# The Public Management of Water Resources in South Africa

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## Summary

The main purpose of the *National Water Act* 36 of 1998 is to provide for water resource management on an equitable basis to achieve the sustainable use of water for the benefit of all water users. The previous distinction between public and private water was abolished and the Minister of Water Affairs and Forestry acts as trustee of the nation's water resources to ensure that water is protected, used, developed, conserved, managed, and controlled to the benefit of all people. As a result no individual has an exclusive right to the use of water, and water resources are national assets managed by the state. The Act provides that, in general, any water use must be allocated by way of general authorization, licenses, or permits. The discretionary powers of the responsible water authority in dealing with applications for and allocation of use rights, as well as compensation for previous water users who lost water use rights, are dealt with in the Act.

Although no water user had ownership of water in terms of common law principles or the previous Act (unless such water had been separated and contained), these water users did have property rights as stipulated by section 25 of the *Constitution of the Republic of South Africa,* 1996 in the form of limited real rights and other use rights recognized by the previous Act. The question arises whether the provisions of the new Act to terminate the exclusive water rights constitute a deprivation or an expropriation of such property rights. The new property concept in terms of section 25 and the distinction between expropriation and deprivation are examined in this paper. The requirements for expropriation, deprivation, and constructive expropriation (inverse condemnation) are discussed with reference to applicable case law. The preference of water entitlements exercised in the public interest to previous exclusive water rights of individuals, and the possibility of compensation to previous users who lost their water rights, are indications of inverse condemnation.

## 1. Demographic background

Water is a scarce commodity in South Africa, which is regarded as one of the 20 most water scarce countries in the world.[1] Although South Africa is rich in minerals and other natural resources, it has only a few navigable rivers and natural lakes. Consequently most South Africans have to rely on rain water for household, industrial and agricultural use. At this stage water for the economic and industrial heart of South Africa, Johannesburg and Pretoria, is mainly bought from Lesotho. The average annual rainfall varies from 2500 mm. at the narrow eastern and southern coastal belts to less than 200 mm. at the arid areas of the Karoo and Kalahari. In addition, hot dry conditions result in a high evaporation rate.[2] It is estimated that at the present population level of more than 50 million people there are less than 1200 kiloliters of fresh water available per person per year. Approximately 18.7% of South

[1] A. Gildenhuys, "A New Water Dispensation," *Butterworths Property Law Digest* (May 1999): 10; J. van Zyl, "Waterskaarste Gaan Elke Onderneming ten Nouste Raak," *Finansies en Tegniek* (17 March 2000): 15.
[2] Anon, *Enviro Facts,* http://www.deltaenviro.org.za/resources/envirofacts/water.html 1 [date of use 2008-06-05].

Africans do not have access to piped water and almost 8.6% people are without adequate sanitation, mostly in rural areas.[3]

The *National Water Act* 36 of 1998 was promulgated on 1 October 1998.[4] It was the result of a prolonged process of research and negotiations since 1995 to change the South African water dispensation of private water rights to one where the socio-economic demands of environmental management and access to water for all people were as far as possible met.[5] The water reforms were regarded as an essential process to address the inequality of water allocation in terms of the previous dispensation and to plan in a responsible manner for future use of water as a limited resource.[6] An important factor in this process was the growing demands to deliver clean water to all South Africans, which demands were based on constitutional rights and international law.[7]

## 2. The origin of private water rights

According to the classical Roman law, water was classified as *res extra commercium*, or non-negotiable things, which could not be privately owned. The Romans distinguished between perennial rivers and the temporary flow of rain-water, which were respectively classified as *res publicae* and *res communes omnium*.[8] Although a river could not be privately owned, the bank of the river could be privately owned by riparian owners.[9] However, the riparian owners could not restrain members of the public to obtain and use water from the river.

This distinction was maintained in Roman-Dutch law 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*.[10] 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.[11] These principles formed part of the reception of Roman-Dutch law in the Cape during the 17th and 18th centuries and were subsequently applied in

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[3] Statistics South Africa, *Annual report 2006/7,* http://statssa.gov.za/publications/AnnualReport2007/ [date of use 2008-06-09]. See also R. Hamman & T. O'Riordan, "Resource Management in South Africa," *SA Geographical Journal* 82/1 (2000): 23; C. Wessels, *Waterreg in die Nuwe Konstitusionele Bedeling,* (2001) (Potchefstroom: Potchefstroom University; LL.M dissertation): 2; V. Bronstein, "Drowning in the Hole of the Doughnut: Regulatory Overbreadth, Discretionary Licensing and the Rule of Law," *South African Law Journal* 119/3 (2002): 471; J. Glazewski *Environmental law in South Africa* (2005) (Durban: LexisNexis): 427-428.

