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**A CRITICAL ANALYSIS OF THE REGULATION OF AGRICULTURAL LAND
UNDER THE DRAFT PRESERVATION AND DEVELOPMENT OF
AGRICULTURAL LAND BILL, OF 2021.**

by

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Declaration

I declare that the dissertation, which I hereby submit for the degree of LL.M in Environmental Law at the University of Pretoria, is my own work and has not previously been submitted by me for a degree at this or any other tertiary institution.

All references made and quotations cited have been referenced and acknowledged herein.

Signed:

ASM van Jaarsveld

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List of abbreviations

DAFF:	Department of Agricultural, Forestry and Fisheries
DALRRD:	Department of Agriculture, Land Reform and Rural Development
FNB:	First National Bank of South Africa Limited
GG:	Government Gazette
GN:	Government Notice
LUPO:	Land Use Planning Ordinance 15 of 1985
MEC:	Member of Executive Council
MPRDA:	Mineral and Petroleum Resources Development Act 28 of 2002
PAJA:	Promotion of Administrative Justice Act 3 of 2000
SCA:	Supreme Court of Appeal
SEIAS:	Socio-Economic Impact Assessment System
SALA:	Subdivision of Agricultural Land Act 70 of 1970
SALRA:	Subdivision of Agricultural Land Repeal Act 64 of 1998
SPLUMA:	Spatial Planning and Land Use Management Act 16 of 2013

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1. Research question

How will the regulation of agricultural land, as proposed in the *Draft Preservation and Development of Agricultural Land Bill*,¹ regulate agricultural land in South-Africa and what impact would the regulations have on property rights and national food security?

2. Introduction

In the 2015 forerunner to the *Draft Preservation and Development of Agricultural Land Framework Bill* (hereafter referred to as “2015 Bill”),² it was proposed in clause 3(1) that “agricultural land is the common heritage of all the people of South Africa and the Department of Agriculture, Land Reform and Rural Development (hereafter referred to as “Department of Agriculture”) is the custodian thereof for the benefit of all South Africans”.³ The 2015 Bill proposes a framework for the regulation of agricultural land, drawing from several existing statutes.⁴ The 2021 Bill would form part of a tapestry of statutes for the regulation of what is regarded to be natural resources and for purposes of this study the 2021 Bill is scrutinized, specifically how the regulation of agricultural land will impact on property rights and food security in South Africa.

In the Preamble of the 2021 Bill the motivation and purpose of the Bill is clearly set out, namely:

“The need for a national regulatory framework to co-ordinate the preservation and development of agricultural land in a proactive manner, to prevent the fragmentation of agricultural land, to minimise the loss of agricultural land, to promote viable farming units, to encourage the optimal use of agricultural land and to provide for food security”.⁵

¹ Draft Preservation and Development of Agricultural Land Framework Bill of 2021 (hereafter the “2021 Bill”). See GN 663 of 2020 in GG 43723 of 18 September 2020.

² 2015 Bill.

³ Clause 3(1) of the 2015 Bill (See note 2 *supra*).

⁴The Mineral and Petroleum Resources Development Act 28 of 2002 (hereinafter “MPRDA”; Provision of Land and Assistance Act 126 of 1993; The Subdivision of Agricultural Land Act 70 of 1970 (hereinafter “SALA”), amongst others.

⁵ Preamble of the 2015 Bill (See note 2 *supra*).

The purpose of the 2021 Bill is to give effect to the constitutional obligation imposed in section 24⁶ for the protection of the environment for the benefit of current and future generations, to ensure sustainable ecological development, and to provide food security.⁷To this end, the regulatory framework of agricultural land as proposed in the 2021 Bill aims to protect high potential agricultural land against development for other purposes, such as mining, and to provide for the ever-growing need for food security.⁸

The primary aims of this study are accordingly to answer the below twofold research question, namely:

- a) How will the regulation of agricultural land, as proposed in the Draft Preservation and Development of Agricultural Land Bill, regulate agricultural land in South-Africa, and
- b) What impact would the regulations have on property rights and national food security?

The research question will be answered by a critical analysis of the proposed 2021 Bill against the background of the property clause, section 25 of the Constitution of the Republic of South Africa, 1996, (hereafter “the *Constitution*”) to determine whether some provisions of the 2021 Bill may result in the expropriation or the deprivation of agricultural land without compensation which the Constitution prohibit⁹. If that is the case, further determine what impacts the 2021 Bill regulations would have on property rights, and to provide food security in the Republic of South Africa.

Thereafter the study investigates whether the 2021 Bill is an answer to the Constitutional obligation to ensure access to food.¹⁰

The South African environmental law is regarded to be fragmented.¹¹ This includes the structural fragmentation in all spheres of government, and which poses a variety

⁶ The Constitution of the Republic of South Africa, 1996 (hereinafter “the Constitution”).

⁷ S 27 of the Constitution.

⁸ GN 663 of 2020 in GG 43723 of 18 September 2020.

⁹ Section 25 (1) of The Constitution of the Republic of South Africa, 1996 (hereinafter “the Constitution”).

¹⁰ S 27 of the Constitution.

¹¹ Republic of South Africa, Department of Forestry, Fisheries and the Environment. 2020. *Annexure B: Socio-Economic Impact Assessment Report (Phase 2): White Paper on the Conservation and Sustainable Use of South Africa’s Biological Resources* October 2020 https://www.dffe.gov.za/sites/default/files/docs/draftwhitepaper_seias.pdf (Accessed 12 July 2022).

of risks against good governance.¹² A fragmented environmental system, especially from a governance perspective, is not beneficial for sustainability.¹³ The 2021 Bill sets a goal to achieve the regulation of agricultural land in South Africa through a regulatory system in all spheres of government.¹⁴

A second aim of this study is to critically analyse the provisions of the 2021 Bill to determine how 2021 Bill will impact on the holders of agricultural property rights, and how the 2021 Bill will provide for national food security. The 2021 Bill defines a “farmer” as “... a person or entity who uses agricultural land for agricultural purposes, and excludes a person employed by the farmer.”¹⁵ The 2021 Bill defines “landowner” as the person or entity in whose name the property is registered.¹⁶ The 2021 Bill specifically defines “land use” as a series of human activities which directly or indirectly relates to the land and making use of its resources or having an impact on it.¹⁷

It is against the background of these definitions finding application in the 2021 Bill that this analytical study is done. It is necessary to investigate the current property regime that exists in the South African property landscape and the freedom of a landowner to conduct a variety of activities, or lack thereof, on the owned land, how the proposed 2021 Bill would find application, and how it would impact on the landowner’s property rights. The 2021 Bill applies to all agricultural land, subject to the exclusions as contemplated in section 1 of the Bill.¹⁸

An analysis is done on how agricultural land will be regulated in future by the 2021 Bill and if this may amount to an arbitrary deprivation. The proposition of productive use as a regulatory goal or achievement is investigated and considered as a regulatory against the current proposed regulatory requirements to ensure good governance and provide for food security.

¹² Kotze ‘A Legal Framework for Integrated Environmental Governance in South Africa and the North-West Province’ (2005) 3 *NWU Institutional Repository* 658.

¹³ See note 11 *supra*.

¹⁴ Preamble of the 2021 Bill. See GN 663 of 2020 in GG 43723 of 18 September 2020.

¹⁵ S 1 of the 2021 Bill. See GN 663 of 2020 in GG 43723 of 18 September 2020.

¹⁶ S 1 of the 2021 Bill. See GN 663 of 2020 in GG 43723 of 18 September 2020.

¹⁷ S 1 of the 2021 Bill. See GN 663 of 2020 in GG 43723 of 18 September 2020.

¹⁸ S 1 of the 2021 Bill. See GN 663 of 2020 in GG 43723 of 18 September 2020.

3. Property Rights in South Africa

The first question should be “What is property?” The starting point to address this short question is to look towards the *Constitution*, and more particular, the Bill of Rights.¹⁹ The *Constitution* provides no definition for property. Muller points out that the definition of “property” is complicated by several factors.²⁰ It seems almost impossible to define property because of all the factors that play a role.²¹ Muller warns that the study of property should be approached with caution and should at the very least be indicative of “the existence of rights and duties among individuals mutually, and between specific individuals and the state, although the context in which these relations are set might vary from traditional private law to constitutional law”.²²

Ownership is the most comprehensive real right a person can possess over a thing, which allows such a person to use or enjoy the thing in any manner not prohibited by law, which includes the Constitution, legislation, and the common law.²³ It is accepted that ownership is the right that confers the most comprehensive control over a thing, considering what the law permits or allows.²⁴

Muller²⁵ explained that although “dominium” and “ownership” may have corresponding meanings, there are also differences and that dominium expresses in more detail an owner’s entitlement and legal ability to control the use of the property in a manner they want and need to satisfy either their own or family needs.²⁶

The so-called “freedom of Property²⁷” seems to be a claim quite often referred to as a “basic right of ownership”. Muller however warns that the survival of the modern society is dependent on the restrictions of this so-called basic right.²⁸

¹⁹ S 25 of the Constitution.

²⁰ Muller *et al* *General Principles of South African Property Law* (2019) 1

²¹ Muller *et al* *General Principles of South African Property Law* (2019) 1

²² Muller *et al* *General Principles of South African Property Law* (2019) 2.

²³ Muller *et al* *General Principles of South African Property Law* (2019) 43.

²⁴ Muller *et al* *General Principles of South African Property Law* (2019) 43 – 44.

²⁵ Muller *et al* *Silberberg and Schoeman’s the Law of Property* (2019) 3.

²⁶ Muller *et al* *Silberberg and Schoeman’s the Law of Property* (2019) 3.

²⁷ Muller *et al* *Silberberg and Schoeman’s the Law of Property* (2019) 4.

²⁸ Muller *et al* *Silberberg and Schoeman’s the Law of Property* (2019) 4.

The restrictions placed on ownership is however not a new subject and has come under the spotlight quite often in the past, and even under the constitutional dispensation. In the matter of *Gien v Gien*²⁹ the rights of an owner were described as the most comprehensive right a person can have in respect of a thing. The argument before the court was that an owner of immovable property can do whatever the owner likes on the owned property.³⁰ The court analysed the legal position. The court found that although property rights may be considered the most comprehensive rights a person may have in respect of things, the right is limited by the application of law.³¹ The *Gien*-case was considered before the Republic of South Africa's new constitutional era. However, the court acknowledged the comprehensive right of ownership, but with limitation.³²

In the matter of *Van Bergen v Van Niekerk & Dos Santos*,³³ Southwood J referred to the matter of *Gien*-case)³⁴ and the fact that an owner's rights to property is limited in that the law places reciprocal duties on owners.³⁵ Although the *Gien*-case is pre-constitutional, the *Van Bergen* case is not. Property rights are acknowledged in the *Constitution*, although limited.³⁶

An example of a restriction of property rights in the constitutional dispensation was highlighted by Nkabinde J in *ReflectAll 1025 CC & others v MEC for Public Transport, Roads & Works*³⁷ where the Constitutional Court held that "property rights are not absolute, even though they are given constitutional protection". Nkabinde's judgement follows the approach that was confirmed in *Du Toit v Minister of Transport* where the Constitutional Court established that expropriation may take place however the need of compensation was confirmed.³⁸

²⁹ *Gien v Gien* 1979 2 SA 1113 (T) para 1120.

³⁰ *Gien v Gien* 1979 2 SA 1113 (T) para 1120.

³¹ *Gien v Gien* 1979 2 SA 1113 (T) para 1120

³² *Gien v Gien* 1979 2 SA 1113 (T) para 1120.

³³ *Van Bergen v Van Niekerk & Dos Santos* unreported case number 3037/2005 of 17 March 2005 (T). Also see *Regal v African Superslate (Pty) Ltd* 1962 (3) SA 18 (A).

³⁴ *Gien v Gien* 1979 2 SA 1113 (T).

³⁵ *Van Bergen v Van Niekerk & Dos Santos* unreported case number 3037/2005 of 17 March 2005 (T) para 16.

³⁶ S 25(1) of the Constitution. No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

³⁷ *ReflectAll 1025 CC & others v MEC for Public Transport, Roads & Works, Gauteng Provincial Government & another* 2012 para 33.

³⁸ *Du Toit v Minister of Transport* 2005 para 28.

As already mentioned, Muller describes “property” to be a complicated concept by virtue of several factors.³⁹ Muller differentiates between the law of property and the law of obligations.⁴⁰ It is proposed that a study of the law of property should not be confined to the narrow sense of the word, but should be studied in a broader sense.⁴¹

It is important to notice that the Constitution does not prohibit interference but allow for the regulation of property and the most common example is most probably By laws of a municipality where private property is regulated on a daily basis.⁴² In discussing section 25 of the *Constitution*, Muller correctly points out that this property clause sets parameters for state interference into private property law.⁴³ Despite the constitutional parameters set, it seems that recent developments in promulgated legislation and the support towards what Muller⁴⁴ describes as the “...functionalisation or socialisation of property” results in property law not existing in isolation. Muller proposes that various rules such as the “economics of life” need to be redefined.⁴⁵ Muller mentions that the concept of private law has changed over time and uses the examples of hire-purchases and the “... use of the lease...”.⁴⁶ It is argued that the right to use property is becoming more important.

Support exists both academically and legislatively for what can be described as “divided ownership” or *duplex dominium*.⁴⁷ Examples of the above are seen in the new trend of ownership such as members to a sectional title scheme, time-share, and perhaps, to some extent, land reform.⁴⁸ Although this new trend of ownership is used in the same breath as the constitutional property and more specific section 25, the

³⁹ Muller *et al Silberberg and Schoeman’s the Law of Property* (2019) 1.

⁴⁰ Muller *et al Silberberg and Schoeman’s the Law of Property* (2019) 2.

⁴¹ Muller *et al Silberberg and Schoeman’s the Law of Property* (2019) 2.

⁴² Examples of Bylaws include City of Cape Town Metropolitan Municipality’s Problem Property By-law By-law, 2020 (Published in Western Cape Provincial Gazette 8362 on 27 November 2020), and Winnie Madikizela-Mandela Local Municipality’s Accommodation Establishments By-law, 2017 (Published in Eastern Cape Provincial Gazette 3830 on 24 April 2017).

⁴³ Muller *et al Silberberg and Schoeman’s the Law of Property* (2019) 4.

⁴⁴ Muller *et al Silberberg and Schoeman’s the Law of Property* (2019) 5.

⁴⁵ Muller *et al Silberberg and Schoeman’s the Law of Property* (2019) 5.

⁴⁶ Muller *et al Silberberg and Schoeman’s the Law of Property* (2019) 5.

⁴⁷ Muller *et al Silberberg and Schoeman’s the Law of Property* (2019) 6.

⁴⁸ Muller *et al Silberberg and Schoeman’s the Law of Property* (2019) 6.

Sectional Title Act⁴⁹ and the Property Time-Sharing Control Act⁵⁰ pre-date the Constitution, with respective dates of 1986 and 1983.

New patterns in law developed after the enactment of the *Constitution* focussing on the protection of rights and to prevent the arbitrary deprivation of property. This is seen in the Prevention of Illegal Eviction from Unlawful Occupation of Land Act.⁵¹

In the matter of *Port Elizabeth Municipality v Various Occupiers*⁵² the court was confronted with competing rights. On the one hand, there were the rights of non-landowners that were afforded Constitutional protection and on the other hand, private property rights of a land-owner. The court was required to balance these competing rights. The court explained that occupation of immovable property seems to be a new right worthy of protection in terms of the constitutional era which by its very nature stands in contrast to the common law concepts of ownership such as use, occupation, and possession⁵³ culminating in the conclusion that it is the judiciaries' duty to find a balance between these competing rights.

Kotze⁵⁴ described this peculiar situation and highlighted the fact that on the one hand property rights are protected and in fact embedded in the *Constitution* and on the other hand, placed an obligation on the state to interfere with the property rights and promote land reform.⁵⁵ This Constitutional obligation is found in section 25(5) of the *Constitution*.⁵⁶ Kotze points out that the constitutional obligation provides for the state

⁴⁹ The Sectional Titles Act 95 of 1986.

⁵⁰ The Property Time-Sharing Control Act 75 of 1983.

⁵¹ Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (hereinafter referred to as "PIE-act").

⁵² *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) para 23.

⁵³ *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) para 23.

⁵⁴ Kotze 'The regulation of agricultural land in South Africa: A legal comparative perspective' (2020) 17. (Kotze, T. 2020. The regulation of agricultural land in South Africa: A legal comparative perspective. Unpublished LLD (Law). University of Stellenbosch. Available at: https://scholar.sun.ac.za/bitstream/handle/10019.1/108464/kotze_regulation_2020.pdf?sequence=2 [Accessed 12 July 2022] 1 17.

⁵⁵ Kotze 'The regulation of agricultural land in South Africa: A legal comparative perspective' (2020) 17. (Kotze, T. 2020. The regulation of agricultural land in South Africa: A legal comparative perspective. Unpublished LLD (Law). University of Stellenbosch. Available at: https://scholar.sun.ac.za/bitstream/handle/10019.1/108464/kotze_regulation_2020.pdf?sequence=2 [Accessed 12 July 2022] 1 18.

