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

Andrew Blackmore

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1

INTRODUCTION

Nature reserves with other protected areas comprising less than 6 percent of South Africa's land mass¹ remain vulnerable to activities and disturbances that conflict with the purpose for which they were established such as isolation of protected areas from neighbouring natural areas or other protected areas², loss and fragmentation of habitat.³ Protected areas are also subjected to human-induced actions such as recreational and consumptive use of the natural resources, and development of management and tourism related facilities.⁴ It is these actions that, either individually or cumulatively, negatively impact the integrity of the protected area and the biodiversity therein, as well as livelihood of those who depend on environmental services like clean water, which are provided by the protected area. Thus it is important to ensure that decisions taken within protected areas do not undermine biological conservation values or the integrity of the protected area.

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

- 1 See the synopsis of the South African National Biodiversity Assessment on <http://bgis.sanbi.org/nsba/terrestrialAreas.asp> and generally Driver, K.J. Sink, J.N. Nel, S. Holness, L. Van Niekerk, F. Daniels, Z. Jonas, P.A. Majiedt, L. Harris and K. Maze 'National Biodiversity Assessment 2011: An assessment of South Africa's biodiversity and ecosystems. Synthesis Report' (2012). *South African National Biodiversity Institute and Department of Environmental Affairs, Pretoria.*
- 2 See generally, JW Kiringe and MM Okello, 'Threats and their Relative Severity to Wildlife Protected Areas of Kenya' (2007) 5/2 *Applied Ecology and Environmental Research* 49-62.
- 3 J Liu, M Linderman, Z Ouyang, L An, J Yang and H Zhang, 'Ecological Degradation in Protected Areas: the Case of Wolong Nature Reserve for Giant Pandas' (2001) 292/5514 *Science* 98.
- 4 PH Morrison and KR Romain-Bondi, 'Landscape-Level Analysis of Cumulative Effects Mt. Spokane State Park Master Facility Plan' (2009) *Pacific Biodiversity Institute, Winthrop, Washington* 1.

2

BACKGROUND TO THE TEMBE ELEPHANT PARK AND SURROUNDS

2.1 Biological Significance of the Tembe Elephant Park

South Africa is ranked as the third most biologically diverse country in the world,⁵ and contains three 'Centres of Endemism' or global 'Biodiversity Hotspots'.⁶ The Maputaland-Pondoland-Albany Hotspot,^{7,8} within which the Tembe Elephant Park is located, is estimated to contain a minimum of 2500 species of vascular plants, and of these at least 230 species/infraspecific taxa are endemic or near endemic to the region.^{9,10} Other endemics include a mammal (14 at subspecies level), 23 reptiles, three frogs, and eight fresh water fish.¹¹ In addition, the southern area of the South-eastern African coast Endemic Bird Area overlaps with this Hotspot. This overlapping area contains more than 472 species of birds (approximately

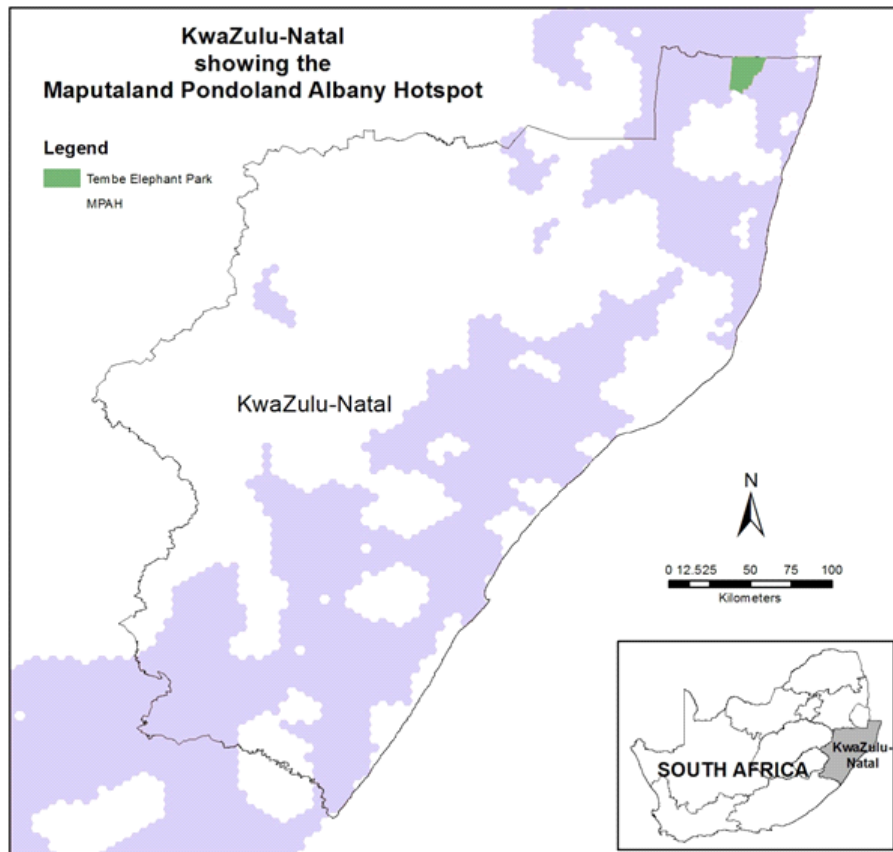
- 5 South Africa: White Paper on the Conservation of Biodiversity N/1095, Government Gazette No 18163, 28 July 1997, and P Goldblatt, 'An Analysis of the Flora of Southern Africa: its Characteristics, Relationships and Origins' (1978) 65 *Annals of the Missouri Botanical Garden* 369.
- 6 See generally, P Seligmann *et. al.*, 'Centers for Biodiversity Conservation: Bringing Together Science, Partnerships, and Human Well-being to Scale Up Conservation Outcomes' (Conservation International, 2007); and Conservation International, *Biodiversity Hotspots* (2007), <www.biodiversityhotspots.org> accessed 25 July 2014.
- 7 Including the Cape Floristic Region, Succulent Karoo, and Maputaland-Pondoland-Albany.
- 8 In order for a region to qualify as a 'hotspot,' it must meet two strict criteria: (a) it must contain at least 1 500 species of vascular plants (0.5 percent of the world's total) as endemics, and it has to have lost at least 70 percent of its original habitat.
- 9 AE van Wyk, 'Biodiversity of the Maputaland Centre' in L.J.G Van der Maesen, X.M Van den Burgt and J.M van Medenbach de Rooy (eds), *The Biodiversity of African Plants* 198 (Kluwer Academic Publishers 1996).
- 10 The region is also recognised by the IUCN as a key centre of plant endemism.
- 11 W Matthews, 'Maputaland's Tembe Elephant National Park - a Little Known Reserve with Many Natural Secrets', <www.africaelephants.com/ecology.htm> accessed 25 July 2014.

