleged (potential) damage was primarily its own responsibility.[437] Referring to the WHCA, an act that has not been analysed in chapter three above, the court dealt with iSimangaliso's ecocentric arguments. iSimangaliso maintained that required breaching serves only UCOSP's interest ignoring any ecological interests. The removal of the dredge spoil as required by UCOSP would contradict the duties imposed on iSimangaliso in the WHCA,[438] according to which iSimangaliso has to balance individual against collective interest and against the obligation to protect and conserve the site informed by the developed and above-mentioned IMP.[439] In the context of customary rights the KZNHC stated that the artificial breaching could not be considered as reasonable as scientific studies showed that it had an adverse impact on the whole estuarine system of St. Lucia and its biodiversity; and also wasted valuable fresh water.[440] The court hence found that the management iSimangaliso chose to apply for the area was based on scientific research and in accordance with its statutory obligations. It aimed not only to serve the collective park community but to preserve the world heritage site as well.[441] Marginal note: Again it is not clear from the way the court ruled whether it defines the collective community as required by NEMICMA as including the living organisms. The preservation of the site namely serves the interests of the collective community.

Though the requirements for the declaratory relief are not of interest here, it is adequate in the context of considered ecocentric elements to briefly reflect on the courts rationale with regard to the alleged right to breach the estuarine mouth based

[436] 85.
[437] 86.
[438] 102
[439] 103.
[440] 140.
[441] 141.

on an existing water use licence.[442] According to UCOSP's registered water uses, UCOSP was entitled to impede or divert the water flow in and even alter the bed, banks, course or characteristics of a watercourse. The DWAF obviously accepted the lawfulness of the historically claimed water uses, which comprised of the flood protection infrastructure with regard to the artificial uMfolozi River mouth but not the St. Lucia estuary since it was under iSimangaliso's competence.[443] Such historically established water use rights might not be consistent with the applicable law, the question is why they might be verified or limited, restricted or prohibited by any other applicable law.[444] The court considered the WHCA and NEMICMA as they provided for the protection of ecological interests and would prohibit, as shown above, the breaching of estuarine mouths when the action was adversely impacting on the respective natural environment.[445]

To sum up, the KZNHC touched on some provisions reflecting ecocentric element relevant to estuaries as analysed above in chapter three. It touched on the interest of the whole community, the coastal zone and the planning tools with specific relevance to estuaries in NEMICMA. Besides NEMICMA, the court relied predominantly on the WHCA, which is obvious as the park is a world heritage site, but not the focus of the dissertation.

4.3.2 Possible alternate outcome had the provisions reflecting more ecocentric thinking been considered and applied correctly

4.3.2.1 Abbott v Overstrand Municipality

Bearing in mind the importance of the matter of colliding proprietary and ecological interests – the reason for modern environmental law – and the fact that there are radical changes and a certain number of pretty new environmental laws in South Africa, it is surprising that neither the WCHC nor the SCA felt responsible to

[442] 110-113.
[443] 118-121.
[444] 132-134; NWA, ss 22(2) & 35.
[445] *UCOSP KZNHC* para132.

elaborate on the matter in question. Especially the WCHC's approach to the case is *prima facie* not understandable, as Abbott did not ask for compensation for the alleged damage suffered. Before even starting to discuss the causality between the alleged damage suffered and any failure of the municipality to protect Abbott's property from flooding, the WCHC should have first examined whether there was a legal basis for the claim and, if not, an established practice on which Abbott might have relied for his application. Only if a legal basis or an established practice (from which the municipality had no reason to depart) could have been affirmed, it would have made sense to answer the question of causality. However, based on the approach the WCHC chose to solve the case, it is a logical consequence that it did not deal with any of the provisions outlined in chapter three above.

With regard to the SCA 's judgement it can be said that the approach to first establish the municipality's legal duty to do as requested, regardless of the outcome of this inquiry, might be legally correct. However, the SCA after going through a couple of laws rather superficially, simply concluded that the municipality was not (yet) the competent authority to undertake any measures related to estuarine management dismissing the appeal on that basis. Surprisingly, in choosing this approach, the SCA did not touch on the NWA at all, though, when dealing with estuarine management perusal of this act seems obviously necessary. As shown above the NWA namely defines estuaries as water resources, whose protection is reason of the act's existence. Omitting to refer to the NWA or simply ignoring it suggests that the judge was beating "around the bush"; and, as he was giving a leading judgment on behalf of a powerful court, did not want to touch on relevant questions of how to solve competing private proprietary and ecological interests with relevance to estuaries. Hence, neither the WCHC nor the SCA dealt with the environmental legal framework relevant to estuarine management with its above-described ecocentric elements and failed to reflect ecocentric thinking.

