To fell or not to fell: The impact of NEMBA on the rights and obligations of a usufructuary*

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OPSOMMING

Om te kap of nie te kap nie: Die impak van NEMBA op die regte en verpligtinge van vruggebruikers

'n Vruggebruiker is geregtig op die gebruik en genot van objekte waaroor die vruggebruik gevestig is asook die reg om die vrugte daarvan te trek. In die geval waar die vruggebruik oor 'n kollektiewe saak gevestig word, moet die vruggebruiker verseker dat die geheel konstant bly. In die geval van bome tref die gemenereg 'n onderskeid tussen *silva caedua* (kaphout) wat vir brandhout afgekap mag word en *silva non caedua* (nie-kaphout) wat nie afgekap mag word nie. In hierdie artikel voer ek aan dat hierdie pragmatiese onderskeid, wat getref word op grond van die tempo waarteen die onderskeie bome groei, onvolledig is omdat dit nie omgewingsfaktore oorweeg nie. Ek voer aan dat die omskrywing van *silva caedua* en *silva non caedua* uitgebrei moet word om onderskeidelik vreemde en indringende asook bedreigde en beskermde spesies soos omskryf in die Nasionale Omgewingsbestuur: Biodiversiteit Wet 10 van 2004 in te sluit. Ek oorweeg daarna hoe die verpligting van die vruggebruiker om die objek *salva rei substantia* terug te besorg na afloop van die serwituut deur hierdie ontwikkeling beïnvloed word.

1 INTRODUCTION

A usufruct is a limited real right in terms of which the owner/grantor of a thing confers on the usufructuary the right to use and enjoy (*ius utendi*) the thing and to draw both the natural and civil fruits (*ius fruendi*) from the thing to which the usufruct relates.[1] In turn the usufructuary must ensure that the thing is returned to the owner/grantor without impairment of its essential qualities (*salva rei substantia*)

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* ORCID: 0000-0003-1254-6601. This article is based on a paper entitled "The impact of the National Environmental Management: Biodiversity Act 10 of 2004 on the obligations of a usufructuary" delivered at the Private Law and Social Justice Conference held at the (then) Nelson Mandela Metropolitan University in 2015. I conceptualised this article while I was employed at Rhodes University, but significantly developed and refined my argument after I commenced my employment at the University of Pretoria. I dedicate this article to the late Professor AJ van der Walt who encouraged me to write this article so that he could include it in *The law of servitudes* (2016). I have been haunted by the fact that I did not complete this article before his untimely death. I owe thanks to Professor Warren Freedman, Professor Graham Glover and Mr Malcolm Hacksley for reading an earlier version of this article.

1 Van der Walt *The law of servitudes* (2016) 464; Badenhorst *et al Silberberg and Schoeman's The law of property* (2006) 339; and Van der Merwe *Sakereg* (1989) 508.

upon termination of the servitude.[2] Van der Merwe explains that the social function of a usufruct is to confer on the usufructuary an income from the property for the duration of her lifetime while someone else is the owner of the property.[3] When a usufruct is established over a collection of things – like a flock, a herd, an orchard or a vineyard – the usufructuary must ensure that the number of sheep, cattle, fruit trees or vines remain constant. Van der Walt explains that the use value that accrues to the usufructuary would then be to slaughter mature or injured animals; or to fell infertile and dead plants rather than collecting the further[4] offspring, fruits or grapes as natural fruits (*fructus naturales*).[5] When the object of the usufruct is a stand of trees, Van der Merwe notes that the common law draws a distinction between *silva caedua* (or felling timber) and *silva non caedua* (or free timber).[6] *Silva caedua*, such as eucalyptus trees, may be cut down and sold for firewood in a manner that behoves a reasonable person[7] while a usufructuary must refrain from cutting down *silva non caedua*, such as trees that provide shade and ornamental trees, to sell as firewood for personal gain.[8] Despite this a usufructuary may prune the latter trees and collect dead branches and brushwood. A usufructuary also has the right to collect dead trees provided that new trees are planted in their place.[9]

The common law appears to draw a distinction between *silva caedua* and *silva non caedua* with reference to the rate at which the respective kinds of trees grow.[10] This distinction is pragmatic because after being cut down *silva caedua* can, in principle, grow back to its original dimensions before the servitude terminates and enable the usufructuary to fulfil her obligation to return the thing without impairment of its essential qualities. By the same token, the inability to grow back to its original dimensions is the rationale for prohibiting the cutting down of *silva non caedua*. Despite being pragmatic (and fulfilling certain secondary adornment and utilitarian functions), the distinction between *silva caedua* and *silva non caedua* does not appear to embody environmental considerations like preventing the ecological degradation of biodiversity, protecting sustainable development and use of natural resources, or promoting conservation in South Africa.

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2 Van der Walt *The law of servitudes* 464; Badenhorst *et al Silberberg and Schoeman's The law of property* 340 and Van der Merwe *Sakereg* 508.