60 percent of South Africa's total, and with five species endemic/near endemic to the Hotspot).¹²

Tembe Elephant Park is located within the core area of the Maputaland-Pondoland-Albany Hotspot and contains rare vegetation types as well as rare plant and animal species.¹³ The park is approximately 30,000 ha¹⁴ in extent and its northern limit is the international boundary between South Africa and Mozambique, and encompasses a significant representative sample

of the endangered Sand Forest¹⁵ – which is poorly conserved elsewhere in this region.¹⁶ Sand Forest comprises a wide variety of rare and unusual plant and animal species, including several endemics. Of the total number of plant species endemic to the Maputaland Centre, 30 are associated with Sand Forest and 20 exist solely within this vegetation type.¹⁷

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



¹² *ibid.*

¹³ *ibid.*

¹⁴ Declaration as a nature reserve in accordance with section 23 of the National Environmental Management: Protected Areas Act 57 of 2003, Extraordinary Provincial Gazette of KwaZulu-Natal, No 83 of 30 August 2012.

¹⁵ In Mozambique this forest type is known as 'licuati forest'.

¹⁶ About half of the forests have been destroyed, with variations of this forest type occurring in Ndumu and the iSimangaliso Wetland Park World Heritage Site. See generally DR Macdevette *et al.*, 'Floristics of the Natal Indigenous Forests' in ECJ Geldenhuys (ed) *Biogeography of the Mixed Evergreen Forests of Southern Africa* 124–144 (Foundation for Research Development, Pretoria, Ecosystems Programmes Occasional Report 45 1989).

¹⁷ W. Matthews, 'Maputaland's Tembe Elephant National Park - a Little Known Reserve with Many Natural Secrets' www.africaelephants.com/ecology.htm, accessed 16 September 2014.

The park was set aside by the late iNkosi (Chief) Msimba Tembe, to establish a secure sanctuary for the last naturally occurring population of African elephant (*Loxodonta africana*) in KwaZulu-Natal,¹⁸ primarily to protect life and property of the local people from damage and injury by the free roaming elephants. iNkosi Msimba also envisioned to protect the largest population of Livingstone's Suni (*Neotragus moschatulus*) in Southern Africa, as well as other naturally occurring fauna and important vegetation types – including the endangered Sand Forest.¹⁹

Initially, the protected area's northern border was left open allowing elephants to continue their normal migratory patterns into Mozambique.²⁰ At that time, poaching for meat and ivory and the recent civil war in Mozambique were the key threats to the elephant roaming in the coastal. Elephant were killed or injured by the military for ivory, or were injured or killed by landmines during this war.²¹ The then KwaZulu Department of Conservation made a decision in 1989 to elephant proof the northern South African - Mozambique boundary to confine the resident elephant in the protected area. The purpose was to make the existing population serve as a seed population to restock the southern Mozambique areas on the establishment of the Usuthu-Tembe-Futi Transfrontier sub-Conservation Area. This was a sub-component of the broader Lubombo Transfrontier Conservation Area.²² The containment of the elephant within, and

the subsequent expansion of, the Tembe Elephant Park has resulted in significant impacts on the vegetation therein, and particularly on the sensitive Sand Forest. This has prompted research on the concern²³ and the conservation agency took steps to slow or halt the rate of increase in the number of elephant.²⁴

2.2 Cultural Significance of the Tembe Elephant Park and Surroundings

South Africa, including the Maputaland region in which the Tembe Elephant Park is located, is a culturally diverse country. The park and surrounding areas have been recorded as containing stone flakes and stone tools that date back to between 300,000 and 1.7 million years BP.²⁵ The archaeological record also indicates an array of early and late Iron Age pottery, grinders and ceramic fragments – the oldest of which date back to first Bantu-speaking agriculturists that entered KwaZulu-Natal from Eastern Africa approximately 1600 years ago.²⁶ The cultural significance of the area is also related to a fusion of Tonga, Swazi, and Zulu cultures there – overlain by an influx of refugees during the 1815 Zulu Wars and later during the Mozambican War (1975-1992).²⁷ The area has also evolved culturally and economically as a 'frontier life style', following the division of the Mabudu chiefdom in the British South Africa and Portuguese Mozambique nations by the 1875

18 This is one of three original populations of elephant.

The other two are within Addo Elephant National Park and Kruger National Park.

