WATER USE RIGHTS AS AN ESTATE ASSET: AN EXAMINATION OF THE VALUATION AND TRANSFERABILITY OF WATER USE RIGHTS

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OPSOMMING

Die doel van die *Nasionale Waterwet* 36 van 1998 is om voorsiening te maak vir fundamentele hervorming van die reg wat betrekking het op waterhulpbronne in Suid-Afrika. Artikel 3(1) van die *Nasionale Waterwet* 36 van 1998 bepaal dat die nasionale regering, as die openbare trustee van die nasie se waterhulpbronne, moet verseker dat water beskerm, gebruik, ontwikkel, bewaar, bestuur en beheer word op ’n volhoubare en billike wyse, tot die voordeel van alle persone en ooreenkomstig die nasionale regering se grondwetlike mandaat. Subartikel (2) bepaal verder dat die nasionale regering finaal verantwoordelik is om te verseker dat water regverdig toegewys word en voordelig in die openbare belang gebruik word, terwyl omgewingswaardes bevorder moet word. Subartikel (3) bepaal op sy beurt dat die nasionale regering die bevoegdheid het om die gebruik, vloei en beheer van alle water in die Republiek te reguleer. Hierdie wetgewing het oorsprong gegee aan die ontstaan van die sogenaamde *public trust*-doktrine in die Suid-Afrikaanse reg.

Die *Nasionale Waterwet* maak voorsiening vir `n aantal verskillende watergebruiksregte, van watergebruiksregte vir huishoudelike gebruik tot watergebruiksregte vir landboudoeleindes. Inaggenome die omvang van die studie gaan daar in hierdie navorsing gefokus word op gelisensieerde watergebruiksregte wat gerig is op landbou. In hierdie studie word daar dus bepaal of hierdie gelisensieerde watergebruiksregte deel kan vorm van `n persoon se boedel, of hierdie regte oordraagbaar is en hoe die waardasie daarvan geskied.

SLEUTELWOORDE: *Watergebruiksregte, gelisensieerde watergebruiksregte as konstitusionele eiendom, oordraagbaarheid van watergebruiksregte, waardasie van watergebruiksregte en gelisensieerde watergebruiksregte as `n boedelbate.*

ABSTRACT

The main purpose of the *National Water Act* 36 of 1998 is to provide for fundamental reform of the law relating to water resources in South Africa. Section 3(1) of the *National Water Act* 36 of 1998 (NWA) stipulates that the national government, as the public trustee of the nation's water resources, must ensure the protection, use, development, conservation and management of water. Water must also be controlled in a sustainable and fair manner, to the advantage of all persons and in accordance with the national government`s constitutional mandate. Subsection (2) stipulates that the Minister is ultimately responsible to ensure that water is allocated and used in a fair manner, for the benefit of the public interest, while promoting environmental values. Subsection (3) further stipulates that the national government also has to regulate the use, flow and control of all water in the Republic. These provisions of the NWA gave birth to the concept of public trusteeship in the South African law.

The NWA provides for a number of different water us rights; from water use rights for domestic purposes to water use rights for the purpose of agriculture. Considering the extent of the study of all the water use rights that exist within the provisions of the NWA, this research will focus on licensed water use rights intended for agriculture. In this study it will be determined whether these licensed water use rights form part of a person's estate. Furthermore, it will also be determined whether these rights are transferable and whether a value can be attached to these rights in the estate of a person.

KEY WORDS: *Water use rights, licensed water use rights as constitutional property, transferability of licensed water use rights, valuation of licensed water use rights and licensed water use rights as an estate asset.*

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1 Introduction

Section 27 of the *Constitution*[1] provides everyone with a fundamental human right to health care, food, water and social security. According to subsection 27(1) (b) everyone has the right to have access to sufficient food and water.[2] With this constitutional provision the road was paved for water law reform in South Africa. The process gained momentum with the commencement of the *National Water Act* 36 of 1996 (hereafter referred to as the NWA) on the 1st of October 1998.

Before the commencement of the NWA, the previous water law dispensation was regulated by the *Water Act* 54 of 1956 (hereafter referred to as the 1956-Act). The 1956-Act was regarded to be a codification of the Roman-Dutch *dominus fluminus* principle[3] and of the English system of riparian ownership.[4] In terms of the 1956-Act, a distinction was made between private water and public water.[5] Public water was any water that flowed or was found in the bed of a public stream or that occurred there or originated from it, whether visible or not.[6] Private water was any water that rose or fell in a natural way on any land, or which naturally drained, or was lead on to

1 *Constitution of the Republic of South Africa*, 1996 hereafter referred to as the Constitution.

2 For a discussion on the Constitutional Court`s interpretation of s 27(1)(b) of the Constitution in *Lindiwe Mazibuko and Others v City of Johannesburg and Others* CCT 39/09 [2009] ZACC 28 see Stewart L "Adjudicating Socio-Economic Rights under a Transformative Constitution" Winter 2010 *Penn State International Law Review* 28(3) 504-508 and Mostert ea *Law of Property* 293. See also the legal implications of the South African Constitutional Court judgement of *Government of the Republic of South Africa and others vs Grootboom and others* 2001(1) SA 46 (CC) in view of the developing debate on socio-economic rights under the Constitution on the constitutional right of access to sufficient water in Stein R and Niklaas L "Access to Water" 2002 *Physics and Chemistry of the Earth* 27 733–739.

3 According to this principle the state acted as the custodian of water on behalf of the whole population.

4 Pienaar GJ and van der Schyff E "The Public Management of Water Resources in South Africa" 2008 *Forum on Public Policy* 3; Wessels *Waterreg* 7; Tewari DD "A Detailed Analysis of Evolution of Water Rights in South Africa: An Account of Three and a Half Centuries from 1652 AD to Present" October 2009 *Water SA* 35(5) 697.

5 S 1 of the *Water Act* 54 of 1956; Wessels *Waterreg* 19; Stein R "Water Law in a Democratic South Africa: A Country Case Study Examining the Introduction of a Public Rights System" 2005 *Texas Law Review* 83 2177; Stein R "South Africa`s Water and Dam Safety Legislation: A Commentary and Analysis on the Impact of the World Commission on Dams` Report, Dams and Development" 2001 *Am. U. Int'l L. Rev.* 16(1573) 1581; Thompson *Water Law* 64. This distinction between private water and public water has often been analysed by the court. See in this regard *Minister van Waterwese v Mostert en Andere* 1964 2 SA 656 (A).

6 S 1 of the *Water Act* 54 of 1956; Wessels *Waterreg* 19; Thompson *Water Law* 65.

one or more pieces of land that was the object of separate grants, but which could not be used for collective irrigation purposes.[7] As *dominus fluminus*, the state regulated the use of both public and private water.[8] In accordance with the 1956-Act, rights to use public water were allocated to riparian owners, who were entitled to sufficient quantities of water for domestic use, watering of cattle and cultivation.[9] The 1956-Act expressly proclaimed that there was no ownership of public water,[10] and all rights to use public water were to be regarded as water use rights.[11] Although no similar explicit proclamation was made regarding the ownership of private water, the 1956-Act determined that the exclusive rights to use private water could only be exercised by the owner of the land on which the water had sourced or flowed over.[12]

Although there was no certainty about the ownership of water,[13] water use rights were always connected to the ownership of the land.[14] In the case of public water, the water user had to be the riparian owner.[15] In the case of private water, ownership of the land over which the water flowed or where the source of the water occurred, was required.[16] The 1956-Act additionally provided for water servitudes and in the case where a water servitude was granted, the servitude could only be granted by the owner of the servient tenement.[17]

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7 S 1 of the *Water Act* 54 of 1956; Wessels *Waterreg* 20; Thompson *Water Law* 73.

8 Tewari October 2009 *Water SA* 701; Thompson *Water Law* 62.

9 Section 10 of the *Water Act* 54 of 1956; Pienaar and van der Schyff 2008 *Forum on Public Policy* 3; Wessels *Waterreg* 21.

10 S 6(1) of the *Water Act* 54 of 1956; Wessels *Waterreg* 21.

11 Wessels *Waterreg* 21.

12 Section 5 of the *Water Act* 54 of 1956; Pienaar and van der Schyff 2008 *Forum on Public Policy* 3; Wessels *Waterreg* 21.

13 Wessels *Waterreg* 25-34.

14 Pienaar GJ and van der Schyff E "Watergebruikregte ingevolge die Nasionale Waterwet 36 van 1998" 2003 *Obiter* 135; Pienaar and van der Schyff 2008 *Forum on Public Policy* 3; Stein 2001 *Am. U. Int'l L. Rev.*1577; Stein R "South Africa's New Democratic Water Legislation: National Government's Role as Public Trustee in Dam Building and Management Activities" 2000 *Journal of Energy and Natural Resources Law* 18(3) 285; Stein 2005 *Texas Law Review* 2168.

15 Pienaar and van der Schyff 2003 *Obiter* 135; Pienaar and van der Schyff 2008 *Forum on Public Policy* 3. Non-riparian owners could only acquire entitlements to use public water through acquisition of land, water court orders in terms of s 11(2) of the *Water Act* 54 of 1956, agreements, prescription and trading. Regarding this, see Thompson *Water Law* 91-93.

16 Pienaar and van der Schyff 2003 *Obiter* 135; Pienaar and van der Schyff 2008 *Forum on Public Policy* 3. Non-land owners could only acquire entitlements to use private water through acquisition of land, a permit issued by the Minister in terms of s 5(2) of the *Water Act* 54 of 1956, agreements, prescription and trading. Regarding this, also see Thompson *Water Law* 91-93.

17 Pienaar and van der Schyff 2003 *Obiter* 136; Pienaar and van der Schyff 2008 *Forum on Public Policy* 3. This owner would have either been a riparian owner or the owner of land over which the water flowed or where the source of the water occurred.

With the promulgation of the NWA the water law dispensation in South Africa changed dramatically[18] and existing water use rights[19] in terms of the 1956-Act were directly affected.[20] One of the main objectives of the NWA was to reform the water dispensation from a system of private water rights based on riparian ownership and ownership of land to one based on government allocation of water.[21]

Section 4[22] of the NWA gives an explicit explanation of the range of authorised water uses that exists under the new water law dispensation.[23] Entitlements to use water in accordance with the NWA range from water use as set out in Schedule 1 of the NWA and existing lawful water use in terms of section 34 of the NWA to water use in terms of a general authorisation or licence under the NWA.[24] It is therefore clear that exclusive rights of water use which were in force before 1998 were replaced by

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18 Van der Schyff E "Die Nasionalisering van Waterregte in Suid-Afrika:Ontneming of Onteiening?" 2003 *PER* 1; Pienaar and van der Schyff 2003 *Obiter* 136. For a more complete discussion on the transformations in the South African water law and policy, see Francis R "Water Justice in South Africa: Natural Resources Policy at the Intersection of Human Rights, Economics, and Political Power" 2005 *The Georgetown International Environmental Law Review* 18(149) 160-176; Tewari October 2009 *Water SA* 695-705; Thompson *Water Law* 17-124; Mostert ea *Law of Property* 283-288.