⁵⁶ S 25(5) of the Constitution: "The 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".

to be able to legally interfere in property rights and to “open up land to derive some benefit from it”.⁵⁷ One example of legislative attempts to open-up land was the Regulation of Agricultural Landholdings Bill.⁵⁸

The Regulation of Agricultural Land Bill sets out its aim to establish a Land Commission,⁵⁹ amongst others, and to ensure the redistribution of agricultural land. Kotze correctly warns that these mechanisms are to be aligned with the provisions of section 25 of the Constitution but entails an interference with the owner’s entitlements,⁶⁰ and this arguably draws back to competing rights as indicated above in the discussion of *Port Elizabeth Municipality v Various Occupiers*.

Muller⁶¹ identifies three categories of limitations which may be imposed on ownership and categorises them as follows: “... public law limitations (imposed on all owners of a particular kind of property to benefit society or certain sections of society), restrictions imposed in the interest of neighbour relations, and individual restrictions”.⁶²

Ownership is thus recognised but subject to a variety of regulatory provisions and measures. Some provisions and measures may severely affect an owner’s entitlement to the use of and enjoyment of owned property.⁶³ In terms of section 25 of the *Constitution*, no person may be arbitrarily deprived of property except in terms of law of general application.⁶⁴

⁵⁷ Kotze ‘The regulation of agricultural land in South Africa: A legal comparative perspective’ (2020) 17. (Kotze, T. 2020. The regulation of agricultural land in South Africa: A legal comparative perspective. Unpublished LLD (Law). University of Stellenbosch. Available at: https://scholar.sun.ac.za/bitstream/handle/10019.1/108464/kotze_regulation_2020.pdf?sequence=2 [Accessed 12 July 2022] 1 20.

⁵⁸ The Regulation of Agricultural Land Holdings Bill [B-2017]. (See GN 229 of 2017 in GG 40697 of 17 March 2017).

⁵⁹ The Preamble of The Regulation of Agricultural Land Holdings Bill [B-2017] (See GN 229 of 2017 in GG 40697 of 17 March 2017).

⁶⁰ Kotze ‘The regulation of agricultural land in South Africa: A legal comparative perspective’ (2020) 17. (Kotze, T. 2020. The regulation of agricultural land in South Africa: A legal comparative perspective. Unpublished LLD (Law). University of Stellenbosch. Available at: https://scholar.sun.ac.za/bitstream/handle/10019.1/108464/kotze_regulation_2020.pdf?sequence=2 [Accessed 12 July 2022] 1 24.

⁶¹ Muller *et al Silberberg and Schoeman’s the Law of Property* (2019) 101.

⁶² Muller *et al Silberberg and Schoeman’s the Law of Property* (2019) 101.

⁶³ *Minister of Police and Others v Fidelity Security Services (Pty) Limited* 2022 ZACC 16.

⁶⁴ S 25(1) of the Constitution. Also see G Muller *et al Silberberg and Schoeman’s the Law of Property* (2019) 626.

Property ownership is recognised in the Constitution and forms part of the Bill of Rights. It is entrenched that ownership is not absolute but subject to limitations being a law of general application as already specified above. Ownership of agricultural land is no exception and is recognised but once again, may be regulated by law of a general application. An example of legislation that provides for the regulation of agricultural land is the Subdivision of Agricultural Land Act (hereinafter referred to as “SALA”),⁶⁵ which pre-dates the Constitution by a few decades.

SALA, arguably similar to 2021 Bill, limits a landowner from using owned agricultural land in a certain way by prohibiting certain actions and restricting ownership entitlements in a very specific manner. SALA prevents the subdivision of agricultural land into uneconomical farming segments and aims to preserve agricultural land.⁶⁶ Sewapa⁶⁷ correctly argues that the SALA could be separated from the initial goals namely to preserve farmland for the minority of white people in South Africa and the fragmentation of high value agricultural land. If this was not the case the SALA would have been found to be unconstitutional⁶⁸

Agricultural land is defined in SALA as *any land* situated outside or other than the land in the control or within the boundaries of municipalities, town- or city councils and or local boards.⁶⁹ In short, agricultural land can be described as all areas of land outside municipalities.⁷⁰ The purpose of SALA was thus to control and regulate agricultural land, as defined in section 1(i), in a specific manner.⁷¹

Frantz argues that these regulations found in SALA were part of the Apartheid’s regime goals to ensure and enforce racial segregation.⁷² SALA, according to Frantz,

⁶⁵ Subdivision of Agricultural Land Act 70 of 1970 (hereinafter referred to as “SALA”).

⁶⁶ Frantz “Repealing the Subdivision of Agricultural Land Act: A constitutional analysis” (unpublished LLM thesis, Stellenbosch University, 2010) 92.

⁶⁷ Sewapa ‘The Subdivision of Agricultural Land in South Africa’ 28 March 2016 https://www.academia.edu/23735378/The_Subdivision_of_Agricultural_Land_in_South_Africa_Subdivision_of_Agricultural_Farm_Land (accessed 20 October 2022) 12.

⁶⁸ Sewapa ‘The Subdivision of Agricultural Land in South Africa’ 28 March 2016 https://www.academia.edu/23735378/The_Subdivision_of_Agricultural_Land_in_South_Africa_Subdivision_of_Agricultural_Farm_Land (accessed 20 October 2022) 12.

⁶⁹ S 1 of SALA. See specifically the definition of agricultural land, which definition was accepted in the case of *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* 2008 (1) SA 654 (SCA) para 14.

⁷⁰ Steytler “The Decisions in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC): Be wary of these holdings” (2009) 2 *Constitutional Court Review* 429 430.

⁷¹ S 1 of SALA; G Frantz (note 61 above).

⁷² Frantz (note 61 above) 92.

was followed up by the Subdivision of Agricultural Land Repeal Act (hereinafter referred to as: “SALRA”)⁷³ which created some confusion. SALRA has not been brought into operation despite the fall of Apartheid regime almost three decades ago.⁷⁴ However, it did lead to several statutes in all three spheres of government being enacted and becoming law that expanded on the regulatory framework already in place, such as the Municipal Structures Act,⁷⁵ the Local Government: Municipal Systems Act,⁷⁶ and the Local Government: Municipal Demarcation Act⁷⁷ which *inter alia* and for the first time established local councils for rural areas. The question was asked on how this tapestry of then new statutes impacted on agricultural land, if at all. It seems that the same definition of agricultural land as found in SALA was used in these statutes.⁷⁸ SALRA was designed to replace SALA.⁷⁹

The 2021 Bill provides for the amendment of SALRA.⁸⁰ The implementation of section 38 of the 2021 Bill would have the effect that the Minister no longer needs to provide consent for example for the subdivision of agricultural land, but in its place creates a more effective process to allow and align spatial development and land use. This would phase out SALA.⁸¹ For purposes of this paper, the definition of agricultural land as defined in SALA shall be used and applied where necessary, unless the context indicates otherwise.

3.1 Development of and interpretation of the protection of property after the enactment of the Constitutional

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*, (hereinafter referred to as the “FNB-case”) the Constitutional Court had the opportunity to scrutinise Section 25(1) of the *Constitution* and considered the question pertaining to arbitrary deprivation of the vehicles (being

⁷³ Act 64 of 1998.

⁷⁴ Frantz (note 61 above) 2.

⁷⁵ Act 117 of 1998.

⁷⁶ Act 32 of 2000.

⁷⁷ Act 27 of 1998.

⁷⁸ See S 1 of SALA.

⁷⁹ Act 64 of 1998.

⁸⁰ S 38 of the 2021 Bill.

⁸¹ Spatial Planning and Land Use Management Act 16 of 2013 (hereinafter “SPLUMA”).

movable corporeal property).⁸² The court could not have scrutinised Section 25 of the *Constitution* without determining the constitutionality of the property under attack.⁸³

The court reinforced that when interpreting legislation, regardless of its priority, and when developing the common or customary law, every court, tribunal, or forum is to promote the spirit, purpose and objects found in the Bill of Rights.⁸⁴ This spirit, purpose and objects should also be found in the enactment of any legislation following the *Constitution*.

To determine the existence of “sufficient reason” for deprivation of property as defined and in the application of the FNB methodology, the court had asked seven pertinent questions to determine if *FNB* had been deprived of its property and if so, whether it was done constitutionally.⁸⁵ This has become known as the “FNB-methodology”.⁸⁶

In the application of the FNB methodology the court asked these critical questions to determine if *FNB* was deprived of its property, which in this case were motor vehicles, being corporeal moveable property:⁸⁷

Firstly, whether that which was taken away from *FNB* constitutes “property” in terms of section 25 of the *Constitution*. Secondly whether there has been a deprivation of such property. Thirdly, whether such deprivation, if it had occurred, was consistent with the provisions of section 25(1) of the *Constitution*. Fourthly, and if the foregoing question was answered in the negative, whether the deprivation was justifiable in terms of section 36 of the *Constitution*. Fifthly, and if the foregoing question was answered in the affirmative, whether the deprivation amounts to expropriation for any of the purpose of section 25(2). Sixthly, whether the deprivation then complies with section 25(2)(a) and (b). Seventhly, in the case of non-compliance with section

⁸² *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 (7) BCLR 702 (hereinafter referred to as the “FNB case”).

⁸³ Act 70 of 1970.

⁸⁴ FNB case (note 77 above) para 31.

⁸⁵ FNB case (note 77 above) para. 46

⁸⁶ Frantz (note 61 above) 11.

⁸⁷ FNB case (note 77 above) para 46.

25(2)(a) and (b) of the *Constitution*, whether the expropriation at hand of the Commissioner is justified by section 36 of the *Constitution*.

Ackermann J dealt with the “property” description in mentioning the following cautiously: “At this stage of our constitutional jurisprudence it is, for the reasons given above, practically impossible to furnish – and judicially unwise to attempt – a comprehensive definition of property for purposes of section 25”.⁸⁸ The court however was clear that the ownership of a corporeal movable must - as must the ownership of “land” - lie at the heart of the property clause.⁸⁹

The court held that it is important to evaluate the relationship between the “means employed, namely the deprivation in question, and ends sought to be achieved”, namely the purpose of the law in question.⁹⁰ It is further necessary to consider the complexity of relationships. In short, it was contended that because *FNB* did not use the vehicles and their ownership is nothing but contractual, they cannot claim protection under section 25 of the *Constitution*.⁹¹ The court found that the use or lack thereof, of a corporeal moveable plays no role and is irrelevant for purposes of classification if the owner should enjoy the protection of section 25.⁹²

Ackermann J was very clear in the judgment that neither the subjective interest of an owner in a thing, nor the value of ownership plays a role in categorising a thing to enjoy protection under section 25 of the *Constitution*.⁹³ The court held that to evaluate the deprivation in question, regard must be given to the relationship between the purpose for the deprivation and the person whose property is affected.⁹⁴ This seems to have played a determining role in the judgment of the *FNB* case. In addition, regard must be given to the relationship between the purpose of the deprivation and the nature of the property. What justification is found for the deprivation? This is evaluated together

⁸⁸ *FNB* case (note 77 above) para 51.

⁸⁹ *FNB* case (note 77 above) para 51. It states: “Here it is sufficient to hold that ownership of a corporeal movable must – as must ownership of land – lie at the heart of our constitutional concept of property, both as regards the nature of the right involved as well as the object of the right and must therefore, in principle, enjoy the protection of section 25”.

⁹⁰ *FNB* case (note 77 above) para 100.

⁹¹ *FNB* case (note 77 above) para 53.

⁹² *FNB* case (note 77 above) para 54.

⁹³ *FNB* case (note 77 above) para 56.

⁹⁴ *FNB* case (note 77 above) para 55.

with the extent of the deprivation in respect of such property and the court asked the question if such deprivation is arbitrary of nature?⁹⁵

The court held that where the deprivation of property concerns ownership of land or a corporeal moveable asset, a more compelling purpose will have to be established for a depriving law to constitute sufficient reason for the deprivation to pass the muster of the Constitutional requirement.⁹⁶ The above compared to a case when the property is something different.⁹⁷ The judgment in the *FNB* case did not consider incorporeal property. Incorporeal property is not scrutinised or considered for purposes of this study. The court held that when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling compared to when the deprivation embraces only some incidents of ownership and those incidents only partially.

Ackermann J does not turn a blind eye to the constitutional goals and remark that the purpose of section 25 is not only to protect property rights but also to advance public interest in property.⁹⁸

The court established an open list of circumstances that may be considered to determine if sufficient reason justifies the deprivation depending on the interplay between variable means and ends, the nature of the property in question, the extent of its deprivation, and a proportionality evaluation (closer to that required by section 36(1) of the *Constitution*).

In emphasising the open list of circumstances, the court indicated that to determine whether there is sufficient reason to warrant the deprivation is an evaluation to be decided on all relevant facts of each case, where case should be considered on its own merit, while requiring a court to be alive to the fact that the enquiry is concerned with “arbitrary” in relation to the deprivation of property under section 25.⁹⁹

⁹⁵ *FNB* case (note 77 above) para 61 & 62.

⁹⁶ *FNB* case (note 77 above) para 98.

⁹⁷ *FNB* case (note 77 above) para 98.

⁹⁸ *FNB* case (note 77 above) para 50 & 64.

⁹⁹ *FNB* case (note 77 above) para 100.

It is important to note that the FNB methodology enquires whether a deprivation is substantively arbitrary – namely to determine if there is “sufficient reason” for the deprivation or not.¹⁰⁰

For purposes of this study the 2021 Bill is scrutinised and analysed against the *FNB* methodology, to establish whether the Bill through regulating agricultural land, constitutes an arbitrary interference or deprivation as extensively dealt with in the *FNB* case.

The Court in the *FNB* case held that section 25 of the *Constitution* is not limited to immovable property (being land).¹⁰¹ The argument was advanced by the respondents in the *FNB* case that because *FNB* was not using the property, despite it being the owner, it cannot claim protection under section 25 of the *Constitution*.¹⁰² So the argument went that the respondents attempted to differentiate between property that was being used by the owner or not. For the purpose of this study the use of property (or lack thereof) is of great importance.

The court correctly rejected the respondents’ argument and rather applied the FNB methodology as set-out above. The pertinent questions set out above were necessary to determine if an arbitrary deprivation of FNB’s property (vehicles) had taken place or not.¹⁰³ The court considered all possible meanings of the word “arbitrary” and concluded that for purposes of section 25 “arbitrary” means, “...without sufficient reason...”¹⁰⁴ for the deprivation.

The court held that deprivation is arbitrary when law does not provide sufficient reason for the deprivation or if such deprivation is procedurally unfair.¹⁰⁵ To determine arbitrary deprivation the court asked the questions and applied the FNB methodology

¹⁰⁰ FNB case (note 77 above) para 61.

¹⁰¹ FNB case (note 77 above) para 48. The Court held that: “Subsection (4)(b) makes plain that for purposes of the section “property is not limited to land”.

¹⁰² FNB case (note 77 above) paras 53-54.

¹⁰³ FNB case (note 77 above) para 46.

¹⁰⁴ FNB case para 99.

¹⁰⁵ FNB case (note 77 above) para 100.

allowing every case to be decided on its own merit.¹⁰⁶ The court found in favour of FNB recognising and protecting its property rights under Section 25 of the *Constitution*.

The court considered the relationship between the property and the purpose of deprivation.¹⁰⁷ Ackermann J, in remarking about agricultural land, states as follows: “... a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation of agricultural land”.¹⁰⁸ The FNB methodology has been the benchmark to determine the lawfulness of the depriving law when dealing with the deprivation of property and comparing the depriving legislation to the *Constitution*. In the words of Ackermann J¹⁰⁹ the same FNB methodology is also to be applied to depriving laws pertaining to land regardless of if it is defined as agricultural land or other land falling outside the definition of “agricultural land”. It has become clear that the FNB methodology is applicable to all property, being both moveable and immovable.¹¹⁰

Van der Walt¹¹¹ echoed Roux’s¹¹² view that the FNB decision may have the effect that the property test can easily be sucked into the arbitrariness vortex¹¹³ and the other considerations may become of lesser importance. Van der Walt agrees with Roux that the *FNB* case can easily be used to enquire if deprivation is arbitrary or not by applying the FNB methodology. In fact, both argue that the FNB methodology may have sucked in all other stages or other tests to determine if the deprivation was arbitrary or not.¹¹⁴

Despite this criticism the FNB methodology remains the most comprehensive test to be applied when deprivation of property forms the subject matter¹¹⁵ and a court needs to strike a balance between the private interest of a party (such as an individual’s rights to property) and the public interest or public purpose (such as deprivation through

¹⁰⁶ FNB case (note 77 above) para 100.

¹⁰⁷ FNB case (note 77 above) para 100.

¹⁰⁸ FNB case (note 77 above) para 100.

¹⁰⁹ FNB case (note 77 above) para 100.

¹¹⁰ *Minister of Police and Others v Fidelity Security Services (Pty) Limited* 2022 ZACC 16.

¹¹¹ Van der Walt ‘Section 25 vortices (part 1)’ (2016) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 412.

¹¹² Roux ‘Property’ in S Woolman, T Roux and M Bishop (eds) *Constitutional Law of South Africa* (2003) 46.1 46-2 & 46-20.

¹¹³ Van der Walt ‘Section 25 vortices (part 1)’ (2016) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 412.

¹¹⁴ Van der Walt ‘Section 25 vortices (part 1)’ (2016) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 412 413.