19 Tembe Elephant Park: Management Plan, compiled in accordance with section 39 of the National Environmental Management: Protected Areas Act 57 of 2003, <<http://www.kznwildlife.com/index.php/conservation/planning/protected-area-management-planning.html>>.

20 Part of the international border between South Africa and Mozambique forms the northern boundary of the protected area.

21 Roelof J Kloppers, 'Border Crossings: Life in the Mozambique/South Africa Borderland Since 1975' 1, 68 (D Phil Thesis (Anthropology), University of Pretoria 2005).

22 See Peace Parks Foundation's website <<http://www.peaceparks.co.za/tfca.php?pid=19&mid=1006>> accessed 29 July 2014.

23 See generally DDG Lagendijk, Respondent L Mackey, BR Page and R Slotow, 'The Effects of Herbivory by a Mega- and Mesoherbivore on Tree Recruitment in Sand Forest, South Africa' (2011) 6/3 *PLoS ONE* [17983. doi:10.1371/journal.pone.0017983]; and JY Gaugris and MW Van Rooyen, 'Effects of Water Dependence on the Utilization Pattern of Woody Vegetation by Elephants in the Tembe Elephant Park, Maputaland, South Africa' (2010) 48 *African Journal of Ecology* 126-134.

24 Fiona Macleod, 'Jab for Birth Control gets Jumbo Roll-out', *Mail & Guardian*, 10 August 2012.

25 Frans Prins 'Heritage Impact Assessment. Tembe Elephant Park, Ezemvelo KZN Wildlife. Two Star Camp' (Thlahlo Environmental 2012) <www.sahra.org.za/findreports> accessed 29 July 2014.

26 *ibid.*

27 Kloppers, *Border Life in the Mozambique/South Africa* (n 21) at 50 and 215.

MacMahon Award.²⁸ This award supported most of Portugal's claims over those of Great Britain. The boundary was not, however, put into effect until 1888, when a joint boundary commission comprising the United Kingdom, Portugal, Swaziland, and the South African Republic was established to resolve the remaining boundary disputes between Mozambique, Swaziland and South Africa. In respect of the Mozambique/ Natal boundary, the resolution of the commission was recorded in Article III of an Anglo-Portuguese Treaty of 11 June 1891 which states that 'Great Britain engages not to make any objection to the extension of the sphere of influence of Portugal, south of Delagoa Bay, as far as a line following the parallel of the confluence of the River Pongolo with the River Maputo²⁹ to the sea-coast'.³⁰

Despite this history and concomitant political separation, local communities continued to traverse the border on a daily basis and formally exchange produce and other goods at the weekly border market at KwaPuza.^{31,32} Thus this area a cultural identity which is dissimilar to the Portuguese-influenced Tonga in the north and the Zulu nation to the south.

2.3 Church of Nazareth Baptists (Shembe Church)

Religious events within protected areas are common, and in some cases they are actively encouraged – such

as church services, weddings, celebrations of religious holidays and memorial services. While most of these events make use of existing facilities such as chapels and picnic spots, others take place in natural areas and occasionally in areas classified as 'wilderness'.³³ The latter category, in accordance with the permissions granted, may not result in any significant damage or the use of vehicles off the established road network. Furthermore, protected areas in KwaZulu-Natal, and elsewhere, contain spiritual sites such as graves of various ancestors and leaders³⁴ and sacred rock art paintings and etchings.³⁵ Many sites are still visited and used by people for cultural and spiritual reasons.³⁶

The Church of Nazareth Baptists (known as the Shembe Church) was founded by the Zulu healer-prophet Isaiah Shembe (1870-1935) in the early 20th Century, following a revelation and covenant on Nhlankakazi mountain in central KwaZulu-Natal.³⁷ The followers of this religion revere Isaiah Shembe as an African 'messiah'. According to Shembe lore, God conferred on him the founding principles (mixture of Zulu tradition and Christianity) of the Church, and extraordinary powers to heal the sick, to interact with and command animals, and to communicate with the universe and spiritual beings. Over time, the Shembe Church has become a prominent religion in KwaZulu-Natal and beyond, with over six million followers.³⁸

28 In 1861, Navy Captain Bickford declared the area stretching from this area to Inhaca and Elephant islands as British territory. This act finally culminated in a dispute in 1872 between Great Britain and Portugal, which was submitted to French president Adolphe Thiers for arbitration. Thiers failed to do so and his successor, Marshal MacMahon, declared in favour of the Portuguese on 19 April 1875 (the "MacMahon Award"). See: Award of the President of the French Republic, on the Claims of Great Britain and Portugal to certain Territories formerly belonging to the Kings of Tembe and Mapoota, on the Eastern Coast of Africa, including the Islands of Inyack and Elephant (Delagoa Bay or Lorenzo Marques), Versailles, 24 July 1875 (66 British Foreign and State Papers 1874-5) 554-556.

