

# **Repealing the Subdivision of Agricultural Land Act: A constitutional analysis**

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Thesis presented in fulfilment of the requirements for the degree of Master of Laws  
at Stellenbosch University



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December 2010

# Declaration

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# Summary

All agricultural subdivisions in the Republic of South Africa are regulated by the Subdivision of Agricultural Land Act 70 of 1970. The declared purpose of the Act is to prevent the creation of uneconomic farming units and this purpose is achieved through the requirement that the Minister of Agriculture, Forestry and Fisheries (“Minister of Agriculture”) must consent to the proposed subdivision. The Act was promulgated in the 1970s when the South African landscape was racially divided. The government of the time used law to provide benefits for the white minority. At this time the rights of non-whites were restricted. This is the social and political background of the Subdivision of Agricultural Land Act. The Act formed part of a legislative scheme that provided benefits for white farmers. More than a decade after democratisation and the end of apartheid the Subdivision of Agricultural Land Act is still in operation. The post-apartheid legislature drafted and enacted the Subdivision of Agricultural Land Act Repeal Act 64 of 1998, but it has not yet been brought into operation. During 2003 the legislature tabled the Draft Sustainable Utilisation of Agricultural Resources Bill which contains subdivision provisions that are identical to the provisions contained in the Subdivision Act. These legislative actions have created some uncertainty about the state of agricultural subdivisions. In 2008 the Constitutional Court decided that the Act continues to apply to all agricultural subdivisions and that this would be the position until the legislature chooses a definitive course of action.

This constitutional analysis of the Subdivision of Agricultural Land Act examines the effect of the Act beyond the pre-constitutional legislative intention and framework under which it was enacted. If the Act cannot be saved from its apartheid context, the Repeal Act should become operational. This thesis concludes that the necessary and legitimate purpose of the Act, namely the regulation of subdivision of agricultural land, can be removed from its pre-constitutional setting in the apartheid era and may continue to justify the legitimate regulation of subdivision of land. Comparative sources, namely the United States of America, specifically the states of Oregon and

Hawaii, Western Australia and the province of British Columbia, Canada indicate that the regulation of agricultural subdivisions is a valid means of protecting agricultural land.

If the Act can continue to exist without its legacy of apartheid and still serves a legitimate and necessary purpose it will have to be constitutionally compliant. The purpose of the Act and the means used to realise it were tested against the Bill of Rights. The effect that the regulation has particularly on ownership entitlements was examined against section 25(1) of the 1996 Constitution. Similarly, the consequences of the regulation with regard to other rights in the Bill of Rights were investigated. The conclusion was that where the Subdivision of Agricultural Land Act is used for its purpose of preventing the uneconomic subdivision of agricultural land, in the national interest, it is a legitimate land-use regulation that can continue to justifiably operate in a constitutional dispensation.

# Opsomming

Alle onderverdelings van landbougrond in die Republiek van Suid-Afrika word gereguleer deur die Wet op die Onderverdeling van Landbougrond 70 van 1970. Die verklaarde doel van die Wet is om die totstandkoming van onekonomiese landbou-eenhede te voorkom, en hierdie doel word bereik deurdat die Minister van Landbou, Bosbou en Visserye ("Minister van Landbou") toestemming moet verleen vir die voorgestelde onderverdeling van landbougrond. Die Wet is in die 1970s gepromulgeer toe grond in Suid-Afrika in terme van ras verdeel was. Die destydse apartheidsregering het die regstelsel gebruik om voordele vir die blanke minderheidsgroep te bewerkstellig, terwyl die regte van nie-blankes ingeperk was. Dit is die sosiale en politieke agtergrond waarteen die Wet op die Onderverdeling van Landbougrond tot stand gekom het. Die Wet was deel van 'n wetgewende raamwerk waarbinne voordele vir blanke boere geskep is. Meer as 'n dekade na apartheid en die totstandkoming van 'n demokratiese Suid-Afrika is die Wet op die Onderverdeling van Landbougrond steeds in werking. Die post-apartheid wetgewer het die Wet op die Herroeping van die Wet op die Onderverdeling van Landbougrond 64 van 1998 gepromulgeer, maar nog nie in werking gestel nie. Gedurende 2003 het die wetgewer die "Draft Sustainable Utilisation of Agricultural Resources Bill", wat onderafdelings soortgelyk aan die bepalings in die Wet op die Onderverdeling van Landbougrond bevat, gepromulgeer. Bogenoemde stappe het onsekerheid geskep ten opsigte van die stand van onderverdeling van landbougrond. In 2008 het die Konstitusionele Hof beslis dat die Wet op die Onderverdeling van Landbougrond sal voortgaan om die onderverdeling van landbougrond te reguleer totdat die wetgewer uitsluitel oor die aangeleentheid verskaf.

Die doel van die tesis is om die uitwerking van die Wet op die Onderverdeling van Landbougrond te analiseer as deel van die huidige grondwetlike bedeling, aangesien dit geskep is tydens die apartheidsera. Indien die Wet nie van sy apartheidskonteks geskei of gered kan word nie sal die Herroeping Wet in werking gestel moet word.

Die tesis kom tot die gevolgtrekking dat die doel van die Wet, naamlik die regulering van die onderverdeling van landbougrond, van die voor-konstitusionele agtergrond in die apartheids-era geskei kan word en dat dit kan voortgaan om die wettige regulering van onderverdeling van landbougrond te regverdig. Regsvergelykende bronne, naamlik die Verenigde State van Amerika, veral die state van Oregon en Hawaii, Wes Australië en Brits-Columbië, 'n provinsie van Kanada, dui aan dat die regulasie van die onderverdeling van landbougrond 'n regsgeldige metode is om landbougrond te beskerm. Die doel van die Wet en die metodes wat gebruik word om hierdie doel te laat realiseer is getoets teen die Handves van Menseregte. Die uitwerking van die regulasie op die inhoudsbevoegdheid van die eienaar is spesifiek geëvalueer teen artikel 25(1) van die 1996 Grondwet, maar die gevolge van die regulasie is ook getoets teen ander regte in die Handves van Menseregte. Die gevolgtrekking was dat waar die Wet op die Onderverdeling van Landbougrond gebruik word met die doel om onekonomiese onderverdeling van landbougrond te verhoed in die nasionale belang, dit 'n legitieme regulasie van grondgebruik is waarvan die gebruik steeds regverdigbaar is in 'n grondwetlike bedeling.

# Table of contents

<b>Declaration</b> .....	<b>i</b>
<b>Summary</b> .....	<b>iii</b>
<b>Opsomming</b> .....	<b>v</b>
<b>Table of contents</b> .....	<b>vii</b>
<b>Chapter 1: Introduction</b> .....	<b>1</b>
1 1 Introduction .....	1
1 2 Hypotheses and research aims.....	4
1 3 Overview of substantive chapters .....	6
1 3 1 Analysis of the Subdivision of Agricultural Land Act .....	6
1 3 2 Identifying and separating the legitimate purpose from the illegitimate aim .....	9
1 3 3 Section 25 compliance.....	10
1 3 4 General constitutional compliance.....	11
1 4 Methodologies.....	14
<b>Chapter 2: Analysis of the Subdivision of Agricultural Land Act</b> .....	<b>16</b>
2 1 Introduction .....	16
2 2 Historical development of the Act.....	18
2 2 1 Agricultural landholding before the Subdivision Act.....	18
2 2 2 Policy reasons for the enactment .....	22

2 2 3	Promulgation .....	29
2 3	Interpretation of the Act.....	30
2 3 1	Land affected by the regulation .....	30
2 3 2	Actions which are excluded from the Act's application .....	44
2 3 3	Prohibition of certain actions regarding agricultural land .....	46
2 3 3 1	Subdivision of agricultural land .....	46
2 3 3 2	Vesting of an undivided share .....	46
2 3 3 3	Vesting of a part of an undivided share .....	48
2 3 3 4	Long-term lease over a portion of agricultural land.....	48
2 3 3 5	Sale or advertising for sale of a portion of agricultural land .....	50
2 3 4	Application for the Minister's consent .....	64
2 3 5	Succession .....	65
2 3 6	Servitudes.....	65
2 3 7	Offences and penalties.....	67
2 4	Current status of the Act .....	67
2 5	Concluding remarks .....	70
<b>Chapter 3: Identifying and separating the legitimate purpose from the illegitimate aim of the Act.....</b>		<b>73</b>
3 1	Introduction .....	73
3 2	Land-use regulations.....	75

3 2 1	Land-use regulation defined .....	75
3 2 2	Justification for land-use regulation .....	78
3 2 3	Subdivision as land-use regulation .....	82
3 2 3 1	Purpose of subdivision.....	82
3 2 3 2	Subdivision of Agricultural Land Act .....	83
3 2 3 3	Comparative policy and legislation .....	86
3 3	Concluding remarks .....	90
<b>Chapter 4: Section 25 compliance.....</b>		<b>92</b>
4 1	Introduction .....	92
4 2	The FNB methodology .....	94
4 2 1	Is there an interest in the property? .....	94
4 2 2	Is there a deprivation? .....	97
4 2 3	Does the deprivation fulfil the requirements of sections 25(1)? .....	99
4 2 3 1	Law of general application .....	99
4 2 3 2	Is the deprivation an arbitrary deprivation? .....	100
4 2 4	Does the Act comply with the requirements for a valid expropriation? .....	106
4 3	Conclusion .....	110
<b>Chapter 5: General constitutional compliance.....</b>		<b>112</b>
5 1	Introduction .....	112
5 2	The affected rights .....	114

5 2 1	Equality.....	114
5 2 2	Just administrative action .....	123
5 3	Conflicting rights.....	130
5 4	National, provincial or municipal competency? .....	137
5 5	Conclusion .....	140
<b>Chapter 6: Conclusion .....</b>		<b>143</b>
6 1	Introduction .....	143
6 2	Overview of chapters .....	146
6 2 1	Analysis of the Subdivision of Agricultural Land Act .....	146
6 2 2	Identifying and separating the legitimate purpose from the illegitimate aim	149
6 2 3	Section 25 compliance.....	150
6 2 4	General constitutional compliance.....	153
6 3	Concluding remarks .....	158
<b>List of abbreviations .....</b>		<b>160</b>
<b>Bibliography .....</b>		<b>161</b>
<b>Legislation .....</b>		<b>166</b>
	Foreign legislation.....	166
	South African legislation .....	166
<b>Case law.....</b>		<b>169</b>

**Electronic sources ..... 172**

# Chapter 1: Introduction

## 1 1 Introduction

The Subdivision of Agricultural Land Act (“Subdivision Act”)<sup>1</sup> regulates the subdivision of all agricultural land in the Republic. The declared purpose of the Act is to prevent the creation of uneconomic farming units and this purpose is achieved through the requirement that the Minister of Agriculture, Forestry and Fisheries (“Minister of Agriculture”) must consent to the proposed subdivision. This purpose is to prevent the degradation of prime agricultural land in the Republic. However, the Act was crafted with more than uneconomic farming units in mind. It was crafted and implemented at a time when white South African agricultural interests were being promoted and protected by the apartheid government. At this time black South Africans were limited to land that was released by the state. This is the social and political background of the Subdivision Act. The Act was arguably used to promote an apartheid agenda which preserved prime agricultural land for white farmers. If the Act was in fact used to promote this apartheid agenda, it will be necessary to distinguish and separate this agenda from the necessary regulation that prevents the creation of uneconomic farming units. The use of the Act to promote this apartheid agenda will be termed “the illegitimate aim of the Subdivision Act”. The regulation that serves to prevent agricultural degradation by preventing the creation of uneconomic units will be termed “the legitimate purpose of the Subdivision Act”. The legitimate purpose will have to be separated from the illegitimate aim. The severance of the illegitimate aim of the Act from the legitimate purpose is necessary to justify the continued operation of the Subdivision Act in a constitutional dispensation. However, this severance, if possible, will not mean that the Act is automatically constitutional. It will be necessary to further test the legitimate purpose for constitutional consonance. The legitimate purpose of the Act will have to be tested in terms of the Constitution of the Republic 1996. This constitutional analysis of the Subdivision Act will examine the effect of the Subdivision Act beyond the pre-constitutional legislative intention and framework under which it was created.

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<sup>1</sup> 70 of 1970.

The Subdivision Act's declared purpose is "[t]o control the subdivision and, in connection therewith, the use of agricultural land".<sup>2</sup> This is what is termed the legitimate purpose of the Act. To achieve this purpose the Act regulates the subdivision and most of the actions that could result in the subdivision of agricultural land. These actions include the sale or long term lease, the registration of servitudes, subject to exceptions, and the disposition of a portion of agricultural land. These actions may not occur without written consent from the Minister of Agriculture. These limitations on the right of an owner to subdivide agricultural land and alienate or lease or to encumber it with servitudes are clearly acts of regulation. The regulation is aimed at preventing the subdivision of land into uneconomic portions. The Act exists to regulate the agricultural sector to prevent a loss of land specifically zoned for agricultural purposes.

Apart from the declared purpose of the Act, it is clear that the Act also has the effect of determining who may obtain agricultural land. This relates to the history and context of the Act and the state of agricultural landholding because of the legacy of apartheid. It will be argued that the Act was used to preserve prime agricultural land for white ownership and occupation. This is the illegitimate aim of the Act. The limitation on the right of agricultural land owners to subdivide and dispose of their land is in effect a limitation on the free disposal of agricultural land which would promote access to this land. The operation of the Act would ensure that white farmers could retain agricultural holdings obtained during the apartheid period. The power the then Minister had to oversee agricultural subdivisions was used to further ensure that white farmers retained control of prime agricultural holdings. The power of the Minister in terms of the Act, the limitation on disposal because of the operation of the Act and the legislative scheme that created the Act will serve as evidence for the argument that the Subdivision Act serves and served racially segregated agricultural land holding. It served racially segregated agricultural land holding by

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<sup>2</sup> Subdivision of Agricultural Land Act 70 of 1970, long title.

preserving agricultural land for whites. It still serves racially segregated agricultural land holding because the Act limits the disposal of agricultural land. It allows whites who obtained this land under apartheid to maintain ownership of agricultural holdings and it is an obstacle to black access.

