THE SUBDIVISION OF AGRICULTURAL LAND ACT 70 OF 1970, OPTIONS TO PURCHASE AND RELATED MATTERS

OPSOMMING

Die Wet op Onderverdeling van Landbougrond, opsies om te koop en verbandhoudende aangeleenthede

Hierdie bydrae toon aan hoe die Wet op Onderverdeling van Landbougrond in die 45-jarige bestaan daarvan tot 'n magdom beslissings aanleiding gegee het en hoe die tersaaklike bepalings daarvan oor die jarige gewysig is om by veranderende tye en behoeftes aan te pas. In die besonder word aandag gegee aan die doel van die Wet en die onlangse beslissing in *Four Arrows* en die implikasies wat die beslissing inhou vir opsies, voorkoopsregte, skenkings en ruilkontrakte ten opsigte van die verdeling van landbougrond. Die gevolgtrekking is dat die Wet so gou moontlik geskrap moet word aangesien dit meer probleme skep as wat dit oplos. Daar word voorgestel dat die vereiste van ministeriële toestemming vir die onderverdeling van landbougrond eerder in ander wetgewing, soos die Registrasie van Aktes Wet 47 van 1937 en die Grondopmetingswet 8 van 1997, opgeneem kan word.

1 Introduction

The Subdivision of Agricultural Land Act 70 of 1970 (hereafter "the Act") came into operation on 2 January 1971. Although the Act was repealed *in toto* by the Subdivision of Agricultural Land Act Repeal Act 64 of 1998, the latter Act has never been put into operation.

In its 45 years of existence, the Act has given rise not only to a plethora of litigation but its provisions and the court decisions given in terms of it have been cited, noted, referred to, applied and distinguished in more than 40 reported cases of the High Courts (see, eg, *Van der Bijl v Louw* 1974 2 SA 493 (C*); McConnell v SA Stevedores Service Co (Holdings) (Pty) Ltd* 1976 2 SA 126 (C); *Bekker v Duvenhage* 1977 3 SA 884 (E); *Mangion v Bernhardt* 1977 3 SA 901 (W); *Kruger v Terblanche* 1978 2 SA 198 (T); *Sentraalwes Personeel Ondernemings (Edms) Bpk v Wallis* 1978 3 SA 80 (T); *Parsons v MCP Bekker Trust (Edms) Bpk* 1978 3 SA 101 (T); *Willis v Registrateur van Aktes, Bloemfontein* 1979 1 SA 718 (O); *Sentraalwes Personeel Ondernemings (Edms) Bpk v Nieuwoudt* 1979 2 SA 537 (C); *Tuckers Land & Development Corporation (Pty) Ltd v Soja*

