Water and the public trust doctrine – a South African perspective

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Abstract

The legal principles concerning rights to water have been changed considerably by the provisions of the *National Water Act* 36 of 1998. The *National Water Act* aims to redistribute water rights to previously disadvantaged people and communities by the introduction and application of a public trust doctrine to South African natural resources law. It is proposed that these legislative measures will ensure that water as a natural resource will be used to the benefit of the nation as a whole. However, the practical application of the public trust doctrine needs to be analysed, especially with the view of determining the actual benefits to poor and deprived people.

Keywords: Water, public trust doctrine, hierarchy of entitlements, poverty.

Disciplines: Law, social science.

Certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace. Sax J[1]

1 Introduction

Poverty in South Africa is considered by many to be one of the harsh legacies of apartheid. The country's pre-1998 water law dispensation contributed to this sorry state by linking access to water to land

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1 Sax J "The Public Trust Doctrine in Natural Resource Law: Effective in Judicial Intervention" 1970 *Michigan Law Review* 471-566 on 484.

access. The victory of democracy and promulgation of the Constitution of the Republic of South Africa 1996 emphasised the need for land reform and equitable access to all South Africa's natural resources and demanded a revision of the national water use policy. The amendment of the South African water law dispensation was inevitable.

With the promulgation of the *National Water Act* 36 of 1998,[2] a complex and dynamic framework for governing the country's scarce water resources drew its first frail breath.[3] The Roman Dutch[4] and English[5] common-law base of the South African water law dispensation, linking water-use rights inextricably to land access, has been wiped out.[6] In contrast to the pervious regime, the NWA is based on the principle that water as a natural resource belongs to all people.[7] The National Government is appointed as public trustee of the country's natural water resources for the benefit of all people.[8] Against the background of apartheid-induced poverty, the primary question to be answered in this article is whether the statutory application of public trusteeship in South African Water law can contribute to poverty alleviation?

Due to the fact that several doctoral theses can be written on both the concept of public trusteeship and poverty alleviation, it is the aim of this article to give a brief exposition of public trusteeship as novel concept introduced to South African water law and speculate tentatively on the effectiveness its application in the race towards poverty eradication.

2 Public Trusteeship

Public trusteeship refers to the State's (National Government's) duty to act as custodian or public trustee of certain interests, in this case – water, to the benefit of the public as a whole. Research indicated

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2 The *National Water Act* 36 of 1998 hereafter referred to as NWA or "the Act."

3 Thompson H *Water Law – a practical approach to resource management and the provision of services* (Juta Cape Town 2006) hereafter referred to as Thompson Water Law, 1.

4 Due to the application of the Roman law doctrine *cuius est solum eius est usque ad coelum et ad inferos* which implied that a land owner was also the owner of everything beneath and above the surface of his or her land, groundwater – that was not a source of flowing or running water – were regarded to be privately owned by the land owner - Thompson *Water Law* n 3 above 19. On 27 he indicates that *Voet* held the opinion that the principle was also incorporated in the Roman-Dutch law.

5 After the British occupation of the Cape of Good Hope in 1806, certain English law principles were introduced and applied in the law of the Cape. Hence the riparian principle was introduced.- Thomson *Water Law* n 3 above 36. See also Thompson *Water Law* n 3 above 47 - 50.

6 Van der Walt AJ *Constitutional Property Law* (Juta Cape Town 2005) 373.

7 Preamble of NWA.

8 S 3(1) NWA.

that this concept has respectable philosophical credentials. John Locke[9] asserted in his *Second Treatise on Civil Government* (1685) that governments merely exercise a "fiduciary trust" on behalf of their people. Roscoe Pound[10] suggested that the role of states in the management of common natural resources must be limited to "a sort of guardianship for social purposes" and Karl Marx[11] voiced the opinion that "the private property of particular individuals in the earth will appear just as absurd as private property of one man in other men. Even an entire society, a nation, or all simultaneously existing societies taken together, are not owners of the earth. They are simply its possessors, its beneficiaries, and have to bequeath it in an improved state to succeeding generations…".

