

# **The Reform of Water Rights in South Africa**

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## **Abstract**

South Africa's water law dispensation changed dramatically with the promulgation of the National Water Act 36 of 1998. The previous distinction between public and private water was abolished and the public trust doctrine was statutorily incorporated. Due to the working of the public trust doctrine existing water use rights which were in force before 1998, were replaced by water allowances, granted in the discretion of the relevant authority.

Three key issues are investigated in this paper. Firstly the history and development of water rights in South Africa are discussed. Secondly the system of water allowances is analysed to determine the socio-economic effects of these measures.

Thirdly the question whether the state expropriated vested rights in property through the transition brought about by the incorporation of the public trust doctrine is discussed. The new concept of property and the distinction between deprivation and expropriation as dealt with in section 25 of the Constitution are examined. It is indicated that the concept of property in South African law has been extended to include pre-existing water use rights and it is argued that it also enfolds water allocations made in terms of the Act. Due to the application of the public trust doctrine it is doubtful whether any legitimate deprivation of a water use allocation can be defined as an expropriation – this issue is considered with reference to the requirements set for deprivation and expropriation in South African law.

## **Keywords**

Water, National Water Act 36 of 1998, water use rights, water use allowances, socio-economic, expropriation, deprivation, property, constructive expropriation, public trust doctrine, *dominus fluminis*.

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## 1. INTRODUCTION

The National Water Act, 38 of 1998 is part of a series of controversial Acts dealing with the country's natural resources,<sup>1</sup> promulgated since the inception of the Constitution of the Republic of South Africa, 1996.<sup>2</sup> The controversy stems from the fact that a complete new water law dispensation, amounting to a regime change, was introduced with the Act's commencement on 1 October 1998.<sup>3</sup> It's promulgation was preceded by an extended process of research and negotiations since 1995. Growing demands for access to clean water emerging from day-to-day-needs and based on constitutional rights necessitated a reassessment of the water law dispensation. In 1996 it was estimated that approximately 16 million people (40 per cent of the population) in South Africa did not have access to clean water for domestic use and 21 million people did not have sufficient water for sanitation.<sup>4</sup> These statistics indicate why water reform was regarded as an essential element for addressing the inequalities of the past brought about by the previous political dispensation of apartheid.<sup>5</sup>

Accommodating the socio-economic demands of environmental management and access to water for all people resulted in a significant change of South Africa's water law dispensation. The pre-existing distinction between public and private water was abolished. Exclusive rights of water use which were in force before 1998 were replaced by water allowances, granted in the discretion of the relevant authority.<sup>6</sup> The public trust doctrine has statutorily

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<sup>1</sup> See eg the National Environmental Management Act, 107 of 1998 and the Mineral and Petroleum Resources Development Act, 28 of 2002.

<sup>2</sup> Hereafter referred to as the Constitution.

<sup>3</sup> Pr R95 GG 19269 of 16 September 1998.

<sup>4</sup> R Hamman & T O'Riordan, 'Resource management in South Africa' 82:1 *SA Geographical Journal* 23 (2000); C Wessels, *Waterreg in 'n nuwe konstitusionele bedeling 2* (Unpublished LLM Thesis, PU for CHE, 2001); V Bronstein, 'Drowning in the hole of the doughnut: regulatory overbreadth, discretionary licensing and the rule of law' 119:3 *South African Law Journal* 471 (2002).

<sup>5</sup> GJ Pienaar & E van der Schyff, 'Watergebruikregte ingevolge die Nasionale Waterwet 36 van 1998' 24:1 *Obiter* 132, 133 (2003).

<sup>6</sup> See par 3.1.3 below.

been incorporated and the Minister of Water Affairs and Forestry has been appointed to act as trustee of all water resources on behalf of the nation.<sup>7</sup>

Seeing that South Africa is regarded as one of the twenty most water scarce countries in the world<sup>8</sup> the importance of investigating the implications of the changes brought about by this Act is self-evident. The three key issues that are highlighted in this paper are the history and development of water rights in South Africa, the system of water allowances and the extent of constitutional protection awarded to water use rights from the preceding and current era.

## **2. HISTORY AND DEVELOPMENT OF WATER RIGHTS IN SOUTH AFRICA**

The true legal status of water has always been rather vague and could not be defined clearly. This might be ascribed to the fact that water were never regarded as something that could be 'owned' and this was strange in a legal community where ownership epitomised the most comprehensive real right in property and was regarded as the source of all limited rights.<sup>9</sup> As a result the 'ownership' of water was always a contentious issue.

The regulation of water use before 1998 can be divided into two separate phases. Since 1652 the common-law principle, that the government as *dominus fluminis* had the right to control water in streams, had been applied.<sup>10</sup> This principle formed part of the reception of Roman-Dutch law in the Cape during the 17th and 18th centuries and was subsequently applied in South African law.<sup>11</sup> The Roman-Dutch law was in turn based on Roman law. In classical Roman law water was classified as *res extra commercium*, or non-negotiable things, which could not be privately owned. The Romans

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<sup>7</sup> See par 3.1.1 below.

<sup>8</sup> J van Zyl, 'Waterskaarste gaan elke onderneming ten nouste raak', *Finansies en Tegniek*, 17 Maart 2000 page 13; [www.deltaenviro.org.za/resources/envirofacts/water.html](http://www.deltaenviro.org.za/resources/envirofacts/water.html).

<sup>9</sup> See par 4.1.1 below.

<sup>10</sup> CG Hall, *The Origin and Development of Water Rights in South Africa* 8, 15 (Oxford: Oxford University Press, 1939); JG Kotze, *Simon van der Leeuwen's Commentaries on Roman-Dutch Law* Vol 11, 296 (London: Bell Yard, 1886).

<sup>11</sup> M Uys 'Natuurbewaring se wateraanspraak in regshistoriese perspektief' 3 *Stellenbosch Law Review* 375, 385; Wessels note 4 above<sup>10</sup>.

distinguished between perennial rivers and the temporary flow of water after rain, which were respectively classified as *res publicae* and *res communes omnium*.<sup>12</sup> Although a river could not be privately owned, the bank of the river could be privately owned by riparian owners.<sup>13</sup> However, the riparian owners could not restrain members of the public to obtain and use water out of the river.

