

Repealing the Subdivision of Agricultural Land Act: A constitutional analysis

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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.

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Chapter 1: Introduction

1 1 Introduction

The Subdivision of Agricultural Land Act (“Subdivision Act”)¹ 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.

¹ 70 of 1970.

The Subdivision Act's declared purpose is "[t]o control the subdivision and, in connection therewith, the use of agricultural land".² 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

² 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”).³ 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*”)⁴ 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.⁵

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

³ 64 of 1998.

⁴ 2008 (11) BCLR 1123 (CC).

⁵ 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 Land⁶ were mandated to

⁶ 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.⁷ 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,⁸ as only agricultural land is affected by this regulation; actions related to agricultural land that are not affected by the Act's operation;⁹ actions that are prohibited;¹⁰ the extent of the Minister's consent;¹¹ the restrictions placed on succession¹² and servitudes;¹³ and the penalties and fines¹⁴ 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

⁷ Subdivision of Agricultural Land Act 70 of 1970, sec 3.

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

⁹ Subdivision of Agricultural Land Act 70 of 1970, sec 2.

¹⁰ Subdivision of Agricultural Land Act 70 of 1970, sec 3.

¹¹ Subdivision of Agricultural Land Act 70 of 1970, sec 4.

¹² Subdivision of Agricultural Land Act 70 of 1970, sec 5(1).

¹³ Subdivision of Agricultural Land Act 70 of 1970, sec 6A.

¹⁴ 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*”).¹⁵ 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 1,¹⁶ and that it no longer held any relevance because of municipal restructuring throughout the Republic.¹⁷ 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.

¹⁵ 2008 (11) BCLR 1123 (CC).

¹⁶ 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”.

¹⁷ 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 Act¹⁸ 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

¹⁸ 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”)¹⁹ the Constitutional Court decided that a deprivation

¹⁹ 2002 (4) SA 768 (CC).

would be arbitrary if there was insufficient reason for it.²⁰ 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”.²¹ This chapter on section 25 compliance 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. Testing the Subdivision Act for constitutional compliance will focus on the legitimate purpose of the instrument and whether the means used to achieve this purpose, namely the limitation on ownership entitlements, can be justified in terms of the standard of arbitrariness set by the court in *FNB*. This chapter will use the methodology of the *FNB* case to determine whether the Act’s legitimate effect and means of regulation amount to an arbitrary deprivation.

The *FNB* methodology will be used to determine whether the limitation on the common law right of land owners to subdivide their land is a limitation on an interest in property and whether that limitation is a deprivation for the purposes of section 25. The test will then determine whether the deprivation complies with the requirements of section 25(1). The focus is on the arbitrariness standard set by court in the decision. This entails testing whether a sufficient reason for the deprivation exists based on the variable interplay of relationships considered by the court. Both procedural and substantive arbitrariness will need to be considered and tested. The Subdivision Act also makes provision for expropriation in certain instances. An expropriation in terms of the Subdivision Act will be tested in terms of the constitutional standard set in sections 25(2) and 25(3) of the Constitution.

1 3 4 General constitutional compliance

The further constitutional implications of the Subdivision Act will be considered and tested in the chapter on the general constitutional compliance of the Act. The

²⁰ *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 100.

²¹ Constitution of the Republic of South Africa 1996.

necessary and legitimate purpose of the Subdivision Act, the preservation and protection of agricultural land from uneconomic subdivision, divorced from its pre-constitutional apartheid aim, the preservation of prime agricultural land for white ownership and occupation, will have to be tested in terms of other rights in the Bill of Rights. The fact that the Act had the effect of determining who may have access to agricultural holdings requires examination. In instances where the Act's legitimate purpose could maintain white ownership of prime agricultural land that was obtained because of apartheid regulation requires scrutiny. This effect of the Act will have to be tested against the equality provision in the Constitution for possible unfair discrimination.²² The limitation on disposal posed by the Subdivision Act is an obstacle to black access to agricultural resources and allows whites to hold agricultural land acquired under apartheid. It will be necessary to determine whether this effect is unfair discrimination because the Act restricts access to land that has a racialised history. The agricultural land that was subject to the Act was the prime agricultural land outside of the homelands. This land was white owned land and the operation of the Subdivision Act could ensure that this land remains in white occupation and prevents blacks from accessing this land. It is necessary to test this effect against the Promotion of Equality and Prevention of Unfair Discrimination Act ("PEPUDA").²³ PEPUDA was enacted to give effect to the section 9 right of equality and will be used to test this effect of the Subdivision Act.

The administrative nature of the powers awarded to the Minister of Agriculture in terms of the Subdivision Act will also require due consideration. The Minister's administrative powers to decide on applications for subdivision existed at a time when administrative powers were abused to serve an apartheid political agenda. Although these powers are necessary in achieving the legitimate purpose of the Act they will require testing in terms of the Constitution because of the history of the

²² Constitution of the Republic of South Africa 1996, sec 9.

²³ 4 of 2000.

Act.²⁴ To determine the validity of these administrative powers the Act will be tested against the Promotion of Administrative Justice Act.²⁵

The socio-economic public purpose of the Subdivision Act, namely the preservation of prime agricultural land, also serves to promote and protect other rights in the Bill of Rights. The right to a safe and healthy environment²⁶ and the right to food security²⁷ are rights that can be promoted by the legitimate purpose of the Act. The preservation of agricultural land for agricultural purposes 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. It is necessary to consider all these rights, the rights promoted by the effective implementation of the legitimate purpose of the Act and the rights restricted by this purpose. There is a conflict between these rights and case law dealing with the conflict of rights will be considered and applied to this situation.

The issue raised in the minority decision in *Wary Holdings* also needs to be discussed. Yacoob J, for the minority, found that the national regulation of agricultural subdivision was in conflict with the Constitution. Here the issue of national, provincial and municipal competences comes into question. Deciding on whether it is appropriate for the Minister of Agriculture to continue overseeing agricultural subdivisions is necessary for the future and continued application of the Act. This is of particular relevance when considering the inoperative Repeal Act and the future of regulations over agricultural subdivision and whether new regulation should be left to provincial and municipal authorities.

²⁴ Constitution of the Republic of South African 1996, sec 33.

²⁵ 3 of 2000.

²⁶ Constitution of the Republic of South Africa 1996, sec 24.

²⁷ Constitution of the Republic of South African 1996, sec 27(1)(b).

1 4 Methodologies

The following methodologies will be used to test the hypotheses and aims identified above: a historical survey of the development of the Act; a policy analysis of the regulation of agricultural subdivisions; a statutory analysis of the legislative tool and its purpose; a constitutional analysis of validity legislation and a brief comparative survey of the regulation of agricultural subdivision in foreign jurisdictions. The historical survey will examine agricultural landholding before the promulgation of the Subdivision Act. This will contextualise and identify the legislative scheme that promoted and protected white agricultural interests. This analysis will identify both the illegitimate apartheid aim and the legitimate purpose of the legislation. The policy analysis will focus on evidence led by the Select Committees on Subdivision of Agricultural Land.²⁸ The two Committees investigated the feasibility of state regulation over the common law right of agricultural land owners to subdivide their land. The statutory analysis of the Act will examine specific provisions in the Act. Case law deciding on the operation of the Act's provisions will aid the interpretation of the Act and identify the extent of the Act's application. The analysis will further identify the steps the legislature has taken to limit the right of agricultural landowners to subdivide their land.

A constitutional analysis will be used to determine the validity of the Act in terms of the Constitution of the Republic of South Africa 1996. The constitutionality inquiry will be dealt with in two chapters. The first will test the Act against section 25 and the second will test the Act against other rights in the Bill of Rights. The comparative survey will be used to identify and distinguish the legitimate purpose from the illegitimate aim of the Subdivision Act. Zoning and land planning mechanisms have been successfully and legitimately employed in foreign jurisdictions to preserve agricultural land. Examining the policies and regulations relating to the preservation of agricultural land in the United States of America, specifically the states of Oregon

²⁸ 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.

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.

Chapter 2: Analysis of the Subdivision of Agricultural Land Act

2 1 Introduction

The Subdivision of Agricultural Land Act¹ (“Subdivision Act”) was enacted to prevent the uneconomic fragmentation of agricultural land in the Republic of South Africa. This is the declared purpose of the Act.² To achieve this purpose, the legislature has limited the common law right of agricultural landowners to subdivide their land.³ This limitation exists in the form of executive regulation and oversight over the practice of subdivision. Landowners are compelled to apply for, and the Minister of Agriculture, Forestry and Fisheries (“Minister of Agriculture”) is empowered to approve or deny, applications for agricultural subdivision. This is to preserve prime agricultural land in the national interest. This chapter will serve as an analysis of the legislative tool. The historical context and policy from which the Act was crafted, the extent of the Act’s application and considerations for its future application will serve as the main categories in this analysis.

The context, specifically the position of agricultural landholding before the Act, and the policy reasons for its enactment will serve as a historical background. This background will examine the legislative tools that were used to dispossess non-white South Africans of rural land entitlements in favour of white South Africans. Many of these tools did not expressly state an apartheid political aim, but this aim was a by product of the context that created these tools. The Subdivision Act serves to protect agricultural land from uneconomic subdivision but it also aimed to preserve prime agricultural land for white occupation. This section will map the creation of the Act. The Subdivision Act fell within a legislative scheme that promoted and protected

¹ 70 of 1970.

² Subdivision of Agricultural Land Act 70 Of 1970, the long title states that the purpose of the Act is “[t]o control the subdivision and, in connection therewith, the use of agricultural land”.

³ *Mangion v Bernhardt* 1977 (3) SA 901 (W) 915C-915D.

white agricultural interests.⁴ This will later serve as the premise for the argument that the Subdivision Act served and serves racially segregated agricultural land holding.⁵

The interpretation of the Act's provisions will identify the steps the legislature has taken in limiting the common law right of agricultural landowners to subdivide their land. It will also show that the Act does not only restrict the act of subdivision, but most of the actions that could result in uneconomic subdivision. The legislature has subjected most actions that may lead to the subdivision of agricultural land to the limitation, for example the sale of a portion of agricultural land. Emphasis will be placed on the definition of agricultural land,⁶ as only agricultural land is affected by this regulation; actions related to agricultural land that are not affected by the Act's operation;⁷ actions that are prohibited;⁸ the extent of the Minister's consent;⁹ the restrictions placed on succession¹⁰ and servitudes;¹¹ and the penalties and fines imposed when contravening the Act.¹² To further gauge the extent of the Act's application the courts' interpretation of the various provisions will be considered.

The current status of the Act, the position of the Act since the promulgation of the still inoperative Repeal Act¹³ and the uncertainty created will also need to be considered. Badenhorst, Pienaar and Mostert refer to "the limbo" that the Repeal Act has

⁴ See 2.2 below.

⁵ See chaps 3 and 5 below.

⁶ Subdivision of Agricultural Land Act 70 of 1970, sec 1(a) – (f).

⁷ Subdivision of Agricultural Land Act 70 of 1970, sec 2.

⁸ Subdivision of Agricultural Land Act 70 of 1970, sec 3.

⁹ Subdivision of Agricultural Land Act 70 of 1970, sec 4.

¹⁰ Subdivision of Agricultural Land Act 70 of 1970, sec 5(1).

¹¹ Subdivision of Agricultural Land Act 70 of 1970, sec 6A.

¹² Subdivision of Agricultural Land Act 70 of 1970, sec 11.

¹³ Subdivision of Agricultural Land Act Repeal Act 64 of 1998.

created.¹⁴ The motivation behind the repeal, the possible implications it holds and the future legislative plans for agricultural subdivisions will be discussed. The Draft Sustainable Utilisation of Agricultural Resources Bill of 2003 will have to be considered even though it has not been presented to Parliament. The Draft Bill serves an indication of future legislative plans for regulating agricultural subdivisions.

2 2 Historical development of the Act

2 2 1 *Agricultural landholding before the Subdivision Act*

The relevance of a historical background lies in the fact that it sketches the context in which the Subdivision Act was later created. This background is a starting point to the formation of agricultural policy. This policy was heavily politicised. Legislation was used to directly limit black African entitlements to agricultural land. It was also important in fostering white economic agricultural interests.

A good point of departure is the Glen Grey Act of 1894. This Act limited the areas where Africans could establish farming operations. The Act created the Glen Grey district¹⁵ and was aimed at confining black squatters¹⁶ to a reserve. The reserve land could not be sold, rented or subdivided. The Act was further designed to serve the labour needs of white commercial farmers.¹⁷ The Glen Grey Act was the predecessor to the later Land Acts of 1913 and 1936.¹⁸ The Glen Grey Act had the effect of limiting the size of land that could be held by Africans. It also restricted the

¹⁴ Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2006) 109.

¹⁵ The Glen Grey District was situated in the Cape Colony.

¹⁶ The term "black squatters" is used to identify all Africans that lived and worked on European (white owned) farms. See Youé C "Black squatters on white farms: Segregation and agrarian change in Kenya, South Africa, and Rhodesia, 1902-1963" (2002) 24 *International History Review* 558-602.

¹⁷ White farmers were able to source black labour directly from the reserves. Vink N and Van Zyl J "Black disempowerment in South African agriculture: A historical perspective" in Kirsten J, Van Zyl J and Vink N (eds) *The agricultural democratisation of South Africa* (1998) 61-70 at 63.

¹⁸ Black Land Act 27 of 1913 and the South African Development Trust and Land Act 18 of 1936.

sale of land by white owners to Africans and prohibited sharecropping¹⁹ and cash rentals.²⁰ Mbongwa, Van den Brink and Van Zyl submit that the Act was intended to transform black African tenants into wage labourers destined for the mines.²¹

The further disempowerment of black African farmers can be traced back to the formation of the Union in 1910. The four colonies were consolidated, bringing together the English and Afrikaner whites under the Union. This strengthened settler state further promoted the isolation and suppression of African farmers from mainstream agriculture. This was accomplished by closing off access to most of the markets²² needed for successful farming practices. Economic policy was used to force the African farmer off his farm and into the position of the farmhand. At the same time the white farmer was receiving support from a wide range of state implemented measures.²³ Examples of these measures were the creation of the Land and Agricultural Bank from provincial institutions already in existence; the securing of market services under the Co-operative Societies Acts;²⁴ and the regulation of produce markets under the Marketing Act.²⁵

¹⁹ In a sharecropping system an agricultural landowner allows a tenant to use the land in return for a share of the crop produced on the land. It was used by the black farming communities to allow black families without resources to cultivate land and make it productive. Sharecropping arrangements were also entered into between rural blacks and white farmers. See Cross C "Informal tenures against the state: Landholding systems in African rural areas" in de Kerk M (ed) *A harvest of discontent. The land question in South Africa* (1991) 63-98 90.

²⁰ This was where cash payments could be made by blacks to white farmers and owners to cultivate and farm the land.

²¹ Mbongwa M, Van den Brink R and Van Zyl J "Evolution of the agrarian structure in South Africa" in Van Zyl J, Kirsten J and Binswanger H P (eds) *Agricultural land reform in South Africa: Policies, markets and mechanisms* (1996) 36-63 at 43.

²² These markets included land sale, the rental markets, rural finance and markets for farm requisites and skilled labour.

²³ Vink N and Van Zyl J "Black disempowerment in South African agriculture: A Historical perspective" in Kirsten J, Van Zyl J and Vink N (eds) *The agricultural democratisation of South Africa* (1998) 61-70 at 61.

²⁴ The Co-operative Societies Act 28 of 1922 was later replaced by the Co-operative Societies Act 29 of 1939.

²⁵ 26 of 1937.

The position of white farmers settling on state owned land was regulated by the Land Settlement Act.²⁶ This Act, and amendments to it, standardised the acquisition and disposal of state land for white settlement. The Act had an application procedure which allowed white settlers to apply for state or privately owned land. The Minister of Land was authorised in terms of the Act to allot state land, to use state funds to purchase private land and to subdivide land into appropriate agricultural holdings. This instrument and the others mentioned promoted virtually complete segregation of the agricultural sector and simultaneously created a system of support measures for white farmers.

The farming structure at the beginning of 1913 largely consisted of settler-owned farms with hired black labourers or black squatters.²⁷ The discrimination in access to rural land was further strengthened by the introduction of the Black Land Act.²⁸ The Act outlawed other forms of access to land, such as sharecropping and labour tenancy. The Act deprived Africans of the land they traditionally occupied by creating scheduled areas that were exclusively created for black occupation. It was also aimed at curbing black farming practices at the time that white farms were prospering. This was in response to “black syndicates” that were purchasing land and operating farms successfully.²⁹ Bundy argues that by preventing the successful black peasants from accumulating land within the reserves, potential competition with white farmers could be stopped.³⁰

The South African Development Trust and Land Act³¹ released more land to blacks and enabled further state control over these released areas. Carey Miller and Pope

²⁶ 12 of 1912.

²⁷ See fn16 above.

²⁸ 27 of 1913.

²⁹ Davenport TRH “Can sacred cows be culled? A historical review of land policy in South Africa with some questions about the future” (1987) 4 *Development Southern Africa* 388-399 at 398.

³⁰ Bundy C *The rise and fall of South African peasantry* (2nd ed 1988) 213.

³¹ 18 of 1936.

indicate that there was a distinct shift from individual tenure to trust tenure in these released areas, the reserves.³² It should be noted that at this time white land holding was consistently individual.³³ The Act in effect created two distinct classes in the population and this was reflected in the way land was occupied by black South Africans on the reserves and owned by white South Africans elsewhere. These reserves were where the TBVC states³⁴ and Bantustans were later created as self-governing territories.

The long term effect of all these policies was to reduce African farming practices to subsistence farming. The 1948 election and victory of the National Party is also relevant for the further development of agricultural policy. The foundation for the National Party's doctrine of separate racial development was already laid in the Land Acts of 1913 and 1936, and was further entrenched after the elections. This doctrine was realised through the enactment and implementation of legislation that promoted racial segregation.

The Group Areas legislation³⁵ in urban areas with the Land Acts was the realization of this doctrine. The Group Areas legislation divided urban spaces into separate race areas. The effect on rural land could be seen in the way the Group Areas legislation identified all other land, which would include agricultural land.³⁶ These areas were controlled areas and were reserved for white owners. The implication was that only

³² Carey Miller DL with Pope *A Land title in South Africa* (2007) 26.

³³ An individual owner had control over the land he was farming.

³⁴ The Transkei, Bophuthatswana, Venda and Ciskei accepted independence from the rest of the country. From the 1950s the reserves were gradually consolidated into homelands or Bantustans which were treated as the *de jure* states. The TBVC states accepted independence from South Africa, first the Transkei and then three others followed suit.

³⁵ Group Areas Act 41 of 1950; Group Areas Act 65 of 1952; Group Areas Act 77 of 1957; Group Areas Act 36 of 1966 and the seventeen amendments to these Acts comprised the Group Areas legislation.

³⁶ The Group Areas Act of 1966 divided towns and cities into separate race areas. The Act also defined all other land, including agricultural land as "controlled areas" which was reserved for white owners.

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

Numerous other Acts³⁷ 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.³⁸ 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.³⁹ 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.

³⁷ 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.

³⁸ 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.

³⁹ 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.

Relating to the practical need for the regulation Dr PD Henning was questioned by the 1964 Committee. At the time of the hearing he was a member of the Development of Natural Resources Board. The Board had to deal with applications for subdivision in the controlled areas. During these application processes the board had found that 43 of the 68 applications they had received, if approved, would have resulted in uneconomic farming units. He stated that this was an indication of what could happen in the uncontrolled rural areas. The Board was also responsible for investigating the consolidation of certain portions of land. In this regard he had been made aware of 36 instances, out of 70 farms investigated, that were already uneconomic units. These findings and other reports available at the time indicated that between 50 and 60 percent of farms were already uneconomic units. The full extent of uneconomic farming units that were in existence at that time would have had to be researched and investigated further. He submitted that this estimation could not be applied across the entire country, but indicated that uneconomic units were a problem. Dr Henning stated that farmers had many difficulties to overcome, and that in building a strong farming community, the minimum requirement for any farmer would have to be that the unit on which he farms needs to be an economic unit.⁴⁰

Numerous publications had highlighted the problems experienced in the agricultural sector during the period preceding the Committee hearings.⁴¹ These included issues of the surface use of agricultural land as well as the occupation of agricultural land. The issue became pertinent during the 1962 meeting of the House of Assembly which later led to the appointment of the Interdepartmental Study Group on Uneconomic Subdivision of Agricultural Land. The findings of this Study Group led to the drafting of the concept Bill. The statistical extent of the problem of uneconomic

⁴⁰ Republic of South Africa Select Committee on Subdivision of Agricultural Land *Report SC 9-64 (1964) 1-88 at 1-4.*

⁴¹ The important publications were Grosskopf JFW *Verslag van die Carnegie-kommissie: Plattelandsverarming en plaasverlating* (1932); Republiek van Suid-Afrika Departement Landbou en Bosbou *Verslag van die heropbou van landbou* (1943); Republiek van Suid-Afrika Sosiale en Ekonomiese Planneraad *Die toekoms van boerdery in Suid Afrika* (1945).

units was not available at that time, but whenever uneconomic farming operations were discussed, uneconomic units were emphasised. Mr de Swardt, the Secretary of Agricultural Economics and Marketing, during his questioning by the 1964 Committee submitted that had the issue not been addressed, it would have become a real threat to the future existence of independent farmers.⁴²

Mr de Swardt identified the predominant factors resulting in the injudicious subdivision of agricultural land as the traditional system of testate succession, the inherent urgency with which ownership of land was desired by the Afrikaner, land speculation, the high capital needs of modern farming, the inadequate knowledge of most land buyers about production potential and the lack of sufficient legislative tools to prevent detrimental and injudicious subdivision. These factors, if left unaddressed, would have had negative consequences for the economic, agricultural and social spheres. Economically, it would eventually have resulted in a peasant farming community. Agriculturally, it would have led to a system of over-cropping and the exhaustion of the land and socially, the economic aspect would have resulted in a decline in living standards. This economic impoverishment would have negatively impacted the spiritual wellbeing of the individual, which would be accompanied by cultural, educational and further social problems.⁴³

He further submitted that the size of the land may be one of many factors that may result in an uneconomic farming unit, but it remained one of the more important factors when determining whether a farming operation was economically effective. The physical, economic and sociological factors are all relevant in this regard.⁴⁴ The

⁴² Republic of South Africa Select Committee on Subdivision of Agricultural Land *Report SC 9-64* (1964) 1-88 at 59-60.

⁴³ Republic of South Africa Select Committee on Subdivision of Agricultural Land *Report SC 9-64* (1964) 1-88 at 60-61.

⁴⁴ The factors identified in this regard were the climate, the quality and quantity of natural resources, the interaction of these resources, the management skills of the farmer, the business financing, the relationship between the prices of products and production means, price tendencies and the lifestyle of the farmer and his family.

interaction of these factors could allow one farmer to farm productively on a smaller unit, but another farmer would not be as successful under the same conditions. Land that has been injudiciously subdivided and is the cause of an uneconomic farming unit has very little chance of being rectified through consolidation, unless neighbouring land is available for consolidation. To prevent this situation it would be necessary to take steps to prevent the injudicious subdivision of agricultural land.⁴⁵

According to Mr de Swardt, determining an appropriate method of state control would require certain administrative powers to be conferred on an authorised body. These administrative powers should be necessary in achieving the aim of the proposed regulation and not receive unfavourable public response.⁴⁶ The exercise of these administrative powers could only apply to new instances of subdivision. Farming units that were already uneconomic units would not be affected by the proposed legislation. The proposed legislation could only be preventative and would prevent the creation of further uneconomic units.⁴⁷

Determining whether the proposed subdivision would result in an uneconomic unit showed that the surface area of the land would not serve as a reliable measure of the economic potential. It was proposed that the actual measurement would be the net income that the average farmer, under normal circumstances, could earn on the hypothetically subdivided land.⁴⁸ When deciding whether a farming unit is economically viable it becomes necessary to only use the characteristics and factors attached to the land. This would assist in determining whether the land has sufficient earning potential. The most important of these characteristics, as identified by the

⁴⁵ Republic of South Africa Select Committee on Subdivision of Agricultural Land *Report SC 9-64* (1964) 1-88 at 61-62.