(Pty) Ltd 1979 3 SA 477 (W); *Dreyer v Tuckers Land and Development Corporation (Pty) Ltd* 1981 1 SA 1219 (T); *Tuckers Land & Development Corporation (Pty) Ltd v Truter* 1981 4 SA 982 (SWA); *Tuckers Land And Development Corporation (Pty) Ltd v Truter* 1984 2 SA 150 (SWA); *Tuckers Land And Development Corporation (Pty) Ltd v Wasserman* 1984 2 SA 157 (T); *Smith v Tuckers Land and Development Corporation (Pty) Ltd; Tuckers Land and Development Corporation (Pty) Ltd v Smith* 1984 2 SA 166 (T); *Gien v Gien* 1984 3 SA 54 (T); *Rousseau v Stone* 1992 3 SA 355 (C); *Blaauwberg Municipality v Bekker* [1998] 1 All SA 88 (LCC); *Joubert v Van Rensburg* 2001 1 SA 753 (W); *Thanolda Estates (Pty) Ltd v Bouleigh 145 (Pty) Ltd* 2001 3 SA 196 (W); *Mooikloof Estates (Edms) Bpk v Premier, Gauteng* 2000 3 SA 463 (T); *Theron v Master of the High Court* [2001] 3 All SA 507 (NC); *Hamilton-Browning v Denis Barker Trust* 2001 4 SA 1131 (N); *Kotzé v Minister van Landbou* 2003 1 SA 445 (T); *Moll v Nedcor Bank Ltd* [2004] 2 All SA 451 (T); *Torgos (Pty) Ltd v Body Corporate of Anchors Aweigh* 2006 3 SA 369 (W); *Pesic v Wetdan W 38 CC* 2006 5 SA 445 (W); *Ploughmann v Pauw* 2006 6 SA 334 (C); *Naudé v Terblanche* 2008 4 SA 178 (C); *Prefix Properties (Pty) Ltd v Golden Empire Trading 49 CC* 2011 2 SA 334 (KZP); and *Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs and Development Planning* 2012 3 SA 441 (WCC)), the former Appellate Division and the present Supreme Court of Appeal (see, eg, *Neugarten v Standard Bank of South Africa Ltd* 1989 1 SA 797 (A); *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* 1993 1 SA 768 (A); *Cussons v Kroon* 2001 4 SA 833 (SCA); *Geue v Van der Lith* 2004 3 SA 333 (SCA); *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* 2008 1 SA 654 (SCA); *Majomatic 115 (Pty) Ltd v Kouga Municipality* [2010] 3 All SA 415 (SCA); *Diggers Development (Pty) Ltd v City of Matlosana* [2012] 1 All SA 428 (SCA); *Adlem v Arlow* 2013 3 SA 1 (SCA); and *Four Arrows Investments 68 (Pty) Ltd v Abigail Construction CC* 2016 1 SA 306 (SCA)) and even the Constitutional Court (see, eg, *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC); and *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC)).

2 Amendments, current provisions and purposes of the Act

Perhaps the most important provision for purposes of this note is section 3 which, after several amendments, at present reads as follows:

> **"3 Prohibition of certain actions regarding agricultural land**
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> Subject to the provisions of section 2 –
>
> (a) agricultural land shall not be subdivided;
>
> (b) no undivided share in agricultural land not already held by any person, shall vest in any person;
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> (c) no part of any undivided share in agricultural land shall vest in any person, if such part is not already held by any person;
>
> (d) no lease in respect of a portion of agricultural land of which the period is 10 years or longer, or is the natural life of the lessee or any other person mentioned in the lease, or which is renewable from time to time at the will of the lessee, either by the continuation of the original lease or by entering into a new lease, indefinitely or for periods which together with the first period of the lease amount in all to not less than 10 years, shall be entered into;
>
> (e) (i) no portion of agricultural land, whether surveyed or not, and whether there is any building thereon or not, shall be sold or advertised for sale, except for the purposes of a mine as defined in section 1 of the Mines and Works Act, 1956; and

(ii) no right to such portion shall be sold or granted for a period of more than 10 years or for the natural life of any person or to the same per son for periods aggregating more than 10 years, or advertised for sale or with a view to any such granting, except for the purposes of a mine as defined in section 1 of the Mines and Works Act, 1956;

(f) no area of jurisdiction, local area, development area, peri-urban area or other area referred to in paragraph (a) or (b) of the definition of 'agricultural land' in section 1, shall be established on, or enlarged so as to include, any land which is agricultural land;

(g) no public notice to the effect that a scheme relating to agricultural land or any portion thereof has been prepared or submitted under the ordinance in question, shall be given,

unless the Minister has consented in writing."

Commenting on section 3 in its original form, Baker J in *Van der Bijl v Louw* 1974 2 SA 493 (C) 499 explained the purposes of the Act as follows:

> "The purpose of the Act is manifest: its object is to prevent the sub-division of economic units of farming land into non-viable (uneconomic) subunits or smaller units . . . and for this reason Parliament has very wisely put a stop to unrestricted fragmentation of arable land. The Act, in the interests of national welfare, effects a drastic curtailment of previous common-law rights of land-owners in a certain category to carve their properties into units as small as they choose, and is indisputably one of the wisest pieces of legislation on the statute book."