Given that the SCA came to the conclusion that only in future the respective EMP (it is not implemented yet) might establish the municipality's powers to manage estuaries, it appears understandable, that it did not want to touch prematurely on the real issue of whether there was a basis to litigate to protect private property from

natural incidents at all and specifically with reference to estuaries. It also did not grapple with the ecocentric provisions of the relevant laws. However, based on the same argument (the NEMP provided for the respective delegation norm) the SCA, could have said more on the lawfulness of artificially breaching the berm of an estuary in general. Moreover, as the SCA itself felt the need to say that there may be occasions when ecology is endangered and needs protection, in which case the berm should be breached at certain levels, it suggests the importance and topicality of the matter. Regardless of whether the SCA's conclusion is correct or not (the focus of the dissertation is not the powers and competences of governmental authorities), and whether the municipality was the correct authority for Abbott to address, the case gave opportunity to discuss the relevant questions with regard to the solution of conflicts between human proprietary and ecological interests relating to estuaries (more deeply) – at least in an *obiter dictum.* If the SCA had done so, it would have given itself the opportunity to seriously grapple with the ecocentric provisions outlined in chapter three above and specifically reflect on the ones of the NWA and NEMICMA.

Stating that artificial breaching of a berm might be required in certain circumstances for the protection of nature starts the relevant discussion by indirectly referring to the interests of the whole community as introduced by NEMICMA. It should not have stopped there. In reading NEMICMA and the NWA the SCA would have concluded that under the new legal regime relevant to estuarine management it was difficult to simply favour human proprietary over ecological interests, because humans are generally able to look for alternatives but species dependent on estuaries are not. If the SCA had read through the NWA it would not only have come across the provisions for the water reserves favouring ecological interests over human interests but upgrading them and putting in concurrence with basic human needs. The interests of the whole community have to be considered in practically every decision-making process, be it granting permits or planning permission subject to NEMICMA. When reading the relevant legal framework one must conclude that in order to understand respective ecological interests and secure an adequate human interaction with such complex natural elements as estuarine ecosystems, NEMA in general and NEMICMA and the NWA in particular require an integrated approach to

governance and management. The coastal environment and the fresh water resources are put in the trust of the State that is required to develop divers plans based on the cooperation of authorities throughout all spheres of government.

By dealing with the mentioned provisions the court would have had the opportunity to reflect on how the individual provisions impact on each other, probably revealing the degree of inter-connection and cooperation between governmental spheres on the one hand and the extent to which individual legal tools inform and how they depend on each other on the other hand on. The SCA probably would have concluded that based on the principle of ecological governance, the municipality indeed had relevant powers and responsibilities when it comes to estuarine management. Moreover, it could have stated that, despite the fact that the determination of the reserves and the development of the EMP's had simply not yet been done, the laws give guidance for the direction in which to go. As this direction seems in any event to have been overtaken in the existing MP developed by the special communal committee, the fact that some of the provisions have not been implemented yet is no excuse not to deal with the issues in question.

4.3.2.2 uMfolozi Sugar Planters Ltd v iSimangaliso Wetland Park Authority

It is already mentioned above that the KZNHC did touch on several relevant and ecocentric elements/provisions in dealing with human proprietary and ecological interests. However, though the judgment is fills almost 65 pages their discussion appears rather sparse, not touching on such themes as the ecological sustainability or ecological stewardship. The reason might be that the court simply had a huge number of documents to work through in a case of great factual and legal complexity. It focused on the WHCA, which is why is possibly why it ignored the NWA almost completely or just forgot to make reference to it. NEMA did not even find reference.

The KZNHC chose to deal with the case on the basis of provability, focusing on disputes of fact and the factual basis of the case. In resolving the disputes it asked whether iSimangaliso admitted that it did not have the relevant estuarine management plans as was alleged by UCOSP. Another approach, and probably the

easier, might have been to simply answer the question whether iSimangaliso failed to develop and/or implement the statutory policies and plans it was obliged to. This approach would have given the court the opportunity to first distil iSimangaliso's mandate, then ascertaing the possible tools to fulfil the mandate, showing the discretion given by law. In a second step the discussion would have followed whether iSimangaliso factually failed to comply with its legal obligations on the one hand, and on the other hand, whether UCOSP satisfied its onus of proof to prove the negative (subject to it being questionable whether UCOSP bore the onus to prove a negative on the basis of *negativa non sunt probanda*). This approach definitely would have allowed a deeper discussion of the ecocentric provision of potential relevance to the emerging conflict between UCOSP and iSimangaliso. Moreover, it could or could have motivated the court to write about the evidenced shifting from the anthropocentric to the ecocentric approach to environmental legislation in the relevant South African legal framework. A more holistic discussion would have supported the court's finding that there was no reason for iSimangaliso to "work" for UCOSP's proprietary interests.