⁴⁶ Republic of South Africa Select Committee on Subdivision of Agricultural Land *Report SC 9-64* (1964) 1-88 at 62.

⁴⁷ Republic of South Africa Select Committee on Subdivision of Agricultural Land *Report SC 9-64* (1964) para 1-88 at 62.

⁴⁸ Republic of South Africa Select Committee on Subdivision of Agricultural Land *Report SC 9-64* (1964) para 1-88 at 62-63.

1965 Committee, were the nature of the soil, the provision of water, the specific climate, the amount of rainfall, the marketing prospects of the agricultural land and whether there is sufficient transport access.⁴⁹ These characteristics would be used to determine the production potential and projected income of the farming endeavour.

The 1965 Committee also indicated that it was doubtful whether the subdivision of land was the only factor that resulted in an uneconomic farming endeavour. It could be accepted that there were instances where subdivision supported the farmer with less capital, but that there were also other factors, like the necessary management skills and capabilities, sufficient capital and healthy creditor relationships that were needed to farm successfully. Without these factors no farmer would be able to farm successfully on land of any size. The Committee stated that these factors would need to be left out of a discussion on the regulation of economic farming units, as there was no way to regulate them.⁵⁰

Mr de Swardt identified the process that would be needed to enforce the regulation. The projected income would have to be used and applied by the concerned Minister. The policy considerations that would be applied in considering the proposed subdivision application would have been determined by the Minister. A full time Board would have to be employed to exercise the Minister's policy. The Board's functions would be quasi-judicial in nature because their decisions would affect the established rights of the landowner. It would be responsible for deciding whether subdivision applications should be rejected or accepted, based on the evidence led by the applicant. Each application would have to be dealt with on its own merits because the minimum size of agricultural land cannot be a fixed standard. In this

⁴⁹ Republic of South Africa Select Committee on Subdivision of Agricultural Land *Report SC 4-65* (1965) 1-51 at 2.

⁵⁰ Republic of South Africa Select Committee on Subdivision of Agricultural Land *Report SC 4-65* (1965) 1-51 at 2.

regard local committees would be necessary to evaluate these applications.⁵¹ It was submitted at an earlier stage of the hearing that a general norm or minimum standard could not be established even with farms in the same area. On this basis each farm would have to be investigated on its own merits to determine whether it is an economic unit after taking all other factors into consideration.⁵²

The 1965 Committee illustrated two problems that needed to be distinguished and separated when evaluating an uneconomic farming unit. This would be relevant in the application of the regulation. The first problem was a *bona fide* farmer who had begun a farming endeavour and was struggling to keep it afloat. The second was where prime agricultural land was being spoiled through subdivision.⁵³

In dealing with the first problem the Committee identified certain measures that could be taken, namely that sufficient information should be made available; that the nature of the information should allow the new farmer to evaluate the potential of the farming unit and to make the most beneficial use of it; that unprofitable undertakings be discouraged, especially in the absence of state funding and funding from other sources; and to encourage the creation of profitable units through sensible financing. The remaining issues could be left to economic legislation.⁵⁴

The second problem would need to be regulated by the state. State control would be necessary where prime agricultural land was being spoiled through subdivision. The problem with the regulations that were in place at that time was that they were

⁵¹ Republic of South Africa Select Committee on Subdivision of Agricultural Land *Report SC 9-64* (1964) 1-88 at 64-66.

⁵² Republic of South Africa Select Committee on Subdivision of Agricultural Land *Report SC 9-64* (1964) 1-88 at 1.

⁵³ Republic of South Africa Select Committee on Subdivision of Agricultural Land *Report SC 4-65* (1965) 1-51 at 4.

⁵⁴ Republic of South Africa Select Committee on Subdivision of Agricultural Land *Report SC 4-65* (1965) 1-51 at 5.

varying and uncoordinated. These regulations were national and provincial but only affected certain areas. If the state was to prevent agricultural land being subdivided into uneconomic units it would be necessary to consolidate and centralise the controlling authority. This control would be imperative where actions relating to the resource would result in the inexpediency of the agricultural land. A prerequisite for this control over the utilisation of agricultural land was that agricultural land needs to be properly defined and demarcated. As the proposed regulation concerns agricultural land it was necessary to determine what land would be affected, and the way this land would be identified. The practical application of these measures and the measure of control to be exercised, after agricultural land had been identified, would be that, firstly, it was enforceable and, secondly, that it did not receive unfavourable public response when it came to its enforcement.⁵⁵

The arguments against state interference with the freedom of the farmer to use his land as he sees fit were not to be permitted to promote the fragmentation or abuse of good agricultural land. These evils needed to be argued against and prevented. In the process of regulating subdivision it should also not be necessary to apply semi-socialist measures.⁵⁶ To avoid this possibility focus should be placed on whether the envisioned subdivision or use of the agricultural land would make the land unsuitable for the farming endeavour. The 1965 Committee indicated that the resource, prime agricultural land within the Republic, was too scarce to allow other types of operations, or to allow farming operations that would be unsuccessful due to the proposed subdivision.⁵⁷

⁵⁵ Republic of South Africa Select Committee on Subdivision of Agricultural Land *Report SC 4-65* (1965) 1-51 at 4-5.

⁵⁶ Republic of South Africa Select Committee on Subdivision of Agricultural Land *Report SC 4-65* (1965) 1-51 at 3.

⁵⁷ Republic of South Africa Select Committee on Subdivision of Agricultural Land *Report SC 4-65* (1965) 1-51 at 3.

Both Committees stated that the failure to regulate the practice of subdivision would be detrimental and the 1964 Committee went as far as to state that it would be impossible to build a strong farming community without the regulation.⁵⁸ The 1965 Committee pointed out that by failing to draft and enforce a regulation it would later result in farmers becoming a financial burden on the state. Farmers would require financial support when their farming operations were in trouble and by not regulating the injudicious subdivision it would only be matter of time before this was a reality.⁵⁹

The Committee reports indicate that the proposed legislative limitation on the common law right to subdivide was necessary. It also revealed that the state was concerned that a white peasant farming community was being created. The need for the regulation was further highlighted in *Mangion v Bernhardt*⁶⁰ where Viljoen J stated that:

“Parliament has very wisely put a stop to unrestricted fragmentation of arable land. The Act, in the interests of national welfare, effects a drastic curtailment of previous common-law rights of land owners in a certain category to carve their properties into units as small as they choose, and it is indisputably one of the wisest pieces of legislation on the statute book.”⁶¹

2 2 3 Promulgation

The Subdivision of Agricultural Land Act was assented to in September of 1970 and was brought into operation on 2 January 1971. The Act was promulgated “to curb the increasing fragmentation of arable farming land”.⁶² According to Scholtens and

⁵⁸ Republic of South Africa Select Committee on Subdivision of Agricultural Land *Report SC 9-64* (1964) para 1-88 at 1.

⁵⁹ Republic of South Africa Select Committee on Subdivision of Agricultural Land *Report SC 4-65* (1965) 1-51 at 15-16.

⁶⁰ 1977 (3) SA 901 (W).

⁶¹ *Mangion v Bernhardt* 1977 (3) SA 901 (W) 915C-915D.

⁶² Scholtens J E and Petersen J D “Law of property (including mortgage and pledge)” 1970 *Annual Survey of South African Law* 202-224 at 203.

Peterson, the Act was aimed at preventing the injudicious subdivision by testators and property speculators creating uneconomic farming units that would eventually lead to a peasant farming community.⁶³ The court in *Van der Bijl and Others v Louw*⁶⁴ stated that “[t]he purpose of the Act is manifest: its object is to prevent the subdivision of economic units of farming land into non-viable sub-units or smaller units”.⁶⁵ From the policy discussions it was clear that the Act would need to only regulate future acts of subdivision. The way in which the Act’s purpose is realised is by application procedure. The landowner wanting to subdivide and sell or register a long-term lease would apply to the Minister of Agriculture for consent to subdivide. The Act also affected succession, testate and intestate, and the registration of certain servitudes. In achieving the purpose, the Act has also been subjected to a number of amendments.⁶⁶ The amendments have extended the scope of the Act’s application to actions that may result in the subdivision of agricultural land.⁶⁷ The amendments were clearly attempts by the legislature to close off loopholes in the Act.

2 3 Interpretation of the Act

2 3 1 Land affected by the regulation

The land affected by the regulation on subdivision is described in the definition of agricultural land in the Act. The definition of agricultural land identifies all land which is subject to the legislative limitation on the right to subdivide. The Act defines

⁶³ Scholtens J E and Petersen J D “Law of property (including mortgage and pledge)” 1970 *Annual Survey of South African Law* 202-224 at 203.

⁶⁴ 1974 (2) SA 493 (C).

⁶⁵ *Van der Bijl and Others v Louw* 1974 (2) SA 493 (C) 449D-449E.

⁶⁶ Subdivision of Agricultural Land Amendment Act 55 of 1972; Subdivision of Agricultural Land Amendment Act 19 of 1974; Subdivision of Agricultural Land Amendment Act 18 of 1977; Subdivision of Agricultural Land Amendment Act 12 of 1979; Subdivision of Agricultural Land Amendment Act 18 of 1981; Subdivision of Agricultural Land Amendment Act 33 of 1984.

⁶⁷ The more notable of these extensions were the restrictions on the sale of advertising for sale of a portion of agricultural land in sec 3(e) of the Act and the registration of a long-term lease over a portion of agricultural land in sec 3(d) of the Act without the written consent from the Minister of Agriculture.

agricultural land in terms of exceptions. Agricultural land is any land, except land that is excluded from the Act's operation. These exceptions are identified in sections 1(a) to (f). Section 1(a) identifies agricultural land as all land not situated within the jurisdiction of a municipality. This would be land in areas identified as urban prior to the 1993 municipal restructuring⁶⁸ and also peri-urban land that fell within the area of municipality or town council.

This definition was further supplemented by the 31 October 1995 proviso.⁶⁹ It was drafted in response to the Local Government Transition Act⁷⁰ and declared all land classified as agricultural land prior to the transitional period to retain that classification. The effect of the proviso was that all agricultural land would continue to be subject to the provisions of the Subdivision Act. However, since the introduction of the Municipal Demarcation Act⁷¹ and the Municipal Structures Act⁷² and the end of the transitional period this definition has become contentious. Whether the proviso was to surpass the transitional period has resulted in disputes⁷³ in which the courts have had to determine the continued application of the Subdivision Act.

⁶⁸ The Local Government Transition Act 209 of 1993 was the first step towards a nationwide restructuring of local government. The Act was implemented "to provide for revised interim measures with a view to promoting the restructuring of local government". The creation of wall-to-wall municipalities was the end result through the promulgation and application of the Municipal Structures and Municipal Demarcation Acts.

⁶⁹ Proclamation R100 of 1995, GG 16785, 31 October 1995. The proviso reads: "Provided that land situated in the area of jurisdiction of a transitional council as defined in section 1 of the Local Government Transition Act, 1993 (Act No. 209 of 1993), which immediately prior to the first election of the members of such transitional council was classified as agricultural land, shall remain classified as such".

⁷⁰ 209 of 1993.

⁷¹ 27 of 1998.

⁷² 117 of 1998.

⁷³ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 (11) BCLR 1123 (CC); *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Another* 2008 (1) SA 654 (SCA); *Kotzé en 'n Ander v Minister van Landbou en Andere* 2003 (1) SA 445 (T). See the discussion that follows.

The creation of wall-to-wall municipalities through the promulgation of the Municipal Structures and Municipal Demarcation Acts should have subjected all land to Subdivision Act's exception in section 1(a). The end of the transitional period, if this view is accepted, would have excluded all agricultural land from the Act's operation. The Subdivision Act would have been practically ineffective. This has resulted in litigation where parties have argued that the requirement of written ministerial consent for subdivision applications would no longer apply because the land is not affected by definition of "agricultural land" in the Act. The courts have had to interpret the proviso in the light of constitutional changes to local government, taking cognisance of the intention of the legislature that subdivision is to be regulated nationally through the ministerial consent requirement.

Three judgments will be dealt with in this section. The first is *Kotzé en 'n Ander v Minister van Landbou en Andere* ("Kotzé")⁷⁴ in which the court had to decide whether agricultural land still exists for the purposes of the Act after the end of the transitional period. The other two judgments concerned litigants in a contractual dispute appealing to both the Supreme Court of Appeal and the Constitutional Court respectively. The Supreme Court of Appeal's finding in *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Another* ("Stalwo")⁷⁵ indicated that the Act's applicability was now limited to land that the Minister declares as being agricultural land for the purposes of the Act.⁷⁶ The Constitutional Court finding confirmed that the *Kotzé* judgment represented what the law was before the *Stalwo* decision was handed down.⁷⁷ The majority of the court set aside the SCA finding.

⁷⁴ *Kotzé en 'n Ander v Minister van Landbou en Andere* 2003 (1) SA 445 (T).

⁷⁵ 2008 (1) SA 654 (SCA).

⁷⁶ It should be noted that the Minister still has the power to identify land as being agricultural land within a municipal area, thus not making the Act wholly obsolete. Section 1(a) further states that land situated within municipal area excludes "any such land declared by the Minister after consultation with the executive committee concerned and by notice in the Gazette to be agricultural land for the purposes of this Act".

⁷⁷ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 (11) BCLR 1123 (CC) para 93.

In *Kotzé v Minister van Landbou*⁷⁸ the applicants were co-owners of a farm. In July 2001 they applied to have their farm subdivided. This application was made to the local authority. The applicants subsequently concluded a contract of sale with regard to three undivided parts of the farm. The contract was subject to a suspensive condition stipulating that the contract of sale was subject to the applicants obtaining the written subdivision consent from the involved authorities. Deposits were already paid by two of the buyers, and the applicants proceeded to make improvements to the land, in the form of erected fences. The consent was officially received from the local authority in November of that year. In January of 2002, the applicants discovered that they still required written consent from the Minister of Agriculture for the subdivision. The applicants contended that this consent was not necessary in the light of statutory and constitutional changes to local municipal structures. Their land was now situated within the jurisdiction of a local authority, the Lephalele municipality. Based on the definition of “agricultural land” in the Subdivision Act their farm was situated in the area of municipality and would not be agricultural land for the purposes of the Act. The negotiations between the parties to the dispute were unsuccessful and consequently the applicants approached the court for a declaratory order indicating that the land in question was no longer subject to the Subdivision Act. This contention was based on the definition of agricultural land in the Act and the exception to agricultural land within this definition.⁷⁹

Van der Westhuizen J approached this argument by examining the current status of the Act. He acknowledged the existence of the Subdivision of Agricultural Land Act Repeal Act⁸⁰ and speculated on the reasoning for this contended repeal. He came to the conclusion that although the Repeal Act had been promulgated, it remained inoperative and the Subdivision Act and its requirements continued to apply. This was based on the steps taken by the legislature to keep the Act in operation until a time when appropriate measures could replace and regulate the practice of

⁷⁸ *Kotzé en 'n Ander v Minister van Landbou en Andere* 2003 (1) SA 445 (T).

⁷⁹ *Kotzé en 'n Ander v Minister van Landbou en Andere* 2003 (1) SA 445 (T) 447J-448F.

⁸⁰ 64 of 1998.

subdivision.⁸¹ The Subdivision Act thus needed to be seen as being operational. The court continued to determine the scope of its operation in view of municipal restructuring.⁸²

Van der Westhuizen J considered whether agricultural land, for the purposes of the Act, still existed in view of constitutional changes to the system of local government. The Municipal Structures Act⁸³ was enacted to establish wall-to-wall municipalities. The effect of this new system of local government would have subjected all land, previously classified as agricultural land, to the exception in the Act's definition. This would have rendered the Subdivision Act practically ineffective. It was held that this could not have been the intended result and that section 1 of the Act should be interpreted to mean what it did at the time when it was promulgated. The fact that the Constitution created a new functionality for local government did not mean that the Act's purpose fell away. The Act concerned agricultural policy that related to the control of agricultural land. An interpretation that would result in no agricultural land existing for the purposes of the Act would be unacceptable. The court considered that leaving this regulation up to local government would result in differing policies and decision processes. This would have made it impossible for the Minister to regulate agricultural policy and this would have a negative impact on issues of agricultural reform and access. In this particular instance this effect would not have been intended.⁸⁴ Up until a time when the legislature creates new legislation to control the practice of subdivision, or finalises the repeal of the Act, the Subdivision Act would continue to apply. Van der Westhuizen J found that any land classified as agricultural land prior to the election of the first transitional councils would retain that classification. The agreement concluded by Kotzé was in fact subject to section 3 of

⁸¹ *Kotzé en 'n Ander v Minister van Landbou en Andere* 2003 (1) SA 445 (T) 450C-450J.

⁸² *Kotzé en 'n Ander v Minister van Landbou en Andere* 2003 (1) SA 445 (T) 451B.

⁸³ 117 of 1998.

⁸⁴ *Kotzé en 'n Ander v Minister van Landbou en Andere* 2003 (1) SA 445 (T) 456A-456I.

the Subdivision Act as the land was agricultural land in terms of the Act, and the application was consequently turned down.⁸⁵

In *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Another*⁸⁶ the appellant and respondent concluded an agreement for the sale of land. The validity of this agreement was questioned by the respondent. The Port Elizabeth High Court dismissed appellant's application to have the agreement declared binding, releasing the respondent from its obligation to transfer the land.⁸⁷ The advertisement of sale identified the plots as light industrial, and the appellant had intended to use it for that purpose. However, the land was still zoned as agricultural land. The respondent had applied to have the land rezoned and subdivided, and as in *Kotzé*, applied to the local authority. The applicant was aware that these applications could be rejected, but proceeded to take occupation of the land. A lease agreement was entered into and the applicant started preparing the land for its use as light industrial. The local authority had granted the applications, but this was subject to certain conditions. The conditions required the respondent to effect substantial improvements on the land in the form of an access way, storm water drainage and other essential services. In response to the conditions and the financial costs involved in complying with the conditions, the respondent wanted an increase in the purchase price. The appellant was not amenable to the increase in the purchase price.⁸⁸

In the court *a quo* the appellant sought an application declaring the contract binding between the two parties. The respondent opposed this application on two grounds. The first was that a material term was omitted from the written contract. The term was that the agreement was subject to the suspensive condition that the land was to be subdivided. The contention was that this was in contravention of section 2(1) of

⁸⁵ *Kotzé en 'n Ander v Minister van Landbou en Andere* 2003 (1) SA 445 (T) 456J.

⁸⁶ 2008 (1) SA 654 (SCA).

⁸⁷ The High Court decision was handed down on 26 January 2006 under *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* case no 5349/2005 (unreported).

⁸⁸ *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Another* 2008 (1) SA 654 (SCA) paras 1-3.

the Alienation of Land Act 68 of 1981. The second was that the agreement was in contravention of sections 3(a)⁸⁹ and 3(e)(i)⁹⁰ of the Subdivision Act. These sections prohibit the subdivision and the sale of the portion of agricultural land without the written permission of the Minister of Agriculture. The basis of this contention was that the land was “agricultural land” within the meaning of section 1(i)(a) of the Subdivision Act. The only relevant ground for the purposes of this discussion is the second, that there was non-compliance with sections 3(a) and 3(e)(i) of the Subdivision Act.⁹¹

The court *a quo* found that the land was to be defined as agricultural land and that the lack of ministerial consent rendered the agreement void.⁹² On this basis leave to appeal was granted. The Supreme Court of Appeal had to decide whether the agreement complied with provisions of the Subdivision Act. The judgment focuses on whether the land was “agricultural land” within the meaning of the Act when the agreement was concluded. The court had to determine whether the subject land fell within the definition of the Act.⁹³

A fact of common cause at the time of the agreement was that the land fell under the jurisdiction of the Nelson Mandela Metropolitan Municipality, which is a category A municipality in terms of section 2 of the Local Government: Municipal Structures Act.⁹⁴ Before the Nelson Mandela Metropolitan Municipality was established the land fell under the Port Elizabeth Transitional Rural Council, as contemplated in section 1 of the Local Government Transition Act.⁹⁵ Deciding whether the Nelson Mandela Metropolitan Municipality fell within the meaning contemplated in the definition of

⁸⁹ See 2 3 3 1 below.

⁹⁰ See 2 3 3 5 below.

⁹¹ *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Another* 2008 (1) SA 654 (SCA) para 4.

⁹² *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* case no 5349/2005 (unreported).

⁹³ *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Another* 2008 (1) SA 654 (SCA) para 5.

⁹⁴ 117 of 1998.

⁹⁵ 209 of 1993.

agricultural land in the Act was the central issue. The Subdivision Act fails to define the terms municipal council, city council or town council. In terms of section 93(8) of the Municipal Structures Act⁹⁶ “any reference in a law referred to in item 2 of Schedule 6 to the Constitution of the Republic of South Africa⁹⁷ ... to a municipal council, municipality, local authority or another applicable designation of a local government structure, must be construed as a reference to a municipal council or a municipality established in terms of this Act” (the Municipal Structures Act).⁹⁸ Maya JA found that there could be no doubt that the Subdivision Act was old order legislation in terms of item 2 of schedule 6 of the Constitution and section 93(8) of the Municipal Structures Act. This meant that the Nelson Mandela Metropolitan Municipality would be a municipality as per the definition of “agricultural land” in the Subdivision Act.⁹⁹

Maya JA proceeded to determine whether the land retained its original status as agricultural land. The subject land was classified as agricultural land prior to the election of the transitional council. By virtue of the proviso¹⁰⁰ in the definition of agricultural land the subject land would have retained this classification for the transitional period. Notwithstanding this fact the land now fell within the area of jurisdiction of a municipal council. The court *a quo*'s judgment traced the land back to a point in time where it would have been classified as agricultural land, during the transitional period. The court *a quo* judgment showed that the land would remain agricultural land, notwithstanding any changes to local government structures. The land was classified as agricultural land and would remain so. This conclusion was

⁹⁶ 117 of 1998.

⁹⁷ Constitution of the Republic of South Africa, Item 2 of Schedule 6: “(1) all law in force when the new Constitution took effect continues in force, subject to (a) any amendment or repeal; and (b) consistency with the new Constitution ... (2) old order legislation ... (b) continues to be administered by the authorities that administered it when the new constitution took effect, subject to the new Constitution.”

⁹⁸ 117 of 1998.

⁹⁹ *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Another* 2008 (1) SA 654 (SCA) paras 15-17.