It is important to note that before its amendment in 1972, section 3 only consisted of subsections (a), (b) and (c). As explained by Kirk-Cohen in *Smith v Tuckers Land and Development Corporation (Pty) Ltd; Tuckers Land and Development Corporation (Pty) Ltd v Smith* 1984 2 SA 166 (T) 172–173, this meant that non-compliance with section 3 had no impact on the validity of the underlying or obligatory agreement (sale) concluded without ministerial consent. The subdivision itself was prohibited, that is to say, the actual vesting and transfer of the real right to the land in question was prohibited, which could only take place by registration in the Deeds Office.

After the insertion of sections 3(d) and (e), the underlying or obligatory agreement for the sale of undivided agricultural land came squarely in the cross-fire, as was explained by McEwan J in *Tuckers Land and Development Corporation (Pty) Ltd v Wasserman* 1984 2 SA 157 (T) 162. In his interpretation and approval of *Smith* 1984 2 SA 166 (T), Erasmus J in *Naudé v Terblanche* 2008 4 SA 178 (C) para 15 therefore held that contracts entered into before the amendment were valid but not those entered into after the amendment:

> "[D]ie toestemming van die Minister was 'n voorvereiste vir die oordrag of vestiging van die betrokke reg, maar nie vir die ontstaan van die verbintenisskeppende ooreenkoms wat 'n persoon geregtig maak op die oordrag of verkryging van die reg nie. Die kontrak wat gesluit is vóór die wysiging van art 3 was dus nie strydig met die Wet nie. Wat die tweede koopkontrak betref, wat na die wysiging van art 3 gesluit is, word daar . . . met steun op die beslissing in *Tuckers Land and Development Corporation (Pty) Ltd v Wasserman* . . . bevind dat die kontrak strydig met die Wet en derhalwe nietig is."*

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* "The approval of the Minister was a prerequisite for the transfer or vesting of the right in question, but not for the coming into being of the obligatory agreement which entitled someone to the transfer or acquiring of the right. The contract concluded before the amendment of section 3, therefore, was not in conflict with the Act. As regards the second

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In *Geue v Van der Lith* 2004 3 SA 333 (SCA) (which is regarded as the *locus classicus* on section 3(e)(i) – see the remarks by Bam J in the unreported case of *Four Arrows Investment 68 (Pty) Ltd v Abigail Construction CC* 2014 JDR 0682 (GNP) para 11), Brand JA explained as follows:

> "The purpose of the Act is not only to prevent alienation of undivided portions of land. The target zone of the Act is much wider. This is clear, for example, from s 3(e)(i) which also prohibits *advertisements* for sale. Since advertisements obviously precede the actual sale or alienation of an undivided portion, it is by no means absurd to infer that the Legislature intended to prohibit any sale of an undivided portion of farmland, whether conditional or not, unless and until the subdivision has actually been approved by the Minister . . . I find the inference quite plausible that the Legislature did not want undivided portions of agricultural land to be sold and occupied by the purchaser for an indefinite period of time pending the consent of the Minister, which may then not even be sought. Another inference which comes to mind is that the Legislature wanted to protect unwary or unsuspecting purchasers from binding themselves into onerous agreements, subject to an event of uncertainty that may remain unresolved for an extended period of time."

In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC) para 13 Kroon AJ summarised the case law on this point as follows:

> "The essential purpose of the . . . Act has been identified as a measure by which the legislature, in the national interest, sought to prevent the fragmentation of agricultural land into small uneconomic units. In order to achieve this purpose, the legislature curtailed the common law right of landowners to subdivide their agricultural property. It imposed the requirement of the Minister's written consent as a prerequisite for subdivision, quite evidently to permit the Minister to decline any proposed subdivision which would have the unwanted result of uneconomic fragmentation."

In *Adlem v Arlow* 2013 3 SA 1 (SCA) para 9 Cloete JA said that he would add "and furthermore to prevent encroachment on the use of agricultural land so as to threaten its viability as such".