It is imperative to gain insight in the concept of public trusteeship before predictions can be made of its implementation as poverty eradicating tool. It will be argued in this article that public trusteeship entails more than merely recognising the government's role in managing, protecting and determining the proper use of the country's scarce water resources.[12] We are of the opinion that although this concept entered the South African legal realm without much fanfare, it changed the foundation of the water law dispensation in totality. Water as natural resource was removed from the sphere of private property[13] and an "all-encompassing uniform system of regulated use rights with regard to public water"[14] has been introduced.

The paper will thus be structured to address the relevant attributes of public trusteeship as it manifests through the provisions of the NWA and tentatively indicate the extent to which its application can benefit the promotion of poverty alleviation.

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[9] Found on http://www.constitution.org/jl/2ndtreat.htm[2006/11/15] Chapter 11 s139. Also see Dunn J "The concept of Trust in the Politics of John Locke" in Rorty R (ed) *Philosophy in History* (Cambridge University Press Cambridge 1984), 279-301.

[10] Pound R 1954 *An Introduction to the Philosophy of Law* (Revised edition Yale University Press New Haven 1992) 111.

[11] Marx K *Capital* vol. 3 (Vintage Publishers New York 1981), 911. This passage is frequently quoted. See *inter alia* Foster JB "Marx's 'Theory of Metabolic Rift: classical Foundations for Environmental Sociology" 2006 105:2 *AJS* 366-405 on 385 – http://pubs.socialistreviewindex.org.uk [2006/11/15].

[12] Thompson *Water Law* n 3 above 279.

[13] Van der Walt *Constitutional Property Law* n 6 above 376 – "the notion of private ownership of water is abolished". See the text accompanying n 48 *infra.*

[14] Van der Walt *Constitutional Property Law* n 6 above 376. Although persons (juristic persons or natural persons) can obtain entitlements to use water, water as a resource has to be regarded as public property. See Principle 3 of the "Fundamental Principles and Objectives for the New Water Law in South Africa" approved by the Cabinet in November 2006 http://www.africanwater.org/Principles.htm. See also *Sechaba v Kotze and others* [2007] All SA 811 (NC) par [13] on 818 for an analogues application of the concept to the mineral law dispensation.

2.1. Attributes of the public trusteeship as it manifests in the NWA

The authors are of the opinion that the public trust doctrine, a foreign legal doctrine, has been introduced through the NWA to South African water law.[15] Although this doctrine shares characteristics with certain of the South African Roman Dutch-common law principles as its relates to the categories of things[16] as well as some Indigenous and Customary Law principles, we are of the opinion that its introduction should not be regarded as a resurrection of these principles. The emergence of the doctrine is not the result of different principles of our Roman, Roman-Dutch, Indigenous and Customary heritage being stitched together to create a new South-African quilt – it is the legislative introduction of a foreign legal doctrine that displays similarities with, but goes beyond customary and common law principles.

The characteristics displayed by the public trust[17] as created in the NWA are similar to the characteristics of the existing Anglo-American public trust doctrine.[18] Public trusteeship, *albeit* statutorily introduced, will attain a distinctly South African flavour when it is interpreted and applied against the background of our rich customary and common law heritage. Nevertheless, in extracting the essence of the doctrine it is necessary to turn to the foreign legal systems where it is applied as part of the common law of those jurisdictions. Our focus fell on the application of the doctrine in the United States of America[19] and we limit the discussion to those attributes of the doctrine that is relevant to the research question stated in the article.

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[15] S 3 NWA; Thompson *Water Law* n 3 above 160;

[16] Property not belonging to any individual but to the people at large was either classified as *res publicae* or *res omnium communes*- Inst 2.1.pr *The Institutes of Justinian* with English introduction, translation and notes by Sandars TC 14th Impression (Longmans Green and Co London 1917).

[17] See Principle 12 of the "Fundamental Principles and Objectives for the New Water Law in South Africa" approved by the Cabinet in November 2006 http://www.africanwater.org/Principles.htm.

[18] Van der Schyff E *The Constitutionality of the Mineral and Petroleum Resources Development Act, 28 of 2002* LLD-Thesis North-West University 2006 at 98.