19 The term *existing water use rights* generally refers to water use rights that existed before the promulgation of the NWA on 1 October 1998.

20 Van der Schyff 2003 *PER* 1.

21 Pienaar and van der Schyff 2008 *Forum on Public Policy* 4; Thompson *Water Law* 165; DWAF (Department of Water Affairs and Forestry) "White Paper on a National Water Policy for South Africa" 1997 Pretoria: Department of Water Affairs and Forestry http://www.dwaf.gov.za/documents/policies/nwpwp.pdf [date of use 25 August 2010]; Stein 2001 *Am. U. Int'l L. Rev.* 1581; Francis 2005 *The Georgetown International Environmental Law Review* 161.

22 S 4 of the NWA states that entitlements to use water includes the following:

> (1) A person may use water in or from a water resource for purposes such as reasonable domestic use, domestic gardening, animal watering, fire fighting and recreational use, as set out in Schedule 1.
> (2) A person may continue with an existing lawful water use in accordance with section 34.
> (3) A person may use water in terms of a general authorisation or licence under this Act.
> (4) 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 -
> *(a)* to take or use water;
> *(b)* to obstruct or divert a flow of water;
> *(c)* to affect the quality of any water;
> *(d)* to receive any particular flow of water;
> (e) to receive a flow of water of any particular quality; or
> *(f)* to construct, operate or maintain any waterworks.

23 In terms of the NWA.

24 In this mini-dissertation the focus will fall on water use in terms of a general authorisation or licence under the NWA as set out in s 4(3) of the NWA.

water allowances, granted in discretion of the relevant authority.[25] With the commencement of the NWA other significant changes also occurred in the South African water law dispensation. The pre-existing distinction between public and private water was abolished.[26] Furthermore, the public trust doctrine was statutorily incorporated[27] and the Minister of Water Affairs and Forestry was appointed to act as trustee of all water resources on behalf of the nation.[28]

Although the new system of water rights is in many respects superior to the previous system and more in line with international standards and trends regarding water legislation or modern water rights structures, it is not free from complications and drawbacks.[29] One of the major drawbacks of the new water rights system is that, because of the fact that the state acts as the public trustee of the country's water resources, water allocation is now generally being done through a licensing system which consequently increases the administrative burden on the Department of Water Affairs (hereafter referred to as DWA).[30] Due to this new water allocation system, a lot of uncertainties have arisen regarding the transferability[31] of water use rights in our country and, furthermore, questions regarding water use rights as an estate asset also arise.

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25 Pienaar GJ and van der Schyff E "The Reform of Water Rights in South Africa" 2007 *LEAD* 181; DWAF 1997; Tewari October 2009 *Water SA* 704; Thompson *Water Law* 165; Mostert ea *Law of Property* 286; Francis 2005 *The Georgetown International Environmental Law Review* 163.

26 Pienaar and van der Schyff 2007 *LEAD* 181; Mostert ea *Law of Property* 284 and 285; DWAF 1997; Tewari October 2009 *Water SA* 703; Thompson *Water Law* 165; Francis 2005 *The Georgetown International Environmental Law Review* 162; Stein 2000 *Journal of Energy and Natural Resources Law* 292; Stein 2005 *Texas Law Review* 2177.

27 S 3 of the NWA.

28 Pienaar and van der Schyff 2007 *LEAD* 181; DWAF 1997; Stein 2001 *Am. U. Int'l L. Rev.* 1583-1585; Thompson *Water Law* 164 and 279-284; Tewari October 2009 *Water SA* 703-704; Stein and Niklaas 2002 *Physics and Chemistry of the Earth* 734; Francis 2005 *The Georgetown International Environmental Law Review* 161; Stein 2000 *Journal of Energy and Natural Resources Law* 287 and 289-291; Stein 2005 *Texas Law Review* 2170-2177; van der Schyff and Viljoen "Water and the Public Trust Doctrine – a South African Perspective" 2008 *The Journal for Transdisciplinary Research in Southern Africa* 340.

29 Tewari October 2009 *Water SA* 705.

30 Tewari October 2009 *Water SA* 705.

31 The transferability of licensed water use rights will be discussed in chapter 4 of this mini-dissertation. Transferability can be subdivided into categories of trading and transmissibility respectively. Trading refers to the buying and selling of entitlements to water, while transmissibility refers to the bequest of entitlements to water in a will. Both of these possibilities will be discussed. For now it is important to only take note of the fact that there exists uncertainty in the South African law regarding these matters.

A perfect example of this uncertainty is the dispute between AgriSA and the Department of Water Affairs and Forestry, who are at odds over the trading of water rights.[32] Since the commencement of the NWA in 1998, more than 100 farmers have been barred from selling their water use rights or unused water rights when selling their land because of a decision made by the Department.[33] Farmers are under the impression that the land and water can be sold as a unity,[34] while the Department considers the land and the water as separate from each other. Therefore, when land is sold or bequeathed, application in terms of the NWA must be made to obtain licensed water use rights separate from the land itself.[35]

With regard to the range of the different types of water use rights that exist within the NWA,[36] this mini-dissertation will only focus on water use rights intended for agricultural purposes.[37] The research question that has to be answered in this mini-dissertation is whether or not such licensed water use rights can be regarded and protected as property under section 25 of the Constitution. Furthermore, the question has to be answered whether licensed water use rights can be classified as an asset or property in the estate of a person. In order to answer this question meaningfully it also needs to be determined how such water use rights can be valuated, and whether such water use rights are transferable for the purposes of estate planning and estate law in South Africa.

This will be achieved by identifying the specific rights in question in chapter 2 of this mini-dissertation. In chapter 3, licensed water use rights as constitutional property will be discussed and the question of whether or not licensed water use rights can be regarded and protected as property under section 25 of the Constitution will be answered. In chapter 4, focus will fall on the transferability of these licensed water

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32 Duvenhage *Rapport* 29 November 2008 52 http://jv.news24.com//Rapport/Sake-Rapport/0,,752-803_2434551,00.html [date of use 10 July 2009].

33 Duvenhage *Rapport* 29 November 2008 52.

34 Farmers were allowed to sell the land and water as a unity in the previous water law dispensation.

35 Duvenhage *Rapport* 29 November 2008 52.

36 The full range of water use rights provided for in the NWA is discussed in Pienaar and van der Schyff 2003 *Obiter* 137-139. For purposes of this mini-dissertation the different types of water use rights will only be named, as the focus will fall on water use rights for the purposes of agriculture.

37 Specifically the rights that can be obtained through the procedures set out in section 41 and 42 of the NWA.

use rights and the possibility of regarding licensed water use rights as an estate asset will be discussed. In chapter 5, a possible approach that can be followed when valuating a licensed water use right will be given and some factors that might have an influence on the value attached to a licensed water use right will be named. In chapter 6, practical advice regarding the handling of a licensed water use right as an estate asset will be given and in chapter 7, some concluding remarks will be made.

2 Specific rights in question

In order to be able to answer the questions regarding the transferability and valuation of water use rights,[38] the rights in question needs to be identified. It is important to remember that previously existing water use rights connected to, or acquired as a result of ownership in land have been replaced with entitlements[39] to use water, as set out in section 4 of the NWA. This includes[40] water use rights that are awarded through a licence procedure where the granting of a licence for water use lies within the discretion of the Minister of Water and Forestry.[41]

In terms of section 4(2) and section 34 of the NWA, existing lawful water use[42] can be continued without obtaining a licence.[43] An existing lawful water use may only continue to the extent that it is not limited, prohibited or terminated by the NWA.[44] No licence is required to continue with an existing lawful water use until a responsible

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38 It is important to remember that the phrase "water use rights" refers to licensed water use rights throughout this mini-dissertation.

39 An entitlement to water refers to a right to use water in terms of any provision of the NWA, for example a licence or general authorisation. The concept is also used to include other rights to water not necessarily authorised under the NWA. Keep in mind that for purposes of this mini-dissertation, entitlements to water refers to licensed water use rights.

40 Other entitlements to use water are set out in fn 22 of this mini-dissertation.

41 S 4(3) of the NWA; Pienaar and van der Schyff 2003 *Obiter* 136; Pienaar and van der Schyff 2007 *LEAD* 181; DWAF 1997; Tewari October 2009 *Water SA* 704; Thompson *Water Law* 165; Mostert ea *Law of Property* 286; Francis 2005 *The Georgetown International Environmental Law Review* 163; Badenhorst, Pienaar and Mostert *Law of Property* (2006) 740.

42 Existing lawful water use is defined in s 32 of the NWA. An existing lawful water use means a water use which has taken place at any time during a period of two years immediately before the date of commencement of the NWA, or which has been declared an existing lawful water use under section 33 of the NWA, and which was authorised by or under any law which was in force immediately before the date of commencement of the NWA that is identified as a stream flow reduction activity in section 36(1)of the NWA or is identified as a controlled activity in section 37(1).

43 Badenhorst, Pienaar and Mostert *Law of Property* (2006) 740.

44 Mostert ea *Law of Property* 288.

authority requires a person claiming such an entitlement to apply for a licence.[45] In the case where a lawful water user would like to attain legal certainty regarding his water use, he is allowed to apply to have his existing water use licensed.[46] If a licence is issued it becomes the source of authority for the water use. If a licence is not granted the water use is no longer permissible.[47]

However, in the instances specifically defined in section 43[48] of the NWA, the responsible authority can require compulsory licensing of any aspect of water use in respect of one or more water resources within a specific geographic area.[49] Licences issued under part 8[50] of the NWA replace previous entitlements to any existing lawful water use by the applicant.[51]

In order to get a comprehensive overview of the sections of the NWA that deals with licensed water use, it is vital to contextualise licensed water use within the NWA.

Section 40(1) of the NWA states that, a person who is required or wishes to obtain a licence to use water, must apply to the relevant responsible authority for a licence, while section 41 stipulates the procedure that must be followed during a licence application. During this administrative process the Minister has to take the guidelines stipulated in the NWA into account.[52] Section 42 requires of the responsible authority to always provide reasons for their decisions and the applicant can also request that written reasons be provided to him.[53]

Section 43 sets out certain circumstances where a compulsory licence should be applied for. This section requires that compulsory licence application should be made if it is desirable that water use in respect of one or more water resources within a specific geographic area be licensed.[54] In this instance, the responsible authority

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45 Badenhorst, Pienaar and Mostert *Law of Property* (2006) 740.
46 Badenhorst, Pienaar and Mostert *Law of Property* (2006) 740.
47 Badenhorst, Pienaar and Mostert *Law of Property* (2006) 740.
48 S 43 of the NWA will be discussed in more detail later on in this mini-dissertation.
49 Badenhorst, Pienaar and Mostert *Law of Property* (2006) 740.
50 S 43-48 of the NWA.
51 S 48 of the NWA.
52 As set out in s 40(2) to 40(4) of the NWA.
53 S 42(b) of the NWA.
54 S 43(1) of the NWA.

may issue a notice requiring persons to apply for licenses for one or more types of water use contemplated in section 21 of the NWA.[55] According to section 21(e), water use includes engaging in a controlled activity identified as such in section 37(1) or declared under section 38(1) (these subsections mainly refer to water use in accordance with waterworks and irrigation).

