

Is water flowing in a public river or stream ‘a thing capable of being stolen’?

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1. Introduction

The environmental problem is without doubt one of the most critical problems facing our generation today (Judge CG Weeramantry in the foreword to D Grindlinton and P Taylor *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (2011)). Water, as an invaluable human resource, lies at the heart of the environmental disaster threatening the continued existence of life on earth as we know it. This valuable resource, commonly regarded as a gift of nature’s bounty (which ought to be reserved for the whole of the populace) has been misused and abused to such an extent that it is only through innovative intervention that its sustainable protection can be pursued.

The South African legislature embraced this challenge and crafted a novel, far-reaching instrument which created the ideal milieu within which sustainable and equitable water use, can be regulated for the benefit of all persons. With the promulgation of the National Water Act 36 of 1998 (hereafter referred to as the ‘NWA’) the Parliament of the Republic of South Africa exercised its sovereign right and responsibility to regulate the proper use of the nation’s water resources. In recognising that water is a resource that belongs to all people and by appointing the National Government as the public trustee thereof, the NWA brought to life the policy ideal of creating a ‘doctrine of public trust’ as stated in the *White Paper on a National Water Policy for South Africa*, 1997.

Through acknowledging that water ‘belongs to all people’ and the subsequent appointment of a public trustee, the NWA unwittingly generates a debate around the question as to whom water, as a natural

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resource, belongs. This question was highlighted in the case of *Mostert v The State* 2010 (2) SA 586 (SCA) (hereafter referred to as *Mostert*) where the question arose as to whether a person who abstracted water from a river without the necessary authorisation could be found guilty of the common-law crime of theft. This scenario is unique in the sense that it does not deal with the abstraction of water for reasonable domestic use that is authorised through section 4 of the NWA but with the abstraction of water that is regulated through licensing in terms of section 4(3) of the NWA. It is the detrimental effect that the unauthorized use of water for commercial purposes might have on individual users who are dependent on the water sources for their daily livelihood, that inspired this note.

2. Facts of the Case

The two accused (who are father and son) are sugarcane farmers in the Barberton district of Mpumalanga. Their farm is riparian to the Lomati River and falls within the Lomati Irrigation District which is controlled by the Lomati Irrigation Board (the complainant) as it was called at the time. The accused abstracts water from this irrigation scheme to irrigate their lands. The complainant exercises control over the water in the Lomati River (within the complainant's irrigation district) and also regulates the amount of water abstracted by the farmers. The complainant requires farmers to register their pump stations and to have the pump stations fitted with a water flow monitoring system called a Water Administration Monitoring System (WAMS) in order to monitor the quantity of water being abstracted by each farmer. In practice each farmer must read the meter on the WAMS periodically and then report the quantity of water used to the complainant. These readings are verified from time to time by the complainant's official (the water-bailiff) who also conducts spot checks.

The accused registered a single pump (pump station 46) in respect of their farm for these purposes. In July 2004 the complainant learned that the accused constructed a second unregistered pump station on the farm which was not fitted with a WAMS. The complainant suspected that the accused used this unregistered pump station to abstract water from the river which was not reflected in the accused's water consumption returns. The complainant later also discovered that the electrical wiring leading to the WAMS fitted to the registered pump station appeared to be interfered with in such a way that the pump could be operated without the water abstracted being recorded.

The accused were charged in the Malelane magistrates' court in Mpumalanga with seven criminal counts. Five of these charges were statutory offences under the NWA and two charges were the common-

law offences of fraud and theft. The magistrate's court convicted accused one on all seven counts, while accused two was convicted on six of the seven counts.

The accused lodged an appeal to the North Gauteng High Court in Pretoria against their convictions and sentences. The High Court confirmed only two of their convictions on statutory counts and set aside the other three statutory convictions as well as the two common-law convictions of fraud and theft. The appellants then lodged a further appeal to the Supreme Court of Appeal (SCA) against their two remaining convictions and sentences. At the same time the state sought and obtained leave to cross-appeal (on questions of law) against the High court's decision regarding the common-law offences of fraud and theft.