In view of the above and for the sake of clarity it should be noted that Act 18 of 1981 extended the meaning of "sale" to include a sale subject to a suspensive condition. (This is also important for the discussion in section 3 below. Revisiting the so-called *Corondimas* principle and the controversy surrounding the question whether a sale subject to a suspensive condition actually is a sale is beyond the scope of this note. See, eg, the discussion of this topic by Brand JA in *Geue* paras 7–8; *Diggers Development (Pty) Ltd v City of Matlosana* [2012] 1 All SA 428 (SCA); Lötz and Nagel "The *Corondimas* principle is still alive and well. *Diggers Development (Pty) Ltd v City of Matlosana* Case No 824/2010 [2011] ZASCA 247" 2012 *THRHR* 681; and *Paradyskloof Golf Estate v Stellenbosch Municipality; Paradyskloof Golf Estate (Pty) Ltd v Stellenbosch Municipality* 2011 2 SA 525 (SCA).)

Suffice it to say that, after *Geue*, it was clear that parties could not make their contract of sale of an undivided portion of agricultural land without prior ministerial approval, subject to the very same suspensive condition, namely,

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contract of sale, which was concluded after the amendment of section 3, it was held . . . relying on the decision in *Tuckers Land and Development Corporation (Pty) Ltd v Wasserman* . . . that the contract was in conflict with the Act and therefore was invalid" (own translation).

obtaining the Minister's consent. The contract was void *ab initio*. In their discussion of *Geue*, Lötz and Nagel 2004 *THRHR* 702 submitted that the prohibition in section 3(e)(i) was against the relevant land being "sold or advertised for sale" and that nothing prevented parties from circumventing the provisions of the Act by, for example, entering into a contract of exchange or of alienating the property by means of an option, donation or pre-emptive right (708). However, as is shown below, the Supreme Court of Appeal held a different view regarding an option in *Four Arrows Investments 68 (Pty) Ltd v Abigail Construction CC* 2016 1 SA 306 (SCA).

3 *Four Arrows Investment 68 (Pty) Ltd v Abigail Construction*

3 1 General

For a proper understanding of the judgment of the Supreme Court of Appeal in this matter, it is necessary to have a close look at the judgment of Bam J in the court *a quo*. For example, as is pointed out in section 3 3 below, the question regarding the validity of an option for the sale of a portion of agricultural land without ministerial consent was not raised in the court *a quo*.

3 2 Four Arrows *a quo*

The main dispute in the court *a quo* (see 2014 JDR 0682 (GNP)) turned upon an agreement between Four Arrows ("F") and Abigail Construction ("A") regarding certain immovable property registered in A's name. A had purchased the property, Portion 175 of the farm Tweefontein, in extent 21ha, for a purchase price of R8 094M. On 1 March 2011 the parties entered into the agreement, which, *inter alia*, provided that F would assist A in financing the purchase price and that the property would be registered A's name. The agreement further provided that A and F intended to have 10.9ha of Portion 175 subdivided, which subdivided portion A then sold to F. Leave to subdivide the property was subsequently granted by the Minister of Land Use and Soil Management. F also did assist A in financing the purchase price.

Later on, F, relying on the terms of the above agreement, applied for an order entitling it to take transfer of the property against payment in the amount of R3 585 972.43 to A. A opposed the application and in its counterclaim applied for an order declaring the agreement null and void, and that the mortgage bond registered over the property be cancelled against payment in the amount R4 047 000.00.

F's case was founded on the provisions of clause 2.5 of the agreement which provided as follows:

> "Should the sale agreement between the Seller [A] and the liquidator in respect of Portion 175 stand to be terminated or not to proceed for any reason pertaining to the inability on the part of the Seller to comply with the Seller's payment obligations towards the liquidator, then the Purchaser [F] shall have the right to . . . 2.5.2 advance to the Seller all amounts payable by the Seller to the Liquidator in order that registration of transfer of Portion 175 may be passed into the name of the Seller and to simultaneously register transfer of Portion 175 from the name of the Seller into the name of the purchaser; in which event this Agreement *mutatis mutandis* shall constitute the required deed of alienation between the Seller of the purchaser for this purpose."