[19] The American legal system was chosen due to the fact that Joseph Sax, a renowned American scholar is widely acknowledged as the father of the modern public trust doctrine – Olson J "The Public Trust Doctrine: Procedural and Substantive Limitations on the Governmental Reallocation of Natural Resources in Michigan" 1975 2 *Detroit College of Law Review* 161-209 on 162; Huffman JL "Trusting the Public Interest to Judges: A Comment on the Public Trust Writings of Professors Sax, Wilkinson, Dunning and Johnson" 1986 63 *Denver University Law Review* 565-584 on 566; Dunning HC "The Public Trust: A Fundamental Doctrine of American Property Law" 1989 19 *Environmental* Law 515-526 on 524; Brady TP "But most of it belongs to those yet to be born: The Public Trust Doctrine, NEPA and the Stewardship Ethic" 1990 17 *Boston College Environmental Affairs Law Review* 621-64 on 622; Kearney JD and Merrill TW "The Origins of the American Public Trust Doctrine: What Really Happened in *Illinois* Central" 2004 71 *University of Chicago Law* Review 799-931 on 806.

2.2 Legal title of the public trust corpus

When questions are asked that relate to the ownership of property falling under the public trust doctrine, one must immediately be aware of the limitations of language. The use of the term "ownership" is therefore discouraged when dealing with property falling under the public trust doctrine. "Ownership" is a term intrinsically linked to the South African private property concept.[20] The question should rather be where does the legal title of property falling under the public trust vest?[21] Focused on the research question of this article, the question is actually – where does the legal title to water as public property lie?

This being said however, it is trite that due to the private property framework that dominates the South African property law, the notion has developed that virtually everything has an owner. The South African legal system further provides that only *legal personae* (that is natural – or juristic persons) can acquire and hold property.[22] The wording of the preamble to the NWA therefore creates a dilemma, for how can something "belong to all people" if the entity named "people" does not have legal personality.[23]

One answer might be that water flowing in the rivers of South Africa has always been regarded as *res publicae*[24] and that the NWA merely codified this Roman Dutch based common law principle. One has to keep in mind however that the NWA deals with water as a natural resource, irrespective of whether the water is found in a river or a spring located on private land. The answer is therefore, not to be found solely in our common law heritage. The answer is to be found

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[20] Van der Walt AJ *The Constitutional Property Clause* (Juta Kenwyn 1997) 32.

[21] "Ownership" is a real right in property. The concept of ownership in a society is usually reflected in the political and juridical systems of that society. In short it can be stated that "ownership has to do with both the relationship between a legal subject and the thing and with the relationship between legal subjects regarding the thing."- Van der Walt and Pienaar *Introduction* n 22 below on 41. "Legal title" is to be differentiated from "ownership" because the content of ownership –depicted in the entitlements of the owner- as concept functioning in property law, differs from the rights and responsibilities of the State who acts as custodian of the public trust. As stated in *Rex v Lapierre* 1905 ORC 61- "The expression 'private property' ... is used in contradistinction to property to which the public have a common right of user..."

[22] Van der Walt AJ and Pienaar GJ *Introduction to the Law of Property* 5th ed (Juta Lansdowne 2006) 7.

[23] Due to the scope of this article it is not possible to delve in all the possibilities that might provide answers to this question. This article focuses on the possible application of the "public trust doctrine". For a cursory comparison between the 'public trust doctrine' and 'Trust law' see Van der Schyff n 18 above 115, 116. See also the text accompanying n 33 *infra*.

[24] *Van Heerden v Wiese* 1 BUCH AC 5 1880; *Butgereit v Transvaal Canoe Union* 1988 1 SA 759 (A); Pienaar GJ and Van der Schyff E "Watergebruiksregte ingevolge die *Nasionale Waterwet* 36 van 1998" 2003 24:1 *Obiter* 132-156.

in case law where the public trust doctrine, as part of the American jurisprudence, is discussed. In *Shively v Bowlby*[25] Justice Gray explained the common law perspective on the nature of the sovereign's claim when dealing with navigable waters and the sea (the only things traditionally falling under the public trust doctrine)*:*