¹⁰⁰ Proclamation R100 of 1995, GG 16785, 31 October 1995.

based on the judgment in *Kotzé*.¹⁰¹ Counsel for the appellant challenged this conclusion, arguing that it would result in the status of agricultural land remaining “perpetually frozen” from the time the transitional councils were established and not on the basis of whether the land was situated within the area of jurisdiction of the local government structures as listed in the definition in section 1. A narrow interpretation would simply have preserved the *status quo* pending the demarcation and establishment of the final new order of local government structures. At that time the land fell within the jurisdiction of the Nelson Mandela Metropolitan Municipality and had lost its historical character as agricultural land in terms of the Act.¹⁰²

Maya JA found that the framers of the Subdivision Act had contemplated the concept of “agricultural land” to be fluid rather than static. It would change with the expansion of local authorities and the creation of new ones. The purpose of the proviso needed to be determined in light of the legislative scheme which guided the restructuring process. This was the establishment of new categories of municipalities and to use existing statutory provisions until new ones could be enacted. Maya JA’s literal interpretation of the proviso served as further evidence that the proviso was to operate only as long as the land envisaged remained situated in the jurisdiction of a transitional council. If the legislature had intended the land to retain the classification after the transitional councils ceased to exist, it would have said so expressly.¹⁰³

The court was persuaded that the legislature enacted the proviso as a stop gap measure. This was based on the realisation that the effect of the Transition Act,¹⁰⁴ which would establish municipalities for the first time in rural areas, would be to include transitional councils within the meaning of municipal council envisaged in the definition of agricultural land. To exclude certain agricultural land from the definition

¹⁰¹ *Kotzé en ‘n Ander v Minister van Landbou en Andere* 2003 (1) SA 445 (T).

¹⁰² *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Another* 2008 (1) SA 654 (SCA) paras 18-20.

¹⁰³ *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Another* 2008 (1) SA 654 (SCA) paras 22 and 25.

¹⁰⁴ The Local Government Transition Act 209 of 1993.

would have created an untenable situation. When the transitional council was disestablished and the land fell under the jurisdiction of the Nelson Mandela Metropolitan Municipality. The subject land had ceased to be agricultural land within the meaning of the Subdivision Act. The court found that the *Kotzé*¹⁰⁵ judgment could not be sustained.¹⁰⁶

The Supreme Court of Appeal further found that the court *a quo* failed to acknowledge the “radically enhanced status and power” given to local government under the new constitutional order.¹⁰⁷ These constitutional competences allowed local governments to administer and regulate land within their jurisdictions without executive oversight. It was also clear that allowing this competence to local government did not thwart the objective of the Act, to control the subdivision of agricultural land. In terms of the definition of “agricultural land” the Minister would still be able to exclude land from the exceptions imposed and declare land “agricultural land” for the purposes of the Act. The court found that this point was overlooked in the *Kotzé*¹⁰⁸ judgment. This was based on that court’s view in *Kotzé* that any other interpretation would result in the emasculation of the Subdivision Act. The court’s decision was further fortified by the fact that the land in dispute was no longer being used as agricultural land. Sections 3(a) and 3(e)(i) were not applicable and the Minister’s consent was not a prerequisite for validity of the contract of sale.¹⁰⁹ The appeal was granted.

Leave to appeal to the Constitutional Court was granted in the judgment of *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others*.¹¹⁰ The Constitutional Court had to

¹⁰⁵ *Kotzé en ‘n Ander v Minister van Landbou en Andere* 2003 (1) SA 445 (T).

¹⁰⁶ *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Another* 2008 (1) SA 654 (SCA) para 25.

¹⁰⁷ *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Another* 2008 (1) SA 654 (SCA) para 26.

¹⁰⁸ *Kotzé en ‘n Ander v Minister van Landbou en Andere* 2003 (1) SA 445 (T).

¹⁰⁹ *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Another* 2008 (1) SA 654 (SCA) paras 26 and 27.

¹¹⁰ 2008 (11) BCLR 1123 (CC).

decide, on the same facts, whether the property sold at the time of the conclusion of the contract was “agricultural land” as envisaged by the Subdivision Act. The resolution of this issue would also determine the validity of the contract of sale between the parties. The facts appear above as discussed in the Supreme Court of Appeal’s decision.

The Constitutional Court had to decide whether a constitutional issue had been raised. The court acknowledged that the concept “a constitutional issue” in itself was broad, but was restricted to matters outlined in section 167(3)(b).¹¹¹ Two main submissions were used by the majority of the court to decide that a constitutional issue had been raised. The applicant’s submission maintained that the meaning and effect of the definition of “agricultural land” in the Subdivision Act needed to be read and interpreted within the constitutional context of the development of local government structures. The impact this has on the constitutional functional areas of different organs of state was therefore relevant. In terms of section 167(4)(a)¹¹² the court has the jurisdiction to decide on matters relating to disputes between specific organs of state. This contention emphasised the fact that the Minister retained the power to approve or reject a subdivision application, irrespective of the powers of present day municipalities. The effect of this decision would have effectively removed or confirmed the Minister’s power over agricultural subdivisions.¹¹³

On behalf of the *amici* and the Minister the second submission that “section 39(2)¹¹⁴ fashions a mandatory constitutional canon of statutory interpretation” was raised.¹¹⁵

¹¹¹ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 (11) BCLR 1123 (CC) para 39.

¹¹² Constitution of the Republic of South Africa, sec 167(4)(a) “[o]nly the Constitutional Court may decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state”.

¹¹³ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 (11) BCLR 1123 (CC) para 42.

¹¹⁴ Constitution of the Republic of South Africa, sec 39(2): “[w]hen interpreting any legislation ... every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”.

¹¹⁵ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 (11) BCLR 1123 (CC) paras 49.

From this submission the rights in sections 24(b)(iii),¹¹⁶ 25(5)¹¹⁷ and 27(1)(b)¹¹⁸ were invoked. It was averred that the Supreme Court of Appeal's interpretation of the Act's proviso failed to give proper recognition to these rights. The Minister and *amici* averred further that the High Court's decision gave better recognition of these rights. On this basis an interpretation of the proviso which continued to give the right of control over the issue of subdivision of agricultural land to the Minister would better serve the interpretive mandate in section 39(2).¹¹⁹

Another factor identified by the court that granting leave to appeal would be in the interests of justice emphasised the impact the interpretation of the proviso would have on agricultural policy. The judgment would have far-reaching implications, greater than the resolution of the contractual dispute between the parties. The court indicated that “[I]and, agriculture, food production and environmental considerations are obviously important policy issues at national level”,¹²⁰ and that whether or not municipalities should have a say in these matters is not in question. The court had to determine whether the legislature had intended to do away with the power of the Minister to preserve agricultural land or whether the Act recognises the need for national control and policy in decisions that affect the reduction of agricultural land and the need for a consistent national agricultural policy.¹²¹

¹¹⁶ Constitution of the Republic of South Africa, sec 24(b)(iii): “[e]veryone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development”. See 5 3 below.

¹¹⁷ Constitution of the Republic of South Africa, sec 25(5): “[t]he state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis”. See 5 3 below.

¹¹⁸ Constitution of Republic of South Africa, 27(1)(b): “[e]veryone has the right to have access to sufficient food and water”. See 5 3 below.

¹¹⁹ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 (11) BCLR 1123 (CC) paras 49-50.

¹²⁰ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 (11) BCLR 1123 (CC) para 53.

¹²¹ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 (11) BCLR 1123 (CC) para 53.

The proviso was introduced into the Act in terms of the Local Government Transition Act.¹²² When the Local Government Transition Act was promulgated all existing agricultural land fell within the jurisdiction of a transitional council and became municipal land. The proviso was introduced to ensure that agricultural land continued to be classified as such for the purposes of the Act. The legislature's intention was to keep the functional area of agricultural land with the Minister of Agriculture. This would include the administration of the Subdivision Act. The transitional phase could not have resulted in the eradication and destruction of agricultural land and its productive capacity. The legislature intervened to ensure this. This particular concern was acknowledged by the Supreme Court of Appeal.¹²³

The Constitutional Court had to determine whether the land, which now fell under the jurisdiction of the Nelson Mandela Metropolitan Municipality, was still agricultural land. Kroon AJ for the majority posed the question: would the land have retained its classification as agricultural at the time the parties concluded their agreement?¹²⁴ In answering this question, the court had to determine the intention of the legislature. Kroon AJ first looked at the plain meaning of the words and found that "a purely textual interpretation" could result in findings that suited both the High Court and the Supreme Court of Appeal judgments.¹²⁵ It could have meant that the classification should have persisted past the formation of the transitional councils or that the classification was only to survive the transitional period and would cease after that. Kroon AJ stated that "a further canon of statutory interpretation [is] that the ordinary meaning of the words in a statute must be determined in the context of the statute (including its purpose) read in its entirety".¹²⁶ The purpose of the Act included empowering the Minister as set out in the definition of "agricultural land" and section

¹²² 209 of 1993.

¹²³ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 (11) BCLR 1123 (CC) para 56.

¹²⁴ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 (11) BCLR 1123 (CC) para 57.

¹²⁵ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 (11) BCLR 1123 (CC) para 59.

¹²⁶ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 (11) BCLR 1123 (CC) para 61.

4 of the Subdivision Act and that no compelling reason had been presented for this position to be changed after the period of the transitional councils had ended.¹²⁷

Kroon AJ interpreted the proviso to mean that “the classification of land as ‘agricultural land’ was not tied to the life of the transitional councils”.¹²⁸ However, the proviso remained ambiguous and other indicators of the legislature’s intention would be necessary to determine the continued application and effect of the proviso.¹²⁹ The court determined the other indicators by addressing certain comments made in the Supreme Court of Appeal judgment.¹³⁰

The literal interpretation employed by the SCA, as indicated above, could have reached either conclusion.¹³¹ The point raised in the SCA decision about the enhanced status of municipalities would have to be addressed. This enhanced status included the competence and capacity to administer land in their jurisdictions, and this would reaffirm the point that land classified as agricultural land had been removed from the Minister’s control. The Constitutional Court found that no reason existed for the Minister and the present day municipalities not to share this control and the argument in favour of the SCA’s interpretation was not as convincing.¹³² The fact that the land was no longer being used as agricultural land, but as an industrial space, also did not preclude the Act’s operation. The land was zoned as agricultural land, and the Act had to be applied.¹³³

¹²⁷ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 (11) BCLR 1123 (CC) paras 58-61.

¹²⁸ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 (11) BCLR 1123 (CC) para 62.

¹²⁹ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 (11) BCLR 1123 (CC) para 62.

¹³⁰ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 (11) BCLR 1123 (CC) para 63.

¹³¹ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 (11) BCLR 1123 (CC) para 65.

¹³² *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 (11) BCLR 1123 (CC) paras 66 and 69.

¹³³ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 (11) BCLR 1123 (CC) para 83.

Kroon AJ found that the *Kotzé*¹³⁴ judgment correctly represented the law up until the SCA decision was handed down.¹³⁵ The majority decision was that the land situated in the jurisdiction of the transitional council and which was classified as agricultural land before the first election of the transitional council would remain classified as agricultural land. Even though the land fell under the jurisdiction of the Nelson Mandela Metropolitan Municipality at the time when the agreement between the appellant and respondent was concluded the Subdivision Act had to be applied. The consent of the Minister of Agriculture was required to subdivide and sell the agricultural land. The court set aside the SCA finding and granted the appeal to Wary Holdings.

The further exceptions in the definition of agricultural land relate to land subdivided in terms of the Agricultural Holdings (Transvaal) Registration Act 22 of 1919,¹³⁶ land that forms part of a township as defined in the Deeds Registries Act 47 of 1937,¹³⁷ state owned land or land held in trust by the Minister or the state¹³⁸ and land which has been excluded by the Minister of Agriculture.¹³⁹

2 3 2 Actions which are excluded from the Act's application

Actions specifically excluded by the Act can be placed into two categories, the first being transactions involving the state taking transfer of agricultural land or a right therein. Where a subdivided share,¹⁴⁰ an undivided share¹⁴¹ or a right to any portion

¹³⁴ *Kotzé en 'n Ander v Minister van Landbou en Andere* 2003 (1) SA 445 (T).

¹³⁵ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 (11) BCLR 1123 (CC) para 93.

¹³⁶ Subdivision of Agricultural Land Act 70 of 1970, sec 1(b)(i).

¹³⁷ Subdivision of Agricultural Land Act 70 of 1970, sec 1(b)(ii).

¹³⁸ Subdivision of Agricultural Land Act 70 of 1970, sec 1(c).

¹³⁹ Subdivision of Agricultural Land Act 70 of 1970, sec 1(f).

¹⁴⁰ Subdivision of Agricultural Land Act 70 of 1970, sec 2(a)(i).

¹⁴¹ Subdivision of Agricultural Land Act 70 of 1970, sec 2(a)(ii).

of agricultural land¹⁴² is transferred, sold or granted to the state the Subdivision Act does not apply. The second relates to the prohibited transfers, as identified in sections 3 and 5 of the Subdivision Act,¹⁴³ occurring before the Act came into operation.

The Subdivision Act makes provision for four instances where the Act does not apply in relation to transactions that occurred before the Act's commencement. The first relates to succession. Where a testamentary disposition was made or an estate is subject to intestate succession; if this has resulted in a subdivided or undivided share of agricultural land; and if the testator has died before the commencement of the Act, the provisions of the Act do not apply.¹⁴⁴ This was the case in *Standard Bank of SA Bpk v Meester van die Hooggeregshof, Kimberly en Andere*.¹⁴⁵ Here an application to clarify the provisions of a will was brought. The will had the effect of subdividing agricultural land, but remained unaffected by the Subdivision Act because the testator died in 1962.¹⁴⁶ The second instance is where a contract for the passing of an undivided share was entered into before the commencement of the Act.¹⁴⁷ The third instance is where a surveyor has completed the relevant survey and has submitted a "subdivisional diagram" for examination and approval prior to the commencement of the Act.¹⁴⁸ The inclusion of section 2(d) was aimed at protecting existing interests. Before the enactment of the Subdivision Act, agricultural land in uncontrolled areas could be freely subdivided, as far as it complied with the requirements of the Planning Act 88 of 1967. The owner of such land could have incurred the necessary costs in preparing the land for the subdivision and had the land surveyed with the necessary "subdivisional diagrams". If the Act had

¹⁴² Subdivision of Agricultural Land Act 70 of 1970, sec 2(a)(iii).

¹⁴³ See 2 3 3 and 2 3 5 below.

¹⁴⁴ Subdivision of Agricultural Land Act 70 of 1970, sec 2(b).

¹⁴⁵ [2005] JOL 14408 (NC).

¹⁴⁶ *Standard Bank of SA Bpk v Meester van die Hooggeregshof, Kimberly en Andere* [2005] JOL 14408 (NC) paras 3 and 13.

¹⁴⁷ Subdivision of Agricultural Land Act 70 of 1970, sec 2(c).

¹⁴⁸ Subdivision of Agricultural Land Act 70 of 1970, sec 2(d).

retrospective effect, requiring an application for consent, and if consent had been refused, all the costs incurred by the owner in terms of the old process would be lost. The legislature made an allowance for these subdivisions which are not subject to the Act. Where the land had been surveyed and the “subdivisional diagrams” have been submitted to the Surveyor General for approval, prior to the Act coming into operation, it is excluded from the Act’s operation.¹⁴⁹ The fourth instance is any long-term lease entered into prior to the commencement of the Act.¹⁵⁰

2 3 3 Prohibition of certain actions regarding agricultural land

2 3 3 1 Subdivision of agricultural land

Section 3(a) of the Subdivision Act states that “[a]gricultural land shall not be subdivided” without written consent from the Minister of Agriculture. This provision is a clear directive. Agricultural land is not to be subdivided. It identifies the purpose of the Act, namely to prevent the uneconomic subdivision of agricultural land. The act of subdivision needs to be accompanied by written consent from the Minister. The proceeding sections identify further actions that are also limited by the ministerial consent requirement. These deal with the transfer of agricultural land and actions that will result in the act of subdivision.

2 3 3 2 Vesting of an undivided share

Section 3(b) of the Subdivision Act states that “no undivided share in agricultural land not already held by any person, shall vest in any person ... unless the Minister has consented in writing.” This section aims to prevent the sole owner of agricultural land, not held in undivided shares, from transferring any undivided share in the ownership of that land to another person without the Minister of Agriculture’s

¹⁴⁹ *Willis NO v Registrateur van Aktes, Bloemfontein* 1979 (1) SA 718 (O) 723F-723H.

¹⁵⁰ Subdivision of Agricultural Land Act 70 of 1970, sec 2(e).

consent.¹⁵¹ This section does not, however, preclude agricultural land from being registered as a partnership asset. The only qualification is that the agricultural land be registered in the name of one partner, but not the other partner or partners. The partner with the registered right has a real right, whereas the other(s) have a personal right against the partner to manage the agricultural land as a partnership asset. The case of *Cussons and Others v Kroon*¹⁵² illustrates this position.

In the case of *Cussons* the second appellant had a farm registered in his name. He sold it to the first appellant, who was the nominee for a company to be incorporated. The first appellant then proceeded to transfer the farm to the newly incorporated company, the third appellant. The respondent alleged that the farm was a partnership asset that the second appellant transferred it without his consent, and that this was done with knowledge of the first and third appellants. The respondent brought an application to the Transvaal Local Division. The respondent wanted the contract of sale between the second and first appellants declared void. He also wanted the transfer of the farm from the third to the second appellant, the dissolution of the partnership and the appointment of a liquidator to realise the partnership assets. The court *a quo* found in favour of the respondent and gave an order to have the partnership dissolved.¹⁵³

The relevance of this case to the application of the Subdivision Act is that it was alleged on behalf of the appellants that the farm could never have been a partnership asset because of the application of section 3(b).¹⁵⁴ The decision *a quo* that the partnership agreement was not void because of the provisions of the Subdivision Act was confirmed by the Supreme Court of Appeal. The section states that no undivided share in agricultural land already held by any person shall vest in

¹⁵¹ Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2006) 108.

¹⁵² [2002] 1 All SA 361 (A).

¹⁵³ *Cussons and Others v Kroon* [2002] 1 All SA 361 (A) para 1.

¹⁵⁴ *Cussons and Others v Kroon* [2002] 1 All SA 361 (A) para 3.

any person. An undivided share in the farm was not transferred to the respondent and neither party intended this to happen. They were both aware that this could not be done and proceeded to have the farm registered only in the name of the second appellant. The respondent had no real right in the property. He only had a personal right against the second appellant in terms of which the second appellant had a duty to use the property as a partnership asset.¹⁵⁵ The effect of the Act therefore does not preclude the asset from forming part of a partnership, but it does prevent the asset, the agricultural land, from vesting any real rights in anyone other than the registered owner.

2 3 3 3 Vesting of a part of an undivided share

Section 3(c) of the Subdivision Act states that “no part of any undivided share in agricultural land shall vest in any person, if such part is not already held by any person ... unless the Minister has consented in writing.” The section aims to prevent the holder of an undivided share in the ownership of agricultural land from transferring a portion of his undivided share to another. It does not prohibit the holder of two or more shares of ownership in agricultural land from transferring one or more of these shares. The purpose of this section is to prevent the uncontrolled division of agricultural land into uneconomic units and the further division of agricultural land into smaller shares.¹⁵⁶

2 3 3 4 Long-term lease over a portion of agricultural land

Section 3(d) of the Subdivision Act states that “no lease in respect of a portion of agricultural land of which the period is 10 years or longer, or is the natural life of the lessee or any other person mentioned in the lease, or which is renewable from time to time at the will of the lessee, either by the continuation of the original lease or by entering into a new lease, indefinitely or for periods which together with the first

¹⁵⁵ *Cussons and Others v Kroon* [2002] 1 All SA 361 (A) para 6.

¹⁵⁶ Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2006) 108.

period of the lease amount in all to not less than 10 years, shall be entered into ... unless the Minister has consented in writing.” This provision invalidates any lease entered into which continues for any period over ten years. The option to renew after a period of nine years and eleven months is also invalidated. This was the case in *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk*.¹⁵⁷

In *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk*¹⁵⁸ a contract of lease was concluded between the appellant and the respondent. In the contract a plantation was to be leased for a period of nine years and 11 months. The appellant was the lessee. The appellant had applied to the local division to have the contract declared valid and the respondent opposed it. They disputed the validity of a clause which contained an option to renew and extend the lease period. If the option was valid the entire contract would have been invalid in terms of section 3(d) of the Subdivision Act, which prohibits a lease period longer than 10 years without the consent of the Minister.¹⁵⁹ It was argued by the appellant that the option to renew was severable from the contract. If the option was invalid the lease contract would still be valid. The appellant averred that the clause, which made provision for negotiations for a renewed rental period and arbitration where the negotiations failed, was invalid and unenforceable due to vagueness. The court *a quo* dismissed this application. The Appellate Court considered these positions and found that the option was not void for vagueness and was in fact in conflict with section 3(d) of the Act. The contract was invalid because of the existence of the option, because it had the potential effect of creating a long term lease, and this was done without the written consent of the Minister.¹⁶⁰

¹⁵⁷ 1993 (1) SA 768 (A).

¹⁵⁸ 1993 (1) SA 768 (A).

¹⁵⁹ *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* 1993 (1) SA 768 (A) 772A–772H.

¹⁶⁰ *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* 1993 (1) SA 768 (A) 773A–773B and 777C.

2 3 3 5 Sale or advertising for sale of a portion of agricultural land

Section 3(e)(i) of the Subdivision Act states that: “no portion of agricultural land, whether surveyed or not, and whether there is any building thereon or not, shall be sold or advertised for sale ... unless the Minister has consented in writing.” This section expressly prohibits the sale of a portion of agricultural land or the advertisement for sale of a portion of agricultural land without the Minister’s consent.

The majority of the cases dealing with this section of the Act are rooted in contractual disputes. A contract for the sale of agricultural land has been entered into and what is evident from the cases results in one of the contracting parties wishing to escape liability and performance. Failure to comply with the Act and the requirement of ministerial consent is then used to escape the contract because the formality requirements for the sale of agricultural land have not been complied with. The Act and its requirement of written ministerial consent in section 3 are reduced to an exit strategy for unhappy contracting parties. The cases here will be dealt with from the oldest to the more recent. This will illustrate the extensions and interpretations of the limitation to sell or advertise for sale a portion of agricultural land where the necessary ministerial consent has not been obtained.

The following three cases all deal with the same party as the seller of agricultural land, Tuckers Land and Development Corporation (Pty) Ltd.¹⁶¹ All three cases were reported in the same year. In each of the cases the necessary ministerial consent was not obtained and this fact had been used as a defence against claims of specific performance by the seller. The judgments will be discussed in the order that they were delivered because the later judgments rely on the earlier ones. *Tuckers Land Development Corporation (Pty) Ltd v Truter*¹⁶² was an appeal against an order by

¹⁶¹ *Tuckers Land Development Corporation (Pty) Ltd v Truter* 1984 (2) SA 150 (SWA); *Smith v Tuckers Land and Development Corporation (Pty) Ltd*; *Tuckers Land and Development Corporation (Pty) Ltd v Smith* 1984 (2) SA 166 (T); and *Tuckers Land and Development Corporation (Pty) Ltd v Wasserman* 1984 (2) SA 157 (T).

¹⁶² 1984 (2) SA 150 (SWA).

the magistrate's court declaring the contract of sale between appellant and the respondent void and unenforceable. The contract was for the sale of an erf in a township. The appellant had approached the court and claimed payment of arrear instalments on the purchase price. Judgment was given in favour of the respondent in his counterclaim for the repayment of instalments already made. It was common cause at the time when the contract was concluded that the subject land was "agricultural land" as in the Act's definition in section 1, and that the required consent was not obtained. This consent was, however, later obtained.