During 1998 the post-apartheid legislature passed the Subdivision of Agricultural Land Act Repeal Act (“Repeal Act”).<sup>3</sup> The Repeal Act has not has been brought into operation yet, but has created some uncertainty. The reasons for drafting this Repeal Act, as well as the reasons for not implementing it, will need to be considered. A decade after the still inoperative Repeal Act was promulgated the Constitutional Court handed down a judgment which effectively decided on the continued application of the Subdivision Act. In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* (“*Wary Holdings*”)<sup>4</sup> the Constitutional Court had to decide whether agricultural land still existed for the purposes of the Subdivision Act. The case was not decided on the constitutionality of the provisions of the Act, but on the question whether the definition of “agricultural land” in the Act would continue to apply after municipal restructuring throughout the Republic. The Subdivision Act only affects agricultural land and the apartheid legislature defined this land in the Act as all the land not situated in the jurisdiction of a municipality or town council. This definition has become problematic because wall-to-wall municipalities have been established throughout the Republic.<sup>5</sup>

This thesis will attempt to do four things. The first will be to identify the legitimate purpose of the Subdivision Act, namely the preservation of agricultural land for agricultural purposes. The second is to show that the Act was used for an illegitimate aim during apartheid, namely the preservation of agricultural land for whites. The

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<sup>3</sup> 64 of 1998.

<sup>4</sup> 2008 (11) BCLR 1123 (CC).

<sup>5</sup> The Municipal Demarcation Act 27 of 1998 and the Municipal Structures Act 117 of 1998, sec 93(8) had in effect created wall-to-wall municipalities and would have excluded the Subdivision Act's operation.

third is to distinguish the illegitimate aim and the legitimate purpose for the purpose of trying to effectively separate them. Here it will be necessary to determine what constitutes legitimate land-use regulations over property. This will set the standard that the Subdivision Act needs to be tested against to determine whether it is a regulation that can operate free from its illegitimate aim. If the Act cannot be saved from its apartheid context then the Repeal Act should be put into operation and new legislation should replace it. After this process a legitimate and functional purpose of the Act should remain. The fourth will be to test the remaining legitimate regulation against constitutional provisions. If the Act can continue to exist without its legacy of apartheid it will have to be proved to be constitutionally compliant, especially where the continued application of the Act perpetuates the inequitable legacy of apartheid land allocation. This will show that the 1970s regulation is a valid and constitutionally sound regulation that can continue to justifiably regulate agricultural subdivisions in the current dispensation.

## **1 2 Hypotheses and research aims**

The first assumption necessary for this constitutional analysis of the Subdivision Act is that that Act serves a legitimate purpose in a constitutional democracy despite its racialised apartheid past. The analysis of the Subdivision Act aims to show that the Act serves a legitimate purpose that is still valid in post-apartheid law, namely the prevention of the uneconomic subdivision of agricultural land.

The Act appears to only regulate agricultural subdivision, but it may also have an illegitimate aim or motive because of the apartheid context within which it was created. The analysis of the Act will further identify that the Act was also used for an illegitimate goal during the apartheid era, namely the preservation of productive farmlands for whites. The history of the Act and policy reasons for its enactment will be used to identify this aim.

It is necessary to assume that the legitimate purpose of the Act can be separated from the illegitimate aim and that it still has a legitimate function, namely regulation of agricultural subdivision. The further assumption is that if separation is not possible the Act should be repealed and new legislation should replace it. It is necessary to argue that, if the legitimate purpose can be separated from the illegitimate apartheid goal, a functional purpose for the regulation will remain, namely to prevent the uneconomic subdivision of agricultural land. It can be accepted that if the identified illegitimate aim cannot be separated from the legitimate purpose that the Act would be unconstitutional. It will be necessary to define what constitutes a rational and justifiable regulation over property to distinguish between the purpose and the aim. Testing the Act against the standard of a “rational and justifiable regulation” should indicate whether the legitimate purpose of the Act can continue to operate without the illegitimate aim.

I further assume that a regulation, like the Subdivision Act, that poses excessive restrictions or burdens on certain ownership entitlements and may be in conflict with section 25 of the Constitution. Even though the regulatory purpose of the Subdivision Act may be found to be legitimate, it will nevertheless have a restricting effect on ownership entitlements, specifically on the right to subdivide and then to sell, lease or bequeath the portion of agricultural land and the right to register certain servitudes over the land without consent from the Minister of Agriculture. In the constitutional era, it is necessary to determine whether this restricting effect complies with section 25(1) of the Constitution.

The final assumption is that from the existing case law it should be possible to test the Subdivision Act for general constitutional compliance. The aim is to test the further constitutional implications of the Act against the Bill of Rights and existing case law. This would indicate the Act's compliance in terms of the Constitution. This would focus on the limitation on access to prime agricultural land, the Minister's powers in terms of the Act, the conflict of rights promoted by the Act's purpose and

those restricted by this purpose and finally the issue of competences under the Constitution.

### **1 3 Overview of substantive chapters**

#### *1 3 1 Analysis of the Subdivision of Agricultural Land Act*

The analysis of the Subdivision of Agricultural Land Act chapter will serve as an analysis of the historical background of the Subdivision Act, the policy reasons for its enactment, the provisions that allow the Act to serve its purpose of preventing the uneconomic fragmentation of agricultural land and considerations for its future application.

The context and policy from which the Act was crafted will serve as a historical background. This history will also identify the illegitimate aim of the Act, namely the preservation of prime agricultural land for white ownership and occupation. The legislative tools used to dispossess black South Africans and provide benefits for the white minority will contextualise the creation of the Act. This will serve as the premise for the argument that the Subdivision Act served and serves racially segregated agricultural land holding. The continued effect of the Subdivision Act on the right of an agricultural land owner to subdivide and dispose of their land could affect black access to agricultural land. It is a fact that the majority of prime agricultural in the Republic is held by white owners and they obtained this land under an apartheid system. Insofar as the Act prevents or is an obstacle to the disposal of this land, it could be seen as preserving a state of apartheid land allocation. If the Act continues to perpetuate this state it will need to be amended or abolished. The policy reasons for the regulation of subdivision will show that the concern for the creation of uneconomic farming units was in fact a concern for the wellbeing of the white farmer. The Select Committees on Subdivision of Agricultural Land<sup>6</sup> were mandated to

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<sup>6</sup> Republic of South Africa Committee on Subdivision of Agricultural Land *Report SC 9-64* (1964) 1-88; Republic of South Africa Committee on Subdivision of Agricultural Land *Report SC 4-65* (1965) 1-51.

investigate the feasibility of state control over agricultural subdivisions in the Republic. The reports will indicate that the Committees were concerned that the rate of agricultural subdivisions would create a white peasant farming community. The policy analysis will clearly show the two elements of the Subdivision Act, the legitimate purpose of preserving agricultural land and the illegitimate aim of preserving this land for white use.

In terms of the Subdivision Act landowners are compelled to apply for, and the Minister of Agriculture is empowered to approve or deny, applications for agricultural subdivision. This is to preserve prime agricultural land in the national interest. The interpretation of the Act's provisions will identify the steps the legislature has taken in limiting the right of agricultural landowners to subdivide their land. It will also show that the Act restricts not only the act of subdivision, but most actions that may lead to the subdivision of agricultural land.<sup>7</sup> These include the sale and advertising for sale of a portion of agricultural land, long-term lease of a portion of agricultural land, the disposition of a portion of agricultural land and the registration of certain servitudes. This section will emphasise the definition of agricultural land,<sup>8</sup> as only agricultural land is affected by this regulation; actions related to agricultural land that are not affected by the Act's operation;<sup>9</sup> actions that are prohibited;<sup>10</sup> the extent of the Minister's consent;<sup>11</sup> the restrictions placed on succession<sup>12</sup> and servitudes;<sup>13</sup> and the penalties and fines<sup>14</sup> imposed when contravening the Act. The courts' interpretation of these various provisions will also be considered in this section. The majority of the cases dealing with the Act will show that the regulation and

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<sup>7</sup> Subdivision of Agricultural Land Act 70 of 1970, sec 3.

<sup>8</sup> Subdivision of Agricultural Land Act 70 of 1970, sec 1(a) – (f).

<sup>9</sup> Subdivision of Agricultural Land Act 70 of 1970, sec 2.

<sup>10</sup> Subdivision of Agricultural Land Act 70 of 1970, sec 3.

<sup>11</sup> Subdivision of Agricultural Land Act 70 of 1970, sec 4.

<sup>12</sup> Subdivision of Agricultural Land Act 70 of 1970, sec 5(1).

<sup>13</sup> Subdivision of Agricultural Land Act 70 of 1970, sec 6A.

<sup>14</sup> Subdivision of Agricultural Land Act 70 of 1970, sec 11.

requirements have been used to escape contracts of sale of agricultural land. Contracting parties would use the technicalities of the Act, specifically the requirement of written ministerial consent, to escape contracts with unfavourable terms. This was the case in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* (“*Wary Holdings*”).<sup>15</sup> The Constitutional Court in *Wary Holdings* had to decide whether agricultural land still existed for the purposes of the Subdivision Act. This finding would have directly affected the contract of sale between the parties, but would also have had an effect on the status of agricultural land subdivisions over the entire country. The respondent argued that the Act had no application because of the limited definition of agricultural land in section 1,<sup>16</sup> and that it no longer held any relevance because of municipal restructuring throughout the Republic.<sup>17</sup> The main purpose of this contention was to enforce the contract which sold a subdivided portion of agricultural land, but did so without the necessary written consent. The court provided an interpretation of the definition of “agricultural land” in the Act and the proviso it was subject to. A discussion of the constitutional issues raised in the *Wary Holdings* decision is necessary. Although the decision does not deal with the effect of the regulation on rights in the Bill of Rights, it does raise issues with the competency of national government to regulate agricultural subdivision and provides an interpretation of the definition of “agricultural land” which is central to the operation of the Act.

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<sup>15</sup> 2008 (11) BCLR 1123 (CC).

<sup>16</sup> Subdivision of Agricultural Land Act 70 of 1970, sec 1 states that “[a]gricultural land means any land, except - (a) land situated in the area of jurisdiction of a municipal council, city council, town council, village council, village management board, village management council [...] Para (a) amended by s 1 (a) of Act No 33 of 1984, and by Act No 49 of 1996”.

<sup>17</sup> The Municipal Demarcation Act 27 of 1998 and the Municipal Structures Act 117 of 1998, sec 93(8) had in effect created wall-to-wall municipalities and would have excluded the Subdivision Act’s operation. However, the inclusion of the proviso in GN R100 of 1995 GG 16785 which extended the operation of the Subdivision Act beyond the transitional period, during which the final municipalities were to be finalised, created uncertainty as to the continued application and operation after the end of the transitional period.

The current status of the Act since the promulgation of the Subdivision of Agricultural Land Act Repeal Act<sup>18</sup> needs to be considered. The Repeal Act is still inoperative with a date of operation to be determined by the President. The reasons provided for the repeal were that the post-apartheid legislature no longer finds it appropriate for government to decide on the size of agricultural holdings. The legislature also stated that other legislation was already in place to protect and conserve agricultural land. It has been more than a decade since the Repeal Act was promulgated and it remains inoperative. A great deal of uncertainty was created after the promulgation of the Repeal Act. The status of agricultural subdivisions and the state's intention of how this regulation will be dealt with in future are discussed in this section. The Draft Sustainable Utilisation of Agricultural Resources Bill of 2003 was drafted, but never presented to Parliament. The Draft Bill was revisited in 2007, but there have been no developments since. The Bill contains provisions that are identical to the Subdivision Act. It will be necessary to question the existence of the Repeal Act in light of legislature's intention with the Draft Bill.

### *1 3 2 Identifying and separating the legitimate purpose from the illegitimate aim*

The Subdivision Act is legislation that was crafted during the apartheid period. It is a regulation that has a legitimate purpose, but also an inherently illegitimate aim. The Act's legitimate purpose is the societal need to protect and preserve agricultural land, whereas the illegitimate aim was the apartheid aim to preserve prime agricultural land for white use and occupation. The state's intervention in this regard was to prevent agricultural land from being subdivided into uneconomic units. This fostered white agricultural interests and through the requirement of ministerial consent prevented black South Africans from gaining access to agricultural land. The legitimate purpose and the illegitimate aim exist side-by-side in this legislative text. This is the situation in most of apartheid planning law and land-use management. To separate the purpose of the Act from the aim of the Act, if this is at all possible, will be the focus of the chapter on identifying and separating the legitimate purpose and

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<sup>18</sup> 64 of 1998.

the illegitimate aim of the Act. The use of comparative examples will further indicate whether the subdivision regulation is a legitimate land-use regulation.

An understanding of land-use regulations as legitimate limitations on the rights of the owner will aid in identifying a rational and legitimate purpose in the Subdivision Act. The justifications for imposing regulations over property often fall within the categories of public health, safety and the general welfare of the citizens. The state can exercise its police powers in terms of these justifications. The South African pre-constitutional context will have to be considered and the distinction between what is perceived to be a legitimate and neutral land-use regulation and its creation under the apartheid order will be questioned. An understanding of what constitutes a legitimate regulation imposed by a state authority will be used to distinguish and separate the legitimate purpose from the illegitimate aim of the Act. If the Subdivision Act cannot satisfy the factors identified for a valid and justifiable land-use regulation it will be assumed to still serve the illegitimate aim. The foreign jurisdictions, specifically the United States of America, focussing on the states of Oregon and Hawaii, Western Australia and the province of British Columbia, Canada, will be used to identify legitimate land-use regulations that serve to protect agricultural land. This will provide further clarity when deciding whether a Subdivision Act is a legitimate land-use regulation over agricultural land. Identifying and separating the illegitimate from the legitimate purpose will be able to justify the continued operation of the Act in a constitutional dispensation.

### *1 3 3 Section 25 compliance*

Section 25 provides that a deprivation of property may not be arbitrary. In *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* (“FNB”)<sup>19</sup> the Constitutional Court decided that a deprivation

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<sup>19</sup> 2002 (4) SA 768 (CC).









and Hawaii, Western Australia and the province of British Columbia, Canada will aid in identifying the legitimate purpose in the Subdivision Act. The legitimate statutory regulations over agricultural land in these foreign jurisdictions will aid an interpretation of the Subdivision Act and will serve to justify the Act's continued application.













white South Africans could own agricultural land and this was predominantly in the productive areas outside of the homelands.

Numerous other Acts<sup>37</sup> that directly affected the agricultural sector were promulgated during the period from 1948 to the late 1980s and were aimed at providing benefits for the white farming minority. Throughout this period agriculture and agricultural landholding was further compartmentalised along racial lines. Black farmers were restricted in the way agricultural land could be held and acquired. This position was further aggravated through the implementation of agricultural policy that allowed for the exclusion of black farmers from financial support and market services.<sup>38</sup> White farmers were receiving these benefits. The Subdivision of Agricultural Land Act formed part of this legislative scheme. The policy reasons for its enactment reflect the state’s role in the promotion and preservation of white agricultural interests.