3 Van der Merwe *Sakereg* 508.

4 Van der Walt *The law of servitudes* 467.

5 *Idem* and Van der Merwe *Sakereg* 511 note that natural fruits include anything that qualifies as the regular and natural produce of the property. See further *Beneke v Van der Vijver* 1905 22 SC 523 529 and *Geldenhuys v Commissioner of Inland Revenue* 1947 3 SA 256 (C) 262.

6 I am indebted to Mr Malcolm Hacksley for his translation of "kaphout" (felling timber) and "nie-kaphout" (free timber) from Afrikaans.

7 Voet 7 1 22, translated and reprinted as part of Johannes Voet (tr Percival Gane) *The Selective Voet being the Commentary on the Pandects* Vol 2 (1955) 344.

8 Van der Merwe *Sakereg* 511–512; Voet 7 1 22.

9 Van der Walt *The law of servitudes* 468. Van der Merwe *Sakereg* 512 fn 396 states that the practice to collect trees that have been uprooted by strong wind or a snowstorm was received into South African law from Roman-Dutch law. However, in terms of Roman law, a usufructuary did not have the right to collect such trees and had to allow the owner of these trees to remove them from the property.

10 I am indebted to Professor JC Sonnekus for this insight.

My hypothesis is that the National Environmental Management: Biodiversity Act[11] ("NEMBA") provides a starting point for a constitutionally-inspired and doctrinally-driven development of the common law rights and obligations of a usufructuary in this context. I explore this possibility in the following sections by providing an overview and engaging in a subsidiarity analysis of NEMBA. This analysis will then be used to argue that the common law rights and obligations of a usufructuary should be developed to avoid counter-constitutional results.

2 NEMBA

2 1 Introduction

NEMBA was enacted to provide *inter alia* for the management and conservation of biological diversity in South Africa,[12] and the use of indigenous biological resources[13] in a sustainable manner.[14] To this end NEMBA provides an intricate regulatory scheme for species that are classified as either threatened or in need of protection (chapter 4), or that pose a potential threat to biodiversity in South Africa (chapter 5).

Chapter 4 of NEMBA empowers the Minister for Environmental Affairs to publish a list of species[15] that are regarded as critically endangered,[16] endangered,[17] vulnerable,[18] or protected.[19] Individuals are then prohibited from engaging in certain restricted activities – either absolutely[20] or in respect of some activities without a permit[21] – with specimens of these species once they have been classified and listed as threatened or in need of protection. In this context,

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11 10 of 2004.

12 S 2(a)(i) of NEMBA. S 1 of NEMBA defines "biological diversity" as "the variability among living organisms from all sources including, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part and also includes diversity within species, between species, and of ecosystems."

13 S 2(a)(ii) of NEMBA. This is defined in s 80(2) (when used in relation to bioprospecting) and in s 1 (when used in relation to any other matter) of NEMBA.

14 S 2(a)(iii) of NEMBA. S 1 of NEMBA defines "sustainable" use of biological resources as "the use of such resource in a way and at a rate that – (a) would not lead to its long-term decline (b) would not disrupt the ecological integrity of the ecosystem in which it occurs; and (c) would ensure its continued use to meet the needs and aspirations of present and future generations of people."

15 S 56(1) of NEMBA. This was done in GN 389 in *GG* 36375 of 16 April 2013 and subsequently updated in terms of s 56(2) of NEMBA in GN 256 in *GG* 38600 of 31 March 2015 and GN 476 in *GG* 40875 of 30 May 2017.

16 S 56(1)(a) defines this as "being any indigenous species facing an extremely high risk of extinction in the wild in the immediate future".

17 S 56(1)(b) defines this as "being any indigenous species facing a high risk of extinction in the wild in the near future, although they are not a critically endangered species".

18 S 56(1)(c) defines this as "being any indigenous species facing an extremely high risk of extinction in the wild in the medium-term future, although they are not a critically endangered species or an endangered species".

19 S 56(1)(d) defines this as "being any species which are of high conservation value or national importance or require regulation in order to ensure that the species are managed in an ecologically sustainable manner".

20 S 57(2)(a) of NEMBA prohibits any activity that "may negatively impact on the survival" of these species.

21 S 57(2)(b), read with chapter 7, of NEMBA prohibits some activities if it is not carried out by a permit holder.

individuals may *inter alia* not gather, collect or pluck,[22] pick parts off, cut, chop off, uproot, damage or destroy[23] threatened and protected trees. The Minister may also exempt individuals from these restricted practices following a process of consultation and public participation.[24]