In Roman-Dutch law this distinction was maintained in a somewhat changed form. Water in non-navigable streams, as well as spring water on land, was regarded as water at the disposal of the landowner, while water in navigable streams was regarded as *res publicae*.<sup>14</sup> Therefore water in navigable streams was at the disposal and use of everyone who had access to the stream. The state as *dominus fluminis* (custodian) had the right to control and regulate the use of water in navigable streams.<sup>15</sup>

In 1873, however, this system changed. A new set of principles, rooted in English law, were prescribed for the division of water.<sup>16</sup> According to these new principles, riparian owners had the right to share in the water of a river flowing alongside or over their properties. Landowners were in addition entitled to spring water on their land. As a result, the state played a negligible role in the allocation of water rights and the development of water resources.<sup>17</sup>

The distinction between public and private water originated with the promulgation of the Irrigation and Water Conservation Act 8 of 1912.<sup>18</sup> This distinction was based on the principle that spring water on land, as well as water flowing over land,<sup>19</sup> could be used by and belonged as private water to

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<sup>12</sup> M Kaser, *Roman Private Law* 101 (Durban: Butterworths, 2<sup>nd</sup> ed, 1968); PH Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 122-123 (Durban: Butterworths, 1977). Water in a container could be privately owned.

<sup>13</sup> *Surveyor-General (Cape) v Estate de Villers* 1923 AD 588 619.

<sup>14</sup> Voet *Commentarius ad Pandectas* 8.3.6; W Vos, *Principles of South African Water Law* 1-2 (Cape Town: Juta, 2<sup>nd</sup> ed); Wessels note 4 above 10.

<sup>15</sup> Hall note 10 above 8, 15; F Soltau, 'Environmental justice, water rights and property' *Acta Juridica* 229, 236 (1999).

<sup>16</sup> *Hough v Van der Merwe* 1874 Buch 148.

<sup>17</sup> Pienaar & van der Schyff n 5 above 135.

<sup>18</sup> *Le Roux v Kruger* 1986 (1) SA 327 (C).

<sup>19</sup> Spring water or rain water.

the landowner, with the proviso that the water should also be available to lower-lying owners if it flowed over their land as well. Water in public streams was regarded as public water, and the use of such water was regulated by the 1912 Act. In the case of public water the riparian owner was not owner of the water, but in the case of private water there was no certainty who owner of the water was.<sup>20</sup> This distinction between private and public water was also maintained in the Water Act 54 of 1956. The Water Act did not explicitly determine who the owner of private water was, but confirmed that the exclusive use rights of private water could be exercised by the landowner of the land where it had its source or flowed over.<sup>21</sup> Rights to public water were regulated by the state, but riparian owners were entitled to sufficient quantities of surplus water for domestic use, watering of cattle and cultivation.<sup>22</sup>

In terms of the 1956 Act riparian owners had the right to use public water in public streams, but the use-rights were controlled and regulated by the state. The right of private owners to use water in rural areas (farms) which had its source on the land or flowed over the land, was a direct consequence of their landownership. Although there was no finality over the ownership of water,<sup>23</sup> the use of water was derived from and linked to the ownership of land:

- (a) in the case of public water, riparian ownership;
- (b) in the case of private water, ownership of the land over which the water flowed or where the source of the water was situated;
- (c) in the case of water servitudes, only those granted by the owner of the servient tenement.

### **3. THE NATIONAL WATER ACT 36 OF 1998<sup>24</sup>**

It has been stated above that the pre-1998 water legislation was mainly based on Roman-Dutch and English legal principles. These principles originated in countries in Europe and England abounding in water while it is the shortage of

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<sup>20</sup> Wessels note 4 above 25-34; Bronstein note 4above 472.

<sup>21</sup> S 6(1).

<sup>22</sup> S 10.

<sup>23</sup> Wessels note 4 above 25-34; Bronstein note 4above 472.

<sup>24</sup> Hereafter referred to as the National Water Act.

perennial water sources that concern land owners in South Africa. Due to the apartheid regime the majority of the country's inhabitants did not have undisturbed and equal access to clean water. As part of the holistic action of liberating the country from the shackles of apartheid the above-mentioned water use rights were to a large extent abolished by the National Water Act.

### **3.1 General objectives of the National Water Act**

Section 2 of the Act states that it is the purpose of the Act to 'ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled' taking into account *inter alia* the basic human needs of present and future generations, equitable access to water, social and economical development, the public interest, the growing demand for water, ecosystems and biological diversity and international obligations.

The legislature set out to facilitate the purpose of the Act by substituting the dispensation that differentiated between private and public water with a water law dispensation that recognises that water as a natural resource belongs to all the people of the country. This transition was effected through the interconnected working of the preamble of the Act where it is stated that 'water is a natural resource that belongs to all people' and section 3 that provides for '[p]ublic trusteeship of the nation's water resources'. Section 3 of the Act can therefore be regarded as the axle of the new water law dispensation. Through the content of this section the Anglo-American public trust doctrine was introduced to South African jurisprudence. The impact of this development can only fully be understood if it is taken into consideration that the South African legal system has undeniably strong Roman-Dutch roots. The concept of property 'belonging to all people' is strange to lawyers educated in the Roman-Dutch legal tradition and increases the responsibility placed on government's dealing with the country's water resources to a great extent. The accommodation of a notion of 'property belonging to all' in a Roman-Dutch centred legal community is thus regarded as pivotal for a discussion of the impact of the Act.

### 3.1.1 The public trust doctrine<sup>25</sup>

It can be argued that ownership of water as a natural resource cannot legally vest in 'all people' as the nation has no legal personality enabling it to acquire ownership. The reality is however that the legislature's intention as clearly expressed in the preamble and section 3 of the Act, indicates that this is precisely what the legislature set out to achieve. The Act reflects the legislature's unmistakable intention that water as a natural resource 'belongs' to all people.

The mechanism that the legislature employed to overcome this fundamental hurdle is mirrored through the emphasis placed on the state's fiduciary role and fiduciary responsibilities throughout the Act. The public trust doctrine is the legal tool that encapsulates the state's fiduciary responsibility towards its people and bridges the gap between the Roman-Dutch based property concept and the notion that water as natural resource 'belongs to all people'. Property subject to the doctrine falls in a unique category not previously recognised in South African law, although traces of the principles underlying the doctrine were found in a historical survey of the property concept in South African jurisprudence.