These two sections explicitly require that it is compulsory to apply for a licence for purposes of agricultural waterworks and irrigation.[56] Where a water user has been directed to apply for a compulsory licence in terms of section 43 of the NWA, the existing water use will no longer be lawful without a licence and where an application for a licence has been unsuccessful, it will no longer be possible to use the water for waterworks and irrigation. However, where the licence has been issued, the licence will form the new source of authority for the water use.[57]

Consequently, when dealing with agricultural land and water use rights specifically aimed at agricultural waterworks and irrigation, it is compulsory for the water user to apply for a licence to be able to continue with the use of water. Therefore, the specific rights focused on in this mini-dissertation are licensed water use rights.

The compulsory licensing of these water uses promotes fair allocation of water from a water resource which is under water stress.[58] It also helps to achieve equity in the allocation of water use and it promotes the beneficial use of water in the public interest.[59] The compulsory licensing of this water use furthermore facilitates the efficient management of the water resource and it protects water resource quality.[60]

The question now arises whether or not this licensed water use right can be regarded and protected as constitutional property under section 25 of the Constitution.

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55 S 43(d) of the NWA.
56 S 21 read with s 43 of the NWA.
57 Badenhorst, Pienaar and Mostert *Law of Property* (2006) 740.
58 S 43(1)(a)(i) of the NWA.
59 S 43(1)(a)(ii) and (1)(b) of the NWA.
60 S 43(1)(c) and (d) of the NWA.

3 Licensed water use rights as constitutional property

It is necessary to determine whether a licensed water use right can be seen and protected as constitutional property under section 25 of the Constitution. To accomplish this, the development of the property concept in the South African law has to be studied in broad terms. It should be noted that it is not the purpose of this mini-dissertation to give a complete discussion of the development of the constitutional property concept in the South African property law. Such a discussion would fall outside the scope of the research question in this mini-dissertation.

Defining property in any particular law system is not a simple task.[61] The property concept is determined by a number of different factors.[62] Religious, philosophical, historical, economical, political and social factors all play a part in determining the property concept.[63] Ackerman J determined in *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance*[64] that:

> At this stage of our constitutional jurisprudence it is …practically impossible to furnish – and judicially unwise to attempt – a comprehensive definition of property for the purposes of section 25.

To a large extent, the constitutional property concept is still a foreign concept to the traditional Roman-Dutch law system, which also forms the basis of the South African property law.[65] To get a better understanding of the constitutional property concept in South Africa and whether or not a licensed water use right falls within the scope of the constitutional property concept, the development before and after 1994 are now going to be considered in broad terms.

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61 Badenhorst, Pienaar and Mostert *Law of Property* (2003) 1; Pienaar and van der Schyff 2007 *LEAD* 188; Currie and de Waal *Bill of Rights* 536; van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development* 56; van der Schyff *Die Nasionalisering van Waterregte* 2.

62 Pienaar GJ "Ontwikkelings in die Suid-Afrikaanse Eiendomsbegrip in Perspektief" 1986 *TSAR* 295.

63 Pienaar 1986 *TSAR* 295.

64 *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 7 BCLR 702 (CC) par 51 at 794E-F.

65 Pienaar and van der Schyff 2003 *Obiter* 140.

3.1 Pre-1994 property concept

As stated above, the property concept is determined by a number of different factors. The word "property", dependent upon the context in which the term is being used, is capable of a variety of meanings. Because of this, lawyers in the Roman-Dutch legal tradition preferred to conceptualise property as a legal relationship between persons and corporeal (physically tangible) things.[66] Things were then narrowly defined as the objects of this relationship.[67] However, this definition led to confusion and theorists suggested avoiding the term property altogether and rather making use of the term rights.[68] The reason being, that which is deemed of value to a person is not the thing itself, but the legal relationship the person has to that thing, that was seen as a right such as ownership.[69] Ownership was considered to be the most comprehensive real right in property, and also regarded as the source of all limited real rights.[70]

According to the *Expropriation Act* 63 of 1975 and a decision of the Transvaal Provincial Division in *Badenhorst v Minister van Landbou*[71] water use rights granted in accordance with the 1956-Act were regarded as 'goods' that could be expropriated (and therefore also seen as property) from as early as 1974.[72]

3.2 Post-1994 constitutional property concept

With the inclusion of section 25 (the property clause) in the Constitution, the South African property concept was to a large extent revolutionised and the ownership-object relation changed to a rights-based paradigm with the emphasis shifting from 'ownership' to 'rights in property'.[73] The Constitutional Court`s decision in the *First*

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66 Currie and de Waal *Bill of Rights* 536; Pienaar and van der Schyff 2007 *LEAD* 188.
67 Currie and de Waal *Bill of Rights* 536; Pienaar and van der Schyff 2007 *LEAD* 188.
68 Currie and de Waal *Bill of Rights* 536.
69 Currie and de Waal *Bill of Rights* 536.
70 Pienaar and van der Schyff 2003 *Obiter* 141; Pienaar and van der Schyff 2007 *LEAD* 188; van der Schyff *Nasionalisering van Waterregte* 3; van der Schyff *Mineral and Petroleum Resources Development Act* 58.
71 *Badenhorst v Minister van Landbou* 1974 1 PH K7 17.
72 Pienaar and van der Schyff 2003 *Obiter* 141; Pienaar and van der Schyff 2007 *LEAD* 188; van der Schyff *Nasionalisering van Waterregte* 4.
73 Pienaar and van der Schyff 2007 *LEAD* 188.

National Bank-case[74] resolved much of the initial uncertainty surrounding the interpretation of section 25 of the Constitution. The Court held that the overriding purpose of the constitutional property clause is to strike "a proportionate balance"[75] between the protection of existing property rights and the promotion of the public interest.[76] The decision in the *First National Bank*-case[77] helped to clarify how the South African property clause should be interpreted to achieve the balance between private and public interests in property.[78] Any constitutional property clause enquiry essentially breaks down into the following questions:

1) Is the interest at stake constitutionally protected property?
2) If so, does the legislation provide for deprivation or expropriation?
3) If it provides for deprivation, does the legislation meet the requirements of section 25(1)?
4) If it provides for expropriation, does the legislation meet the requirements of section 25(2) and (3)?[79]

For purposes of this mini-dissertation the focus will only fall on the first question, namely, whether the interest[80] at stake amounts to constitutionally protected property for the purposes of section 25.

3.2.1 The scope of constitutionally protected property

When the possibility of a constitutional property clause was first raised in the late 1980s the meaning of the term 'property' in such a clause was regarded as the most important interpretation problem created by the constitutionalisation of property.[81] Most of these problems arose because of obvious inconsistencies between the characteristics of property in private law and the nature and function of the

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74 *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 7 BCLR 702 (CC).

75 *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 7 BCLR 702 (CC) at par 50 (hereafter referred to as *FNB*).

76 Roux "Property" (2003) 46-2.

77 *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 7 BCLR 702 (CC).

78 Roux "Property" (2003) 46-2.

79 Roux "Property" (2003) 46-3; Roux "Property" (2002) 441.

80 For purposes of this mini-dissertation, one has to keep in mind that the term 'interest' refers to 'licensed water use rights', if not explicitly stated otherwise.

81 Van der Walt *Constitutional Property Law* 58.

Constitution and the Bill of Rights.[82] The constitutional property concept is similar to, but wider than, the private law concept of property.[83] The Constitution consigns the state to a process of transformation that is difficult to merge with the previously liberated entrenchment of property holdings.[84] Constitutional property entails an acknowledgement of restrictive state powers which deviates from the absolute protection of private property.[85] The analysis is that constitutional property is connected to, but not alike with property in private law; while in the constitutional sphere, property is an explicit constitutional right.[86] The constitutional property concept differs to that of the traditional private law concept in that the private law concept of property is already established, whilst in determining the concept of property in light of the Constitution, the exact meaning and scope thereof still has to be determined for every individual case and reference must preferably be made to a general, fundamental directive obtained from the Constitution.[87]

At this point in the development of the new South African constitutional order it is not possible to provide an extensive list of the rights to property that deserve constitutional protection as property. Section 25(4) of the Constitution only states that "property is not limited to land" and does not give a comprehensive definition of the term 'constitutionally protected property'. It is, however, important to determine the scope of the rights to property protected by section 25 of the Constitution, in order to be able to determine whether the term 'licensed water use right' falls within the scope of the meaning of 'property'. The opinions of leading property law writers in the South African law, regarding this particular question, have been found to be as follows:

Van der Walt[88] is of the opinion that for purposes of section 25, 'property' can relate to a wide range of objects, both corporeal and incorporeal. It can also relate to a wide range of traditional property rights and interests, both real and personal, as well as a wide range of other rights and interests which (in the civil-law tradition) have

82 Van der Walt Constitutional *Property Law* 72.
83 Badenhorst, Pienaar and Mostert *Law of Property* (2003) 30.
84 Van der Walt Constitutional *Property Law* 72.
85 Van der Walt Constitutional *Property Law* 73.
86 Van der Walt Constitutional *Property Law* 73.
87 Van der Walt Constitutional *Property Law* 113.
88 Van der Walt Constitutional *Property Law*.

never been considered in terms of property before.[89] This includes licences, permits and quotas. These commercial property interests are contentious to the extent that they are not commonly acknowledged and regarded as constitutional property because of the fact that they are granted and controlled by the state. Licences, permits and quotas are subject to state powers of cancellation, revision and regulation and because of this they are often not regarded as property.[90]

According to van der Walt, it is important to keep in mind that in the commercial world these interests can attain great value, particularly when they give access to valuable services, trading or manufacturing opportunities and when they can be sold or transferred.[91] Regardless of the fact that these interests are awarded by the state, and that there is resistance to the idea that commercial interests in licences, permits and quotas could be protected as property, some of these interests have enjoyed limited constitutional protection in foreign case law.[92] The trend is to consider licences, permits and quotas as constitutional property only if they have commercial value and only if they have been vested and acquired in accordance with the relevant statutory or regulatory requirements.[93] Van der Walt further also states that commercial-type interests might be protected and regarded as property under section 25 of the Constitution.[94]

Roux[95] remarks that the only express textual guidance on the meaning of property is the provision found in section 25(4)(b) that "property is not limited to land".[96] He is of the opinion that this strongly suggests that it was the intention of the legislature to extend protection to intangible assets, such as real rights and personal rights to certain types of performances. Roux acknowledges the fact that the text of section 25 is unclear as to which rights in particular are constitutionally protected. The neo-liberal strand of the constitutional theory would extend legal, if not constitutional,

89 Van der Walt Constitutional *Property Law* 77.
90 Van der Walt Constitutional *Property Law* 100.
91 Van der Walt Constitutional *Property Law* 100.
92 Especially in the United States case law jurisprudence; Van der Walt Constitutional *Property Law* 100.
93 Van der Walt Constitutional *Property Law* 100.
94 Van der Walt Constitutional *Property Law* 106.
95 Roux "Property" (2002); Roux "Property" (2003).
96 Roux "Property" (2002) 444.

protection to virtually all interests that have an economic value.[97] Roux suggests that regardless of what strand of the constitutional theory is considered, the meaning of property in relation to the fundamental values underlying the Constitution cannot be deduced by reference to political theories alone. The Constitutional Court has on many occasions emphasised the need to develop a uniquely South African conception of the phrase 'open and democratic society based on human dignity, equality and freedom', one that takes into consideration the country`s history, socio-economic inequalities and contrasting cultural traditions.