¹¹⁵ Van der Walt ‘Section 25 vortices (part 1)’ (2016) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 412 413.

expropriation).¹¹⁶ Van der Walt¹¹⁷ agrees with Roux that before the *FNB* case was delivered the constitutional test consisted of two phases, namely: section 25 and the second phase, section 36 of the Constitution.¹¹⁸

Since the *FNB* judgement was delivered the constitutional property enquiry needs to be done against the *FNB* methodology.¹¹⁹ Van der Walt asks the question pertaining to the vortex theory of Roux¹²⁰ that if the required balance is reached by asking only the one question¹²¹ to answer the constitutional question.

The court in the *FNB* case did a proper analysis of the place of property in the constitutional framework and concluded that constitutional protection of ownership of land and or corporeal moveable assets is not absolute and does not stop with section 25 of the Constitution, but possible interference must be understood in the constitutional context.¹²² In short, the fact that property enjoys protection under section 25 does not indemnify it against interference under section 36.¹²³

The court in the *FNB* case has adopted a very wide definition of deprivation.¹²⁴ In fact, the court define deprivation as “...any interference with the use, enjoyment or exploitation of private property”.¹²⁵ Both deprivation¹²⁶ and expropriation¹²⁷ meets the requirements of deprivation. Kotze correctly points out that the *Constitution* does make provision for deprivation, but the Constitutional threshold needs to be met before it

¹¹⁶ Van der Walt ‘Section 25 vortices (part 1)’ (2016) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 412 413.

¹¹⁷ Van der Walt ‘Section 25 vortices (part 1)’ (2016) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 412 413.

¹¹⁸ The Constitution.

¹¹⁹ Van der Walt ‘Section 25 vortices (part 1)’ (2016) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 412 413.

¹²⁰ Van der Walt ‘Section 25 vortices (part 1)’ (2016) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 412 414.

¹²¹ Van der Walt ‘Section 25 vortices (part 1)’ (2016) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 412 415.

¹²² *FNB* case (see note 77 above) para 52.

¹²³ S 36 of the Constitution.

¹²⁴ *FNB* case (see note 77) para 52.

¹²⁵ *FNB* case (see note 77) para 57

¹²⁶ *FNB* case (see note 77) para 46, see Question 2.

¹²⁷ *FNB* case (see note 77) para 46, see Questions 5 & 6.

would be valid.¹²⁸ Kotze correctly points out that although the *FNB* case has not been without critique, it remains the test for constitutional property disputes.¹²⁹

Kotze correctly points out that the court refrained from defining property in the *FNB* case for purposes of section 25 of the *Constitution*.¹³⁰ Hence, the definition will need to be determined on each individual case and on each case's merits. What the court in the *FNB* case did was to find that ownership of immovable property; "... lies at the heart of our constitutional concept of property, both as regards the nature of the right involved as well as the object of the right...".¹³¹

Kotze agrees with Van der Walt¹³² that the right and obligation to regulate ownership entitlement is called the "policing powers of the state".¹³³ Kotze argues that it is not always easy to differentiate between deprivation and expropriation, but that both can be regarded as some form of interference with private property, and which interference brings some measure of loss to the holder.¹³⁴ Van Der Walt & Pienaar differentiate between deprivation and expropriation by explaining that in the case of deprivation,

¹²⁸ Kotze 'The regulation of agricultural land in South Africa: A legal comparative perspective' (2020) 17. (Kotze, T. 2020. The regulation of agricultural land in South Africa: A legal comparative perspective. Unpublished LLD (Law). University of Stellenbosch. Available at: https://scholar.sun.ac.za/bitstream/handle/10019.1/108464/kotze_regulation_2020.pdf?sequence=2 [Accessed 12 July 2022] 1 117.

¹²⁹ Kotze 'The regulation of agricultural land in South Africa: A legal comparative perspective' (2020) 17. (Kotze, T. 2020. The regulation of agricultural land in South Africa: A legal comparative perspective. Unpublished LLD (Law). University of Stellenbosch. Available at: https://scholar.sun.ac.za/bitstream/handle/10019.1/108464/kotze_regulation_2020.pdf?sequence=2 [Accessed 12 July 2022] 1 117.

¹³⁰ Kotze 'The regulation of agricultural land in South Africa: A legal comparative perspective' (2020) 17. (Kotze, T. 2020. The regulation of agricultural land in South Africa: A legal comparative perspective. Unpublished LLD (Law). University of Stellenbosch. Available at: https://scholar.sun.ac.za/bitstream/handle/10019.1/108464/kotze_regulation_2020.pdf?sequence=2 (Accessed 12 July 2022) 1 118.

¹³¹ *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services* 2002 4 SA 768 (CC) para 51.

¹³² Van der Walt 'Constitutional Property Law' (2011) 1 *Annual Survey of South African Law* 195.

¹³³ Kotze 'The regulation of agricultural land in South Africa: A legal comparative perspective' (2020) 17. (Kotze, T. 2020. The regulation of agricultural land in South Africa: A legal comparative perspective. Unpublished LLD (Law). University of Stellenbosch. Available at: https://scholar.sun.ac.za/bitstream/handle/10019.1/108464/kotze_regulation_2020.pdf?sequence=2 [Accessed 12 July 2022] 1 120.

¹³⁴ Kotze 'The regulation of agricultural land in South Africa: A legal comparative perspective' (2020) 17. (Kotze, T. 2020. The regulation of agricultural land in South Africa: A legal comparative perspective. Unpublished LLD (Law). University of Stellenbosch. Available at: https://scholar.sun.ac.za/bitstream/handle/10019.1/108464/kotze_regulation_2020.pdf?sequence=2 [Accessed 12 July 2022] 1 120.

some restrictions are placed on the owner that restrict his use and enjoyment of the property or ownership, while in the case of expropriation, ownership is taken away.¹³⁵

Van der Walt¹³⁶ correctly pointed out that the court in the *FNB* case did not deal with expropriation *per se* but reference is made to the relationship, differences, and similarities for the purposes of the section 25 test. It seems reasonable to believe that the same test applies to conduct the arbitrariness enquiry.¹³⁷ Similarly, Kotze pointed out that the court has also not provided a definition of deprivation.¹³⁸ What has become clear from the court's approach in the *FNB* case is that the court regarded any restrictions placed or any form of interference into the enjoyment and use of property to be deprivation of some sort.¹³⁹

Kotze holds the view that the same wide interpretation has not always been applied in the same wide manner as in the *FNB* case.¹⁴⁰ The Constitutional Court attempted to narrow the definition of deprivation in the matter of *Mkontwana*.¹⁴¹ In *Mkontwana*¹⁴² the court attempted a narrower definition and, in the process, created some confusion as to the application of the FNB methodology in cases of deprivation to those cases that "... are not to be expected in an open and democratic society".¹⁴³ This narrower

¹³⁵ Van der Walt & G Pienaar *Introduction to the Law of Property* (2019) 353.

¹³⁶ Van der Walt 'Section 25 vortices (part 1)' (2016) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 412 421.

¹³⁷ Van der Walt 'Section 25 vortices (part 1)' (2016) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 412 421.

¹³⁸ Kotze 'The regulation of agricultural land in South Africa: A legal comparative perspective' (2020) 17. (Kotze, T. 2020. The regulation of agricultural land in South Africa: A legal comparative perspective. Unpublished LLD (Law). University of Stellenbosch. Available at: https://scholar.sun.ac.za/bitstream/handle/10019.1/108464/kotze_regulation_2020.pdf?sequence=2 [Accessed 12 July 2022] 1 121.

¹³⁹ *FNB* case (see note 77 above) para 49.

¹⁴⁰ Kotze 'The regulation of agricultural land in South Africa: A legal comparative perspective' (2020) 17. (Kotze, T. 2020. The regulation of agricultural land in South Africa: A legal comparative perspective. Unpublished LLD (Law). University of Stellenbosch. Available at: https://scholar.sun.ac.za/bitstream/handle/10019.1/108464/kotze_regulation_2020.pdf?sequence=2 [Accessed 12 July 2022] 1 122.

¹⁴¹ *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng* 2005 1 SA 530 (CC).

¹⁴² *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng* 2005 1 SA 530 (CC).

¹⁴³ Kotze 'The regulation of agricultural land in South Africa: A legal comparative perspective' (2020) 17. (Kotze, T. 2020. The regulation of agricultural land in South Africa: A legal comparative perspective. Unpublished LLD (Law). University of Stellenbosch. Available at: https://scholar.sun.ac.za/bitstream/handle/10019.1/108464/kotze_regulation_2020.pdf?sequence=2 [Accessed 12 July 2022] 1 123.

approach found in *Mkontwana*, suggests that the regulatory test should only be applied if the interference has a sufficient impact before it can be regarded as deprivation.¹⁴⁴

Kotze correctly points out that it is not always easy to differentiate between deprivation and expropriation.¹⁴⁵ Van der Walt¹⁴⁶ also pointed out that after the *FNB* case, the Constitutional court considered international jurisprudence to do a comparative analysis to justify the non-arbitrariness requirements but to no avail as it seems that the *FNB* methodology still succeeded in striking the balance between constitutional protection of ownership on the one hand and regulatory interference on the other.¹⁴⁷

3.2 An analysis of the development that followed the *FNB* decision and the regulatory framework

Before the 2021 Bill is analysed against the backdrop of the *FNB* methodology, it is important to look at the development that followed from the *FNB* case. This will grant a better understanding of the importance and relevance of the *FNB* case and the *FNB* methodology to the current property regime in the South African context and the regulatory framework of which the 2021 Bill will play a vital part.

3.2.1 The regulatory framework since the enactment of the Constitution

In the first case after the *FNB* decision and perhaps the first case where the interplay of the different spheres of government were considered was the case of *Kotze v Die Minister van Landbou en Andere*.¹⁴⁸ In this case the application of SALA came under

¹⁴⁴ *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC). Also see *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 6 SA 125 (CC) para 73.

¹⁴⁵ Kotze 'The regulation of agricultural land in South Africa: A legal comparative perspective' (2020) 17. (Kotze, T. 2020. The regulation of agricultural land in South Africa: A legal comparative perspective. Unpublished LLD (Law). University of Stellenbosch. Available at: https://scholar.sun.ac.za/bitstream/handle/10019.1/108464/kotze_regulation_2020.pdf?sequence=2 [Accessed 12 July 2022] 1 122.

¹⁴⁶ Van der Walt 'Section 25 vortices (part 1)' (2016) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 412 423.

¹⁴⁷ Van der Walt 'Section 25 vortices (part 1)' (2016) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 412 418.

¹⁴⁸ *Kotzé v Minister van Landbou* 2003 1 SA 445 (T).

scrutiny when the applicant's applied to the local government for the sub-division of a farm (agricultural land).¹⁴⁹

In *Kotze v Minister van Landbou en Andere* the Court had to consider the interaction of pre-constitutional legislation and new constitutional legislation in respect of agricultural land.¹⁵⁰ The court was confronted with the question of whether the definition of agricultural land as described in Section 1 of SALA is still applicable after the enactment of new constitutional legislation.¹⁵¹ After scrutinizing the definition of "agricultural land" the court held that the SALA should be interpreted exactly the way it was meant to be when enacted.¹⁵² The court made it clear that the powers afforded to the Minister has nothing to do with the government of the day or the local sphere of government but to regulate the subdivision of agricultural land.¹⁵³ It is of importance that agriculture does not fall within the ambit of local government in terms of Schedule 4 Part A of the Constitution which sets out the functional areas of concurrent National and Provincial Legislative Competence.¹⁵⁴

The court reaffirmed that ownership of property has been described as the most complete right a person could have.¹⁵⁵ It is a complex right to hold or to have and it is afforded protection in Section 25 of the Constitution. Ownership of property is the right a person has not only to decide what to do with the person's property but also when and how the person wants to do it or use it. The use of property afforded by ownership is neither the whole spectrum of rights nor does the definition of ownership stop there.

¹⁴⁹ *Kotzé v Minister van Landbou* 2003 1 SA 445 (T).

¹⁵⁰ *Kotze v Minister van Landbou en Andere* 2003 (1) SA 445 (T).

¹⁵¹ The Constitution.

¹⁵² *Kotze v Minister van Landbou en Andere* 2003 (1) SA 445 (T) para E-446.

¹⁵³ *Kotze v Minister van Landbou en Andere* 2003 (1) SA 445 (T) para I-453. The Court held that: "*Hierteenoor handel Wet 70 van 1970 nie met die staatsbestel of munisipale regering nie, maar met beheer oor die onderverdeling van landbougrond, insluitende met die verantwoordelikheid van die Minister van Landbou as die bewaker van landbougrond en vermoedelik as politieke hoof verantwoordelik vir landbou in die land*".

¹⁵⁴ Schedule 4, Part A of the Constitution.

¹⁵⁵ *Gien v Gien* 1979 (2) SA 1113 (T) 1120. Also see *Minister of Police and Others v Fidelity Security Services (Pty) Limited* 2022 ZACC 16.

The applicant's accepted the need to apply for consent and agreed to a suspensive condition in the agreement.¹⁵⁶ They however only made provision for consent from the local government and not from the minister as required in terms of SALA.¹⁵⁷

For purposes of this study, the 2021 Bill is analysed and considered against the possible proposed productive use requirement. It has already been demonstrated that Section 25 of the *Constitution* recognises property rights but allows for limitations thereon.

Kotze points out the learned Van der Westhuizen J scrutinised both SALA and SALRA concluding that the legislator intended to keep SALA operative until such time that a regulatory framework has been put in place to replace the current system.¹⁵⁸

Frantz observed that if the regulations were left to local governments it would result in different and fractured policies for different local governments resulting in an impossibility for the minister to regulate the agricultural policies.¹⁵⁹

In the *Kotze*-case the applicant obtained the consent of the local government but then realised they required the consent of the Minister.¹⁶⁰ The applicant applied to court for a declaratory order as the applicant was convinced that the farm (agricultural land) now fell within the ambit of the new local government structures and is no longer classified as "agricultural land".¹⁶¹

Van der Westhuizen J¹⁶² had to consider what the position was since the new local municipality structures became a reality and if any land can fall outside of a local

¹⁵⁶ *Kotzé v Minister van Landbou* 2003 1 SA 445 (T) para 448A.

¹⁵⁷ S 3(a) of SALA.

¹⁵⁸ Kotze 'The regulation of agricultural land in South Africa: A legal comparative perspective' (2020) 17.(Kotze, T. 2020. The regulation of agricultural land in South Africa: A legal comparative perspective. Unpublished LLD (Law). University of Stellenbosch. Available at: https://scholar.sun.ac.za/bitstream/handle/10019.1/108464/kotze_regulation_2020.pdf?sequence=2 (Accessed 12 July 2022) 1 39.

¹⁵⁹ Frantz "Repealing the Subdivision of Agricultural Land Act: A constitutional analysis" (unpublished LLM thesis, Stellenbosch University, 2010).

¹⁶⁰ *Kotzé v Minister van Landbou* 2003 1 SA 445 (T) para 448 C-D.

¹⁶¹ *Kotzé v Minister van Landbou* 2003 1 SA 445 (T) para 448 C-D.

¹⁶² *Kotzé v Minister van Landbou* 2003 1 SA 445 (T) para 449.

council.¹⁶³ The court proceeded to address the question that had the definition for agricultural land (as found in SALA) lost its meaning since the court concluded that no land falls outside a local government.¹⁶⁴

The court found that although the *Constitution* and in particular section 151 of the *Constitution* brought a new dispensation to the South African legislative landscape, the minister still has a duty to protect agricultural land in terms of SALA as SALRA had not (and still has not) been put in motion.¹⁶⁵ Under the circumstances the court was not persuaded that SALA is no longer in operation and ruled that the consent of the minister is still a requirement.¹⁶⁶

The question of restrictions in respect of agricultural land is not a new subject and came under the spotlight in the matter of *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Another*.¹⁶⁷ The issue to be addressed was whether land that was previously classified as agricultural land would still be regarded as such if it was no longer used as agricultural land.¹⁶⁸ The validity of the sale agreement pivoted on whether the land forming the subject matter was classified as “agricultural land” as defined in SALA,¹⁶⁹ despite the purchaser’s intention to develop the land. SALA¹⁷⁰ defines agricultural in summary as all land outside municipalities with certain exceptions, such as state land.¹⁷¹

The first respondent intended to use the land for industrial purposes, despite the land being zoned as agricultural land at the time of purchase.¹⁷² The applicant intended to cancel the agreement and raised the issue of non-compliance with *inter alia* section 3

¹⁶³ S 151 of the Constitution states that: “... the local sphere of government consists of municipalities which must be established for the whole of the territory of the Republic.”

¹⁶⁴ *Kotzé v Minister van Landbou* 2003 1 SA 445 (T) para 446 C-E.

¹⁶⁵ *Kotzé v Minister van Landbou* 2003 1 SA 445 (T) para 449G.

¹⁶⁶ *Kotzé v Minister van Landbou* 2003 1 SA 445 (T) para 457.

¹⁶⁷ *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Another* 2008 (1) SA 654 (SCA) (hereinafter referred to as the “Wary-case”).

¹⁶⁸ *Wary-case* (see note 168 above).