Research of the Anglo-American public trust doctrine indicates that the title in public trust property vests in the state as trustee, with the nation as beneficiary. At the core of the public trust doctrine is the principle that state ownership of property subject to the doctrine is held by a title different in character from that which states hold in property intended for sale.<sup>26</sup> Where the state owns property that it can sell in the open market under the obligation that its dealings with such property should be governed by the principles of good governance, the state's holding of the property can be equated with that of any other private holder or owner. In contrast thereto, the state holds

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<sup>25</sup> For a thorough exposition of the Anglo-American public trust doctrine see E Van der Schyff 'The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002' 2006 106-149 (Unpublished LLD Thesis, North-West University, 2006)

<sup>26</sup> *Illinois Central Railroad Company v Illinois* 1946 US 387 (1892).

property subject to the public trust solely as representative of the nation for the benefit of the nation, not the state treasury or the leading political party. Although the state can alienate trust property in exceptional circumstances the recipient of the title accepts it encumbered with the public trust and subject to the public's pre-existing title.<sup>27</sup>

The objectives stated in section 2 of the Act would not have been feasible if the nature of property holding as it relates to water use rights, had not been changed. The impact and reality of providing equitable access to water in order to fulfil the basic human needs of the present generation and protecting the resource for future generations whilst simultaneously protecting the public interest in *inter alia* ecosystems and biological diversity could not be accommodated by a purely private law property concept.<sup>28</sup> The state, on the other hand, is the people's democratically elected representative and as such empowered and obliged to act in the nation's best interest. This obligation is further nuanced by the state's appointment as trustee of the nation's water resources. This appointment resulted in the fact that it is not the unfettered discretion to deal with the resource or ownership of the resource that was allocated to the state, but the obligation to act as trustee to the benefit of 'all people'.

The theory of the public trust doctrine touched ground in specifically the socio-economic effect of the Act. The state's duty to regulate the sustainable use of the nation's water resource is reflected in the sections of the Act that deals with the allocation of water. These aspects will be discussed before the impact of the Act on the pre-existing holding of water rights is scrutinised.

### **3.1.2 Socio-economic effect of the Act**

Two socio-economic aspects of the *National Water Act* can be highlighted:

- Accessibility to water for the whole population.

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<sup>27</sup> *Shively v Bowlby* 152 US 1 (1894).

<sup>28</sup> See par 4.1 below for a brief analyses of the South African property concept.

The principle that everyone is entitled to sufficient water for domestic purposes is firmly entrenched in the Act.<sup>29</sup> This objective brings the South African water dispensation in line with international standards. The Convention on Economic, Social and Cultural Rights of 1988 clearly stated that the right to water falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the fundamental conditions for survival. Article 16(2) of the *African Charter on Human and Peoples' Rights* proclaims that state parties to the Charter must take the necessary measures to protect the health of their people. Access to water is not explicitly mentioned, but the obligation to protect the health of its citizens would imply that the state party must ensure that its subjects enjoy basic water and sanitation services.<sup>30</sup>

Section 27(1)(b) of the South African Constitution provides that everyone has the right to have access to sufficient food and water and section 27(2) determines that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights. "Basic water supply" is defined in section 2 of the *Compulsory National Standards and Measures to Conserve Water Regulations* of 2001<sup>31</sup> as 25 litres per person per day accessible within 200 metres. The current policy of the Department of Water Affairs and Forestry is that 6 000 litres of water per household per month should be available without charge.

Although water for domestic purposes is still not available for every household or individual within 200 metres of his/her house or shelter, the Act contains the basic conditions to obtain these targets within the South African legislative framework. For the period 2000-2002 the Department of Provincial and Local Government stated that 78.1 per cent of households had piped water, 21.8

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<sup>29</sup> Ss 2 and 4(1); Schedule 1.

<sup>30</sup> *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehova v Zaïre* Communication 25/89, 47/90 & 56/91, 100/93, 9th Annual Activity Report.

<sup>31</sup> *Gazette 22355, Regulation Gazette 7079, 2001-06-08.*

per cent households did not have piped water and 22.3 per cent households were living more than 200 metres from a water source. More recent statistics based on the General Household Survey conducted during 2005 indicate that only 7 per cent of households in the City of Cape Town had no access to water in the home or on the site. When compared with the 16 per cent indicated in the 2001 census it is clear that a substantial improvement occurred.<sup>32</sup> It is also published in the *Local Government Budget and Expenditure Review: 2001/02 -2007/08* that the non-financial census conducted by Statistics South Africa for the year ended June 2004 indicated that 14 per cent more households had access to basic water and 11,8 per cent more households had access to sewerage and sanitation than in the year before. These statistics indicate that some progress has been made with the supply of water to all households, but the practical implementation of the statutory obligation still needs the urgent attention of policy makers and administrative authorities.

- Environmental management

Section 24 of the Constitution states that everyone has the right to an environment that is not harmful to their health or well-being and that the environment has to be protected for the benefit of present and future generations through reasonable legislative and other measures. These measures include the prevention of pollution and ecological degradation, conservation, and ecologically sustainable development and use of natural resources. These constitutional principles are echoed in the *National Water Act*. In section 2 one of the objectives of the Act is the protection of the environment by managing water resources. Section 3(2) stipulates that the Minister of Water Affairs and Forestry must, in the allocation of water use-rights, see to environmental protection. Any water authority may require that a water user must apply for a license if polluted water is to be released in a water source, if the water is polluted in any other way or water is used in such a way that the quality of the water is detrimentally affected.<sup>33</sup> Furthermore

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<sup>32</sup> <http://www.statssa.gov.za>

<sup>33</sup> S 21.

water restrictions are instituted in instances where excessive use of water resources takes place.<sup>34</sup>

### 3.1.3 Use rights by licensing

A reading of the Act indicates that water rights are allocated in the following manner:

- Section 4(1), read with schedule 1 to the Act, stipulates that everyone is entitled to water for reasonable household purposes from any source to which such a person has lawful access. Spring water on land or water from a source on adjacent land may be used by the owner or occupier<sup>35</sup> of the land for reasonable household purposes, gardening<sup>36</sup> and watering of cattle on the land to the extent of the grazing capacity of the land, provided that such use is in accordance with the capacity of the water source and the reasonable demands of other water users from the same source.
- All persons are entitled to catch and store rain water from roofs and use water from any source for fire fighting.<sup>37</sup>
- Water may be used for recreational purposes by all persons having lawful access to such water source and any person may carry or transfer a boat or canoe over riparian land to continue a boat trip on the river which has started lawfully.<sup>38</sup>
- Sections 4(2) and 34 stipulate that any person may continue the lawful use of water in terms of the previous *Water Act*. Such use right is subject to any conditions and obligations in terms of the previous legislation, as well as any conditions regarding the substitution of the use right by the new licensing procedure or any other limitation in terms of the *National Water*

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<sup>34</sup> S 43.