[4] Republic of South Africa, *Government Gazette* 19269, *Proclamation* R95 of 16 September 1998. This Act is applied together with the *Water Services Act* 108 of 1997, which sets the framework for the supply of water and sanitary services by local governments.

[5] F. Soltau, "Environmental Justice, Water Rights and Property," in G, Bradfield *et al* (eds) *Acta Juridica 1999* (1999) (Cape Town:Juta): 229; Wessels, *Waterreg,* 45-47.

[6] Gildenhuys, "Water dispensation," 10.

[7] See 3.3 below.

[8] M. Kaser, *Roman Private Law,* (1968) (Durban: Butterworths, 2nd ed.): 101; D.H. van Zyl, *Geskiedenis en Beginsels van die Romeinse Privaatreg,* (1977) (Durban:Butterworths): 122-123; Glazewski, *Environmental Law,* 430-431. Water in a container could be privately owned.

[9] *Surveyor-General (Cape)* v. *Estate de Villers* 1923 (Appellate Division) 588 at 619.

[10] J. Voet, *Commentarius ad Pandectas,* (1955) (Durban: Butterworths): par. 8.3.6; W. Vos, *Principles of South African Water Law,* (1978) (Cape Town: Juta): 1-2; Wessels, *Waterreg,* 10.

[11] C.G. Hall, *The Origin and Development of Water Rights in South Africa* (1939) (Oxford: Oxford University Press): 8, 15; Soltau, "Environmental Justice," 236.

South African law.[12] Since 1873 the English principle of riparian ownership was introduced by the decision of Lord de Villiers in *Hough* v. *Van der Merwe,*[13] which decision was the basis of the allocation of water rights to riparian owners.[14] Landowners were furthermore entitled to spring water on their land. Consequently the state played a negligible role in the allocation of water rights and the development of water resources. Since the promulgation of the *Irrigation and Water Conservation Act* 8 of 1912 a distinction was made between public and private water.[15] This distinction was based on the principle that spring water on land, as well as water flowing over land,[16] could be used as private water by a landowner on condition that the water should also be available to lower-lying owners. Water in public streams[17] was regarded as public water, and the use of such water was regulated by the 1912 Act.[18]

The previous *Water Act* 54 of 1956 was regarded as a codification of the Roman-Dutch *dominus fluminus* principle[19] and the English system of riparian ownership. These principles were applied in England and European countries abounding in water, but it was not entirely suitable as a solution to South African problems concerning water rights and the scarcity of water.[20] The distinction between private and public water was also maintained in the *Water Act* 54 of 1956. The 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.[21] 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.[22] Although there was no finality over the ownership of water,[23] 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. **Public management of water**

One of the main objectives of the *National Water Act* 36 of 1998 (hereafter NWA) was to reform the water dispensation from private water rights based on riparian ownership and ownership of land to one based on government allocation of water by balancing demand for

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[12] Hall, *Water Rights,* 1-2; M. Uys, "Natuurbewaring se Wateraanspraak in Regshistoriese Perspektief," *Stellenbosch Law Review* 3 (1992): 385; Wessels, *Waterreg,* 10.
[13] 1874 (Cape High Court) *Buchanan Law Reports* 148.
[14] Soltau, "Environmental Justice", 236; Gildenhuys, "Water Dispensation," 10; *Butgereit* v. *Transvaal Canoe Union* 1988 1 SA 579 (Appellate Division).
[15] *Le Roux* v. *Kruger* 1986 1 SA 327 (Cape Provincial Division); Glazewski, *Environmental law,* 431.
[16] Spring water or rain water.
[17] A public stream is defined as "a natural stream of water which flows in a known and defined channel, if the water therein is capable of common use for irrigation on two or more pieces of land riparian thereto"; s. 1(xiv) of Act 54 of 1956.
[18] Wessels, *Waterreg,* 25-34; Bronstein, "Regulatory Overbreath", 472; Glazewski, *Environmental law,* 431.
[19] The state is the custodian of water on behalf of the population.
[20] C.G. Hall and A.P. Burger, *Water Rights in South Africa* (1957) (Oxford: Oxford University Press, 3rd ed.): 1-7; Wessels, *Waterreg,* 1.
[21] S. 6(1).
[22] S. 10.
[23] Wessels, *Waterreg,* 25-34; Bronstein "Regulatory Overbreath," 472. Water in a container could be privately owned.

and availability of water, the so-called licensing principle.[24] A consequence of this reform process was that existing water rights in terms of the *Water Act* 54 of 1956 were abolished.[25]

*3.1 Public trust concept*

Several new concepts regarding the use of water were introduced by the NWA. The distinction between public and private water was abolished. Section 3(3) stipulates that the capacity to regulate the use, flow, and control of all water is vested in the national government. Furthermore, the national government, acting through the Minister of Water Affairs and Forestry, acts as trustee of the nation's water resources on behalf of the whole population. The Minister has to ensure that all water is protected, used, developed, conserved, managed, and controlled in a sustainable and equitable manner.[26] This is an explicit application of the Anglo-American public trust doctrine. The Minister is also in terms of section 3(2) responsible for the reasonable allocation of water use entitlements in the public interest and the furthering of nature conservation.