Such waters, and the land which they cover, either at all times, or at least when the tide is in, are **incapable** of **ordinary and private occupation**, cultivation, and improvement; and their natural and primary uses are public in their nature,[26] ...state control and ownership therein being supreme, subject only to the paramount right of navigation and commerce. [27]

In *Illinois Central Railroad Company v Illinois*[28] the court emphasised that state ownership of lands subject to the public trust were held by a title different in character from that which states hold in lands intended for sale:

It is a title held in trust for the people of the state,... [29]

We are of the opinion that what is effectively achieved through the application of the public trust doctrine in South African water law, is that the *dominium* in water resources and the use and enjoyment of these water resources are separated. The *dominium* in the country's water resources are acquired by the State and therefore the legal title to water as public property vest in the State. This is a natural consequence of the application of the public trust doctrine and compatible with the Roman and Roman Dutch principle of *res publicae*.[30] However, through the public trust doctrine, the concept of water being regarded as *res publicae* has been developed and refined. For although the State acquired the legal title of the nation's water resources, the title is to be held as trustee, in a purely fiduciary capacity.[31] The "people" as a generic entity, acquired the use and

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[25] *Shively v Bowlby* 152 US 1 (1894).

[26] *Shively v Bowlby* n 25 above 11, 12.

[27] *Shively v Bowlby* n 25 above 56.

[28] *Illinois Central Railroad Company v Illinois* 146 US 387 (1892).

[29] *Illinois Central Railroad Company* n 28 above 452.

[30] According to Kaser M *Das Römische Privatrecht* vol 1 3rd ed (CH Beck'sche Verlagsbuchhandlung: München 1971) *res publicae* in its technical sense indicated state property or state owned property. The notion is also contained in South African law relating to the sea-shore, another instance of *res publicae* in our legal system. In *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 on 624 Kotze JA stated – " while the **ownership** of the seashore is in the Crown, the public has the free right of its lawful use" (*my emphasis).*

[31] In Principle 12 "Fundamental Principles" n 17 above it is stated – "The National Government is the custodian of the nation's water resources". Public trusteeship pre-supposes a fiduciary relationship – see text accompanying n 33 *infra.*

[32] Although the people as a generic entity acquired the use and enjoyment of the nation's water resources, this use and enjoyment is subject to the provisions of the NWA. The use and enjoyment are regulated to ensure *inter alia* "the sustainable use of water for the benefit of all users".

enjoyment of the water resources.[32]

The boundaries and responsibility attached to the *dominium* and the extent of the use and enjoyment are legislatively determined. In the following paragraphs the focus will fall on the State's dominium and the "people's" rights as it manifests in the NWA.

2.3 Inherent limitations on the dominium *of the State in property subject to the public trust doctrine*

The legal nature of the public trust doctrine is not to be deduced from the phrase 'public trust doctrine'. The word 'trust' refers to the fiduciary responsibility of the sovereign and is not an indication that the trust analogy was adopted to satisfy the need to identify the owner of the legal title to the resources in which the people have a common right.[33]

Through the statutorily created public trust, government's activities with the country's water resources are constrained to the sphere created by the objectives and purpose of the NWA.[34] In addition an obligation is created through which the government is positively compelled to see that the said objectives are pursued. The provisions of the NWA should thus be interpreted "with due regard to the constitutional rights, norms and values the Legislature sought to encapsulate, protect and advance in the act. The more prominent rights, norms and values appear to be the custodial role of the State …"[35]

The government is obliged to take positive action and must ardently strive to ensure that the nation's water resources is to be protected, used, developed, managed and controlled in ways to meet basic human needs of present and future generations; promote equitable access to water; redress results of past racial discrimination; promote efficient, sustainable and beneficial use of water in the public interest and facilitate social and economic development.[36] 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 to the exact parameters as set in the NWA. Any act of the State that does not adhere to these objectives will

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[33] Van der Schyff n 18 above 114 – 116.

[34] Preamble and s 2 of the NWA. One should always keep in mind that the NWA was promulgated with the aim to fulfil the constitutional obligation created through the provision of section 27 of the Constitution of the Republic of South Africa, 1996 where it is determined that "Everyone has the right to have access to … sufficient food and water.."