<sup>35</sup> It is not a requirement that the occupier should be in lawful occupation of the land and includes unlawful occupiers.

<sup>36</sup> Gardening for commercial purposes is explicitly excluded.

<sup>37</sup> Schedule 1; s 1(c) and (d).

<sup>38</sup> Schedule 1; s 1(e).

Act. It can at any stage be expected from the water user to register the legitimate use right in terms of the new procedure. Section 32 determines that an existing right to use water is enforceable only in instances where such a right was lawfully exercised for a period of two years before the commencement of the new Act.

- Any person may apply to the applicable water authority to obtain a general authorisation to use water.<sup>39</sup> Section 39 stipulates that a general authorisation to use water subject to the conditions of schedule 1 to the Act<sup>40</sup> is to be published by a notice in the *Government Gazette* with regard to the general use of water, a specific water source or an area specified in the notice. For the purposes of a general authorisation to use water regulations are to be published in terms of section 26 or conditions set in terms of section 29.
  
- A licence to use water can be obtained by following the procedure set in sections 41 and 42.<sup>41</sup> In terms of section 43 it is compulsory to apply for a licence in the following circumstances:
  - (i) to ensure a fair and reasonable division of water use rights in the case of over-used sources or where people are sharing the same water source;
  - (ii) to ensure the beneficial use of water in the public interest;
  - (iii) to establish the efficient management of a water source; or
  - (iv) to protect the quality of a water source.
  
- The water authority may by notice in the *Government Gazette* require that water users apply for a licence to use water for the following purposes:<sup>42</sup>
  - (i) to extract water from a water source;
  - (ii) to store water;

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<sup>39</sup> S 4(3). Catchment management agencies and water use associations are established in terms of chapters 7 and 8 of the Act respectively.

<sup>40</sup> Schedule 1 prescribes conditions for general water use by any person for household purposes or water use by owners and occupiers for household purposes, gardening or watering of cattle.

<sup>41</sup> S 4(3). Ss 41 and 42 stipulates the general application procedure and the obligation to supply reasons by the water authority.

<sup>42</sup> S 21.

- (iii) to change or alter the flow of a stream;
  - (iv) to reduce the flow of a stream;
  - (v) to control the activities listed in sections 37 and 38 (these sections mainly deal with waterworks and water for irrigation purposes);
  - (vi) to set polluted water or water containing refuse free in a water source or stream;
  - (vii) to use water in such a way that it is polluted or the quality of the water is affected
  - (viii) to use subterranean water in such a way that it endangers the use of the water source by other persons or endangers the source itself; and
  - (ix) to use water for recreational purposes.
- Section 4(4) determines that a permit to use water may be issued in circumstances where the water authority is satisfied that the aims of the Act will be reached by issuing such permit.<sup>43</sup>
  - The following factors will be taken into consideration in the case of the issuing of a general authorisation, a licence or a permit:<sup>44</sup>
    - (i) existing water use;
    - (ii) to abolish previous racial or gender discrimination in the allocation of water rights;
    - (iii) the efficient and beneficial use of water in the public interest;
    - (iv) the socio-economic impact of the allocation or refusal of water use rights;
    - (v) the strategic importance of a specific water source;
    - (vi) the probable consequences of the allocation of a use right to other water users;
    - (vii) the quality of the water source;
    - (viii) investment in existing improvements and equipment;
    - (ix) the strategic importance of the water use right; and
    - (x) the duration of the allocation.

The use of subterranean water may be allocated to another person as the

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<sup>43</sup> S 22(3).

<sup>44</sup> S 27.

landowner with the consent of the landowner or where a good reason for the allocation exists.<sup>45</sup>

- A wide discretion in the allocation of water rights by general authorisation, licence or permit is allowed to the water authority.<sup>46</sup> This discretion must obviously be exercised according to the requirements of just administrative action in terms of section 33 of the Constitution.<sup>47</sup>
- A lawful water user who is exercising an existing water right in terms of the previous legislation may claim compensation in terms of section 22(6) for damages suffered if a licence is refused or an existing water right is decreased. In terms of section 22(8) a claim for compensation must be lodged with the Water Tribunal within 6 months after the resolution of the applicable water authority.

The exposition above emphasis the practical application of the principles underlying the public trust doctrine as it requires the state to consider the public interest in all water allocations. It is also clear that all water use rights exercised on authority of the Act and allocated in terms of the act, are allocated and exercised within the scope of the public trust doctrine. This means that while recipients of water use rights may use those rights to their advantage, the rights are encumbered with the public trust and subject to the public's pre-existing title. If a sudden change in public interest thus demands a retraction or curtailment of these rights, the individual's interests in these rights will be secondary to the public's.

#### **4. THE CONSEQUENCES FOR HOLDERS OF PRE-EXISTING WATER RIGHTS**

It has been explained above that South Africa's water law dispensation underwent a revolutionary transition. This transition was necessary to align

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<sup>45</sup> S 24.

<sup>46</sup> See Bronstein note 4above 474-480.

<sup>47</sup> S 33 of the Constitution.

the country's water law with constitutional values and norms. However, it impacted greatly on pre-existing water right holding. The underlying reason is that a new property concept was introduced through the Act.

