THE NATIONALISATION OF WATERRIGHTS: DEPRIVATION OR EXPROPRIATION?

SUMMARY

South Africa's water law dispensation has changed dramatically with the promulgation of the National Water Act 36 of 1998. The previous distinction between public and private water has been abolished and the Minister of Water Affairs and Forestry has been appointed to act as trustee of the nation's water resources. Through the working of section 4(4), exclusive rights of water use, which were in force before 1998, were replaced by water allowances, granted in the discretion of the relevant authority.

The key issue, which is investigated in this article, is whether the state, through the provisions of the National Water Act, expropriated vested rights in property or whether such infringement merely constituted a deprivation.

The new concept of property in terms of section 25 of the Constitution of the Republic of South Africa and the distinction between deprivation and expropriation are examined. It is indicated that the concept of property in South African law has been extended to include not only ownership but also rights in property. Existing water use rights, which were available to certain individuals in terms of the 1956 Water Act, can be classified as property.

Section 25(1) authorises the infringement of private property in certain defined instances. Despite the many academic works which define the difference between deprivation and expropriation as described in section 25(2), the Constitutional Court clarified this matter in First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services 2002 7 BCLR 702 (CC). Expropriation is described as a sub-category of deprivation. Only when it has been established that the requirements of section 25(1) have been complied with, is the question of whether deprivation constitutes expropriation, asked.

The requirements for deprivation, expropriation and inverse condemnation are discussed with reference to applicable case law.
After the aim of the National Water Act was weighed up against the disadvantages which individuals suffer through the infringement of their vested rights, the conclusion was reached that the nation’s need for sustainable water resources carries more weight than the individual's exclusive right of use of water. A constitutionally valid deprivation has thus occurred. Due to the fact that the state did not appropriate any rights in this process, the conclusion was reached that this provision does not amount to expropriation. It does however appear that the provisions of the National Water Act can give rise to inverse condemnation or constructive expropriation in specific circumstances.

In addition, three other strategies of strengthening international environmental governance should be pursued: First, the various international environmental treaty-making and treaty-implementation processes should be better harmonised or, at least, co-ordinated; in this context, UNEP is called upon to continue and intensify its efforts to enhance the synergies and linkages between multilateral environmental agreements (MEAs) with comparable areas of focus, by prompting the respective MEA secretariats to enter into appropriate co-ordination arrangements and giving them full logistic support in this respect. Second, as many non-governmental organisations (NGOs) have considerable knowledge and expertise in environmental and developmental matters, States should consider intensifying the partnership with them. States should, however, be empowered to make a selective choice among the mass of NGOs operating at international level. They should accept as partners only those NGOs which meet certain qualitative requirements. Third, as local governments are key components of national sustainable development strategies if such plans are to succeed, the existing local Agenda 21 processes should be expanded and intensified. In particular, supporting the direct engagement of local and sub-national institutions from around the world in international activities and partnerships is an important component of good international environmental governance.