¹⁶⁹ *Wary-case* (see note 168 above) para 2. Also see Section 1(i)(a) Act 70 of 1970.

¹⁷⁰ S 1 of Act 70 of 1970.

¹⁷¹ N Steytler “The Decisions in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC): Be wary of these holdings” (2009) 2 *Constitutional Court Review* 430.

¹⁷² *Wary-case* (see note 168 above) para 3.

of SALA,¹⁷³ namely that the consent of the minister is required for purposes of the sub-division of agricultural land.¹⁷⁴ The court specifically scrutinized the definition of agricultural land and more so the rationale behind SALA.¹⁷⁵

The court concludes that the purpose of SALA is in national interest¹⁷⁶ and is a form of regulation implemented to prevent the sub-division of agricultural land into uneconomical small units. The court concludes that the intention of the legislature was to interfere with the common law right of landowners to sub-divide land.¹⁷⁷

The court found that the minister has a wide range of obligations to regulate agricultural land to achieve the goals of the act.¹⁷⁸ The court correctly pointed out that the *Wary* case¹⁷⁹ was the first time the court had the opportunity to consider the interaction between SALA, the *Constitution*, and the local government sphere structures since the enactment of the *Constitution*.¹⁸⁰

The court could not be persuaded that the enactment of the *Constitution* and the inclusion of Chapter 7¹⁸¹ thereof marked the end of the minister's obligations and powers¹⁸² as set out in SALA.¹⁸³ The court emphasised the role of the spheres of government to align their roles to create a national regulatory framework.¹⁸⁴ In fact, the court acknowledged the role that the different spheres of government play in the regulation of agricultural land to achieve the goals set.¹⁸⁵

It is clear from the judgment that the regulation and regulatory framework of agricultural land was accepted by all parties involved, including the court. The relevance is that the court's judgment stems from the premise that there is a national

¹⁷³ *Wary*-case (see note 168 above) para 3 & 5.

¹⁷⁴ *Wary*-case (see note 168 above) para 6.

¹⁷⁵ *Wary*-case (see note 168 above) para 12.

¹⁷⁶ *Wary*-case (see note 168 above) para 13.

¹⁷⁷ *Wary*-case (see note 168 above) para 13.

¹⁷⁸ *Wary*-case (see note 168 above) para 13.

¹⁷⁹ *Wary*-case (see note 168 above) para 53.

¹⁸⁰ *Wary*-case (see note 168 above) para 53.

¹⁸¹ Ch 7 of the *Constitution* ("Local Government").

¹⁸² *Wary*-case (see note 168 above) para 79 & 80.

¹⁸³ S 4 (1) – (4) of SALA.

¹⁸⁴ *Wary*-case (see note 168 above) para 80.

¹⁸⁵ *Wary*-case (see note 168 above) para 83.

interest¹⁸⁶ for a regulatory framework to exist for agricultural land of which SALA is a pre-constitutional example.¹⁸⁷

Kroon AJ explains the importance of the Supreme Court of Appeal's ruling as follows:¹⁸⁸

“The Supreme Court of Appeal's interpretation could potentially have far-reaching effects on agricultural policy in the country, far beyond the narrow facts of this case. Land, agriculture, food production and environmental considerations are obviously important policy issues at a national level. The question is not whether the municipalities should not have a say in these matters. The question is rather whether the legislature intended to do away with the powers of the national Minister of Agriculture to preserve ‘agricultural land’ or whether the Agricultural Land Act, and specifically the proviso, recognises the need for national control, oversight and policy to play a role in decisions to reduce agricultural land and for consistency as part of a national agricultural policy.”

Two very important questions emanated from the judgment. Firstly, on who's shoulders rest the obligation to make decisions regarding agricultural land? Secondly, how should the interpretation of the interaction between the three spheres of government be done by our courts?¹⁸⁹

Steytler holds the view that the *Wary* judgment is important to understand the interaction and decentralization of power in the new dispensation.¹⁹⁰ Despite the judgment, it seems that the Minister still has the power to declare land as “agricultural” regardless if the land is classified or found within a municipality.¹⁹¹ The court held that the role of the Minister is still to ensure that a fragmentation of agricultural land does

¹⁸⁶ *Wary*-case (see note 168 above) para 13. Also see *Geue and Another v Van der Lith and Another* 2003 ZASCA 118; 2004 (3) SA 333 (SCA) at 338E-F.

¹⁸⁷ *Wary*-case (see note 168 above) para 53.

¹⁸⁸ *Wary*-case (see note 168 above) para 53.

¹⁸⁹ Steytler “The Decisions in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC): Be wary of these holdings” (2009) 2 *Constitutional Court Review* 429 & 433.

¹⁹⁰ Steytler “The Decisions in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC): Be wary of these holdings” (2009) 2 *Constitutional Court Review* 429.

¹⁹¹ Steytler “The Decisions in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC): Be wary of these holdings” (2009) 2 *Constitutional Court Review* 429 & 435.

not occur.¹⁹² No indication exists to suggest that the role of the Minister has been taken over by the local council.¹⁹³ In fact, the court held that:¹⁹⁴

“Excessive fragmentation of agricultural land, be it arable land or grazing land, may result in an inadequate availability of food, and the Agricultural Land Act is a valuable tool enabling the State to carry out the necessary control.”

The result of the foregoing culminates in the conclusion that the Minister can still overrule a local Council and SALA still applies. A need for a constructive regulatory structure for the regulation of agricultural land within these parameters exists. This need will have to respect property rights but still ensure food security. Yacoob in the minority judgement expresses the view that in the spirit of the *Constitution*, the retention of power by the minister is not assisting in “...*the restructuring, decentralisation and democratisation of power*”¹⁹⁵ which is a constitutional requirement. Yacoob expresses the view that the fear that agricultural land shall disappear, and food would only be made more readily available if the minister retained power is misplaced.¹⁹⁶

In the *Agri South Africa v Minister of Minerals and Energy* (“hereinafter referred to as “*Agri SA-case*”)¹⁹⁷ it became clear that even the state’s acquisition of property constitutes a form of interference and carries some elements of expropriation but not elements of deprivation.¹⁹⁸

The Court expresses the view that the legislative intervention started with the promulgation of the Mineral and Petroleum Resources Development Act (hereinafter referred to as the “MPRDA”).¹⁹⁹ The court indicated that the enactment of MPRDA immediately impacted on the rights of the holders of such rights. There was an immediate freezing of rights that occurred, such as holders could not cede, sell or rent

¹⁹² *Wary-case* (see note 168 *supra*) para 53.

¹⁹³ *Wary-case* (see note 168 *supra*) paras 67 and 69.

¹⁹⁴ *Wary-case* (see note 168 *supra*) para 85.

¹⁹⁵ *Wary-case* (see note 168 *supra*) para 138.

¹⁹⁶ *Wary-case* (see note 168 *supra*) para 138.

¹⁹⁷ *Agri South Africa v Minister of Minerals and Energy* 2013 4 SA 1 (CC) (hereinafter referred to as the “*Agri SA-case*”).

¹⁹⁸ *Agri SA-case* (see note 198 above) para 77 & 78.

¹⁹⁹ Mineral and Petroleum Resources Development Act 28 of 2002 (hereinafter referred to as the “MPRDA”).

these rights.²⁰⁰ The court correctly pointed out that the previous holders of these rights immediately reacted and raised their concerns that the MPRDA caused nothing but an expropriation of their rights.²⁰¹

The court points out that under the common law, the right of ownership of land encompassed everything above and below the surface of the land so owned.²⁰² The court acknowledged the common law right of owners to utilise property and third parties were unable to enjoy or use such property without the consent of the owner.²⁰³ The court suggested that the only way interference with these rights could traditionally happen was if a cession had taken place.²⁰⁴

Sadly, the court did not acknowledge that before the enactment of the *Constitution* interference had already been acknowledged in our law, of which SALA is but one example. In fact, by the first reading of the judgment it seems that the court took the view that the common law had no restrictions.

The court kicks off the analysis of the facts by referring to the changes the MPRDA²⁰⁵ has brought, namely that the state is now the guardian of all mineral and petroleum resources within its territory.²⁰⁶

The court scrutinised the judgment of the Supreme Court of Appeal's decision and disagreed with the "value" argument.²⁰⁷ The court held that what should rather be considered is the characteristics of the rights.²⁰⁸ The "value" argument was, correctly, also rejected in the *FNB case* by Ackermann J.²⁰⁹ The court agreed with the legal position that value or the lack thereof does not destroy ownership.²¹⁰

²⁰⁰ *Agri SA-case* (see note 198 above) para 2.

²⁰¹ *Agri SA-case* (see note 198 above) para 3.

²⁰² *Agri SA-case* (see note 198 above) para 7.

²⁰³ *Agri SA-case* (see note 198 above) para 7.

²⁰⁴ *Agri SA-case* (see note 198 above) para 8.

²⁰⁵ Mineral and Petroleum Resources Development Act 28 of 2002.

²⁰⁶ S 3(1) of MPRDA.

²⁰⁷ *Agri SA-case* (see note 198 above) para 33. The Supreme Court of Appeal held that the rights Sebenza held was the mineral rights which constitute property. In the concurring judgement the court held if what Sebenza held was of value it constitutes property.

²⁰⁸ *Agri SA-case* (see note 198 above) para 33.

²⁰⁹ *FNB case* (see note 77) para 56

²¹⁰ *Agri SA-case* (see note 198 above) para 42.

The court acknowledged that in terms of Section 24 of the Minerals Act,²¹¹ the interference with rights, such as by expropriation, was only allowed against payment of compensation.²¹²

The court makes the following striking remark:²¹³

“Whereas deprivation always takes place when property or rights therein are either taken away or significantly interfered with, the same is not necessarily true of expropriation.”

The court differentiated between deprivation which the court regarded as some form of “sacrifice”, and which might not entail compensation. Expropriation, being a “state acquisition”, and requires compensation.²¹⁴ In doing so the court came to the following remarkable conclusion:²¹⁵

When a determination has to be made whether there was deprivation of property, an affirmative answer would necessitate a further enquiry into the extent, if any, to which that deprivation limits the section 25(1) right. And if it does limit the right, whether the limitation is reasonable and justifiable in terms of section 36 of the Constitution. A constitutionally invalid deprivation, either because it was not brought about through a law of general application or by reason of its arbitrariness, would put an end to the enquiry.

The court concluded that a claimant would need to show that the state has acquired the content for him to succeed in a claim for expropriation.²¹⁶ The court highlighted the role of section 25 of the *Constitution* in national interest and nation building²¹⁷ and the fact that section 25 sits at the heart of this this process.

²¹¹ Minerals Act 50 of 1991. The Minerals Act was repealed by the MPRDA.

²¹² *Agri SA*-case (see note 198 above) para 41.

²¹³ *Agri SA*-case (see note 198 above) para 48.

²¹⁴ *Agri SA*-case (see note 198 above) para 48.

²¹⁵ *Agri SA*-case (see note 198 above) para 49.

²¹⁶ *Agri SA*-case (see note 198 above) para 58.

²¹⁷ *Agri SA*-case (see note 198 above) para 60.

The court emphasised the obligation of section 25, namely, not to overemphasise private property rights to the detriment of all South Africans.²¹⁸ The court finds that a case-to-case approach is what needs to be followed when a determination needs to be made in respect of an acquisition.²¹⁹

The court distinguishes between expropriation and deprivation. It identified three elements to be considered as separate requirements:²²⁰

- (i) compulsory acquisition of rights in property by the state;
- (ii) for a public purpose or in the public interest; and
- (iii) subject to compensation.

The court ruled that the deprivation in the *Sebenza* case was not to acquire land for the state nor did the state acquire the mineral rights of *Sebenza*²²¹ but the state exercised custodianship in the interest of all people of South Africa.²²² Although the court concludes that the state has become the custodian of all mineral rights and petroleum resources in terms of the MPRDA, the court do not attempt to define “custodianship”.²²³

Although the predecessor of the 2021 Bill, namely the Draft Preservation and Development of Agricultural Land Framework Bill of 2015²²⁴ mention is made of the state being the custodian of all agricultural land in South Africa, this does not form part of the 2021 Bill and is not analysed for purposes of this study.

In fact, the court in the *Agri SA* case, specifically mentions that the intention is not for the state to become a competitor for mineral rights.²²⁵ Mogoeng CJ was acutely aware of the transformation goals set in the MPRDA and refers to the previously race-based inequalities that existed in South-Africa.²²⁶

²¹⁸ *Agri SA*-case (see note 198 above) para 62.

²¹⁹ *Agri SA*-case (see note 198 above) para 64.

²²⁰ *Agri SA*-case (see note 198 above) para 67. Also see BV Slade ‘The Effect of avoiding the FNB methodology in Section 25 Disputes’ (2019) 40 *Obiter* 36 46.

²²¹ *Agri SA*-case (see note 198 above) para 68.

²²² *Agri SA*-case (see note 198 above) para 68.

²²³ *Agri SA*-case (see note 198 above) para 71.

²²⁴ See 2015 Bill (see note 2 above).

²²⁵ *Agri SA*-case (see note 198 above) para 71.

²²⁶ *Agri SA*-case (see note 198 above) paras 1, 2, 21, 25, 26, 60 - 62, 65, 68 – 70 & 73.

Froneman J and Cameron J concur with the judgement but add an important *caveat* namely that “acquisition” is a feature of expropriation.²²⁷ Froneman J goes even further and considered the relevance of the *FNB case*, expropriation in the context of section 25 of the *Constitution* and points out the requirement of compensation may be necessary because of the individual case not meeting the required balance between justice and equity.²²⁸

Froneman J concludes by finding that section 25 provides for a constitutional norm which had been explained in the *FNB case* by Ackermann J as a balance between individual property rights and public interest.²²⁹ Froneman J concludes that section 25 of the *Constitution* requires an acknowledgement when pre-existing property is taken away and allocated differently,²³⁰ and then, if there is a deprivation that is non-arbitrary, then the FNB methodology needs no further scrutiny.²³¹

Badenhorst and Olivier²³² regarded the decision in the *Agri SA* case to be a revolution and will play a role in what is called the “... future erosion of the property clause in s 25 of the Constitution and related protection of private ownership in South Africa.”²³³

It is interesting to note that after twenty years and being put through the test, the FNB methodology is as relevant as it was when delivered. For purposes of this study, it is proposed that the FNB methodology should be applied as a tested yardstick to critically analyse the 2021 Bill as it proposes to regulate agricultural land and the FNB methodology should find application.

In the recent judgement of the Constitutional Court in *Fidelity Security Service v Minister of Police*²³⁴ the court grappled with the specific issue of ownership restrictions

²²⁷ *Agri SA*-case (see note 198 above) paras 77 - 80.

²²⁸ *Agri SA*-case (see note 198 above) paras 87 - 88.

²²⁹ *Agri SA*-case (see note 198 above) para 88.

²³⁰ *Agri SA*-case (see note 198 above) para 89.

²³¹ *Agri SA*-case (see note 198 above) paras 89 & 92.

²³² Badenhorst & N Olivier ‘The Agri South Africa Constitutional Court Decision’ (2014) 33 *Australian Resources and Energy Law Journal* 230 249.

²³³ Badenhorst & N Olivier ‘The Agri South Africa Constitutional Court Decision’ (2014) 33 *Australian Resources and Energy Law Journal* 230 249.

²³⁴ *Minister of Police and Others v Fidelity Security Services (Pty) Limited* 2022 ZACC 16.

in the form of licence regulations as contemplated in the Firearms Control Act.²³⁵ The issue under scrutiny was whether a gun owner who lost the right to possess (ownership of) a firearm due to the expiration of the appropriate licence to retain ownership despite losing possession.²³⁶

In terms of section 24 of the Firearms Control Act²³⁷ a license holder needs to apply at least 90 days before the expiry of the license for the renewal of such a license. Fidelity Security Services (Pty) Limited (hereinafter referred to as “Fidelity”) attempted to renew 700 firearm licenses, which renewal application was not made timeously.²³⁸ A circular from the Commissioner of Police dated 3 February 2016 suggested that a late application can be considered but the license holder is required to surrender the firearm to the closest Police Station and the previous holder of the licence is to be informed that possession of the firearm is no longer lawful.²³⁹ Section 149 of the Firearms Control Act determines that a firearm should be destroyed by the state only as prescribed.²⁴⁰ Interestingly enough, section 149(2)(b) determined that an owner remains the owner of the firearm until the firearm is destroyed. Section 149(3)(c) makes provision for compensation to be paid to the owner if the state becomes the owner of such a firearm.²⁴¹ The SCA was confronted with this position as interpreted by the Commissioner on the one hand and the argument of Fidelity on the other arguing that nothing in the Act terminates ownership if the licence lapses or that an owner cannot bring a new application. Before the Supreme Court of Appeal (SCA), the SCA ruled that it cannot be sensible to expect a previous license holder to lose ownership of a firearm and therefore an owner can make a new application to be considered.²⁴²

The State parties contested that the matter is raising constitutional issues and will have far reaching consequences for the regulation of firearm licenses.²⁴³ Fidelity’s main

²³⁵ The Firearms Control Act 60 of 2000.

²³⁶ *Minister of Police and Others v Fidelity Security Services (Pty) Limited* 2022 ZACC 16 para 1. Also see S 28 of the Firearms Control Act 60 of 2000.