The public trust concept, introduced through legislation to South African water law, displays the characteristics of the Anglo-American public trust doctrine.[27] The main question is where the legal title to water as public property lies. In *Shively* v. *Bowlby*[28] the common law perspective on the nature of navigable waters and the sea is explained as "… incapable of ordinary and private occupation, cultivation, and improvement; and their natural and primary uses are public in their nature ,… ".[29] The state's claim to property subject to the public trust doctrine is effectively public ownership.[30] However, in *Illinois Central Railroad Company* v. *Illinois*[31] the court emphasized that state ownership of property subject to the public trust was held by a title different in character from that whereby states hold property intended for sale, as it is a title held in trust for the people of the state.[32]

The doctrine attains a distinctly South African flavor when it is interpreted and applied against the background of the South African common law (Roman-Dutch) heritage. The *dominium* and use and enjoyment of water resources are separated, with limitations and responsibilities attached to the *dominium* and the use and enjoyment of water respectively determined by legislation. Although the state acquired the legal title of the nation's water resources, the title is held by the state as trustee in a purely fiduciary capacity. The people, as a generic entity, acquired the use and enjoyment of the water resources. The government's actions with the country's water resources are constrained to the management sphere created by the objectives of the NWA.[33] The government is obliged to take positive action and must ardently strive to ensure that the nation's water resources are to be protected, used, developed, managed, and controlled in ways to meet basic human needs of present and future generations. Furthermore, the government must promote equitable access to water; redress

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[24] Bronstein, "Regulatory Overbreath," 472-474.
[25] S. 163(3) stipulates that saving clauses in the 1998 Act validate anything done under any repealed law to the extent that it is not inconsistent with the 1998 Act or until it is repealed; *cf.* ss. 4 and 34, as well as 3.2 below.
[26] S. 3(1).
[27] For a comprehensive discussion of the public trust doctrine, see E. van der Schyff, *The Constitutionality of the Minerals and Petroleum Resources Development Act,* (2006) (Potchefstroom: Northwest University; LLD thesis): 106-133.
[28] 152 US 1 (1894); S.C. of the U.S.; 1894 U.S. LEXIS 2090.
[29] *Shively* case 11, 12.
[30] *Shively* case 56.
[31] 1946 US 387 (1892); S.C. of the U.S.; 1892 LEXIS 2208.
[32] *Illinois* case 452.
[33] Preamble and s. 2 of the NWA.

results of past racial discrimination; promote efficient, sustainable, and beneficial use of water in the public interest; and facilitate social and economic development.[34] This responsibility is irretrievably intertwined with the legal title to the country's water resources. It simultaneously limits the state's entitlement to deal with the trust property within these exact parameters. Any action of the state that does not adhere to these objectives will therefore be regarded void or voidable.[35]

It is clear that the government's title to the country's water resources is severely restricted. The trust property cannot be sold at random,[36] equitable access to water needs to be established, and the necessary measures must be taken to ensure the sustainable, efficient, and effective use of water.[37] In meeting these responsibilities, the state's regulative authority is increased through the public trust doctrine.[38] It can be stated that, while the doctrine limits the government's dealings with property subject to the doctrine, it simultaneously provides the mechanism for the state to give effect to constitutional obligations regarding water in pursuing the objectives and purpose of the NWA.[39] The judicial recognition of the people's entitlements to the country's water resources does not mean that an individual person has an unrestricted right of access and use. Any entitlement awarded to a person must be compatible with the collective objectives and public interest in the water resources. As several objectives have been stated in the NWA, the state must balance opposing interests to attain the statutorily set equilibrium.