The appellant instituted an action for the arrear instalments and the respondent raised the defence that the contract was void and unenforceable in terms of section 3(e) of the Subdivision Act. This subsection was not originally included in the Act. The section was amended to include that "no erf or plot of agricultural land ... or right to such an erf or plot, shall be sold or advertised for sale unless the Minister has consented in writing".¹⁶³ Berker AJ identified the amended section as well as the penalty provisions contained in section 11 of the Act.¹⁶⁴ Section 11 included a sanction where there was contravention of section 3(e). He was left to consider whether or not the absence of the Minister's consent to a contract of sale in contravention of section 3(e) was void, confirming the decision in the magistrate's court.¹⁶⁵

Whether the contract of sale was void due to non-compliance had to be determined when the statutory provision, section 3(e), did not clearly state that effect. The court used and applied the principles from *Swart v Smuts*¹⁶⁶ to determine the intention of the legislature. The court had to ascertain whether it was the intention of the legislature for the agreement to continue being valid even though there was non-

¹⁶³ Subdivision of Agricultural Land Act 70 of 1970, sec 3(e).

¹⁶⁴ See 2 3 7 below.

¹⁶⁵ *Tuckers Land Development Corporation (Pty) Ltd v Truter* 1984 (2) SA 150 (SWA) 151A–151F.

¹⁶⁶ 1971 (1) SA 819 (A).

compliance with the statutory provision.¹⁶⁷ The principles set out in *Swart v Smuts*¹⁶⁸ indicated that the validity of the contract depended on the intention of the legislature, and that the general consequence of conflict between a contract and a statutory rule was nullity of the contract. The court also indicated that this was not an inflexible rule, and that a reading of the statute's section may have indicated that the legislature did not intend invalidity. To determine the intention of the legislature in this regard, certain *indiciae* could be used. Three *indiciae* that point to the intention of the legislature being nullity of the contract were identified. The first is the use of the word "shall" in the relevant section. The second is that the provision is expressed in negative terms and the third is the inclusion of a penal sanction where there is contravention of the section.¹⁶⁹ With the third *indicia* regard must be had to the intention of the legislature where the penal sanction was to serve as a sufficient sanction which would not also render the contract void.¹⁷⁰

The court in *Tuckers Land Development Corporation (Pty) Ltd v Truter*¹⁷¹ found that all three *indiciae* were present. The provision was stated in negative terms; "no agricultural land ... shall be sold ... unless the Minister has consented in writing". It also contained the word "shall", which was considered to be a *prima facie* indication that an act in contravention of the provision would be void. However, these two factors remained a *prima facie* indication of a void action. The existence of the penal sanction in section 11 of the Act, where there was contravention of section 3(e), was the third *indiciu*m. The court considered the argument raised by the appellant, that the imposition of potentially severe penalties was sufficient to achieve the purposes of the Act and that, on this basis; the legislature did not intend contracts of sale entered into in contravention of section 3(e) to be void. The court rejected this

¹⁶⁷ *Tuckers Land Development Corporation (Pty) Ltd v Truter* 1984 (2) SA 150 (SWA) 151G.

¹⁶⁸ 1971 (1) SA 819 (A).

¹⁶⁹ *Tuckers Land Development Corporation (Pty) Ltd v Truter* 1984 (2) SA 150 (SWA) 151G–152E.

¹⁷⁰ *Tuckers Land Development Corporation (Pty) Ltd v Truter* 1984 (2) SA 150 (SWA) 151G–152E.

¹⁷¹ 1984 (2) SA 150 (SWA).

argument and perceived the existence of the penal sanction to be another indication in support of the nullity of the contract.¹⁷²

The court determined the legislature's intention by examining the basic object and purpose of the Act, namely to prevent the subdivision of economic units of agricultural land into non-viable units. Apart from restricting the common law right to subdivide, the legislature had extended the prohibition to the use of uneconomic farming units.¹⁷³ The introduction of section 3(e), as an extension of the Act, clearly acted to prevent the entering into of contracts of sale of land without the Minister's consent. Berker AJ stated that "[t]he very introduction of s 3(e) into the Act, which was not necessary to prevent transfers of portions of agricultural land (which is one of the fundamental mischiefs the Act tries to prevent) ... is a strong indication that contracts of sale of such land in contravention of s 3(e) are void".¹⁷⁴ The court concluded that it was the intention of the legislature that contracts of sale of portions of agricultural land in contravention of s 3(e) be void *ab initio*.¹⁷⁵ The appeal was dismissed.

In *Tuckers Land and Development Corporation (Pty) Ltd v Wasserman*¹⁷⁶ the appellant and the respondent concluded an agreement of sale. The appellant was to transfer a stand of unproclaimed township land to the respondent and the purchase price was to be paid in monthly instalments. The respondent fell behind on these instalments and the appellant consequently sued the defendant for the outstanding payments. The defendant pleaded that the agreement was invalid and of no force and counterclaimed for the instalments already paid. The basis of this plea was,

¹⁷² *Tuckers Land Development Corporation (Pty) Ltd v Truter* 1984 (2) SA 150 (SWA) 154H.

¹⁷³ *Tuckers Land Development Corporation (Pty) Ltd v Truter* 1984 (2) SA 150 (SWA) 152H–153B.

¹⁷⁴ *Tuckers Land Development Corporation (Pty) Ltd v Truter* 1984 (2) SA 150 (SWA) 155H–156A.

¹⁷⁵ *Tuckers Land Development Corporation (Pty) Ltd v Truter* 1984 (2) SA 150 (SWA) 156D.

¹⁷⁶ 1984 (2) SA 157 (T).

firstly, that the contract was in conflict with the provisions of the Township and Town Planning Ordinance,¹⁷⁷ and secondly that the contract was in conflict with section 3(e) of the Subdivision Act, which is the focus of this discussion.¹⁷⁸ The magistrate's court dismissed the appellant's claim.

The appellant relied on the argument that the effect of section 3(e) was not to render an agreement made contrary to it null and void. The section did not contain an express provision stating that an agreement made contrary to it is of no force and effect. As in *Tuckers Land Development Corporation (Pty) Ltd v Truter*,¹⁷⁹ the court applied the principles from *Swart v Smuts*¹⁸⁰ and came to the same conclusion, namely that there are *prima facie* indications that the legislature intended contracts made in conflict with the section to be void.¹⁸¹

McEwan J ascertained the intention of the legislature by examining the objectives of the Act. He discussed the original form of the Act that only contained sections 3(a), (b) and (c) and pointed out that these provisions were not enough to prevent the mischief of the division of agricultural land into uneconomic units. The fact that the Act did not prevent certain instances of subdivision led to the extension of the prohibition to long-term leases and the sale of erven. The primary purpose of the extension was to achieve the original purpose of the Act. On this basis the appellant argued that the sale of an erf in an unproclaimed township would not by itself lead to the uneconomic subdivision of agricultural land. The act of transfer would be needed, and transfer could not take place until the approval of the establishment of the township had been obtained. The appellant's argument then assumed that the proclamation of the township would not take place until the Minister consented to the

¹⁷⁷ 25 of 1965 (T).

¹⁷⁸ *Tuckers Land and Development Corporation (Pty) Ltd v Wasserman* 1984 (2) SA 157 (T) 158A–158C.

¹⁷⁹ 1984 (2) SA 150 (SWA).

¹⁸⁰ 1971 (1) SA 819 (A).

¹⁸¹ *Tuckers Land and Development (Pty) Ltd v Wasserman* 1984 (2) SA 157 (T) 160D.

inclusion of the land into the area of jurisdiction of a local authority, so that the land ceased to be agricultural land under the section 1 definition. In cases where the Minister did not consent to the proclamation of the township, transfer would not occur and the sale would fall away. No harm would come to the buyer if he had taken occupation of the erf, because the occupation would be similar to a short term lease, which was not prohibited by the Act.¹⁸²

The appellant argued that sufficient sanctions were provided for in the Act. There are penalties contained in section 11 and the Registrar of Deeds in terms of section 6(1) may not effect transfer where the Minister's consent had not been submitted to him. The existence of these sanctions made the introduction of a further penalty, invalidity of the contract of sale, unnecessary. McEwan J approached the first argument by stating that the penalty imposed, a fine of R400 at that time, would not be a deterrent to a township developer. He stated that a developer would in particular circumstances pay the penalty and even possibly take it into consideration in the price of the erf. A further penalty of R10 a day for each day that the offence continues was introduced and served as a stronger deterrent, but this was not raised in the appellant's argument. This penalty would have proved that the sale was a continuing offence and this would be the position until the sale was cancelled or until the Minister's consent was obtained, which the court viewed as unlikely. On the second ground the court pointed out that both parties failed to note that the section 6(1) provision did not exist at the time their agreement was entered into.¹⁸³

McEwan J found that the long title of the Act was amended to include "in connection therewith, the use of agricultural land" and this indicated that the legislature was not only concerned with the technical aspects of registration of rights to smaller units of agricultural land, but agreements that would give rights to use smaller units. Where a person obtained the right to use a small portion of agricultural land, the object of the

¹⁸² *Tuckers Land and Development (Pty) Ltd v Wasserman* 1984 (2) SA 157 (T) 162B–162H.

¹⁸³ *Tuckers Land and Development (Pty) Ltd v Wasserman* 1984 (2) SA 157 (T) 162H–163F.

Act would still be defeated. The prohibition in section 3(d), relating to long-term leases, showed that a lease entered into in contravention of the Act would not remain valid and enforceable. The section read: “No lease ... shall be entered into”. McEwan J found that there was no reason to distinguish between the two provisions, and that this was a clear indication that the legislature intended for both types of contracts to be invalid.¹⁸⁴

The court found that after all these considerations the respondent’s contention that the agreement was invalid should to be upheld. The court stated that its decision was fortified by the fact that a similar conclusion was reached in *Tuckers Land Development Corporation (Pty) Ltd v Truter*¹⁸⁵ on similar facts.¹⁸⁶

In *Smith v Tuckers Land and Development Corporation (Pty) Ltd; Tuckers Land and Development Corporation (Pty) Ltd v Smith*¹⁸⁷ two separate contracts of sale were concluded between Tuckers Land and Smith. In terms of the contracts Tuckers Land would sell two stands of unproclaimed township land to Smith. The land was agricultural land, as defined in the Subdivision Act, and required consent from the Minister of Agriculture. This consent was only obtained a number of years after the conclusion of the contracts. The first contract was concluded before the 1972 amendment to section 3. In this amendment subsections (d), (e) and (f) were inserted. The second contract was concluded after the 1972 amendment. The magistrate’s court found that the first contract did not offend the provisions of the Act at the time that it was concluded, as the extended prohibition did not exist at the time of conclusion of the contract. The second contract was concluded after the amendment and was in conflict with section 3(e), and the lack of ministerial consent prior to the conclusion of the contract rendered the contract void. Both parties were

¹⁸⁴ *Tuckers Land and Development (Pty) Ltd v Wasserman* 1984 (2) SA 157 (T) 163G–164B and 164F.

¹⁸⁵ 1984 (2) SA 150 (SWA).

¹⁸⁶ *Tuckers Land and Development (Pty) Ltd v Wasserman* 1984 (2) SA 157 (T) 165D.

¹⁸⁷ 1984 (2) SA 166 (T).

appealing the magistrate's court finding on the two contracts respectively. Tuckers claimed that both contracts were valid and enforceable and wanted Smith to perform in terms of outstanding instalments. Smith claimed that both contracts were void.¹⁸⁸ Counsel for both parties acknowledged that the Act did not have retrospective effect and that further amendments to the Act were of no consequence in the appeal.

The court referred to the judgment of *Tuckers Land and Development Corporation (Pty) Ltd v Wasserman* ("Wasserman"),¹⁸⁹ as discussed above, and acknowledged that the facts were similar to the facts in the present case.¹⁹⁰ The finding in *Wasserman* was that the contract was invalid and unenforceable for the reasons already mentioned above. The court agreed with this assessment of the effect of section 3 of the Act and found that Tuckers' appeal had to be dismissed as the judgment in *Wasserman* was *res judicata*.¹⁹¹

The grounds of the appeal by Smith could not be decided on the finding in *Wasserman*. The contract was concluded before the amendment to the section. This was the amendment that included section 3(e) and the criminal sanction in section 11. Counsel for Smith therefore argued that the contract was in contravention of subsections 3(a) and 3(b). The court had to interpret the Act in its original form. Section 3(a) prohibited subdivision, but did not prohibit the sale of a specific portion, because it did not result in subdivision. Section 3(a) only prohibited the physical fragmentation of agricultural land so that ownership of the newly created fragments could be transferred. The subsection did not prohibit the conclusion of a contract which would require one of the contracting parties to realise the subdivision. Section 3(b) prohibited an undivided share of agricultural land vesting in another person. The

¹⁸⁸ *Smith v Tuckers Land and Development Corporation (Pty) Ltd; Tuckers Land and Development Corporation (Pty) Ltd v Smith* 1984 (2) SA 166 (T) 168B–169H.

¹⁸⁹ 1984 (2) SA 157 (T).

¹⁹⁰ *Smith v Tuckers Land and Development Corporation (Pty) Ltd; Tuckers Land and Development Corporation (Pty) Ltd v Smith* 1984 (2) SA 166 (T) 170A–171H.

¹⁹¹ *Smith v Tuckers Land and Development Corporation (Pty) Ltd; Tuckers Land and Development Corporation (Pty) Ltd v Smith* 1984 (2) SA 166 (T) 172A.

subsection prohibited someone from acquiring the right to an undivided share in agricultural land. An agreement to acquire the right to an undivided share is not prohibited by the subsection. The court found that the obligation creating agreement that gives someone a right to acquire an undivided share in agricultural land was not prohibited.¹⁹² Neither of the subsections was contravened and the court concluded that the first contract remained valid and enforceable.¹⁹³

The following three cases are more recent. They also deal with the courts' interpretation of section 3(e) and the scope of the sale of a portion of agricultural land.

In *Geue v Van der Lith and Another* ("Geue")¹⁹⁴ the first respondent, an owner of a farm, entered into a written agreement with the first and second appellants, Geue and his wife, in terms of which he sold an undivided portion of his land. The farm was agricultural land as defined by the Subdivision Act and at the time of the agreement the farm was not divided into portions, nor had the required consent been obtained. The agreement was concluded without the consent from the Minister of Agriculture, as required under section 3(e)(i) of the Subdivision Act, but was subject to a suspensive condition that the consent be later obtained. The agreement required the appellant to transfer part of the purchase price to the attorneys responsible for the transfer, the second respondent, which they did. Subsequent to this transfer the appellants brought an application to the High Court declaring the agreement null and void and claimed back the amount transferred. The respondent brought a counter-application seeking the order to be declared valid and enforceable as the suspensive condition had been fulfilled. The Minister had, during this period, consented to the proposed subdivision. The court *a quo* dismissed the applicants' application and

¹⁹² *Smith v Tuckers Land and Development Corporation (Pty) Ltd; Tuckers Land and Development Corporation (Pty) Ltd v Smith* 1984 (2) SA 166 (T) 172B–172H.

¹⁹³ *Smith v Tuckers Land and Development Corporation (Pty) Ltd; Tuckers Land and Development Corporation (Pty) Ltd v Smith* 1984 (2) SA 166 (T) 173F.

¹⁹⁴ [2003] 4 All SA 553 (SCA).

granted the respondent's counter application. The appeal was against that order. The Supreme Court of Appeal had to decide whether the agreement was rendered void by the lack of consent, where the parties had the common intention to have the land subdivided by subjecting the agreement to the condition that consent was to be obtained later.¹⁹⁵

Brand JA analysed section 3(e)(i) and the definition of "sale" in section 1 of the Act. Section 3(e)(i) prohibits the sale or advertising for sale of agricultural land unless the Minister has consented to it. The definition of sale was introduced as an amendment to the Act and reads: "sale includes a sale subject to a suspensive condition". The court found that the meaning of Act was clear and succinct. The agreement concluded between the parties fell within its ambit. It was a sale, subject to a suspensive condition, of agricultural land concluded without the Minister's consent. Van der Walt J for the court *a quo* had the same initial impression, but surprisingly reached a different conclusion. Van der Walt J proceeded to find that the agreement did not fall within the ambit of section 3(e)(i) as the legislature could not have intended to prohibit a suspensive condition like the one contained in the agreement. He claimed that it would be absurd to restrict a condition that intended to comply with the consent requirement of the Act as the main object of the Act is "to prevent the fragmentation of agricultural land into small uneconomic units".¹⁹⁶ On this basis the court *a quo* decided that the agreement of sale could never have been in conflict with the object of the Act. By subjecting their agreement to the condition the parties were promoting the very purpose of the Act.¹⁹⁷

The Supreme Court of Appeal questioned the reason for the legislative extension of the definition of "sale" which now specifically included a sale subject to a suspensive

¹⁹⁵ *Geue v Van der Lith and Another* [2003] 4 All SA 553 (SCA) paras 1-2.

¹⁹⁶ *Geue v Van der Lith and Another* [2003] 4 All SA 553 (SCA) para 5.

¹⁹⁷ *Geue v Van der Lith and Another* [2003] 4 All SA 553 (SCA) paras 3-6.

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).¹⁹⁸

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 decisions¹⁹⁹ on

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

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

this issue, which were acknowledged by the counsel for the respondent to be correct, but on their specific facts. The agreements in those cases were unlike the one concluded by the parties, which specifically rendered their contract subject to obtaining the Minister's consent. On this basis an interpretation that would have permitted the nullity of a contract that aimed to fulfil the requirements of the Act would be untenable. The court rejected this contention as an agreement of this kind is exactly what the legislature intended to prohibit and there could be no argument that the agreement was not in conflict with this intention.²⁰⁰ The court found in favour of the appellant.

In *Guba v Odendaal*²⁰¹ the applicant wanted a declaratory order that the agreement of sale between him and the first respondent was void. The contract was for the sale of a portion of agricultural land and he further wanted the respondent to vacate the premises. The respondent's counter application was for specific performance of the agreement. The sale entered into between the parties did not comply with the provisions of the Subdivision Act. The question left to the court was whether the agreement of sale was void as there was non-compliance with the statutory provision, and if this was affirmed, whether the agreement could be revived by the parties subsequent to the Minister granting the permission. The Minister's consent was granted 18 months after the parties had signed the agreement, and left the court to answer whether the agreement could be revived after it was void *ab initio*.²⁰²

Because of the use of a suspensive condition the court applied the judgment in *Geue*.²⁰³ The court in *Geue* found that a contract based on the eventuality that the Minister's consent would become unnecessary was founded in illegality. If the consent was not obtained the contract of sale, subject to the suspensive condition,

²⁰⁰ *Geue v Van der Lith and Another* [2003] 4 All SA 553 (SCA) paras 17-20.

²⁰¹ (5155/05) [2006] ZAGPHC 89 (6 September 2006).

²⁰² *Guba v Odendaal* (5155/05) [2006] ZAGPHC 89 (6 September 2006) paras 1-7.

²⁰³ *Geue v Van der Lith and Another* [2003] 4 All SA 553 (SCA).

would be null and void. The legislature found it necessary in the 1981 amendment to close off further loopholes in this regard. This was done by including the suspensive condition, especially where the contract of sale of undivided agricultural land could circumvent the Minister's consent subject to some other suspensive condition unrelated to the Minister's consent being obtained. When the condition was fulfilled the agreement would become a sale where consent would be required. Such an agreement could never be of force without the Minister's consent. The 1981 amendment existed to avoid this circumvention of the Act's requirement.²⁰⁴

The argument for the revival of the contract at the time when the Minister's consent was received also failed. The court referred to section 2(1) of the Alienation of Land Act,²⁰⁵ which made it impossible to revive a contract of sale of immovable property.²⁰⁶ The court concluded that the agreement of sale was invalid and of no force and effect in law because of non-compliance with section 3(e)(i). The ministerial consent did not revive the agreement. A new agreement did not come into existence between the parties by their conduct.²⁰⁷

In the case of *Colchester Zoo SA Investments (Pty) Ltd v Weenan Safaris CC*²⁰⁸ the respondent and the applicant had entered into a written agreement for the option to purchase a game fishing farming business. This included the immovable property as described in the contract. The agreement was subject to obtaining approval to subdivide the land. The respondent had lodged the application to subdivide with the Minister of Agriculture, but had failed to lodge the water certificate that was required for the application. The respondent then abandoned the application and informed the applicant that he no longer considered the option agreement to be of any force or

²⁰⁴ *Guba v Odendaal* (5155/05) [2006] ZAGPHC 89 (6 September 2006) para 8.

²⁰⁵ 68 of 1981.

²⁰⁶ *Guba v Odendaal* (5155/05) [2006] ZAGPHC 89 (6 September 2006) para 17.

²⁰⁷ *Guba v Odendaal* (5155/05) [2006] ZAGPHC 89 (6 September 2006) para 18.

²⁰⁸ (2386/07) [2007] ZAKZHC 24 (16 October 2007).

effect.²⁰⁹ The basis of this contention was that the option was void because it was in conflict with section 3(e)(i) of the Subdivision Act. The applicant wanted a declaratory order declaring the option contract valid, an order to have the respondent take reasonable steps to get the necessary approvals and an interdict to preserve the property.²¹⁰

The applicant claimed that an option to purchase was not covered by the statutory prohibition because it is not referred to in the subsection or the definition of sale in the Act. Counsel for the respondent referred to the legislative extensions on the Act, which initially only prohibited the act of subdivision, but now includes all acts that preceded the actual subdivision. It was clear that the definitions of “advertise” and “sale” had been extended, and even though an option or a right of pre-emption were not expressly mentioned in the Act, courts in other instances had read formalities legislation to apply to these transactions. These transactions are entered into to facilitate later agreements that would lead to the alienation of agricultural land. Counsel for the respondent argued “that judicial policy requires that an interpretation placed on section 3(e)(i) of the Act which would encompass an option; further that such interpretation will also resonate with the approach followed by the courts in interpreting the formalities legislation”.²¹¹ Moosa AJ concluded that a written option was covered by the definition of “sale” in the Subdivision Act and that the applicant was not entitled to the declarator.²¹²

²⁰⁹ *Colchester Zoo SA Investments (Pty) Ltd v Weenan Safaris CC (2386/07)* [2007] ZAKZHC 24 (16 October 2007) 2-4.

²¹⁰ *Colchester Zoo SA Investments (Pty) Ltd v Weenan Safaris CC (2386/07)* [2007] ZAKZHC 24 (16 October 2007)5.

²¹¹ *Colchester Zoo SA Investments (Pty) Ltd v Weenan Safaris CC (2386/07)* [2007] ZAKZHC 24 (16 October 2007) (N) 8.

²¹² *Colchester Zoo SA Investments (Pty) Ltd v Weenan Safaris CC (2386/07)* [2007] ZAKZHC 24 (16 October 2007) (N) 8.