F contended that it had to advance an amount of R495 369 69 to A in order to enable it to pay the liquidators the required deposit. F submitted that this payment

entitled it to rely on the provisions of clause 2.5.2 to claim transfer of the property into its name. A argued that F was not entitled to rely on clause 2.5.2 as the sale in fact proceeded. Bam J agreed with A and pointed out that, although A may have experienced problems with the full payment to the liquidators, and therefore needed F's financial assistance, the sale was indeed proceeded with and eventually concluded. The property was then registered in A's name. Bam J remarked:

> "[F] was clearly satisfied with the developments. Only after expiration of a further approximately 2 years, [F] decided to rely upon the provisions of clause 5.2. Accordingly I am of the opinion that [F's] belated reliance on clause 5.2 is without merit" (para 8).

However, as Bam J pointed out (para 9), the main dispute between the parties turned upon the validity of their agreement. A contended that the agreement was null and void *ab initio* because of the provisions of section 3(e)(i) of the Subdivision of Agricultural Land Act (quoted in full above), namely, that "no portion of agricultural land, whether surveyed or not, and whether there is any building thereon or not, shall be sold or advertised for sale . . . unless the Minister has consented in writing".

In what can only be described as a terrible misconception, F contended that the agreement was subject to a suspensive condition and therefore *not* prohibited (my emphasis), alternatively, that the clauses not dealing with the subdivision of land should be separated from the offending clauses and held to be valid, binding and enforceable (para 10).

Bam J correctly referred (para 11) to *Geue v Van der Lith* 2004 3 SA 335 (SCA) (which he considered to be the *locus classicus* on the issue) in which Brand J pointed out that the amended definition of a sale includes a sale subject to a suspensive condition (also referred to in section 2 above). Following *Geue*, Bam J held that the whole of the agreement between A and F was void *ab initio* (para 11). He held that the clauses of the agreement could not be separated and that F could not rely on any clause thereof (para 12). F's application therefore did not succeed while A's counterclaim was granted (para 15). F appealed against this decision.

3 3 Four Arrows *appeal*

On appeal (see 2016 1 SA 306 (SCA)), the central issue as defined by Swain JA (para 1) was whether the contract between F and A conferred upon F an option to purchase a portion of an undivided immovable property, or whether it was a contract of sale of the property subject to a suspensive condition. F submitted (para 2) that an option for the sale of a portion of agricultural land does not fall within the prohibition contained in section 3(e)(i) of the Subdivision of Agricultural Land Act quoted above, namely, that "no portion of agricultural land . . . shall be sold or advertised for sale . . . unless the Minister has consented in writing". As pointed out by Swain JA (*ibid*), the definition of "sale" in section 1 of the Act includes a sale subject to a suspensive condition.

According to Swain JA (para 2), "[F] unsuccessfully relied upon this submission in seeking an order before the Gauteng Division of the High Court, Pretoria, compelling [A] to pass transfer of the whole property to it". However, this submission is nowhere to be found in the reported judgment of Bam J in the court *a quo*. Also, Swain JA said (*ibid*) that "[t]ransfer was sought in reliance upon additional terms in the contract, which made provision for this eventuality

in the event of the sale agreement between Abigail and the liquidators of an insolvent company, from whom the property was to be acquired, not proceeding, *or the consent of the Minister of Agriculture (the Minister) to the subdivision of the property not being obtained*". The italicised part of this sentence is nowhere stated in these terms by Bam J in the court *a quo*, at least not in the version of his judgment that was available to me.

With apparent approval, Swain JA stated (para 3) that in "[t]he court *a quo* (Bam J) held that the contract constituted a sale subject to a suspensive condition, *being the approval of the Minister*" (my emphasis). This was also not stated in so many words by Bam J. Again with apparent approval, Swain JA mentioned that Bam J, relying on *Geue*, declared the contract void. However, it appears from his remarks regarding the terminology used by the parties in their contract (see paras 4–5) that Swain JA agreed that "a sale of the property subject to a suspensive condition was intended by the parties" (para 4).