Roux advises that any enquiry into whether an interest is protected by section 25 should begin by asking whether the interest is recognised as a property right in common law, in customary law or in terms of legislation.[98] Thereafter, the Court should consider whether extending constitutional protection to the interest would be consistent with the Bill of Rights, having regard to the values underlying the final Constitution. In common law, the term 'property' includes both real rights themselves and the object of real rights (corporeal and incorporeal things). Customary law interests in land in South Africa have been widely codified; both in terms of national or subordinate legislation, and therefore these interests should be treated as property rights recognised by statute. True (that is, uncodified) customary law interests in land can take on one of two forms: a) the right to claim an allotment of land, or b) the right to benefit from land already allotted. Both of these rights are property rights in the strict sense. Property rights recognised in legislation are legion and can range from extensions of common law ownership rights to interests in land recognised as property rights under new land reform legislation.[99]

After determining whether the particular interest has been recognised as a property right in terms of common law, customary law or legislation, Roux advises that the court should then proceed to consider whether the interest should enjoy constitutional protection under section 25. Where an interest has not previously been recognised, the court must decide whether the interest should be given

97 Roux "Property" (2002) 445.
98 Roux "Property" (2002) 449, read with s 39(3) of the Constitution.
99 Roux "Property" (2002) 449-450.

constitutional protection for the first time.[100] Roux explains that the most important non-traditional property interests are the cases of so-called 'new property'.[101]

The question whether or not constitutional protection of property should be extended to non-traditional property interests or so-called 'new property' depends on whether incorporeal property as such should be protected under section 25 and, if so, whether any distinction should be made between the various forms of incorporeal property.[102] In answering this question, Roux considers the Constitutional Court`s decisions in the *FNB*-case as well as the *First Certification*-case[103] as authority for his argument.[104] He gives three specific reasons for extending the protection of section 25 to incorporeal things. First, the blanket exclusion of incorporeal property from the protection of section 25 would be a very crude way of balancing competing public and private interests in property, and where private and public interests in incorporeal property conflict, the latter should prevail. Second, the overwhelming predominance of foreign law authority favours the constitutional protection of incorporeal property. Thirdly, the role that these forms of property have to play in economic growth and consolidation of democracy justifies the extension of constitutional protection to incorporeal property.[105]

According to Roux, the main category of incorporeal property, personal rights to performances (including a range of commercial rights), has been widely recognised in foreign law as being capable of constitutional property clause protection.[106] Another important category of incorporeal property concerns public law entitlements in the form of welfare rights (including pensions and medical aid benefits) and other

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100 Roux "Property" (2002) 450.

101 Roux "Property" (2003) 46-15; Outside the private law of property, the most important forms of property are personal rights to performances regulated by the law of contract, including some commercial rights, intellectual property rights (copyright, trademarks and patents), and certain public-law entitlements (the so-called 'new property'), including welfare rights (pensions and medical aid benefits) and other forms of state 'largesse' (such as licenses, permits and quotas).

102 Roux "Property" (2003) 46-15.

103 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC). Hereafter referred to as the *First Certification*-case.

104 In the *FNB*-case, the Constitutional Court was at pains to restrict its holding to corporeal property, but in doing so the Court was simply being cautious. Roux argues that neither the *FNB*-case nor the *First Certification*-case should be taken as an indication that the Court will not extend the constitutional conception of property to encompass incorporeal property.

105 Roux "Property" (2003) 46-15-46-16.

106 Roux "Property" (2003) 46-16.

kinds of government 'largesse' (including licences, permits and quotas). These entitlements are collectively referred to as 'new property' and enjoy constitutional protection, to the extent of procedurally unfair deprivation, in many countries. There exists a wealth of foreign law that suggests that certain personal rights to performances should enjoy constitutional protection under the property clause.[107] Roux is of the opinion that any doubt over the preparedness of South African courts to recognise such interests as constitutional property has been removed by the decision in *Transkei Public Servants Association v Government of the Republic of South Africa and Others*.[108] In this case the court considered some of the new property authorities and came to the conclusion that:

> the meaning of 'property' in section 28 of the interim Constitution may well be sufficiently wide to encompass a State housing subsidy.[109]

Although this remark was *obiter dictum*, and made in relation to the interim Constitution,[110] Roux regards this as an indication that the South African courts are very open to foreign law on this issue.[111] Roux therefore clearly supports the idea that protection of section 25 should be extended to incorporeal things, including government 'largesse' such as licences, permits and quotas.

Currie and de Waal[112] emphasise that section 25 does not refer to 'rights' or to 'real rights' or even to 'ownership', but rather to a far broader and vague term – 'property'.[113] In everyday popular use, 'property' refers to both the object of rights and those rights themselves. Currie and de Waal further state that for purposes of section 25, there are at least three possible meanings attached to 'property'. First, the clause could refer to physical property itself, to those things in respect of which legal relations between people exist. Second, the term could refer to the set of legal rules governing the relationship between individuals and their physical property –

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107 Roux "Property" (2002) 451.
108 *Transkei Public Servants Association v Government of the Republic of South Africa and Others* 1995 (9) BCLR 1235 (Tk).
109 Roux "Property" (2002) 452; *Transkei Public Servants Association v Government of the Republic of South Africa and Others* 1995 (9) BCLR 1235 (Tk) at 1246-1247.
110 *Constitution of the Republic of South Africa* 200 of 1993 hereafter referred to as the interim Constitution.
111 Roux "Property" (2002) 452.
112 Currie and de Waal *Bill of Rights*.
113 Currie and de Waal *Bill of Rights* 536.

what the common law terms “property rights”.[114] Third, the term could refer to any relationship or interest having an exchange value. If considered against the background of the South African private law of property, it seems that the second meaning (property as rights) is closest to the traditional conception of property in the South African law. Property cannot extend to every right or interest, even if it is a right or interest of an economic nature, but too narrow an interpretation of what property means deprives the right of any usefulness. Therefore, property for the purposes of section 25 probably has the second meaning: property as rights. Van der Walt also agrees with this interpretation of property.[115] However, even if one takes property to mean rights in property, there still remain difficulties in determining the scope of the term. One should keep in mind that if property means property rights and not simply property pertaining to corporeal and incorporeal things, it is clear that the clause protects more than just the right of ownership and more than just simply ownership of corporeal things.[116]

Currie and de Waal further state that there exists a great deal of foreign authority that suggests that the definition of property for purposes of constitutional protection should not be limited to real rights.[117] In modern economic life, physical property and land have lost their status as the defining attribute of wealth, and a person`s wealth no longer depends on whether the person owns land or other physical property. Private wealth now consists of personal rights such as shares and unit trusts, private pension benefits, public welfare entitlements, salaries, life insurance policies and intellectual property. If the constitutional definition of property is limited to real rights, it would leave a great deal of people`s assets unprotected against state interference. Currie and de Waal advise that ‘property’ for the purposes of section 25 should therefore be seen as those resources that are generally taken to constitute a person`s wealth, and that are recognised and protected by law.[118] An important qualification to keep in mind is that for a right to constitute property, it must be a

114 Currie and de Waal *Bill of Rights* 537.
115 As stated in the paragraph about van der Walt`s opinion on the meaning of property. ‘Property’ means ‘rights in property’ that are demonstrably vested in the claimant and that have some patrimonial value.
116 Currie and de Waal *Bill of Rights* 538.
117 Currie and de Waal *Bill of Rights* 539.
118 Currie and de Waal *Bill of Rights* 539.

vested right.[119] For purposes of this mini-dissertation, vested rights will be considered when the transmissibility of licensed water use rights is investigated.

Currie and de Waal also recognise interests in government largesse[120] as an important source of wealth in the modern state.[121] These public law interests have the character of property[122] and should receive protection under the property clause in order to protect the individual`s possession or exercise of any of these rights against arbitrarily interference. The individual should also be protected in the case where these rights are taken over without compensation. Finally, Currie and de Waal state that licences, permits and quotas are sometimes treated as property and sometimes not.[123]

Badenhorst, Pienaar and Mostert[124] state that property, in its most simple sense, can be seen as a right or object with patrimonial value.[125] For purposes of private and constitutional law, property may be divided into patrimonial rights and patrimonial objects. Respectively, the terms "property rights" and "objects of property rights" may also be used in this regard.[126] For purposes of this mini-dissertation, the focus will fall on the classification of different patrimonial rights or property rights. Badenhorst, Pienaar and Mostert distinguish the following patrimonial rights or property rights, namely:

- Real rights: A real right is a right to a thing. A thing is an independent corporeal object (other than human beings) which is susceptible to legal control and which is valuable and useful to a person.
- Personal rights: A personal right is a right to performance. Performance is an act in the form of delivering something, doing or not doing something (*dare, facere* or *non facere*) which one person can require a particular other person to perform.

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119 Currie and de Waal *Bill of Rights* 540.

120 Claim rights against the state to certain resources or performances such as state pensions, medical aid schemes, state jobs, state contracts, licences, permits and quotas (the so-called 'new property').

121 Currie and de Waal *Bill of Rights* 539.

122 As decided by the court in *Transkei Public Servants Association v Government of the Republic of South Africa and Others* 1995 (9) BCLR 1235 (Tk) at 1246-1247.

123 Currie and de Waal *Bill of Rights* 539 fn 25.

124 Badenhorst, Pienaar and Mostert *Law of Property* (2006).

125 Badenhorst, Pienaar and Mostert *Law of Property* (2003) 31.

126 Badenhorst, Pienaar and Mostert *Law of Property* (2006) 23.

- Immaterial property rights: An immaterial property right is a right to immaterial property. Immaterial property is the intangible expression of human skills, or inventions of the human mind, embodied in a tangible agent and which are by law allotted to their author.
- Limited real rights: A limited real right to other patrimonial rights (serving as legal objects) such as real rights, personal rights and immaterial property rights.
- Statutory rights: A statutory right granted by the legislature to a party to an agreement to claim performance from the other party to the contract. Performance in this instance is also an act in the form of delivering something, doing or not doing something (*dare, facere* or *non facere*) which one person can require a particular other person to perform.
- Statutory rights against the state to certain resources or performances: The following rights are distinguished:
  a) welfare rights against the state and not based on contract (for example pension, medical benefits and subsidies);
  b) licences, permits and quotas issued by the state; and
  c) other rights against the state based on legislation (especially land use rights and water use rights in terms of land reform and similar initiatives undertaken in terms of section 25 of the Constitution).[127]

This classification clearly shows that Badenhorst, Pienaar and Mostert regard licences and other rights (such as water use rights) against the state based on legislation as constitutional property.