[35] *Sechaba v Kotze and others* [2007] All SA 811 (NC) 818 – the principle as voiced with regards to the mineral law dispensation applies *mutatis mutandis* to the water law regime.

[36] S 2 NWA.

therefore be regarded *ultra vires*.[37]

If the government is found to be recalcitrant or noncompliant, the public's right of user as created by the doctrine creates judicially enforceable rights held in common by all the people of the country. *Locus standi* is thus awarded to any member of the public who can prove that the government is not complying with the objectives held in common by all the members of the public – "the people" - thus awarding a legal remedy to ensure government compliance. This attribute of the public trust doctrine is firmly entrenched in South African jurisprudence through section 38 of the Constitution where *locus standi* is awarded to certain categories of people who allege that a right in the Bill of Rights has been infringed or threatened.[38]

It is clear that the government's title to the country's water resources is severely restricted. The trust property cannot be alienated,[39] 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.[40] At the same time special attention is to be given to internationally shared water courses.[41] Although these objectives set the parameters and limits for the government's dealing with the country's water resources, it will be indicated below that in pursuing this responsibility, the state's regulative authority is increased through the public trust doctrine to the extend that the opinion has been voiced that the doctrine destroys the basic fabric of property law.[42] 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[43] in pursuing the objectives and purpose of the NWA.

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[37] *Illinois* –case n 28 above; *National Audubon Society v Superior Court of Alpine County* 33 Cal 3 d 419, 658 P 2d 709, 189 Cal Rptr 346, modified, 33 Cal 3d 726a, cert denied, 104 S Ct 413 (1983).

[38] S 38 states: "The persons who may approach a court are – anyone acting in their own interest, anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons, anyone acting in the public interest and an association acting in the interest of its members."

[39] Blumm M "Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine" 1989 19 *Environmental Law* 537-604 on 584, 585.

[40] Thompson *Water Law* n 3 above 161.

[41] NWA Chapter 10.

[42] Scott GR "The Expanding of the Public Trust Doctrine: A Warning to Environmentalists and Policy Makers" 1998 10 *Fordham Environmental Law Journal* 1-70 on 4; Kearny and Merrill n 19 above 800. See par. 2.5 below.

[43] Constitution of The Republic of South Africa, 1996, s 27 (1)(b).

2.4 The public's right of user

Being functional in the United States of America as a common law doctrine, the range of public purposes protected by the public trust doctrine is dictated by the "need for continued protection of a public benefit" and "changing public needs".[44] It should however be considered that the South African public trust doctrine is not a common law legacy but statutorily introduced. As such the South African public trust doctrine will be less flexible than its American counterpart. The people's public rights in the trust property – the country's water resources- are determined according to, as well as restricted by, the provisions contained in the NWA itself. Due to the fact that courts cannot usurp the functions of the legislature,[45] courts will not be able to determine the scope of the public interest to fall outside the parameters set by the NWA - These parameters can only be narrowed or widened by further legislation.[46]

It is also imperative to state that the judicial recognition of the people's right in and to the country's water resources does not mean that any individual person has an unrestricted right of access and use.[47] Any entitlement awarded to any *legal persona* 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.

It should also be noted that it is a question whether an entitlement to use water amounts to property in the sense of private property. The NWA defines "entitlement" as "a right to use water in terms of any provision of this Act or in terms of an instrument issued under this Act". However, Van der Walt[48] indicates that although it can be expected that certain commercial interests as licences, [49] will be

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[44] Olson n 19 above 182; Dunphy PO "Comments: The Public Trust Doctrine" 1976 59:4 *Marquette Law Review* 787-808 on 794; Stevens JS "The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right" 1980 *UC Davis LR* 195-232 on 196; Hannig TJ "The Public Trust Doctrine Expansion and Integration: A proposed Balancing Test" 1983 23 *Santa Clara Law Review* 211-236; Manzanetti AB "The Fifth Amendment as a Limitation on the Public Trust Doctrine in Water Law" 1984 15 *Pacific Law Journal* 1291-1319 on 1309.

[45] *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty)Ltd and others* (OFS) 3215/06 decided 13 December 2007 –unreported.

[46] If it is however an issue of interpretation, the courts will have to consider South African, Roman Dutch and Roman law and also law of other jurisdictions.