2 3 4 Application for the Minister's consent

In terms of section 4 of the Act the Minister has certain powers. The application for consent, in terms of section 3 must be made by the owner of the land;²¹³ the application must also be lodged and accompanied by supporting documentation at a place as determined by the Minister.²¹⁴ The Minister may in his or her discretion refuse the application.²¹⁵ The effect of this refusal was illustrated in *Bekker NO v Duvenhage*.²¹⁶ The defendant in the case was not permitted to transfer property to the estate of the plaintiff, and no damages were granted due to the impossibility created through the Minister's refusal. The Minister's refusal had rendered a notarial agreement concluded between the parties void due to impossibility. The court found that the provisions of the Act not only prevented the defendant from passing transfer of the property to the estate of the plaintiff, but that no action by either party would result in damages arising from non-performance.²¹⁷

In terms of the Act the Minister is empowered to attach further conditions to the subdivision application. These conditions may pertain to the proposed use of the agricultural land.²¹⁸ The Minister may also, in instances where the land is no longer going to be used as agricultural land, consult with the relevant bodies to determine if the application should be granted.²¹⁹ The section further empowers the Minister to enforce,²²⁰ vary or withdraw any condition.²²¹ Where a condition has been registered

²¹³ Subdivision of Agricultural Land Act 70 of 1970, sec 4(1)(a)(i).

²¹⁴ Subdivision of Agricultural Land Act 70 of 1970, sec 4(1)(a)(ii).

²¹⁵ Subdivision of Agricultural Land Act 70 of 1970, sec 4(2).

²¹⁶ 1977 (3) SA 884 (E).

²¹⁷ *Bekker NO v Duvenhage* 1977 (3) SA 884 (E) 888H-889A and 889F.

²¹⁸ Subdivision of Agricultural Land Act 70 of 1970, sec 4(2)(a).

²¹⁹ Subdivision of Agricultural Land Act 70 of 1970, sec 4(2)(b).

²²⁰ Subdivision of Agricultural Land Act 70 of 1970, sec 4(3).

²²¹ Subdivision of Agricultural Land Act 70 of 1970, sec 4(4).

and the Minister varies or withdraws it, the Minister may have the condition on the title deed of the land varied or cancelled.²²²

2 3 5 *Succession*

Section 5(1) of the Act provides for the realisation and payment of the proceeds of agricultural land, subject to a testamentary disposition or intestate succession, where the Minister has, in terms of section 4,²²³ refused to grant consent to a subdivision. The Act directs the executor to realise the land or the undivided share and dispose of the proceeds in accordance with the testamentary disposition or the intestate succession. This is to be done in accordance with the compensation requirements in section 12 of the Expropriation Act.²²⁴

2 3 6 *Servitudes*

The Act further limits the entitlement of an owner of agricultural land to grant and register certain servitudes over his land. The section excludes certain servitudes from the requirement of ministerial consent. The excluded servitudes are a right of way, an aqueduct, a pipe line or conducting electricity of a width not exceeding 15 metres;²²⁵ a servitude which is supplementary to a servitude identified above, and which has a servitude area not exceeding 225 square metres and which adjoins the area or the last-mentioned servitude;²²⁶ and a usufruct over the whole of agricultural land in favour of one person or in favour of such person and his spouse or the survivor of them if they are married in community of property.²²⁷ Sinclair submits that the inclusion of certain servitudes under the requirement of consent exists to prevent

²²² Subdivision of Agricultural Land Act 70 of 1970, sec 4(4).

²²³ As discussed in 2 3 4 above.

²²⁴ The Act refers to the Expropriation Act 55 of 1965 which was replaced by the Expropriation Act 63 of 1975. See 4 2 4 below.

²²⁵ Subdivision of Agricultural Land Act 70 of 1970, sec 6A(1)(a).

²²⁶ Subdivision of Agricultural Land Act 70 of 1970, sec 6A(1)(aA).

²²⁷ Subdivision of Agricultural Land Act 70 of 1970, sec 6A(1)(b).

the registration of servitudes that are in fact lease agreements. As long-term leases are prohibited in the Act the legislature has closed off the loophole which also has the potential to fragment agricultural land in this manner.²²⁸

The applicants in *Moll and Another v Nedcor Bank Ltd and Others*²²⁹ were holders of a usufruct over land. The land had been sold in execution to satisfy a judgment obtained by the first respondent, Nedcor Bank. They sought an application prohibiting the transfer of the property free from the usufruct that was registered in their favour. The relevance for this discussion is based on the respondent's contention that the usufruct was not registered in terms of section 3(e) of the Subdivision Act. On this basis the applicants lacked *locus standi* to bring the application.²³⁰

The problem with the respondent's contention was that the failure to register the usufruct was argued under the wrong section of the Act. Section 6A deals with servitudes and not section 3(e). The second point raised was that it was not common cause that the land subject to the usufruct was agricultural land. The respondent had failed to prove that the land in question was agricultural land in terms of the definition in the Act. The respondent also failed to show that the land was not within the jurisdiction of a local government council or board,²³¹ which reverts back to the initial discussion on the definition of agricultural land in section 1. Although the case does not deal with the interpretation of the Act's section on servitudes, it does show that it would be possible to argue that certain servitudes are invalid where the required ministerial consent was not obtained prior to their registration.

²²⁸ Sinclair J "Law of property (including mortgage and pledge)" 1972 *Annual Survey of South African Law* 170–190 at 171.

²²⁹ *Moll and Another v Nedcor Bank Ltd and Others* [2004] 2 All SA 451 (T).

²³⁰ *Moll and Another v Nedcor Bank Ltd and Others* [2004] 2 All SA 451 (T) para 7.

²³¹ *Moll and Another v Nedcor Bank Ltd and Others* [2004] 2 All SA 451 (T) para 7.

2 3 7 Offences and penalties

The Act makes provision for penalties and offences. The conduct penalised varies from making false statements or failing to disclose information with the intention to deceive²³² to contravening sections 3(d)²³³ and 3(e)²³⁴ of the Act. The sanction imposed by the Act is currently a fine not exceeding R1000, or a period of imprisonment that does not exceed 2 years. In the case of failing to comply with conditions set, or contravention of section 3(d) and 3(e) a fine of R50 a day for each day that the offence continues is imposed.

2 4 Current status of the Act

The Subdivision Act is old-order legislation. It served and still serves a specific regulatory purpose, namely to prevent the uneconomic fragmentation of prime agricultural land. However, in 1998 the Subdivision of Agricultural Land Act Repeal Act²³⁵ was promulgated with a date of operation to be fixed by the President. The policy reasons for this repeal have been identified in the Subdivision of Agricultural Land Act Repeal Bill. The original aim of the Subdivision Act was to prevent the creation of new portions of agricultural land that were so small that farming would not be economically viable. The reason for the repeal, as stated in the Bill, is 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.²³⁶ The Bill identifies other appropriate zoning mechanisms that are in place to regulate and protect valuable and scarce agricultural land. These are in

²³² Subdivision of Agricultural Land Act 70 of 1970, sec 11(a).

²³³ Subdivision of Agricultural Land Act 70 of 1970, sec 11(cA). As discussed in 2 3 3 4 above.

²³⁴ Subdivision of Agricultural Land Act 70 of 1970, sec 11(d). As discussed in 2 3 3 3 above.

²³⁵ 64 of 1998.

²³⁶ See also Agriculture, Republic of South Africa Water Affairs & Forestry Portfolio Committee *Subdivision of Agricultural Land Repeal Act [B101-97]: Introduction by Department of Agriculture* (11 February 1998); Republic of South Africa Agriculture, Water Affairs & Forestry Portfolio Committee *Presentation on Subdivision of Agricultural Land Repeal Bill & discussion on National Water Bill* (1 June 1998).

the form of the Development Facilitation Act,²³⁷ local government bylaws, and the Conservation of Agricultural Resources Act.²³⁸ The Subdivision Act has also been expressly excluded in land reform legislation.²³⁹ The post-apartheid legislature has identified instances where the Act's regulation prevents the effective implementation of land reform measures. This exclusion is based on the Act's incompatibility with these land reform measures.²⁴⁰ Agricultural land that is subdivided for the purposes of land reform does not have to comply with the requirements of the Subdivision Act.

The position of the Subdivision Act since the promulgation of the still inoperative Repeal Act has created some uncertainty. This was evident in the case of *Thanolda Estates (Pty) Ltd v Bouleigh 145 (Pty) Ltd*.²⁴¹ The court had erroneously concluded that although the land in question was described as agricultural land, there should be no impediment to an act of subdivision. No evidence was led to establish the fact that the land could not be subdivided and because the Subdivision Act had been repealed the application to the Minister was no longer required. Wunsh J stated that even if the Repeal Act had no effect, the land now fell within the jurisdiction of a town council and the Subdivision Act would not apply.²⁴² It is clear from the earlier case discussion on the Act and the extent of its application that this is not the correct position.²⁴³

²³⁷ 67 of 1995.

²³⁸ 43 of 1983.

²³⁹ 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).

²⁴⁰ Van Wyk J "Is subdivision of agricultural land part of municipal planning?" (2009) 24 *SAPR/PL* 545-562 550-551.

²⁴¹ [2001] 1 All SA 141 (W).

²⁴² *Thanolda Estates (Pty) Ltd v Bouleigh 145 (Pty) Ltd* [2001] 1 All SA 141 (W) para 12.

²⁴³ See 2 3 1 above.

The decisions in *Kotzé*²⁴⁴ and *Wary Holdings*²⁴⁵ have been the courts' attempt at clearing up this uncertainty. The Constitutional Court in *Wary Holdings* has speculated on the possibilities for the delay in the Repeal Act's operation. These possibilities are that the legislature is seeking to put other provisions in place of the Act on a national level; that the position is temporary until a time where provincial governments acquire the required capacity to administer the functional area of agriculture; and finally and alternatively, that the administration is to fall within the functional area of the municipal authorities.²⁴⁶ These possibilities are all dependent on future developments and whichever route the legislature deems most appropriate.

The Draft Sustainable Utilisation of Agricultural Resources Bill of 2003 indicates that national government has every intention of continuing to control agricultural subdivision. The Bill was never introduced to Parliament but was revisited during the first half of 2007 as a direct result of the National Land Summit.²⁴⁷ The Bill in its preamble indicates that it aims to address the "racially discriminatory practices and laws of the past and apartheid [that] deprived historically disadvantaged people of land, resulting in their exclusion from the agricultural sector".²⁴⁸ It further aims to "promote sustainable utilisation and development of natural agricultural resources" and to "control the subdivision and change of agricultural land use".²⁴⁹ The Bill expressly includes prime and unique agricultural land. The subdivision provisions in Chapter 8 of the Bill are identical to the provisions contained in the Subdivision Act. Based on this it is clear that government intends for the subdivision of agricultural land to continue being regulated nationally. It does raise questions as to the reason for the repeal of the Subdivision Act in the 1998 Repeal Act.

²⁴⁴ *Kotzé en 'n Ander v Minister van Landbou en Andere* 2003 (1) SA 445 (T).

²⁴⁵ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 (11) BCLR 1123 (CC).

²⁴⁶ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 (11) BCLR 1123 (CC) para 91.

²⁴⁷ Strydom HA and King ND (eds) *Fuggle & Rabie's Environmental management in South Africa* (2nd ed 2009) 332. The Draft Bill is the only document currently available that deals with the issue of agricultural subdivisions since the promulgation of the still inoperative Repeal Act.

²⁴⁸ Draft Sustainable Utilisation of Agricultural Resources Bill of 2003, preamble.

²⁴⁹ Draft Sustainable Utilisation of Agricultural Resources Bill of 2003, preamble.

2 5 Concluding remarks

It is clear from the *Wary Holdings* decision²⁵⁰ that the Subdivision Act in its present form continues to apply. All agricultural land in the Republic is subject to the Act even though wall-to-wall municipalities have now been established throughout the country. In terms of the definition of “agricultural land” in the Act the creation of wall-to-wall municipalities would have effectively excluded the Act’s operation. However, the court’s decision in *Wary Holdings* means that the Act continues to apply to all the agricultural land that was defined as “agricultural land” before the transitional period which facilitated the process of establishing municipalities across the country. The Minister’s consent is still required for certain actions relating to the subdivision of agricultural land.

This chapter has identified the context in which this legislative limitation was created and the policy justifications offered for the limitation. The extent of the statutory limitation was examined by analysing the primary sections of the Act and the courts’ interpretation of those sections. The current status of the Act was also considered. This showed that the still inoperative Repeal Act has created uncertainty. The reason for the repeal is stated to be that it is not appropriate for government to interfere in the determination of the size of agricultural land. The proposed Draft Sustainable Utilisation of Agricultural Resources Bill of 2003 contradicts this reasoning. The Bill contains identical provisions to the Subdivision Act. This means that agricultural subdivisions would continue to be regulated nationally by government. The operation of the Subdivision Act has also been excluded from certain legislation because of its incompatibility with land reform mechanisms. This will be relevant in the later chapter testing the general compliance of the Act.²⁵¹

²⁵⁰ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 (11) BCLR 1123 (CC).

²⁵¹ See 5 2 1 and 5 3 below.

The survey above of the Act's history, context and the policy reasons for its enactment and promulgation has shown that the Act was necessary for the preservation of agricultural land. However, the historical context also shows that the Act was not free from political efforts to promote white interests at the cost of restricted and limited black African interests. This will be important when discussing and differentiating between the legitimate purpose and the illegitimate aim of the Act.²⁵² The history of the Act shows its creation in an apartheid context where agricultural policy was racialised. The focus was preserving prime agricultural land for the white minority. The policy reasons for the Act also identified the legitimate purpose and the illegitimate aim of the Act. The concern for the increasing number of uneconomic farming units was also a concern for the wellbeing of the white farmer. These two issues were not separated when the Act was drafted.

It is clear from the discussion that the statutory limitation on the right to subdivide has numerous implications. In achieving the aim of the Act the legislature has extended the Act's application to restrict certain actions relating to the use agricultural land. The restriction has an effect on the right to alienate through sale and succession and also to register long-term leases and certain servitudes. This limitation will be important when testing section 25 constitutional compliance of the Subdivision Act.²⁵³ The Act's history and purpose will be important when testing the Act for general constitutional compliance.²⁵⁴ The cases used to analyse and interpret the Act's provisions showed that the Act's requirement of ministerial consent has been used to escape contracts for the sale of agricultural land. The Act and consent requirement in these instances has become an exit strategy for unhappy contracting parties. The case law also showed the extent of the Act's regulation to prevent uneconomic farming units. Failure to comply with the formality requirements of the Act has consistently resulted in void contracts.

²⁵² See 3 2 3 2 below.

²⁵³ See chap 4 below.

²⁵⁴ See chap 5 below.

The post-apartheid legislature that has indicated that it no longer finds it appropriate for the government to dictate the size of agricultural land and that it should be left to the agricultural sector and market to determine.²⁵⁵ However, the proposed inclusion of subdivision provisions in the Draft Sustainable Utilisation of Agricultural Resources Bill of 2003 contradicts this reasoning. The fact that the Draft Bill makes use of identical provisions has one question the need for the repeal of the Subdivision Act.

²⁵⁵ See 2 4 above. See the Subdivision of Agricultural Land Act Repeal Bill.

Chapter 3: Identifying and separating the legitimate purpose from the illegitimate aim of the Act

3 1 Introduction

State regulations of private property are generally accepted. The needs of society affect the way in which individuals interact with their property. The state imposes laws that prevent owners and land users, in the instance of immovable property, from exercising their rights without any restriction.¹ The state imposes regulations to give order to society. This is done in the public interest and should serve a vested and collective need for this order. The South African history and context indicates that there was a different use for regulations. The use and occupation of land by blacks and the land-use laws imposed on them were markedly different from whites.² The system of law was aimed at fostering and protecting white interests at the cost of other land users. This was the state of affairs for the largest part of the twentieth century; regulations imposed on land use had a racial motivation.³ The state imposed law that gave benefits to the minority and at the same time limited and restricted the rights of the non-white majority.⁴

¹ Honoré states that “in practice ... the owner’s privileges of using and powers of managing a thing as he wishes have been curtailed and that the social interest in the productive use of things has been affirmed by legislation”: Honoré A M “Ownership” in *Oxford essays in jurisprudence* (Guest A G ed) (1961) 107-147 at 145.

² Van Wyk J *Planning law: Principles and procedures of land-use management* (1999) 99.

³ The system of differentiation and discrimination was introduced by the early settlers. It started with the introduction of restrictive covenants that prevented the use and occupation of land by persons of colour. Legislation was later introduced which allocated certain areas for black occupation. See chap 2 above. See also Van Wyk J *Planning law: Principles and procedures of land-use management* (1999) 99-100.

⁴ Apartheid legislation identified four distinct racial groups, black, Indian, coloured and white. The non-white majority consisted of black, Indian and coloured individuals. Certain areas were designated for each of the groups.

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 specific laws and regulations and many of these laws are still applicable, more than a decade after democratisation. Most of these laws are not facially discriminatory and have continued to apply in the new legal order, but the fact remains that they were created under a different order and had a different objective, even if only in part. This inherently discriminatory aim exists as a part of the Subdivision of Agricultural Land Act (“Subdivision Act”)⁵ and is one of the elements of this chapter.

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.⁶ 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.⁷ To separate the purpose of the Act from the aim of the Act, if this is at all possible, will be the focus of this chapter.

⁵ 70 of 1970.

⁶ The power granted to the Minister of Agriculture could be seen as a means of ensuring that the disposal of agricultural land was only to whites. See 5 2 1 and 5 2 2 below.

⁷ The green paper development and planning explains this. In then Minister Derek Hanekom’s foreword he states that the country “has inherited incoherent, racially fragmented, inequitable and cumbersome planning laws and policies” and that urgent transformation is necessary. Republic of South Africa National Development and Planning Commission and the Department of Land Affairs *Green paper development and planning: Development and Planning Commission document DPC 4/99* (May 1999) ii.

To identify legitimate land use regulations, regulation needs to be defined. Defining and understanding land-use regulations as legitimate limitations on the rights of the owner is necessary to identify a rational and legitimate regulation. The justifications for the imposition of regulations over property will also have to be considered. This will require an examination of the state's exercise of its police powers. This will specifically examine the extent of the state's authority to regulate property rights and interests. Here the South African pre-constitutional context will have to be considered. 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. The Subdivision Act will be explained as an example of a legitimate land-use regulation created in this order. Other jurisdictions with similar policies will be used to explain and justify similar land-use regulations in their respective contexts. This will provide further clarity when determining legitimate land-use regulations over agricultural land. This section will examine the different 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.

3 2 Land-use regulations⁸

3 2 1 Land-use regulation defined

A regulation is defined as a directive, made and maintained by an authority.⁹ As a point of departure, this definition indicates that an authority would be in the position to create and enforce a particular rule. For the purposes of this discussion, the authority is the state and the rules or directives are those created to regulate the use of land. The implication is that the state has the authority to regulate the type of use permitted on land. This directly affects the individuals that have an interest in the land. Needham submits that individuals have collective ambitions for the use of their

⁸ I would like to acknowledge and thank Professor J van Wyk from the University of South Africa for the useful insights provided in seminars presented on Planning Law at the South African Research Chair in Property Law on the 1st of February 2010.

⁹ Soanes C and Stevenson A (eds) *Concise Oxford English dictionary* (11th ed 2006) 1212.

land and the state has been given the power to help them realise these ambitions.¹⁰ At the same time the state wants to influence the ways in which land is used. This is done in the interest of the rest of society, including third parties who do not have a direct interest in the property but who will be affected by its use. Therefore, land-use regulation is the state's attempt to influence and control, in the public interest, the way in which particular rights in land will be exercised.¹¹

State agencies take actions that influence the ways in which individuals use their land. This is common in all jurisdictions.¹² These actions are taken to achieve a desired land use and to prevent undesired land uses in specific locations. The individual is restricted in his use by the state's authority to impose rules. Limits to the way in which owners exercise their rights in relation to their properties exist.¹³ The state, through regulation, limits the rights of owners and the rights they have in relation to their properties. The restrictions in this context are regulations that affect the complete and unrestricted use and enjoyment of the immovable property. In *Gien v Gien*¹⁴ Spoelstra AJ acknowledged the susceptibility of ownership to legal limitations.¹⁵ These include the rights of others which can be seen in neighbour law rules and the rules of public law,¹⁶ the legislative limitations that are the focus here. These in effect deprive owners of certain entitlements in their property.¹⁷

¹⁰ Needham B *Planning, law and economics: The rules we make for using land* (2006) 18.

¹¹ See Wadley JB "The emerging "social function" context for land use planning in the United States: A comparative introduction to recurring issues" (1989) 28 *Washburn Law Journal* 22-50 at 25.

¹² Bonti-Ankomah S and Fox G "Property rights and land use regulation: A comparative evaluation" (2000) 39 *Agrikon* 244-268 at 258.

¹³ Hart W O "Control of the use of land in English Law" in Haar C M (ed) *Law and land Anglo-American planning practice* (1964) 2-27 at 3.

¹⁴ 1979 (2) SA 1113 (T) at 1120C.

¹⁵ *Gien v Gien* 1979 (2) SA 1113 (T) at 1120C.

¹⁶ *Gien v Gien* 1979 (2) SA 1113 (T) at 1120C.

¹⁷ See 4 2 1 and 4 2 2 below.

The regulation of immovable property mostly adopts the form of land-use management rules. These are found in planning and zoning regulations and dictate what use and development may be exercised over the land. Zoning regulations in effect identify the types of use and development that will be permitted on the land. These will often identify which land is urban or rural land. These distinctions then allow for more specific uses, like residential and industrial use in urban areas and agricultural or conservation uses in rural areas and are not limited to these identified. For these spaces to operate for their intended aim, restrictions are placed on the type of use and development that would be permitted.

Regulations determining land-use fall into one of four categories.¹⁸ The first is the type of use. This would be whether the land will have an agricultural, commercial, industrial or residential use. These are usually determined by the zoning requirements as determined by local authorities. The second is the density of use. This deals with the height, width and bulk of use on the land. These would include the physical impact on the land and the rules that will apply in building and developing the land.¹⁹ It also serves to prohibit the types of activities permitted on the land, for example the setting of minimum erf sizes and the maximum height of buildings.²⁰ The third aspect is the aesthetic impact. Emphasis is placed on the design and placement of buildings for residential, commercial and industrial purposes. It is concerned with the overall look of the physical environment. The fourth is the effect of the use of the land on cultural and social values of the community. The societal interest is reflected in this aspect of land-use regulation.

¹⁸ Salsich P W and Tryniecki T J *Land use regulation: A legal analysis and practical application of land use law* (2nd ed 2003) 1.

¹⁹ Here the planning regulations in the form of building regulations are relevant. Building regulations would dictate what development is permitted on the land. The example in South African law is the National Building Regulations and Building Standards Act 103 of 1977. The Act in its preamble “aims to provide for the promotion of uniformity in the law relating to the erection of buildings and the areas of jurisdiction of local authorities” and prescribes the minimum standards buildings must comply with.

²⁰ Bonti-Ankomah S and Fox G “Property rights and land use regulation: A comparative evaluation” (2000) 39 *Agrikon* 244-268 at 244.

These aspects are reflected in all land-use planning and specific regulations will cover one or more of these aspects.

Land-use planning can only be effective if the regulatory framework is enforced.²¹ Regulations are enforced in one of two ways. The first is by prohibition and the second is by incentive.²² The prohibition is in the form of rules that have been specified in advance and prohibit a particular action. The incentive encourages compliance with the regulation. These could be in the form of financial incentives, which includes fines for non-compliance, subsidies and liability in the form of compensation.²³ Authorities need to clearly identify the procedures to be followed and enforce them by penalising non-compliance. This would be the only way to ensure that a planning scheme is effective.