29 Known in South Africa as the Usutu River.

30 United States Department of State (1973) International Boundary Study No 133 Mozambique – South Africa Boundary. Washington, D.C. Office of the Geographer, Bureau of Intelligence and Research.

31 Roelof J Kloppers, 'History of the Mabudu-Tembe', Masters Thesis, University of Stellenbosch 1, 60 (2003).

32 'KwaPuza' – iSiZulu word for 'a place where people can drink' or 'a place where the drinkers are.'

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

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

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

36 The presence of this living heritage within protected areas was the key objective requiring the incorporation of the provision in sub-section 42(3) that provides for co-management and harmonises the management of cultural resources.

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

38 I Hexham, 'amaNazaretha' in Stephen D Glazier (ed), *Pentecostalism in Africa Encyclopedia of African and African-American Religions* 34-37 (London, Routledge 2001), and Skhumbuzo Miya 'Hearts and Minds' *Natal Witness* 3 (Pietermaritzburg, 18 May 2010).

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

Recently, conservation staff working with the Tembe Elephant Park, who are also members of the Shembe Church, cleared an area of approximately 400 m² of potentially sensitive vegetation to establish a place of worship near to their accommodation within the protected area. The establishment of the place of worship triggered a question whether such action was in accordance with the purpose and conservation use of the protected area. Furthermore, given the process followed in identifying the site and its use thereafter, the Shembe staff asserted that the site constituted a heritage site in terms of the National Heritage Resources Act, 1999, and as such, senior management were both duty bound and legally bound to ensure that the site was retained and protected for worship.

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

- a) The role and significance of the Public Trust Doctrine in protected area management with particular reference to the establishment of the Shembe worship site.
- b) Whether the establishment of a Shembe worship site within a protected area is in accordance with the provisions of the South African National Environmental Management Protected Areas Act³⁹ and the Regulations thereto;
- c) Whether such a site qualifies as heritage site in terms of the National Heritage Resources Act, 1999.⁴⁰

³⁹ South Africa, Act 57 of 2003. Hereafter referred to as NEMPA.

⁴⁰ South Africa, Act 25 of 1999.

3

ANALYSIS AND DISCUSSION

3.1 The Public Trust Doctrine

The common law public trust doctrine is considered to have its origins in the Justinian Institutes of Roman law.⁴¹ The public trust doctrine was evolved in the context of the public rights over submerged land under navigable waters. Resultantly, the submerged land under navigable waters was considered as a common property. This concept of common property, and therein public rights, were subsequently incorporated into the Magna Charta and became a part of English common law, where the Crown held these lands for the benefit of its subjects.⁴² The recognition of the importance of the doctrine in safeguarding the public interest has been advanced in the United States of America since its debut in *Illinois Central Railroad Company v Illinois*.^{43,44} Further, the role of the doctrine in environmental decision-making has been advanced by various scholars. For example, in his seminal article, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, Joseph Sax introduced the concept of using the public trust doctrine as a tool for judicial protection of natural resources. He argued that the “central substantive thought” in public trust

⁴¹ P Redmond, ‘The Public Trust in Wildlife: Two Steps Forward, Two Steps Back’ (2009) 49 *Natural Resources Journal* 249, 250.

⁴² TJ Conway, ‘National Audubon Society v. Superior Court: The Expanding Public Trust Doctrine’ (1984) 14 *ENVTL. L.* 617, 622-23 as cited in HR Bader, ‘Antaeus and the Public Trust Doctrine: A New Approach to Substantive Environmental Protection in the Common Law’ (1992) 19/4 *B.C. Envtl. Aff. L. Rev.* 749, 751.

⁴³ 146 US 387 (1892).

⁴⁴ See JD Kearney and MW Thomas, ‘The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central’ 295 (Faculty Publications Paper 2004) <<http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1296&context=facpub>> accessed on 25 July 2014; and C Rose, ‘The Comedy of the Commons: Custom, Commerce, and Inherently Public Property’ (1986) 53/711 *U Chi L Rev* 799. The latter describes this case as the ‘most famous assertion of the public trust theory’.

litigation is “[w]hen a state holds a resource which is available for the free use of the general public, a court will look with considerable scepticism upon *any* government conduct which is calculated *either* to reallocate that resource to more restricted uses or to subject public uses to the self-interest of private parties”.⁴⁵ Some commentators have described the doctrine as a principle that defines the purpose of government ‘to promote the interests of the general public rather than to redistribute public goods from broad public uses to restricted private benefit’.⁴⁶ There is no limitation placed on the nature of the term ‘public’. For this reason, the term ‘public’ not only includes the current generation as beneficiary of the trust but also future generations.⁴⁷ The state, therefore – through its administrative organs, for example the conservation agency – has a duty to administer, protect, manage, and conserve the resource not only for the current generation, but also has an affirmative duty or obligation to preserve the resource for future generations.⁴⁸ Should it be shown that the state’s actions are inconsistent with the public trust, the mandate of the organ of state undertaking the trust function ought to be withdrawn.^{49,50} Thus, the Public Trust Doctrine represents a legal tool that enables or empowers citizens to fight unsustainable use of resources that should be protected for the common good.⁵¹ These resources were determined to include both biodiversity and ecosystem services⁵² as was argued in *National Audubon Society v Superior Court*

(the Mono Lake case),^{53,54} *M C Mehta v Kamal Nath*⁵⁵ and elsewhere.