[47] S 4 of the NWA determines to a great extent the scope of access by prescribing the entitlements to water use.

[48] Van der Walt *Constitutional Property* Law n 6 above 87, 100, 119.

[49] "The tendency is to regard licences, permits and quotas as constitutional property only if they have commercial value and once they have been vested and acquired according to the relevant (statutory or regulatory) requirements." – Van der Walt *Constitutional Property Law* n 6 above100.

regarded as constitutional property,[50] "licences are normally regarded as state grants and awards and therefore subject to state powers of cancellation, amendment and regulation, and are therefore not regarded as property."

2.5 Infringement of entitlements to use water

With the introduction of the public trust doctrine the concept of rights clothed or tainted- with the public interest has been introduced. While this doctrine may be advantageous to the people of the country as a collective unit, individuals might experience a less favourable approach whenever the entitlements awarded to them are curtailed or cancelled if drastic action is deemed necessary to protect the existence of the corpus of the trust or to adhere to the public's right of user as expressed in the NWA. The deprivation of exclusive water use-rights held by *legal personae* under the previous water regime is a consequence of the introduction of the vast regulatory authority codified in the NWA.[51] Section 22 (6)-(10) provides that any person who has applied for a licence in respect of an existing lawful water use, and whose application has been refused or who has been granted a licence for a lesser use than the existing water use, may claim compensation for any financial loss suffered. The only prerequisite is that the refusing of the licence or curtailment of the existing water use must result in severe prejudice to the economic viability of the undertaking in respect of which the water was beneficially used. The question whether the refusal of the licence or curtailment of the water use in these circumstances amounts to an expropriation has already been asked.[52] The conclusion has been reached that in the transition from one water law regime to another the deprivation of exclusive use rights obtained under the *Water Act* 54 of 1956, could in certain circumstances amount to constructive

[50] "Property" represents a laden concept. For the purpose of this paper it suffices to state that a distinction is made between so-called "private property" and "property" referred to in section 25 of the Constitution of the Republic of South Africa, 1996. In the latter instance the scope of the concept is much wider than when it relates to a discussion of private property. For a detailed discussion see Roux T "Property" in Cheadle MH, Davis DM and Haysom NRL (eds) *South African Constitutional Law: The Bill of* Rights (Butterworths: Durban 2002) 429-472; Roux T "Property" in Woolson S and Roux T (eds) *Constitutional Law of South Africa* 2nd ed (Juta Kenwyn 2003) 46-1 to 46-37.

[51] S 3, 4 NWA.

[52] See in this regard Van der Schyff E *Die Nasionalisering van Waterregte in Suid-Afrika: Onteiening of Ontneming?* LLM-dissertation Potchefstroom University for CHE 2003; Pienaar GJ and Van der Schyff E "The Reform of Water Rights in South Africa" *LEAD* 3/2 http://www.lead-journal.org/2007-2.htm.

expropriation.[53] The deprivation took place when the NWA was promulgated as section 4(4) determines that "any entitlement granted to a person by or under this Act **replaces any right to use water** which that person might otherwise have been able to enjoy or enforce under any other law" and section 4(2) created the entitlement that a person may continue with an existing lawful water use in accordance with section 34. The previously existing waterrights were thus deprived in 1998. Under South African prescription law any possible claims to compensation that might have existed, other that the claims provided for by section 22(6)-(10) has prescribed.[54]

A different scenario exists in relation to entitlements, authorisations and licences to use water granted in terms of the NWA, excluding the category of entitlements referred to in the previous paragraph. As it is deemed that all entitlements awarded to *legal personae* since the commencement of the NWA are subject to the pre-existing public trust title, it is argued here that these entitlements can be withdrawn if its withdrawal would benefit the objectives of the trust and protect the trust property. The NWA expressly provides for the withdrawal of, or alteration to, entitlements to use water in *inter alia* sections 28, 31 and 54. Section 28 determines that a licence may not be granted for a period longer that 40 years[55] and requires that all licences must be reviewed at intervals of not more than 5 years.[56] During this review under section 49, the responsible authority may amend any condition of the licence other than the period thereof. The curtailment of the entitlement will, in our opinion, not be regarded as an expropriation due to the fact that entitlements to water that are awarded, are awarded under the veil of the public trust and inherently proned to strive to achieve the collective objectives of the public trust.[57] Any