#### **4.1 The property concept**

##### **4.1.1 The tradition property concept**

It is difficult to define property as a concept. Its definition within a particular legal system is determined by various factors including but not limited to religious, philosophical, historical, economic, political and social factors.<sup>48</sup> The South African Roman-Dutch property concept followed the civil law tradition. As a result of this heritage lawyers initially conceptualised property as a legal relation between persons and corporeal things. Due to the development of the property concept brought about and necessitated by socio-economic development, a limited number of incorporeals were eventually also regarded as 'things', albeit incorporeal things. Property was then narrowly defined as the object of this relationship between persons and things.<sup>49</sup> Ownership epitomised the most comprehensive real right in property and was regarded as the source of all limited real rights.<sup>50</sup> A right to water has been regarded as 'goods' that could be expropriated as early as 1974.<sup>51</sup> In this case it was thus implicitly accepted that the water use right was 'property'.

##### **4.1.2 The constitutional property concept**

Due to the realities of life it was recognised that less-than-ownership property rights needed to be recognised. The inclusion of a property clause in the Constitution revolutionised the South African property concept and the

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<sup>48</sup> GJ Pienaar, 'Ontwikkelings in die Suid-Afrikaanse Eiendomsbegrip in Perspektief', 1 *Tydskrif vir die Suid-Afrikaanse Reg* 295 (1986).

<sup>49</sup> J de Waal, I Currie & G Erasmus, *The Bill of Rights Handbook* 413 (Lansdowne: Juta, 3<sup>rd</sup> ed. 2000)

<sup>50</sup> AJ van der Walt, 'The Fragmentation of Land Rights', 8:3 *South African Journal on Human Rights* 431, 434 (1992).

<sup>51</sup> *Badenhorst v Minister van Landbou* 1974 1 PH K7.

ownership-object relation changed to a rights-based paradigm with the emphasis shifting from *ownership* to *rights in property*.<sup>52</sup>

The question surfaced as to the scope and nature of constitutional property. To date, courts have refrained from formulating a definite answer to this question. For the purpose of this paper it suffices to state that a strong inclination is found towards the idea that the property concept will in the first instance be interpreted to include all rights and objects that have been recognised as such during the pre-constitutional era.<sup>53</sup>

The importance of being recognised a property is found in the fact that property is constitutionally protected to the extent of the protection awarded by section 25 of the Constitution. The consequence of being recognised as a constitutional right have certain implications for the property concept that need to be touched on, even if just fleetingly.

Van der Walt<sup>54</sup> states: 'In property theory, the counterpart of anxiety about the erosion of privacy is the popular notion that private property is under threat from increasingly aggressive and invasive government interference and regulation...'. This statement illustrates the main reason why man deems it necessary to define property in precise terms. We want to protect what is 'ours'. However, despite the illusion of individuality and exclusivity that are produced when attempting to define the term property, the South African property concept has finally been rid of the egocentricity of 'absoluteness'. By being included in a Constitution that accentuates basic human rights, property has been clothed in the cloak of social responsibility. This viewpoint is advanced by Van der Walt<sup>55</sup> when he states: 'In other words, property has a public, civic or 'propriety' aspect to it that transcends individual economic interests and that involves interdependency and the common obligations that

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<sup>52</sup> AJ van der Walt & GJ Pienaar, *Introduction to the Law of Property* 33 (Kenwyn: Juta, 2002).

<sup>53</sup> *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International* 2004 JOL 12940 (SCA); De Waal, Currie & Erasmus note 49 above, 414; T Roux, 'Property' in MH Cheadle, BM Davis & NRL Haysom ed., *South African Constitutional Law: The Bill of Rights* 429, 449 (Durban: Butterworths 2002).

<sup>54</sup> AJ Van der Walt, 'The Public Aspect of Private Property' 19:3 *SA Public Law* 676, 707 (2004).

<sup>55</sup> Van der Walt note 54 above 707.

result from it.’ Individual and public interests are the weights that must balance the scale of property as social construct.<sup>56</sup> In some cases, however, the public interest and constitutional demands require a radical interference resulting in the ‘decline of private property’ for the public’s benefit.

Sax<sup>57</sup> promotes the view that ‘we are in the midst of a major transformation in which property rights are being fundamentally redefined to the disadvantage of property owners’. He attributes this transformation to the ‘perceived allocational failure of traditional property’.<sup>58</sup> Changing public values demands that ‘nonexclusive consumption benefits’<sup>59</sup> are extended and awarded protection. Sometimes this can only be done by removing the particular asset, it would most often be a natural resource or heritage site, from the private property domain. Apart from protecting these so-called nonexclusive consumption benefits the demand on a natural resource can be so extensive that it is detrimental to the resource’s existence to leave it in private hands and in certain scenarios past injustices that occurred in the allocation of resource-use and the development that has since taken place, requires a re-allocation of the rights relating to the resource. The only way to allow justice to prevail is to remove the resource from the sphere of private property. Private property can thus be converted into a public resource. The argument is advanced in this paper that South Africa’s water resources have been converted to a public resource.

#### **4.1.3 Do pre-existing water use rights and newly created water use authorisations constitute property worthy of constitutional protection?**

It has been stated above<sup>60</sup> that property is awarded constitutional protection in the new South African legal dispensation. If the water use rights that existed under the old water law dispensation can be regarded as property, those

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<sup>56</sup> AJ Van der Walt *Constitutional Property Law* 73 (Cape Town: Juta, 2005).

<sup>57</sup> JL Sax, ‘Some Thoughts on the Decline of Private Property’ 58 *Washington LR* 481.

<sup>58</sup> Sax note 57 above 484.

<sup>59</sup> Sax note 57 above explains the concept of nonexclusive consumption benefits. The benefits of enjoying the beauty of nature or from maintaining an existing historic building are examples of nonexclusive consumption benefits.

<sup>60</sup> See par 4.1.2. above.

rights are constitutionally protected to the extent of the nature and scope of protection awarded by section 25 of the Constitution.<sup>61</sup> This protection would not necessarily hamper transformation but it would bring about a certain measure of security for the holders of pre-existing water use rights, because it would entail specific requirements to be adhered to before the state can infringe on water use allowances. One should keep in mind that although the system under the apartheid era was not equitable the majority of 'favoured' individuals who held water use rights when the transition was effected, acquired those rights at a price from predecessors in title. Theoretically those individuals suffered a great loss with the removal of water use rights from the private property sphere. The transition from one water law dispensation to another brought about a transformation of the nature of water use 'rights'. The previously established water use rights that were dealt with as any other independent economic commodity was transformed to water use allowances or authorisations, allotted in the discretion of the applicable minister and bounded by and pre-existing public trust title.