It is safe to say that Roux, Currie and de Waal and Badenhorst, Pienaar and Mostert recognise that licences can be regarded and should be protected as property under section 25 of the Constitution. Although van der Walt does not regard 'new property' to be litigated under section 25,[128] he does acknowledge the possibility that commercial-type interests might be protected and regarded as property under section 25 of the Constitution. He also states that:

> certain intangibles (mostly in the form of rights) have become so important and valuable in modern society that they have to be treated and protected as property.[129]

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127 Badenhorst, Pienaar and Mostert *Law of Property* (2006) 23-24.
128 Van der Walt Constitutional *Property Law* 106.
129 Van der Walt Constitutional *Property Law* 66.

Furthermore, van der Walt states that constitutional law sometimes tends to be more generous in recognising and protecting even interests that are not treated as property in private law.[130]

3.2.2 Can licensed water use rights, in accordance with the NWA, be regarded and protected as property under section 25 of the Constitution?

After considering the opinion of leading property law writers regarding the question whether a licence can be protected as property under section 25 of the Constitution, it became clear that there is some legal uncertainty regarding this matter in South African law. Apart from the opinion of writers, the only leading South African authority on this matter is the court`s decision in *Transkei Public Servants Association v Government of the Republic of South Africa and Others*.[131] In this case the court came to the conclusion that the meaning of 'property' in section 28 of the interim Constitution may well be sufficiently wide to include a state housing subsidy. Even though this remark was *obiter dictum*, and made in relation to the interim Constitution, it is an indication that the South African courts are very open to foreign law on this subject. The most abundant source of foreign law on this matter is that of the United States of America. The American courts have interpreted 'property' to include a number of rights with an economic value which are traditionally not regarded as property. Examples include the right to a driving license, the right to tenure in employment, or to high school education.

When interpreting the term 'property' in constitutional law, the courts will obviously be guided by the existing ambit of the law of property and licensed water use rights will be regarded as constitutionally protected property because of the court`s decision in *Transkei Public Servants Association v Government of the Republic of South Africa and Others*,[132] and the court`s dedication to consider foreign law when interpreting the Bill of Rights.[133]

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130 Van der Walt Constitutional *Property Law* 67.

131 *Transkei Public Servants Association v Government of the Republic of South Africa and Others* 1995 (9) BCLR 1235 (Tk).

132 *Transkei Public Servants Association v Government of the Republic of South Africa and Others* 1995 (9) BCLR 1235 (Tk).

133 S 39 (1) (c) of the Constitution.

Now that it has been established that licensed water use rights can be regarded and protected as property under section 25 of the Constitution, the question should be considered whether these rights can be regarded as an asset in the estate of a person. Furthermore, it has to be established whether these rights can be transferred from one person to another.

4 Transferability of a licensed water use right

The possibility of transferring entitlements to water[134] from one person to another is an established practice in the South African law.[135] For purposes of this mini-dissertation, the word "transferability" refers to two different possibilities that exist within the South African law. "Transferability" can either refer to "transmissibility" or "tradability". The first category, "transmissibility", refers to whether or not there exists a possibility of bequeathing a licensed water use right to an heir by ways of a will.[136] "Transmissibility" is the specific term more frequently used in the South African law of succession for this particular possibility of bequeathing licensed water use rights. The second category, "tradability", refers to the trading of licensed water use rights or the possibility of buying and selling licensed water use rights. "Tradability" is the specific term more frequently used in the South African law for the possibility of buying and selling licensed water use rights.

In order to answer the question whether or not a licensed water use right is transferable, it has to respectively be determined whether a licensed water use right is transmissible and whether trading of a licensed water use is possible within the South African law. Firstly, it has to be determined whether a licensed water use right can be regarded as an estate asset, or in other words, transmissible property. Furthermore, it has to be determined what the rules of the law of succession are that

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134 Thompson *Water Law* 384. As already mentioned, an entitlement to water refers to a right to use water in terms of any provision of the NWA, for example a licence or general authorisation. The concept is also used to include other rights to water not necessarily authorised under the NWA. Keep in mind that for purposes of this mini-dissertation, entitlements to water refers to licensed water use rights.

135 Thompson *Water Law* 517; Armitage RM, Nieuwoudt WL and Backeberg GR "Establishing tradable water rights: Case studies of two irrigation districts in South Africa" July 1999 *Water SA* 25 (3) 301 http://www.wrc.org.za [date of use 12 July 2010].

136 This aspect will be studied in more detail, as it has a direct influence on estates and estate law.

is governing this particular question. The possibility of the trading of water use rights in the South African law then also has to be examined.

4.1 Licensed water use right as an estate asset and the vesting of such an interest

It is important to keep in mind that a distinction exists between interests in the hands of a person[137] and contingent interests.[138] For the purpose of this discussion the differentiation is between water use rights that have been allocated to a person and water use rights that may be allocated to a person. In the first instance, the rights vest in the holder thereof because all the requirements set out in the NWA has been met. In the second instance, a person hopes that a water use right will be allocated to him by the relevant authority, after certain statutory requirements are met. Both of these scenarios will be dealt with in the following discussion. In the first instance, it is necessary to determine whether licensed water use rights can be regarded as estate assets in the estates of the legal holders thereof; thereafter it needs to be determined whether these rights are transferable.[139]

The assets in the estate of a person can either be tangible or intangible.[140] Economists and appraisers generally categorise intangible assets into several distinct categories for purposes of facilitation in general asset identification and classification.[141] Water use rights are generally categorised as intangible assets in the estate of a person.[142] The rights relating to the assets in a person`s estate are termed patrimonial rights.[143] These patrimonial rights might relate to tangible or intangible things, but also to other legal objects. The commonality between these rights is that they all have a patrimonial value.[144] The different patrimonial rights or property rights that exist within the South African constitutional law and private law

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137 Or in the estate of a person. This is interests that has already vested in a person.
138 Interests subject to the fulfilment of certain conditions. This is interests that can only be regarded as a *spes*.
139 In discussing the transferability of licensed water use rights, the question whether it vested in the holder thereof, becomes important.
140 Mostert ea *Law of Property* 25.
141 Reilly and Schweihs *Valuing Intangible Assets* 19.
142 Reilly and Schweihs *Valuing Intangible Assets* 65; Hendrikse and Hendrikse *Valuations Handbook* 70.
143 Mostert ea *Law of Property* 25.
144 Mostert ea *Law of Property* 25.

have already been named,[145] and licences issued by the state for water use rights are regarded as statutory rights against the state to certain resources or performances.[146] Performances form part of the components of a person`s estate.[147] Therefore, licensed water use rights can be regarded as an asset in the estate of a person.[148]

In terms of section 1 of the *Administration of Estates Act* 66 of 1965 'property' includes: "…any contingent interest in property". A contingent interest in property is an interest that is dependent upon something that may or may not happen in future.[149] It is an interest that can only vest in the heir if and when the conditions attached to bequeath of the interest are fulfilled. The *Administration of Estates Act*[150] recognises any interest in property as 'property', even in the event that the interest is contingent. In the hands of the person to who the licence to use water was already issued by the Minister, this licensed water use right will be regarded as an estate asset. To the prospective heir, this licensed water use right will however only be a contingent interest, until the Minister has granted his permission that the heir can continue with the water use.[151] A licensed water use right therefore qualify as 'property' for purposes of the administration of estates and can also be seen as property in the estate of a prospective heir.

In the South African constitutional law, licensed water use rights are considered to form a part of the so-called 'new property'. However, there is a very important qualification placed on the so-called 'new property'.[152] In order for a right to constitute 'new property', the right has to be a vested right.[153] In legal parlance the

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145 See pg 18 of this mini-dissertation.
146 Badenhorst, Pienaar and Mostert *Law of Property* (2006) 23-24.
147 Mostert ea *Law of Property* 26.
148 Subject to the condition that the interest has already vested in the prospective heir. The vesting of a licensed water use right will be discussed later on in this mini-dissertation. For now it is only important to take note of the fact that a licensed water use right can be regarded as an asset in the estate of a person.
149 Corbett, Hofmeyr and Kahn *Law of Succession* 149.
150 *Administration of Estates Act* 66 of 1965.
151 In accordance with s 51(2) of the NWA.
152 Currie and de Waal *Bill of Rights* 540; Roux "Property" (2002) 452.
153 Currie and de Waal *Bill of Rights* 540; Roux "Property" (2002) 452.

terms ‘vest’, ‘vested’ and ‘vesting’ can have different meanings, depending upon the context in which the terms are used.[154]

For the purposes of constitutional law ‘vested’[155] means that the right must be more than an expectation and must have accrued to the claimant in accordance with the relevant rules of common law (in the case of a common law right) or statute (in the case of a statutory right). In other words, to be property, rights must have been vested in the claimant and must be more than merely a *spes*.[156] A very good example of this is found in the Zimbabwean Supreme Court`s decision in *Chairman of the Public Service Commission v Zimbabwe Teachers` Association*.[157] In this case the Zimbabwean Supreme Court decided that an annual bonus of a thirteenth cheque in December was merely a contingent, and not a vested, right.[158] According to the majority in this case, it meant that if and when that contingency happened, the right would only then be created. The right seeking enforcement must have already vested and should not be contingent upon a future happening.[159] There can be no transfer of something that is only contingent and not vested, and therefore there is nothing to transfer and nothing to receive.[160] The effect of this principle of the constitutional law is thus that the licensed water use right will be regarded as a vested right for purposes of constitutional protection in the hands of the person to whom it was issued. The prospective heir cannot claim that he/she has a vested, constitutional protected interest, because of the fact that the NWA clearly stipulates in section 40(1) that a person who is required or wishes to obtain a licence to use water must apply to the relevant responsible authority for a licence and it is within the discretion of the relevant authority to either issue the licence or not.[161]

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154 *Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 163 at 175-6; *Konyn v Viedge Bros (Pty) Ltd* 1961 (2) SA 816 (E) at 823B-C.

155 In the law of succession ‘vesting of rights’ can be a complex matter when the transfer of assets is in question. The term ‘vested’ for the purposes of private law does not have the same meaning. This is however, something that will be dealt with later in this mini-dissertation.

156 Currie and de Waal *Bill of Rights* 540.

157 *Chairman of the Public Service Commission v Zimbabwe Teachers` Association* 1996 (9) BCLR 1189 (ZS).

158 Currie and de Waal *Bill of Rights* 540.

159 *Chairman of the Public Service Commission v Zimbabwe Teachers` Association* 1996 (9) BCLR 1189 (ZS) 1203G-H.