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[53] Van der Schyff *Nasionalisering* n 52 above at 27. "Constructive expropriation" is also known as indirect or effective expropriation. Van der Walt *Constitutional Property Law* n 6 above on 209 describes the concept of constructive expropriation. He states "The idea of constructive expropriation is usually associated with a claim for compensation for excessive regulation... One problem situation is the case where the imposition of a state regulation actually or effectively destroys a private property interest without the state acquiring the property.." The question whether constructive expropriation is applicable or useful in South African law has not yet been decided authoritatively.

[54] Both the *Prescription Act* 68 of 1969 and the *Institution of Legal Proceedings against certain Organs of State Act* 40 of 2002 apply.

[55] S 28(1)(e) NWA.

[56] S 28(1)(f) NWA.

[57] While the ordinary meaning of expropriation is to 'deprive of property", expropriation in the South African legal context entails more than the mere taking away or divesting of property. An individual who is deprived of property or a right in property might feel that he is the victim of expropriation while in the legal sense additional requirements are set before a divesting or depriving act will be regarded as expropriation - Van der Walt *Constitutional Property Law* n 6 above 132. Expropriation equals the sum of taking away (deprivation) plus acquisition – Van der Schyff E "Constructive appropriation – the key to constructive expropriation? Guidelines from Canada" 2007 40:2 *The Comparative and International Law Journal of Southern Africa* 306-321 on 310.

entitlement acquired in the trust resource is acquired subject to whatever state action may be deemed necessary to protect the public's interest in the trust resource. If it would be in the public's interest to amend the conditions of the licence, the responsible authority is compelled to do so by the objects of the NWA and due to the fact that the State is regarded to be the public trustee on behalf of all people. The fact that the NWA provides for the payment of compensation in section 49(4) "if an amendment of a licence condition on review severely prejudices the economic viability of any undertaking in respect of which the licence was issued" should be regarded a measure incorporated by the legislature to "soften the blow" of strict regulatory actions which may harm specific water users. It should not be regarded as compensation for expropriation in the strict legal sense of the word. The reserved sovereign prerogatives in the country's water resources preclude the assertion of vested rights to water contrary to public trust purposes.[58] In addition to the procedure provided for in sections 28 and 49 of the NWA, section 31 expressly states that the issue of a licence is not a guarantee of supply of water. The NWA does not even provide for compensation payable in circumstances where no water is available. Section 54 also provides that the responsible authority may by notice to any person entitled to use water under the NWA suspend or withdraw the entitlement in specific circumstances brought about by the conduct or omission of the licencee.[59]

3 Poverty alleviation promoted through the provisions of the *National Water Act*

It may boldly be stated that by stating unambiguously that

(b) promoting equitable access to water; [and]

(c) redressing the results of past racial and gender discrimination;

are two of the factors to be considered in the use, protection, conservation and management of the country's water resources, they are also to be considered two of the factors through which the public interest is defined. The people's use and enjoyment of the nation's water resources are thus inherently focused on achieving, amongst other, these objectives even if it brings about the total extinguishing

[58] Van der Schyff n 18 above 138.

[59] The reader is also referred to s 64 where express provision is made to expropriate any property for any purpose contemplated in the NWA, if that purpose is a public purpose or is in the public interest. Thompson *Water Law* n 3 above 282 opines that entitlements to water may also be expropriated. Since this section provides for expropriation in the strict legal sense compensation will be determined according to the constitutionally prescribed determinants.

of previously granted entitlements or existing lawful uses.[60] This idea is strengthened if it is taken into consideration that a hierarchy of entitlements to use water emerges from the provisions of the NWA.