The limitation or deprivation of entitlements of individual persons is a consequence of the vast regulatory authority that is inherent to the public trust doctrine. As it is deemed that all entitlements awarded to persons are inseparably clothed with the pre-existing public trust title, these entitlements are subjected to whatever state action may be deemed necessary to protect the public's interest in the trust resource. The reserved state prerogatives in the country's water resources preclude the assertion of vested rights to water contrary to public trust purposes.[40]

*3.2 Entitlements through licensing*

The right to use water based on ownership of land is substituted in the NWA by entitlements allocated to water users through a licensing procedure, which is based on the discretionary allocation in accordance with regulations promulgated by the Minister of Water Affairs and Forestry.[41]

Several personal water uses are distinguished. Section 4(1), read with schedule 1 to the NWA, stipulates that everyone is entitled to water for reasonable household purposes from any source whereto such a person has lawful access. Spring water on land, or water from a

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[34] S. 2 of the NWA.
[35] *Illinois* case 452.
[36] M. Blumm, "Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine," *Environmental Law* 19 (1989): 584 at 585.
[37] Glazewski, *Environmental Law,* 429-430.
[38] G.R. Scott, "The Expanding of the Public Trust Doctrine: A Warning to Environmentalists and Policy Makers, *Fordham Environmental LJ* 10 (1998): 4; J.D. Kearny and T.W. Merrill, "The Origins of the American Public Trust Doctrine: What Really Happened in *Illinois Central*" *University of Chicago LR* 71 (2004): 800.
[39] S. 27(1)(b), *Constitution of the Republic of South Africa,* 1996.
[40] Van der Schyff, *Constitutionality,* 138.
[41] This is regarded by Bronstein, "Regulatory Overbreath", 472 as "soft nationalisation", but it rather looks like the resurrection of the common law principle of *dominus fluminis* without the English principle of riparian ownership.

source on adjacent land, may be used by the owner or occupier[42] of the land for reasonable household purposes, gardening,[43] 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.[44] 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.[45]

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 all conditions and obligations in terms of the previous legislation, as well as any condition regarding the substitution of the use right by the new licensing procedure, or any other limitation in terms of the NWA. It can at any stage be expected from the water user to register the previous legitimate use right according to the new licensing procedure. Section 32 determines that an existing water right is enforceable only in instances where such a right was lawfully exercised for a period of two years before the commencement of the NWA.

Any owner or occupier of land may apply to the applicable water authority[46] to obtain a *general authorization* to use water for household purposes, gardening, or watering of cattle.[47] For the purposes of a general authorization regulations were published in terms of section 26 and conditions set in terms of section 29.

A *license* to use water can be obtained to ensure a fair and reasonable division of water use entitlements in the case of over-used sources or where people are sharing the same water source; to ensure the beneficial use of water in the public interest; to establish the efficient management of a water source; or to protect the quality of a water source.[48] The water authority may by notice in the *Government Gazette* require that water users apply for a license to use water for the following purposes:[49]

(i) to extract water from a water source;
(ii) to store water;
(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 public 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.

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[42] It is not a requirement that the occupier should be in lawful occupation of the land and includes unlawful occupiers.
[43] Gardening for commercial purposes is explicitly excluded.
[44] Schedule 1; s. 1(c ) and (d).
[45] Schedule 1; s. 1(e).
[46] S. 4(3) determines that catchment management agencies and water use associations are established in terms if chapters 7 and 8 op the NWA respectively.
[47] S. 39 and Schedule 1.
[48] Ss. 4(3) and 43. Ss. 41 and 42 stipulate the general application procedure and the obligation to supply reasons by the water authority.
[49] S. 21.

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 NWA will be reached by issuing such permit.[50]

A wide discretion in the allocation of water entitlements by general authorization, license or permit is allowed to the water authority.[51] This discretion must obviously be exercised according to the requirements of just administrative action in terms of section 33 of the *Constitution,* 1996. The following factors will be taken into consideration in the case of the issuing of a general authorization, a license or a permit:[52]
(i) existing water use;
(ii) to abolish previous racial or gender discrimination in the allocation of water entitlements;
(iii) the efficient and beneficial use of water in the public interest;
(iv) the socio-economic impact of the allocation or refusal of water entitlements;
(v) the strategic importance of a specific water source;
(vi) the probable consequences of the allocation of an water entitlement 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 entitlement; and
(x) the duration of the allocation.
The use of subterranean water may be allocated to a person other than the landowner with the consent of the landowner, or where a good reason for such allocation exists.[53]

### *3.3 Socio-economic effects of the* NWA

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

#### 3.3.1 Accessibility to water for the whole population.

The principle that everyone is entitled to sufficient water for domestic purposes is firmly entrenched in the NWA.[54] This objective brings the South African water dispensation in line with international standards. The *Convention on Economic, Social, and Cultural Rights* of 1966[55] clearly states that an adequate standard of living is one of the fundamental conditions for survival. Access to water is one of the essential guarantees for securing an adequate standard of living. Article 16(2) of the *African Charter on Human and Peoples' Rights* of 1979 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.[56]

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[50] S. 22(3).
[51] See Bronstein, "Regulatory Overbreath," 474-480.
[52] S. 27.
[53] S. 24.
[54] Ss. 2 and 4(1); Schedule 1.
[55] Article 11.
[56] *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehova* v. *Zaïre* Communications 25/89, 47/90 & 56/91, 100/93, 9th Annual Activity Report;
http://www.interights.org/Africa/ACPHR_Reports/09thActivityReport/9th%20Activity%20Report_eng.pdf
[date of use 9 June 2008].