Despite the fact that the ownership of water was always a contentious issue and that the true legal status of water before 1998 was rather vague and indefinable, legitimate water users had established water use rights. Writer contends that these previously established rights should be regarded as property in the new constitutional dispensation.

It is a controversial question whether water use authorisations granted under the new dispensation can be defined as property. On the one hand it can be argued that these authorisations can be regarded as property worthy of constitutional protection for the duration of their existence. On the other hand it can be argued that the allocations only represent revocable licences that merely enable persons to do lawfully what they could not otherwise do. However, once these authorisations are granted other persons are excluded from the enjoyment of, interference with or appropriation of the entitlements awarded in terms of the authorisation for the duration of the authorisation.

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<sup>61</sup> See par 4.2 below.

Writer therefore contends that these entitlements should be regarded as property worthy of constitutional protection, always keeping in mind the nature of this unique category of property and the inherent restriction brought about by the public trust doctrine.

## **4.2 CONSTITUTIONAL PROTECTION OF PROPERTY**

### **4.2.1 A constitutional right to property**

The property clause (section 25 of the Constitution) embodies a negative protection of property and the right to acquire, hold and dispose of property is not guaranteed.<sup>62</sup> Through this negatively framed property guarantee property is not rendered inviolable but limits and requirements are set for state intervention.<sup>63</sup> Linked to the fact that the preamble of the Constitution indicates that one of the aims of its adoption was the development and promotion of a society based not only on 'democratic values and fundamental human rights', but also on 'social justice' and the positive obligations with regard to various social and economic rights placed by the Bill of Rights on the state,<sup>64</sup> the purpose of section 25 has to be seen as protecting property rights while serving the public interest.<sup>65</sup> O'Regan J eloquently summarised this perspective when she stated in a minority judgment in the *Mkontwana* case:<sup>66</sup> 'A balance must be struck between the need to protect property, on the one hand, and the recognition that rights in property may be appropriately limited to facilitate the achievement of important social purposes, including social transformation, on the other.' It is inevitable that tension is created whenever a balance is to be struck between seemingly opposing interests to ensure equity. It must also be kept in mind that the right to property 'is no

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<sup>62</sup> *First National Bank of SA Limited t/a Wesbank v The Commissioner for the South African Revenue Services and the Minister of Finance* 2002 7 BCLR 702 (CC) par [48], hereafter referred to as *FNB v SARS* or the *FNB* case.

<sup>63</sup> Van der Walt note 56 above 13.

<sup>64</sup> See, for example section 24 (environment), 26 (housing), 27 (health care, food, water and social security) and 29 (education).

<sup>65</sup> *FNB v SARS* par [52]; AJ Van der Walt, *The Constitutional Property Clause* 8 (Kenwyn: Juta, 1997). As *per* O'Regan J in *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) 565.

<sup>66</sup> *Mkontwana* note 85 above 566.

stronger or no weaker than any other right; whether it is a real right, a personal right, contractual, delictual or a constitutional right.<sup>67</sup>

With this perception in mind, the curtailment and infringement of property will be viewed.

#### 4.2.2 The differentiation between deprivation and expropriation

Section 25 states the requirements for validity all infringements of property rights must comply with. In order to be a legitimate deprivation, the infringement must be authorised in terms of a law of general application and it may not be arbitrary. The phrase 'law of general application' has been held not only to include legislation that does not single out certain people or groups of people for discriminatory treatment<sup>68</sup> but also the common law, equally applicable to all.<sup>69</sup>

It is stated in *Minister of Transport v Du Toit*<sup>70</sup> that '[t]he injunction in section 25 of the Constitution against any law permitting 'arbitrary deprivation of property' was designed not merely to protect private property but also to advance the public interest in relation to property.' The ordinary meaning of the word 'arbitrary' leads one to think that an arbitrary deprivation takes place mercurially and is neither based on reason nor principle.<sup>71</sup> In this context, 'arbitrary' is, however, 'not limited to non-rational deprivations, in the sense of there being no rational connection between the means and the end'.<sup>72</sup> It was stated in *FNB v SARS*<sup>73</sup> that a deprivation will be arbitrary if:<sup>74</sup>

- it is procedurally unfair; or

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<sup>67</sup> *Transnet Ltd v Nyawuza* 2006 (5) SA 100 (D) at 106.

<sup>68</sup> *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 1 BCLR 23 (T) 29 G-H

<sup>69</sup> *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) par [44] and [136]; *Trustees, Brian Lackeytrust v Annandale* 2004 (3) SA 281 (C) par [18].

<sup>70</sup> 2005 10 BCLR 964 (SCA) 968

<sup>71</sup> PJ Badenhorst, JM Pienaar and H Mostert *Silberberg and Schoeman's The Law of Property* 99 (Durban: Butterworths, 4<sup>th</sup> ed, 2003).

<sup>72</sup> *FNB v SARS* note 62 above par [65].

<sup>73</sup> *FNB v SARS* note 62 above par [100]

<sup>74</sup> For a thorough exposition of this aspect see T Roux 'Property' in S Woolson & T Roux eds. *Constitutional Law of South Africa* 46-1, 46-21 – 46-25 (Kenwyn: Juta, 2<sup>nd</sup> ed, 2003).

- the provision under adjudication does not provide sufficient reason for the deprivation concerned.

Whether there is *sufficient reason* for the deprivation, is to be decided on all the relevant facts of each particular case. A ‘complexity of relations’ has to be considered when evaluating the relationship between the purpose of the law and the deprivation effected by that law. The process would *inter alia* entail:

- evaluating the relationship between the particular deprivation and the ends sought to be achieved;
- scrutinising the relationship between the purpose of the deprivation and the affected individual;
- assessing the purpose and extent of the deprivation in relation to the nature of the property affected;
- focusing on all the material facts of each individual case.