3.1 Hierarchy of entitlements to use water

From the provisions of the NWA it is clear that a hierarchy of entitlements to use water is recognised. In section 4(1) it is provided for that water may be used without a licence for reasonable domestic use, domestic gardening, animal watering, fire fighting and recreational use. Unless a notice has been issued in terms of section 43 of the NWA through which the machinery for compulsory licensing is set in motion, existing lawful water uses can continue unlicenced. All other water uses have to be licenced. This section provides explicitly for poverty alleviation as the need to achieve equity in water allocations and the promotion of the beneficial use of water are two of the factors that may be relied on to call for the compulsory licensing of water use of a specific water resource.

The NWA strives to better normal living conditions by allowing for the unlicenced use of water for reasonable domestic, gardening and animal watering purposes. Furthermore, compulsory licensing of water uses in respect of a specific resource can be called for if equity requires it. This is another manifestation of the government's commitment to address results of racial discrimination. The objectives of the NWA should constantly be measured and taken into consideration when licence applications are considered. These objectives are reiterated explicitly in section 27 of the NWA. The factors that should be taken into account that may impact on poverty alleviation are *inter alia:*

(b)the need to redress the results of past racial and gender discrimination;

(c)efficient and beneficial use of water in the public interest;

(d)the socio-economic impact—

(i) of the water use or uses if authorised; or

(ii) of the failure to authorise the water use or uses.

The application of section 27 provides for more than the improvement of living conditions. Here poverty alleviation in its raw form can take shape by granting much needed access to water to upcoming farmers or industrialists. It must be stressed however, that all the factors mentioned in section 27 should be balanced to ensure that all water use entitlements allocated foster the aims of the public trust by

[60] DWAF strategy -http://www.dwaf.gov.za/WAR/documents/WARStrategyNov06.pdf. [12/11/2008].

promoting the public interest in the people's water.

Section 61 provides for rendering financial assistance to any person for the purposes of the NWA taking into account all relevant considerations including:

(a) the need for equity;

(b) the need for transparency;

(c) the need for redressing the results of past racial and gender discrimination;

(d) the purpose of the financial assistance;

(e) the financial position of the recipient: and

(f) the need for water resource protection.

In the final instance it is imperative to take cognisance of the fact that section 49 of the NWA provides for the amendment of licences to use water if "it is necessary or desirable to accommodate demands brought about by changes in socioeconomic circumstances, and it is in the public interest to meet those demands." Through the application of this provisions water use allocations can be altered to fulfill the needs of the poor if circumstances require it.

4 Conclusion

The question that inspired this paper is - to what extent can the statutory application of the public trust doctrine contribute to poverty alleviation?

It was argued in the first instance that through the application of the public trust doctrine water as natural resource was completely removed from the sphere of private property by awarding the severely limited and burdened *dominium* of the water resources to the State but the right of use and enjoyment to the people as a collective entity. This right of use and enjoyment awarded to the people as collective entity does not mean that individual *personae* have an unrestricted right to access and use. The State is encumbered with the responsibility to regulate access to and the use of South Africa's water resources in the interest of the public at large. Although the State was awarded the legal title in water this title is simultaneously being restricted to the scope set down in the NWA and burdened with the immense responsibility to strive towards achieving the purpose of the NWA. Entitlements to use water awarded to *legal personae* may in certain circumstances be regarded as constitutional property.

Poverty alleviation will be a natural consequence of the application of the provisions of the NWA as the "need to redress the results of past racial and gender discrimination" is explicitly stated as one of the factors that determines the extent of the public interest in the nation's water recourses. It also forms part of the State's responsibility when dealing with the water resources. The NWA promotes the improvement of the living conditions of the poor by prescribing that

water use for reasonable domestic use, gardening and animal watering should be allowed without a licence. It also provides for the alleviation of poverty by providing access to water to e.g. upcoming farmers. The public interest cuts so deep that the NWA allows for the curtailment of existing lawful water uses and the revision of licences if it would promote the purposes of the Act.

The goal has been set and in a certain sense the concept of public trusteeship as it is embodied in the NWA describes a utopia- a vision to be realised through the implementation of the Act by the different branches of State. Unfortunately we are left with an unfailing truth- in this broken reality we call 'Now', legal mechanisms are only as effective as the people steering them. Fortunately the public trust doctrine provides an effective mechanism through which the people of South Africa can enforce their constitutionally created right to water.

Amanzi Ayimpilo – Water is Life