²³⁷ The Firearms Control Act 60 of 2000.

²³⁸ *Minister of Police and Others v Fidelity Security Services (Pty) Limited* 2022 ZACC 16 para 4-5.

²³⁹ *Minister of Police and Others v Fidelity Security Services (Pty) Limited* 2022 ZACC 16 para 5.

²⁴⁰ S 149 of The Firearms Control Act 60 of 2000.

²⁴¹ S 149 of The Firearms Control Act 60 of 2000.

²⁴² *Minister of Police and Others v Fidelity Security Services (Pty) Limited* 2022 ZACC 16 para 11.

²⁴³ *Minister of Police and Others v Fidelity Security Services (Pty) Limited* 2022 ZACC 16 para 13.

argument seems to have rested on the distinction between “ownership” and “possession”²⁴⁴ and the fact that the Firearms Control Act is applicable on possession and not ownership.²⁴⁵ The backbone of this argument is found in the distinction between two very important concepts, namely possession and ownership on the one hand and the regulatory framework on the other. Fidelity argued that the fact that a license for possession has lapsed does not mean ownership comes to an end.²⁴⁶

The court correctly started its analysis with reference to the *Constitution*.²⁴⁷ The court acknowledged the duty of the South African Police Service to combat crime and amongst others, regulate firearms.²⁴⁸ The court recognised the property rights on the one hand (to own a firearm) and the right to live in a safe environment (to regulate firearms by ways of licensing requirements).

What is of importance for this study is the provision of Section 120(1)(a) of the Act that provides for a penalty if a person is found to be in possession of a firearm without a valid license.²⁴⁹ The court found that if a person remains in possession of a firearm without a valid license such person can be convicted for a criminal offence,²⁵⁰ which does not mean the owner surrenders or abandons ownership.

The court confirms that ownership is the most comprehensive real right and is protected in terms of section 25 of the *Constitution*.²⁵¹ The court acknowledged possession to be one of the entitlements of ownership and identified two elements that are required. Firstly, the intention (*animus*) and secondly the physical control over the subject (*detentio*).²⁵² The court distinguished between ownership and possession and found that the essence of possession is simply control over the subject and is by its nature far more limited than ownership.²⁵³ Ownership entails more than just

²⁴⁴ *Minister of Police and Others v Fidelity Security Services (Pty) Limited* 2022 ZACC 16 para 19.

²⁴⁵ *Minister of Police and Others v Fidelity Security Services (Pty) Limited* 2022 ZACC 16 para 19.

²⁴⁶ *Minister of Police and Others v Fidelity Security Services (Pty) Limited* 2022 ZACC 16 para 19.

²⁴⁷ S 205(3) of the Constitution dealing with the obligations of the Police. Also see S 25 of the Constitution in respect of property rights.

²⁴⁸ *Minister of Police and Others v Fidelity Security Services (Pty) Limited* 2022 ZACC 16 para 24.

²⁴⁹ S 120(1)(a) of The Firearms Control Act 60 of 2000.

²⁵⁰ *Minister of Police and Others v Fidelity Security Services (Pty) Limited* 2022 ZACC 16 para 32.

²⁵¹ *Minister of Police and Others v Fidelity Security Services (Pty) Limited* 2022 ZACC 16 para 38.

²⁵² *Minister of Police and Others v Fidelity Security Services (Pty) Limited* 2022 ZACC 16 para 38.

²⁵³ *Minister of Police and Others v Fidelity Security Services (Pty) Limited* 2022 ZACC 16 para 39.

possession. In this instance, if an owner's license expires, but the owner has the intention (*animus*) to ensure the legal use of the firearm, the owner should be allowed to make a new application.²⁵⁴

The argument by Fidelity was that the Firearms Control Act applies to possession and not ownership.²⁵⁵ Fidelity went one step further and argued that the court should differentiate between "ownership" and "possession", and the fact that a license expires does not bring an end to ownership.²⁵⁶

The court recognised a person's right to be the owner of a firearm but also the limitation of use of such firearm as required in terms of the Firearms Control Act,²⁵⁷ namely a licence.²⁵⁸

The court held that if a person allowed a licence to lapse, it did not mean the forfeiture of the property rights towards the firearm, but just restricted in the use thereof. The court found that although both possession and ownership is used in the Act, the Act only controls possession, but may limit ownership in public interest.²⁵⁹

The decision in the *Fidelity* case is of importance for the analysis done in this study as the regulatory framework proposed in the 2021 Bill provides a spectrum of obligations levelled against an owner of property which is discussed in detail hereunder.

It appears that despite the limitation on property rights, for example not to be able to sub-divide agricultural land without the consent of the Minister in terms of SALA,²⁶⁰ property rights are acknowledged and are worthy of protection. The court held that

²⁵⁴ *Minister of Police and Others v Fidelity Security Services (Pty) Limited* 2022 ZACC 16 para 8.

²⁵⁵ *Minister of Police and Others v Fidelity Security Services (Pty) Limited* 2022 ZACC 16 para 19.

²⁵⁶ *Minister of Police and Others v Fidelity Security Services (Pty) Limited* 2022 ZACC 16 para 19.

²⁵⁷ Firearms Control Act 60 of 2000. See also Firearms Control Regulations GN 345 of 2004 in GG 26156 of 26 March 2004.

²⁵⁸ S 3 of Act 60 of 2000. See also Firearms Control Regulations GN 345 of 2004 in GG 26156 of 26 March 2004.

²⁵⁹ *Minister of Police and Others v Fidelity Security Services (Pty) Limited* 2022 ZACC 16 para 39.

²⁶⁰ S 4 (1)(a)(i) of SALA.

ownership (property rights) as described in section 25 of the *Constitution* "... is our most comprehensive real right that a subject can have over a thing."²⁶¹

The property clause in the *Constitution* makes provision for the protection against arbitrary deprivation.²⁶² The court is clear on the aspect of ownership and that is not the intention of the Act to remove ownership but purely to regulate possession.²⁶³

Despite several instances where the methodology as set-out in the *FNB* case has been tested, it seems that the *FNB* methodology is still applicable and more than a handy tool in any constitutional enquiry pertaining to interference with property rights. In fact, according to Slade²⁶⁴ section 25 is the starting point of all deprivation enquiries. Slade agrees that the Constitutional Court in the *FNB* case has set the benchmark for all property disputes to be measured against²⁶⁵ and in fact also sets down the steps to determine if the constitutional question is answered.

Slade holds the view that this will most probably not be followed in cases where expropriation takes place and where the only question would be if it was done for a public purpose.²⁶⁶ Despite Slade's argument that this is justifiable,²⁶⁷ it seems that the Constitutional court has as recently as the *Fidelity*-case²⁶⁸ glanced at the methodology of the *FNB*-case in determining a constitutional property dispute.

Slade goes one step further and suggests that the *FNB* methodology does not need to be followed if a so-called "formal expropriation" does not take place.²⁶⁹ Slade finds justification for this view in matters considered by the Constitutional Court such as the

²⁶¹ *Minister of Police and Others v Fidelity Security Services (Pty) Limited* 2022 ZACC 16 paras 38 to 41.

²⁶² S 25(1) of the Constitution of the Republic of South-Africa, 1996.

²⁶³ *Minister of Police and Others v Fidelity Security Services (Pty) Limited* 2022 ZACC 16 para 42.

²⁶⁴ BV Slade 'The Effect of avoiding the FNB methodology in Section 25 Disputes' (2019) 40 *Obiter* 36.

²⁶⁵ BV Slade 'The Effect of avoiding the FNB methodology in Section 25 Disputes' (2019) 40 *Obiter* 36 37.

²⁶⁶ BV Slade 'The Effect of avoiding the FNB methodology in Section 25 Disputes' (2019) 40 *Obiter* 36 37.

²⁶⁷ BV Slade 'The Effect of avoiding the FNB methodology in Section 25 Disputes' (2019) 40 *Obiter* 36 37.

²⁶⁸ *Minister of Police and Others v Fidelity Security Services (Pty) Limited* 2022 ZACC 16

²⁶⁹ BV Slade 'The Effect of avoiding the FNB methodology in Section 25 Disputes' (2019) 40 *Obiter* 36 38.

case of *Arun Property Development v Cape Town City*.²⁷⁰ For purposes of this study, it is prudent to consider this view as well as the Constitutional Court's judgment, as the 2021 Bill deals directly with "regulatory state action".²⁷¹

In the *Arun Property*-case the court was confronted with a constitutional question pertaining to expropriation of land (immoveable property) where a local authority acquired land for purposes of a development and the obligation to pay compensation.²⁷² The property was originally zoned as "agriculture"²⁷³ but the then owners, namely the University of Stellenbosch received notice that the application for rezoning was approved to undertake some property development.²⁷⁴

Both the previous owner (University of Stellenbosch) and the then current owner (Arun Property) were told that no application for development would be approved without a provision for a variety of road infrastructure.²⁷⁵ Arun property argued that the land under dispute relates to expropriation and therefore called for compensation to be paid.²⁷⁶

The City of Cape Town on the other hand argued that compensation is not to be paid and relied on the terms of Land Use Planning Ordinance²⁷⁷ and argued that Arun Property chose not to seek relief in terms of LUPO. The City based its argument on LUPO rather than the *Constitution* and argued that Arun Property is not entitled to compensation in terms of the policy.²⁷⁸ LUPO created some form of internal procedure by which a party can exhaust some form of internal appeal or review process.²⁷⁹

²⁷⁰ *Arun Property Development (Pty) Ltd v Cape Town City* 2015 (2) SA 584 (CC) (hereinafter referred to as the *Arun Property*-case).

²⁷¹ BV Slade 'The Effect of avoiding the FNB methodology in Section 25 Disputes' (2019) 40 *Obiter* 36 41.

²⁷² *Arun Property*-case (see note 271 above) para 1.

²⁷³ *Arun Property*-case (see note 271 above) para 6.

²⁷⁴ *Arun Property*-case (see note 271 above) para 6.

²⁷⁵ *Arun Property*-case (see note 271 above) para 7.

²⁷⁶ *Arun Property*-case (see note 271 above) para 24.

²⁷⁷ Land Use Planning Ordinance 15 of 1985 (hereinafter referred to as "LUPO").

²⁷⁸ *Arun Property*-case (see note 271 above) para 26-27.

²⁷⁹ *Arun Property*-case (see note 271 above) para 29.

The court held that the City's argument pertaining to section 28 is not convincing as expropriation per definition compels the "... giving up of ownership..."²⁸⁰ which triggers the mechanism of paying compensation. Slade argues that there should be suitable cases whereby the *FNB* methodology should be avoided, and such avoidance should be justifiable.²⁸¹ Slade contests that if the state follows the prescriptive process, the *FNB* methodology could be avoided as this goes to "... the heart of the matter".²⁸²

Slade concedes that in the *FNB*-case the court distinguished between expropriation and deprivation but argues that a party has a choice to either rely on section 25(1) or section 25(2) of the *Constitution*.²⁸³ Slade concludes that the avoidance of the *FNB* methodology would only be justified if the property has been expropriated formally and based on legislation. What became clear from the analysis of the cases that followed the *FNB*-case is the fact that the *FNB* methodology in constitutional property disputes has become the threshold to determine if such cases meet the Constitutional requirements.

Marais argues that the *Arun* judgment is problematic for both expropriation law and administrative law and raised four objections against the judgement:²⁸⁴

- The court disregarded public interest.
- The court ignored the role of compensation
- The distinction that is made between deprivation and expropriation
- The aggrieved party has a choice whether to accept the expropriation or to have it set aside under PAJA.²⁸⁵

In the matter of *Redefine Properties Ltd v The Government of the Republic of South Africa and Two Others*²⁸⁶ the court was confronted with both the question of ownership and the use of land. In this case the state became owner of a property without any

²⁸⁰ *Arun Property*-case (see note 271 above) para 59.

²⁸¹ BV Slade 'The Effect of avoiding the FNB methodology in Section 25 Disputes' (2019) 40 *Obiter* 36 43.

²⁸² BV Slade 'The Effect of avoiding the FNB methodology in Section 25 Disputes' (2019) 40 *Obiter* 36 43.

²⁸³ BV Slade 'The Effect of avoiding the FNB methodology in Section 25 Disputes' (2019) 40 *Obiter* 36 45.

²⁸⁴ Marais & PJH Maree 'At the Intersection between Expropriation Law and Administrative Law: Two Critical Views on the Constitutional Court's *Arun* Judgment' (2016) 19 *Potchefstroom Electronic Law Journal* 1.

²⁸⁵ Promotion of Administrative Justice Act 3 of 2000.

²⁸⁶ *Redefine Properties Ltd v The Government of the Republic of South Africa and Others* 2022 ZAGPPHC 62.

services such as access to water, running water, and sewer disposal in an industrial area.²⁸⁷

One of the problematic issues in this case is the fact that the applicant was unable to launch an eviction application against the illegal occupiers as it was not in control of the property on which some illegal occupants were occupying.²⁸⁸ The applicant brought an interdict and, amongst others, raised the issue of custodianship vesting in either the MEC of the provincial government or the MEC of Roads and Transport.²⁸⁹

The court once again confirmed ownership of land to be not absolute but subject to limitations.²⁹⁰ The court accepted that some limitations stem from the Constitution, others from the regulatory regime, and specifically mentions that such limitations may be governed by the specific use of the land which for purposes of this study is of relevance.²⁹¹ The court also confirms the common law limitation namely that an owner can use her property in such a way that it does not cause damage or nuisance to other owners or neighbours and calls it a “reciprocal right”.²⁹²

The court was faced with the question if the nuisance caused will interfere with neighbours’ enjoyment of their property.²⁹³ The court recognised an owner carries both rights and obligations and, in this case, as did the national government like private landowners.²⁹⁴

²⁸⁷*Redefine Properties Ltd v The Government of the Republic of South Africa and Others* 2022 ZAGPPHC 62 para 5.

²⁸⁸*Redefine Properties Ltd v The Government of the Republic of South Africa and Others* 2022 ZAGPPHC 62 para 4.

²⁸⁹*Redefine Properties Ltd v The Government of the Republic of South Africa and Others* 2022 ZAGPPHC 62 para 6.

²⁹⁰*Redefine Properties Ltd v The Government of the Republic of South Africa and Others* 2022 ZAGPPHC 62 para 15.

²⁹¹*Redefine Properties Ltd v The Government of the Republic of South Africa and Others* 2022 ZAGPPHC 62 para 15.

²⁹²*Redefine Properties Ltd v The Government of the Republic of South Africa and Others* 2022 ZAGPPHC 62 para 16-17. Also see *Gien v Gien* 1979 2 SA 1113 (T).

²⁹³*Redefine Properties Ltd v The Government of the Republic of South Africa and Others* 2022 ZAGPPHC 62 para 17. G Muller *et al Silberberg and Schoeman’s the Law of Property* (2019) 116.

²⁹⁴*Redefine Properties Ltd v The Government of the Republic of South Africa and Others* 2022 ZAGPPHC 62 para 35.

The significance of the judgment is found in Manamela AJ utilizing his wide discretion and ruling that the owner regardless of its occupation or use is to ensure that its use and occupation does not pose a threat to neighbours.²⁹⁵

The court highlighted a very important point that seems to have stemmed from the defence of the respondents, namely the denial of use or occupation of the property.²⁹⁶ The importance of this defence, described by the court as “bizarre”, seems to suggest that the lack of use or occupation somewhat “indemnifies”²⁹⁷ the owner “against” obligations. After analysing the facts of the matter, the court held that the national government cannot escape its obligations as an owner regardless of its occupation and use of the property.

What remains clear is that section 25 of the *constitution* provides protection of property rights.²⁹⁸ The same section allows for the regulation of property as demonstrated herein but to the extent that deprivation may only take place in terms of law of general application.²⁹⁹ According to section 25 of the *Constitution*, deprivation is a form of regulatory measures taken by the state in comparison to expropriation which can only take place if it is justifiable in terms of a law of general application, for a public purpose, and subject to the payment of compensation.³⁰⁰

In the analysis of the 2021 Bill the impact thereof is scrutinized to investigate to what extent it will have on property rights and then specifically in respect of agricultural land.

3.3 Draft Preservation and Development of Agricultural Land Bill (hereafter the “2021 Bill”)

The preamble of the 2021 Bill already sets the recognition of the need to preserve and promote agricultural land for food production in a sustainable manner for both current

²⁹⁵ *Redefine Properties Ltd v The Government of the Republic of South Africa and Others* 2022 ZAGPPHC 62 para 42(b).

²⁹⁶ *Redefine Properties Ltd v The Government of the Republic of South Africa and Others* 2022 ZAGPPHC 62 para 25.

²⁹⁷ *Redefine Properties Ltd v The Government of the Republic of South Africa and Others* 2022 ZAGPPHC 62 para 25.

²⁹⁸ S 25(1) of the Constitution.

²⁹⁹ S 25(1) of the Constitution.