As regards the granting of an option to purchase, Swain JA quoted clause 2.7.1 of the contract between F and A which apparently granted an option to F and found it "incomprehensible" (para 7). The clause provided as follows:

> "[T]his Agreement shall be deemed to be an option to purchase the Property granted by [A] to [F] at the price and upon and subject to the terms and conditions hereof which option shall be exercisable by [F] at any time after [F] and [A] succeeds (*sic*) in obtaining the required consent to the subdivision of the Property from Portion 175."

Bearing in mind the legal nature of an option as conferring upon the option holder a choice whether to enter into the main contract or not, it was clear to Swain JA that the contract made no provision for the repayment by A of the purchase price paid in advance, in the event of F choosing not to exercise the "option" (para 8). The judge held (*ibid*) that the parties did not cater for this eventuality because they clearly envisaged the sale proceeding without any election to purchase the property by F once the consent of the Minister was obtained. "The absence of this essential element precludes the creation of an option by the parties. The fact that the parties recorded that the agreement 'shall be deemed to be an option to purchase the property' matters not" (*ibid*). Referring to *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC* 2014 4 SA 319 (SCA) para 23ff, Swain JA said that substance rather than form has to be considered to ascertain the true nature of the transaction. Finally agreeing with the court *a quo*, he held that the true nature of the transaction was that of a sale subject to a suspensive condition, which is prohibited by the Act (*ibid*).

However, Swain JA did not leave the matter there and proceeded to state that, even if a valid option to purchase had been conferred upon F, the result would have been the same (para 9). Having quoted the above passage from *Geue* (see section 2 above) in which Brand JA mentioned that section 3(e)(i) also prohibits *advertisements* for sale, Swain JA held as follows (para 10):

> "That the Legislature has prohibited the advertisement of a portion of agricultural land for sale in the absence of Ministerial consent, clearly indicates that the object of the legislation was not only to prohibit concluded sale agreements, but also preliminary steps which may be a precursor to the conclusion of a prohibited agreement of sale. In this context the grant of an option would clearly be a precursor to the conclusion of a prohibited agreement of sale, at the election of the option holder."

The judge referred to a *dictum* by Lewis JA in *Du Plessis v Goldco Motor & Cycle Supplies (Pty) Ltd* 2009 6 SA 617 (SCA) para 15 that "[t]he essence of an option is that it is binding on the option grantor. It is an offer, in this case to sell property, which cannot be revoked. It is the option holder that has the choice whether to exercise its right" and stated that it becomes clear that an option falls within the ambit of the prohibition in the Act if its true nature is considered (para 11). He explained as follows (*ibid*):

> "In the present context the option grantor purports to be bound to sell a portion of agricultural land without Ministerial consent, on the election of the option holder, contrary to the provisions of the Act. The fact that the option may provide, as in the present case, that the option holder may only exercise the option after the consent of the Minister has been obtained, matters not. In the interim, the option grantor purports to be bound to sell a portion of agricultural land without Ministerial consent, which remains contrary to the provisions of the Act."

In the end, the judge was not convinced by F's arguments regarding severability and held that the "offending clause consequently results in the entire contract being null and void" (para 12). The appeal was dismissed.

4 Commentary

Several aspects of the Supreme Court of Appeal's decision in *Four Arrows* need further examination and explanation. For example, the contract in question apparently fell squarely within the prohibition in section 3(e)(i) as being subject to a suspensive condition. It therefore could not escape being void as explained in *Geue* and subsequent cases. Was it really necessary to involve the whole question as regards options and their nature and effect when it had already been decided that the clause in question did not constitute a valid option?

4 1 Advertise for sale

The relevant part of section 3(e)(i) reads "shall be sold or advertised for sale". According to section 1 of the Act, "advertise" means to distribute to members of the public or bring to their notice in any other manner any written, illustrated, visual or other descriptive material or oral statement, communication, representation or reference.

It seems strange that Swain JA did not refer to this definition at all. He simply decided, without any reference to authority, that "advertise" was aimed at all preliminary steps, including an option, taken as a precursor towards concluding a prohibited contract. In view of the clear definition in the Act itself it is difficult to understand the meaning that Swain JA attached to the concept "advertise". Viewed from a different angle: If one were to ask "What new knowledge did the decision in *Four Arrows* add to the law on this point?", could one, without being artificial or laboured, really and convincingly answer: "That an option to sell immovable property is an advertisement to sell"?

