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Water Rights and Transformation

The battle for the control and ownership of water rights appears to be heating up. The call for expropriation of land without compensation was a theme of the 2019 elections. Is the reallocation of water rights on racial lines going to be a theme for the 2024 elections?

It is important to understand the context.

The Freedom Charter, which the ANC Congress adopted in Kliptown in 1955, called for all land and natural resources to be returned to the people and redivided. When it came to negotiating the final Constitution in 1994, some 40 years later, the same call was made. It was, of course, a different era. The Berlin Wall had fallen and communism throughout the world was disintegrating. Nonetheless Section 25, the property clause of the Constitution, was the most hotly debated and the last to be resolved. A compromise was reached between the call for all natural resources to be redistributed to the people and the private ownership of property and natural resources.

Ownership of property, which included all natural resources such as minerals and water, was protected subject to the exception that the State was obliged to take reasonable, legislative and other measures to enable citizens to gain access to natural resources on an equitable basis. In particular, the State was obliged to adopt measures to achieve land, water and related reform to redress the results of past racial discrimination.

The National Water Act (the **Act**), which was passed in 1998, was the first piece of legislation to do so. The Act changed our water law from a system whereby water rights were privately held to one where the State became the public trustee of the nation's resources and the State, as a public trustee, became the responsible authority to issue water use licences.

In order to overcome any argument that this new legal structure constituted an expropriation of water rights, Section 34 of the Act provided that a person who held a right to water at any time during the 2-year period immediately before the Act came into force (an existing lawful water use) could continue with the existing lawful water use until this right was replaced by a licence. In the licencing process, which would replace any existing entitlement including an existing lawful water use, the responsible authority is entitled to reduce existing allocations so as to meet, inter alia, water assigned for the reserve (environmental and basic human needs) and the water which needs to be allocated to those who need to be allocated water so as to redress the results of past racial and gender discrimination.

Section 22(6) of the Act states that a person who has applied for a licence in respect of an existing lawful water use and who is granted a licence for a lesser use than the existing lawful

water use, resulting in prejudice to the economic viability of an undertaking in respect of which the water was beneficially used, may claim compensation for any financial loss suffered.

A discount to market value can be justified if the purpose is to address past imbalances.

Apart from existing rights for which compensation must be paid if they are expropriated, the structure of removing ownership of rights, generally, and vesting these rights in the State as public trustee on behalf of the nation was considered by the Constitutional Court in relation to minerals in AgriSA vs Minister of Minerals & Energy. The Constitutional Court held:

> "*There can be no expropriation in circumstances where deprivation does not result in property being acquired by the State*".

In these circumstances, the property is acquired by the nation and the State is simply the trustee acting on behalf of the nation.

This construct has been criticized as the practical effect of the arrangement is that the State becomes the controller of all water resources.

When the Act was passed, it was intended that the licencing process would follow shortly thereafter. It was in the licencing process that redistribution would occur and if there was any acquisition of rights so as to redress past imbalances, compensation would be paid. Some 25 years have now passed, and the progress in converting old lawful water uses into licences has not yet occurred. There has therefore been no meaningful reallocation of water rights.

As an interim step, water uses have been registered with the Department and the Department has gone through a process of verifying existing lawful water uses.

Recently, there have been a number of important developments which indicate that the hiatus is coming to an end. Instead of following the licencing process contemplated by the Act, the Department is seeking to introduce new measures to achieve the redistribution of water rights.

A contentious issue has been whether the Act allows the trading of water entitlements. Section 25 of the Act allows a person, who holds a water use, to surrender that entitlement in favour of another private user who makes application for a licence. This was interpreted to allow the holder of a water use to sell or trade that water use to a person who needed a new water use and was applying for a licence.

In 2018, the Department of Water Services issued a legal services circular that Section 25 of the Act does not allow for the trading of water entitlements. The circular stated that the Act did not permit "*the privatisation of a natural resource to which all persons must have access*". It was argued that such a system would maintain a "*monopoly of access to water resources only to established farmers who are financially well resourced*".