³⁰⁰ S 25(2) of the Constitution.

and future generations as a goal to be achieved.³⁰¹ The 2021 Bill seeks compliance with sections 24 and 27 of the *Constitution* to protect agricultural land as a scarce and non-renewable resource on the one hand, and to ensure compliance with section 27(1)(c) of the *Constitution* for providing access to sufficient food on the other hand.³⁰²

One of the main objectives of the 2021 Bill is to amend SALA.³⁰³ According to the SEIAS report, it is confirmed that no structure currently exists to administer SALA throughout the Republic of South Africa,³⁰⁴ but the need to do so exists. The main aim of the 2021 Bill seems to be the prevention of sub-dividing agricultural land into uneconomical units and to regulate the activities (use) that takes place on agricultural land within the territory³⁰⁵ to ensure the productive use of agricultural land.

Before the goal to preserve the productive use of agricultural land is analysed it is prudent to first look at the proposed sections and definitions of the 2021 Bill.

The 2021 Bill provides for a detailed definition of agricultural land, which means:³⁰⁶

all land in the jurisdiction of the Republic, excluding land-

- a) In a township as defined in the Deeds Registries Act, or land for which a township register, separate subdivision register or sectional title register, as defined in the Sectional Titles Act, 1986 (Act No. 95 of 1986), has been opened;
- b) Which, immediately prior to the date of commencement of this Act, was lawfully zoned for non-agricultural purposes by an organ of state subject to the conditions of the zoning;
- c) Which has been excluded in terms of the Subdivision of Agricultural Land Act, 1970 (Act No. 70 of 1970), by means of a notice in the Gazette; or
- d) Which the Minister excludes in terms of section 5(2).

³⁰¹ Preamble of the *Draft Preservation and Development of Agricultural Land Framework Bill* (See GN 663 of 2020 in GG 43723 of 18 September 2020) (hereinafter the “2021 Bill”).

³⁰² Preamble of the 2021 *Bill* (see note 1 *supra*).

³⁰³ S 38 of the 2021 *Bill* (see note 64 *supra*).

³⁰⁴ Republic of South Africa, Department of Forestry, Fisheries and the Environment. 2020. *Annexure B: Socio-Economic Impact Assessment Report (Phase 2): White Paper on the Conservation and Sustainable Use of South Africa's Biological Resources* October 2020 https://www.dffe.gov.za/sites/default/files/docs/draftwhitepaper_seias.pdf (Accessed 12 July 2022) 3.

³⁰⁵ Republic of South Africa, Department of Forestry, Fisheries and the Environment. 2020. *Annexure B: Socio-Economic Impact Assessment Report (Phase 2): White Paper on the Conservation and Sustainable Use of South Africa's Biological Resources* October 2020 https://www.dffe.gov.za/sites/default/files/docs/draftwhitepaper_seias.pdf (Accessed 12 July 2022) 4.

³⁰⁶ S 1 of the 2021 *Bill* (see note 1 *supra*).

What the 2021 Bill does is to specifically define the “agricultural potential” as a measure of the productivity of the land.³⁰⁷ The aim seems to be a method to not only measure but also increase productivity per unit area but within a specified time frame for a specific crop and or veld type, considering factors such as climate, soil and terrain.³⁰⁸

This definition is followed up by the definition of “agricultural purposes” which defines the practices associated with the use of the land for agricultural purposes. The definition of agricultural purposes focuses on the use of the land. The word “use” is repeated twice in the same definition which seems to be significant.³⁰⁹

The 2021 Bill however goes one step further and defines the activity of “agriculture” as follows:³¹⁰

means the science, practice, occupation or economic activity in all its aspects concerned with the keeping or active production of useful plants, fungi or animals for—

- a) bio-fuel;
- b) fibre;
- c) food; or
- d) other agricultural goods or services, and includes, in varying degrees, the preparation or marketing of the resulting products.

What seems interesting is the definition of a “farmer”³¹¹ to be the person using the agricultural land for agricultural activities but excludes the employee of the farmer. What is significant of this definition is the omission of the word “owner” as no reference is made to ownership. “Ownership” found its own definition as the person or entity in who’s name the land or right into the land is register in the Deeds Office.³¹²

³⁰⁷ S 1 of the 2021 Bill (see note 1 *supra*).

³⁰⁸ S 1 of the 2021 Bill (see note 1 *supra*).

³⁰⁹ S 1 of the 2021 Bill (see note 1 *supra*).

³¹⁰ S 1 of the 2021 Bill (see note 1 *supra*). See specifically S 1(d) thereof.

³¹¹ S 1 of the 2021 Bill (see note 1 *supra*).

³¹² S 1 of the 2021 Bill (see note 1 *supra*).

Another important definition is “land use”³¹³ which is defined as the activities or series of activities which is directly related to what happens on the agricultural land making use of the resources or impacting on the resources.

The definition of “land use” is followed up by the definition of “optimal agricultural use”. Section 1(d) further makes provision for a definition for “optimal agricultural use” and defines it as follows:³¹⁴

“Optimal agricultural use” means the maximum productivity per unit area and unit time achievable by the best suited or adapted farming practices in a sustainable manner, with minimum negative impacts on the natural agricultural resources upon which the agricultural economy depends, including soil, water, climate, terrain, natural fauna and flora, but excluding weeds and invasive species.”

There can be no doubt that the 2021 Bill aims to ensure the optimal use of land and places a lot of emphasis on the term “use” which plays an indicative role throughout the 2021 Bill.

Section 2 sets out the goals and objects of the 2021 Bill with the promotion and preservation through sustainable development at the pinnacle of the priorities to be achieved. The steppingstones to achieve these goals, norms, and standards for the use of agricultural land is the ensuring of a regulatory framework with focus on:³¹⁵

- (i) “promote and encourage viable farming units from a long-term economic, environmental and social perspective;
- (ii) discourage land use changes from agricultural to non-agricultural uses to prevent the fragmentation of the agro-ecosystems; and
- (iii) facilitate concurrent land uses on agricultural land without jeopardising long term food security.

Section 3 makes it clear that the 2021 Bill will be applicable and finds application to all agricultural land within its territory. It binds all three spheres of government and specifically makes the application of the 2021 Bill subject to section 146 of the

³¹³ S 1 of the 2021 Bill (see note 1 *supra*).

³¹⁴ S 1(d) of the 2021 Bill (see note 1 *supra*).

³¹⁵ S 2(d) of the 2021 Bill (see note 1 *supra*).

Constitution.³¹⁶ It seems the legislator's aim is to ensure that the 2021 Bill in harmony with the *Constitution*, the Spatial Planning and Land Use Management Act ("SPLUMA") to form the legislative framework to regulate agricultural land.³¹⁷

Chapter 2 under the heading of "Agricultural Land Management" sets out the principles that will manage, amongst other things, the "productivity",³¹⁸ stability,³¹⁹ resiliency,³²⁰ viability,³²¹ and equitability³²² as well as which principles should be applied and when:³²³

- (a) assessing applications for agro-ecosystem authorisations,
- (b) determining norms and standards,
- (c) developing provincial agricultural sector plans,
- (d) declaring protected agricultural areas, and
- (e) all actions and decisions made in respect of agricultural land is considered.

The legislator sets the constitutional obligations to ensure equality in section 4(1)(f)(iii) by including the principle of "equitability" as follows: "all farmers have the opportunity to develop the skills and capacity required for the emergence of productive, viable and resilient farming units, and the participation by vulnerable and disadvantaged farmers or potential farmers are ensured".³²⁴ It is not clear as to how this "equitability" principle would be achieved. According to the Socio-Economic Impact Assessment System's (SEIAS) Final Impact Assessment Template³²⁵ this would open up opportunities and

³¹⁶ S 146 of the Constitution (Chapter 6: "Conflicting Laws" dealing with conflicts between national and provincial legislation.

S 3 of the 2021 Bill (see note 1 *supra*). Also see https://static.pmg.org.za/PDALB_SEIAS_report.pdf 3.

³¹⁸ S 4(1)(b) of the 2021 *Bill* (see note 1 *supra*).

³¹⁹ S 4(1)(c) of the *of the 2021 Bill* (see note 1 *supra*).

³²⁰ S 4(1)(d) of the 2021 *Bill* (see note 1 *supra*).

³²¹ S 4(1)(e) of the 2021 *Bill* (see note 1 *supra*).

³²² S 4(1)(f) of the 2021 *Bill* (see note 1 *supra*).

³²³ S 4(2)(4) of the 2021 Bill (see note 1 *supra*).

³²⁴ S 4(1)(f)(iii) of the 2021 Bill.

³²⁵ Republic of South Africa, Department of Forestry, Fisheries and the Environment. 2020. *Annexure B: Socio-Economic Impact Assessment Report (Phase 2): White Paper on the Conservation and Sustainable Use of South Africa's Biological Resources* October 2020 https://www.dffe.gov.za/sites/default/files/docs/draftwhitepaper_seias.pdf (Accessed 12 July 2022) 6.

allow “prospective farmers” access to agricultural land and assistance from financial institutions due to clearly defined land classifications and crop suitability.³²⁶

Chapter 3 possess some interesting developments in the agricultural sector, under the heading “Agro-ecosystem Management”.³²⁷ Provision is made for agro-ecosystem management. In terms of section 16(1)(d), a person who intends to engage in a listed activity as described in section 16(1)(a), which activity takes place on agricultural land, must apply for an agro-ecosystem authorisation.³²⁸

According to the SEIAS Report it would cost landowners money to apply for an agro-ecosystem authorisation which is indicative of the intention of the legislator that not only future use but also current use of agricultural land would trigger an application.³²⁹

In terms of section 15(2) of the 2021 Bill, the competent authority “may” grant an agro-ecosystem authorization.³³⁰ Similarly, to what is provided for in the MPRDA³³¹ where the holders of old order mineral rights had to apply for these rights after the enactment of the MPRDA, landowners would need to apply for an agro-ecosystem authorisation regardless of what activities currently are conducted on agricultural land if at all.

Section 15(4) of the 2021 Bill provides for several factors to be taken into consideration when an application for an agro-ecosystem authorization is applied for.³³² Section 15(5) does not exclude the need to apply for an agro-ecosystem authorisation if another authorisation has been obtained under another law.³³³

³²⁶ Republic of South Africa, Department of Forestry, Fisheries and the Environment. 2020. *Annexure B: Socio-Economic Impact Assessment Report (Phase 2): White Paper on the Conservation and Sustainable Use of South Africa’s Biological Resources* October 2020 https://www.dffe.gov.za/sites/default/files/docs/draftwhitepaper_seias.pdf (Accessed 12 July 2022) 6.

³²⁷ Ch 3 of the 2021 Bill.

³²⁸ S 15(1) of the 2021 Bill.

Republic of South Africa, Department of Forestry, Fisheries and the Environment. 2020. *Annexure B: Socio-Economic Impact Assessment Report (Phase 2): White Paper on the Conservation and Sustainable Use of South Africa’s Biological Resources* October 2020 https://www.dffe.gov.za/sites/default/files/docs/draftwhitepaper_seias.pdf (Accessed 12 July 2022) 8.

³³⁰ Republic of South Africa, Department of Forestry, Fisheries and the Environment. 2020. *Annexure B: Socio-Economic Impact Assessment Report (Phase 2): White Paper on the Conservation and Sustainable Use of South Africa’s Biological Resources* October 2020 https://www.dffe.gov.za/sites/default/files/docs/draftwhitepaper_seias.pdf (Accessed 12 July 2022) 8.

³³¹ Mineral and Petroleum Resources Development Act 28 of 2002. Also see Agri SA-case (see note 198 above).

³³² S 15(4) of the 2021 Bill (see note 1 *supra*).

³³³ S 15(5) of the 2021 Bill (see note 1 *supra*).

Section 16 of the 2021 Bill provides for listed activities that may be conducted, subject to authorisation on the agricultural land. Section 17 of the 2021 Bill provides for activities to be listed and the procedures to be followed to achieve this goal. Section 20 of the 2021 Bill makes provision for the process to be followed to make such an application.

Chapter 5 of the 2021 Bill ensures compliance throughout the whole territory as it proposes a national agro-eco information system.

Section 25 of the 2021 Bill provides more details as to what the objectives of the agro-ecosystem entail. Four objectives are set relating to the gathering, storing, and providing of data pertaining to the use and management of agricultural land in South Africa.³³⁴

Section 14(1)(b) provides for and to:³³⁵

“Identify, predict and evaluate the actual and potential impact of activities on the agro-ecosystem, the risks, consequences, alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits and promoting compliance with the principle of agro-ecosystem management set out in section 4.”

The proposed agro-ecosystem management sets the goals to identify, predict, and evaluate potential activities on the agro-ecosystem and adequate consideration is given before the activity is commenced with.³³⁶ The intention is to engage in a listed activity that would require authorisation, which authorisation may be granted by the Director-General.³³⁷ It would be argued that for the same token the intended activity may not be granted which may place a further limitation on an owner’s property rights as the minister may list activities not permitted on the agricultural land.³³⁸

³³⁴ S 25 of 2021 Bill.

³³⁵ S 14(1)(b) of the 2021 *Bill* (see note 1 *supra*).

³³⁶ S 14(1)(c) of the 2021 Bill (see note 1 *supra*). See also S 15(3) of the 2021 Bill.

³³⁷ S 14(2) of the 2021 Bill (see note 1 *supra*).

³³⁸ S 16 of the 2021 Bill (see note 1 *supra*).

Emphasis is placed on the use/activity on the land for which the landowner may require authorisation for. The question raised in this paper is if such action/ discretion by the minister would constitute an arbitrary deprivation and whether it would still meet the Constitutional goals set. The authorisation for a listed activity would be required from the Minister who may delegate powers to the Director-General or Head of department.³³⁹ If a person that made an application is aggrieved by the decision, the aggrieved person may appeal to the Minister.³⁴⁰

The 2021 Bill neither considers the current land-use or activities currently exercised on agricultural land nor does it outright recognise ownership or provision for ensuring compliance with Section 25 and Section 27 of the *Constitution*.³⁴¹ At the very best the owner may in terms of section 15 include current activities in the application for registering an agro-ecosystem authorisation.³⁴² In this instance the Bill makes no provision for the owner's limited freedom to decide which activity he or she wishes to undertake on the property or for that matter any activity whatsoever and would be required to apply for an activity.³⁴³ This limitation or restriction pertains to a very specific activity unfamiliar to the landowner, which may be regarded as a deprivation of property rights. The landowner may not be familiar with the specific activity that forms the subject matter of the agro-ecosystem authority.

Chapter 6 of the 2021 Bill makes provision for appeals, compliance, and contraventions.³⁴⁴ If a person is aggrieved by the decision of the competent authority pertaining to her application for the registration of an agro-ecosystem authorization then such a person has the right of appeal, which shall have the effect that the operation of the agro-ecosystem authorisation is immediately pended until the finalisation of the appeal.³⁴⁵ The 2021 Bill provides for an internal appeal process to be considered by the Minister in terms of section 30 of the 2021 Bill.³⁴⁶

³³⁹ S 19(1) to (3) of the 2021 *Bill* (see note 1 *supra*).

³⁴⁰ S 27 of the 2021 *Bill* (see note 1 *supra*).

³⁴¹ S 25 & S 27 of the *Constitution*.

³⁴² S 15(4)(a) which states that "any action to be taken before submitting an application".

³⁴³ FNB case (note 77 above) para 100.

³⁴⁴ Chapter 6 of the 2021 *Bill*.

³⁴⁵ S 27 of the 2021 *Bill*.

³⁴⁶ S 30(1) provides for; "The Minister must consider an appeal lodged in terms of section 27 and he or she may- (a) confirm, set aside or vary the decision of the competent authority; and (b) order the competent authority to execute the decision in connection therewith".

Section 32 of the 2021 Bill provides for the competent authority to issue a directive if a person does not comply with any provision of the 2021 Bill or the agro-ecosystem and shall face a directive.³⁴⁷

Section 35 of the 2021 Bill provides the opportunity to the Minister to make regulations in conjunction with the relevant MEC³⁴⁸ and amongst other remedies propose that a person that contravene the regulations be fined up to R250 000.00 or a term imprisonment.³⁴⁹

It seems from the reading of Section 36 of the 2021 Bill that a person will be committing an offence if the person contravenes the restrictions imposed on the use of agricultural land.³⁵⁰ Section 37 of the 2021 Bill imposes the sanctions for non-compliance with the 2021 Bill once a person has been found guilty of an offence in terms of Section 36 of the 2021 Bill.

This *per se* does not constitute a breach of the Constitutional requirements. Section 25 must be seen as part of the Bill of Rights and not in isolation.³⁵¹ This need is to be interpreted to serve the public interest. Kotze correctly argues that the public interest also includes the commitment to land reform.³⁵² Muller explains that the *Constitution* sets out the parameters within which the legislator can interfere with property rights.³⁵³

The question can be asked whether this interference is an arbitrary deprivation as forbidden by the *Constitution*. Ackermann J³⁵⁴ describes the protection of section 25 as being a negative protection of property which includes no guarantee to acquire, hold or dispose of property. Section 25 prohibits arbitrary deprivation of property. In

³⁴⁷ S 32(1) of the 2021 Bill.

³⁴⁸ S 35(1) of the 2021 Bill.

³⁴⁹ S 35(1) of the 2021 Bill.

³⁵⁰ S 36(a) of the 2021 Bill (see note 1 *supra*).

³⁵¹ S 25(4) of the Constitution.