3. SCA in *Mostert*

The SCA confirmed the convictions of both accused on the two statutory counts and replaced the sentence with a fine of R5000.00 or six months imprisonment (both counts were taken together for purposes of sentencing). Regarding the cross-appeal of the state on the common-law offences of fraud and theft the SCA found (at para [19]) that the High Court misdirected itself by finding that the legislature intended that the NWA (with its creation of numerous statutory offences) limits the prosecution of persons for offences in relation to water and its use to those it had provided for in the said Act thereby excluding prosecution of common-law offences such as fraud and theft. The elements of these common-law offences may overlap with the statutory offences created by legislation but that does not mean that the legislature intended only the statutory offence capable of prosecution. The SCA explained that in certain cases where conduct which amounts to a statutory offence overlaps with the common-law offence, the penalty prescribed for the statutory offence may in certain circumstances be a useful guide in considering an appropriate sentence for a conviction of the common-law offence.

The SCA concluded that the legislature could, in principle, bar the prosecution of certain common-law offences and restrict the prosecuting authority to bringing charges solely in respect of statutory offences. But in this instance there is no provision in the NWA which specifically bars the prosecution of common-law offences relating to water or its misuse, nor can such a provision be found by necessary implication, and consequently the SCA found that the High Court erred in finding that the appellants could not be prosecuted for common-law offences.

Regarding the common-law fraud charge, the SCA held that the appellants deceived the complainant by way of misrepresentation and

as a result the complainant was prejudiced. The appellants deceived the complainant with regard to the quantity of water they had abstracted from their registered pump station. The SCA (at para [30]) found that the High Court missed the true issue of this count – that the appellants intended to and did in fact deceive the complainant by knowingly providing incorrect water consumption figures. The cross-appeal of the state on common-law fraud was upheld by the SCA and each appellant was sentenced on this charge to a fine of R20 000 or 12 months' imprisonment, wholly suspended conditionally.

What is important for the purpose of this note is that in this case the SCA also considered whether water flowing in a stream or river can be stolen in terms of the common-law crime of theft. The SCA in an *obiter dictum* stated that such water cannot be stolen. The SCA was of the opinion that in terms of the South African law based on Roman –and Roman-Dutch law, water in a public river is *res communes*. As such, the court argued, it was incapable of being owned and thus incapable of being stolen.

The SCA (at para [23]) considered the argument of the state that the fundamental changes brought about by the NWA – where all water resources are specifically placed under the trusteeship of the National Government – resulted in the above no longer being an accurate reflection of the South African law. The SCA held that the NWA did nothing more than place all water within the aegis of state control, which control the state had in any event exercised over public water before the NWA came into operation. The court opined that this approach did not mean that water flowing in a river must now be regarded as capable of being owned and thus capable of being stolen.

According to the SCA a riparian owner who abstracts more water from such a water source than that to which he or she is legally entitled, may commit a statutory offence under section 151 of the NWA but does not commit the common-law offence of theft. However it was not necessary to reach a final decision on this issue as the common-law charge of theft could only stand in this case if it was proved that the appellants had abstracted more water than what they had been entitled to. The evidence in the trial court failed to establish that to have been the case and for this reason the appellant's conviction on common-law theft was set aside in the High Court.

4. Is water in a public river a 'thing capable of being stolen'?

The judges in the *Mostert* case clearly did not think that water in a river is capable of being stolen. After providing a concise overview of the

nature of water running in a public stream under Roman law (at para [22]), they argued that because water is incapable of being owned, it is incapable of being stolen (at para [23]). They cited J Burchell *Principles of Criminal Law* 3ed (2005) 167 (hereafter referred to as Burchell) as authority. Burchell, in turn (p 790) relies on *R v Laubscher* 1948 (2) SA 793 (C) as authority for this view and in *R v Laubscher*, De Villiers J at 794 stated without substantiating the remark: '... this is public water ... which indeed in law cannot be taken into private ownership.'

It must be mentioned at this stage that we are of the opinion that the learned judges in the *Mostert* case erred in holding that in 2010 under the auspices of the NWA, public water is incapable of being owned. It must also be emphasised that the NWA did away with the differentiation between public and private water and the question should rather be whether water in a stream or river is capable of being stolen..