Land-use regulations are not an arbitrary creation. They are crafted and imposed to serve specific societal needs. These are to ensure public health, safety and the welfare of the citizens.²⁴ Regulations will vary according to these needs depending on location and context. These aspects will be dealt with in the justification of land-use regulation below.²⁵

3 2 2 *Justification for land-use regulation*

Land-use regulation restricts the way in which people exercise rights in immovable property. The regulatory restrictions on the entitlements individuals have in property

²¹ See Ingle M "What price developmental land-use in South Africa? Paying lip service to law" (2006) 41 *Journal of Public Administration* 750-760. The author identifies the problems experienced where there is a failure to enforce planning and building regulations. He finds that enforcement in South Africa is an issue. The failure of local governments to enforce regulations has delegitimized the efficacy of planning and building regulations.

²² Needham B *Planning, law and economics: The rules we make for using land* (2006) 22.

²³ Needham B *Planning, law and economics: The rules we make for using land* (2006) 22.

²⁴ Ingle M "What price developmental land-use in South Africa? Paying lip service to law" (2006) 41 *Journal of Public Administration* 750-760 750.

²⁵ See 3 2 2

are imposed in terms of the state's inherent police power.²⁶ This is the general governmental power to protect the health, safety, morals and general welfare of the citizens.²⁷ To protect and promote these interests legislation is created and imposed. The state's exercise of its police powers usually affects all citizens without differentiation and it is accepted that affected owners must bear the resulting burdens and losses.²⁸ As a general point of departure no regulation should be excessive to any individual owner and a reciprocal burden will need to be spread equally among all owners. The regulation should generally be imposed for a legitimate public purpose and should be fair. The imposed regulation is often discussed as a restriction on private interests in favour of the public interest. The effect is a limitation on the individual interests, but where it is necessary to protect the public, that would take precedence. The nature of the property and the relationships between the owner, the state and third parties to the property is also an important factor. Where there is a social relationship and the function of the property affects more than the owner, the wider the regulatory powers of the state would be. The converse is also true, where the property is typically individual, the smaller these powers would be. The social impact of the property is an important factor that has to be considered. Where the property does not only affect the holder but also the lives and interests of others the more susceptible it will be to regulation.

Salsich and Tryniecki²⁹ have identified useful criteria for determining when a land-use regulation can be imposed legitimately. They indicate that, firstly, there should be a valid public purpose, secondly that the means must be reasonably tailored to the purpose of the regulation and thirdly that the regulation must be achieved in a

²⁶ Paster E "Preservation of agricultural land through land use planning tools and techniques" (2004) 44 *Natural Resources Journal* 283-318 285.

²⁷ Salsich P W and Tryniecki T J *Land use regulation: A legal analysis and practical application of land use law* (2nd ed 2003) 3.

²⁸ Van der Walt A J *Constitutional property law* (2005) 132-137. The following section has been paraphrased from Van der Walt's section on the police-power principle.

²⁹ Salsich P W and Tryniecki T J *Land use regulation: A legal analysis and practical application of land use law* (2nd ed 2003) 3.

manner that does not unduly impose excessive costs on the individual.³⁰ In South African law these criteria form part of the constitutional protection afforded to property holders. In terms of section 25(1) “[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”.³¹ In terms of the section the law must be of general application,³² it has been submitted that an implicit public purpose requirement must be read into the section³³ and in terms of the arbitrariness requirement and case law on its application shows that the interplay of various factors include the means being tailored to the purpose and that the means may not be excessive.³⁴ In South African law, where a regulation is excessive it will need to comply with the requirements of section 25(1) to be constitutionally justifiable. This was not always the South African position. The country’s apartheid history, the grossly unequal distribution of land and the tools crafted and employed to realise this state will need to be considered with circumspection.

The exercise of the state’s police powers in the South African context served an entirely different purpose. The fact that many land-use planning and building regulations were created in a pre-constitutional context makes their continued application problematic. The same criteria for the justification of land-use regulations will not suffice when dealing with pre-constitutional land-use law. It needs to be determined whether a public interest that existed during apartheid can operate in a constitutional setting as an interest that serves an open and democratic society. The pre-constitutional public interest was synonymous with the promotion of white interests and the restriction of non-whites. The complete repeal of all statutory law

³⁰ The excessive costs criteria means that no individual owner should have to bear excessive burdens and losses.

³¹ Constitution of the Republic of South Africa 1996. See chap 4 below.

³² See 4 2 3 1 below.

³³ Van der Walt A J *Constitutional property law* (2005) 138.

³⁴ See chap 4 below. The application and interpretation of the section 25(1) arbitrariness requirement 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* 2002 (4) SA 768 (CC) para 100 encompasses a test that resembles this requirement.

dating pre-1994 is not the solution. Legislation, of this nature, that does not serve a core public purpose must be assessed with circumspection.³⁵ Where it is clear that the consequences and continued effect of these laws perpetuate an apartheid aim they will need to be repealed or amended.

Land-use regulation was one way in which apartheid doctrine could be realised.³⁶ By zoning the South African landscape along racial lines, apartheid doctrine could be realised. This unequal and racialised distribution of land, including the protection and benefits provided to the white minority is the illegitimate object that needs to be dealt with. Many of the land-use regulations and planning mechanisms created before 1994 continue to apply. A distinction needs to be drawn between planning and building mechanisms that serve a central public purpose, for example public health and safety, and those that serve a social and aesthetic purpose. Land-use mechanisms created during this period that have a central public purpose should continue to operate with a lower level of scrutiny, whereas the planning laws that do not directly serve a public health or safety purpose should be subjected to a higher level of scrutiny.³⁷ Mechanisms that arguably serve borderline purposes would need to be scrutinised. Where it is clear that the mechanism's sole purpose was to benefit and promote white interests then it should be repealed. It is necessary to determine whether the Subdivision Act serves a central or core public purpose or whether it predominantly serves an illegitimate apartheid aim.³⁸

³⁵ Van der Walt AJ *Constitutional property law* (2005) 169.

³⁶ Republic of South Africa National Development and Planning Commission and the Department of Land Affairs *Green paper development and planning: Development and Planning Commission document DPC 4/99* (May 1999) 4-5.

³⁷ Van der Walt AJ *Constitutional property law* (2005) 169.

³⁸ See 3 2 3 2 below.

3 2 3 Subdivision as land-use regulation

3 2 3 1 Purpose of subdivision

Regulating subdivision is a typical regulation of immovable property. Subdivision is the practice of dividing one parcel of land into two or more parts. State and local governments regulate this practice and it is a typical example of a regulatory limitation on the right of a property owner.³⁹ In this instance it is a limitation on the immovable property owner's common law right to subdivide his land into two or more parts.⁴⁰ Subdivision regulation ensures that the subdivided land is useable and safe. The regulation compliments zoning regulations as the type of use, the zoned use, will often dictate the size of land that will need to be allocated for the intended use.⁴¹ Subdivision further determines whether suitable or adequate access is available, whether municipal services can be provided and that certain cultural and natural features are protected.⁴²

Subdivision regulation predominantly forms part of a land-use planning scheme. In this context these regulations are usually relevant at the establishment of a township. This would involve changing the size of the land and would require practical procedures to be followed. The system in South Africa is varied. Numerous pre-1994 ordinances still apply in urban areas and would have to be complied with when subdividing urban land for the purposes of township establishment.⁴³ There is a difference when dealing with rural land. The Subdivision Act is applicable when subdividing land that is zoned as agricultural land. When dealing with agricultural land the Act applies nationally. The purpose would not be to establish a township by

³⁹ Van Wyk J "Is subdivision of agricultural land part of municipal planning?" (2009) 24 *SAPR/PL* 545-562 at 545.

⁴⁰ *Mangion v Bernhardt* 1977 (3) SA 901 (W) 915C-915D.

⁴¹ Salsich P W and Tryniecki T J *Land use regulation: A legal analysis and practical application of land use law* (2nd ed 2003) 337-338.

⁴² Vermont land use education and training collaborative *Implementation manual Subdivision Regulations* (2007) 26-1 www.vpic.info/pubs/implementation/pdfs/26-Subdivision.pdf (accessed online on 25 August 2010).

⁴³ See further van Wyk J *Planning law: Principles and procedures of land-use management* (1999) 182-184.

creating new plots of a land. The Subdivision Act's purpose is to prevent the fragmentation of agricultural land and the creation of uneconomic farming units.⁴⁴ It does, however, have an alternative aim. This aim exists because of the Act's apartheid history.⁴⁵

3 2 3 2 Subdivision of Agricultural Land Act

The Subdivision Act regulates a certain category of immovable property, namely prime agricultural land. The Subdivision Act regulates the right of agricultural land owners to subdivide their land. To prevent the uneconomic subdivision of agricultural land is the legitimate purpose of the Act. All subdivisions of rural land are subject to the Act and require an application process which is dependent on the Minister approving the application.⁴⁶ The purpose of the Act is to prevent this land being subdivided into uneconomic units. This purpose was justified in terms of the national interest in preserving agricultural land and to ensure the welfare of white farmers.⁴⁷ The Act serves to regulate the practice of subdivision of agricultural land and the main policy reason is the preservation of agricultural land for agricultural purposes. This purpose, the conservation and protection of scarce and valuable agricultural land from uneconomic division, is in the public interest. The Act's purpose is realised through the requirement of consent to the proposed subdivision from the Minister of Agriculture. This has implications for the sale,⁴⁸ long-term lease,⁴⁹ registration of certain servitudes over,⁵⁰ and the testamentary disposition⁵¹ of the agricultural land which is to be subdivided.

⁴⁴ See 2 2 2 and 2 2 3 above.

⁴⁵ See 2 2 1 above.

⁴⁶ Subdivision of Agricultural Land Act 70 of 1970, sec 4. See 2 3 4 above.

⁴⁷ See 2 2 2 above.

⁴⁸ Subdivision of Agricultural Land Act 70 of 1970, sec 3(e). See 2 3 3 5 above.

⁴⁹ Subdivision of Agricultural Land Act 70 of 1970, sec 3(d). See 2 3 3 4 above.

⁵⁰ Subdivision of Agricultural Land Act 70 of 1970, sec 6A(1). See 2 3 6 above.

⁵¹ Subdivision of Agricultural Land Act 70 of 1970, sec 5(1). See 2 3 5 above.

However, apart from this legitimate goal the Act is a pre-1994 statute. It was created with another objective, namely the preservation of agricultural land for the white minority. The Act has an apartheid aim that is embedded in doctrine that distributed land across racial lines. The apartheid system was a network of primary and subordinate legislation that was used to award rights to the white minority that encroached on the common law and indigenous law. It precluded blacks from accessing and holding the rights that were protected under the common law. Blacks had resort to forms of land control that were not recognised.⁵²

The legislative framework that created the Act used planning and regulatory laws to separate the races.⁵³ The Subdivision Act falls within this legislative framework, it was part of the network of legislation that awarded rights to white South Africans. The Act's illegitimate apartheid aim was achieved through the application of its provisions and ministerial consent requirement. Through the requirement of ministerial consent the Act ensured that prime agricultural land was transferred to white owners and occupants. The Act appears to be politically neutral insofar as its focus is the protection of agricultural land from uneconomic subdivision, but this apparent neutrality cannot just be assumed when the Act had the effect of nationally regulating the right of access to agricultural land through the ministerial consent requirement.

Since democratisation in 1994 most of the legislation used to achieve apartheid goals has been abolished. The repeal of these laws was necessary to achieve a society founded on "human dignity, the achievement of equality and the advancement of human rights".⁵⁴ The preservation of agricultural land is a legitimate regulation over agricultural land and it is in the national interest. This interest can no

⁵² 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) 13-14.

⁵³ See 2 2 1 above.

⁵⁴ Constitution of the Republic of South Africa 1996, founding provision sec 1(a).

longer be defined as a white apartheid interest. Race no longer dictates the South African landscape and this would mean that individuals of any race could have access to agricultural land. The inclusion of identical provisions in Chapter 8 of the Draft Sustainable Utilisation of Agricultural Resources Bill 2003 shows that subdivision regulations are needed “[t]o provide for the sustainable utilisation of natural agricultural resources”.⁵⁵ The legitimate purpose of the Act, to prevent agricultural degradation, in terms of this Bill, has been identified as a national interest in our current dispensation.

The purpose of the Subdivision Act, to preserve agricultural land for agricultural purposes now serves all South Africans. The Act is a regulation that serves to protect the health, safety and general welfare of the citizens.⁵⁶ The protection of agricultural land does not only benefit the individual farmer, but benefits the greater society and is necessary to realise certain rights in the Constitution.⁵⁷ These rights will be discussed in chapter five.⁵⁸ In certain instances where the Act is an obstacle to access to agricultural land, it has been excluded from land reform legislation.⁵⁹ This is an indication that there are problems with the limitation the Subdivision Act poses to land reform initiatives. These problems will be explored in chapter five.⁶⁰ The fact that land is no longer allocated along racial lines would mean that the issue of access also fails to be a reason for the illegitimate aim to trump the legitimate purpose of the Act. The ministerial consent required under the Act can no longer be used to ensure white ownership and occupation of agricultural land. The

⁵⁵ Draft Sustainable Utilisation of Agricultural Resources Bill 2003, long title.

⁵⁶ See 3 2 2 above.

⁵⁷ Here the right to a safe and healthy environment and the socio-economic right to food will be discussed as rights that can be realized through the effective implementation of the Subdivision Act. See 5 3 below.

⁵⁸ See 5 3 below.

⁵⁹ 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).

⁶⁰ See 5 3 below.

administrative powers of the minister still require testing under Constitution, but only as they pertain to the legitimate purpose of the Act.⁶¹

The Subdivision Act, as it applies in a constitutional dispensation, affects all citizens without differentiation. It is imposed for a legitimate public purpose, namely to preserve agricultural land for agricultural purposes. The nature of the property, agricultural land, and the relationship between the owner, the state and third parties to this land would indicate that preserving agricultural land is necessary to ensure public health, safety and the welfare of all citizens.⁶² The regulation over the right to subdivide and the ministerial consent requirement are reasonably tailored to the purpose of the regulation to preserve agricultural land. Based on these considerations the Subdivision Act is a legitimate regulation that can operate free from the illegitimate apartheid aim.

3 2 3 3 Comparative policy and legislation

Regulating subdivision is not unique to South African rural land-use planning. In most foreign jurisdictions it forms part of a legislative framework aimed at the protection and preservation of agricultural land. The preservation of agricultural land in this context is in the public interest. This section is an examination of different 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.

In the United States of America the policies for the protection and preservation of agricultural land vary according to each state. The states of Oregon and Hawaii and their policies in relation to agricultural land preservation show two very different

⁶¹ See 5 2 2 below.

⁶² The Act serves to promote certain rights, specifically the right to a safe and healthy environment and the socio-economic right to food. These will be discussed in 5 3 below.

approaches. In the State of Oregon agriculture is very important to its economy. It is the second largest industry in the state and the implementation of sensible land-use planning policies is essential to the protection and preservation of agricultural land for production purposes.⁶³ The approach followed to protect agricultural land is considered to be one of the most effective in the United States of America.⁶⁴ The state has a set of ten goals for land-use policy and planning and the local authorities need to address each of these goals in their local planning policies. The state reviews these policies to ensure that the goals have been complied with. A uniform and consistent approach among all other local authorities is aimed for. The tools used to protect agricultural land include the required local plans which incorporate the state's goals, zoning and urban growth boundaries.⁶⁵ Zoning is the primary mechanism used for protecting agricultural land. The zoning laws include rules for the use of agricultural land and the conditions under which agricultural land can be converted into non-farm uses. Zoning has been used to identify exclusive farm use areas and to maintain them for this use. Bernasek submits that non-farm uses on prime agricultural land threatens agricultural infrastructure.⁶⁶ This results in a loss of farmland and once this land had been lost it rarely reverts back to agricultural uses. The policy in Oregon focuses on strict zoning and co-ordination with the local government to preserve and protect agricultural land.

Agricultural land in Hawaii is regulated on a state level. This has been problematic as the state has had to balance increasing housing needs with the need to preserve agricultural land. The state and county laws reflect the compromise between these

⁶³ Bernasek T "Oregon agriculture and land-use planning" (2006) 36 *Environmental Law* 165-175 166-167.

⁶⁴ Jacobs H M "Agricultural land protection policy for Albania: Lessons from Western Europe, North America and Japan" (1997) *Working paper No 6 Albania Series* 1-24 18. minds.wisconsin.edu/bitstream/handle/1793/21939/37_wp6.pdf?sequence (accessed on 25 August 2010).

⁶⁵ Jacobs H M "Agricultural land protection policy for Albania: Lessons from Western Europe, North America and Japan" (1997) *Working paper No 6 Albania series* 1-24 19. minds.wisconsin.edu/bitstream/handle/1793/21939/37_wp6.pdf?sequence (accessed on 25 August 2010).

⁶⁶ Bernasek T "Oregon agriculture and land-use planning" (2006) 36 *Environmental Law* 165-175 166-168.

two goals, but has resulted in agricultural subdivision as a means of striking the balance. This has been detrimental to the aim of preserving agricultural land. The way in which the state's land-use law is structured allows for a loophole which permits subdivision of prime agricultural land to make up for the housing shortage.⁶⁷ Suarez⁶⁸ identifies the loophole allowing for agricultural subdivision as one of the problems in this current system and argues that proactive steps will have to be taken to protect agricultural land in the state. The current approach to land-use and the extent to which agricultural land is being subdivided is going to affect prime agricultural land. This will result in non-agricultural uses on prime agricultural land, which is often irreversible. The state has not committed itself to realising agricultural preservation as part of its land-use framework, but according to Suarez this will have to change for the future of its economy and citizens.⁶⁹ The ineffective measures that are currently in place and the failure to implement sound conservation measures are problematic. By eradicating the housing deficit the state has not considered the effect on agricultural land. The public need for housing has in this instance resulted in injudicious subdivision and this will have a negative impact on the Hawaiian economy in the future.

In Western Australia the Town Planning and Development Act of 1928 applies to the subdivision of rural land alienated from the Crown. The process of subdividing rural land requires an application to be lodged with the Western Australian Planning Commission. A set of policy objectives have been drafted to aid the consideration of these applications. The policy objectives aim to discourage land uses that are unrelated to agriculture and to prevent the *ad hoc* fragmentation of agricultural

⁶⁷ Suarez A I "Avoiding the next Hokuli'a: The debate over Hawaii's agricultural subdivisions" (2005) 27 *University of Hawaii Law Review* 441-467 442.

⁶⁸ Suarez A I "Avoiding the next Hokuli'a: The debate over Hawaii's agricultural subdivisions" (2005) 27 *University of Hawaii Law Review* 441-467 461-462.

⁶⁹ Suarez A I "Avoiding the next Hokuli'a: The debate over Hawaii's agricultural subdivisions" (2005) 27 *University of Hawaii Law Review* 441-467 467.

land.⁷⁰ The policy document states that this can be achieved through proper planning, by making provision for rural settlement and by minimising the potential for land-use conflict and the careful management of natural resources.⁷¹ The policy also states that there is a general presumption against the subdivision of agricultural land unless it has been provided for in the town planning scheme.⁷² What is clear about this policy is that the regulation of subdivision falls within a scheme of agricultural preservation. Provision is made for conflicting land-use needs and the need for a balance that does not result in the degradation of prime agricultural lands.

British Columbia, a province of Canada, has limited agricultural land. The need for regulation that will preserve and protect agricultural land is of more importance because of the limited agricultural resources.⁷³ The Agricultural Land Commission Act of 2002 regulates the use of agricultural land. The Act makes provision for a central enforcing body, the Agricultural Land Commission. The Agricultural Land Commission is responsible for administering the Act. In terms of section 6 of the Act the purpose of the Commission is to preserve agricultural land,⁷⁴ to encourage farming on agricultural land⁷⁵ and to encourage local government to accommodate farm use within their plans, by-laws and policies.⁷⁶ In terms of section 21 of the Act a

⁷⁰⁷⁰ Western Australia Planning Commission *Policy DC 3.4 Subdivision of rural land* (2002) 4. devplan.kzntl.gov.za/General/Discussion/Aus_subdivision_agri_land.pdf (accessed on 25 August 2010).

⁷¹ Western Australia Planning Commission *Policy DC 3.4 Subdivision of rural land* (2002) 4. devplan.kzntl.gov.za/General/Discussion/Aus_subdivision_agri_land.pdf (accessed on 25 August 2010).

⁷²⁷² Western Australia Planning Commission *Policy DC 3.4 Subdivision of rural land* (2002) 4. devplan.kzntl.gov.za/General/Discussion/Aus_subdivision_agri_land.pdf (accessed on 25 August 2010).

⁷³ Jacobs H M "Agricultural land protection policy for Albania: Lessons from Western Europe, North America and Japan" (1997) *Working paper No 6 Albania series* 1-24 9. minds.wisconsin.edu/bitstream/handle/1793/21939/37_wp6.pdf?sequence (accessed on 25 August 2010).

⁷⁴ Agricultural Commission Act 2002, sec 6(a)

⁷⁵ Agricultural Commission Act 2002, sec 6(b).

⁷⁶ Agricultural Commission Act 2002, sec 6(c).

person must not subdivide agricultural land unless it is permitted under the Act,⁷⁷ and where an owner of agricultural land wants to subdivide agricultural land, he must apply to the Commission.⁷⁸ The Act regulates subdivision through the application process to the Commission in a regulation that serves to preserve agricultural land. The subdivision provision in the Agricultural Commission Act is similar to the provisions in the Subdivision of Agricultural Land Act.

The comparative sources show that other jurisdictions also use land-use planning mechanisms when conserving agricultural land. These mechanisms are considered to be valid regulations in the scheme of rural land-use management. These systems are different in the type of regulation and the manner of enforcement, but they have the preservation of agricultural land as their goal. The prevention of agricultural land fragmentation is a concern and it falls within the scope of a valid land-use regulation. The ruin of prime agricultural land is topical in many other farming societies and the subdivision regulation is one mechanism that can be used effectively to prevent the creation of uneconomic farming units. The Hawaiian example shows how important the protection and preservation of agricultural land should be. It serves as an indication of what could happen where conflicting land needs and uses are not addressed appropriately.

3 3 Concluding remarks

The regulation of the right to subdivide is a legitimate land-use regulation. The fact that the Subdivision of Agricultural Land Act was promulgated during apartheid does not outweigh the regulatory function it serves at present. It falls within a scheme of agricultural land preservation and protection that is important in many farming societies. The purpose of the Act is to prevent the uneconomic subdivision of prime agricultural land. Its illegitimate aim does not affect this purpose. The comparative discussion indicated that agricultural land is a finite resource that needs to be

⁷⁷ Agricultural Commission Act 2002, sec 21(1).

⁷⁸ Agricultural Commission Act 2002, sec 21(2).

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.

Chapter 4: Section 25 compliance

4 1 Introduction

The Subdivision of Agricultural Land Act (“the Subdivision Act”)¹ forms part of a legislative framework that aims to preserve agricultural land. This is done by preventing acts that will result in the uneconomic subdivision of the land. It was evident from the previous chapters that this framework also served apartheid goals.² This was specific to the preservation of agricultural land for the white minority. It was shown in the previous chapter that this aim does not necessarily affect the legitimacy of the Act’s main purpose. To ensure that this land is preserved the state limits the rights of agricultural land owners to divide the land into newly formed plots and to have these newly formed plots registered. Comparative sources indicated that this type of regulation, a regulation on the right to subdivide and dispose, is not an unusual measure when preserving and protecting agricultural land.³ The regulation is imposed in the public interest and this justifies the state’s interference and exercise of its police power. It remains to consider whether this interference is also constitutionally compliant.