## *2 2 2 Policy reasons for the enactment*

The development of the Act from policy to enactment is contained in two policy documents. These documents are the written records of evidence led by the Select Committees on Subdivision of Agricultural Land.<sup>39</sup> The Committees were mandated to investigate the feasibility of state regulation over the common law right to subdivide with the aim of preventing the uneconomic subdivision of agricultural land. The focus was placed on the need for the regulation, what the consequences for failing to regulate would be, whether state regulation of the practice of subdivision was appropriate and how this regulation would work.

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<sup>37</sup> The Agricultural Credit Act 28 of 1966, the Marketing Act 59 of 1968, the Designated Areas Development Act 87 of 1979 and the Co-operatives Act 91 of 1981 are examples of statutes promulgated during this period and that have remained on the statute book.

<sup>38</sup> De Wet CJ, McAllister PA and Hart T “The land tenure and rural development workshop: an analytical overview” (1987) 4 *Development South Africa* 371-387 at 372.

<sup>39</sup> Republic of South Africa Committee on Subdivision of Agricultural Land *Report SC 9-64* (1964) 1-88; Republic of South Africa Committee on Subdivision of Agricultural Land *Report SC 4-65* (1965) 1-51.











































































condition. The court *a quo* found that the extension was to prevent the use of suspensive conditions that managed to circumvent the requirement of ministerial consent, making the respective agreements subject to conditions other than the Minister's consent. This would have the effect of making the agreement fall outside the ambit of the definition of sale in the Act. On this basis the legislature had a good reason to prevent avoidance of the Act's requirement. It was contended that the suspensive condition contained in the parties' agreement was not aimed at avoiding the requirement of ministerial consent as required under the Subdivision Act. The Supreme Court of Appeal rejected this contention. Brand JA indicated that presupposing that the legislature only wanted to prevent the transfer of an undivided portion of land without ministerial consent was incorrect. The Act does not only prohibit the alienation of an undivided portion of land. It also prohibits the advertising for sale of agricultural land without ministerial consent. This is an act that precedes sale and alienation. Brand JA stated that the absurdity claimed by the court *a quo* cannot be used to avoid the legislature's clear intention and that speculating on the real purpose and intended result of the provision was dangerous. It served no purpose to speculate on the reason for this prohibition on agreements concluded by the parties. The court thus found that the agreement concluded by the parties was in contravention of section 3(e)(i).<sup>198</sup>

The further contention raised by the respondent was that if the agreement was in fact in contravention of section 3(e)(i) it was not null and void. The basis for the contention was that the Act did not declare contracts concluded in contravention to be null and void and the fact that the Act contains a penalty provision should be the only sanction for the offence. The court indicated that an agreement that is in conflict with a statutory provision is not *ipso iure* void unless the intention for nullity can be imputed to the legislature. The court referred to the earlier High Court decisions<sup>199</sup> on

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<sup>198</sup> *Geue v Van der Lith and Another* [2003] 4 All SA 553 (SCA) paras 15-16.

<sup>199</sup> *Tuckers Land Development Corporation (Pty) Ltd v Truter* 1984 (2) SA 150 (SWA); *Smith v Tuckers Land Development Corporation (Pty) Ltd*; *Tuckers Land Development Corporation (Pty) Ltd v Smith* 1984 (2) SA 166 (T); and *Tuckers Land Development Corporation (Pty) Ltd v Wasserman* 1984 (2) SA 157 (T) and *Hamilton-Browning v Denis Barker Trust* 2001 (4) SA 1131 (N).





























































preserved and protected. The regulation of agricultural land with the purpose of preserving it for agricultural purposes is, therefore, a legitimate land-use regulation.

The illegitimate aim of the regulation did not focus on the limitation placed on agricultural land owners. This focus was the history and context in which the Act was crafted. The effects of the Act as a limitation on the rights of agricultural land owners will still need to be tested against constitutional requirements. The following chapter will examine and test the constitutional validity of this type of land-use regulation within the framework of section 25(1) of the Constitution of the Republic of South Africa. The Act may be legitimate, but it nevertheless has a restricting effect on ownership entitlements, namely the right to subdivide and then sell or lease the portion of agricultural land, to register certain servitudes and to bequeath agricultural land without consent from the Minister. In the constitutional era it is necessary to determine the constitutional compliance of these restrictions.



Van Wyk submits that the Subdivision Act has always been a prime example of the extent to which the exercise of ownership can be limited by legislation.<sup>5</sup> The Act has a restricting effect on the right of agricultural land owners to dispose of their property. This limitation on the exercise of ownership will have to be tested against section 25(1) of the Constitution. Section 25(1) states that “[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property”.<sup>6</sup> This chapter will consider whether the Subdivision Act, as a law of general application, arbitrarily deprives agricultural land owners of the right to dispose of their property. Constitutional case law will be used to test the Subdivision Act for constitutional compliance. In this instance the judgment in *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* (“FNB”)<sup>7</sup> will be central to the discussion. The court in its interpretation of section 25 provides a useful test which will be used to determine whether the Subdivision Act is section 25(1) compliant.

In terms of the *FNB* test this chapter will identify whether what is being taken away under the Subdivision Act constitutes property under section 25, whether there has been a deprivation of this property and whether this deprivation is consistent with section 25(1). It will also be necessary to determine whether the Act’s provisions comply with section 25(2) and (3) as the Act makes provision for expropriation in certain cases.

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<sup>5</sup> Van Wyk J “Is subdivision of agricultural land part of municipal planning?” (2009) 24 *SAPR/PL* 545-562 545. See also Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 108-109, Van der Merwe CG *Sakereg* (2<sup>nd</sup> ed 1989) 180, Carey Miller DL with Pope A *Land title in South Africa* (2000) 122.

<sup>6</sup> Constitution of the Republic of South Africa 1996.

<sup>7</sup> 2002 (4) SA 768 (CC).

































An expropriation in terms of section 5 of the Subdivision Act is done in terms of a law of general application; it is in the public interest and it is subject to the payment of compensation which satisfies the constitutional norm. Therefore, an expropriation in terms of the Subdivision Act will be a constitutional expropriation.

### **4 3 Conclusion**

The discussion above has considered the constitutionality of the limitations imposed on the exercise of ownership by the Subdivision of Agricultural Land Act. By testing the impugned provisions of the Act against the test created in the *FNB* decision it has become clear that the effect the Act has on the ownership entitlement of disposal is constitutionally permissible.

The chapter has identified the entitlement of disposal as an interest in property for the purposes of section 25. The limitation on disposal by the operation of the Subdivision Act is a deprivation for the purposes of section 25. It was concluded that even the “substantial interference” requirement developed by the court in *Mkontwana* would also be met. The limitation on the right of disposal was tested against the section 25(1) requirements and complies with these. The Subdivision Act is a law of general application. When testing the arbitrariness requirement the focus on substantive arbitrariness showed that there was sufficient reason for the deprivation. The interplay of the factors provided in *FNB* applied to the deprivation in the Subdivision Act required a mere rational relationship between the means and the end sought to be achieved. To prevent the creation of uneconomic farming units for the purpose of preserving agricultural land for agricultural purposes is a sufficient reason based on the requirement of mere rationality.

The Act makes provision for expropriation in section 5. This was tested against section 25(2) and (3) and was also shown to be compliant. An expropriation in terms of the Act would be in terms of a law of general application, in the public interest and would be subject to the payment of compensation. The calculation of compensation

is subject to the standard in the Expropriation Act. This standard was found to satisfy the constitutional norm, this was confirmed by the Constitutional Court, but should be questioned. In the next chapter the Act will be tested for general constitutional compliance. The further constitutional implications of the Act will be considered and tested.

# Chapter 5: General constitutional compliance

## 5 1 Introduction

The previous chapter considered the constitutionality of the limitations imposed on the exercise of ownership entitlements by the Subdivision of Agricultural Land Act (“Subdivision Act”).<sup>1</sup> Section 25 of the Constitution and the *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* (“FNB”)<sup>2</sup> decision were central to the discussion. This chapter will consider the further constitutional implications of the Subdivision Act. Ackermann J in the FNB decision stated that section 25(1) “must not be construed in isolation, but in the context of the other provisions of section 25 and their historical context, and indeed in the context of the Constitution as a whole”.<sup>3</sup> This was specific to the interpretation of the property clause in that case. Ackermann’s words indicate that a constitutional interpretation cannot only focus on one specific right interpreted in isolation, but the interplay of various rights in the Bill of Rights. Further constitutional implications can be developed from the discussion in chapter four as the court has previously indicated that rights within the Bill of Rights do not exist independently.<sup>4</sup> The rights overlap, but they can also be in tension. This tension exists between rights in the Bill of Rights. The previous chapter indicated that the limitation posed by the legitimate regulation on agricultural land owners is constitutionally permissible.<sup>5</sup> The regulation serves a socio-economic public interest, namely the preservation of agricultural land

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<sup>1</sup> 70 of 1970.

<sup>2</sup> 2002 (4) SA 768 (CC).

<sup>3</sup> *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 49.

<sup>4</sup> An example of this would be the Constitutional Courts approach in *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 30, where it was decided that the right to dignity is so closely related to the right of equality that an infringement of the one would invariably lead to an infringement of the other.

<sup>5</sup> See chap 3 above. It was shown that there was sufficient reason for the subdivision regulation. This serves as a justification for the deprivation of agricultural land owners’ entitlement of disposal.

for agricultural purposes.<sup>6</sup> However, in order to give effect to this legitimate purpose, the rights of agricultural land owners have to be restricted in a constitutionally justifiable way. This was proved to be the case,<sup>7</sup> but the further constitutional implications now need to be considered.

This discussion will focus on the implications and interaction of the rights and interests that are affected by the means employed by, and the effect of the regulation. The right to equality and just administrative action are directly affected by the Act. In terms of the right to equality the continued effect of the legitimate regulation in the current dispensation will have to be considered. It was previously concluded that the Subdivision Act can be saved from its illegitimate apartheid goal, namely the preservation of prime agricultural land for white occupation. The Act now applies in a non-racialised context, but where the Act continues to hinder black access to agricultural resources and allows whites to hold agricultural land acquired under apartheid its further application requires critical examination. This continued effect of the Act needs to be tested for possible unfair discrimination. The right to just administrative action is an entrenched right in the Bill of Rights.<sup>8</sup> The discretion and powers conferred on the Minister in terms of the Subdivision Act existed in a different context. This was a context where governmental powers were abused and where they were specific to the illegitimate aim of the Subdivision Act. The then Minister could use his administrative powers to ensure that whites retained ownership and occupation of agricultural resources. This power does not exist anymore. However, the power of the Minister of Agriculture to consider applications for subdivision in terms of the legitimate regulation will need to be tested. Here the Promotion of Administrative Justice Act (“PAJA”)<sup>9</sup> and section 33 of the Constitution will be central to the discussion.

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<sup>6</sup> See chap 3 above.

<sup>7</sup> See chap 4 above.

<sup>8</sup> Constitution of the Republic of South Africa 1996, sec 33.

<sup>9</sup> 3 of 2000.

As mentioned, the rights in the Bill of Rights do not exist independently. There is a tension between these rights. This tension or conflict between rights requires examination. There is a socio-economic public interest in preserving agricultural land for agricultural purposes. This discussion will have to consider the right to an environment which is not harmful to one's health and wellbeing and the right of access to sufficient food and the tension between these rights and the right of access to adequate housing and the land reform goals.<sup>10</sup> Finally the chapter will consider the issue raised by the minority judgment in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* ("*Wary Holdings*")<sup>11</sup> about national, provincial and municipal competencies. The dissenting judgment concluded that the regulation of agricultural subdivision was an exclusive provincial and municipal competency and that the continued national regulation was in conflict with the Constitution.

## 5 2 The affected rights

### 5 2 1 Equality

Moseneke J in *Minister of Finance and Another v Van Heerden*<sup>12</sup> stated that:

"[t]he Constitution commands us to strive for a society built on the democratic values of human dignity, the achievement of equality, the advancement of human rights and freedom. Thus the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance."<sup>13</sup>

Moseneke J's judgment indicates that testing the Subdivision Act for constitutional compliance in terms of the equality clause is necessary. The equality standard

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<sup>10</sup> Constitution of the Republic of South Africa 1996, secs 24, 27, 26 and 25(5) to (9).

<sup>11</sup> 2008 (11) BCLR 1123 (CC).

<sup>12</sup> 2004 (6) SA 121 (CC).

<sup>13</sup> *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) para 22.

should inform the law and is the standard against which the Subdivision Act “must be tested for constitutional consonance”.<sup>14</sup> The Subdivision Act was promulgated in the 1970s. It formed part of a legislative scheme that protected white agricultural interests.<sup>15</sup> The Act served to prevent the uneconomic division of all agricultural land situated outside of the homelands. Ownership of land was determined by race and to maintain this *status quo* it was submitted that the Act also served as a means to not only preserve agricultural land for whites, but also to ensure white occupation of all productive agricultural land.<sup>16</sup> The requirement of ministerial consent was arguably another means to ensure that the agricultural land remained in white occupation. This was the illegitimate aim of the Act. If the Act continued to serve this illegitimate apartheid aim it would be struck down because it would be unconstitutional. It was shown that the legitimate purpose of the Act could be saved from this aim.<sup>17</sup> However, where the legitimate purpose of the Act continues to maintain white occupation of prime agricultural land in the Republic it will need to be considered in light of section 9 of the Constitution.<sup>18</sup> Nothing in the Act is directly discriminatory, but the possibility that the legitimate regulation allows for indirect discrimination by maintaining the race based unequal distribution of land requires some consideration.

Section 9 of the Constitution is structured to ensure firstly that everyone is equal before the law and secondly that no one may be unfairly discriminated against.<sup>19</sup> The focus of this discussion is to investigate the possibility of discrimination because of the continued application of the legitimate regulation of the Subdivision Act.<sup>20</sup> Discrimination may either be direct or indirect. Direct discrimination is present when

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<sup>14</sup> *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) para 22.

<sup>15</sup> See 2 2 1 and 2 2 2 above.

<sup>16</sup> See chap 3 above.

<sup>17</sup> See 3 2 3 2 and 3 3 above.