³⁵² Kotze 'The regulation of agricultural land in South Africa: A legal comparative perspective' (2020) 17. (Kotze, T. 2020. The regulation of agricultural land in South Africa: A legal comparative perspective. Unpublished LLD (Law). University of Stellenbosch. Available at: https://scholar.sun.ac.za/bitstream/handle/10019.1/108464/kotze_regulation_2020.pdf?sequence=2 [Accessed 12 July 2022] 1 64.

³⁵³ Muller *et al Silberberg and Schoeman's the Law of Property* (2019) 4.

³⁵⁴ FNB case (see note 77 above) para 48.

the *FNB* case the court described arbitrary deprivation when the law that allows the interference provides no sufficient reasons for the interference which results in procedurally unfair interference or arbitrary deprivation.³⁵⁵

Frantz holds the view that although the *FNB* case does not provide guidelines for how the test is to be applied, both procedural fairness and substantive arbitrariness need to be accounted for.³⁵⁶ For this purpose, Frantz proposes that the first step to take is to consider the relationship between the method employed and the result required.³⁵⁷ Kotze agrees that a deprivation can be arbitrary on either substantive or procedural grounds.³⁵⁸

In the words of Ackermann J:³⁵⁹

“Generally speaking, where the property in question is ownership of land or a corporeal movable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right is something less extensive.”

The substantive arbitrariness enquiry can be answered by looking at the aim of the 2021 Bill and whether the aim could be achieved in another manner.³⁶⁰ What appears from the 2021 Bill is that the aim of the 2021 Bill, read with other legislation, protects agricultural land, amends SALA to be more effective and to ensure food security for everyone.³⁶¹

³⁵⁵ *FNB* case (see note 77 above) para 100.

³⁵⁶ Frantz “Repealing the Subdivision of Agricultural Land Act: A constitutional analysis” (unpublished LLM thesis, Stellenbosch University, 2010) 101.

³⁵⁷ Frantz “Repealing the Subdivision of Agricultural Land Act: A constitutional analysis” (unpublished LLM thesis, Stellenbosch University, 2010) 103.

³⁵⁸ Kotze ‘The regulation of agricultural land in South Africa: A legal comparative perspective’ (2020) 17. (Kotze, T. 2020. The regulation of agricultural land in South Africa: A legal comparative perspective. Unpublished LLD (Law). University of Stellenbosch. Available at: https://scholar.sun.ac.za/bitstream/handle/10019.1/108464/kotze_regulation_2020.pdf?sequence=2 [Accessed 12 July 2022]) 1 127.

³⁵⁹ *FNB* case (see note 77 above) para 100.

³⁶⁰ Frantz “Repealing the Subdivision of Agricultural Land Act: A constitutional analysis” (unpublished LLM thesis, Stellenbosch University, 2010)

³⁶¹ Preamble of the 2021 Bill.

The 2021 Bill provides for a regulatory framework pertaining to agricultural land, to ensure its optimal use, and more importantly, for the protection of agricultural land and it would be argued that the deprivation is constitutionally justifiable to achieve these goals to the benefit of all.

Kotze³⁶² correctly pointed out that the question is not if a government can interfere with vested property rights or not but rather if such interference constitutes "...a legitimate constitutional activity."³⁶³ If a deprivation of property took place as an administrative action, then the Promotion of Administrative Justice Act³⁶⁴ should find application and not section 25.³⁶⁵

Kotze differentiates between deprivation taking place inside or outside the ambit of PAJA and should it be an administrative action, then it would be dealt with under PAJA, but if the deprivation takes place through the application of a specific law, then it would be dealt with under section 25.³⁶⁶ For purposes of this study the focus is on the 2021 Bill, which is specific legislation (law), and therefore the arbitrary test is to be done under section 25 of the *Constitution*.

If section 25 is applied to constitutional property disputes where a form of deprivation did take place the question can be asked if section 36 would ever come to the rescue

³⁶² Kotze 'The regulation of agricultural land in South Africa: A legal comparative perspective' (2020) 17. (Kotze, T. 2020. The regulation of agricultural land in South Africa: A legal comparative perspective. Unpublished LLD (Law). University of Stellenbosch. Available at: https://scholar.sun.ac.za/bitstream/handle/10019.1/108464/kotze_regulation_2020.pdf?sequence=2 [Accessed 12 July 2022] 1 112.

³⁶³ Kotze 'The regulation of agricultural land in South Africa: A legal comparative perspective' (2020) 17. (Kotze, T. 2020. The regulation of agricultural land in South Africa: A legal comparative perspective. Unpublished LLD (Law). University of Stellenbosch. Available at: https://scholar.sun.ac.za/bitstream/handle/10019.1/108464/kotze_regulation_2020.pdf?sequence=2 [Accessed 12 July 2022] 1 112.

³⁶⁴ The Promotion of Administrative Justice Act 3 of 2000 (hereinafter referred to as "PAJA").

³⁶⁵ Kotze 'The regulation of agricultural land in South Africa: A legal comparative perspective' (2020) 17. (Kotze, T. 2020. The regulation of agricultural land in South Africa: A legal comparative perspective. Unpublished LLD (Law). University of Stellenbosch. Available at: https://scholar.sun.ac.za/bitstream/handle/10019.1/108464/kotze_regulation_2020.pdf?sequence=2 [Accessed 12 July 2022] 1 133.

³⁶⁶ Kotze 'The regulation of agricultural land in South Africa: A legal comparative perspective' (2020) 17. (Kotze, T. 2020. The regulation of agricultural land in South Africa: A legal comparative perspective. Unpublished LLD (Law). University of Stellenbosch. Available at: https://scholar.sun.ac.za/bitstream/handle/10019.1/108464/kotze_regulation_2020.pdf?sequence=2 [Accessed 12 July 2022] 1 133 & 134.

of such action? Kotze correctly argues that the answer to this should be negative as the requirements of both sections are very similar and leaves no room for escape.³⁶⁷

Once it is established that section 25 is applicable, the question that can then be raised is whether the deprivation amounts to expropriation or not? What we found in the *FNB* case is that the court held that expropriation is some form of deprivation but distinguishable.³⁶⁸ Section 25 requires compensation to be paid if expropriation takes place.³⁶⁹ According to Van der Schyff, the *Constitution* differentiates between deprivation and expropriation and that expropriation is in fact a category of deprivation.³⁷⁰ Deprivation can be regarded as state interference in private property in a legitimate manner, and to regulate property for the benefit of and to enhance economic prosperity.³⁷¹ Van der Schyff holds the view that the *FNB*-case confirmed that deprivation in terms of section 25 of the *Constitution* can occur without constituting arbitrary deprivation.³⁷² Van der Schyff points out that Section 25 of the *Constitution* does not allow for expropriation without the payment of compensation, and above all it should be in the public interest.³⁷³

Nowhere in the 2021 Bill is any reference made to the expropriation of land. The distinction between deprivation and expropriation has already been drawn in this study. Hence, expropriation is not further discussed. In conclusion the 2021 Bill makes no provision for the expropriation of property for non-compliance with the 2021 Bill but proposes other penalties. To measure the 2021 Bill against the *FNB* methodology it is necessary to ask the questions of the *FNB* methodology. Firstly, agricultural land as defined in the 2021 Bill meets the requirements of section 25 of the *Constitution* and

³⁶⁷ Kotze 'The regulation of agricultural land in South Africa: A legal comparative perspective' (2020) 17. (Kotze, T. 2020. The regulation of agricultural land in South Africa: A legal comparative perspective. Unpublished LLD (Law). University of Stellenbosch. Available at: https://scholar.sun.ac.za/bitstream/handle/10019.1/108464/kotze_regulation_2020.pdf?sequence=2 [Accessed 12 July 2022] 1.

³⁶⁸ *FNB* case (see note 77 above) para 57.

³⁶⁹ S 25(2)(b) of the *Constitution*. Also see *Agri SA*-case (note 198 above) para 58.

³⁷⁰ Van der Schyff 'Die nasionalisering van waterregte in Suid Afrika: Ontnemings van onteiening?' (2003) 6 *Potchefstroom Electronic Law Journal* 81 93.

³⁷¹ Van der Schyff 'Die nasionalisering van waterregte in Suid Afrika: Ontnemings van onteiening?' (2003) 6 *Potchefstroom Electronic Law Journal* 81 93.

³⁷² Van der Schyff 'Die nasionalisering van waterregte in Suid Afrika: Ontnemings van onteiening?' (2003) 6 *Potchefstroom Electronic Law Journal* 81 94.

³⁷³ Van der Schyff 'Die nasionalisering van waterregte in Suid Afrika: Ontnemings van onteiening?' (2003) 6 *Potchefstroom Electronic Law Journal* 81 96. See also S 25(2), (3) and (4) of the *Constitution*.

is therefore open for the constitutional challenge. Asking the second question that has been triggered by section 25 is if there was a deprivation. The answer to this question is affirmative in that regulatory restrictions is applied in the 2021 Bill. On the third question namely if the deprivation is consistent with section 25, the answer is also affirmative. On the fourth question the answer could also be that the deprivation is justifiable under section 36 of the Constitution. The further questions of the FNB methodology deals with expropriation and it became clear that the 2021 Bill does not constitute an arbitrary deprivation as the 2021 Bill makes no provision for expropriation of land (property) and therefore not all the questions listed in the FNB methodology can be answered.

Section 38 of the 2021 Bill seems to be a very important section which is already referred to in the preamble of the 2021 Bill in that it amends the SALA as reflected in the Schedule.

4. Productive Use

A regulation, according to Frantz,³⁷⁴ is defined as a directive by the authority to regulate what activity is conducted on land. In the interest of the population the state can regulate the activity on land.³⁷⁵ The role that agricultural land plays in the production of food is linked to so many facets of lives, but it is also be linked to the social, political, and economic life of most Africans.³⁷⁶ Agriculture, natural resources and the activities that take place on the land are critical for millions of Africans, for their food security, their incomes and employment.³⁷⁷

³⁷⁴ Frantz “Repealing the Subdivision of Agricultural Land Act: A constitutional analysis” (unpublished LLM thesis, Stellenbosch University, 2010) 75.

³⁷⁵ Frantz “Repealing the Subdivision of Agricultural Land Act: A constitutional analysis” (unpublished LLM thesis, Stellenbosch University, 2010) 76.

³⁷⁶ Akinyemi & Mushunje ‘Land ownership and usage for agriculture: Empirical evidence from South African Living Conditions Survey’ (2019) 5 *Cogent Social Sciences* 1.

³⁷⁷ Akinyemi & Mushunje ‘Land ownership and usage for agriculture: Empirical evidence from South African Living Conditions Survey’ (2019) 5 *Cogent Social Sciences* 1.

The 2021 Bill mentioned no less than twice in the preamble the need to encourage the optimal use of agricultural land to provide for food security while the need to preserve and promote sustainable development needs to be encouraged.³⁷⁸

The National development plan also sets achieve by 2030 the development of the agricultural sector in a productive manner.³⁷⁹

“Men’s activities on land have by their modifications, practices, customs and institutions, depleted their natural resources, sometimes consciously but most often unconsciously. They have done this because, for the most part, they have not understood the relationships of the economic, social and political practices and institutions to their natural resources.”³⁸⁰

Before the concept of productive use is analysed, it is important to investigate the existence of and jurisprudence of a concept that was not necessarily the focal point in the regulation of agricultural land. According to Linford there is an ongoing debate taking place in relation to the boundaries of a trademark.³⁸¹ Linford points out that a “...a properly functioning productive use regime is valuable because such a regime is more likely to encourage an efficient initial allocation of property rights while also providing fairness-based limits on the scope of property rights”.³⁸²

Claeys refers to property rights and the use thereof as a “...deliberate and beneficial activity on ownable resources, conducted within morally defensible parameters”.³⁸³

³⁷⁸ The Preamble of the 2021 Bill (see note 64 *supra*).

³⁷⁹ South African Government ‘National Development Plan – 2030, Our future, make it work – Executive Summary’ (date unknown) <https://www.gov.za/sites/default/files/Executive%-20Summary-NDP%202030%20-%20Our%20future%20-%20make%20it%20work.pdf> (accessed 02 February 2022).

³⁸⁰ Proceedings of the Inter-American Conference on Conservation of Renewable Natural Resources, Denver, Colorado, September 7-20, 1948 (1948) 203.

³⁸¹ Linford ‘Trademark Owner as Adverse Possessor: Productive Use and Property Acquisition’ (2013) 63 *Case Western Reserve Law Review* 703.

³⁸² Linford ‘Trademark Owner as Adverse Possessor: Productive Use and Property Acquisition’ (2013) 63 *Case Western Reserve Law Review* 703.

³⁸³ Claeys ‘Use and the Function of Property’ (2018) 63 *American Journal of Jurisprudence* 221 223.

Claeys refers to the Roman law principle of *accessio* and explains it as two assets that merge and become one and the question can be asked as to whose asset it is.³⁸⁴ If labour and property is merged (*accessio*,) who becomes the owner? This according to Claeys should be distinguished from *specificatio*³⁸⁵ where the one improves the other to form something new and *confusio* in which two objects do not become one but become interdependent on each other to function.

To illustrate the interaction of the Roman law principles Claeys refers to the case of *Haslem v Lockwood*³⁸⁶ in which the plaintiff, a one Mr. Haslem, gathered manure scattered on a public road with the help of his labourers, gathered it into piles and left it there overnight with the intention to collect it the next day with a cart. On arrival he found that the defendant, Lockwood, had already collected the piles of manure, with the help of his labourers. The question thus arose of whose manure it is. Claeys define the term “use” to consist of “... *the application of one’s own person or other inputs to pursue prosperity in a manner consistent with other individuals’ pursuing prosperity concurrently*”.³⁸⁷ The application of labour and skills to improve things for the benefit of life makes the “use” productive.

According to Claeys: “the property labour theory secures property regulations with an overriding focus”.³⁸⁸ To apply this theory to the legal framework suggested in the 2021 Bill, property rights should be scaled in the words of Claeys in a manner to ensure that the resource is used (laboured) in the most productive way possible.³⁸⁹

³⁸⁴ Claeys ‘Productive Use in Acquisition, Accession, and Labour Theory’ (2013) 13 *George Mason Law and Economics Research Paper* 1 28.

³⁸⁵ Claeys ‘Productive Use in Acquisition, Accession, and Labour Theory’ (2013) 13 *George Mason Law and Economics Research Paper* 1 28.

³⁸⁶ Claeys ‘Productive Use in Acquisition, Accession, and Labour Theory’ (2013) 13 *George Mason Law and Economics Research Paper* 1 13. Also see *Haslem v Lockwood* (1871) 37 Conn para 506.

³⁸⁷ Claeys ‘Productive Use in Acquisition, Accession, and Labour Theory’ (2013) 13 *George Mason Law and Economics Research Paper* 1 11.

³⁸⁸ Claeys ‘Productive Use in Acquisition, Accession, and Labour Theory’ (2013) 13 *George Mason Law and Economics Research Paper* 1 46.

³⁸⁹ Claeys ‘Productive Use in Acquisition, Accession, and Labour Theory’ (2013) 13 *George Mason Law and Economics Research Paper* 1 46.

Muller rightfully contends that for “a thing” or an object to have value, it should be used in accordance with its purpose.³⁹⁰ If a thing then is of no use, it is of no value. Similarly, agricultural land should be utilised in a manner that is productive to have value.

Muller goes on to note that the value attached to a thing need not necessarily be economic in nature and that the sentimental value over a thing could satisfy the requirement of value.³⁹¹ If a thing or object is thus of use, or if it serves the needs of a person or group of people, it is considered of value and classified as a “thing”.³⁹²

The Constitutional Court in *Daniels v Scribante and Another*³⁹³ held that, within a constitutional context, “a re-appraisal of our conception of the nature of ownership and property” is required. Muller highlights the fact that recent developments and opinions pertaining to property rights require “...a functionalisation or socialisation of property”.³⁹⁴ According to Muller these developments happened because of changes in socio-economic structures³⁹⁵ and saw the emergence of different forms of property rights such as timeshare, sectional title developments and land reform programs.³⁹⁶

The South African law of property has what is called a “mixed legal system” containing elements of common law, Roman law, Roman-Dutch law and even English law.³⁹⁷ Muller points out that the *Constitution* brought about encouragement of further development and highlights section 8 read with section 39(2) of the *Constitution* that allows for the development of the common law, statutory law and precedent to reflect the spirit and objects of the Bill of Rights.³⁹⁸ Accordingly, Muller argues that the *Constitution* is set to release the tension between common law principles and new developments and to manage stability on the one hand by protecting vested rights on the one hand and ensure constitutional obligations such as reform on the other.³⁹⁹

³⁹⁰ Muller *et al General Principles of South African Property Law* (2019) 28.

³⁹¹ Muller *et al General Principles of South African Property Law* (2019) 28.

³⁹² Muller *et al General Principles of South African Property Law* (2019) 28.

³⁹³ *Daniels v Scribante and Another* 2017 4 SA 341 (CC).

³⁹⁴ Muller *et al General Principles of South African Property Law* (2019) 5.

³⁹⁵ Muller *et al General Principles of South African Property Law* (2019) 6.

³⁹⁶ Muller *et al General Principles of South African Property Law* (2019) 6.

³⁹⁷ Muller *et al General Principles of South African Property Law* (2019) 7-8.

³⁹⁸ Muller *et al General Principles of South African Property Law* (2019) 8.