160 Currie and de Waal *Bill of Rights* 540.

161 S 40(4) of the NWA.

The term 'vested' is also relevant when one wants to determine whether a licensed water use right will be regarded as property in terms of private law. It is only when this right is regarded as property in terms of private law that it can be regarded as an estate asset. When the term 'vested' is used in connection with private law (or more specifically, with rights of succession), it indicates that which is fixed and certain as distinct from that which is conditional or contingent.[162] Therefore, an inheritance, bequest or other interest in a deceased estate is said to 'vest' in the heir, legatee or other beneficiary concerned if and when the right has become unconditionally fixed and established in such a person.[163] A vested interest of this nature is normally transmissible to the heirs or representatives of the beneficiary upon his or her death or insolvency and forms an asset in the estate.[164] In the case of a conditional or contingent interest, however, this is not the case. No transmissible right is conferred upon the beneficiary unless and until the condition is fulfilled.[165] These are the very broad and general principles that are applied in the case of interests entitling the beneficiary to the prospective benefit. However, licensed water use rights are not regarded as being held in full ownership.[166] Even though a licensed water use right can be regarded as an asset in the estate of a person, a licensed water use right only amounts to a statutory right against the state to certain resources or performances.[167] Therefore, the principles regarding the vesting and transmissibility of interests other than those consisting of a right to full ownership in the South African law of succession have to be studied.

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162 Corbett, Hofmeyr and Kahn *Law of Succession* 146.

163 Corbett, Hofmeyr and Kahn *Law of Succession* 147.

164 Corbett, Hofmeyr and Kahn *Law of Succession* 147.

165 Corbett, Hofmeyr and Kahn *Law of Succession* 147; As has already been mentioned, in the law of succession 'vesting of rights' can be a complex matter when the transfer of assets is in question. It is however not the purpose of this mini-dissertation to give a complete discussion of this matter. It will only be discussed in broad terms and in connection with licensed water use rights. For a complete discussion of the 'vesting of rights' refer to van der Merwe and Rowland *Suid-Afrikaanse Erfreg* 272-280 and Corbett, Hofmeyr and Kahn *Law of Succession* 146-198.

166 Licences to use water are in some instances also regarded as entitlements to water. See in this regard Thompson *Water Law* 517-525.

167 This has already been established in par 3 of this mini-dissertation.

4.2 Vesting and transmissibility of interests other than full ownership

The general principles regarding the vesting and transmissibility of interests other than full ownership in the South African law of succession will firstly be discussed. These principles will then be applied to licensed water use rights.

When determining the time of vesting in the cases of interests other than full ownership,[168] the same general principles are applied than in the cases of full ownership.[169] In all these cases the basic and fundamental fact that has to be established is whether or not the bequest of the interest has been made subject to a condition, express or implied; and the answer to this will depend on the nature of the particular bequeathed interest and the intention of the testator as expressed in the will.[170] However, it is important to keep in mind that a distinction is made between the vesting and the transmissibility of an interest.[171] It can be said that a vested interest is normally also transmissible and that vesting is a very important and sometimes decisive criteria when determining the transmissibility of an interest, but in the case of interests other than those consisting of full ownership this is not always the position.[172] The bequest of an interest other than full ownership which is unconditional, vests in the beneficiary *a morte testatoris*,[173] but it does not necessarily mean that this interest is transmissible to the estate of the beneficiary upon his/her death, seeing that the transmissibility of such an interest depends on other factors.[174]

First, the transmissibility of an interest other than ownership depends on whether or not the interest was meant to last only for the lifetime of the beneficiary.[175] If indeed it was, it terminates at the time of the death of the beneficiary and cannot be

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168 Examples of interests other than full ownership include, but are not limited to, the following interests: usufructs (for an example of this see *Du Toit v CIR* 1931 AD 28; *CIR v Estate Crewe* 1943 AD 656 at 677); rights to the income derived from property (for an example of this see *Goliath v Estate Goliath* 1937 CPD 312); annuities (for an example of this see *Ex parte Estate Velkoop* 1945 NPD 72); and mineral rights over land (for an example of this see *Ex parte Pierce* 1950 (3) SA 628 (O) at 632H-633H).

169 Corbett, Hofmeyr and Kahn *Law of Succession* 185.

170 Corbett, Hofmeyr and Kahn *Law of Succession* 185.

171 As decided in *Webb v Davis NO* 1998 2 SA 975 (SCA) at 983I-J.

172 Corbett, Hofmeyr and Kahn *Law of Succession* 185.

173 As decided in *Ex parte Dickins: In re Dugmore`s Will* 1944 GWLD 55.

174 Corbett, Hofmeyr and Kahn *Law of Succession* 185.

175 Corbett, Hofmeyr and Kahn *Law of Succession* 185.

transmitted to somebody else.[176] The question whether or not the interest was meant to last only for the lifetime of the beneficiary depends on both the nature of the particular interest and an appropriate and correct interpretation of the terms of the bequest, as stated in the will.[177] No problem occurs when the will clearly and definitely states that the interest is restricted to the lifetime of the beneficiary.[178] However, when no clear or definite statement to this effect has been made in the will, the general rule applies that the bequest of an interest other than ownership is normally meant to last only for the lifetime of the beneficiary to whom it has been bequeathed.[179] In the case where the interest has been granted for a definite and clearly stated period (other than the lifetime of the particular beneficiary, such as the licence period), this general rule does not apply and the defined period is taken as the duration of the interest, and not the lifetime of the beneficiary.[180]

Secondly, an interest other than ownership will also not be transmissible in a case where provision is made for substitution by way of representation in the will of the beneficiary.[181] Substitution by way of representation will occur where the testator indicates that, under certain circumstances, someone (*substitutes*) should inherit something in the place of the established beneficiary (*institutes*).[182] *Substitutes* will not have any vested rights, as their interests will be conditional and dependent upon the fulfilment of those conditions.[183]

Thirdly, where the bequest of an interest other than ownership is made subject to a suspensive condition, the interest will only vest when and if the condition is fulfilled. While the fulfilment of the condition is pending, the interest is generally not

176 Corbett, Hofmeyr and Kahn *Law of Succession* 185.
177 Corbett, Hofmeyr and Kahn *Law of Succession* 185.
178 As decided in *Gordon`s Bay Estate v Smuts* 1923 AD 160.
179 *Goliath v Estate Goliath* 1937 CPD 312 at 316; *Ex parte Short`s Executors* 1938 CPD 322 at 327; *Ex parte Dickins: In re Dugmore`s Will* 1944 GWLD 55 at 60; *Ex parte Estate Daverin* 1945 CPD 204 at 211; *Ex parte Bryant* 1946 CPD 527 at 531.
180 *Goliath v Estate Goliath* 1937 CPD 312 at 316; *Ex parte Short`s Executors* 1938 CPD 322 at 327; *Ex parte Dickins: In re Dugmore`s Will* 1944 GWLD 55 at 60; *Ex parte Estate Daverin* 1945 CPD 204 at 211; *Ex parte Bryant* 1946 CPD 527 at 531.
181 Examples of this can be found in the court`s decisions in *Ex parte Bryant* 1946 CPD 527 and *Ex parte Easton* 1948 3 SA 535 (C).
182 De Waal and Schoeman-Malan *Law of Succession* 133. For a complete discussion of substitution see De Waal and Schoeman-Malan *Law of Succession* 133-155.
183 Corbett, Hofmeyr and Kahn *Law of Succession* 186.

transmissible.[184] Even after fulfilment of the condition and vesting of the interest, the transmissibility of the interest will still depend upon the first and second factors, as mentioned above.[185]

Regarding the transmissibility of a licensed water use right, the following must be taken into account. A licence can be seen as permission given by one party (the licensor) to another (the licensee) to do something that would otherwise be unlawful.[186] The duration of a licence is usually dependent upon the type of licence and the agreement or contract through which the licence was issued.[187] Section 28 of the NWA stipulates the essential requirements of licences issued by the Minister for water use. This section determines that a licence contemplated in Chapter 4 of the NWA must specify the licence period, which may not exceed forty years[188] and it must also specify the review periods during which the licence may be reviewed under section 49, which must be at intervals of not more than five years.[189] Subsection 2 further states that a licence remains in force until the end of the licence period, when it expires.

It can therefore be said that the transmissibility of a licensed water use right will depend on whether or not the licence was granted for a definite and clearly stated period other than the lifetime of the particular licensee, such as the licence period. The licence period will be determined as set out in section 28 of the NWA, and the licence period will be taken as the duration of the interest while the lifetime of the licensee will not be taken into account. The licence will thus be transmissible until the end of the licence period. The transmissibility of a licensed water use right will furthermore depend on whether or not provision has been made for substitution in the will of the beneficiary. In the case where such provision has been made, the licensed water use right will not be transmissible. However, where no provision has been made for substitution in the will of the beneficiary, the licensed water use will be transmissible. Where the bequests of a licensed water use right is made subject

184 Corbett, Hofmeyr and Kahn *Law of Succession* 187.
185 Corbett, Hofmeyr and Kahn *Law of Succession* 187.
186 Fowlston *Commercial and Industrial Licensing* 8 and 64; Byrne *Licensing Technology* 22.
187 Fowlston *Commercial and Industrial Licensing* 107-108;
188 S 28 (1) (e); Nieuwoudt WL, Backeberg GR and Du Plessis HM "The Value of Water in the South African Economy: Some Implications" June 2004 *Agrekon* 43(2) 163.
189 S 28 (1) (f); Nieuwoudt, Backeberg and Du Plessis 2004 *Agrekon* 163.

to a suspensive condition, the licensed water use right will only vest when and if the condition is fulfilled. While pending the fulfilment of the condition, the licensed water use right will not be transmissible.

Section 51 of the NWA deals with successors-in-title in the case where a licence has already been awarded to a licensee. It stipulates that a successor-in-title of any person to whom a licence to use water has been issued may, subject to the conditions of the relevant licence, continue with the water use and must promptly inform the responsible authority of the succession, for the substitution of the name of the licensee, for the remainder of the term.[190]

However, problems may arise where a licence is issued to a person to use water in an enterprise on a piece of land, but that person is not the owner of the land. What happens in the case where the enterprise is transferred without transferring the land or in the case where the land is transferred without transferring the enterprise? In the case where land which includes an enterprise, is transferred, the person to whom the land is transferred also becomes the successor-in-title for the purpose of the licence.[191] An example of this would be where irrigation takes place on the land. The land and the irrigation are transferred to the heir[192] or the buyer[193] and the transferor has no rights to either the land or the irrigation after the transfer.[194] In the case where the land is transferred separate from the enterprise, the heir or buyer to whom the land is transferred does not become the successor-in-title for the purpose of the licence.[195]

Notwithstanding these perspective problems, it is apparent that licensed water use rights can be transmitted to a heir by means of a will. The transferability of licensed water use rights are now going to be discussed.

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190 S 51(2) (a) and (b); S 34(1); Thompson *Water Law* 469.
191 Thompson *Water Law* 469.
192 In the case where the licence is bequeathed by means of a will, or in other words transmitted.
193 In the case where the licence is sold to a buyer through a sell agreement, or in other words where trading of the licence took place.
194 Thompson *Water Law* 469.
195 Thompson *Water Law* 469.