In order to deal with the question at hand, whether water in a river is a thing 'capable of being stolen' one must take cognisance of the fact that the authors of criminal law handbooks in South Africa are *ad idem* of the view that only certain types of property can be stolen (Burchell 788-790; CR Snyman *Criminal Law* 5ed (2008) 491, hereafter referred to as Snyman). The generally accepted principle is that property must be movable and corporeal, it must belong to someone else and it must be *in commercio* (negotiable) before it can be stolen. It is the last two requirements that are the proverbial thorns in our sides. Water in a stream is movable and it is corporeal, but (1) does the water belong to someone else before the unauthorized user appropriates it and (2) is water negotiable? These two aspects will be dealt with in more detail in the following paragraphs.

4.1 Does the water belong to someone else before the unauthorized user appropriates it?

To answer this question, and to substantiate the authors' critique on the judges' findings as stated above, the nature of water in South African rivers and streams before and after the promulgation of the NWA needs to be determined.

The honourable judges in *Mostert* held that according to Roman law principles, public water in a stream or river was classified as *res communes* (at para [22]). The issue is however not so simple and straightforward. There is no 'single' Roman law view in this regard. Two often referred to and well respected Roman jurists support contradicting views. (H Thompson *Water Law: a practical approach to resource management and the provision of services* (2006) 17). The first of these Roman jurists is Gaius (*Digesta* 1.8.2 *pr*) who was of the

view that flowing water was *res publicae*. The second was Marcianus (Digesta 1.8.2.1) according to whom flowing water was *res omnium communes*. It is therefore not entirely correct and overtly simplifying to state that under Roman law, water flowing in a public river was regarded to be *res communes*.

Secondly, it is not primarily the Roman law principles pertaining to water that applied in South Africa, but the Roman-Dutch law principles (CG Hall and AP Burger *Hall on Water Rights in South Africa* 4ed (1974) 1, hereafter referred to as Hall). Sir Henry Juta (*Water Rights under the Common Law and the Irrigation Act No.32 of 1906* (1907) 33) states with reference to *inter alia Vermaak v Palmer* (1876 Buch 25): 'After all, it cannot be denied that the principles of the Roman-Dutch law have, by a wise and beneficent interpretation been made applicable to this country and to its streams...'

In support of this line of thought Van der Vyfer (*Étatisation of Public Property* in DP Visser (ed) *Essays on the History of Law* (1989) 261-299) argues convincingly that in South Africa the common-law has developed to such an extent that all public rivers were regarded to be *res publicae*.

The importance of determining the applicable common-law source that underlies the South African water law dispensation is found in the integral difference between the legal concepts *res omnium communes* and *res publicae*. The essence of the distinction between *res omnium communes* and *res publicae* might seem trivial at first glance, but it is this distinction that bores down to the core of the question at hand. Although both categories can be classified as comprising of things that cannot privately be owned a conceptual difference between these categories of things existed. The importance of the distinction lies in the fact that where *res omnium communes* was ownerless and regarded to be *res nullius*, *res publicae* (public property) has already been occupied by the state and ceased to be *res nullirae* (*Van der Walt v Rex* 1939 GWLD 52; C.G. Hall *Maasdorp's Institutes of South African Law* (1976) 8). According to the well-known Roman-Dutch authority, Voet (*Commentarius ad Pandectas* as translated by Gane P in *The selective Voet being the Commentary on the Pandects by Johannes Voet* (1955) 1.8.8) *res publicae* had already begun to be in ownership. Tewari (DD Tewari 'A detailed analysis of evolution of water rights in South Africa: An account of three and a half centuries from 1652 AD to present' (2009) 35 *Water SA* 693 at 696) confirms:

'The Dutch rulers [of the Cape of Good Hope] chose to apply the laws of The Netherlands: the doctrine of state ownership of all public rivers was accepted in the 17th century.'

In this sense, it can therefore be stated that according to common-law principles applied prior to the promulgation of the NWA, water did

belong to a legal entity namely the state. The 'state' in this context refers to the juristic person that represents all the citizens of the country (JP Verloren van Themaat and M Wiechers *Staatsreg* (1981) 7) and not the national government.

However, it can, and has been argued by the court in *Mostert* (at para [22]) that section 6 of the preceding Water Act 54 of 1956 is conclusive evidence that water in a public stream belonged to no-one. Section 6 read: 'There shall be no rights of property in public water and the control and use thereof shall be regulated as provided in this Act.' A view does however exist that this section should not be read as if it deprives the state of its status of *dominus fluminis*. Hall holds:

'As the result of the Water Act (54 of 1956) and the statutes amending it, the State has been re-invested as *dominus fluminis* for all practical purposes, with the same power which the Hollandsche Oos-Indiese Kompanjie exercised over water at the Cape during the seventeenth and eighteenth centuries, and thus the wheel has come full circle.'