Chapter 5 of NEMBA further establishes a regulatory scheme that seeks to prevent the unauthorised introduction and spread of alien[25] and invasive[26] species to ecosystems and habitats where they do not occur naturally;[27] to manage and control these species with the aim of mitigating harm to the environment;[28] and to eradicate these species from ecosystems and habitats where they may cause such harm.[29] The Minister has an obligation to publish a list[30] of these alien[31] and invasive[32] species that threaten biodiversity in South Africa. Individuals are subjected to prohibitions[33] on and exemptions[34] from restricted activities that are comparable to the regulatory scheme in chapter 4. However, the classification of these species – specifically invasive species – is done according to the threat level that they pose. The Minister developed the following classification system: (i) category 1a invasive species "must be combatted or eradicated";[35] (ii) category 1b invasive species "must be controlled";[36] (iii) category 2 invasive species require a permit to carry out a restricted activity;[37] and (iv) category 3 invasive species are subject to certain exemptions and further statutory prohibitions.[38] In this context individuals may *inter alia* not grow, propagate or cause alien and invasive trees to multiply.[39]

At present it appears that both the common law and NEMBA may apply to the determination of the rights of a usufructuary: specifically, whether certain trees may be felled and their branches collected for firewood; or whether an enabling

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22 See (a)(ii) of the definition of "restricted activity" in s 1 of NEMBA.
23 See (a)(iii) of the definition of "restricted activity" in s 1 of NEMBA. Compare ss 7 and 15 of the National Forest Act 84 of 1998 and *Nanaga Property Trust v Director-General of the Department of Agriculture, Forestry and Fisheries* [2016] ZAECGHC 18 (16 February 2016).
24 Ss 99 and 100 of NEMBA.
25 S 1 of NEMBA defines "alien species" as "(a) a species that is not an indigenous species; or (b) an indigenous species translocated or intended to be translocated to a place outside its natural distribution range in nature, but not an indigenous species that has extended its natural distribution range by natural means of migration or dispersal without human intervention".
26 S 1 of NEMBA defines "invasive species" as "any species whose establishment and spread outside its natural distribution range – (a) threaten ecosystems, habitats or other species or have demonstrable potential to threaten ecosystems, habitats or other species; and (b) may result in economic or environmental harm or harm to human health".
27 S 64(1)(a) of NEMBA.
28 S 64(1)(b) of NEMBA.
29 S 64(1)(c) of NEMBA.
30 GN 864 in *GG* 40166 of 29 July 2016.
31 S 67(1) of NEMBA.
32 S 70(1)(a) of NEMBA.
33 S 65 of NEMBA.
34 S 66 of NEMBA.
35 Reg 2 of GN R598 in *GG* 37885 of 1 August 2014.
36 Reg 3 of GN R598 in *GG* 37885 of 1 August 2014.
37 Reg 4 of GN R598 in *GG* 37885 of 1 August 2014.
38 Reg 5 of GN R598 in *GG* 37885 of 1 August 2014 read with s 71A of NEMBA.
39 See (b)(iii) of the definition of "restricted activity" in s 1 of NEMBA.

environment may be created where certain trees can grow without impediment. Put differently, two parallel systems of law exist that regulate the rights of a usufructuary to fell and/or grow trees. This position is problematic because these parallel systems of law in terms of the common law and NEMBA arguably lead to a fragmented system of law in terms of which not only different procedures and substantive considerations would apply, but also different outcomes will be achieved. Van der Walt states that the existence of such a choice between different systems of law has the potential to result in a power struggle between forces that entrench the *status quo* and forces that promote transformation.[40] In my argument the pragmatic distinction between *silva caedua* and *silva non caedua* might operate as a force to protect the vested rights of a usufructuary while protecting the environment for the benefit of current and future generations might operate as a force to promote transformation.

The enquiry into which source of law is the most appropriate to regulate the rights of a usufructuary must begin with the fact that South Africa is a democracy founded on the values of the supremacy of the Constitution and the rule of law.[41] The effect of this fact is that no source of law – which in this case includes a choice between the common law and post-1994 legislation – exists independently in the South African legal system that is grounded on the supremacy of the Constitution.[42]

2 2 Angle of approach

When the Constitutional Court laid down the single-system-of-law principle in *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa*,[43] it concluded the debate as to which source of law ranks superior in legal disputes.[44] In that case Chaskalson P (as he then was), in a unanimous judgment, emphatically held that "all law . . . derives its force from the Constitution and is subject to constitutional control".[45] Consequently, all sources of law must promote the spirit, purport and objects of the Bill of Rights, as per the directive in section 39(2).[46] Determining which source of law should apply to a legal dispute – in this context, either the common law or NEMBA – should therefore be guided by the Constitution.[47] It is in this context that the subsidiarity principles developed by the Constitutional Court present a useful methodology.[48]

The aim of the subsidiarity principles is to help identify the most appropriate source of law to resolve a dispute. According to Van der Walt, these principles entail a constitutional vision of sources, one which requires all sources of law to display the positive characteristics that the Constitution requires of all law while

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40 Van der Walt *Property and Constitution* 19.
41 S 1(c) of the Constitution. See Michelman "The rule of law, legality and the supremacy of the Constitution" in Woolman *et al* (eds) *Constitutional law of South Africa* (original service June 2008) ch 11 ("Woolman *et al*").
42 Van der Walt *Property and Constitution* 20.
43 2000 2 SA 674 (CC) para 44.
44 Van der Walt *Property and Constitution* 20.
45 2000 2 SA 674 (CC) para 44.
46 Van der Walt *Property and Constitution* 20.
47 *Idem* 24–25.
48 *Idem* 24ff.