In analysing the KZNHC' reasoning, one cannot then start with the mentioned interests of the whole community, as they imply rights of nature. The interest of the whole community must be taken into account when the respective authorities are fulfilling their mandates – when they are managing activities relevant to coastal waters such as activities in estuaries for example, which might be the artificial breaching of their mouths,[446] when they must restrict access to coastal public property,[447] when they are asked to issue an environmental authorisation for coastal activities.[448] If the court have done a comprehensive analysis of NEMICMA, it would have realised that its section 12 refers to the State's trusteeship of the public coastal zone, which again must serve the interest of the whole community. Thereby it could have followed on with a short discussion about the ecological reason for putting the public coastal zone into state stewardship. That again would have lead to discussion about the coastal zone itself revealing ecocentric justification for forming human

[446] NEMICMA, s 21(a).
[447] NEMICMA, s 13(2)(c).
[448] NEMICMA, ss 63(2)(g) & 64(1)(a); the authorities may in the interest of the whole community grant or may not issue an environmental authorisation.

proprietary rights. The respective provisions read together, they namely reveal that they are aimed to regulate human relationship with nature, humans being an equal partner of nature. These discussions have been omitted in the judgement completely.

The KZNHC especially had the opportunity to refer to the above.analysed acts, at least to NEMA and NEMICMA, when dealing with the required artificial breach of the estuarine mouth. Although it is understandable that it chose to primarily refer to the WHCA, it is puzzling that it did not examine other potentially relevant environmental laws, as it seems obvious that an artificial breach of an estuarine mouth might trigger their application. Both, NEMA and NEMICMA (though the latter more specifically) provide for protection of sensitive ecosystems: NEMICMA for the protection of aquatic ecosystems. Furthermore, when dealing with the required artificial breach of the estuarine mouth the KZNHC had the opportunity to say that the breach might trigger an Environmental Impact Assessment, the tool to ensure (ecological) sustainable development. Thereby it could have made reference to the Constitution and NEMA that, read together. require the weighing of ecological and socio-economic interests. In requiring any development seriously impacting on the environment to balance the respective interests, the notion of ecologically sustainable development in requires their balancing. Touching on ecological sustainability, the KZNHC could have made property the subject of discussion in relationship to nature. It then could have discussed principles guiding the balancing of competing human proprietary and ecological interests specifically when colliding in estuarine environments.

The last point leads to the conclusion that the KZNHC then could have discussed the new NWA, which introduced the human basic need and the ecological water reserve in order to secure basic human and ecological needs for water. It accepted nature to be dependent on water and therewith gave guidance in how to weigh human basic needs against the water needs of dependent ecologies. According to the NWA they were to be treated equally. The KZNHC’s short reference to the NWA’s water use licence could have been extended. The water use licence for other uses than basic human needs or ecological interest namely shows that other human uses might be limited. This again implies that other human water-use interests are not as relevant

as basic human and ecological interests. It is hence to be concluded that the KZNHC missed the chance to discuss the ecocentric provision in question. It did not − as assumed in the introduction − weigh basic human interests against ecological interests in water. However, and probably contrary to expectation, it did at least start the discussion in how to deal with colliding human proprietary and ecological interests. Against this background it can be assumed, that the KZNHC could have managed the discussion more deeply and thoroughly. However it has to be said that even if it did so, the outcome would basically have been the same.

The judgement could have provided for a comprehensive analysis of ecocentric provisions in the South African legal framework relevant to solving conflicts between competing human proprietary and (public) ecological interests in estuarine environments. As shown, the case offered an excellent opportunity to do so. The KZNHC definitely missed the opportunity to give clear guidance on how individual human interests, and specifically human proprietary interests, had to be balanced against ecological interests of estuarine ecosystems. It implicitly had done that work already by saying that iSimangaliso was reasonably fulfilling its legal duties. iSimangaliso argued that the breaching of estuarine mouths would only be executed when in the interest of the whole community, meaning when required by ecological interests. Human proprietary interests do not fall within its competences. The KZNHC could have extended on this conception. This applies even more as – opposed to the Abbott case – at least the estuarine management plan was much more developed and definitely gave material to discuss.