Section 27(1)(b) of the South African *Constitution,* 1996 provides that everyone has the right to have access to sufficient food and water, while section 27(2) determines that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of these rights. "Basic water supply" is defined in section 2 of the *Compulsory National Standards and Measures to Conserve Water Regulations* of 2001[57] as 25 liters per person per day accessible within 200 meters. The current policy of the Department of Water Affairs and Forestry is that 6 000 liters of water per household per month should be available without charge. In several cases it was held that the disconnection of water services based on arrear payments for such services is an infringement of section 27(1)(b) of the *Constitution,*[58] while the obligation to install prepaid water meters, disregarding the monthly free allocation of 6 000 liters per household, was found to be unconstitutional discrimination.[59]

Although piped water for domestic purposes is still not available for every household or individual within 200 meters of his/her house or shelter, the NWA contains the basic guidelines to obtain these targets within the South African legislative framework. For the period 2006-2007 the Department of Provincial and Local Government stated that 18.7% households, mostly in rural areas, did not have piped water and 18.9% households were living more than 200 meters from a water source. 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.

3.3.2 Environmental management

Section 24 of the *Constitution,* 1996 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 NWA. In section 2 one of the objectives of the NWA 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 entitlements, 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.[60] Furthermore, water conservation is instituted in instances where excessive use of water resources takes place.[61]

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[57] Republic of South Africa; *Government Gazette* 22355; *General Notice* 7079 of 8 June 2001.
[58] *Residents of Bon Vista Mansions* v. *Southern Metropolitan Local Council* 2002 6 SA *BCLR* 625 (Witwatersrand Local Division); *Highveld Residents Concerned Party* v. *Highveldridge TLC* 2003 1 SA *BCLR* 72 (Transvaal Provincial Division); Glazewski, *Environmental law,* 429-430.
[59] *Mazibuko and Others* v. *City of Johannesburg* (unreported case nr 13865/2006; Johannesburg High Court).
[60] S. 21; Glazewski, *Environmental law,* 444-448.
[61] S. 43.

## 4. **Deprivation or expropriation?**

The constitutional property clause, section 25 of the *Constitution,* 1996 regulates deprivation and expropriation of property.[62] The question is whether the state, through the provisions of the NWA, expropriated established rights in property (takings), or whether the provisions of the NWA amount to a deprivation (police power). If these measures are classified as expropriation, the procedures of the *Expropriation Act* 63 of 1975 have to be followed and compensation has to be paid, even in instances where the water rights have not been exercised, but had potential value. In the case of deprivation government measures only boil down to regulation, without the requirement to compensate the holder of the right. The scope of constitutional protection of property by the property clause is to ensure that a just and equitable balance is struck between the interests of private property holders and the public interest in the control and regulation of property. [63] This view is supported by the constitutional court in *First National Bank* v. *South African Revenue Services*[64] where it was held "…[t]hat property should also serve the public good...".[65]

### *4.1 Deprivation and expropriation: scope and conten*t

In the *FNB* case the constitutional court confirmed that, in the context of section 25, the concept *deprivation* is used to indicate any infringement on property.[66] It is an ambiguous term that includes both deprivation as a regulatory measure and expropriation. Expropriation is, therefore, regarded as a subdivision of deprivation.[67]

The requirements for the constitutional validity of any infringement on property (deprivation or expropriation) are that the infringement must take place in terms of generally applicable legislation and it may not be arbitrary.[68] The test prescribed by the *FNB* case to determine whether a specific deprivation is arbitrary, is extremely wide.[69] In summary, a deprivation will be arbitrary if it is procedurally unfair, or the legislative provision does not provide adequate reasons for the deprivation concerned. Whether there are adequate reasons for the deprivation is determined on the basis of the following aspects:

- a weighing up of the nature and scope of the infringement and the desired objective, the so-called *nexus* requirement;
- a comparison of the relationship between the objective of the infringement and the individual's property that is affected; and
- a comparison between the nature of the property and the scope of the infringement.[70]

When the state carries out regulatory measures to promote the economic prosperity, safety and health of its subjects by merely placing limitations on the use of property, these will be

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[62] Water rights in terms of the previous Act and entitlements in terms of the NWA are regarded as property in terms of s. 25; see A.J. van der Walt, *Constitutional Property Law,* (2005) (Cape Town: Juta): 65-72.
[63] Van der Walt, *Constitutional Property,* 51-52.
[64] *First National Bank of SA Limited t/a Wesbank* v. *Commissioner for the South African Revenue Services and Another* 2002 7 SA *BCLR* 702 (Constitutional Court) (hereafter referred to as the *FNB* case).
[65] 724.
[66] 725 par. 57.
[67] 726 par. 59.
[68] S. 25(1).
[69] *FNB* case 726-730; 740.
[70]726 par. 59. If the requirements of s. 25(1) are not met, an investigation should first be done in terms of s. 36 in order to determine whether the limitation has been justified before the constitutional validity of the provision is questioned.

legitimate deprivations, on condition that the requirements stated in section 25(1) have been met.