In terms of the constitutional mandate in section 39(2) “[w]hen interpreting any legislation ... every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”.⁴ This makes testing the constitutional compliance of the Subdivision Act necessary. It needs to be established whether the Act can indeed be interpreted so as to promote the spirit, purport and objects of the Bill of Rights. In this chapter the effect of the Act on ownership entitlements will be considered.

¹ 70 of 1970.

² See 2 2 1, 2 2 2 and 3 2 3 2 above.

³ See 3 2 3 3 above.

⁴ Constitution of the Republic of South Africa, sec 39(2).

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.⁵ 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”.⁶ 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”)⁷ 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.

⁵ 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* (5th ed 2006) 108-109, Van der Merwe CG *Sakereg* (2nd ed 1989) 180, Carey Miller DL with Pope A *Land title in South Africa* (2000) 122.

⁶ Constitution of the Republic of South Africa 1996.

⁷ 2002 (4) SA 768 (CC).

4 2 The FNB methodology

4 2 1 Is there an interest in the property?

The property concept under the Constitution is different from the traditional private-law concept.⁸ The meaning and scope of “property” has to be determined in every individual case.⁹ Van der Walt states that “the property question has to be argued and proven separately and concretely in each individual case”.¹⁰ Van der Walt also points out that some categories of property might be easier to prove; examples of these are land and movable corporeals.¹¹

The provisions contained in the Subdivision Act affect all agricultural land owners and all agricultural land in the Republic is subject to the Act. The Act prevents land from being subdivided and the newly created plots registered for sale or long-term lease, the registration of certain servitudes and the bequeathing of subdivided portions before written consent of the Minister of Agriculture is obtained.¹² The Subdivision Act is a regulation over agricultural land. The object of the right affected by the regulation is land, immovable property. The court in *FNB* decided that ownership of land must “lie at the heart of our constitutional concept of property”.¹³ This is in terms of “both the nature of the right involved as well as the object of the right”.¹⁴ The object, land, is clearly covered by the section 25 right to property. The Subdivision Act specifically limits the rights of an owner.¹⁵ The nature of the right

⁸ Van der Walt AJ *Constitutional property law* (2005) 113.

⁹ Van der Walt AJ *Constitutional property law* (2005) 113.

¹⁰ Van der Walt AJ *Constitutional property law* (2005) 117.

¹¹ Van der Walt AJ *Constitutional property law* (2005) 115.

¹² Sec 3(a)-(g), sec 5(1) and sec 6A(1).

¹³ *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 para (CC) para 51.

¹⁴ *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 para (CC) para 51.

¹⁵ The application to subdivide can only be made by the owner of the land. This is in terms of sec 4(1)(a)(i).

affected by the Act is a real right in land, namely ownership. According to Van der Walt this falls within the category of rights that will be the easiest to prove and where the existence of the right will suffice to establish an interest in property.¹⁶ However, the Subdivision Act only limits some of the ownership entitlements that the agricultural land owner would have in terms of his property. It will be necessary to determine whether the entitlement affected by the regulation is an interest in property in terms of section 25. The effect on the owner's capacity to decide what to do with the property, in terms of sale, lease, the registration of servitudes and who will inherit the property is extensive. The interest affected is the entitlement of the owner to dispose of this property and this entitlement forms part of the ownership right. The right of disposal is one of the incidents of ownership.

Honoré lists the standard incidents of ownership and includes the right to capital as one of these incidents.¹⁷ The right to capital or right of disposal consists of the right to alienate, consume or destroy a part or the whole object. Honoré states that the right to alienate is the most important within this category because the wilful destruction of permanent objects is uncommon.¹⁸ He then subdivides the power of alienation into the power of disposition and the power to transfer. These powers can be exercised by way of sale, mortgage, gift or other mode and can be exercised in relation to a part or the whole object.¹⁹ In terms of Honoré's classification the limitation on the owner's capacity to sell, lease, register servitudes and bequeath property in terms of the Subdivision Act is a limitation on the standard incident of the right to capital. Lewis uses these classifications and applies them to the South

¹⁶ Van der Walt AJ *Constitutional property law* (2005) 118.

¹⁷ Honoré A M "Ownership" in *Oxford essays in jurisprudence* (Guest A G ed) (1961) 107-147 118. See also Lewis C "The modern concept of ownership of land" 1985 *Acta Juridica* 241-266 at 250-253.

¹⁸ Honoré A M "Ownership" in *Oxford essays in jurisprudence* (Guest A G ed) (1961) 107-147 118.

¹⁹ Honoré A M "Ownership" in *Oxford essays in jurisprudence* (Guest A G ed) (1961) 107-147 118.

African context. She accepts that the right to capital, which includes the right to alienate, forms part of the standard incidents of ownership in South African law.²⁰

Roux states that the traditional incidents of ownership, which include the rights to consume and alienate, should enjoy protection under the property clause.²¹ He supports this statement with the judgment of *Geyser v Msunduzi Municipality and others*.²² Kondile J in the judgment states that “[t]he property that is protected by s 25 of the Constitution includes property rights such as ownership and the bundle of rights that make up ownership”.²³ The “bundle of rights that make up ownership” are the traditional incidents of ownership. Further support for Roux’s view is derived from the *FNB* decision. Roux explains how the factor in the substantive inquiry for arbitrariness, namely the affect on the incidents of ownership,²⁴ either wholly or in part, allows for an inference to be drawn that constitutional property includes the recognised incidents of ownership.²⁵ 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*”)²⁶ it was accepted that the right to alienate property is an interest in property for the purposes of section 25(1). Yacoob J states that “[t]he right to alienate property is an important incident of its use and

²⁰ Lewis C “The modern concept of ownership of land” 1985 *Acta Juridica* 241-266 at 250-253.

²¹ Roux T “Property” in Woolman S, Roux T and Bishop M (eds) *The constitutional law of South Africa* (2nd ed 2009 original service 2003) 46.1-46.37 at 46.13.

²² 2003 (5) SA 18 (N).

²³ *Geyser v Msunduzi Municipality and others* 2003 (5) SA 18 (N) 37A-37B.

²⁴ See 4 2 3 2 below. *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 100.

²⁵ Roux T “Property” in Woolman S, Roux T and Bishop M (eds) *The constitutional law of South Africa* (2nd ed 2009 original service 2003) 46.1-46.37 at 46.13.

²⁶ 2005 (1) SA 530 (CC).

enjoyment”.²⁷ The limitation in that case affected the right to alienate and this was accepted to be an interest in property for the purposes of section 25(1).²⁸ Based on Honoré’s classification, Roux’s view on the traditional incidents of ownership and the Constitutional Court’s decision in *Mkontwana* the right to capital, which is also the right of disposal, constitutes an interest in property for the purposes of section 25.

4 2 2 *Is there a deprivation?*

The state is authorised to deprive owners of some of the entitlements of ownership as far as it is constitutionally permissible.²⁹ Roux states that deprivations after the *FNB* decision would be given a wide meaning.³⁰ This would mean that a court would construe most interferences with the use and enjoyment of property as a deprivation.³¹ Ackermann J in the *FNB* decision succinctly states that “[i]n a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned.”³² Based on the *FNB* decision and Roux’s argument, regulations that affect the use and enjoyment of property would be deprivations.³³ In *Mkontwana* the court found that the right to alienate “is an important incident of its use and

²⁷ *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.

²⁸ *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.

²⁹ Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman’s The law of property* (5th ed 2006) 96.

³⁰ Roux T “Property” in Woolman S, Roux T and Bishop M (eds) *The constitutional law of South Africa* (2nd ed 2009 original service 2003) 46.1-46.37 at 46.18.

³¹ Roux T “Property” in Woolman S, Roux T and Bishop M (eds) *The constitutional law of South Africa* (2nd ed 2009 original service 2003) 46.1-46.37 at 46.18.

³² *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 para (CC) para 57.

³³ Van der Walt AJ *Constitutional property law* (2005) 124.

enjoyment”,³⁴ as stated above, and that the impugned provision in the case was a “substantive obstacle to alienation and constitute[d] a deprivation of property within the meaning of s 25(1)”.³⁵ The *Mkontwana* judgment requires a “substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society” for it to amount to a deprivation.³⁶ The limitation on the right of disposal in the Subdivision Act based on the standard set in *Mkontwana* would still constitute a deprivation of property. The limitations in the Subdivision Act are substantial.

The fact that the Subdivision Act regulates and limits the entitlement of disposal by limiting the right to subdivide deprives the owner of his use of the property. The Act limits the right to alienate through sale and disposition. It also limits the rights to register long-term leases and certain servitudes. This clearly constitutes a deprivation of property. The Act requires an owner to lodge an application before he subdivides and sells, registers a long-term lease or bequeaths the property. It also affects the registration of certain servitudes. Section 3 of the Act lists prohibited actions and they are all subject to obtaining consent from the Minister.³⁷ The regulation over succession and servitudes are contained in sections 5 and 6A of the Act respectively. The Act serves as a land-use regulation that preserves agricultural land by preventing the creation of uneconomic units, but to achieve this function the

³⁴ *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.

³⁵ *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.

³⁶ *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 32.

³⁷ Sec 3(a)-(g). The actions include the subdivision of agricultural land, the vesting of an undivided share, the vesting of a part of an undivided share, the long-term lease over a portion of agricultural land and the sale or advertising for sale of a portion of agricultural land. See chap 2 above.

entitlement of disposal is limited. This limitation on the disposal of the agricultural land constitutes a deprivation. It is a deprivation of the owner's entitlement to subdivide the land and to perform a subsequent act that will give permanence to the subdivision. The subsequent act is the registration of the newly created parcels of land for transfer, through sale or testamentary disposition, or the creation of the limited real rights of long-term lease or servitude. The previous chapter identified the legitimate purpose of the regulation and showed that the exercise of the state's police power is in the public interest.³⁸ The limitation on the owner's capacity to dispose will need to be justified. It now needs to be determined whether the deprivation of the entitlement of disposal complies with the requirements of section 25(1).³⁹

4 2 3 Does the deprivation fulfil the requirements of sections 25(1)?

4 2 3 1 Law of general application

Law of general application is law that is published or accessible, precise or certain.⁴⁰ It refers to general and publicly accessible rules that affect the rights of individuals and do not target specific individuals.⁴¹ Ackermann J in the *FNB* decision⁴² found that the legislation tested in that case, namely the Customs and Excise Act,⁴² "clearly constitute[d] a law of general application" but provided no test for it.⁴³ The nature of the Subdivision Act as original legislation that imposes burdens on an abstract class would classify as law of general application. It applies generally and does not single

³⁸ See chap 3 above.

³⁹ Van der Walt AJ *Constitutional property law* (2005) 13.

⁴⁰ Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2006) 565-566.

⁴¹ Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2006) 565-566.

⁴² 91 of 1964.

⁴³ *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 61.

out an individual or group of individuals.⁴⁴ The Customs and Excise Act was arguably accepted as a law of general application for the same reasons.

4 2 3 2 Is the deprivation an arbitrary deprivation?

The right to not be arbitrarily deprived of property encompasses a negative protection of property.⁴⁵ Ackermann J states that “section 25 embodies a negative protection of property and does not expressly guarantee the right to acquire, hold and dispose of property.”⁴⁶ The right does not confer an absolute right against any state interference which would constitute a deprivation.⁴⁷ The section does not offer an absolute prohibition on interferences with the owner’s right to dispose of his property. The Subdivision Act limits the right of agricultural land owners to dispose of their property, but section 25(1) does not prohibit any interference that limits the right of disposal. It will be necessary to determine the nature and extent of the deprivation posed by the Subdivision Act. The nature and extent of the deprivation will indicate, depending on the circumstances, whether “no more than a rational connection between [the] means and ends would be required” or whether “the ends would have to be more compelling to prevent the deprivation from being arbitrary”.⁴⁸

Section 25(1) prohibits limitations that are arbitrary. The court in *FNB* interprets arbitrary deprivations as those that fail to give a sufficient reason for the deprivation and those that are procedurally unfair. Ackermann J states that “[h]aving regard to what has gone before, it is concluded that a deprivation of property is 'arbitrary' as

⁴⁴ Currie I and De Waal J *The bill of rights handbook* (5th ed 2005) 542.

⁴⁵ Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman’s The law of property* (5th ed 2006) 96.

⁴⁶ *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 48.

⁴⁷ Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman’s The law of property* (5th ed 2006) 96.

⁴⁸ *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 66.

meant by s 25 when the 'law' referred to in s 25(1) does not provide sufficient reason, it is substantively arbitrary, for the particular deprivation in question or is procedurally unfair.”⁴⁹ Both procedural fairness and substantive arbitrariness will have to be considered at this point.

A deprivation that is procedurally unfair will be arbitrary. The court in *FNB* did not provide guidelines for how to test procedural fairness in the arbitrariness inquiry.⁵⁰ Where the court in *FNB* failed to provide an adequate assessment for the test of procedural fairness the judgments of *Mkontwana* and *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another*⁵¹ (“*Reflect-All*”) can be used. The court in *Mkontwana* expanded on the concept of procedural fairness. The judgment identified procedural fairness as a flexible concept that is dependent on all relevant circumstances.⁵² In applying this standard the court in *Reflect-All* had to decide on whether a deprivation affecting the use, enjoyment and exploitation of private property would be procedurally unfair where it failed to consult individual owners on the proposed planning of provincial roads.⁵³ The court found that the claim of procedural arbitrariness had to fail because it would be impractical, costly and not in the public interest to require consultation with each and every property owner. The costs involved would be exponentially high and it would be practically impossible.⁵⁴ The flexible-circumstance based standard identified by the court in *Mkontwana* and the

⁴⁹ *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 100.

⁵⁰ *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 100.

⁵¹ 2009 (6) SA 391 (CC).

⁵² *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 65.

⁵³ The designs for the proposed roads had already been accepted.

⁵⁴ *Reflect-All 1025 CC and Others V MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) paras 46 and 47.

circumstances relevant in the *Reflect-All* decision would indicate that the Subdivision Act is not procedurally unfair. The Act limits the right to subdivide subject to the application process set out in section 4 of the Subdivision Act. There is not an absolute prohibition on subdivision and the application process serves as a procedural safeguard. The decision taken by the Minister cannot 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. However, it must be kept in mind that the requirements for procedural fairness in terms of an administrative action will still need to be complied with. This will be considered in the next chapter.⁵⁵ Roux distinguishes between procedural fairness in terms of the *FNB* requirements and procedural fairness under the Promotion of Administrative Justice Act (“PAJA”).⁵⁶ Under administrative law and PAJA the focus is the decision or action taken and not the procedural fairness of the Act.

To determine whether a sufficient reason for the deprivation exists will depend on the interplay of the factors and relationships identified by the court in *FNB*. These factors should result in a determination of whether the reason would need to be a mere rational relationship between means and ends or whether a more burdensome proportionate relationship should exist.⁵⁷ Considering these factors requires a balancing of a “complexity of relationships”.⁵⁸ These relationships will now be tested against the deprivation identified in 4 2 2 above.

⁵⁵ See 5 2 2 below.

⁵⁶ Roux T “Property” in Woolman S, Roux T and Bishop M (eds) *The constitutional law of South Africa* (2nd ed 2009 original service 2003) 46.1-46.37 at 46.25.

⁵⁷ *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 100.

⁵⁸ The factors and interplay of the relationships provided by the court in paragraph 100 of the *FNB* decision will now be used to determine whether a sufficient reason for the deprivation in the Subdivision Act exists. *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 100.

The first consideration is the relationship between the means employed and the end sought to be achieved.⁵⁹ The Act serves to prevent the division of agricultural land into uneconomic portions. This function is to preserve prime agricultural land for agricultural purposes. When considering whether the means of achieving this function is justified, due consideration must be given to the way in which the Act is implemented. It limits the rights of agricultural land owners to subdivide their land and then dispose of it. The prohibition is not an absolute prohibition as it attaches an application process which would ensure that the proposed subdivision does not result in the uneconomic fragmentation of agricultural land.

At this stage of the substantive arbitrariness inquiry it is necessary to ask whether the aim of the Act could be achieved in another way and whether the regulation of subdivision is the only way in which agricultural land can be preserved and conserved. From the comparative discussion in chapter three it was clear that this is not an unusual means of protecting and preserving prime agricultural land.⁶⁰ It was also clear that by taking these steps other jurisdictions have been able to protect and preserve agricultural land as a valuable and scarce resource.⁶¹ On this basis it would be not be arbitrary to restrict agricultural land owners when exercising their entitlement of subdivision. There is a nexus between the application process to subdivide and preventing the creation of uneconomic farming units.

The court in *FNB* considered the relationship between the purpose of the deprivation and the person whose property was affected.⁶² The purpose of the deprivation is to preserve agricultural land by preventing it from being divided into uneconomic units.

⁵⁹ *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 100.

⁶⁰ See 3 2 3 3 above.

⁶¹ See 3 2 3 3 above.

⁶² *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 100.

The owner of the land is limited by the application process attached to the act of subdivision. Here the purpose of the deprivation affects the owner of agricultural land directly. This is different from the *FNB* situation where the property of third parties was being attached to be executed for a debt they did not incur.⁶³ This distinction is important. The limitation placed on agricultural land owners by the Subdivision Act affects them because of the nature of the property and its zoning. Changes to land for the purposes of subdivision in urban areas, building or rezoning are often subject to some form of application.⁶⁴ These are usually done on a local government level where applications are made to the municipality in the area in which the property is situated. The application in terms of the Subdivision Act is different because it is done on a national level and sets one standard for all agricultural land over the entire country. The aim of the Act, as identified earlier, cannot be overlooked.⁶⁵ There was an illegitimate aim, the preservation of agricultural land for white occupation. The Act served to maintain white ownership and occupation of the productive agricultural land outside of the homelands. In this context the purpose of the Act was still the preservation of agricultural land, but the individuals affected were only white owners. The conclusion in the previous chapter indicated that it is possible to separate the legitimate purpose of the Act from the illegitimate aim of the Act.⁶⁶

When considering the relationship between the purpose of the deprivation and the nature of the property it is clear that this instance deals with the preservation of scarce and valuable agricultural land.⁶⁷ The nature of the property is immovable agricultural land. Ackermann J stated that if the property is the ownership of land “a more compelling purpose will have to be established in order for the depriving law to

⁶³ *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 108.

⁶⁴ See 3 2 3 1 above.

⁶⁵ See 3 2 3 2 above.

⁶⁶ See chap 3 above.

⁶⁷ *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 100.

constitute sufficient reason for the deprivation”.⁶⁸ The fact that the deprivation affects land would move the relationship between the means and ends, in this instance, closer to proportionality.

The effect of section 3 of the Act on the incidents of ownership is the next consideration.⁶⁹ The Act limits the right of disposal, one of the core ownership entitlements. The rights specifically are the right to subdivide and then to sell, or to register a long-term lease, to register certain servitudes or to bequeath the property. The deprivation does not embrace all the incidents of ownership. It only affects the right of disposal and is done in a manner that does not completely exclude the right to dispose of the property. This factor will not require a more compelling reason as the deprivation only attaches an application process to the preceding acts of disposal. Based on this consideration the scale would move back towards mere rationality.

Based on the discussion above and Ackermann J’s “interplay of variable means and ends”, this shows that even though the nature of the property is land, a mere rational relationship between the means and ends would establish a sufficient reason. When the “complexity of relationships” is considered the only conclusion to be drawn is that a rational connection will suffice when establishing a sufficient reason. To prevent the creation of uneconomic agricultural land units is a compelling purpose and would serve as a sufficient reason. There is a rational connection between the regulation of subdivision and the prevention of the uneconomic fragmentation of agricultural land. The provisions of sections 3, 5 and 6A of the Subdivision Act are not substantively arbitrary and the limitation on the right of disposal is not in conflict with the section 25(1) right to property. The protection and preservation of agricultural land by

⁶⁸ *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 100.

⁶⁹ *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 100.

preventing the creation of uneconomic fragmentation is a constitutionally justifiable limitation on an agricultural landowner's right of disposal. It will not be necessary to move to the next leg of the test, namely the section 36 justification, because the deprivation is not arbitrary.

4 2 4 Does the Act comply with the requirements for a valid expropriation?

In terms of the test provided in *FNB* if the deprivation is not arbitrary or it can be justified under section 36, it would have to be tested against the requirements of section 25(2) and (3).⁷⁰ The limitations contained in the provisions of the Subdivision Act have been found to be compliant in terms of 25(1). In *Nhlabathi v Fick* ("*Nhlabathi*")⁷¹ the court applied the test in *FNB* and moved on to apply the requirements in section 25(2). The court had considered whether the impugned provision (section 6(2)(dA) the Extension of Security of Tenure Act⁷²) allowed for expropriation without compensation.⁷³ The court moved on to the question of expropriation because the impugned provision did "not authorise an arbitrary deprivation".⁷⁴

The Subdivision Act makes provision for expropriations where the land is to be subdivided for the purpose of succession, which is dealt with in a separate section of the Act.⁷⁵ Section 5(2) of the Act makes compensation for expropriation possible where an application for subdivision has not been made in the case of testate succession. It is also possible where intestate succession will result in the uneconomic fragmentation of the land. The Subdivision Act states that "the

⁷⁰ *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 46.

⁷¹ 2003 (7) BCLR 806 (LCC).

⁷² 62 of 1997.

⁷³ *Nhlabathi v Fick* 2003 (7) BCLR 806 (LCC) paras 33-34.

⁷⁴ *Nhlabathi v Fick* 2003 (7) BCLR 806 (LCC) para 31.

⁷⁵ Subdivision of Agricultural land Act, secs 5(1) and 5(2).

provisions of section 12 of the Expropriation Act of 1965 shall *mutatis mutandis* apply in respect of any such proceeds of land or an undivided share in any land".⁷⁶ The provision in section 12 of the Expropriation Act deals with the basis on which compensation is to be calculated.⁷⁷ It lists the factors that may be taken into account when determining compensation. To determine whether this expropriation provision is constitutionally valid will require an analysis of section 25(2) and 25(3) of the Constitution. In terms of section 25(2) a valid expropriation must occur by a law of general application, for a public purpose or a public interest and subject to the payment of compensation.⁷⁸

It has been established earlier that the Subdivision Act is a law of general application.⁷⁹ It has been submitted that it would be unlikely that the law of general application issue would be revisited where it has been dealt with conclusively in the deprivation analysis.⁸⁰ Van der Walt states that the same considerations would apply to the law of general application requirement as in section 25(1) as well as section 36(1), the limitations clause.⁸¹ It can be accepted that the section 25(2) requirement of property being expropriated in terms of law of general application has been met.

From the previous chapter it was established that a valid public purpose for the Act exists.⁸² This purpose is the preservation of prime agricultural land and it is in the public's interest. The public purpose requirement has been included to prevent the arbitrary use of the state's power of eminent domain.⁸³ Expropriations that serve

⁷⁶ Subdivision of Agricultural Land Act 70 of 1970, sec 5(2). The Act refers to the Expropriation Act 55 of 1965, which was replaced by the Expropriation Act 63 of 1975.

⁷⁷ Expropriation Act 63 of 1975, sec 12.

⁷⁸ Constitution of the Republic of South Africa, secs 25(2)(a) and (b).

⁷⁹ See 4 2 3 1 above.

⁸⁰ Van der Walt AJ *Constitutional property law* (2005) 238.

⁸¹ Van der Walt AJ *Constitutional property law* (2005) 238.

⁸² See chap 3 above.