simultaneously preventing the realisation of the negative features that the Constitution seeks to avoid. Examples of these positive goals, specifically in the property context, include the protection of the environment for the benefit of current and future generations,[49] the prevention of arbitrary deprivation of property,[50] and the promotion of access to land on an equitable basis.[51] These goals may be seen as "concrete formulations" of what section 39(2) describes as the spirit, purport and objects of the Bill of Rights.[52] They also extend beyond the property context and include the protection of each person's inherent human dignity,[53] the promotion of equality and prevention of unfair discrimination,[54] the right to just administrative action,[55] and the right of access to courts.[56] The negative features that should be avoided include insecure tenure; pollution and degradation;[57] the dereliction, destruction and damage of the environment;[58] and unsustainable development and use of natural resources.[59]

NEMBA was enacted after 1994 and reliance on it should afford a generous amount of deference to the democratically elected legislature which enacted it because it is likely that it will demonstrate the desired positive features and attempt to steer clear of the unwanted negative outcomes.[60] NEMBA is partial[61] legislation of a technical[62] nature that directly gives effect to section 24 of the Constitution. Despite this, NEMBA was never intended to cover the common law insofar as it pertains to the rights of a usufructuary. Furthermore, NEMBA's partial nature requires circumspect application because it does not exhaust the constitutional obligation in section 24 of the Constitution and it is also likely that it will not cover or replace the common law to the extent that it pertains to the rights of a usufructuary. The directive force of the subsidiarity principles should be reduced accordingly. However, considering NEMBA in the context within which it was enacted still serves the general purpose of the subsidiarity analysis,

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49 S 24(b) of the Constitution. Van der Linde and Basson "Environment" in Woolman *et al* ch 50.

50 S 25(1) of the Constitution.

51 S 25(5) of the Constitution. Pienaar and Brickhill "Land" in Woolman *et al* ch 48 and Van der Walt *Constitutional property law* (2005) 354–368

52 Van der Walt *Property and Constitution* 33.

53 S 10 of the Constitution. Woolman "Dignity" in Woolman *et al* ch 36.

54 S 9 of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. See Albertyn and Goldblatt "Equality" in Woolman *et al* ch 35.

55 S 33 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000. See Klaaren and Penfold "Just administrative action" in Woolman *et al* ch 63; Hoexter *Administrative law in South Africa* (2012) and Van der Walt *Property and Constitution* 26–33.

56 Brickhill and Friedman "Access to courts" in Woolman *et al* ch 59.

57 S 24(b)(i) of the Constitution.

58 S 24(b)(ii) of the Constitution.

59 S 24(b)(iii) of the Constitution.

60 Van der Walt *Property and Constitution* 34.

61 There is a raft of statutes that regulate the environment which includes the National Forest Act 84 of 1998, the National Environmental Management Act 107 of 1998, the National Environmental Management: Protected Areas Act 57 of 2003, the National Environmental Management: Air Quality Act 39 of 2004, and the National Environmental Management: Waste Act 59 of 2008.

62 The *Oxford advanced learner's dictionary* (2005) defines "technical" as "connected with a particular subject and therefore difficult to understand if you do not know about that subject."

namely to ensure that the choice of law favours the promotion of constitutional goals and the general characteristics of the property system.[63]

The second subsidiarity principle states that a litigant who avers that a right in the Bill of Rights has been infringed must rely on the legislation that was specifically enacted to protect that right and may not rely directly on the common law when bringing an action to protect the right.[64] However, the proviso to this principle (which Van der Walt deduced on logical grounds) allows a litigant to rely directly on the common law if the legislation was not intended to, or in fact does not, replace the common law in that specific context. This would only be permitted in two instances, namely where (i) the common law is not in conflict with the constitutional right at hand or with the scheme that the legislation introduced, or (ii) in the event of such a conflict existing, it can be developed – through statutory and/or constitutional interpretation – to accord with the Bill of Rights or the legislative scheme.[65] Simply stated, my argument is that the pragmatic distinction that is drawn between *silva caedua* and *silva non caedua* with reference to the rate at which these respective kinds of trees grow is incomplete. The pragmatic distinction should be expanded through a constitutionally-inspired and doctrinally-driven development of the common law that is animated by environmental considerations.