Interpreting these criteria - Yacoob J stated in *Mkontwana v Nelson Mandela Metropolitan Municipality*<sup>75</sup> that ‘if the purpose of the law bears no relation to the property and its owner, the provision is arbitrary’. This approach was welcomed by Van der Walt,<sup>76</sup> because Ackerman J managed to introduce a more substantive element into the first-stage analysis of any infringement of property. According to the *ratio* of the *FNB* decision par [59], the question whether a deprivation constitutes an expropriation will only come into consideration if all the above-mentioned requirements have been met.

#### **4.2.3 Expropriation**

For the purpose of this paper a pragmatic approach is followed. This is not the forum to debate the philosophical basis and ‘true’ nature and scope of the concept of expropriation. The aim is to explain the concept of expropriation as it manifests from case law.

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<sup>75</sup> 2005 (1) SA 530 on 547

<sup>76</sup> AJ van der Walt ‘Striving for the Better Interpretation – A Critical Reflection on the Constitutional Court’s *Harksen* and *FNB* Decisions on the Property Clause’ 121:5 *South African Law Journal* 854, 870 (2004).

For the current discussion it is important to note that whenever the pre-constitutional meaning of the concept of expropriation is under discussion, many commentators and judges revert to the well known pre-constitutional decisions given in *Beckenstrater v Sand River Irrigation Board*,<sup>77</sup> *Tongaat Group Ltd v Minister of Agriculture*<sup>78</sup> and *Apex Mines Ltd v Administrator, Transvaal*<sup>79</sup> for an exposition of the concept.<sup>80</sup> These cases emphasised that although the ordinary meaning of the word expropriate was 'to dispossess of ownership, to deprive of property',<sup>81</sup> the concept of expropriation entailed more than the mere dispossession or deprivation of property. It was the indispensable accompanying requirement of 'appropriation' of the particular property by the expropriator that gave rise to legally defined expropriation. The inclusion of the element of acquisition or appropriation in the inherent requirements set for compensative expropriation excluded state actions that destroyed or took away rights.<sup>82</sup> This line of reasoning led to the viewpoint that a prerequisite for expropriation was *inter alia* the compulsory acquisition of rights by the expropriator. It also contributed to the development of the clear distinction made between so called control measures or regulation, and expropriation. The regulation of property<sup>83</sup> merely prevented a person from using his property in a particular manner and neither the property nor any rights were acquired by the expropriating authority.<sup>84</sup> Therefore, no compensation was payable for damages or losses arising from regulatory actions by the state. The distinction can be summarised as 'appropriation (expropriation) versus restriction (regulation)'.

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<sup>77</sup> *Beckenstrater v Sand River Irrigation Board* 1964 (4) SA 510 (T), hereafter referred to as *Beckenstrater*.

<sup>78</sup> *Tongaat Group Ltd v Minister of Agriculture* 1977 (2) SA 961 (A).

<sup>79</sup> *Apex Mines Ltd v Administrator, Transvaal* 1988 (3) SA 1 (A), hereafter referred to as *Apex Mines*.

<sup>80</sup> JD Van der Vyfer, 'Expropriation, Rights, Entitlements and Surface Support of Land' 105:1 *South African Law Journal* 1, 5 (1988); MD Southwood, *The Compulsory Acquisition of Rights* 14 (Lansdowne:Juta, 2000); *Harksen v Lane* 1997 11 BCLR 1489 (CC) par [38]; *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA); *City of Cape Town v Rudolph* 2003 11 BCLR 1236 (C).

<sup>81</sup> *Beckenstrater* at 515A.

<sup>82</sup> *Cape Town Municipality v Abdulla* 1976 (2) SA 370 (C) 374-6.

<sup>83</sup> In some foreign jurisdictions eg the United States of America the power to execute control measures is called 'police power'. This phrase is common to American Law but has been used in South African literature. See eg AJ Van der Walt, *Constitutional Property Clauses* 19 (Kenwyn:Juta, 1999).

<sup>84</sup> *Cape Town Municipality v Abdulla* 1976 (2) SA 370 (C) 375B-D; *Feun v Pretoria City Council* 1949 (1) SA 331 (T) at 342.

In mathematical terms it can be stated that expropriation equals the sum of taking away plus acquisition by the expropriator ( $E = T+A$ ).<sup>85</sup> In light of the application of the *stare decisis* rule in South African jurisprudence, courts will be bound by this interpretation of expropriation until it is redefined by the appellate division or Constitutional Court. This is exactly what is happening in practice where lower courts are bound to the set interpretation and both the Constitutional Court and the Supreme Court of Appeal seemingly hesitant to broaden the scope of the concept by expanding the restrictive interpretation the concept.<sup>86</sup>

#### 4.2.4 Constructive expropriation

The doctrine of constructive expropriation have not formally been accepted as part of South African jurisprudence although traces of the doctrine's underlying principles are found in pre-constitutional case law.<sup>87</sup> Comparative studies indicated that the doctrine normally arises in instances where the regulatory acts of the state exert such an enormous restriction on the rights in the property of the entitled person, that the holder of the entitlements is deprived of the ability to exercise any or a substantive portion of his entitlements.<sup>88</sup> It also comes to the foreground in those instances where rights

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<sup>85</sup> Van der Walt note 56 above 130-131, 180 argues that the acquisition alone should not be seen as the sole distinctive feature of expropriation. To date the courts have not supported this line of thought.

<sup>86</sup> See eg *Harksen v Lane* 1997 11 BCLR 1489 (CC); *Steinberg v South Peninsula Municipality* 2001 4 SA 1243 (SCA) 1246F-C; *Davies v Minister of Lands, Agriculture and Water Development* 1997 1 SA 228 (ZS); *Farmerfield Communal Property Trust v Remaining Extent of Portion 7 of the Farm Klipheuvel No 459* 1998 JOL 4152 (LCC) 5; *Shells Annandale Farm (Pty) Ltd v Commissioner for the SARS* 2000 JOL 5948 (C) 16; *Colonial Development v Outer West Local Council* 2002 (2) SA 589 (N) 611; *Nkosi v Bührmann* 2002 (1) SA 372 (SCA); *City of Cape Town v Rudolph* 2003 11 BCLR 1236 (C)

<sup>87</sup> *Minister van Waterwese v Mostert* 1964 (2) SA 656 (A) 669; *Pretoria City Council v Blom* 1966 92 SA 139 (T) 144; *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1988 (3) SA 122 (A) 129.