3.2 Public Trust Doctrine in South African Conservation Jurisprudence

Whilst the courts in the United States of America continue to debate whether the Public Trust Doctrine extends from the use of and access to waterways to biodiversity,⁵⁶ the environmental right in section 24 of the Bill of Rights in the Constitution of the Republic of South Africa⁵⁷ consolidated 1500 years of common law and two centuries of American case laws by making explicit that the Public Trust Doctrine in South Africa’s jurisprudence⁵⁸ recognises current and future generations as beneficiaries of a trust duty of the state. The Bill of Rights in South Africa’s Constitution grants to everyone a right to, inter alia, have the “environment protected for the benefit of present and future generations through reasonable legislative and other measures” by “preventing pollution and ecological degradation, promoting conservation”, and finally securing “ecologically sustainable development and use of natural resources while promoting justifiable economic and social development”.⁵⁹ The re-codification of this ‘environmental right’⁶⁰ into the preamble of the National Environmental Management Act,⁶¹ makes this statute the key framework conduit to fulfil this right.⁶² The NEMA openly state the application of the Public Trust Doctrine,⁶³ and characterises it in a

45 J.L. Sax, ‘The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention’ (1970) *Mich. L. Rev.* 471.

46 Redmond, *The Public Trust in Wildlife* (n. 41) 250.

47 Timothy P Brady, ‘But Most of it Belongs to those yet to be Born: The Public Trust Doctrine, NEPA and the Stewardship Ethic’ (1990) 17(3) *BC Envtl. Aff. L. Rev.* 621.

48 Redmond, *The Public Trust in Wildlife* (n. 41) 259.

49 R.A. Simms, ‘A Sketch of the Aimless Jurisprudence of Western Water Law’ in K.M. Carr and J.D. Crammond (eds), *Water Law: Trends, Policies, and Practice* 321 (ABA Professional Education 1995).

50 The withdrawal of a Public Trust mandate within a South African protected area context is dealt with in detail below.

51 David Takacs, ‘The Public Trust Doctrine, environmental Human Rights and the Future of Private Property’, (2008) 16 *N.Y.U. Environmental Law Journal* 711, 715.

52 The Millennium Ecosystem Assessment (www.maweb.org) defines Ecosystem Services as ‘the benefits people derive from ecosystems’.

53 *National Audubon Society v Superior Court of Alpine County*, 658 P.2d 709,719 (Cal 1983).

54 See generally D Owen ‘The Mono Lake Decision, the Public Trust Doctrine, and the Administrative State’, (2012) *U.C. Davis L. Rev.* 1099.

55 *M.C. Mehta v Kamal Nath*, Supreme Court of India Judgement of 13 December 1996, 1996, SCC 388.

56 Redmond (n 41) at 251.

57 South Africa, Act 108 of 1996. Hereafter referred to as ‘the Constitution’.

58 Takacs (n 51) 723.

59 Section 24.

60 This term does not imply that the ‘environment’ has rights, but rather serves to describe a fundamental human right to have a safe environment.

61 South Africa, Act 107 of 1998. Hereon referred to as ‘NEMA’.

62 M Kidd, *Environmental Law* 32 (Juta and Company Ltd 2008).

63 Section 2(4)(o).

series of operating principles that guide any organ of state that exercises any function that concerns the protection of the environment.⁶⁴ These include: placing people and their needs at the forefront of decision making⁶⁵ and ensuring that all development is sustainable⁶⁶ by avoiding disturbances to the ecosystem, the loss of biological diversity and sites that constitute the nation's cultural heritage;⁶⁷ uses of ecosystems are within resilience levels;⁶⁸ impacts on people's environmental rights are to be avoided or made good.⁶⁹ The Doctrine is further operationalised in the NEMA by giving protection to whistle-blowers who act in good faith to protect the environment. The NEMA also grants any person or group of persons – who believe that a decision taken by the state or the actions taken by a private party are, *inter alia*, harmful to either the environment or people's environmental rights or contrary to any statutory provision that provides for the protection of the environment – the right to approach the courts for remedies.⁷⁰ This locus is granted not only if the relief is sought “in that person's or group of persons' own interest” – but is extended to include “the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings [for example future generations]; in the public interest; or in the interest of protecting the environment”.⁷¹ The NEMA further grants the court the discretion not to award costs where a person or persons have reasonably acted in pursuance of protecting the environment.⁷² Removing the deterrent of costs enables the public to bring legal action to safeguard the environment and therein ensuring the integrity of the public trust entity for current and future generations.