3 RECALIBRATING THE RELATIONSHIP BETWEEN THE OWNER/GRANTOR AND USUFRUCTUARY

3 1 Rights

The common law position is currently that a usufructuary may cut down and sell *silva caedua* for firewood in a manner that behoves a reasonable person while a usufructuary must refrain from cutting down *silva non caedua*, like trees that provide shade and ornamental trees, to sell as firewood for personal gain. The problem is that this pragmatic distinction between *silva caedua* and *silva non caedua* – based on the rate at which these trees grow – excludes a positive obligation to promote environmental goals. This position is arguably in conflict with the right of present and future generations have to an environment that is protected and where natural resources are used in a sustainable manner.[66]

In my view the description of *silva caedua* should be developed to include alien and invasive species in terms of chapter 5 of NEMBA. This would enable usufructuaries to cut down and sell alien and invasive species – species that should be combatted, eradicated and controlled in terms of NEMBA[67] – for firewood in terms of an expanded description of *silva caedua*. This expanded description of *silva caedua* would require usufructuaries to obtain a permit to engage in a number of restricted activities, which include growing and selling these species. The description of *silva non caedua* should similarly be developed to include threatened and protected species in terms of chapter 4 of NEMBA. This would allow usufructuaries to grow and translocate threatened and protected

63 Van der Walt *Property and Constitution* 50.
64 *Idem* 103–105.
65 *Idem* 36ff 115–116.
66 S 24(b)(iii) of the Constitution.
67 S 75 of NEMBA.

species – thereby actively having a positive impact on their survival in terms of NEMBA[68] – as free timber in terms of an expanded description of *silva caedua*. This expanded description of *silva non caedua* would also require usufructuaries to obtain a permit to engage in a number of restricted activities which include growing and translocating these species.

However, obtaining such a permit should in principle not be that difficult if the usufructuary motivates her application: (i) as exercising her rights to use, enjoy and draw the fruits (both natural fruits in the form of timber and civil fruits in the form of profit) from the wood flowing from a limited real right in land;[69] and (ii) that she will comply with all reasonable conditions[70] that are imposed on her in terms of the permit. These conditions might include fulfilling a duty of care towards these species,[71] specific maintenance conditions, a carefully circumscribed ability to destroy these species for environmental reasons, drawing up a detailed inventory, and providing adequate security that would cover potential penalties that may be imposed in terms of NEMBA.[72]

Recalibrating the rights of the usufructuary according to the regulatory scheme of NEMBA would promote the general characteristics of a property system:[73] (i) equality in that these rights would apply to all usufructs over a collection of trees equally and will not discriminate against usufructuaries based on any of the listed grounds in section 9(3) of the Constitution as read with section 29 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000; (ii) the inherent human dignity of every usufructuary in benefitting from the lifelong income that flows from its social function; (iii) access to administrative justice through the consultative and public participation processes envisaged in sections 99 and 100 of NEMBA; and (iv) access to courts in that a usufructuary may appeal[74] the decision of the issuing authority in refusing her application for a permit or subjecting it to overbearing conditions.[75]

The recalibrated rights of a usufructuary in terms of NEMBA's regulatory scheme would not only be "legitimate, natural and inevitable" because it serves the legitimate public purpose[76] of protecting the environment for the benefit of current and future generations, but would also establish an equitable balance between the public interest (in an environment that is protected and where natural resources are used in a sustainable manner) and the private interests[77] of the usufructuary (to use, enjoy and draw the fruits from the property in fulfilment of the social function of providing her with a lifelong income from the property). The recalibration would further show due respect for the legislature's efforts to enact legislation which gives effect to the reform goals[78] of preventing the ecological degradation of biodiversity, of protecting sustainable development and

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68 S 57(2)(a) of NEMBA.
69 Application of s 88(2)(a) of NEMBA.
70 Application of s 88(2)(b) of NEMBA.
71 Application of ss 69 and 73 of NEMBA.
72 I expand on this in the section immediately following this one.
73 Van der Walt *Property and Constitution* 28.
74 Ss 94–96 of NEMBA.
75 S 88(2)(c) and (d) of NEMBA.
76 Van der Walt *Property and Constitution* 29.
77 *Ibid* 30.
78 *Ibid* 31 40–43 on the notion of legislation that gives effect to a right.

the use of natural resources, or of promoting conservation in South Africa.[79] By implication the recalibration would not have the effect of causing or exacerbating insecure tenure; pollution and degradation;[80] the dereliction, destruction and damage of the environment;[81] and unsustainable development and use of natural resources.[82]

3 2 Obligations

Van der Merwe[83] and Grobler[84] state that the *salva rei substantia* obligation has both a teleological signification and a physical denotation. In the former context the obligation refers to the internal character or economic destination of the object, which the usufructuary may not alter even if such a change will not change the meaning of the obligation in the latter context. This latter context should be construed as a positive duty to maintain the object and as a negative duty that prohibits or limits any interference with the substance, form or physical configuration of the object. The *salva rei substantia* obligation thus imposes two primary obligations on the usufructuary.

First, the usufructuary may not destroy, damage or change the nature or substance of the object.[85] In *Geldenhuys v Commissioner of Inland Revenue*[86] the court held that a usufructuary had a duty to maintain the size, quality and integrity of the object by not consuming it entirely through normal use and exploitation. The usufructuary may further not change the use or economic destination of the object to increase the income from it or its value. This part of the obligation is usually interpreted strictly as an absolute prohibition on the deterioration or impairment of the object.[87] However, in *Fourie v Munnik*[88] the court cautioned against an overly strict, narrow interpretation of the *salva rei substantia* requirement:

> "[F]or while on the one hand there must be no destruction or substantial impairing or undue deterioration of the usufructuary property, one should, conversely, not insist on such counsels of perfection regarding the user as to make the enjoyment something unsubstantial, unproductive or illusory."