<sup>18</sup> Constitution of the Republic of South Africa 1996.

<sup>19</sup> Constitution of the Republic of South Africa 1996, sec 9(1), sec 9(3) and sec 9(4).

<sup>20</sup> See chaps 2 and 3 above.



application of a geographical standard, although seemingly neutral, may in fact be racially discriminatory”.<sup>27</sup> This same approach can be followed when testing the Subdivision Act. The agricultural land affected by the Act was the productive land situated outside of the homelands and was white owned. The extent to which the Act regulates the right to dispose of the land, as discussed above,<sup>28</sup> could ensure that white owners keep control of productive farmlands. The express exclusion of the Subdivision Act from certain land reform legislation serves as evidence of this point.<sup>29</sup> The Act is considered to be an obstacle to the reform process and black access to agricultural land. The Act does not directly discriminate on the basis of race, but the continued effect of the legitimate regulation may not be overlooked. The fact that the Act can maintain the position where prime agricultural land was acquired by whites before and during apartheid requires circumspection. It should be noted that most of the prime agricultural land in the Republic is still in white occupation.<sup>30</sup>

When determining section 9 compliance, the application of the Promotion of Equality and Prevention of Unfair Discrimination Act (“PEPUDA”)<sup>31</sup> is central. This has to be done in terms of the principle derived from *South African National Defence Union v Minister of Defence* (“*SANDU*”).<sup>32</sup> In terms of *SANDU* one cannot rely directly on the constitutional provision to protect a right where legislation was enacted to give effect to a right in the Constitution. To rely directly on the right in the Constitution would

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<sup>27</sup> *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 32.

<sup>28</sup> See 4.2.2 above.

<sup>29</sup> Development and Facilitation Act 67 of 1995, secs 33(2)(j)(vi) and 51(2)(d)(ii); Land Reform Labour Tenants Act 3 of 1996, sec 40; Communal Property Associations Act 28 of 1996, sec 8(8); Extension of Security of Tenure Act 62 of 1997, sec 4(7); Land Restitution and Reform Laws Amendment Act 63 of 1997, sec 42B(1); Provision of Land Assistance Act 26 of 1998, sec 10(3). See also van Wyk J “Is subdivision of agricultural land part of municipal planning?” (2009) 24 *SAPR/PL* 545-562 551.

<sup>30</sup> Sources have shown that only 6 percent of all agricultural has been returned to individuals that lost this land during apartheid. The state’s aim of returning 30 percent by 2014 has also been claimed to be impossible. See Zigomo M “Minister says SA won’t meet land-reform target” *Mail and Guardian online* (26 Feb 2010).

<sup>31</sup> 4 of 2000.

<sup>32</sup> 2007 (5) SA 400 (CC) paras 51-52.

require the legislation to be challenged for being inconsistent with the Constitution.<sup>33</sup> This is the principle of subsidiarity. O'Regan states that "where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution".<sup>34</sup> The judgment that confirms the application of the subsidiarity principle in the case of PEPUDA is *MEC for Education, Kwa-Zulu Natal and Others v Pillay* ("*Pillay*").<sup>35</sup> Langa CJ found that a litigant could not and should not circumvent the legislation, in that case PEPUDA, enacted to give effect to a constitutional right by relying directly on the constitutional right.<sup>36</sup> Failing to use the legislation would negate the task conferred upon the legislature to respect, protect, promote and fulfill the rights in the Bill of Rights. He finds that the principle of subsidiarity applies to PEPUDA and that courts must assume that the Act is consistent with the Constitution and claims must be decided within its margins.<sup>37</sup>

PEPUDA was created to give effect to section 9 and "to prevent or prohibit unfair discrimination and to promote the achievement of equality".<sup>38</sup> In terms of section 7(c) of PEPUDA, "no person may unfairly discriminate against any person on the ground of race, including the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group".<sup>39</sup> The argument that the Subdivision Act allows for indirect discrimination on the basis of race would have to be made in terms of this section. The section in PEPUDA clearly illustrates the problem of the continued effect of the legitimate regulation on subdivision. The Subdivision Act in effect maintains exclusive white control over prime agricultural land because of the

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<sup>33</sup> *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) paras 51-52.

<sup>34</sup> *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) para 73.

<sup>35</sup> 2008 (1) SA 474 (CC) para 40.

<sup>36</sup> *MEC for Education, Kwa-Zulu Natal and Others v Pillay* 2008 (1) SA 474 (CC) para 40.

<sup>37</sup> *MEC for Education, Kwa-Zulu Natal and Others v Pillay* 2008 (1) SA 474 (CC) para 40.

<sup>38</sup> Preamble of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

<sup>39</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, sec 7(c).

limitation on disposal.<sup>40</sup> The fact that race and land are inextricably linked, as stated in *Walker*, means that whites who gained control of prime agricultural land during apartheid, and because of this system, continue to have control and possession in the current dispensation. The fact that the Subdivision Act is an impediment to the free disposal of agricultural land, which would facilitate black access to agricultural land, would justify a challenge in terms of section 7(c) of PEPUDA.

In *Manong & Associates (Pty) Ltd v City Manager, City of Cape Town*<sup>41</sup> where PEPUDA was applied, Moosa J stated:

“[i]n terms of section 9 of the Constitution the onus is on the complainant to establish discrimination on the basis of race. Once the complainant has discharged such onus, section 9(5) creates a rebuttable presumption of unfair discrimination. In such event the burden of proof shifts to the respondents who must show, on a balance of probabilities, that the discrimination is fair. In terms of section 13 of PEPUDA all complainant is required to do in order to discharge its onus, is to make out a *prima facie* case of discrimination based on race”.<sup>42</sup>

As stated by Moosa J, to discharge an onus for discrimination on the basis of race requires the complainant to make a *prima facie* case. The *Walker* case may provide evidence that supports the argument that the legitimate regulation in the Subdivision Act is indirectly discriminatory on the ground of race. The apartheid race-based land allocation which allows for most of the prime agricultural land to remain in white occupation, coupled with the limiting effect the Act has on black access to this land, would serve as a *prima facie* case for discrimination based on race. The legitimate regulation has the effect of maintaining white agricultural land holding and restricting

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<sup>40</sup> See chap 4 above.

<sup>41</sup> 2009 (1) SA 644 (EqC).

<sup>42</sup> *Manong & Associates (Pty) Ltd v City Manager, City of Cape Town* 2009 (1) SA 644 (EqC) para 12.

black access. The legislature has taken steps to address the Act's effect on black access to agricultural holdings. This only applies to certain instances.<sup>43</sup> The legislation excludes the Act's operation so that certain land reform goals can be achieved. However, this legislation only applies to these instances and it needs to be asked whether these exclusions are sufficient.

Race is a listed ground in section 9(5) of the Constitution.<sup>44</sup> The section creates the presumption that the discrimination on a listed ground is unfair. What now needs to be determined is whether the presumption of unfair discrimination can be rebutted. Albertyn provides guidelines for determining this question.<sup>45</sup> These guidelines have been adapted from the unfairness test developed in *Harksen v Lane NO and Others* ("*Harksen*").<sup>46</sup> They are stated as factors that can be practically applied to this situation.

The first factor is the history, social and economic context of the Act and its practical operation.<sup>47</sup> The Subdivision Act was promulgated in the 1970s to regulate the common law right of agricultural land owners to subdivide their land. The legitimate purpose of the regulation is to prevent the uneconomic fragmentation of agricultural land. It was submitted earlier that the Act also had an illegitimate aim, namely the

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<sup>43</sup> Development and Facilitation Act 67 of 1995, secs 33(2)(j)(vi) and 51(2)(d)(ii); Land Reform Labour Tenants Act 3 of 1996, sec 40; Communal Property Associations Act 28 of 1996, sec 8(8); Extension of Security of Tenure Act 62 of 1997, sec 4(7); Land Restitution and Reform Laws Amendment Act 63 of 1997, sec 42B(1); Provision of Land Assistance Act 26 of 1998, sec 10(3).

<sup>44</sup> Constitution of the Republic of South Africa 1996, s 9(5) states that "[d]iscrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair".

<sup>45</sup> Albertyn C *Summary of equality jurisprudence and guidelines for assessing the South African Statute Book for constitutionality against section 9 of the 1996 Constitution* (2006) 1-39 at 34-35. The following section is paraphrased from Albertyn's guidelines and applied to the Subdivision Act.

<sup>46</sup> 1998 (1) SA 300 (CC) paras 64-66.

<sup>47</sup> Albertyn C *Summary of equality jurisprudence and guidelines for assessing the South African Statute Book for constitutionality against section 9 of the 1996 Constitution* (2006) 1-39 35. See also *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 64.

preservation of agricultural land for whites.<sup>48</sup> The history of the Act showed that it was created in an apartheid context where agricultural policy was racialised.<sup>49</sup> The focus was preserving agricultural land for the white minority. It was argued earlier that the application process was a means of ensuring white occupation of agricultural land.<sup>50</sup> The practical operation of the legitimate purpose of the Act, saved from this illegitimate aim, still has the effect of preventing black access to prime agricultural land. This purpose also allows white farmers to continue occupying prime agricultural land because of the effect the Act has on disposal of the subject land.

The second factor considers the position of the affected group or person in society and whether this group has suffered from a pattern of disadvantage in the past.<sup>51</sup> The group that will be affected are black South Africans. The country's history of gross inequality has affected this group the most. Land reform initiatives have been put in place to address this situation.<sup>52</sup> The apartheid land division left eighty seven percent of land in the Republic for white occupation and thirteen percent remained for black occupation. To date only six percent of agricultural land has been "returned" to blacks who were dispossessed of their land during apartheid.<sup>53</sup> The Minister of Rural Development and Land Reform has stated that the target of acquiring thirty percent of agricultural land for handing to the black majority by 2014 is practically impossible.<sup>54</sup> A vast majority of this group still suffers landlessness and it is clear that the process of addressing this situation is complex and requires time.

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<sup>48</sup> See chaps 2 and 3 above.

<sup>49</sup> See 2 2 1 above.

<sup>50</sup> See 3 2 3 2 above.

<sup>51</sup> Albertyn C *Summary of equality jurisprudence and guidelines for assessing the South African Statute Book for constitutionality against section 9 of the 1996 Constitution* (2006) 1-39 at 35. See also *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 65.

<sup>52</sup> See 5 3 below.

<sup>53</sup> Zigomo M "Minister says SA won't meet land-reform target" *Mail and Guardian online* (26 Feb 2010).

<sup>54</sup> Duvenhage H "Minister sit swart grondbesit op ys" *Rapport* (28 Feb 2010) (no page numbers on server).

The third factor considers the nature of the provision and its purpose. Albertyn submits that if the purpose is to achieve an important societal goal and if the discrimination is not aimed at impairing the dignity of the group it might not be unfair.<sup>55</sup> The preservation of agricultural land for agricultural purposes is in the national interest. This is the legitimate purpose of the Act. The illegitimate goal, which preserved agricultural land for whites does not have continued application in the current dispensation. The legitimate purpose of the Act was not to impair the dignity of black South Africans. This legitimate purpose was shown to be in the public interest and comparative sources indicated that subdivision regulations are necessary when preserving prime agricultural land.<sup>56</sup>

The fourth factor examines the rights and interests that are impaired. The Subdivision Act, in this context, can only affect the rights of blacks to access prime agricultural land in the Republic. It was stated earlier that the Subdivision Act has been excluded from certain land reform legislation.<sup>57</sup> Where the effect of the Subdivision Act allows white farmers to hold on to agricultural land acquired during apartheid, and prevents black access to this land in the current dispensation it has been expressly excluded. The legislature has identified certain instances where the operation of Subdivision Act prevents black access to agricultural land. It has neutralised the Act's effect by excluding it. In other instances where the Act remains to be an obstacle to land reform, a similar approach can be adopted. The legislature would identify the instance and could include similar provisions as in the legislation identified.

Based on these factors it is safe to assume that the presumption of unfair discrimination can be rebutted. The Subdivision Act limits the right of black South Africans to access agricultural land and on this basis it appears to be indirectly

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<sup>55</sup> Albertyn C *Summary of equality jurisprudence and guidelines for assessing the South African Statute Book for constitutionality against section 9 of the 1996 Constitution* (2006) 1-39 at 35.

<sup>56</sup> See 3 2 3 2 and 3 2 3 3 above.

<sup>57</sup> See fn 43 above.

discriminatory. The presumption in section 9(5) would mean that this discrimination is unfair, but the factors Albertyn derived from the *Harksen* decision would indicate that the presumption of unfair discrimination is rebutted. The legitimate operation of the Act serves an important purpose, the preservation of agricultural land. Where the Subdivision Act limits the right of blacks to access agricultural land it has been expressly excluded. The legitimate purpose of the Subdivision Act tested against the standard of equality shows that the Act may allow for indirect discrimination, but that this discrimination is not unfair.

### *5 2 2 Just administrative action*

The right to just administrative action is entrenched in the Bill of Rights.<sup>58</sup> The discretion and powers conferred on the Minister in terms of the Subdivision Act existed in a different context, and in this context governmental powers were abused. The powers and discretions given to government officials allowed for this abuse. Currie and De Waal state that the apartheid regime was characterised by an “executive autocracy”.<sup>59</sup> It was submitted earlier that the illegitimate aim of the Act, to preserve prime agricultural land for whites could be ensured by the requirement that the Minister consent to the subdivision and disposal of agricultural land.<sup>60</sup> The history of administrative conduct that allowed for the perpetuation of apartheid rules could be seen in the powers awarded to the then Minister of Agriculture. The Act’s legitimate purpose, to preserve agricultural land for agricultural purposes, is still subject to ministerial oversight, but these powers are now subject to constitutional scrutiny. The power conferred on the Minister, in terms of the Act, to decide on agricultural subdivision needs to be tested in terms of administrative law. Firstly, it needs to be determined whether the Minister’s conduct is administrative action. If it is administrative action it can be subject to judicial review and this would already be a marked difference to the way in which the Minister’s powers were exercised prior to

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<sup>58</sup> Constitution of the Republic of South Africa 1996, sec 33.

<sup>59</sup> Currie I and De Waal J *The bill of rights handbook* (5<sup>th</sup> ed 2005) 642.

<sup>60</sup> See chap 3 above.

1994. This would neutralise the powers that were necessary for achieving both the illegitimate aim and the legitimate purpose. Secondly, the grounds for review applicable to the Subdivision Act would have to be considered as well as the rights the individual is entitled to in terms of the right to just administrative action.