Within the framework of NEMA, the title to section 3 of the National Environmental Management Biodiversity Act⁷³ declares the state as the sole trustee of biodiversity and in so doing endeavours to bring

into South African biodiversity legislation the common law provisions of the Public Trust Doctrine. The provisions of this section, however, do not state the Doctrine, but reaffirm the rights contained in section 24 of the Constitution. As discussed herein above, these provisions are synonymous with the duties imposed on the state by the Doctrine, in that a mandatory duty is placed on all organs of state who apply, *inter alia*, these two statutes to fulfil the environmental right by managing, conserving and sustaining South Africa's biodiversity,⁷⁴ and act as a trustee of protected areas in the Republic of South Africa.⁷⁵ Section 3 of both NEMBA and NEMPA further places a duty on the state to implement the Act to achieve progressive realisation of environmental rights in the Constitution. Given that both the NEMBA and NEMPA are specific environmental management legislation established within the terms of NEMA,⁷⁶ the application of this legislation must be guided by the NEMA principles. Furthermore, NEMBA provides a series of tools to give effect to the Public Trust Doctrine by: (a) a national biodiversity framework⁷⁷ that provides for a co-ordinated and uniform approach to biodiversity management by, *inter alia*, organs of state in all spheres of government⁷⁸ and ensuring that representative and viable samples of South Africa's biodiversity are conserved;⁷⁹ and (b) in defining bioregions of the country and developing management plans thereto⁸⁰ as well as supplementary biodiversity plans for the conservation of either an ecosystem or for a specific species.⁸¹

Both the NEMBA and the NEMPA provide for monitoring of the achievement of aims and objectives of the legislation. While NEMBA requires any person, organisation or organ of state involved in biodiversity conservation to report regularly to the Minister, who in turn reports to Parliament on the trends and conservation status of biodiversity,⁸² the Act is silent

64 Section 2(1).

65 Section 2(2).

66 Section 2(3).

67 Subsections 4(a)(i) and (iii).

68 Subsections 4(a)(vi).

69 2(4)(a)(viii).

70 Section 32(1).

71 Section 32(1) (a) to (e).

72 Section 32(2).

73 South Africa, Act 10 of 2004. Hereafter referred to as 'NEMBA'.

74 Section 3(a).

75 Section 3(a).

76 See the definition of Specific Environmental Management Acts, section 1 of NEMA.

77 Section 38.

78 Section 39(1)(a).

79 Section 39(1)(c).

80 See sections 38 and 39.

81 Section 43.

82 See Section 49.

on accountability and responsibility for the measured trends and conservation status of South Africa's biodiversity. NEMBA is also silent on the action or actions to be taken should the responsible organ of state fail to meet its predetermined indicators that are set in place to ensure that the environmental right has been achieved and the provisions of the Public Trust Doctrine observed. In contrast, section 3 of the NEMPA specifically mandates the state to explicitly "act as the trustee of protected areas in the Republic" and to achieve the progressive realisation of the environmental right enshrined in the Constitution.⁸³ This Act provides for the establishment of indicators against which monitoring of the performance of management authorities in achieving the objectives of the Act takes place and hence the application of the Public Trust Doctrine occurs.⁸⁴ The Act also provides for the state to undertake corrective intervention where a management authority of a protected area fails to perform its duties, or under-performs.⁸⁵ The state may also terminate, if needed, a management authority's mandate to manage the protected area and assign another organ of state the mandate of the management authority.⁸⁶ In case the actions of the conservation authority are inconsistent with the provision of public trust duties – by failing to adequately accomplish the requirements of NEMPA – the state may withdraw the mandate of the conservation authority.

3.3 Public Trust Doctrine in South African Heritage Jurisprudence

In contrast to NEMPA and NEMBA, and in particular NEMA, the National Heritage Resources Act (NHRA) follows a perplexing approach to the Public Trust Doctrine in conserving heritage resources – in that Section 5(1)(b)⁸⁷ levies a 'moral responsibility' on the public 'to act as a trustee'. In the absence of clarification in the Act, the term 'to act' must assume a colloquial meaning, namely to behave in a specified way or to perform or play the part of. Thus the Act appears to

set in place the exact antithesis to that contemplated by the Doctrine. This is done by confusing the roles and responsibilities of the state and the public by assigning a trust responsibility on the beneficiary of the trust and restricting the state's obligation solely to the management of heritage resources. It further appears to provide a dais for the state to relinquish its trust obligations in conserving heritage resources for current and future generations.

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

83 Section 3(a) and (b).

84 See Section 43.

85 Section 44(1).

86 Section 44(2).

87 "[E]very generation has a *moral responsibility to act as trustee* of the national heritage for succeeding generations and the *State has an obligation to manage heritage* resources in the interests of all South Africans" (own emphasis).

88 A Eshleman, 'Moral Responsibility' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2009 Edition) <<http://plato.stanford.edu/archives/win2009/entries/moral-responsibility/>> accessed 25 May 2014.

reaching definition of cultural resources.⁸⁹ Despite this risk, the Act – and particularly the principles for management of heritage resources⁹⁰ – is silent on the requirements to determine whether a trustee has acted in a ‘morally’ acceptable manner and hence brings into question whether such obligation is legally binding. The Act is, however, explicit on the duties and responsibilities to be undertaken by the state – for example ‘rights, duties and exemptions of state and supported bodies’ and ‘protection and management of heritage resources’⁹¹ and so on. These are predominantly those duties conventionally exercised by the trustee in accordance with the Public Trust Doctrine. The Act, therefore, appears to remove the trusteeship duties already conferred to the public, and reassigns the conventional trusteeship responsibilities to the state. This affirmation is further supported by the requirement that the state is to be treated as a trustee by any individual who intends to undertake a development activity that may impact on any component of a heritage resource – by way of an application to the heritage authority.⁹² Thus the intention of a ‘trustee’ in section 5(1)(b) must be profoundly different from that contemplated in the Public Trust Doctrine.