A flexible and pragmatic approach to the *salva rei substantia* obligation would allow some interference with the object as long as the economic destination of the object is not altered.[89] A court could consider the locality of the object, established practices in the area, the nature of the object, and the circumstances relevant to the enjoyment of the object as contextual factors to determine the desirability of an interference with the object.[90] The *salva rei substantia* obligation

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79 S 24 of the Constitution.
80 S 24(b)(i) of the Constitution.
81 S 24(b)(ii) of the Constitution.
82 S 24(b)(iii) of the Constitution.
83 Van der Merwe "Regsbegrippe en regspolitiek" 1979 *THRHR* 9 10–12.
84 Grobler *The* salva rei substantia *requirement in personal servitudes* (unpublished LLD thesis US 2015) 55 ("Grobler *Thesis*").
85 Van der Walt *The law of servitudes* 475 and Van der Merwe *Sakereg* 519.
86 1947 3 SA 256 (C) 264.
87 Grobler *Thesis* 56 notes that this strict approach is probably animated by a narrow literal interpretation of the *salva rei substantia* obligation and a concern for the preservation of the physical object.
88 1919 OPD 73 87.
89 Van der Walt *The law of servitudes* 476 and Grobler *Thesis* 56.
90 See *Fourie v Munnik* 1919 OPD 73 79 87.

could also be replaced with the obligation to return the object without any impairment of its value (*salva rei aestimatione*).[91] A last feature of a flexible and pragmatic approach might be to accept that economic gain – an enhanced value of the object – is a valid reason to justify a change in the use or economic destination of the object.

In those instances where *silva caedua* (trees that may be felled) includes alien and invasive species (trees that must be combatted, eradicated and controlled) the obligation to refrain from changing the use or economic destination of the object should be developed. This development may be operationalised through a flexible approach of the *salva rei substantia* obligation that considers the established practices in the area (it is a common occurrence throughout South Africa to purchase braai wood that is produced from alien and invasive species), the nature of the object (alien and invasive species must be combatted, eradicated and controlled), and the circumstances relevant to the enjoyment of the object (the usufructuary can fulfil an environmental objective while exercising her limited real right in land). Ironically, this flexible approach would require a usufructuary to engage in restricted activities – of being in possession, growing or propagating, moving or translocating, and selling or otherwise trading – after cutting down those trees. However, this counter-intuitive prohibition on cutting down and selling *silva caedua* which includes alien and invasive species could easily be removed by granting the usufructuary a permit. The issuing authority could embrace a flexible approach to the interpretation of the *salva rei substantia* obligation in the conditions that it attaches to the permit. These conditions could include: (i) that *silva caedua* should not be maintained from its saplings if they are alien or invasive species; (ii) that dead trees should be replaced with new – preferably, *silva non caedua* – trees following the obligation to return the thing without any impairment of its value (*salva rei aestimatione*); and (iii) that economic gain for the usufructuary from selling firewood is a valid reason to justify a change in the use or economic destination of the object if it simultaneously advances the environmental objective of combatting, eradicating and controlling alien and invasive species.

A similar development should occur in instances where *silva non caedua* (trees that may not be felled) include threatened and protected species (the survival of which depends on their being protected as free timber) where the obligation to refrain from changing the use or economic destination of the object would prohibit the growing and translocating of these trees.

The second obligation attached to the *salva rei substantia* principle is that the usufructuary is under an obligation to conduct all maintenance work that a reasonable person (*bonus paterfamilias*) would have undertaken at her own cost.[92] This includes the costs to produce and harvest natural fruit and to gather civil fruits. The usufructuary is bound also to pay for all normal and regular expenses and charges in respect of the property. Since the usufructuary is under no obligation to improve the property[93] the owner must pay for all extraordinary costs to ensure the continued existence of the property.[94] However, the usufructuary will

91 Van der Merwe 1979 *THRHR* 9 15–16 and Grobler *Thesis* 56.
92 Van der Walt *The law of servitudes* 477 and Van der Merwe *Sakereg* (1989) 518.
93 Joubert "Die vruggebruiker se verpligting om verbeterings aan te bring" 1958 *THRHR* 256 275.
94 This includes the payment of fire insurance premiums and interest on the mortgage loan.

have the right to remove any improvements (*ius tollendi*) that she made to ensure the continued existence of the property[95] or a claim for compensation in terms of the principles of the law of unjustified enrichment.[96]

Normal and regular expenses should include all the costs to execute the duty of care towards alien[97] and invasive[98] species included in *silva caedua*; the costs to replace dead trees with new – preferably, *silva non caedua* – trees; the costs to grow and propagate alien and invasive species with a permit; and the costs to fell threatened and protected species with a permit. Arguably, the fee (if any) charged by an arborist to draw up an inventory should also be included as a normal expense.