4.3 Transferability of licensed water use rights

Trading of licensed water use rights can be seen as a specific category of transferring entitlements to water. This takes place where a willing seller sells a licensed water use right to a willing buyer.[196] The trading of any entitlement to water usually takes place via a water market.[197] Since 1993 the transfer of entitlements to water for irrigation purposes, temporarily (by means of a lease agreement) or permanently (by means of a sell agreement), was considered to be a real policy option.[198] This transfer had to take place under supervision of a delegated authority and these entitlements to water could only be transferred for purposes of irrigation.[199]

The trading of water use rights can occur on a permanent (sale) or temporary (lease) basis. For purposes of the trading of water use rights a sale is defined as a permanent sale or transfer of a water use right, while a lease is defined as a temporary transfer of water from one user to another for a contracted length of time, where the original water use right holder retains his or her water use right.[200]

The trading of water use rights through water marketing has been recommended as one of the most effective means of reallocating scarce water supplies in South Africa.[201] Water marketing can also promote the assurance of water in the country.[202] One of the most important reasons for a farmer to buy water use rights is to ensure a steady flow throughout the entire year, without having to be concerned about drought. Allocation of water use rights through an established water market offers a number of advantages. It can be said to promote efficiency in the allocation of water by placing water in the most highly valued uses in a flexible manner. Property rights

196 Thompson *Water Law* 520; van der Merwe *A Method of Evaluating an Irrigation Water Use* 22.
197 Thompson *Water Law* 520.
198 Thompson *Water Law* 101. Although there did not exist a structured water market before 1994, it was an established trade between farmers to buy and sell water rights individually and personally among each other.
199 Thompson *Water Law* 102.
200 Basta E and Colby BG "Water Market Trends: Transactions, Quantities and Prices" Winter 2010 *The Appraisal Journal* 50.
201 Armitage, Nieuwoudt and Backeberg 1999 *Water SA* 301; Walmsley JJ "Market Forces and the Management of Water for the Environment" January 1995 *Water SA* 21(1) 43-44.
202 Nieuwoudt, Backeberg and Du Plessis 2004 *Agrekon* 178.

to water also empower water users as any reallocation of water requires their consent and compensation has to be given for any transferred water. The water market process also establishes some suppleness in reaction to changes in crop prices and water values. Within a water market, individual users are forced to take the complete opportunity cost[203] of their water use into consideration, as well as external costs related to their water use or transfer. Finally, a water market also requires well-defined and enforceable water rights, providing for secure tenure of water and investments in water-saving technology.[204] Even though there might be some disadvantages to a water market, [205] the pros far outweigh the cons in any economy.[206]

However, there are certain requirements to comply with before a market in tradable water use rights can be established. Firstly, a proficient water market requires well-defined rights that are totally specified in the unit of measurement, consistency, and priority, in order to create certainty in that which is being traded and predictability in the reallocation process. Secondly, it requires enforceable water use rights that protect the net benefits of the rights holder. Thirdly, it requires transferable water use rights, separate from land use. Fourthly, it requires constitutional security of title ownership and legal endorsement of water transfers by the relevant government jurisdiction. It also requires a competent administration system to maintain and update the chain of title over the water use rights.[207]

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203 The complete cost of acquiring and maintaining the water use.

204 Armitage, Nieuwoudt and Backeberg 1999 *Water SA* 301.

205 For instance, the trading of water use rights via a water market will be subject to various degrees of control, dependent upon whether it takes place within a single user sector or between different user sectors and whether it is within or between water management areas. The feasibility of a water market in a water economy will also depend upon the institutional frameworks set in place for the trading of water rights. However, the disadvantages and challenges that occur with the trading of water rights are not applicable to trading within the irrigation sector, seeing that there are already policy, guidelines and procedures in place and that these are regularly improved for the needs of a specific area.

206 This can clearly be seen in the comparison between the two irrigation districts in South Africa, the Lower Orange River and the Nkwaleni Valley, made in Armitage, Nieuwoudt and Backeberg 1999 *Water SA* 302-310 and Armitage RM and Nieuwoudt WL "Water market transfers in South Africa: Two case studies" 2004 *Water Resources Research* (40) 3-9.

207 Armitage and Nieuwoudt 2004 *Water Resources Research* 2-3.

The NWA contains a number of provisions that support the idea of a water market.[208] Section 63(6) determines that with the permission of the Minister the entitlements allocated to a property for irrigation purposes can also be used on another property for irrigation purposes.[209] But in the light of the NWA the ownership of water in South Africa has changed from private ownership to public ownership.[210] This reform must not be allowed to hinder the growth of water markets in South Africa.[211] However, the water market in South Africa should then be compared and develop in line with the situation in the United States. For example, in Colorado an active market for the usufructuary rights of water has developed while water itself remains public property (as is the case in South Africa).[212] This is important for South Africa since, according to the NWA, the South African Government will act as the custodian of the nation's water resources, and its powers in this regard will be exercised as a public trust. The Colorado example also shows that a water market requires both government involvement and active water-user participation. The government can assist in providing institutional support, but water needs to be managed at the lowest appropriate level.[213]

Furthermore, section 25 of the NWA also allows the transfer of water use authorisations. The Department of Water Affairs has established a policy regulating the trading of water use entitlements.[214] This policy indicates that the responsible authority will have no say in the price agreed by both parties in such a trade.[215] This signals that the responsible authority has no intention to impede in the normal market mechanisms underlying water use rights.[216] These transfers or trades of

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208 Some examples include s 25 and s 63(6); Nieuwoudt, Backeberg and Du Plessis 2004 *Agrekon* 163.

209 S 63(6); Thompson *Water Law* 101.

210 This was discussed in detail in chapter 1 of this mini-dissertation.

211 In the well-developed water markets of the United States, western states claim ownership of water within their boundaries. All states in the western United States allow private rights in the use of water to be established and sold.

212 Nieuwoudt WL "Water market institutions in Colorado with possible lessons for South Africa" January 2000 *Water SA* (26) 27.

213 Nieuwoudt January 2000 *Water SA* 33.

214 DWAF (Department of Water Affairs and Forestry) "Procedural Guideline for Trading in Water Use Entitlements" 2004b Pretoria: Department of Water Affairs and Forestry http://www.dwaf.gov.za/Docs/ [date of use 25 August 2010].

215 DWAF 2004b.

216 Quibell G and Stein R "Can payments be used to manage South African watersheds sustainably and fairly? A legal review" 2005 *Centre for Scientific and Industrial Research (CSIR)*, Pretoria, South Africa and International Institute for Environment and Development, London, UK 16.

water use rights could therefore be a potential mechanism for implementing catchment environmental services. For example, where sellers could institute actions to maintain flows to buyers, they would not seek a water use licence for this water.[217] However, section 25(2) of the NWA states that, in order for a permanent trade to be effected, the seller must surrender the licensed water use right and the buyer must apply for a new licence. There is no warranty that the licence would be granted to the buyer, or that the conditions of the licensed water use right would remain the same.[218] Therefore, trading in licensed water use rights is unlikely to offer significant opportunities for a 'willing buyer, willing seller' market for catchment protection services.[219] Only if all the requirements for a market in tradable water use rights are met, a market in tradable water use rights will be established successfully in South Africa.

A possible approach that can be followed when valuating a licensed water use right will now be discussed. Furthermore, some factors that might influence the value attached to a licensed water use right will also be named.

5 Valuation of a licensed water use right

The assignment of values to natural resources can directly lead to better conservation and sustainable use of these resources, as humans tend to care and appreciate things more when a value in monetary terms is linked to a specific natural resource.[220] The value of any property is normally determined through a valuation process. It is not the purpose of this mini-dissertation to determine what the value of a particular licensed water use right might be, as this question falls outside the scope of research in this field of study.[221] The purpose of this mini-dissertation is merely to

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217 Quibell and Stein 2005 *Centre for Scientific and Industrial Research* 16.

218 Quibell and Stein 2005 *Centre for Scientific and Industrial Research* 16.

219 Quibell and Stein 2005 *Centre for Scientific and Industrial Research* 16.

220 De Lange W "Water as an Economic Currency: Zooming in on Value Drivers" August 2009 *Sciencescope* 29.

221 The valuation process should always be performed by a qualified valuer or appraiser. Furthermore, not much is published in the South African law about the valuation of water use rights. There is however more available on this subject in Australian, U.S. and Namibian law. Readers interested in literature on the valuation of water use rights in Australia, United States and Namibia respectively can study the following resources: Bjornlund and O'Callaghan "Property Implications" 1-18; Basta and Colby Winter 2010 *The Appraisal Journal*; Herzog SJ "The Appraisal of Water Rights: Their Nature and Transferability" Winter 2008 *The Appraisal*

indicate whether or not a licensed water use right[222] does have a value in the estate of a person and how this value might be determined and which factors might have an influence on this value.

A valuation can be defined as an informed opinion about the monetary value of the subject being valued (water use right), based on an assessment and appraisal of the subject by using the appropriate tools, procedure and methodology and taking into account any special circumstances and the need of all the interested parties.[223] Any property will only have a value when it can play a useful part in the general economic activity and the value thereof will be influenced by the usefulness of the particular property.[224]

When valuing farm property, the Market Data valuation method is usually used.[225] This method takes the following factors into account when determining the value:

1) the type of soil and quality of the soil (for example turf, sandy or clay);
2) rainfall in the area;
3) irrigation requirements;
4) accessibility to water;
5) contours of the ground;
6) date of comparable sales;
7) improvements;
8) location;
9) size; and

Journal 39–46; Herzog SJ "The Appraisal of Water Rights: Valuation Methodology" Spring 2008 *The Appraisal Journal* 122–131; Colby BG "Alternative Approaches to Valuing Water Rights" April 1989 *The Appraisal Journal* 180–196; Colby BG "Recent Trends in South Western Water Values" October 1991 *The Appraisal Journal* 488–500; Nilsson A, Sahlén L and Stage J "A Net Back Valuation of Irrigation Water in the Hardap Region in Namibia" September 2003 *Agrekon* 42(3) 252-271.This chapter was written with much help and practical input from Mr. Alan Stephenson, professional valuer and appraiser and Mr Johan Barnard, professional geophysical water-diviner.

222 S 28 of the NWA states that a licence must specify the water use or water uses for which it is issued and s 29 requires of the general authority to attach conditions to every general authorisation or licence. From these sections it is clear that every licence issued by the Minister can be subject to different conditions and is issued for a different "amount" of water. It is therefore impossible to attach a value to the licence on a stand-alone basis. Because of this, the focus in this chapter will fall on the value attached to a water use right.

223 Hendrikse and Hendrikse *Valuations Handbook* 4 and 262.

224 Squire *South African Property and the Valuer* 2-3.

225 This method was recommended by Mr. Alan Stephenson.

10) other relevant factors.

It is clear from this valuation method that water availability and access play a big role in determining the value of farm land. Furthermore, a higher security and value are generally attached to land with a water use right.[226] Water therefore does play a useful part in the general economic activity. As property in the estate of a person, there has to be a value attached to this water use right. The approach explained in this mini-dissertation to attach a value to a water use right was suggested by Mr. Alan Stephenson.[227]

5.1 Approach followed to value a water use right

In all normal circumstances it is essential that property should be valued upon a full market basis[228] between a willing buyer and a willing seller. In certain cases this might involve considerable difficulty in the valuation process, but nonetheless, it must be the object to be pursued when valuing property.[229] The price for water use rights is usually determined by a willing buyer and willing seller and it is the responsibility of the buyer to acquire the necessary funds for the purchase.[230]

In the case where the water use right has to be valuated separately from the land, a partial interest in real estate is being valued. The potential valuation technique available in this case is the “before-and-after” approach. When using the” before-and-after” approach, the value of the property with the water use right is compared to the value of the property without the water use right, the difference being the indication of the contributing value of the water use right to the property. The question to be investigated by the valuer in using this approach is whether a notional fully informed hypothetical purchaser would pay a premium for the water use rights when purchasing the land. Simultaneously the valuer will have to consider whether a

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226 Armitage, Nieuwoudt and Backeberg 1999 *Water SA* 303.