It is recognised that a significant proportion of heritage objects,⁹³ as with items of biodiversity, are in private ownership, and it is likely – given the large number that may occur in South Africa – that relatively few of these have been formally protected.⁹⁴ It is thus incumbent on the owner of the heritage resource to recognise it as a heritage object, and then apply the conditions of NHRA to ensure that its integrity is not lost. Thus, it may appear that the intention of the Act with respect to moral trusteeship conferred on the public may extend no further than a requirement of the legal owner of the heritage object to safeguard that object so as to accomplish the purposes of the Act as expressed in the

long title: namely to ‘empower civil society to nurture and conserve their heritage resources so that they may be bequeathed to future generations’. Whilst the Act enables the public to request the Minister or relevant member of the Executive Council⁹⁵ to declare the object as being of ‘special national significance’,⁹⁶ part of the ‘national estate’,⁹⁷ or ‘worthy of conservation’,⁹⁸ the Act fails to confer any power or legal authority⁹⁹ to the owner of the heritage object and thus falls short of providing meaningful fulfilment of the ‘empowerment’ envisioned in the long title of the Act. This observation is underscored by the absence of any provision in the Act that would enable delegation of powers or duties to a private owner of a heritage object.

3.4 The Protected Area and Disturbance

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

Alternatively, it may be argued that cumulatively, together with the impacts associated with elephants, tourism¹⁰⁰ and management infrastructure, the impact of the worship site is potentially significant at a habitat, vegetation type or protected area scale. The incremental accumulation of impacts is described by American economist Alfred E Kahn in his essay¹⁰¹ regarding a

89 A heritage resource is defined in section 1 as “any place or object of cultural significance, where significance is defined as any object having an aesthetic, architectural, historical, scientific, social, spiritual, linguistic or technological value or significance”.

90 Section 6.

91 Section 9 and Part 2 and Chapter II of the Act respectively.

92 See, for example, sections 27(18), 29(10), 32(13) and 32(19).

93 Section 1 and 3 provides a list of objects that are expressly protected in terms of this Act, and covers the spectrum between moveable and immoveable objects.

94 Section 7 of the Act provides for a conservation grading of heritage resources.

95 Commonly known as the Provincial Minister.

96 Section 7(1)(a).

97 Section 7(1)(b).

98 Section 7(1)(c).

99 Here empowerment is interpreted as “to give (someone) the authority or power to do something” *Oxford English Dictionary* (2013) Oxford University Press.

100 The Park already has a network of tourist roads and game-viewing hides and an upmarket safari tent lodge.

101 See AE Kahn, “The Tyranny of Small Decisions: Market Failures, Imperfections, and the Limits of Economics” (1966) 19/1 *Kyklos*: 23.

“tyranny of small decisions” or what might be called “small decisions effects”.¹⁰² Kahn describes circumstances where a series of individually small rational decisions (or indecisions) can negatively impact subsequent choices and reach a point where desirable alternatives (i.e. the integrity of protected area) are irreversibly destroyed. Fuggle and Rabie¹⁰³ describe this as an ‘insidious problem’ that leads to unregulated degradation of the natural environment¹⁰⁴ and the implications with regard to the integrity of the protected area being unclear. It thus stands to reason, therefore, that the degradation of the natural environment in a protected area, as a result of the cumulative permissions (or indecisions) granted, may be largely a result of the management authority’s failure to provide adequate protection, at the decision-making level, of the natural resources on behalf of current and future generations. A similar notion is proposed by Stack and Vandenberg as the ‘One Percent Problem’ – where cumulative impacts of small, seemingly insignificant actions cause incremental degradation.¹⁰⁵ By way of example, Stack and Vandenberg highlight the consequence of exempting a party from regulation (e.g. the Shembe worshippers) on the justification that the action would contribute to less than one percent of the problem (*viz.* the erosion of the integrity of the protected area or a sensitive vegetation type therein). In so doing, Stack and Vandenberg bring to the fore the role of the state (in this case the management authority) in contributing to the vulnerability and degradation of the natural environment (the protected area or sensitive vegetation type)¹⁰⁶ – by not providing a mechanism to prevent accumulation of seemingly insignificant actions. Stack and Vandenberg argue that authorities tend to use their discretion to make decisions of convenience. They point out that in a situation where contributors to a regulatory problem (in this case, human-induced

impacts on the natural environment) are very low-percentage contributors, the small size is taken by the authority as an excuse to exempt them from regulation. They conclude that ‘[i]f too many are exempted, public goods are imperilled’.¹⁰⁷ In addition to exemption, a significant proportion of environmental degradation is in one way or another positively granted by way of a decision or other authorising mechanism.¹⁰⁸ Thus, by way of this reasoning, it is argued that each decision taken by the conservation authority requires consideration of the public trust duties of that authority.

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

3.5 Protected Areas and Spiritual Sites

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

102 WE Odum, ‘Environmental Degradation and the Tyranny of Small Decisions’ (1982) 32/9 *BioScience* 728.

103 RF Fuggle and MA Rabie (eds), *Environmental Concerns in South Africa: Technical and Legal Perspectives* 93 (Juta and Company Ltd 1983).