The third obligation of the usufructuary is to draw up an inventory of the property if the owner insists on it.[99] This inventory may be executed at the commencement of the usufruct[100] or at a later stage.[101] The purpose of framing an inventory is to inform the owner of the nature, scope and state of things which she must receive *salva rei substantia* from the usufructuary upon termination of the servitude. There are no exceptions to the general duty of the usufructuary to draw up an inventory[102] and she can thus be compelled by court order to comply with the request of an owner. A court could order that the object of the usufruct be returned to the owner if the usufructuary fails to comply with the latter order.[103]

For purposes of the amended meaning of *silva caedua* and *silva non caedua* it will be necessary to frame an inventory at the commencement of the usufruct. Section 101 of NEMBA criminalises the engagement in restricted activities with regard to both threatened and protected, and alien and invasive species. This should in principle preclude the possibility that an owner can insist on the framing of an inventory at a later stage. The principled exclusion of this possibility ought to mitigate against an owner being complicit in the usufructuary's engagement in restricted activities and facilitate the successful prosecution and imposition of penalties on a usufructuary who engages in such restricted activities. The purpose of drawing up the inventory would encompass more than a mere perfunctory description of the trees and an indication of how many trees form part of the collective object. For purposes of *silva caedua*, the obligation to

95 Van der Walt *The law of servitudes* 479 and Van der Merwe *Sakereg* (1989) 519.

96 In *Ex parte Estate Borland* 1961 1 SA 6 (SR) 8A the court, drawing on *Brunsdon's Estate v Brunsdon's Estate* 1920 CPD 159, held that "[t]he general rule is undoubtedly that a usufructuary is not entitled to compensation for improvements. Further, it is one of his duties to keep the usufructuary property in repair at his own cost and to meet all ordinary expenses. It is only when the expenses are special or extraordinary that compensation may properly be claimed". Van der Walt *The law of servitudes* 479 and Van der Merwe *Sakereg* 519 state that the usufructuary will thus not have a claim for useful and luxurious improvements. See further Du Plessis *The South African law of unjustified enrichment* (2012) 288 and the exceptions to this principle at 282.

97 S 69 of NEMBA.

98 S 73 of NEMBA.

99 Van der Walt *The law of servitudes* 480 and Van der Merwe *Sakereg* 516.

100 *Heukelman v Heukelman NO* [2012] ZAGPPHC 179 (20 August 2012).

101 *Stain v Hiebner* 1976 1 SA 34 (C) 36F–G.

102 Corbett "Usufruct, usus and habitatio" in Hahlo (ed) *The law of succession in South Africa* (1980) 378 393.

103 Van der Walt *The law of servitudes* 480 and Van der Merwe *Sakereg* 516.

frame an inventory should include: (i) a broad characterisation of whether the trees are alien or invasive; (ii) a specific characterisation of the trees as a category 1a, 1b, 2 or 3 invasive species; (iii) in the event of a category 1a species, how the species should be combatted or eradicated; (iii) in the event of a category 1b species, how the species should be controlled; (iv) in the event of a category 2 species, whether the owner has a permit that may be ceded and which restricted activities may be engaged in by the usufructuary; and (v) in the event of a category 3 species, whether any of the exemptions or further restrictions are applicable to the usufructuary. For purposes of *silva non caedua*, the obligation to frame an inventory should then include: (i) a broad characterisation of whether the trees are threatened or protected; (ii) a specific characterisation of the trees as critically endangered, endangered, vulnerable, or protected; (iii) the applicable restricted activities which should be avoided; (iv) whether the owner may cede a permit to the usufructuary which would allow her to engage in some restricted activities; and (v) whether any exemptions are applicable to the usufructuary.

The last obligation of the usufructuary is to provide security for the *civiliter* use[104] of the property and to ensure its return *salva rei substantia* upon termination of the servitude.[105] The owner may demand that the usufructuary provides security when the servitude is created or at any time throughout its duration.[106] The right of the usufructuary to draw both the civil and natural fruits of the property may be suspended in the event that the owner insists on the provision of security and the usufructuary is slow to acquiesce to this demand.[107] A court may order that the object of the usufruct be returned to the owner if the usufructuary fails to comply with the latter order. However, it appears that courts have some discretion in the enforcement of this obligation if the usufructuary is genuinely without the means to provide the security demanded by the owner.[108] Van der Merwe notes that it is in principle possible for a court to order that the object of the usufruct be leased and that the civil fruits so generated be used to provide security.[109] The amount of security to be provided by the usufructuary is determined with reference to the value of the object of the servitude at its commencement. Security may be provided for movable things by way of surety or pledge and for immovable things by way of mortgage.[110]

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104 Scott "A growing trend in source application by our courts illustrated by a recent judgment on right of way" 2013 *THRHR* 239–251 242–243 points out that the correct meaning of *civiliter modo* exercise of a servitude means "provided that he exercise[s] the servitude with due regard for the other party".