The Constitution now entrenches the right to just administrative action.<sup>61</sup> This serves to protect the institution of judicial review of administrative power from legislative interference.<sup>62</sup> This also protects the individual and provides remedies for the effect of unlawful administrative action. The function of administrative law is to describe the powers of the administration, to determine the way these powers can be exercised and to provide for remedies in the case of maladministration.<sup>63</sup> Central to the right of just administrative action is the Promotion of Administrative Justice Act (“PAJA”).<sup>64</sup> PAJA was enacted to give effect to the right in section 33 of the Constitution.<sup>65</sup> The right in section 33 may not be relied on directly because of the *SANDU* principle, the principle of subsidiarity.<sup>66</sup> PAJA was enacted to give effect to the right in section 33. In terms of the principle a litigant must rely on the legislation enacted to give effect to the right, or he must challenge the constitutionality of the legislation to rely directly on the right.<sup>67</sup> The standard set in PAJA will firstly be used to determine whether the Minister considering an application for subdivision in terms of the Subdivision Act is administrative action. PAJA will then have to be used to determine the validity of administrative action taken in terms of the Subdivision Act.

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<sup>61</sup> Constitution of the Republic of South Africa, sec 33.

<sup>62</sup> Currie I and De Waal J *The bill of rights handbook* (5<sup>th</sup> ed 2005) 642. See also Hoexter C *Administrative law in South Africa* (2007) 62.

<sup>63</sup> Hoexter C *Administrative law in South Africa* (2007) 8.

<sup>64</sup> 3 of 2000.

<sup>65</sup> Constitution of the Republic of Africa.

<sup>66</sup> See discussion in 5 2 1 and fn 32 above.

<sup>67</sup> *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) paras 51-52; *MEC for Education, Kwa-Zulu Natal and Others v Pillay* 2008 (1) SA 474 (CC) para 40; *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) para 73.

Administrative action is defined in PAJA as “any decision taken, or any failure to take a decision, by an organ of state, when (i) exercising a power in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation ... which adversely affects the rights of any person and which has a direct, external legal effect.”<sup>68</sup> The Subdivision Act requires all agricultural land owners to apply to the Minister of Agriculture to gain approval for the proposed subdivision. Section 4 of the Subdivision Act sets out the application procedure owners must follow to obtain the Minister’s consent.<sup>69</sup> The Minister is granted the discretion to refuse the application and may attach conditions to the proposed subdivision application.<sup>70</sup> The application process involves a decision by the Minister, a member of the executive and an organ of state, exercising a public power authorised by legislation. In terms of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (“SARFU”),<sup>71</sup> “one of the constitutional responsibilities of the President and Cabinet Members in the national sphere ... is to ensure the implementation of legislation. This responsibility is an administrative one, which is justiciable, and will ordinarily constitute 'administrative action' within the meaning of section 33”.<sup>72</sup> The Minister of Agriculture does ensure the implementation of the Subdivision Act. The decision taken by the Minister on an application to subdivide agricultural land is administrative action. In terms of the Constitution, administrative action will be just if it is lawful, reasonable and procedurally fair.<sup>73</sup> PAJA gives effect to these rights and in terms of section 6 of the Act certain grounds could subject the administrative action to judicial review. These grounds will be considered in relation to the application of the Subdivision Act.

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<sup>68</sup> Promotion of Administrative Justice Act 3 of 2000, sec 1.

<sup>69</sup> Subdivision of Agricultural Land Act 70 of 1970.

<sup>70</sup> Subdivision of Agricultural Land Act 70 of 1970, sec 4.

<sup>71</sup> 2000 (1) SA 1 (CC).

<sup>72</sup> *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) para 142. See also *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) paras 124-126.

<sup>73</sup> Constitution of the Republic of South Africa 1996, sec 33(1).

For administrative action to be lawful it must be authorised by law and every requirement set out in the empowering provision needs to be complied with. Under section 6 of PAJA administrative action is reviewable if the administrator who took it was not authorised to do so by the empowering provision or the action was taken for a reason not authorised by the empowering provision.<sup>74</sup> Administrators do not have inherent powers and can only derive powers from a lawful empowering source, usually legislation.<sup>75</sup> In this case the Subdivision Act is the empowering source. The Minister may, in his discretion, refuse the application to subdivide. The Minister may attach conditions that pertain to the proposed use of the agricultural land.<sup>76</sup> The Minister may also, in instances where the land is no longer going to be used as agricultural land, consult with the Premier of the province to determine if the application should be granted.<sup>77</sup> The section further empowers the Minister to enforce,<sup>78</sup> vary or withdraw any condition.<sup>79</sup> Where a condition has been registered and the Minister varies or withdraws it the Minister may direct to have the condition on the title deed of the land varied or cancelled.<sup>80</sup> The Minister may also delegate his powers in terms of section 8 of the Act and may make regulations where it is necessary for achieving the objects of the Act in terms of section 10.<sup>81</sup> This is the extent of the powers the Minister may exercise when considering an application in terms of the Subdivision Act. Any conduct that goes beyond this will be unlawful administrative action.<sup>82</sup> In *Farjas (Pty) Ltd and Another v Regional Land Claims*

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<sup>74</sup> Promotion of Administrative Justice Act 3 of 2000, sec 6(2)(a)(i) and sec 6(2)(e)(i).

<sup>75</sup> Hoexter C *Administrative law in South Africa* (2007) 227.

<sup>76</sup> Subdivision of Agricultural Land Act 70 of 1970, sec 4(2)(a).

<sup>77</sup> Subdivision of Agricultural Land Act 70 of 1970, sec 4(2)(b).

<sup>78</sup> Subdivision of Agricultural Land Act 70 of 1970, sec 4(3).

<sup>79</sup> Subdivision of Agricultural Land Act 70 of 1970, sec 4(4).

<sup>80</sup> Subdivision of Agricultural Land Act 70 of 1970, sec 4(4).

<sup>81</sup> Subdivision of Agricultural Land Act 70 of 1970.

<sup>82</sup> A decision maker or administrator acting beyond the terms of the relevant empowering provision is acting *ultra vires*. Klaaren J and Penfold G “Just administrative action” in Woolman S, Roux T and Bishop M (eds) *The constitutional law of South Africa* (2<sup>nd</sup> ed 2009 original service 2003) 63.1-63.128 at 63.77.

*Commissioner, Kwazulu-Natal*<sup>83</sup> Dodson J stated that there should be “a duty on reviewing Courts to be all the more astute to ensure that public officials confine themselves strictly to the law which confers powers on them”.<sup>84</sup> Any action taken by the Minister will have to be within the parameters of the Subdivision Act for it to be lawful administrative action. The Subdivision Act clearly defines these parameters in section 4.

Section 6(2)(c) of PAJA states that administrative action is reviewable by a court if it was procedurally unfair.<sup>85</sup> Section 3(1) of PAJA requires that any administrative action that materially and adversely affects the rights of any person be procedurally fair.<sup>86</sup> The application for subdivision in terms of the Subdivision Act affects the right of an agricultural land owner to subdivide his land. This was clear from the previous chapter.<sup>87</sup> The right of an agricultural land owner to exercise his entitlement of disposal is affected by the Subdivision Act and the requirement of ministerial consent. The Minister deciding on an application for subdivision materially affects the right of an agricultural land owner to dispose of this property. PAJA states that a fair administrative procedure will depend on the circumstances in each case.<sup>88</sup> This standard is flexible and will vary with different administrative actions. To give effect to the right to procedurally fair administrative action the administrator must give adequate notice of the nature and purpose of the administrative action;<sup>89</sup> a reasonable opportunity to make representations;<sup>90</sup> a clear statement of the

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<sup>83</sup> 1998 (2) SA 900 (LCC).

<sup>84</sup> *Farjas (Pty) Ltd and Another v Regional Land Claims Commissioner, Kwazulu-Natal* 1998 (2) SA 900 (LCC) para 18.

<sup>85</sup> Promotion of Administrative Justice Act 3 of 2000, sec 6(2)(c) reads “[a] court or tribunal has the power to judicially review an administrative action if the action was procedurally unfair”.

<sup>86</sup> Promotion of Administrative Justice Act 3 of 2000, sec 3(1).

<sup>87</sup> See chap 4 above.

<sup>88</sup> Promotion of Administrative Justice Act 3 of 2000, sec 3(2)(a).

<sup>89</sup> Promotion of Administrative Justice Act 3 of 2000, sec 3(2)(b)(i).

<sup>90</sup> Promotion of Administrative Justice Act 3 of 2000, sec 3(2)(b)(ii).



Constitution, which requires that administrative action be “reasonable”, and secondly, requires a simple test which makes an administrative decision reviewable where the reasonable decision maker would not have reached that conclusion.<sup>101</sup> She also provides a useful list of factors that would indicate whether an administrative decision would be reasonable.<sup>102</sup> The right to reasonable administrative action when applied to the Minister’s decision in terms of the Subdivision Act would only require that the Minister act reasonably. The factors provided by O’Regan in the *Bato Star* decision would serve as a useful tool to determine this reasonableness.

The Minister’s decision on an application for subdivision would be administrative action under PAJA and the Constitution. This is important because these powers were used to serve the illegitimate aim of the Subdivision Act, namely the preservation of agricultural land for whites. The fact that these powers are now subject to judicial review under PAJA ensures that the Minister’s powers can only be used to serve the legitimate function of the Subdivision Act. Certain of the review grounds in PAJA were considered and these identified where and in which circumstances the Minister’s conduct could be judicially scrutinised. An administrative action taken under the Subdivision Act may still be found to be unreasonable and invalid, but it cannot be used for an illegitimate aim as it was under the apartheid government. The action, if unlawful or unreasonable or procedurally unfair, will be reviewable in terms of section 6 of PAJA and this will satisfy the section 33 requirement of just administrative action.

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<sup>101</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) para 44.

<sup>102</sup> These factors include “the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected”. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) para 45.

### 5 3 Conflicting rights

The preservation of agricultural land for agricultural purposes was argued to be in the national interest.<sup>103</sup> Preserving this land for the purpose of agriculture is not free from contention. In giving effect to this purpose certain rights in the Bill of Rights are promoted whilst others are limited. There is a conflict between these rights, and through the proper implementation of the Subdivision Act certain rights are promoted, namely the right to an environment which is not harmful to one's health and wellbeing and the socio-economic right of access to sufficient food, and other rights are restricted, namely the land reform goal of access to land and the right of access to adequate housing. An appropriate constitutional relationship needs to be established between these conflicting rights and interests.<sup>104</sup> In *Port Elizabeth Municipality v Various Occupiers*<sup>105</sup> the court decided that when resolving a conflict between rights in the Bill of Rights its function is not to establish a hierarchy, preferring certain rights over others, but to seek an appropriate balance between the rights.<sup>106</sup> It is necessary to balance and reconcile the opposed rights in a manner that is just, taking into account all the interests involved and factors that are relevant in each case. It will be necessary to identify the interests involved and the factors that are relevant in this instance.

Cameron J in *Holomisa v Argus Newspapers Ltd*<sup>107</sup> found that conflicting rights needs to be balanced and that the Constitution provides no solution as to which right(s) should prevail.<sup>108</sup> In terms of Cameron J's judgment, it is necessary to

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<sup>103</sup> See chap 3 above.

<sup>104</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 19.

<sup>105</sup> 2005 (1) SA 217 (CC).

<sup>106</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 23.

<sup>107</sup> 1996 (2) SA 588 (W).

<sup>108</sup> *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) at 606D-E. The case deals with the conflict between the right to freedom of expression and the right to a reputation, both constitutionally protected rights, from the decision the principle of balancing fundamental rights is important and relevant for these purposes. Cameron J provides a "model of clarity for judges and lawyers considering how to balance competing constitutional rights". Milo D, Penfold G and Stein A "Freedom

determine “the meaning and content of the right sought to be asserted” and “then assess whether ... rules which protect the one right, curtail or infringe upon the enjoyment of the other”.<sup>109</sup> It is essential to give content to the rights in conflict, in this case the rights that are protected by preserving agricultural land and the rights infringed upon by preserving agricultural land. It will then be necessary to ask whether an appropriate balance can be struck between these rights.<sup>110</sup> The right to an environment which is not harmful to one’s health and wellbeing, the right to access sufficient food, the land reform goals and right of access to adequate housing will be discussed below.

The right to an environment that is not harmful to one’s health and wellbeing is contained in section 24 of the Constitution. It has been submitted that the prevention of uneconomic subdivision of agricultural land forms part of agricultural conservation. Agricultural resources should arguably also be conserved through environmental measures.<sup>111</sup> Section 24(b)(i) to (iii) of the Constitution places a positive duty on the state to protect the environment. The state, through legislative and administrative measures,<sup>112</sup> needs to ensure that pollution and ecological degradation are

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of expression” in Woolman S, Roux T and Bishop M (eds) *The constitutional law of South Africa* (2<sup>nd</sup> ed 2009 original service 2003) 42.1-42.193 at 42.94.

<sup>109</sup> *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) at 607C-D.

<sup>110</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 23. See also *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) para 28.

<sup>111</sup> There is no uniform answer for what constitutes the environment in terms of section 24 of the Constitution of the Republic of South African 1996. The expansive definition of an environment recognises a variety of physical and social elements. This definition is widely accepted and is supported by the definition of environment in the Environmental Conservation Act 73 of 1989, sec 1. This definition includes “the aggregate of surrounding objects, conditions and influences that influence the life and habits of man or any other organism or collection of organisms”. The definition of environment in the National Environmental Management Act 107 of 1998, sec 1, supports this expansive definition. The court in *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) at 145E defined the environment as “all conditions and influences affecting the life and habits of man”. The court further stated that “[t]his surely would include socio-economic conditions and influences”. From these sources it can be accepted that prime agricultural land forms part of the environment for the purposes of section 24 of the Constitution. See Van der Linde M and Basson E “Environment” in Woolman S, Roux T and Bishop M (eds) *The constitutional law of South Africa* (2<sup>nd</sup> ed 2009 original service 2003) 50.1-50.50 at 50.12.