227 Mr. Alan Stephenson is a professional valuer and appraiser, employed at the Mills Fitchet Group in Pietermaritzburg. His contact details are as follow: e-mail address: alans@millsfitchet.co.za cell nr: 082 895 8880. Mr. Stephenson and I corresponded via e-mail. All recommendations made by him have been included in this mini-dissertation.

228 A full market basis can be seen as complete observance of the price or value attached to the property throughout the entire market that exists between willing buyers and willing sellers.

229 Squire *South African Property and the Valuer* 150.

230 Thompson *Water Law* 521.

notional fully informed hypothetical seller would expect value to be added for the water use right when selling the land.

In the event where the comparative sales or market value shows evidence that in the particular area where the relevant properties are located, a premium or additional amount is paid by buyers in order to purchase one of the properties with the water use right, then the valuer is obliged to place a monetary value on that right. Such value will then be included as part and parcel of the market value of the property.

For instance, a "before-and-after" analysis may indicate that removing a water use right from an irrigated agricultural land will have a negative effect on the market value of the land. In this case the negative effect on the market value, caused by removing the water use right, would be the same as the value of the water right on a stand-alone basis**.** These water use rights may then sell in the open market for a similar value or, in the case where this water use right is transmitted to a heir by means of a will, this similar value will be taken as the value of the right in the estate of a person. In this regard, other sales and leases of water rights will provide the best indications of the correctness of the value. Also, when valuing a water use right on a stand-alone basis the value differential between irrigated agricultural land and non-irrigated land should be kept in mind; the value differential can serve as a test of reasonableness for the value attached to the water use right.[231]

5.2 Factors that might influence the value of a water use right

There are some factors that should be kept in mind as they might have an influence on the value of a particular water use right. The factors named in this mini-dissertation are by no means a complete list of all the factors to be taken into account; they are merely an indication of some factors that has to be considered

[231] As there is a value difference between irrigated agricultural land and non-irrigated agricultural land, there are also different values attached to water in agricultural- and non-agricultural sectors. This should also be kept in mind. In this regard see Nieuwoudt, Backeberg and Du Plessis 2004 *Agrekon* 168-177.

during the valuation process. These factors were suggested by Mr. Alan Stephenson, a professional appraiser and valuer, and Mr. Johan Barnard.[232]

The demand for and supply of water in a specific area will influence the value of a water use right.[233] If the demand for water is high, it is likely that the supply of water would be limited. In return, the value or price of water use rights is likely to be high. Conversely, where there is an abundance of water, the value attached to water use rights will be low.

Rainfall in the specific area where the agricultural land is situated will have an influence on the value of the water use right. Water use rights would have a lower value in an area where higher rainfall is experienced, in comparison to an area where lower rainfall is experienced. In South Africa, higher rainfall areas are situated in the eastern and northern parts of the country, while lower rainfall areas occur in the western and southern parts of the country. In areas where there is no shortage of water, the value attached to a water use right would be lower than in areas where water shortages do occur. The location of the irrigated agricultural land will therefore have a very important influence on the value attached to the water use right.[234] Also, a water use right that has a season of use in the summer, when there tends to be an abundance of water available, could be expected to be worth significantly less than a water use right that has a winter season of use, and *vice versa*.

The type of agricultural undertaking on agricultural land will also influence the value attached to a water use right. For instance, in the case where the agricultural land is used for farming with cattle, a lower value will be attached to the water use right than in the case where crops are being produced on the farm land. The value of the water use right will also depend upon the type of crops being produced on the land, as the amount of water needed for irrigation may vary from one type of crop to another. Soil formation may also influence the value of a water use right. Soil consisting of dolomite rock-formation is regarded as the best carrier of water. Therefore, a water

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232 Mr. Johann Barnard is a professional, geophysical water-diviner, employed throughout South Africa. His contact details are as follow: cell nr: 082 967 4627. Mr. Barnard and I corresponded via phone calls. All the factors named in this mini-dissertation that might have an influence on the value attached to a water use right have been recommended by him.

233 van der Merwe *A Method of Evaluating an Irrigation Water* 23.

234 Nieuwoudt, Backeberg and Du Plessis 2004 *Agrekon* 171-177.

use right for groundwater on a farm with a soil formation of dolomite rock will have a greater value than a water use right on a farm with a different soil formation.

Water quality also has to be taken into consideration. Higher-quality water has low salt content and an absence of other suspended solids, dissolved minerals, and chemicals. This is of great importance to irrigators concerned about long-term build-up in the soil of salts and other substances. High-quality water would therefore automatically ensure a higher value attached to a water use right.[235]

The reliability of the water supply must also be estimated. In agriculture, high assurance of water supply is needed where capital value invested in orchards and vineyards is high and crops are of a long-term nature.[236] The water law applied in South Africa and Australia does not provide farmers with as much security of water use as in the case of prior appropriation water law operating in the Western USA.[237] Under prior appropriation, requirements of senior water right holders must first be satisfied before that of more junior water right holders. Under South African and Australian water law principles the apportionment of all irrigators is reduced by the same fraction when water flow decreases.[238] In the case where there is a lack of assurance for the water use rights, the value attached to the water use right would also be lower.

Because of the large number of factors[239] that might have an influence on the value attached to a water use right, it is common for the valuer to require the assistance of other experts in order to complete a water use right valuation assignment. The services of hydrologists, engineers, well-drilling contractors, salvage specialists, and others may provide great assistance. One should keep in mind that the valuer cannot merely accept consultants' conclusions, but has a responsibility to develop a confidence level that such conclusions are reasonable and correct before incorporating them into the valuation assignment.

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235 Nieuwoudt, Backeberg and Du Plessis 2004 *Agrekon* 178-180.
236 Nieuwoudt, Backeberg and Du Plessis 2004 *Agrekon* 177.
237 Nieuwoudt, Backeberg and Du Plessis 2004 *Agrekon* 178.
238 Nieuwoudt, Backeberg and Du Plessis 2004 *Agrekon* 178.
239 Take into account that the factors named in this mini-dissertation are only an indication. There might be other factors, not named, that will also have an effect on the value of a water use right.

In the light of the discussion above it is evident that a licensed water use right does have a value in the estate of a person. The “before-and-after” approach can be used to assign a value to a licensed water use right. Throughout the valuation process, some factors has to be considered in order to assign a correct value to a licensed water use right. Some general comments on the handling of a licensed water use right as an estate asset will now be made.

6 General comments on the handling of a licensed water use right as an estate asset

The research question that had to be answered in this mini-dissertation was whether or not licensed water use rights could be regarded and protected as property under section 25 of the Constitution. Furthermore, the question had to be answered whether licensed water use rights could be classified as an asset or property in the estate of a person. In order to answer this question meaningfully it also needed to be determined how such water use rights could be valuated, and whether such water use rights were transferable for the purposes of estate planning and estate law in South Africa.

Whenever licensed water use rights or rights in accordance with the 1956-Act might occur in the estate of a client, the research done may serve as a good indication and starting point for estate planners in the South African legal sector.

The research clearly showed that a licensed water use right can be regarded and protected as constitutional property under section 25 of the Constitution.[240] It also showed that a licensed water use right can be regarded as an asset in the estate of a person.[241] The research also showed that a licensed water use right can be transmitted by means of a will to a successor-in-title.[242] It also showed that if all the requirements for a market in tradable water use rights are met, a market in tradable water use rights will successfully be established in South Africa. It will then be possible to transfer licensed water use rights from one person to another by means

[240] In chapter 3 of this mini-dissertation.
[241] In chapter 4.1 of this mini-dissertation.
[242] In chapter 4.2 of this mini-dissertation.

of (for instance) sale agreements.[243] Furthermore, it showed that a licensed water use right does have a value in the estate of a person and suggested a valuation approach to be followed in determining the value of this water use right. It also indicated a number of factors that could influence the value attached to a licensed water use right.[244] These are key factors that should be taken into account by estate planners in the handling of a licensed water use right as an estate asset.

7 Conclusion

To overcome the lack of guaranteed sustainable water rights, South African farmers typically retained surplus water use rights for drought years. South African farmers may not be able to do this in future if non-use rights (sleepers) are lost. At an AgriSA water conference, the previous Minister of Water Affairs, Buyelwa Sonjica, warned farmers in the agriculture sector.[245] Sonjica said that as the country`s largest consumer of water, the agriculture sector has a responsibility to conserve water as a natural resource and farmers will soon be forced to apply for water licences in a number of catchment areas.[246] Sonjica further stated that farmers might have to cut back on the use of surplus water use rights, but would not be denied essential water required for efficient food production. This compulsory licensing process will be initiated as soon as possible and commercial farmers must expect that their water allocations for irrigations could be curtailed.[247] Sonjica also said that water conservation measures has to be put in place in order to reduce water demand and increase the agricultural output per cubic metre of water consumed.[248]

This shows that the Minister has every intention to give practical effect to the provisions of the NWA. In the previous water law dispensation, farmers were allowed to sell and bequeath land and water as a unity. In accordance with the NWA this can no longer be done. Even though farmers may have been able to do this up to now, the Minister has indicated that the practical application of the NWA would be put in

243 In chapter 4.3 of this mini-dissertation.
244 In chapter 5 of this mini-dissertation.
245 Prinsloo L “Compulsory Licensing” 27 August – 2 September 2010 *Engineering News* 37.
246 Prinsloo 27 August – 2 September 2010 *Engineering News* 37.
247 Prinsloo 27 August – 2 September 2010 *Engineering News* 37.
248 Prinsloo 27 August – 2 September 2010 *Engineering News* 37.

force as soon as possible. Licensed water use rights and the land will be considered as separate entities. This could place estate planners and farmers in a position where they must reconsider the provisions made for the bequeathing of land and licensed water use rights. In the case where land and licensed water use rights have been bequeathed as a unity, these provisions have to be altered. Consequently, provision has to be made in the will of the beneficiary to bequeath land and licensed water use rights separate from each other. In the case where the client possesses licensed water use rights, without being an owner of land, estate planners have to remember to attach a value to these rights in the estate of the specific person and to provide for the succession of these rights.

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List of Abbreviations

Am. U. Int'l L. Rev. Amsterdam University International Law Review

DWA	Department of Water Affairs
DWAF	Department of Water Affairs and Forestry
Fn	Footnote
J	Judge
LEAD	Law, Environment and Development Journal
Par	Paragraph
PER	Potchefstroomse Elektroniese Regstydskrif
Pg	Page
S	Section
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
Water SA	Water South Africa