### *4.2 Expropriation*

In the pre-constitutional era the essence of expropriation was that property rights were not merely taken away from an individual, but that those rights had to vest in the state or a competent state organ.[71] This vesting requirement was so rigidly applied that there could be no expropriation if the deprivation of rights was not accompanied by the vesting of such rights in the state (appropriation).[72] The question is whether this definition is also applicable in the post-constitutional era and whether it is tenable to give a pre-constitutional interpretation to a post-constitutional concept.[73]

#### *4.2.1 Post-constitutional interpretation of expropriation*

In order to be constitutional, expropriation has to comply with the requirements stated in sections 25(1) and 25(2) of the *Constitution,* 1996 and administrative justice has to be done.[74] Legislation authorizing expropriation must prescribe the correct administrative procedure or determine that the provisions of the *Expropriation Act* 63 of 1975 have to be applied. If specific conduct by the state in essence amounts to expropriation, but no provision is made for the correct administrative procedure, or no compensation is offered, such expropriation is unconstitutional.[75]

As far as post-constitutional expropriation is concerned, acquisition of the rights by the state or an organ of state for public purposes is still required.[76] From this it is clear that the courts still set the accompanying act of appropriation as a requirement for expropriation. This requirement was stated in *Colonial Development* v. *Outer West Local Council*,[77] *First National Bank of SA Ltd t/a Wesbank* v. *Commissioner, South African Revenue Services*[78] and *Lebowa Mineral Trust Beneficiaries Forum* v. *President of the Republic of South Africa.*[79]

Therefore, it is clear that the courts currently attach established pre-constitutional values to the content of expropriation.[80] The act of acquisition takes place without the agreement of the

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[71] *Tongaat Group Ltd* v. *Minister of Agriculture* 1977 2 SA 961 (Appellate Division) 972D.
[72] *Beckenstrater* v. *Sand River Irrigation Board* 1964 4 SA 510 (Transvaal Provincial Division) 515B-C; A. Gildenhuys and G. Grobler, "Expropriation" in W.A. Joubert (ed) *The Law of South Africa* (1994) vol 3: 31.
[73] A.J. van der Walt, "Moving towards Recognition of Constructive Expropriation? *Steinberg v South Peninsula Municipality* (SCA)," *Journal of Contemporary Roman-Dutch Law* 65/3 (2002): 469.
[74] P.J. Badenhorst, "Compensation for Purposes of the Property Clause in the New South African Constitution," *De Jure* 31/2 (1998) 253; P.J. Badenhorst, "Enkele Opmerkings na aanleiding van die Moderne Suid-Afrikaanse Onteieningsreg" *Obiter* 19/1 (1998): 31.
[75] *Modderklip Boerdery (Pty) Ltd* v. *Modder East Squatters* 2001 4 SA 385 (Witwatersrand Local Division).
[76] H*arksen* v. *Lane NO* 1997 11 SA *BCLR* 1489 (Constitutional Court). This point of view is also confirmed in *Steinberg* v. *South Peninsula Municipality* 2001 4 SA 1243 (Supreme Court of Appeal) 1246F-C. Badenhorst, "Compenation," 252 supports this view. See; however, the criticism of A.J. van der Walt & H. Botha, "Coming to Grips with the New Constitutional Order: Critical Comments on *Harksen v Lane NO,*" *SA Public Law* 13/1 (1998): 17–41.
[77] 2002 2 SA 589 (Natal Provincial Division) 611.
[78] *First National Bank of SA Ltd t/a Wesbank* v. *Commissioner, South African Revenue Services* 2001 3 SA 310 (Cape Provincial Division) 329.
[79] *Lebowa Mineral Trust Beneficiaries Forum* v. *President of the Republic of South Africa* 2002 1 *BCLR* 23 (Transvaal Provincial Division) 30 and 31.
[80] A.J. van der Walt "Compensation for Excessive or Unfair Regulation: A Comparative Overview of Constitutional Practice relating to Regulatory Takings," *SA Public Law* 14/2 (1999): 279: "The most obvious general difference is that regulation does not acquire or appropriate the property for the state, while

owner of the property involved.[81] However, the dispossessed person can challenge the amount of compensation offered.[82] From the wording of the relevant article it is apparent that only the state[83] may expropriate property, and the state may transfer the appropriated property to a third party.[84] This is clearly not the position in terms of the NWA – see 4.2.3 below.