<sup>112</sup> The National Environmental Management Act 107 of 1998 (“NEMA”) is main legislative measure. It creates the framework for environmental protection in South Africa.

prevented,<sup>113</sup> that conservation is promoted<sup>114</sup> and that ecologically sustainable development and use of natural resources are secured while promoting justifiable economic and social development.<sup>115</sup> The state’s failure to secure these “goals” would amount to a violation of the individual’s right.<sup>116</sup> Earlier in this thesis, it was argued that the Subdivision Act forms part of a framework intended to preserve and protect agricultural land.<sup>117</sup> The Act serves to prevent agricultural degradation, to promote the conservation of agricultural land and to secure the development and use of agricultural land which is economically and socially justifiable. Prime agricultural land in the Republic should be viewed not only as a commodity but as an environmental resource that should be protected under the Constitution. The state’s role in its preservation is pivotal. De Waal and Currie submit that section 24(b) of the Constitution constitutionalises the notion of inter-generational equity.<sup>118</sup> The duty created by the right in this context means that future generations should also benefit from this valuable and scarce resource. The Subdivision Act forms part of the scheme which enables the state to realise the duty created in section 24.

The right to food is also guaranteed in the Constitution. The central provision is section 27(1)(b) that reads: “[e]veryone has the right to have access to ... (b) sufficient food ”.<sup>119</sup> This section is the focus of this discussion.<sup>120</sup> There is a duty on the state to “respect, protect, promote and fulfil”<sup>121</sup> this right. The state must take reasonable steps, within its available resources, to realise the right. The duty to protect the right to food requires that the state protects the existing right; enhances

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<sup>113</sup> Constitution of the Republic of South Africa, sec 24(b)(i).

<sup>114</sup> Constitution of the Republic of South Africa, sec 24(b)(ii).

<sup>115</sup> Constitution of the Republic of South Africa, sec 24(b)(iii).

<sup>116</sup> Currie I and De Waal J *The new constitutional and administrative law* Volume 1 (2001) 386.

<sup>117</sup> See 3 2 3 2 and 3 2 3 3 above.

<sup>118</sup> Currie I and De Waal J *The New Constitutional and Administrative Law* Volume 1 (2001) 386.

<sup>119</sup> Constitution of the Republic of South Africa 1996, sec 27(1)(b).

<sup>120</sup> The Constitution further guarantees the right in specific instances dealing with children in sec 28(1)(c) and detained individuals in sec 35(2)(e).

<sup>121</sup> Constitution of the Republic of South Africa 1996, sec 7(2).

the enjoyment of the right where it already exists and to give access to the right where there was no access.<sup>122</sup> To give effect to this duty the state will have to regulate through legislation or executive or administrative decisions.<sup>123</sup> Brand proposes three ways of regulating this right.<sup>124</sup> He submits that price regulation,<sup>125</sup> standard setting in respect of the safety and nutritional value<sup>126</sup> and giving effect to the duty by protecting informal tenure rights<sup>127</sup> are the measures that need to be taken.<sup>128</sup> I am submitting that another measure already exists. By preserving productive agricultural land, and ensuring the proper management and use of the resource the right can be further realised.

The Department of Agriculture has already taken steps to realise the right to food. The Food Security and Rural Development Programme provides agricultural starter packs and food production information packs to food insecure households.<sup>129</sup> The Land Redistribution and Development Programme provides financial assistance to small farmers. These programmes focus on the individual or community that is food insecure. Vink and Kirsten state that “agriculture forms a small but important buffer against poverty for some households”, but that this is not the most important

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<sup>122</sup> Brand D “The right to food” in Brand D and Heyns C (eds) *Socio-economic rights in South Africa* (2005) 153-189 170. See also Brand D “Food” in Woolman S, Roux T and Bishop M (eds) *The constitutional law of South Africa* (2<sup>nd</sup> ed 2009 original service 2003) 56C.1-56C.30.

<sup>123</sup> Brand D “The right to food” in Brand D and Heyns C (eds) *Socio-economic rights in South Africa* (2005) 153-189 170.

<sup>124</sup> Brand D “The right to food” in Brand D and Heyns C (eds) *Socio-economic rights in South Africa* (2005) 153-189 170.

<sup>125</sup> By setting a maximum price to be charged by private producers and retailers for basic food will ensure that it is affordable.

<sup>126</sup> Brand states that setting a standard and monitoring the safety and nutritional values would protect adequate access to food.

<sup>127</sup> By protecting the informal rights to land as a resource for food production, this is based on the fact that a more than half a million South Africans depend on farming as a source of farming. An additional one million use farming to supplement their means of obtaining food.

<sup>128</sup> Brand D “The right to food” in Brand D and Heyns C (eds) *Socio-economic rights in South Africa* (2005) 153-189 170-171.

<sup>129</sup> See Agriculture and Land Affairs Portfolio Committee *Food and security* (27 Feb 2001); Agriculture and Land Affairs Portfolio Committee *Food security hearings: finalisation* (27 May 2003).

determinate of food security.<sup>130</sup> A shift from subsistence to commercialisation will need to occur. The Subdivision Act's purpose to prevent the creation of uneconomic units is central to realising this shift. By preserving agricultural land by preventing the creation of uneconomic farming units, as aimed with the Subdivision Act, the state can further realise the aim of eradicating food insecurity.

Ackerman's judgment in *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance*<sup>131</sup> stated that "[s]ubsections (4) to (9) all, in one way or another, underline the need for and aim at redressing one of the most enduring legacies of racial discrimination in the past, namely the grossly unequal distribution of land in South Africa."<sup>132</sup> The three land reform programmes authorised in sections 25(4), (5), (6), (7) and (9) are land redistribution, land restitution and tenure reform. In each of the programmes legislation has been passed to address the legacy of unequal distribution of land. The Subdivision Act has been excluded from land reform legislation as mentioned above.<sup>133</sup> The Act prevents the effective implementation of the land reform goals and for this reason has been excluded.<sup>134</sup> There is a conflict between the goal of preserving agricultural land and the realisation of the land reform goals.

The comparative example in the American state of Hawaii indicated a conflict between increasing housing needs and the need to preserve prime agricultural

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<sup>130</sup> Vink N and Kirsten J "Policy successes and policy failures in agriculture and land reform in South Africa the 1990s" (2003) 18 *South African Journal of Economic History* 96-117 99.

<sup>131</sup> 2002 (4) SA 768.

<sup>132</sup> *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 49.

<sup>133</sup> See fn 43 above.

<sup>134</sup> Van Wyk J "Is subdivision of agricultural land part of municipal planning?" (2009) 24 *SAPR/PL* 545-562 550-551.

land.<sup>135</sup> The Hawaiian example showed that the state was subdividing prime agricultural land for the purpose of housing development. Instead of striking a balance between the goal of realising the right to housing and the goal of preserving prime agricultural land for agricultural purposes the state created a hierarchy preferring the right to housing. The negative economic impact of this preference for the right to housing was identified.<sup>136</sup> In terms of section 26(1) “[e]veryone has the right to have access to adequate housing” and in terms of section 26(2) “[t]he state must take reasonable legislative or other measures within its available resources, to achieve the progressive realisation of the right”. The right has been interpreted in case law,<sup>137</sup> but the focus in this discussion will be on the available resources needed to realise the right. The country has an acute housing shortage. However, it is important that this should not allow for the development of prime agricultural land for housing purposes. The Act “protects agriculture as an important economic activity in the national interest by preventing the fragmentation of agricultural land into small, non-viable uneconomic units and by preventing uncontrolled urban sprawl which would serve to decrease the extent of available agricultural land”.<sup>138</sup> To prevent the decrease of available agricultural land threatened by “uncontrolled urban sprawl” is an important function of the Subdivision Act.

The court in *Government of The Republic of South Africa and Others v Grootboom and Others*<sup>139</sup> found that there is an obligation on the state to take positive action to

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<sup>135</sup> See 3 2 3 3 above. See further Suarez A I “Avoiding the next Hokuli’a: The debate over Hawaii’s agricultural subdivisions” (2005) 27 *University of Hawaii Law Review* 441-467.

<sup>136</sup> See 3 2 3 3 above.

<sup>137</sup> *Government of The Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho intervening)* 2001 (3) SA 1151 (CC); *Abahlali Basemjondolo Movement SA and Another v Premier, Kwazulu-Natal, and Others* 2009 (3) SA 245 (D).

<sup>138</sup> Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J and Van Wyk J *The principles of the law of property in South Africa* (2010) 147.

<sup>139</sup> 2001 (1) SA 46 (CC).

eradicate homelessness, intolerable housing and extreme conditions of poverty.<sup>140</sup> Yacoob J stated that the realisation of the right “requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself”.<sup>141</sup> For the right of access to adequate housing to be realised all of these conditions need to be met.<sup>142</sup> The relevance of the judgment is the obvious need for available land to realise the right. As stated the Subdivision Act also prevents uncontrolled urban sprawl which would decrease the extent of available agricultural land,<sup>143</sup> and for this reason the problem illustrated in the Hawaiian position bears relevance. The conflict between two very important goals, the eradication of homelessness and the preservation of agricultural land, requires balancing. The Act prevents the development of prime agricultural land for the purpose of providing housing. The Act balances these two conflicting goals by preventing the subdivision of agricultural land, in this instance, for the purpose of housing development.

The decision in *PE Municipality* indicates that an appropriate balance needs to be established between conflicting rights. The preservation of agricultural land for agricultural purposes creates a conflict between the rights to a safe and healthy environment and food on the one hand and the right to housing and the land reform goal of access on the other. To find an appropriate balance between these conflicting rights would, based on the discussion above, be found in the application of the Subdivision Act. The Act’s ministerial consent requirement and the exclusion of the Act’s operation in certain legislation can ensure that certain rights and interests are optimised. Government policy decisions will dictate which rights and interests will be optimised. The earlier court decisions indicate that courts will

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<sup>140</sup> *Government of The Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 24.

<sup>141</sup> *Government of The Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 35.

<sup>142</sup> *Government of The Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 35.

<sup>143</sup> Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J and Van Wyk J *The principles of the law of property in South Africa* (2010) 147.

intervene where there is a conflict between rights and interests, but that sufficient deference will be applied when it comes to policy decisions of government. The Subdivision Act preserves agricultural land for agricultural purposes, which is important for realising the right to an environment which is not harmful to one's health and wellbeing and the right to sufficient food. Where the Act prevents the realisation of land reform goals it has been specifically excluded. The Act balances the conflict with the right to housing and the preservation of agricultural land by preventing uncontrolled urban sprawl. This prevents the situation experienced in Hawaii, where agricultural land is being subdivided for the purposes of eradicating the housing shortage. Where it would become necessary to develop agricultural land for purposes of housing development a similar approach adopted in the land reform policies could be followed. It would be necessary to identify specific situations where the development of agricultural land for the purpose of realising the right to housing is warranted and necessary. The conflict between the right of an agricultural land owner to subdivide and dispose of his property and socio-economic purpose of preserving agricultural land for agricultural purposes has not been discussed here. The discussion in the previous chapter on the limitation placed on the right of agricultural land owners to subdivide their land was identified and found to be constitutional in terms of section 25(1).<sup>144</sup> The Act in this context also serves to balance the right of agricultural land owners to subdivide and dispose their land and the socio-economic purpose of preserving agricultural land for agricultural purposes.

#### **5 4 National, provincial or municipal competency?**

Subdivision regulations as a planning mechanism traditionally form part of planning, as was pointed out previously,<sup>145</sup> but in the context of the Subdivision Act the regulation is a means of agricultural preservation. The object of the Subdivision Act is the preservation of agricultural land by preventing the uneconomic subdivision of agricultural land. It has also been submitted that prime agricultural land should be

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<sup>144</sup> See 4 2 3 2 above.

<sup>145</sup> See 3 2 3 1 and 3 2 3 2 above.



provincial government in the constitutional framework.<sup>154</sup> The main substance of the Act is to regulate planning and land use. This supports the finding in Yacoob J's minority judgment.<sup>155</sup> The Act negates the municipal planning function. For this reason Yacoob J found that the regulation of the subdivision of agricultural land should not continue to be regulated on a national level.

The court in *Kotzé v Minister van Landbou*<sup>156</sup> found that Subdivision Act concerns agricultural policy that relates to the control of agricultural land. If local government was to regulate this it would result in varying policies and regulations. This would make it impossible for the Minister to regulate agricultural policy and this would have a negative impact on issues of agricultural reform and access.<sup>157</sup> Subdivision in a scheme of agricultural preservation does not serve the same purpose as with urban planning and development.<sup>158</sup> It is clear from the Draft Sustainable Utilisation of Agricultural Resources Bill of 2003 that national government intends to control agricultural subdivision.<sup>159</sup> The policy discussion in chapter two also provided justifications for the use of subdivision as a means of agricultural preservation,<sup>160</sup> this included that the size of the land was the one factor that could be regulated in an industry that has many variables that could determine success or failure in a farming enterprise. The Act uses a regulation that is usually associated with planning, but its focus remains agricultural preservation. This would fall within the areas of agriculture and the environment and here national government has a concurrent competency. The majority in *Wary Holdings* decided that the Subdivision Act continues to apply to

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<sup>154</sup> Van Wyk J "Is subdivision of agricultural land part of municipal planning?" (2009) 24 *SAPR/PL* 545-562 555-560.

<sup>155</sup> Van Wyk J "Is subdivision of agricultural land part of municipal planning?" (2009) 24 *SAPR/PL* 545-562 at 560.

<sup>156</sup> 2003 (1) SA 445 (T).

<sup>157</sup> *Kotzé v Minister van Landbou* 2003 (1) SA 445 (T) 456A-I. See also 2 3 1 above.

<sup>158</sup> See 3 2 3 1 above.

<sup>159</sup> See 2 4 above.

<sup>160</sup> See 2 2 2 above.

the subdivision of agricultural land.<sup>161</sup> The practice of agricultural subdivision continues to be regulated on a national level, and this requires an application to be made to the national Minister of Agriculture for subdivision.

## 5 5 Conclusion

The further constitutional implications of the Subdivision Act were tested in this chapter. The Act as a remnant of apartheid land-use regulation could not be assumed to have a neutral effect in our current dispensation. It was accepted that the illegitimate aim, namely the preservation of agricultural land for white use and occupation, could be separated from the legitimate purpose of the Act. However, the Act remains the same text that was used to serve the apartheid aim and it was therefore necessary to test the legitimate regulation where it could have unconstitutional implications. The rights directly affected by the Act's continued application were considered. Here the right to equality and the right to just administrative action were discussed.