105 Van der Walt *The law of servitudes* 480 and Van der Merwe *Sakereg* 516.

106 Voet 7 9 1; Van der Walt *The law of servitudes* 480; and Van der Merwe *Sakereg* 517. See further Grobler *Thesis* 71.

107 Van der Walt *The law of servitudes* 481 and Van der Merwe *Sakereg* 517. Both these authors confirm that the following notable exceptions exist to this obligation: (a) a father is automatically exempted if he is the usufructuary and his children are the owners; (b) a mother must be exempted explicitly if she is the usufructuary and her children are the owners; (c) if the owner reserves a usufruct for herself when she sells or donates the property; (d) if the usufruct is created *inter vivos* and it is explicitly stipulated that the usufructuary will be relieved of this obligation; and (e) there will be no obligation if the state is the usufructuary.

108 Van der Walt *The law of servitudes* 481 and Van der Merwe *Sakereg* 517.

109 Van der Merwe *Sakereg* 517. See also Wright "Die onvermoënde vruggebruiker" 1995 *THRHR* 86–91.

110 Van der Walt *The law of servitudes* 481 and Van der Merwe *Sakereg* 517.

The argument advanced above for the framing of an inventory at the commencement of the usufruct should equally apply to the provision of security. The security that the usufructuary provides can be used to pay the penalties that may be imposed on her if she is found guilty of engaging in restricted activities relating to either alien or invasive species[111] and/or threatened and protected species.[112] These penalties and the potential threat of suspending her ability to draw the fruits from the object should create an incentive for the usufructuary to provide the security. However, in those circumstances where the usufructuary is genuinely without the means to provide the security demanded by the owner, a court should exercise its inherent power to find an innovative solution. For purposes of the amended meaning of *silva caedua* this might include a provision that a permit holder may fell all the trees and allow the usufructuary to sell the timber, whereafter she could purchase new trees – preferably *silva non caedua*, but at least indigenous trees – and provide the balance of the civil fruits so generated as security. For purposes of the amended meaning of *silva non caedua* this might include leasing the property to public universities (so that students or acclaimed researchers may conduct their research) or the South African National Biodiversity Institute to perform any of its functions.[113]

4 CONCLUSION

The usufruct is a common phenomenon and fulfils an important social function in the agricultural and farming sectors of South Africa. The usufruct is also an important institution to create access to land and affords the usufructuary a lifelong income from the property. However, in instances where the object of the usufruct is an orchard or a wood, the common law draws a pragmatic, but ultimately outdated and incomplete, distinction between *silva caedua* and *silva non caedua* based on the rate at which these respective trees grow. In this article, I argued that this distinction should be updated through a constitutionally-inspired and doctrinally-driven development of the common law to bring it in line with the regulatory scheme of NEMBA. I have shown that this development is possible by expanding the traditional descriptions of *silva caedua* and *silva non caedua* to include alien and invasive species in the former category and threatened and protected species in the latter category. Recalibrating the rights of the usufructuary in this way has a significant impact on her obligation to return the object *salva rei substantia* upon the termination of the personal servitude. As a result I argued that this obligation should be approached pragmatically to allow a flexible interpretation of the obligation to refrain from damaging, destroying and changing the nature or substance of the property. Such an interpretation is necessary to avoid the counter-intuitive prohibitions that NEMBA would place on the expanded descriptions of *silva caedua* and *silva non caedua* through its restricted activities. I further argued that the maintenance obligation of the usufructuary should be increased to accommodate the unique exigencies of the expanded

111 S 102(1) of NEMBA stipulates that a maximum fine of R10 million, or 10 years imprisonment, or both can be imposed for committing an offence in terms of s 101 of NEMBA.

112 S 102(2) of NEMBA stipulates that a fine of R10 million or "equal to three times the commercial value of the specimen in terms of which the offence was committed", whichever is the greater, can be imposed for committing an offence in terms of s 101 of NEMBA.

113 See s 11 of NEMBA.

descriptions of *silva caedua* and *silva non caedua*. Finally, I argued that the obligation of the usufructuary to draw up an inventory and to provide security for the value of the property should not only be increased, but also be recast as a peremptory requirement that is not subject to the discretion of the owner.

This recalibrated relationship between the owner/grantor and the usufructuary transforms the parallel systems of law that exist in terms of the common law and NEMBA. The transformation would recast the binary opposition that presently exists between the conflicting stability interest of upholding vested rights (the limited real right of the usufructuary) and the justice interest of promoting the sustainable use of natural resources into a new, constitutionally-inspired process of equal, optimal and simultaneous protection.[114] The impact of this shift in emphasis – from conflict to equal, optimal and simultaneous promotion – on the relationship between different sources suggests that there should be a shift in focus away from an understanding of sources competing for supremacy to an understanding of sources promoting the spirit, purport and objects of the Bill of Rights. This recalibrated relationship might prove to be a modest development in our law with significant implications for the agriculture and farming sectors in South Africa.

114 Van der Walt *Property and Constitution* 22.