104 *ibid.*

105 Dave Owen, ‘Critical Habitat and the Challenge of Regulating Small Harms’ (2012) 64 *Fla. L. Rev.* 141, 142.

106 Other protected areas might be vulnerable to other religious groups wanting to create similar facilities to further their spiritual wellbeing – citing the Tembe case as a precedent.

107 KM Stack and MP Vandenberg, ‘The One Percent Problem’ (2011) 111(7) *Columbia Law Review* 1385.

108 M Wood, ‘Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift’ (2009) 39/1 *Environmental Law* 25, 43.

109 Section 17.

110 Included herein is the management of the “interrelationship between natural environmental biodiversity, human settlement and economic development”, which speaks directly to the ultimate purpose of the Tembe Elephant Park as a protected area.

111 Section 17(i).

112 Section 17(g).

113 Section 17(l).

purpose of a protected area must be undertaken within the context of the intention of the Act, which is characterised by the long title of the Act, namely: 'the protection and conservation of ecologically viable areas representative of South Africa's biological diversity and its natural landscapes and seascapes'. The relationship between biodiversity and spiritual enrichment has been well recognised as one of the key benefits of protected areas.¹¹⁴ This has been recognised in the Convention of Biodiversity.¹¹⁵ The relationship has also been recognised in various African multilateral agreements providing for the conservation of biodiversity.¹¹⁶ The emergent benefit that arises from the relationship between biodiversity and spiritual enrichment that protected areas provide, however, is dissimilar if not unrelated to the establishment of a worship site by the Shembe staff members. In the latter case, there appears to be no prerequisite, save for convenience, for the Shembe worship site to be located in a location typical of the indigenous character of the area. Furthermore, it appears to be uncommon for protected areas to be used for the establishment of worship sites.¹¹⁷ Dudley *et al* explored various ways in which faith and protected areas interact – with two principal values emerging. The first was the direct protection of sacred species and sites, and the second the influence of nature on follower's beliefs.¹¹⁸ The World Wildlife Fund (WWF) expanded this research from 100 to 300 protected areas¹¹⁹ and failed to demonstrate that protected areas are either traditionally or occasionally selected to establish new places of worship – but rather continued to emphasise the

importance of the establishment of protected areas to protect the existing and well established spiritual sites. Furthermore, the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage recognises the importance of cultural and spiritual heritage within protected areas.¹²⁰ While the Convention has adopted a wide definition of cultural heritage,¹²¹ this recognition¹²² does not extend to include protected areas as being desirable for the establishment of new places of worship.

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

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

115Preamble to the Convention.

116See, for example, the characterisation of protected areas in Annex 2 of the African Convention on the Conservation of Nature and Natural Resources.

117N Dudley, L Higgins-Zogib and S Mansourian, Beyond Belief - Linking Faiths and Protected Areas for Biodiversity Conservation, (WWF International Research Report 2005).

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

119 *ibid* 119.

120UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, 2003, Article 1.

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

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

123Section 17.

124Regulation 54.

125Regulation 33(1)(c).

126Regulation 33(1)(g).

127Regulation 33(1)(j).

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

3.6 Cultural Heritage

The National Heritage Resources Act¹³³ views South Africa's heritage as 'unique and precious', and that it cannot be renewed. It is also seen as contributing to defining the country's cultural identity, and thus lies 'at the heart of [of South Africa's] spiritual well-being, and affirms the country's diverse cultures, and in so doing shape [South Africa's] national character'.¹³⁴ The question arises is whether the establishment of a Shembe Church of Nazareth worship site in the middle of a nature reserve in South Africa constitutes cultural heritage – as claimed by those who created the site. The Act defines living heritage as 'intangible

aspects of inherited culture' which may include cultural tradition, oral history, performance, ritual, popular memory, skills and techniques, indigenous knowledge systems, and the holistic approach to nature, society and social relationships.¹³⁵ In order to qualify, the worship site must have exceptional qualities that would be determined by a heritage assessment, and to be of special provincial and national significance.¹³⁶

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

4 CONCLUSION

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

128 Section 40(1)(b) of the NEMPA.

129 See Tembe Elephant Park Integrated Management Plan 2009-2013 (2009) at 107, <<http://www.kznwildlife.com/index.php/conservation/planning/protected-area-management-planning.html>> accessed 25 July 2014.

130 Section 6.5.1 at 46.

131 Section 6.7 at 51.

132 See Documents and Policies at the Conservation Organisation's website, <<http://www.kznwildlife.com/index.php/conservation/biodiversity-research-and-assessment>> accessed 25 July 2014.

133 South Africa, Act 25 of 1999.

134 Preamble of the Act.

135 Section 1.

136 Section 27(a) and (b).

therein would be compromised. The cumulative impacts of seemingly small, anthropogenic disturbance pose a threat to the integrity of protected areas and thus risk undermining the conservation agencies' ability to give effect to their trusteeship obligations. The fate of the Shembe worship site lies in the hands of the operational policies and practices of the conservation agency.

It is further concluded that South Africa's biodiversity, and particularly the protected area legislation, embraces the contemporary understanding of the Public Trust Doctrine. South Africa's heritage legislation, however, appears to have confused the roles of the state and the public, and in so doing renders application of the doctrine to the conservation of heritage resources problematic.

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