⁸³ Van der Walt AJ *Constitutional property law* (2005) 242.

capricious improper purposes are always invalid. They should primarily serve a legitimate public purpose like land reform or the provision of public utilities and services.⁸⁴ The preservation of agricultural land was shown to serve a public purpose and this should be sufficient for purposes of section 25(2).

For the purposes of expropriation the Subdivision Act will authorise the realisation of the agricultural land to ensure that the land is not divided into uneconomic portions at succession. The Act also makes section 12 of the Expropriation Act applicable as far as compensation for the expropriation is concerned. The Expropriation Act is still valid but needs to be applied and interpreted within the constitutional framework.⁸⁵ The Expropriation Act gives precedence to the standard of market value and actual financial loss as a measure of compensation. In terms of section 25(3) the compensation awarded must be “just and equitable, reflecting an equitable balance between the public interest and the interests of those affected”.⁸⁶ Badenhorst, Pienaar and Mostert submit that the standard where the market value serves as a starting point to calculate compensation is preferred by the courts and satisfies the constitutional norm.⁸⁷ The majority of the court in *Du Toit v Minister of Transport* (“*Du Toit*”)⁸⁸ confirmed this position.⁸⁹ The majority found that the standard in section 12 of the Expropriation Act will satisfy the requirement for just and equitable compensation in terms of section 25(3).⁹⁰ The methodology the court used was to accept the market value and then to test the other factors listed in section 25(3) as far as they were relevant.⁹¹

⁸⁴ Van der Walt AJ *Constitutional property law* (2005) 269.

⁸⁵ Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2006) 559.

⁸⁶ Constitution of the Republic of South Africa, sec 25(3).

⁸⁷ Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2006) 562.

⁸⁸ 2006 (1) SA 297 (CC).

⁸⁹ *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) para 54.

⁹⁰ *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) para 47 and 52.

⁹¹ *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) para 47.

In terms of section 25(3) market value is listed as one of the factors that would reflect a just and equitable balance between private and public interests.⁹² The minority in the *Du Toit* decision rejected the use of market value as a point of departure when determining the amount of compensation for expropriation.⁹³ Langa ACJ found that the standard in section 25(3) should “not serve as a second level ‘review’ test but as *the* test for the calculation of compensation”.⁹⁴ The decision is relevant to the Subdivision Act because it makes use of the same provision in the Expropriation Act. According to the minority in *Du Toit* all the factors should be considered when determining just and equitable compensation in terms of the Constitution. The Subdivision Act makes use of the compensation provision in the Expropriation Act and this would mean that compensation would be determined at market value or on the actual financial loss, which according the majority in *Du Toit* would satisfy the constitutional norm. However, the history the Subdivision Act should require that the other factors in section 25(3) be taken into account and that they should weigh equally in relation to each other to determine just and equitable compensation. The current use of the agricultural land, the history of how this land was acquired and the purpose of the expropriation, which is to prevent uneconomic subdivision at succession, should all be relevant when compensation is calculated and should not only be considered when affected parties approach the court. These factors should not form part of a secondary review of the compensation amount calculated in terms of the Expropriation Act, but should be the standard. The majority decision serves as precedent and the conclusion, based on their finding, is that the provision in the Subdivision Act does fulfil the compensation requirement for a valid expropriation.

⁹² The factors listed in section 25(3) are (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation.

⁹³ See Van der Walt AJ *Constitutional property law* (2005) 279.

⁹⁴ *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) para 84.

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”).¹ 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”)² 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”.³ 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.⁴ 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.⁵ The regulation serves a socio-economic public interest, namely the preservation of agricultural land

¹ 70 of 1970.

² 2002 (4) SA 768 (CC).

³ *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.

⁴ 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.

⁵ 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.⁶ 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,⁷ 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.⁸ 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”)⁹ and section 33 of the Constitution will be central to the discussion.

⁶ See chap 3 above.

⁷ See chap 4 above.

⁸ Constitution of the Republic of South Africa 1996, sec 33.

⁹ 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.¹⁰ Finally the chapter will consider the issue raised by the minority judgment in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* ("*Wary Holdings*")¹¹ 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*¹² 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."¹³

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

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

¹¹ 2008 (11) BCLR 1123 (CC).

¹² 2004 (6) SA 121 (CC).

¹³ *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”.¹⁴ The Subdivision Act was promulgated in the 1970s. It formed part of a legislative scheme that protected white agricultural interests.¹⁵ 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.¹⁶ 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.¹⁷ 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.¹⁸ 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.¹⁹ 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.²⁰ Discrimination may either be direct or indirect. Direct discrimination is present when

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

¹⁵ See 2 2 1 and 2 2 2 above.

¹⁶ See chap 3 above.

¹⁷ See 3 2 3 2 and 3 3 above.

¹⁸ Constitution of the Republic of South Africa 1996.

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

²⁰ See chaps 2 and 3 above.

there is an explicit link between the differentiation and the prohibited ground.²¹ The provision will specifically differentiate on the basis of a listed or unlisted ground.²² Indirect discrimination is present where a provision appears to be neutral but it has an unequal effect on a particular group that is identified in the prohibited grounds.²³ The Subdivision Act, as a legitimate land use regulation, affects all agricultural land owners and does not directly discriminate on any of the listed grounds. However, the possibility exists that the Act had and has the effect of determining who may have access to agricultural land. In this regard there is a clear link between access to land and the land reform initiatives that will be discussed below.²⁴ The history of the Act and the link between race and the possession of land in South Africa makes an inquiry into the possibility of indirect discrimination on the listed ground of race necessary. This is of particular relevance where it is clear that the Act continues to perpetuate a system where prime agricultural land is held by whites.

The decision of *Pretoria City Council v Walker* (“Walker”)²⁵ deals with urban land, but shows that the racially based apartheid division of land is still relevant when determining indirect discrimination on the basis of race. The court’s finding was that by using geographic distinctions that also happened to coincide with the old apartheid divisions, the differentiation in the case had an unequal racial impact and amounted to indirect discrimination.²⁶ Langa J in his judgment stated that “[t]he effect of apartheid laws was that race and geography were inextricably linked and the

²¹ 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 9.

²² Albertyn C and Goldblatt B “Equality” in Woolman S, Roux T and Bishop M (eds) *The constitutional law of South Africa* (2nd ed 2009 original service 2003) 35.1–35.85 at 35.47.

²³ 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 9. See also Albertyn C and Goldblatt B “Equality” in Woolman S, Roux T and Bishop M (eds) *The constitutional law of South Africa* (2nd ed 2009 original service 2003) 35.1–35.85 at 35.47.

²⁴ See 5 3 conflict of rights below.

²⁵ 1998 (2) SA 363 (CC).

²⁶ *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 32. See also 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 9.

application of a geographical standard, although seemingly neutral, may in fact be racially discriminatory”.²⁷ 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,²⁸ 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.²⁹ 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.³⁰

When determining section 9 compliance, the application of the Promotion of Equality and Prevention of Unfair Discrimination Act (“PEPUDA”)³¹ is central. This has to be done in terms of the principle derived from *South African National Defence Union v Minister of Defence* (“SANDU”).³² 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

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

²⁸ See 4 2 2 above.

²⁹ 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.

³⁰ 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).

³¹ 4 of 2000.

³² 2007 (5) SA 400 (CC) paras 51-52.

require the legislation to be challenged for being inconsistent with the Constitution.³³ 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".³⁴ 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*").³⁵ 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.³⁶ 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.³⁷

PEPUDA was created to give effect to section 9 and "to prevent or prohibit unfair discrimination and to promote the achievement of equality".³⁸ 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".³⁹ 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

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

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

³⁵ 2008 (1) SA 474 (CC) para 40.

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

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

³⁸ Preamble of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

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

limitation on disposal.⁴⁰ 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*⁴¹ 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”.⁴²

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

⁴⁰ See chap 4 above.

⁴¹ 2009 (1) SA 644 (EqC).

⁴² *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.⁴³ 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.⁴⁴ 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. Albery provides guidelines for determining this question.⁴⁵ These guidelines have been adapted from the unfairness test developed in *Harksen v Lane NO and Others* ("*Harksen*").⁴⁶ 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.⁴⁷ 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

⁴³ 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).

⁴⁴ 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".

⁴⁵ Albery 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 Albery's guidelines and applied to the Subdivision Act.

⁴⁶ 1998 (1) SA 300 (CC) paras 64-66.

⁴⁷ Albery 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.⁴⁸ The history of the Act showed that it was created in an apartheid context where agricultural policy was racialised.⁴⁹ 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.⁵⁰ 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.⁵¹ 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.⁵² 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.⁵³ 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.⁵⁴ 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.

⁴⁸ See chaps 2 and 3 above.

⁴⁹ See 2 2 1 above.

⁵⁰ See 3 2 3 2 above.

⁵¹ 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.

⁵² See 5 3 below.

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

⁵⁴ 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.⁵⁵ 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.⁵⁶

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.⁵⁷ 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

⁵⁵ 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.

⁵⁶ See 3 2 3 2 and 3 2 3 3 above.

⁵⁷ See fn 43 above.

discriminatory. The presumption in section 9(5) would mean that this discrimination is unfair, but the factors Albery 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.⁵⁸ 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”.⁵⁹ 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.⁶⁰ 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

⁵⁸ Constitution of the Republic of South Africa 1996, sec 33.

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

⁶⁰ 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.⁶¹ This serves to protect the institution of judicial review of administrative power from legislative interference.⁶² 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.⁶³ Central to the right of just administrative action is the Promotion of Administrative Justice Act (“PAJA”).⁶⁴ PAJA was enacted to give effect to the right in section 33 of the Constitution.⁶⁵ The right in section 33 may not be relied on directly because of the *SANDU* principle, the principle of subsidiarity.⁶⁶ 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.⁶⁷ 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.

⁶¹ Constitution of the Republic of South Africa, sec 33.

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

⁶³ Hoexter C *Administrative law in South Africa* (2007) 8.

⁶⁴ 3 of 2000.

⁶⁵ Constitution of the Republic of Africa.

⁶⁶ See discussion in 5 2 1 and fn 32 above.

⁶⁷ *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.”⁶⁸ 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.⁶⁹ The Minister is granted the discretion to refuse the application and may attach conditions to the proposed subdivision application.⁷⁰ 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”),⁷¹ “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”.⁷² 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.⁷³ 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.

⁶⁸ Promotion of Administrative Justice Act 3 of 2000, sec 1.

⁶⁹ Subdivision of Agricultural Land Act 70 of 1970.

⁷⁰ Subdivision of Agricultural Land Act 70 of 1970, sec 4.

⁷¹ 2000 (1) SA 1 (CC).

⁷² *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.

⁷³ 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.⁷⁴ Administrators do not have inherent powers and can only derive powers from a lawful empowering source, usually legislation.⁷⁵ 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.⁷⁶ 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.⁷⁷ The section further empowers the Minister to enforce,⁷⁸ vary or withdraw any condition.⁷⁹ 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.⁸⁰ 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 10.⁸¹ 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.⁸² In *Farjas (Pty) Ltd and Another v Regional Land Claims*

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

⁷⁵ Hoexter C *Administrative law in South Africa* (2007) 227.

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

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

⁷⁸ Subdivision of Agricultural Land Act 70 of 1970, sec 4(3).

⁷⁹ Subdivision of Agricultural Land Act 70 of 1970, sec 4(4).

⁸⁰ Subdivision of Agricultural Land Act 70 of 1970, sec 4(4).

⁸¹ Subdivision of Agricultural Land Act 70 of 1970.

⁸² 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* (2nd ed 2009 original service 2003) 63.1-63.128 at 63.77.

*Commissioner, Kwazulu-Natal*⁸³ 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”.⁸⁴ 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.⁸⁵ Section 3(1) of PAJA requires that any administrative action that materially and adversely affects the rights of any person be procedurally fair.⁸⁶ 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.⁸⁷ 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.⁸⁸ 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;⁸⁹ a reasonable opportunity to make representations;⁹⁰ a clear statement of the

⁸³ 1998 (2) SA 900 (LCC).

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

⁸⁵ 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”.

⁸⁶ Promotion of Administrative Justice Act 3 of 2000, sec 3(1).

⁸⁷ See chap 4 above.

⁸⁸ Promotion of Administrative Justice Act 3 of 2000, sec 3(2)(a).

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

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

administrative action;⁹¹ adequate notice of any right to review or internal appeal when it is applicable⁹² and notice of the right to reasons.⁹³ To give effect to the right to procedurally fair administrative action these requirements must be present in the Minister's decision. These requirements can be departed from and PAJA identifies the circumstances in section 3(4).⁹⁴

Section 6(2)(h) makes administrative action reviewable where “the exercise of the power or the performance of the function authorised by the empowering provision ... is so unreasonable that no reasonable person could have so exercised the power or performed function”.⁹⁵ The Constitution requires that administrative action be reasonable.⁹⁶ This requirement means that the Minister when acting in terms of the Subdivision Act must act reasonably.⁹⁷ Hoexter uses standard dictionary definitions of “reasonable” to show that an action need only be “within the limits of reason”.⁹⁸ This is the standard that should be demanded of discretionary administrative action. It will not always ensure the perfect or correct decision, but would serve as a sufficient safeguard against capricious decision making.⁹⁹ O'Regan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* (“*Bato Star*”)¹⁰⁰ found that section 6(2)(h) needs to, firstly, be construed consistently with the

⁹¹ Promotion of Administrative Justice Act 3 of 2000, sec 3(2)(b)(iii).

⁹² Promotion of Administrative Justice Act 3 of 2000, sec 3(2)(b)(iv).

⁹³ Promotion of Administrative Justice Act 3 of 2000, sec 3(2)(b)(v).

⁹⁴ Promotion of Administrative Justice Act 3 of 2000, sec 3(4)(a) states that “where it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2). The Act in sec 3(4)(b) sets the parameters for departing from the requirements in sec 3(2)(b).

⁹⁵ Promotion of Administrative Justice Act 3 of 2000, sec 6(2)(h).

⁹⁶ Constitution of the Republic 1996, sec 33(1).

⁹⁷ Klaaren J and Penfold G “Just Administrative Action” in Woolman S, Roux T and Bishop M (eds) *The constitutional law of South Africa* (2nd ed 2009 original service 2003) 63.1-63.128 at 63.105.

⁹⁸ Hoexter C “The future of judicial review in South African administrative law” (2000) 117 *SALJ* 484-519 at 510.

⁹⁹ Hoexter C “The future of judicial review in South African administrative law” (2000) 117 *SALJ* 484-519 at 510.

¹⁰⁰ 2004 (4) SA 490 (CC).

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.¹⁰¹ She also provides a useful list of factors that would indicate whether an administrative decision would be reasonable.¹⁰² 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.

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

¹⁰² 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.¹⁰³ 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.¹⁰⁴ In *Port Elizabeth Municipality v Various Occupiers*¹⁰⁵ 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.¹⁰⁶ 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*¹⁰⁷ found that conflicting rights needs to be balanced and that the Constitution provides no solution as to which right(s) should prevail.¹⁰⁸ In terms of Cameron J's judgment, it is necessary to

¹⁰³ See chap 3 above.

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

¹⁰⁵ 2005 (1) SA 217 (CC).

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

¹⁰⁷ 1996 (2) SA 588 (W).

¹⁰⁸ *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”.¹⁰⁹ 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.¹¹⁰ 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.¹¹¹ 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,¹¹² needs to ensure that pollution and ecological degradation are

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

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

¹¹⁰ *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.

¹¹¹ 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* (2nd ed 2009 original service 2003) 50.1-50.50 at 50.12.

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

prevented,¹¹³ that conservation is promoted¹¹⁴ and that ecologically sustainable development and use of natural resources are secured while promoting justifiable economic and social development.¹¹⁵ The state's failure to secure these "goals" would amount to a violation of the individual's right.¹¹⁶ Earlier in this thesis, it was argued that the Subdivision Act forms part of a framework intended to preserve and protect agricultural land.¹¹⁷ 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.¹¹⁸ 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".¹¹⁹ This section is the focus of this discussion.¹²⁰ There is a duty on the state to "respect, protect, promote and fulfil"¹²¹ 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

¹¹³ Constitution of the Republic of South Africa, sec 24(b)(i).

¹¹⁴ Constitution of the Republic of South Africa, sec 24(b)(ii).

¹¹⁵ Constitution of the Republic of South Africa, sec 24(b)(iii).

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

¹¹⁷ See 3 2 3 2 and 3 2 3 3 above.

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

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

¹²⁰ 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).

¹²¹ 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.¹²² To give effect to this duty the state will have to regulate through legislation or executive or administrative decisions.¹²³ Brand proposes three ways of regulating this right.¹²⁴ He submits that price regulation,¹²⁵ standard setting in respect of the safety and nutritional value¹²⁶ and giving effect to the duty by protecting informal tenure rights¹²⁷ are the measures that need to be taken.¹²⁸ 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 foodinsecure households.¹²⁹ 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

¹²² 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* (2nd ed 2009 original service 2003) 56C.1-56C.30.

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

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

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

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

¹²⁷ 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.

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

¹²⁹ 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.¹³⁰ 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*¹³¹ 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."¹³² 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.¹³³ The Act prevents the effective implementation of the land reform goals and for this reason has been excluded.¹³⁴ 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

¹³⁰ 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.

¹³¹ 2002 (4) SA 768.

¹³² *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.

¹³³ See fn 43 above.

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

land.¹³⁵ 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.¹³⁶ 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,¹³⁷ 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”.¹³⁸ 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*¹³⁹ found that there is an obligation on the state to take positive action to

¹³⁵ 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.

¹³⁶ See 3 2 3 3 above.

¹³⁷ *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).

¹³⁸ 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.

¹³⁹ 2001 (1) SA 46 (CC).

eradicate homelessness, intolerable housing and extreme conditions of poverty.¹⁴⁰ 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”.¹⁴¹ For the right of access to adequate housing to be realised all of these conditions need to be met.¹⁴² 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,¹⁴³ 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

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

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

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

¹⁴³ 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).¹⁴⁴ 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,¹⁴⁵ 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

¹⁴⁴ See 4 2 3 2 above.

¹⁴⁵ See 3 2 3 1 and 3 2 3 2 above.

protected under the section 24 right to an environment which is not harmful to one's health and wellbeing.¹⁴⁶ Schedule 4 part A of the Constitution lists agriculture, environment, and soil conservation as a concurrent national and provincial legislative competence.¹⁴⁷ This means that the national and provincial legislature can and must regulate these areas. Both environmental and agricultural issues fall within the concurrent national and provincial competences.

The dissenting judgment of Yacoob J in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* ("*Wary Holdings*")¹⁴⁸ identifies the regulation of subdivision under the Subdivision Act as a part of planning which is exclusive to provincial and municipal competencies.¹⁴⁹ He contends that the Subdivision Act "is concerned with zoning, subdivision and sale of land [which] is not concerned with agriculture but with the functional area of planning".¹⁵⁰ He finds that the authority the Minister has to decide on agricultural subdivision is in conflict with the Constitution in two respects. Firstly, the power negates municipal planning and secondly, it trespasses into the sphere of exclusive provincial competence of provincial planning.¹⁵¹ Van Wyk agrees with Yacoob J's finding that subdivision regulation forms part of the functional area of planning.¹⁵² She states that his view is not new and was expounded by the 1997 White Paper on South African Land Policy. The policy stated that the principal role of the Act was to operate as zoning regulation.¹⁵³ Van Wyk's article on the issue examines the new local government dispensation, land use planning and the role of municipal and

¹⁴⁶ See 5 2 3 above.

¹⁴⁷ Constitution of the Republic of South Africa.

¹⁴⁸ 2008 (11) BCLR 1123 (CC).

¹⁴⁹ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 (11) BCLR 1123 (CC) paras 128 and 129.

¹⁵⁰ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 (11) BCLR 1123 (CC) para 129.

¹⁵¹ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 (11) BCLR 1123 (CC) para 129. See also Van Wyk J "Is subdivision of agricultural land part of municipal planning?" (2009) 24 *SAPR/PL* 545-562 547.

¹⁵² Van Wyk J "Is subdivision of agricultural land part of municipal planning?" (2009) 24 *SAPR/PL* 545-562 562.

¹⁵³ Republic of South Africa Department of Agriculture and Land Affairs *White Paper on South African Land Policy* (1997) para 3.14.

provincial government in the constitutional framework.¹⁵⁴ The main substance of the Act is to regulate planning and land use. This supports the finding in Yacoob J's minority judgment.¹⁵⁵ 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*¹⁵⁶ 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.¹⁵⁷ Subdivision in a scheme of agricultural preservation does not serve the same purpose as with urban planning and development.¹⁵⁸ It is clear from the Draft Sustainable Utilisation of Agricultural Resources Bill of 2003 that national government intends to control agricultural subdivision.¹⁵⁹ The policy discussion in chapter two also provided justifications for the use of subdivision as a means of agricultural preservation,¹⁶⁰ 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

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

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

¹⁵⁶ 2003 (1) SA 445 (T).

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

¹⁵⁸ See 3 2 3 1 above.

¹⁵⁹ See 2 4 above.

¹⁶⁰ See 2 2 2 above.

the subdivision of agricultural land.¹⁶¹ 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

¹⁶¹ 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”)¹ 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

¹ 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 Act² 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

² 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,³ to protect scarce and valuable agricultural land, and those rights⁴ 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 Act⁵ 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.

³ 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.

⁴ 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.

⁵ 64 of 1998.

6 2 Overview of chapters

6 2 1 Analysis of the Subdivision of Agricultural Land Act

The analysis of the Subdivision Act was divided into an overview of the historical development of the Act, an interpretation of the Act's provisions and a description of the current status of the Act. The overview of the historical development of the Act focussed on agricultural landholding before the promulgation of the Act, the policy reasons for tabling the subdivision regulation and the final promulgation of the Subdivision Act. From this discussion it became clear that the Subdivision Act had a legitimate purpose and an illegitimate aim. The Act's history, context and the policy reasons for its enactment showed that the Act was necessary for the preservation of agricultural land. However, the historical context also showed that the Act was not free from political efforts to promote white interests at the cost of restricted and limited black African interests. The history of the Act showed its creation in an apartheid context where agricultural policy was racialised. The focus was preserving prime agricultural land for the white minority. The policy analysis also identified the dual purpose of the Act. The concern for creating uneconomic farming units was in fact a concern for the wellbeing of the white farmer. The Act was tabled because the creation of a white peasant farming community was a state concern.

The extent of the statutory limitation introduced by the Act was examined by analysing the primary sections of the Act and the courts' interpretation of those sections. It was clear from the discussion that the statutory limitation on the right to subdivide has numerous implications. In achieving the purpose of the Act the legislature has extended the Act's application to restrict certain actions relating to the use agricultural land. The restriction has an effect on the right to alienate through sale and succession and also to register long-term leases and certain servitudes. This limitation was important when testing the section 25 constitutional compliance of the Subdivision Act. The Act's history and purpose, also identified in this chapter, was relevant when testing for general constitutional compliance.

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*⁶ 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* decision⁷ 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

⁶ [2001] 1 All SA 141 (W).

⁷ *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")⁸ 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

⁸ 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*”)⁹ 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”.¹⁰ 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

⁹ 2005 (1) SA 530 (CC).

¹⁰ *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 Act¹¹ 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

¹¹ 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*”).¹² 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

¹² 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.¹³ 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

¹³ 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”)¹⁴ 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

¹⁴ 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.¹⁵ 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.

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

List of abbreviations

SALJ – South African Law Journal

SAPR/PL – South African Public Law

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