Finally, it must be said that the KZNHC could have shortened the judgment considerably. Since UCOSP amended the main relief sought due to facts established by iSimangaliso during the process, and sought the relief that iSimangaliso failed to develop and implement an EMP, the KZNHC simply could have considered iSimangaliso’s mandate as prescribed in NEMICMA, focusing on the prescriptions on the EMP. Moreover, considering the fact that the KZNHC found that the breach of the uMfolozi River mouth would not solve UCOSP’s problems with flooding (the backflooding on the adjacent sugar cane farms on the estuarine floodplain was a natural phenomenon and would occur independently of the state of the estuarine

mouth), it could had concluded at that point, since UCOSP's argument was all about breaching the estuarine mouth to protect of the sugarcane farms, especially where they were situated in an estuarine functional area and within tidal reaches of another river. The (potential) damage alleged was therefore not iSimangaliso's fault at all.[449]

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[449] 84-91.

5. Conclusion

This dissertation shows that it is in fact only the recent recognition that humankind is responsible for the so-called environmental crisis that made environmental law and its underpinning environmental ethics evolve as own legal and philosophical fields. Anthropocentric world views in general are made responsible for the current state of affairs. Specifically the notion of property is identified as probably the driving anthropocentric institution for this development. It is regarded that the anthropocentric interest in property shaped the first environmental laws providing a set of restrictions and limitations on the use of property. Although environmental laws were intended to protect the environment they failed in their objectives because of the wrong approach. It is held that property-oriented thinking enabled the limitless use of natural resources and their exploitation, bringing earth's capacities to a tipping point that called for an urgent new approach, resulting in ecocentrism.

Ecocentric world views on the other hand acknowledge that anthropocentrism does not respect the natural environment, which by its very existence has inherent interests and rights. Nature is interdependent, which is why each of its elements has its own purpose and justification. Hence, nature deserves to have its rights taken seriously. Since humankind has the ability and capacity to understand nature in its whole complexity, it is also able to react when called to stop by using the gained knowledge. In understanding the interdependency of the whole planet, humankind has the ability to care for the environment in a way that supports its biodiversity by preserving the necessary habitats.

These shifts in ethics caused respective shifts in law in which nature is regarded as subject and not the object of human legal systems. Ecocentric instruments are hence encroaching on traditional anthropocentric legal systems. The question raised is the extent to which humankind is willing to adopt the "nature's rights thinking" that is calling for a radical change in which a widening the circle of interests has to be taken into account with humankind stepping back from satisfying its own interests. The answer is not an easy one, as the nature's rights thinking by its nature holds potential for conflicts when for example dealing with estuaries where ecological interests mmaycollide and compete with human proprietary interests.

However, humankind seems to be conscious that it must act and love its natural environment in the interest of its own survival. This dissertation shows that the shift from anthropocentrism to ecocentrism has gained real momentum in law by showing respect toward nature by accepting its own legal rights (and giving it legal standing) as shown on international level in international instruments as well as in other domestic laws. Another way – probably more practical since more adaptable – is to accept nature's intrinsic value and its natural interests legally by imposing duties on humans to, whenever necessary, take them into account and protect them as evidenced in South Africa's environmental law.

The courts recently had the opportunity for discussion of the relevant provisions in South African law, specifically in the context of estuaries. Practice created two similar cases in which authorities were asked to protect private property from flooding. One way to do so was the artificial breach of estuarine mouths that at the same time impacted negatively on the respective ecology. Whereas the courts in the Abbott case did not discuss them at all, the KZHC at least touched on them, though it definitely could have discussed the issue more deeply by commenting more on the relevant provisions that give basic guidance and direction in how to deal with such cases. Despite these prime examples, the courts missed the opportunity to advert to respective conflict and develop or at least start to develop some guidance on how to interpret the relevant provisions and how they interrelate to and inform each other.

By holding that it was UCOSP's own responsibility to protect its farms from flooding,[450] the court implied that it was conscious of about the environmental issue. Detached from the factual scenarios, the question in issue was in fact the question whether the authorities had the duty to protect (private) property from being flooded. Having answered this question negatively, the courts could have closed the case. Analysing environmental law and its development culminating in the shift from anthropocentrism to ecocentrism might have led to the conclusion that environmental law was not intended to protect human proprietary interests and that human property was the cause of environmental law. Neither court addressed the matter on those grounds. A proper analysis might have lead to the recognition that the new ecocentric

[450] 85.

instruments of the public trusteeship, its extension to the duty of care on private persons, the ecological sustainability, the determination of basic human and ecological reserves as well as the introduction of the interests of the whole community in fact are the first steps toward a new and more flexible, indeterminate concept of property as called for by ecocentrists. One is reminded that property is understood as the link between humankind and the natural system; which is why it could be concluded that humankind is already engaged in the general re-evaluation and amendment of its legal concepts, maybe advancing ecocentrism from an standpoint in environmental ethics to the next general world view.

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