*4.2.2 Constructive expropriation*

The question arises what the legal position is in instances where the state carries out regulatory measures that result in the loss or limitation of entitlements of owners, but does not appropriate (for itself) any rights in the property. As no rights have vested in the state, there is no expropriation involved and the entitled person cannot claim any compensation. As the entitled person may suffer damages in the process, the question arises whether he or she has any remedy available to claim compensation.

It seems that a subcategory of expropriation, namely constructive expropriation, is in the process of being developed in South African law. In *Steinberg* v. *South Peninsula Municipality*[85] it was held that the possibility exists for the development of a doctrine of constructive expropriation in South African law. It was held, though, that it is not certain that this development will contribute to legal certainty, as it may obscure the distinction between deprivation and expropriation.[86] However, the scope left for the development of this doctrine is to be welcomed.[87] This should include instances where the regulatory measure has not been exercised in terms of expropriation legislation and procedures, or no provision has been made for the payment of compensation, but the owner suffers a severe limitation to his or her entitlements.[88] Even without any rights vesting in the state, the entitled person may suffer incalculable damage. This will offer a remedy in cases like *Apex Mines v Administrator Transvaal,*[89] where rights were totally extinguished by regulation, but it was not regarded as expropriation because those rights did not vest in the state and no compensation was paid to the prejudiced persons.

*4.2.3 Does the NWA constitutes an act of expropriation*?

Firstly, it is necessary to determine whether the provisions of the NWA comply with the requirements of section 25(1) of the *Constitution*, 1996. It is obvious that the provisions of the NWA are generally applicable. Therefore, it must be determined whether the provisions of section 4(4), whereby existing water rights (as property) are replaced with entitlements, are

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expropriation does." See also M. Chaskalson *et al, Constitutional Law of South Africa,* (Cape Town: Juta; 2nd ed.) (2002) ch 31 14; M.D. Southwood, *The Compulsory Acquisition of Rights* (Cape Town: Juta) (2000): 1.

[81] Chaskalson *et al, Constitutional law,* ch 31 15.

[82] S. 14 *Expropriation Act* 63 of 1975; Southwood, *Compulsory Acquisition,* 69.

[83] "State" is used here in the widest sense and includes all government institutions or state organs; *Groengras Eiendomme (Pty) Ltd* v. *Elandsfontein Unlawful Occupants* 2002 1 SA 125 (Transvaal Provincial Division) 137.

[84] In the absence of any provision in the enabling legislation, the *dominium* passes to the state at the stage when the expropriation notice is given to the current owner of the property. Even where the property concerned is land, no formal deed of transfer is required in order to transfer ownership – R.J.M Jones & H.S. Nel, *Conveyancing in South Africa,* (1991) (Cape Town: Juta; 4th ed.): 92; *Mathiba* v. *Moschke* 1920 (Appellate Division) 354.

[85] 2001 4 SA 1243 (Supreme Court of Appeal) 1246C-F.

[86] For criticism of this argument, see Van der Walt, "Constructive Expropriation," 459-473.

[87] Van der Walt, "Constructive Expropriation," 459.

[88] In his minority finding in *Ndlovu* v. *Ngcobo: Bekker and another* v. *Jika* 2002 (4) All SA 384 (Supreme Court of Appeal) Olivier AJ confirms that any form of expropriation that is not accompanied by compensation is in conflict with both common law and the *Constitution.*

[89] 1988 3 SA 1 (Appellate Division).

arbitrary. Is there an adequate reason (*nexus*) for the infringement on the rights in order to justify these provisions constitutionally?

The main purpose of the NWA is to establish sustainable access to the use of water to the South African population.[90] One person's exclusive water rights are weighed against the nation's need for sustainable water resources. Recognition is given to the fact that water is a scarce and unequally distributed natural resource, which occurs in different places in various forms, and forms part of a unitary interdependent cycle.[91] Despite the fact that water has a definitive economic potential, it is apparent from the wording of section 3(1) of the NWA that the government merely fulfils its duty of care towards the citizens of the country through the provisions of the NWA. A clearly delineated *nexus* between the infringement and the objective of these measures is evident. The sacrifice required from individuals against the public purpose that is to be met,[92] must be placed within the context of sustainable development according to the principles embodied in the NWA and the *Constitution*. From this it is apparent that the provisions of section 4(4) to replace water rights in terms of the previous Act with water entitlements, or to limit existing entitlements in terms of the NWA, are not arbitrary.