Hall argues that what this provision really meant was that a riparian owner could not do with the water he extracted from the public stream or river just what he pleases, even if it represented his proportionate share of the stream. While he could take it and use it and in the course of that use, consume it, a riparian proprietor had to pass on what he did not use (See also *Smuts v Faure and others* 1931 CPD 544 at 550). In this sense public water could not be taken into private ownership, but this does not deny the existence of the state's pre-existing interest in the water.

With water being classified as *res publicae* the state had the ultimate power to regulate its distribution and use. As *res publicae* the title to the water in South African public rivers and streams vested in the state. Although this title is not equitable with that of private ownership, it is a pre-existing title or claim and based on this line of reasoning, we argue that water in public rivers and streams did belong to 'someone else' (i.e. the state) even before the promulgation of the NWA.

If the preamble to the NWA is scrutinized, a very interesting perspective arises. The role of the preamble in interpreting a statute is clear from Sachs J's remark about the preamble to the interim constitution:

'The preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purposes.' (*S v Mhlungu* 1995 (7) BCLR 793 (CC) at para [112]).

The preamble thus contains the points of departure on which a statute is based. In the preamble of the NWA, recognition is given to the fact that water is a scarce natural resource that belongs to all people.

The responsibility that the National Government of South Africa has towards the water within the country's borders is also recognised and emphasised. Although no explicit reference is found in the preamble or the NWA regarding the nature of the country's water resources, one can assume from the wording used in the preamble that the water within the country's borders is still regarded as *res publicae* (H Mostert & A Pope (eds) *The Principles of the Law of Property in South Africa* (2010) 31). This assumption is based on the fact that the water within the country's borders is specifically and explicitly referred to as 'the nation's water resources'. This short phrase claims the water in the borders of South Africa for its people.

If one is open to creative reasoning, this is indicative of the fact that the water in the country's rivers and streams, although it is not to be regarded as private property, is public property. As *res publicae* it belongs to the people of South Africa and consequently it vests in the juristic person that represents the people of South Africa namely the state (E van der Schyff 'Who "owns" the country's mineral resources? The possible incorporation of the public trust doctrine through Mineral and Petroleum Resources Development Act ' (2008) *TSAR* 757-768).

The state submitted to the SCA in *Mostert* (at para [23]) that the fact that the NWA specifically placed water resources under the trusteeship of national government, meant that water in a public stream was capable of being owned. The state's comprehensive arguments are not discussed and thus it is difficult to surmise what the full extent of the state's argument was. In support of the drift of the state's argument as it is captured in the judgment, reference must be made to the fact that the concept of public trusteeship was statutorily entrenched in the South African water law through section 3 of the NWA.

It was stated in the *White Paper on a National Water Policy for South Africa* that one of the aims of the amendment of the water law dispensation was to develop 'a doctrine of public trust which is uniquely South African.' The concept of public trusteeship was foreign to the South African legal system until its incorporation in the NWA. For the purpose of this note it can be stated that a comparison with the well known Anglo-American public trust doctrine indicates that under the traditional Anglo-American public trust doctrine, navigable water resources were regarded to be held in public ownership by the Crown for the benefit of the people (J Sax 'The public trust doctrine in natural resources law: Effective judicial intervention' (1970) *Michigan Law Review* 473-566; (GJ Pienaar and E van der Schyff 'The Reform of Water Rights in South Africa' (2007) 3 *LEAD: Law and Development Journal*, available at <http://www.lead-journal.org/>; E van der Schyff 'Unpacking the public trust doctrine: a journey into foreign territory' (2010) 13 *Potchefstroom Electronic Law Journal* 122 – 189). In this

sense the answer to the question regarding whether water in a public river or stream belongs to someone else will still be the same – it belongs to the state that in turn holds the public property for the benefit of the nation.

An individual thus has no individual claim to use any portion of these resources beyond the parameters set out by the NWA. The individual-as-part-of-the-nation's only claim is that the national government must protect, use, develop, conserve, manage and control the country's water resources in a sustainable and equitable manner for the benefit of all persons and in accordance with its constitutional mandate.