In terms of the equality standard, where the legitimate purpose of the Act had the effect of maintaining white ownership, of agricultural land acquired during apartheid, needed to be tested for indirect unfair discrimination. The fact that geography and race were inextricably linked, and that most of the prime agricultural in the Republic is still white owned with the restriction on the free disposal of agricultural by the Subdivision Act meant that a *prima facie* case for indirect discrimination could be made. The judgment in *Walker* served as evidence for this finding. Because race is a listed ground in section 9 there was a rebuttable presumption that the discrimination was unfair. It was necessary to apply the unfairness test in *Harksen* in this regard. The test indicated that although the Act had the indirect effect of maintaining white ownership of, and preventing black access to agricultural land, the presumption of

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<sup>161</sup> See 2 3 1 above.

unfairness could be rebutted because the Act is excluded by land reform legislation intended to overcome the imbalance in land redistribution.

The administrative nature of the powers the Minister of Agriculture has in terms of the Subdivision Act had to be proved to be constitutionally compliant. It was first necessary to determine whether the conduct was in fact administrative action in terms of PAJA. This was confirmed, which meant that the Minister's conduct could be reviewed in terms of section 6 of PAJA. Where the Minister's powers were used to maintain agricultural land for white ownership and occupation was now subject to judicial review. The necessary ministerial consent in terms of the Subdivision Act may only serve the legitimate purpose of the Act because it could be tested against PAJA and the Constitution.

The section on conflict of rights considered the interplay of rights promoted by the preservation of agricultural land for agricultural purposes and those that are restricted by this purpose. The right to an environment which is not harmful to one's health and wellbeing and the of access to sufficient food were explained as examples of rights promoted by this purpose and the land reform goals and right to access adequate housing as rights and interests restricted by this purpose. From case law it was clear that when adjudicating conflicting of rights that creating a hierarchy of rights would not resolve the conflict. Instead, an appropriate balance needs to be established between the rights. The aim is to balance and reconcile the opposed rights in a justifiable way, taking in account all the relevant interests and factors involved. The Subdivision Act preserves agricultural land for agricultural purposes, which is important for realising the right to a safe and healthy environment and the right to food. Where the Act prevents the realisation of land reform goals it has been specifically excluded. The Act balances the conflict with the right to housing and the preservation of agricultural land by preventing uncontrolled urban sprawl. The Subdivision Act provides balance between the conflicting rights. Where the Act's effect is in favour of realising certain rights over others it can be excluded as seen in certain land reform legislation.

The final point dealt with the issue of competencies and whether agricultural subdivision should be regulated on a municipal level, as found in the minority decision of the *Wary Holdings* case, or whether it should remain a national competency. The minority found that the regulation of subdivision under the Subdivision Act forms part of planning which is exclusive to provincial and municipal competencies. For this reason the national Minister's oversight was found to be in conflict with the Constitution. It was in conflict because the Minister's powers negate municipal planning and because it trespasses into the sphere of exclusive provincial competence of provincial planning. The majority in *Wary Holdings* case found that the Subdivision Act continues to apply to the subdivision of agricultural land and that this practice will continue to be regulated on a national level.

# Chapter 6: Conclusion

## 6 1 Introduction

The Subdivision of Agricultural Land Act (“Subdivision Act”)<sup>1</sup> serves a legitimate purpose that is still valid in post-apartheid law, namely the preservation of agricultural land for agricultural purposes. In the chapter on the analysis of the Act the history and context of the Act was examined. This history and context in which the Act was crafted showed that the Subdivision Act was also used for an illegitimate goal during apartheid, namely the preservation of productive farms for white ownership and occupation. In the following chapter it was necessary to argue that the legitimate purpose and illegitimate aim of the Act could be identified and separated. In the same chapter it was argued that if the legitimate purpose of the Act could not be separated from the illegitimate aim it would have to be repealed. This chapter concluded that the legitimate purpose of the Act could in fact be separated from the illegitimate aim. This revealed the functional and legitimate purpose of the Act, namely the preservation of scarce and valuable agricultural land for agricultural purposes.

However, in the constitutional dispensation this legitimate purpose of the Act could not be assumed to be neutral. The history of the Act and the extent of the regulation it entails made testing the Act in terms of the Constitution necessary. The limitation on the common law right of an agricultural land owner to subdivide and dispose of his land was tested against section 25 of the Constitution. The further constitutional implications of the Act were also considered. This was necessary because the Act has the effect of limiting the right to access agricultural land and it was argued could also maintain the position where prime agricultural land is held by white farmers. It was necessary to apply the equality standard here. The powers of the Minister of Agriculture in terms of the Act also needed to be tested for constitutional consonance. The Minister’s powers were used to preserve agricultural land for white

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<sup>1</sup> 70 of 1970.

occupation, but were also necessary for the legitimate operation of the Act, to prevent uneconomic farming units. The Minister's powers in terms of the Act were used to serve both the legitimate purpose and illegitimate aim of the Act. It was necessary to determine whether these powers could be tested in terms of the Constitution. The Promotion of Administrative Justice Act<sup>2</sup> was used to test these powers. It was found that these powers were administrative and the decision process was an administrative action which could be reviewed by the courts. The preservation of agricultural land for agricultural purposes serves to realise certain rights in the Bill of Rights, namely the right to an environment which is not harmful to one's health and wellbeing and the right of access to sufficient food, but it also restricts other rights and interests, namely the land reform goal of access and the right of access to adequate housing. A conflict between these rights in the Bill of Rights was identified. It was necessary to interpret these rights and interests and apply the courts' approach to conflicting rights. Finally, the constitutional analysis considered the competency of national government to regulate the practice of agricultural subdivisions.

The research aims and hypotheses have been tested in the substantive chapters above. A historical and a comparative survey and policy, statutory, and constitutional analyses allowed a conclusion to be drawn about the applicability of the Subdivision Act in a constitutional dispensation. The chapters indicate that where the Act is used for its purpose of preventing the uneconomic subdivision of agricultural land in the national interest it is a legitimate and constitutionally sound regulation. The Act's regulation of the ownership entitlement of disposal is compliant in terms of the section 25(1) right to property. The Act makes provision for expropriation in certain instances and it was shown to comply with the constitutional standard in section 25(2) and (3). The Act was argued to be section 9 compliant even though it has the effect of maintaining white ownership of agricultural holdings and is an obstacle to black access to agricultural land. In certain instances where the Act is an obstacle to

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<sup>2</sup> 3 of 2000.

land reform goals it has been excluded through legislation. The Minister's power to decide on subdivision applications are administrative actions under the PAJA and can be subject to judicial review which would fulfil the requirements of the section 33 right to just administrative action. The rights and interests that are in conflict with the purpose of the Act,<sup>3</sup> to protect scarce and valuable agricultural land, and those rights<sup>4</sup> promoted by this purpose can be justifiably balanced and optimised, giving due consideration to government policy. The competency of national government to regulate agricultural subdivision was found to be contentious, but it can be argued to be compliant in terms of schedule 4 of the Constitution.

The Subdivision of Agricultural Land Act Repeal Act<sup>5</sup> was promulgated, but has not been brought into operation. The reasons for the repeal have been identified. They include that it is not appropriate for government to dictate the size of agricultural land; that it should be left up to agricultural land-users, the agricultural sector and the market to determine and that other mechanisms are in place to protect valuable agricultural land. The Draft Sustainable Utilisation of Agricultural Resources Bill of 2003 is the only document that can provide clarity on the future of agricultural subdivisions. Since 2003 it has not been presented to Parliament, but it was revisited in 2007 after the National Land Summit. There have been no further indications of what the legislature intends to do in the future. However, the Bill does indicate that a similar approach to agricultural subdivisions as in the Subdivision Act will be adopted. The regulation would effectively operate in the same manner, but under a different legislative text. Each of the substantive chapters will now be considered.

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<sup>3</sup> The land reform goals in secs 25(5)-(9) and the socio-economic right to housing in sec 26 were identified as rights that are in conflict with the purpose of preserving agricultural land for agricultural purposes.

<sup>4</sup> The right to a safe and healthy environment in sec 24 and the right to food in sec 27(1)(b) were discussed as rights promoted by the purpose of preserving agricultural land for agricultural purposes.

<sup>5</sup> 64 of 1998.



The current status of the Act was also considered. This showed that the Repeal Act which has been promulgated, but not yet put into operation, has created some uncertainty. The uncertainty about the Repeal Act has resulted in cases like *Thanolda Estates (Pty) Ltd v Bouleigh 145 (Pty) Ltd*<sup>6</sup> where Wunsh J erroneously decided that the Subdivision Act had been repealed and did not apply it to the case. The reasons provided by the legislature for the repeal was that it is not appropriate for government to interfere in the determination of the size of agricultural land and that the position should be regulated by the agricultural sector, land users and the market. The Subdivision of Agricultural Land Act Repeal Bill stated that appropriate zoning mechanisms were in place to regulate and protect valuable and scarce agricultural land. The Draft Sustainable Utilisation of Agricultural Resources Bill of 2003 contradicts the reasons provided for the repeal of the Act. The Bill shows that national government has every intention of continuing to control and regulate agricultural subdivision. The provisions contained in the Bill are identical to the provisions in the Subdivision Act. The operation of the Subdivision Act has also been expressly excluded from certain legislation because of its incompatibility with land reform mechanisms. This exclusion was relevant when considering the general constitutional compliance of the Act. The majority in the *Wary Holdings* decision<sup>7</sup> confirmed that the Subdivision Act, in its present form, continues to apply to all agricultural subdivisions in the Republic. The Minister's consent is still required for certain actions relating to the subdivision of agricultural land.

The historical analysis showed that the Subdivision Act had an illegitimate goal as well as a legitimate purpose. The history of agricultural land holding and the policy documents identified the apartheid aim which protected agricultural land for white occupation. The Act was not just a neutral land-use regulation; it served an apartheid political agenda. The policy analysis also indicated that the promulgation of the Act was necessary to contend with the rate of uneconomic subdivisions in the Republic. This section concluded that the Act was necessary to preserve agricultural land, but

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<sup>6</sup> [2001] 1 All SA 141 (W).

<sup>7</sup> *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 (11) BCLR 1123 (CC).

was also used to promote an apartheid agenda. The historical and policy analysis confirmed that the Act had both a legitimate purpose, the protection of agricultural land from uneconomic subdivision, and an illegitimate aim, the preservation of agricultural land for whites.

The analysis of the provisions of the Act showed the extent of the legislative limitation when it came to agricultural subdivisions. The land affected by the regulation is all agricultural land in the Republic and this is not affected by the new local government structure. The Constitutional Court confirmed this position. The Act prevents most of the actions that could result in the subdivision of agricultural land and criminalises certain actions when the Act has been contravened. The majority of the cases decided under the Act showed that the Act's ministerial consent requirement has been used to escape contracts for the sale of a portion of agricultural land. Contracting parties have used the Act and the formality requirements for the sale of a portion of agricultural land to exit these contracts. The statutory analysis identified the extent of the Act's operation. The Act prevents most of the actions that could result in the subdivision of agricultural land into uneconomic units.

The Repeal Act of 1998 and the Draft Sustainable Utilisation of Agricultural Resources Bill of 2003 does not clear up the position for future regulation of agricultural subdivisions. The reasons for the repeal are that it is inappropriate for government to dictate the size of agricultural land and it should be left to the agricultural sector and market to determine. The draft Bill adopts the same regulation as contained in the Subdivision Act. There is still uncertainty to that extent, but the final analysis indicates that the Subdivision Act will continue to apply until the legislature finalises the repeal and promulgates new legislation.

### *6 2 2 Identifying and separating the legitimate purpose from the illegitimate aim*

The discussion on the legitimate purpose and illegitimate aim of the Subdivision Act showed that the regulation of the right to subdivide could still be legitimate in post-apartheid land law. The fact that the Act was promulgated during apartheid did not outweigh the regulatory function it serves in our current dispensation. The Subdivision Act is a mechanism which preserves and protects agricultural land. This is important in many farming societies. The purpose of the Act is to prevent the uneconomic subdivision of prime agricultural land and its illegitimate aim, which preserved agricultural land for white ownership and occupation, does not affect this purpose. The national interest the Act serves is no longer a white interest. The legitimate purpose was further confirmed by examining subdivision regulations over agricultural land in the United States of America, specifically the states of Oregon and Hawaii, Western Australia and the province of British Columbia, Canada.

The legislative framework that created the Act used planning and regulatory laws to separate the races. The racial discrimination and grossly unequal distribution of land was affected through a body of apartheid land law. All the land occupied and used was subject to these laws and regulations. Most of these laws are not facially discriminatory and have continued to apply in the new legal order. The Subdivision Act is one of these legislative texts; it is not facially discriminatory, but its inherent apartheid political agenda could not be overlooked. The chapter indicated that the national interest served by the Subdivision Act is no longer a white apartheid interest. The legitimate purpose of the Act, which is to prevent agricultural degradation, is in a national interest that does not give undue benefits to a white minority. The finding in the chapter was that the illegitimate goal could be identified and separated from the necessary and legitimate regulatory purpose. Had this not been the case, the Act would have been found to be invalid and it would have to be abolished. Although the Act could be argued to serve a legitimate purpose it still required testing for constitutional consonance.

The comparative discussion on the policies and regulations relating to the preservation of agricultural land in the United States of America, specifically the states of Oregon and Hawaii, Western Australia and the province of British Columbia, Canada indicated that agricultural land is a finite resource that needs to be preserved and protected. These jurisdictions have, in certain instances, used subdivision and zoning regulations to effectively preserve prime agricultural land. They show that a subdivision regulation, for purposes of agricultural preservation, is a legitimate land-use regulation over agricultural land. The comparative sources also identified the dangers of failing to enforce subdivision regulations. This was the case in the American state of Hawaii where prime agricultural land was being subdivided for the purposes of housing development.

This chapter concluded that it was possible for the Subdivision Act to serve its legitimate purpose free from its illegitimate apartheid aim, namely the preservation of prime agricultural land for white ownership and occupation.

### 6 2 3 Section 25 compliance

The chapter determining the Subdivision Act's compliance in terms of section 25(1) of the Constitution considered the constitutionality of the limitations imposed by the Act on the exercise of ownership rights. The impugned provisions of the Act were tested against the criteria developed in the *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* ("FNB")<sup>8</sup> decision. It was concluded that the effect the Act has on the ownership entitlement of disposal is constitutionally permissible.