<sup>88</sup> AJ Van der Walt, 'Compensation for Excessive or Unfair Regulation: A Comparative Overview of Constitutional Practice Relating to Regulatory Takings' 14:2 *SA Public Law* 273-331 (1999); H Mostert, 'The Distinction between Deprivations and Expropriations and the Future of the 'Doctrine' of Constructive Expropriation in South Africa' 19:4 *South African Journal of Human Rights* 567-592 (2003); AJ Van der Walt, 'An Overview of Developments in Constitutional Property Law since the Introduction of the Property Clause in 1993' 19:1 *SA Public Law* 46-89 (2004); Van der Walt note 56 above 209-237.

are merely extinguished. Even if no rights are transferred to the state, the deprived person suffers incalculable damage.

Initially it appeared as if this subcategory of expropriation found a foothold in constitutional jurisprudence. Cloete AJ in *Steinberg v South Peninsula Municipality*<sup>89</sup> found that space exists for the development of a doctrine of constructive expropriation in South African law.<sup>90</sup> However, he was not convinced that this would contribute to legal certainty and feared that the doctrine might obscure the distinction between deprivation and expropriation.<sup>91</sup>

#### **4.3.2 The extent of constitutional protection awarded to water use rights and water use authorisations**

If one considers that water use rights allocated in terms of pre-existing legislation had monetary value and were regarded as property that could be expropriated or sold, it does not need a vivid imagination to understand the impact of this regime change on the property concept of the country. One would expect that a change as dramatic as this, through which a right previously considered as 'private property' was transformed to property belonging to the all the people of South Africa, would cause great upheaval. Surprisingly enough, the transition was smooth and the constitutional validity of the transformation was not challenged in court. At first glance it seems strange that no case law can be found where the deprivation of pre-existing water rights are contended, especially if seen in light of the fact that an argument can be made supporting the idea that these pre-existing water use rights were expropriated.<sup>92</sup> However, due to the fact that section 22(6) of the Act provides for the payment of compensation to any person who can prove that he was excessively prejudiced by the change in the basis for the

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<sup>89</sup> *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA) 1246C-F.

<sup>90</sup> Cloete A.J. did not take cognisance of the fact that traces of this doctrine were present pre-constitutionally – see Van der Schyff note 25 above par 5.2.1.2.

<sup>91</sup> See Van der Walt's criticism of this argument – AJ Van der Walt, 'Moving Towards Recognition of Constructive Expropriation?' *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA) 65:3 *Tydskrif vir die Hedendaagse Romeins-Hollandse reg* 459-471 (2002).

<sup>92</sup> Van der Walt note 65 above 60, 61.

allocation of water use and the assertion that any possible expropriation claim that could have been brought have expired due to prescription, it has no purpose to continue with the debate.<sup>93</sup> One should rather focus on the effect of not contending the change and the constitutional protection awarded to holders of water use licences under the new dispensation.

It is writers opinion that many parties, especially riparian farmers, affected by the institution of a new water law regime did not challenge the transition because they did not truly understand the implications of the transformation. They were lulled to silence by to the fact that the potential impact of this new water law regime was not immediately felt and provision was made for payment of compensation in terms of section 22(6) of the Act. The public trust doctrine and the concept of a pre-existing public title is new to South African jurisprudence and although it benefits the nation a whole, individuals might be deprived of previously held rights and thus negatively affected. This was a veiled reality. A less cynic argument is that the transition was not formally disputed due to the fact that the spirit of the Constitution and the objects of the Act are shared alike by all South Africans. Maybe holders of pre-existing water use rights accepted that changed public values demanded the removal of water as natural resource from the private property domain.

The changes regarding water and rights to use water is a reality. The question that needs to be answered now, is to what extent newly created water authorisations, or allocation are protected from state interference once a licence is issued. It is specifically during this inquiry that it is of the utmost relevance to take note of the fact that the public trust doctrine has been incorporated in South African water law. Since the authorisation to use water originates from within the public trust created through the working of the public trust doctrine, all the licences are conditional in the sense that they are permanently burdened with a pre-existing title. This title vests in the state as custodian on behalf of the nation. Comparative research indicates that the public trust doctrine preserves the continuing sovereign power of the state

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<sup>93</sup> See E van der Schyff, 'Die Nasionalisering van Waterregte in Suid-Afrika, Ontneming of Onteining' *Potchefstroom Electronic Law Journal* 32 (2003) for a discussion of the subject.

and that there are no 'vested rights' in public trust property.<sup>94</sup> It can thus be argued that the public trust doctrine avoids the takings issue by claiming a pre-existing title.

This does not imply that the holders of water use licences or authorisations are left to the whims of the state. It should always be kept in mind that the state acts as custodian only and it is only when the public interest demands a change in the *status quo* that existing water allocations can be changed. Any interference with these allocations will have to withstand constitutional scrutiny in terms of sections 25 and 36 of the Constitution. It is argued however, that once a deprivation endures constitutional scrutiny, it would not be possible to prove an expropriation due to the fact that the authorisation was awarded subject to the existence of the public trust doctrine.

## **5. CONCLUSION**

Water is crucial for social progress and economic development. Through the incorporation of the public trust doctrine the legislature created a genre wherein rights towards water are held in common by all members of the public but exercised privately. The state as custodian is responsible for enforcing the public's interest in its water sources. As such the state must exercise its discretion taking into account a conglomerate of factors. The public trust doctrine creates the structure wherein the state can integrate the needs of different role players for instance informal and formal communities, municipalities, farmers and the industry. The public interest will continually dictate the hierarchical sequence of importance of the different role players' needs. Since water allocations are made subject to the public trust, it is doubtful whether any legitimate interference by the state with allocated water use licences can amount to expropriation.

The principles underlying South African water law have been subject to the rise and fall of political tides. The incorporation of the public trust doctrine is

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<sup>94</sup> *National Audubon Society v Superior Court of Alpine County* 33 Cal 3d 419 (1983) 447.

preferred as alternative to the downright nationalisation of water rights. If state administration is efficient and uncorrupted the implementation of the doctrine will be hailed by generations yet to be born!