In March, the Constitutional Court handed down judgement confirming that the payment of a fee in respect of the surrender of a water use entitlement, in order to facilitate a licence application, was permissible. The Constitutional Court affirmed the right of private persons to trade and do anything which the law does not prohibit. The court relied on an English case which held:

> "*For private persons, the rule is that you may do anything you chose which the law does not prohibit. It means that the freedom of private citizens are not conditional upon some distinct and affirmative justification for which he must burrow in the law books. Such*

notion would be anathema to our English legal traditions but for a public body, the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law."

In an epilogue to the judgement, the Constitutional Court stated:

"*The conclusion that I have reached is not dismissive of the State's concerns that water, as a scarce national resource, is largely in the hands of advantaged white farmers. On the contrary, I understand why the State may now be seeking to redress the injustice brought about by this disproportionate enjoyment of water use entitlements. Indeed, one of the factors to be considered to ensure the achievement of the purpose of the Water Act is "redressing the results of past racial and gender discrimination". This attests to the reality of the racially skewered enjoyment of water use entitlements. Unfortunately, the existing legislative instrument does not admit of the redress; at least not in the manner contended for by the applicants (the Minister, Director-General and Deputy Director-General of the Department of Water and Sanitation) in this matter*."

Just after the Constitutional Court handed down its judgment, the Minister of Water and Sanitation published, for public comment, draft regulations regarding procedural requirements for water use licence applications. In new water use licence applications, the regulations stipulate that the responsible authority must give preference to applications from black people, followed by women. A table is contained in the regulations stipulating that, depending on the volume of water or the area of land to be irrigated, the percentage of the shares allocated to blacks must range from 0% to 75%. The usage covers taking water from a water resource, storing water, and the use of land for afforestation.

These provisions are not practically possible to implement. Many of South Africa's farms are owned by trusts and not by companies. Large farming operations may be conducted by a listed company and some of the listed companies are listed not only in South Africa but on foreign exchanges. It is not possible for these to be owned, in the proportions indicated, by South African blacks.

A similar approach was adopted in the mining sector with the rules relating to the conversion of old order mineral rights and the grant of new mining rights. These rules have caused many of the large mining companies to prefer other jurisdictions to conduct operations.

How will these provisions affect commercial irrigation and forestry operations in South Africa?

In the forestry sector, Sappi and Mondi have become international companies. Sappi and Mondi have some 650 000 hectares of owned and leased forestry land in South Africa. It is simply not possible for them to comply with these requirements.

In the Government Gazette of 17 November 2023, the National Water Amendment Bill was published and the public is invited to submit comment within 60 days.

The trading of water rights permitted by the Constitutional Court is now to be prohibited. Section 25 is to be amended to allow the holder of a water use to apply to transfer the water use for a period not exceeding 24 months to use that water for the same or different purpose in the same vicinity or to apply for a new licence on land belonging to him or her.

A new Section is to be added which expressly prohibits trading in any form.

Sections 26 and 27 of the Act are to be amended clarifying the obligation to redress the results of past racial and gender discrimination. The Minister will be entitled to prescribe regulations on the criteria to be considered when redressing the results of past racial and gender discrimination and a responsible authority must now prioritise the redressing of past racial and gender discrimination when deciding on the issue of licences.

Although nearly everyone accepts the importance of addressing historical imbalances, the statutory interventions introduced since 1994 have not achieved much mainly because of a lack of implementation. The Act, passed in 1998, provided all of the mechanisms required to achieve reform in the sector. Reform was not achieved because the Act was never properly implemented. The recent further attempts to intervene in the sector display a lack of understanding and most likely will simply result in a withdrawal of investment.

We are seeing the State's failure to operate Eskom and Transnet. The failures of Eskom are being mitigated by the intervention of the private sector through massive investments in renewable and solar energy. The failure of Transnet is resulting in the private sector becoming involved in rescue solutions for our railways and ports.

Whilst the initiatives in the water sector may be appealing for gaining votes in the 2024 elections, they are unlikely to grow the irrigation and forestry sectors and with it, the reallocation of water rights.

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