The answer to the first question is thus affirmative – water does belong to someone else – i.e. the state.

4.2 Is water *in commercio* or negotiable?

This brings the authors to the second question which seems to be caught up in the semantics of physics. The traditional view is that before a unit of water is captured and separated from the body of the natural resource, it is not regarded as *in commercio* – despite the fact that the separated unit in itself is *in commercio*. The fundamental question that must be considered in this regard, is whether it is still appropriate to find in 2011 that water, even when it is still part of the resource, is *res extra commercium*. H Savenije and P van der Zaag ('Water as an economic good and demand management; paradigms with pitfalls' (2002) 27 *Water International* 98-104 at 98) states that: 'Since the Dublin conference on Water and the Environment (ICWE, 1992) it has become generally accepted among water resources managers that water should be considered an economic good'. Without elaborating on this point, it can be argued that the mere fact that South Africa is buying huge quantities of water from Lesotho (AT Wolf and JT Newton 'Case study transboundary dispute resolution: The Lesotho Highlands water project', available at <http://www.transboundarywaters.orst.edu/research/casestudies/Documents/lesotho.pdf>, accessed on 4 November 2011) weakens the argument that in the 21st century water is still to be regarded a *res extra commercium*.

At this stage it is important to note that the principle of legality is not affected by the submission that water flowing in a stream or river can be stolen. It is not proposed that a new crime is created. It is submitted that the water law in this regard has developed in such a manner that it is possible, in certain circumstances, to convict someone of the common-law crime of theft of water because of the fact that water in streams can be regarded to belong to the state and to be *res in commercio*.

5. Alternative approach

Even if the above argued idea that water in rivers do in fact belong to the state, does not sell, another approach is possible. The question in this specific case should not have been whether water in a public stream is capable of being stolen. The question should have been more specific such as whether the water in the Lomati River, which forms part of the Lomati Irrigation Scheme, is capable of being stolen? And thus the first determining question should be whether water flowing in the Lomati River belongs to someone?

A geographical enquiry reveals that the Lomati River is dependent on its water supply from the Lomati Dam. This brings a whole new perspective to the issue at hand, a perspective that was probably not argued before the court. It is trite that it is possible to acquire ownership of portions or units of water in public streams by rendering them susceptible to control (Mostert & Pope op cit 31). In this sense water in rivers should be distinguished from the clouds in the heaven, the wind in the forest or the sunrays in the atmosphere. Capturing flowing water in a container or dam would for example suffice as methods of rendering portions of water susceptible to control. It can therefore be argued that once water from a stream is captured in a dam by either an individual with the necessary authority to do it or a competent government authority, it is susceptible to private ownership. In this sense water is thus rendered *res commercio*. It can then be argued that the water that flows in the Lomati River lost its 'public character' when it was captured in the Lomati Dam. The Lomati River is nothing more and nothing less than a channel through which the water is transported from the dam to its authorised and pre-determined users. If someone, like the farmers *in casu*, then unlawfully and intentionally abstracts more water than they are entitled to they are committing the common-law crime of theft as they are appropriating the water which belongs to someone else to themselves.

6. Conclusion

If the alternative approach is followed, both the questions that were addressed in this note are answered affirmatively – water does belong to someone else and it is negotiable or *res commercio* and therefore a type of property that can be stolen.

The authors of this note argue that different times call for different measures. It has been proven that clean water resources are not as infinite as once thought. Peter Ashton of the CSIR is of the view that transgressors of the water act should be 'persecuted' ('Too thick to drink and too thin to plough? Strategic water quality issues facing South Africa' – Keynote address at the IUCN Academy of Environmental Law:

South Africa Colloquium 2011, 4 July) available at <http://www.iucnael.org/en/our-activities/past-colloquia/223-south-africa-colloquium-water-and-the-law-towar.html>, accessed on 23 September 2012). The authors are in agreement that this scarce resource is invaluable to every nation. Yet in South Africa someone who 'steals' this valuable and scarce resource, who unlawfully and intentionally uses more than his fair share and detracts from the resource as a whole, cannot be labelled a thief but is a mere 'unauthorized water user' and is punished with a slap on the wrist – or as Peter Ashton says 'nicely asked not to do it again'. If an unauthorized water user is convicted of theft, labelled a thief and sentenced accordingly the deterrent effect will be much greater and water protected much more effectively!