³⁹⁹ Muller *et al General Principles of South African Property Law* (2019) 9.

Property has been recognised in the *Constitution* and requires protection. Muller described it as a “... distinct individual function...”⁴⁰⁰ It is also in the interest of everyone that the state exercise its policing powers to prevent the abuse of power.⁴⁰¹ Frantz correctly indicates that individual property rights are affected by society and the state is obliged to regulate the way owners exercise their rights.⁴⁰² Honoré warns against what he calls the “... sixteenth centuries over emphasis of ownership.”⁴⁰³

The right to use and enjoy is recognised as what Honoré calls the “... cardinal feature of ownership...”⁴⁰⁴ and the social interest in the productive use of things is confirmed by legislation.

The enactment of SPLUMA⁴⁰⁵ created a regulatory framework for the incorporation of all land into a framework for spatial planning and policy, and for the management of land use.

SPLUMA utilises the zoning of the land as a land use management tool to a large extent. Nel found the origin of zoning in ancient times where certain “...noxious uses and activities caused a nuisance...”⁴⁰⁶

SPLUMA provides a definition of “land use”. Land use is defined as:⁴⁰⁷

“The purpose for which land is or may be used lawfully in terms of a land use scheme, existing scheme or in terms of any other authority and includes any conditions related to such land use purposes.”

Neither SPLUMA nor the 2021 Bill provides a definition for productive use of land. Nieuwoudt argues that the efficiency of land use is to a large extent dependant on economic incentives to make the investment, improve and conserve agricultural

⁴⁰⁰ Muller *et al Silberberg and Schoeman's the Law of Property* (2019) 667.

⁴⁰¹ Muller *et al Silberberg and Schoeman's the Law of Property* (2019) 667.

⁴⁰² Frantz “Repealing the Subdivision of Agricultural Land Act: A constitutional analysis” (unpublished LLM thesis, Stellenbosch University, 2010)

⁴⁰³ AM Honoré ‘The nature of property and the value of justice’ (1961) 61 *Columbia Law Review* 370.

⁴⁰⁴ Honoré ‘The nature of property and the value of justice’ (1961) 61 *Columbia Law Review* 370 372.

⁴⁰⁵ The Spatial Planning and Land Use Management Act 16 of 2013 (which came into operation on 1 July 2015) (hereinafter referred to as “SPLUMA”).

⁴⁰⁶ Nel ‘Spluma, Zoning and Effective Land Use Management in South Africa’ (2015) 27 *Urban Forum* 1 4.

⁴⁰⁷ S 1 of SPLUMA.

land.⁴⁰⁸ Nieuwoudt already stated in 1990 that property rights should not provide unlimited use of the land but entails conservation of the land for future use.⁴⁰⁹

Nieuwoudt is of the view that secure ownership instead of insecurities increases the production of land.⁴¹⁰ The Food and Agricultural Organization of the United Nations provides some definition for agricultural productivity.⁴¹¹ According to this definition agricultural productivity can be defined as: “Productivity is commonly defined as a ratio of a volume measure of output to a volume measure of input use”.⁴¹² The Food and Agricultural Organization of the United Nations explains this as follows: “A farm is technically inefficient when it does not produce the maximum level of output that can be expected given the type of available inputs”.⁴¹³ The question can be asked, namely if it is possible to measure the optimal productivity of agricultural land?

The Food and Agricultural Organization of the United Nations provides the following example to illustrate how production can be measured according to them namely:⁴¹⁴

“This can be illustrated by way of an example. Suppose a farmer sells grain to a feed processing mill that, in turn, sells processed feed to a livestock farmer. Most statistical systems would count the sale from the farm to the mill as a sale from agriculture (part of output) and the purchase of the feed from the mill as an intermediate input. Now consider feed grown on the farm that is used for the farmer’s own livestock. It is common and correct not to count own account feed as an output if agriculture productivity is being measured. This holds except if there is an interest to measure crop productivity or livestock productivity separately. Under that situation, it would be necessary to value gross commodity flows.”

⁴⁰⁸ Nieuwoudt ‘Efficiency of Land Use’ (1990) 29 *Agrekon* 210 210 - 215.

⁴⁰⁹ Nieuwoudt ‘Efficiency of Land Use’ (1990) 29 *Agrekon* 210 210 – 215.

⁴¹⁰ Nieuwoudt ‘Efficiency of Land Use’ (1990) 29 *Agrekon* 210 210 - 215.

⁴¹¹ Food and Agriculture Organisation of the United Nations ‘Productivity and Efficiency Measurement in Agriculture: Literature Review and Gaps Analysis’ February 2017 <https://www.fao.org/3/ca6428en/ca6428en.pdf> (accessed on 20 October 2022).

⁴¹² Food and Agriculture Organisation of the United Nations ‘Productivity and Efficiency Measurement in Agriculture: Literature Review and Gaps Analysis’ February 2017 <https://www.fao.org/3/ca6428en/ca6428en.pdf> (accessed on 20 October 2022).

⁴¹³ Food and Agriculture Organisation of the United Nations ‘Productivity and Efficiency Measurement in Agriculture: Literature Review and Gaps Analysis’ February 2017 <https://www.fao.org/3/ca6428en/ca6428en.pdf> (accessed on 20 October 2022) 18.

⁴¹⁴ Food and Agriculture Organisation of the United Nations ‘Productivity and Efficiency Measurement in Agriculture: Literature Review and Gaps Analysis’ February 2017 <https://www.fao.org/3/ca6428en/ca6428en.pdf> (accessed on 20 October 2022) 18.

The 2021 Bill in the Preamble already recognises the need for a national regulatory framework to preserve agricultural land, to promote viable farming units and to encourage “... the optimal use of agricultural land and to provide for food security.”⁴¹⁵ The 2021 Bill provides no clarity on how this goal would be achieved and no regulations have been published to cast more light on the method to be used to achieve these goals.

5. Food Security

The most used definition of food security is “Food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life”.⁴¹⁶

The right to food in South Africa is protected in the *Constitution*.⁴¹⁷ According to Statistics South Africa,⁴¹⁸ the right to food entails the availability of food to be “...available, accessible, and adequate for everyone without discrimination.” Then the Department of Agriculture, Forestry and Fisheries (hereinafter referred to as “DAFF”), and now the Department of Agriculture, Land Reform and Rural Development (hereinafter DALRRD) is responsible for developing agricultural policies and initiate support programmes to ensure that South Africans can produce their own food and reduce food insecurity.⁴¹⁹

Statistics South Africa found that:⁴²⁰

⁴¹⁵ Preamble of the 2021 Bill.

⁴¹⁶ Food and Agriculture Organisation of the United Nations: World Food Summit ‘Report of the World Food Summit’ 13 – 17 November 1996 <https://www.fao.org/3/w3548e/w3548e00.htm> (accessed on 19 October 2022).

⁴¹⁷ S 27(1) (b) of the Constitution, which states that: “everyone has the right to sufficient food and water” and S (27) (b) which states that: “the State must formulate reasonable legislative efforts and take other measures within its available resources, to achieve the progressive realisation of these rights”.

⁴¹⁸ Stats, S.A. ‘Towards Measuring the Extent of Food Security in South Africa: An examination of hunger and food inadequacy’ 2019 <http://www.statssa.gov.za/publications/03-00-14/03-00-142017.pdf> (accessed 20 July 2022) 1.

⁴¹⁹ Stats, S.A. ‘Towards Measuring the Extent of Food Security in South Africa: An examination of hunger and food inadequacy’ 2019 <http://www.statssa.gov.za/publications/03-00-14/03-00-142017.pdf> (accessed 20 July 2022) 1.

⁴²⁰ Stats, S.A. ‘Towards Measuring the Extent of Food Security in South Africa: An examination of hunger and food inadequacy’ 2019 <http://www.statssa.gov.za/publications/03-00-14/03-00-142017.pdf> (accessed 20 July 2022) 1 4.

“In South Africa between 2006 and 2015. The report indicates that more than a quarter (25,2%) of the population was living below a food poverty line (R441 per person per month in 2015 prices) in 2015 compared to almost a third (28,4%) in 2006. Between 2006 and 2009, South Africa experienced an increase in the proportion of people living below the food poverty line rising from 28,4% to 33,5%.”

According to the Food and Agricultural Organisation (“FAO”) of the United States that agricultural production in Africa needs to increase by 60% by the year 2050 to keep up with the demand for food.⁴²¹ According to the report after WWF,⁴²² *Agricultural Facts and Trends South Africa* by Dr M. Du Plessis, South Africa has a growth of 2% per annum and would have a population of 82 million by the year 2035.⁴²³ It is reported that less than 3% of the South African Agricultural Land is what can be regarded as high potential land.⁴²⁴

It has been argued that South Africa has, what can be called a dual agricultural economy which entails both well-developed commercial farming units and small scale communal farming which is specifically found in the former homeland areas.⁴²⁵ A large portion of financial resources has been devoted to land reform and in particular, in the agricultural sector as part of government’s land reform programme while South African markets and especially small scale farmers cannot compete with imports from various trade partners of South Africa, taking into consideration that imports of wheat between the years of 2006 and 2008 has increased by 263%.⁴²⁶

The South African government developed a food security legal framework which includes the objectives set out in of the *National Development Plan* of 2030 (hereinafter NDP),⁴²⁷ read in conjunction with the constitutional goals set out in section 27(1)(b) of the *Constitution*. Amongst others, the NDP seeks to identify the main elements of a

⁴²¹ Anon Date Unknown http://www.fao.org/fileadmin/templates/wsfs/docs/expert_paper/How_to_Feed_the_World_in_2050.pdf.

⁴²² Du Plessis 2008 awsassets.wwf.org.za/acts_brochure_mockup_04_b.pdf.

⁴²³ Tsendi, Nkwinti and Shabane Date Unknown www.ruraldevelopment.gov.za/phocadownload/cadastral.survey-management/booklet/landauditbooklet.pdf.

⁴²⁴ Tsendi, Nkwinti and Shabane Date Unknown www.ruraldevelopment.gov.za/phocadownload/cadastral.survey-management/booklet/landauditbooklet.pdf.

⁴²⁵ Du Plessis 2008 awsassets.wwf.org.za/acts_brochure_mockup_04_b.pdf.

⁴²⁶ Du Plessis 2008 awsassets.wwf.org.za/acts_brochure_mockup_04_b.pdf.

⁴²⁷ South African Government ‘National Development Plan of 2030’ date unknown <https://www.gov.za/issues/national-development-plan-2030> (accessed 02 February 2022).

comprehensive food security and nutrition strategy and launch a campaign for both.

As discussed above, even though the 2021 Bill seeks to deprive or limit landowners right to their property, it is argued that its recognition of the need for a national regulatory framework to preserve agricultural land, to promote viable farming units and to encourage "... the optimal use of agricultural land and to provide for food security"⁴²⁸ leads to a positive impact on the addressing food production and security in South Africa.

6. Conclusion

As a point of departure recognition is given to the Constitutional requirements as found in section 25 of the *Constitution*. Legal resources are scrutinised to consider the importance of the property concept in the post-constitutional area as section 25 provides both for the protection and the regulation of property. Section 25(5) provides for a regulatory framework to be established but a balance is to be found not to transgress what is contemplated in section 25(1).

It is important to acknowledge the existence and development of the property concept since the enactment of the *Constitution*, how the interference with property rights have been handled by the courts, the benchmark that has been set by the *FNB* methodology, and the reaffirmation of this benchmark as confirmed in further cases.

The utilisation of the *FNB* methodology has already proven to be a very capable tool to establish if any interference into the property rights of an owner amount to deprivation as described in Section 25 of the *Constitution*. The court in the *FNB* case has gone as far as stating that ownership of land "...must lie at the heart of our constitutional concept of property"⁴²⁹ and the reassurance of this benchmark as confirmed in further cases.

⁴²⁸ Preamble of the 2021 Bill.

⁴²⁹ *FNB* case (see note 77 above) para 51.

In the words of Ackermann J⁴³⁰ “...in 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”. Since the *FNB* case, any court confronted with the question to determine interference has up to now attached a somewhat wide definition to the concept of deprivation.

Section 25 allows for the regulation of property if the law constitutes a law of general application. The 2021 Bill has the goal to apply the Bill to all agricultural land, regardless of who the owner or holder of those rights are. The question pertaining to whether such a limitation amounts to an arbitrary deprivation of property, as prohibited in terms of section 25 of the *Constitution*, should be tested against the *FNB* methodology.⁴³¹

In the words of Van der Schyff⁴³² interference would be justifiable if it is for the benefit of and to enhance economic prosperity.⁴³³ As the 2021 Bill sets out the need to ensure a national regulatory framework and is entitled to limit and regulate the activities that takes place on agricultural land, it still needs to achieve the goals of Sections 25 and 27(1)(b) of the *Constitution*. The 2021 Bill can strike harmony between the Constitutional goals if the optimal use of agricultural land as a non-renewable resource can be achieved without depriving the owner of his property but to ensure productive use of the land.⁴³⁴

The *FNB* methodology requires the deprivation to strike harmony between an “appropriate relationship between means and ends”.⁴³⁵ To determine whether the state should interfere with the property rights of a holder of such rights, the Minister should, in the words of Van der Walt, focus on “...context-sensitive, flexible and open-minded” determinations.⁴³⁶ The state will exercise its constitutional obligation to

⁴³⁰ *FNB* case (see note 77 above) para 57.

⁴³¹ *FNB* case (note 77 above).

⁴³² Van der Schyff ‘Die nasionalisering van waterregte in Suid Afrika: Ontneming of onteiening?’ (2003) 6 *Potchefstroom Electronic Law Journal* 81 96.

⁴³³ South African Government ‘National Development Plan of 2030’ date unknown <https://www.gov.za/issues/national-development-plan-2030> (accessed 02 February 2022).

⁴³⁴ The Preamble of the 2021 Bill (see note 64 *supra*).

⁴³⁵ *FNB* case (note 77 above) para 98.

⁴³⁶ Van der Walt ‘Moving Towards Recognition of Constructive Expropriation’ (2002) 65 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 459 473.

regulate agricultural land and will infringe on an owner's property rights for the ever-growing need for food security. To achieve these goals without arbitrarily depriving an owner of his property rights, the regulatory framework should however make provision for the productive use of the agricultural land as an important considering factor which is submitted should be the determining factor before any deprivation takes place. This will ensure compliance with the *FNB* methodology.

In the words of the *Fidelity*-case “*It is through the limitation of possession that the act potentially qualifies or limit ownership in the public interest*”.⁴³⁷ The court ruled that the expiry of a licence to possess a firearm does not terminate the ownership of such a firearm. At this juncture, the scenario of whether an owner of agricultural land would be allowed to retain ownership without productively using its property is indeterminate.⁴³⁸

Although section 36 and section 37 respectively deals with the offences and penalties a person may encounter for non-compliance of the 2021 Bill, no remedy for expropriation or the loss of ownership is found in the 2021 Bill.⁴³⁹ In this regard it would be argued that the judgement of the *Fidelity* case has once again confirmed the recognition of property rights, the policing rights of the state to regulate ownership and non-compliance does not mean the end of ownership.

The goal of the 2021 Bill is to preserve and promote the sustainable development of agricultural land to produce food. Van der Walt described the constitutional protection as follows:⁴⁴⁰

The purpose of the property clause is to ensure that a just and equitable balance is struck between the interest of private property holders and the public interest in the control and regulation of property.

⁴³⁷ *Minister of Police and Others v Fidelity Security Services (Pty) Limited* 2022 ZACC 16 para 39.

⁴³⁸ *Minister of Police and Others v Fidelity Security Services (Pty) Limited* 2022 ZACC 16 paras 39 & 40.

⁴³⁹ S 36 & 37 of the 2021 Bill.

⁴⁴⁰ Van der Walt ‘The fragmentation of land rights’ (1992) 8 *South African Journal on Human Rights* 431.

There was speculation as to why the Subdivision of Agricultural Land Act Repeal Act⁴⁴¹ was never put in operation. In the *Wary Holdings*-case⁴⁴² the court also speculated about these reasons and draw the inference that the legislator was seeking an opportunity to put other regulatory measures in place not only on a national level but perhaps also on provincial and local level being able to handle the regulatory administration.⁴⁴³

From the reading of section 38 and the Schedule of the 2021 Bill, it is clear that the moment of truth has arrived for the SALA and the legislator has faith that the 2021 Bill together with other regulatory legislation such as SPLUMA, to name one, will answer the call to protect agricultural land and ensure food security for the people of South Africa.

Although the 2021 Bill appears to deprive a landowner of rights in the sense that certain activities are subjected to authorisation and is silent of the mystery of measuring optimal use of agricultural land, being a scarce non-renewable resource, it promotes a pro-active attempt from the state in providing, promoting, and securing national food security for present and future generations.

The means employed by the state in the 2021 Bill and the ends sought to be achieved are in harmony and pass the Constitutional muster in accordance with the *FNB* methodology.

⁴⁴¹ Subdivision of Agricultural Land Act Repeal Act 64 of 1998.

⁴⁴² *Wary Holdings (Pty) Ltd. v Stalwo (Pty) Ltd. And Others* 2008 (11) BCLR 1123 (CC) (herein referred to as the *Wary*-case (see note 61 above)).

⁴⁴³ *Wary*-case (see note 61 above) para 91.

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