The chapter identified the entitlement of disposal as an interest in property for the purposes of section 25. This conclusion was based on the fact that the limitations posed by the Act affect the owner's capacity to sell, lease, register servitudes and

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<sup>8</sup> 2002 (4) SA 768 (CC).

bequeath property. These entitlements form part of the standard incident of the right to capital. It was accepted that the right to capital, which includes the right to alienate, forms part of the standard incidents of ownership in South African law. The Constitutional Court in *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (Kwazulu-Natal Law Society and Msunduzi Municipality as amici curiae)* (“*Mkontwana*”)<sup>9</sup> found that the right to capital is an interest in property for the purposes of section 25. On this basis it was concluded that the right of subdivision and disposal, as regulated under the Act, constituted an interest in property for the purposes of section 25.

The limitation on the right of disposal by the Subdivision Act is a deprivation for the purposes of section 25. This was based on Roux’s argument that a wide meaning should be given to deprivations. This meant that most interferences with the use and enjoyment of property would constitute a deprivation of property. However, the Constitutional Court in *Mkontwana* required that the interference be a “substantial interference”.<sup>10</sup> This would be a limitation that went beyond that of normal restrictions. It was concluded that the Subdivision Act fulfils the “substantial interference” requirement developed by the court in *Mkontwana*. The limitation on the rights of agricultural land owners to dispose of their land under the Act is a deprivation for the purposes of section 25.

The deprivation was tested for compliance in terms of the section 25(1). This examined the requirements that the deprivation must be in terms of a law of general application and that the deprivation should not be arbitrary. The Subdivision Act was found to be law of general application. The arbitrariness test examined both

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<sup>9</sup> 2005 (1) SA 530 (CC).

<sup>10</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (Kwazulu-Natal Law Society and Msunduzi Municipality as amici curiae)* 2005 (1) SA 530 (CC) para 33.

procedural arbitrariness and substantive arbitrariness because the court in *FNB* found that a deprivation is arbitrary if the law does not provide sufficient reason for it. The Act was tested for both substantive arbitrariness and procedural arbitrariness.

The Act was found to be procedurally fair based on the flexible-circumstance based test developed in the *Mkontwana* decision. The Subdivision Act limits the right to subdivide subject to the application process set out in section 4. The Act does not completely prohibit subdivision. It makes the act of subdivision subject to the application process and this serves as a procedural safeguard. The decision taken by the Minister could not be challenged in terms of procedural fairness under section 25. An attack on the basis of procedural fairness applied to the Subdivision Act and as contained in section 25(1) would fail.

The substantive arbitrariness test was based on the factors provided by the court in *FNB*. The variable interplay of relationships was applied to the deprivation on the right of disposal. The factors would indicate whether a mere rational relationship between means and ends was required or whether a more burdensome proportionate relationship was required. There was a nexus between the application process, required in terms of the Act, to subdivide and the prevention of uneconomic farming units. The purpose of the deprivation was found to preserve agricultural land by preventing it from being divided into uneconomic units. The purpose of the deprivation affected the owner of the land, but only limited the right of disposal, which is one of the core ownership entitlements. The deprivation did not embrace all the incidents of ownership; it only affected the right of disposal and was done in a manner that did not completely exclude the right to dispose of the property. It was concluded that only a rational relationship was required to prove that there was a sufficient reason for the deprivation under the Subdivision Act. The Act's purpose of preventing the degradation of agricultural land serves a sufficient reason for the deprivation. The limitation on the right of agricultural land owners to dispose of their property in terms of the Subdivision Act is not in conflict with section 25(1).

The expropriation provision in the Act was tested against section 25(2) and (3). In terms of section 25(2) the Act satisfies the requirements of law of general application and it is in the public interest. The compensation requirement needed further consideration. The Subdivision Act makes provision for expropriation and the Expropriation Act<sup>11</sup> is to be used to calculate compensation. The market value of the land is to serve as compensation. It was necessary to decide whether market value satisfies the constitutional norm of just and equitable compensation. It was argued that it would satisfy this norm. Although market value is only one of the factors identified in the section 25(3) requirements for just and equitable compensation the Constitutional Court found that market value is enough to satisfy the constitutional norm. An expropriation in terms of the Subdivision Act would comply with the constitutional requirements in sections 25(2) and (3).

#### *6.2.4 General constitutional compliance*

The necessary and legitimate purpose of the Subdivision Act, namely the preservation and protection of agricultural land from uneconomic subdivision, was divorced from its pre-constitutional apartheid aim, the preservation of prime agricultural land for white ownership and occupation. To identify and separate the legitimate purpose from the illegitimate aim was necessary to save the Act from unconstitutionality. However, the consequences of the legitimate purpose of the Act, when this purpose had existed side-by-side with the illegitimate aim, required further constitutional scrutiny. The legitimate purpose was tested in terms of other rights in the Bill of Rights. The further constitutional implications of the Act were also considered and tested for in this section.

Where it was clear that the Act's legitimate purpose could maintain white ownership in the current dispensation required an examination of this effect against the equality

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<sup>11</sup> 63 of 1975.

provision in the Constitution. The foundation for this contention was that apartheid race based land allocation and the limitation on disposal of agricultural land by the Act had the effect of maintaining land allocated to whites during this period. The fact that most of the prime agricultural land in the Republic is still white owned supports this view. This coupled with the limiting effect the Subdivision Act has on black access to this land served as a *prima facie* case for discrimination based on race. The presumption of unfair discrimination in terms of section 9(5) of the Constitution required the application of the unfairness test as developed in *Harksen v Lane NO and Others* (“*Harksen*”).<sup>12</sup> After considering these factors, identified below, the conclusion was that the presumption of unfair discrimination was rebutted.

The first factor examined the historic, social and economic context of the Act and its practical operation. The history of the Act showed that it was created in an apartheid context where agricultural policy was racialised. The apartheid aim was to preserve agricultural land for the white minority. The practical operation of the legitimate purpose of the Act, saved from this illegitimate aim, still has the effect of preventing black access to prime agricultural land. This purpose also allows white farmers to continue occupying prime agricultural land because of the effect the Act has on disposal of the subject land.

The second factor considered the position of the affected group or person in society and whether this group had suffered from a pattern of disadvantage in the past. Here it was necessary to consider the position of black South Africans in relation to agricultural land holding because of the limitation the Act poses to black access. A vast majority of black South Africans still suffer landlessness and the statistics on this point indicated that only six percent of agricultural land has been returned to those that were dispossessed of this land during apartheid. The Minister of Rural Development and Land Reform stated that the 2014 goal of redistributing thirty

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<sup>12</sup> 1998 (1) SA 300 (CC) paras 93-97.

percent of all agricultural land to blacks would be impossible. This shows that the process of rectifying the apartheid past is complex and requires time.

The third factor considered the nature of the provision and its purpose. Here it was stated that if the purpose of the provision was to achieve an important societal goal and if the discrimination was not aimed at impairing the dignity of the group affected that it might not be unfair. The Subdivision Act's purpose is the preservation of agricultural land. This purpose is in the national interest. The legitimate purpose of the Act was not to impair the dignity of black South Africans. This legitimate purpose was shown to be in the public interest and from an earlier chapter the comparative sources indicated that subdivision regulations were necessary when preserving prime agricultural land.

The fourth factor examined the rights and interests that were impaired by the Act. It was concluded that the operation of the Act could have an effect on black access to agricultural land. In certain cases where the Act limited the right of access it was excluded in legislation.<sup>13</sup> In these cases the effect of the Subdivision Act is an obstacle to realising land reform goals, as explained above, and the legislature has taken steps to neutralise this effect. In other instances where the Act continues to be an obstacle to black access a similar approach could be followed. The legislature could exclude the operation of the Act as in the legislation identified. Based on these factors it was concluded that the indirect effect of the Act did not constitute unfair discrimination.

The administrative nature of the powers the Minister of Agriculture has in terms of the Subdivision Act was also tested. It was submitted that the Minister's administrative powers to decide on applications for subdivision existed at a time

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<sup>13</sup> Development and Facilitation Act 67 of 1995, secs 33(2)(j)(vi) and 51(2)(d)(ii); Land Reform Labour Tenants Act 3 of 1996, sec 40; Communal Property Associations Act 28 of 1996, sec 8(8); Extension of Security of Tenure Act 62 of 1997, sec 4(7); Land Restitution and Reform Laws Amendment Act 63 of 1997, sec 42B(1); Provision of Land Assistance Act 26 of 1998, sec 10(3).

where administrative powers were abused to serve an apartheid political agenda. Because these powers are necessary in achieving the legitimate purpose of the Act they had to be tested against the constitutional standard. In this regard the Promotion of Administrative Justice Act (“PAJA”)<sup>14</sup> was central to the discussion. Testing the Minister’s powers in terms of the Subdivision Act against PAJA indicated that the Minister’s powers were administrative in nature. The process of considering an application for subdivision is an administrative act. Because the decision process is an administrative action it needs to comply with the requirements for just administrative action in the Constitution and PAJA. An administrative action taken under the Subdivision Act could be subject to judicial review under PAJA. If the Act is used for any purpose or aim that is not the legitimate purpose of the Act it can be reviewed. This ensures that a decision taken under the Act complies with the section 33 right to just administrative action.

The section on conflict of rights considered the interplay of rights promoted by the preservation of agricultural land for agricultural purposes and those that are restricted by this purpose. The socio-economic public purpose of the Subdivision Act, namely the preservation of prime agricultural land, serves to promote and protect rights in the Bill of Rights. This purpose also restricts certain rights and interests protected under the Constitution. This section considered the right to an environment which is not harmful to one’s health and wellbeing, socio-economic right of access to sufficient food, the land reform goals and the right of access to housing. The Act, when effectively implemented, could promote the right to a healthy and safe environment. The Act serves to prevent agricultural degradation, to promote the conservation of agricultural land and to secure the development and use of agricultural land which is economically and socially justifiable. Preserving productive agricultural land and ensuring the proper management and use of the resource can further ensure that the right to food is realised. These rights are promoted by the legitimate purpose of the Act. However, by preserving agricultural land for

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<sup>14</sup> 3 of 2000.

agricultural purposes and dictating minimum erf sizes, the Act also has the effect of preventing the effective implementation of land reform goals and could be an obstacle to the realisation of the socio-economic right to housing. There is a conflict between these rights, the rights promoted by the effective implementation of the legitimate purpose of the Act and the rights restricted by this purpose. The conflict will not be resolved, but requires a balancing of the rights and the interests involved. The aim is to balance and reconcile the opposed rights in a justifiable way, taking into account all the relevant interests and factors involved. This view was derived from case law dealing with conflicting constitutional rights. It was concluded that the Subdivision Act provides this balance. The Act preserves agricultural land for agricultural purposes, and where the Act's effect prevents the realisation of land reform goals in certain cases, it has been excluded. Here it was argued that where the purpose of preserving agricultural land does not correlate with government policy relating to land reform or housing reform that legislation would have to be adopted to exclude the operation of the Act to realise these reforms. Government policy would have to dictate how these conflicting rights and interests would be optimised. From case law it was also clear that if this balance is not struck the courts can and must intervene.

The issue raised in the minority decision in *Wary Holdings* was also discussed. Yacoob J, for the minority, found that the national regulation of agricultural subdivision was in conflict with the Constitution. The decision was that the Act was concerned with the functional area of planning, and that the Minister's authority was in conflict with the Constitution. There is a conflict because the authority negates municipal planning and it trespasses on to the sphere of the exclusive provincial competence of provincial planning. It was contended that the Subdivision Act's primary concern is agricultural preservation and not planning, as Yacoob J decided. The purpose of the Subdivision Act is the preservation of agricultural land by preventing the uneconomic subdivision of agricultural land. In terms of the Constitution, agriculture, the environment and soil conservation are functional areas under the concurrent national and provincial legislative competence. For this reason

an argument that the national Minister continues overseeing this functional area of agriculture can be made. The Act's legitimate purpose is to preserve agricultural land and it uses the planning tool, the subdivision regulation, to achieve it.

### **6 3 Concluding remarks**

This thesis has shown that the Subdivision of Agricultural Land Act 70 of 1970 serves a legitimate purpose that is still valid in post-apartheid law. This purpose is the prevention of the uneconomic subdivision of agricultural land. The fact that the Act was also used for an illegitimate aim during the apartheid era was identified. This aim was the preservation of productive farmlands for whites. It was argued that the legitimate purpose could be separated from the illegitimate apartheid goal and that a functional purpose for the regulation would remain. Had this not been the case the Act would have been unconstitutional.

Although the regulatory purpose was found to be legitimate the effect it had on ownership entitlements required testing in terms of section 25 of the Constitution. The restricting effect the Subdivision Act has on ownership entitlements was found to be section 25 compliant. A general compliance test was used to determine the Act's validity in terms of other rights in the Bill of Rights. The general compliance test identified the further constitutional implications of the Act and concluded that the Act was constitutionally sound.

The Subdivision of Agricultural Land Act is a valid and constitutionally sound regulation. It is a legitimate regulation over the common law right of agricultural land owners to subdivide their land. There is still uncertainty because of the inoperative Repeal Act. It is not clear what the legislature intends to use to replace the Subdivision Act. It is clear that the regulation is necessary to preserve agricultural land. The proposed Draft Sustainable Utilisation of Agricultural Resources Bill of 2003 would indicate that the legislature intends for this regulation to continue being regulated at a national level. The Bill contains identical subdivision provisions as in

the Subdivision Act. This allows one to question the need for the Repeal Act in the first place. The reason mooted by the legislature for the repeal is that it is inappropriate for government to dictate the size of agricultural units and that this should be left to the land users, the agricultural sector and market to determine. This reason does not correspond with the identical provisions contained in the draft Bill. It would be safe to speculate that the Repeal Act in fact exists to repeal the Subdivision Act because of the history and context in which it was crafted. The Repeal Act seems to be no more than a symbolic end to an apartheid land-use instrument. The legislature, it seems, wants to create a new instrument that would essentially do the same thing, but this instrument would be free from an apartheid history and context.

The draft Bill would be nothing more than the Subdivision Act with a new name, promulgated under the new order. This would not change the effect the Act has on ownership entitlements or the limitation on access to agricultural holdings. In effect it would not change the system currently in place. The effect will be similar and it is clear that the regulation cannot be used for illegitimate purposes because it would be subject to constitutional scrutiny. What is certain, for now, is that the Subdivision Act continues to apply in its current form. This was confirmed in the *Wary Holdings* decision.<sup>15</sup> The Minister's consent is still required for certain actions relating to the subdivision of agricultural land and from the discussion above it is now clear that the Act can apply free from an illegitimate apartheid goal and it can be argued to be constitutionally compliant.

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<sup>15</sup> *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 (11) BCLR 1123 (CC).

