There is no indication in the NWA of the vesting of any water rights in terms of the previous Act in the state. Section 4(4) states explicitly that existing water rights are *replaced*.[93] Therefore, pre-1998 water rights ceased to exist in the hands of any legal subject.[94] In order to ensure that South Africa's water legislation reflects the principles of the *Constitution*, the way in which water control is regulated had to be revised. The question may indeed be asked whether the measures taken under the NWA are, in the light of the provision of section 3(1), not merely a codification of the common law *dominus fluminis* principle. Taking into account the requirements set for expropriation, it cannot be argued that the provisions of section 4(4) of the NWA amount to an expropriation. However, the replacement of existing water rights by regulation may in some instances cause incalculable damages to the specific entitled person. This may also include instances where the relationship between the damages suffered by the individual and the public interest that is served is disproportionately large.[95] Regardless of the fact that no rights vest in the state, the entitled person may be seriously prejudiced by regulatory measures. Although no compensation is payable in the case of a deprivation, these instances may constitute constructive expropriation (inverse condemnation).[96]

If a license is refused or an existing water entitlement is decreased, a lawful water user who is exercising a water right in terms of the previous legislation may claim compensation in terms

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[90] Ss. 2, 3(1) NWA; P. Lazarus & I. Currie, "Water Law Reform: Assessing the Constitutionality of Restrictions on the Right to use Water," *The Human Rights and Constitutional Law Journal of Southern Africa* 1/2 (1996): 11.

[91] Preamble to the NWA.

[92] *FNB* case 739 par. 98.

[93] Some commentators opine that existing water rights have to be taken back by the state before the state would have the necessary capacity to replace the aforementioned rights. However, no grounds for such a point of view could be found in the NWA. Gildenhuys, "Nasionale Waterwet," 14 states: "In the conversion from an old system to a new, some of these existing rights and claims that existed under the old system unavoidably fall by the wayside." [Own translation.]

[94] Lazarus & Currie, "Water Law Reform," 12.

[95] It is apparent from the provisions and spirit of the NWA that the purpose is not to obtain political power, but the fair and just distribution of water. Where a specific individual is therefore unproportionally prejudiced to others who are affected by the same legislation, it may be regarded as incalculable harm.

[96] See par. 4.2.2.

of section 22(6) of the NWA for damages suffered. Although this is not an expropriation, the compensation is determined in accordance with the circumstances listed for an expropriation in terms of section 25(3) of the *Constitution,* 1996, on condition that compensation is not awarded in the case of a rectification of unreasonable use or an excessive previous allocation.[97] The circumstances of section 25(3) are used to determine compensation in the case of expropriation, but there is no clear indication in the NWA that the loss or decrease of a previous water right constitutes an act of expropriation and that the requirements of the *Expropriation Act* 63 of 1975 must be fulfilled. In terms of section 22(8) a claim for compensation must be lodged within 6 months after the resolution of the applicable water authority to the effect that a previous water right has been lost.[98] However, it is doubtful whether compensation may be claimed in terms 22(6) in instances where the water supply in terms of the license is adequate at the stage when it is issued, but circumstances change in such a way that at a later stage it is no longer adequate.

## 5. **Conclusion**

The question that was investigated is whether the state, through the provisions of the NWA, expropriated vested rights in property or whether the infringement only amounted to a deprivation. Section 25(1) authorizes an infringement on private property in certain defined instances.

A study of post-constitutional authority revealed that the concept *expropriation*, as in the pre-constitutional era, does not merely involve the taking away of rights. An accompanying act of appropriation is essential in order to establish expropriation. Expropriation is, furthermore, an administrative act which has to comply with the requirements set in the *Expropriation Act* 63 of 1975. It also became apparent that the doctrine of constructive expropriation is being developed to provide for those instances where the practical effect of a constitutionally valid deprivation causes incalculable harm to the entitled person.

In weighing up the main objectives of the NWA against the prejudice suffered by individuals through the loss of vested rights, the conclusion is drawn that the nation's need for sustainable water resources takes precedence to the exclusive water rights of individuals. A constitutionally tenable deprivation has therefore taken place. However, as the state had not appropriated any rights in this process, the conclusion cannot be drawn that this provision amounts to the expropriation of property. As situations may indeed arise where individuals may be excessively prejudiced by the loss or limitation of water rights, this may rather be an example of constructive expropriation (inverse condemnation). Therefore, section 22(6) of the NWA provides for the payment of compensation to prejudiced persons in specific instances.

The loss of property that occurs through the application of the NWA is an excellent example of individual interests that have to yield before public need. Nevertheless, a proportional balance is maintained by the possibility of the payment of compensation to prejudiced persons in instances that justify this.

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[97] S. 22(7).

[98] A. Gildenhuys, *Onteieningsreg,* (Durban: Butterworths, 2nd ed.) (2002): 1.