4 2 Legal nature of an option

As pointed out towards the end of section 3 above, Swain JA referred to only one source of authority regarding the legal nature of an option, namely, a *dictum* by Lewis JA in *Du Plessis v Goldco Motor & Cycle Supplies (Pty) Ltd* 2009 6 SA 617 (SCA) para 15 which is to the effect that an option is "an offer, in this case to sell property, which cannot be revoked".

Broadly speaking, this statement is correct, although not very exact. Lewis JA referred in a footnote to Christie *The law of contract in South Africa* (2006) 54 who offers a better and correct explanation:

> "To understand the true nature of an option it is best to analyse it into two parts – an offer to enter into the main contract together with a concluded subsidiary contract (the contract of option) binding the offeror to keep that offer open for a certain period. On this analysis it is easy to see that the offeror is contractually bound to keep his offer open, and if he breaks this contract of option by disabling himself from performing it or by expressly or impliedly repudiating it he will be liable for damages for breach of contract."

(See now Christie and Bradfield *The law of contract in South Africa* (2011) 57; see also Van Rensburg *et al* "Contract" in 5(1) *LAWSA* (2010) para 377; Van der Merwe *et al Contract general principles* (2012) 67; Hutchison and Pretorius (eds) *The law of contract in South Africa* (2012) 66; and Prozesky-Kuschke "Consensus" in Nagel (ed) *Commercial law* (2015) para 4.63 who offer more correct and comprehensive explanations of the legal nature of an option than does Swain JA. See also *Boyd v Nel* 1922 AD 414; *Hersch v Nel* 1948 3 SA 686 (A); *Brandt v Spies* 1960 4 SA 14 (E); *Venter v Birchholtz* 1972 1 SA 276 (A); *Dettmann v Goldfain* 1975 3 SA 385 (A) 394; and *Hirschowitz v Moolman* 1985 3 SA 739 (A).)

Whichever of the above explanations of the nature of an option one prefers, it is clear and goes without saying that an option to sell in itself is not a contract of sale. Was it not for the forced interpretation of "advertise" by Swain JA in *Four Arrows*, options would never have been subject to the prohibition in section 3(e)(i). Once again, the correctness of Swain JA's reasoning immediately comes to the fore.

4 3 Rights of pre-emption

The difference between an option and a right of pre-emption was succinctly stated by Ogilvie Thompson JA in *Owsianick v African Consolidated Theatres (Pty) Ltd* [1967] 3 All SA 337 (A) 340:

> "A right of pre-emption is well known in our law . . . and it is to be distinguished from an option to purchase. Upon exercise of the latter by the holder of the option, the granter of the option is obliged to sell. The granter of a right of pre-emption cannot be compelled to sell the subject of the right. Should he, however, decide to do so, he is obliged, before executing his decision to sell, to offer the property to the grantee of the right of pre-emption upon the terms reflected in the contract creating that right."

In *Soteriou v Retco Poyntons (Pty) Ltd* [1985] 2 All SA 208 (A) 211 Nicholas JA added:

> "So, a right of pre-emption involves a negative contract not to sell the property to a third person without giving the grantee the first refusal; and the grantee has the correlative legal right against the grantor that he should not sell. This is a right which is enforceable by appropriate remedies. In the case of an option, the grantor has made an offer which the grantee can accept without more, upon which a contract of sale is complete. In the case of a right of pre-emption, there is no offer at the time of the grant, and the grantor is not obliged to make an offer unless and until he wishes to sell the property."

It is clear from the above that the creation of a right of pre-emption is far from entering into a sale itself. (See also *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 3 SA 893 (A); *Hirschowitz v*

Moolman 1985 3 SA 739 (A); and *Krauze v Van Wyk* 1986 1 SA 158 (A).) However, applying Swain JA's reasoning in *Four Arrows* regarding "advertise for sale" above would most certainly also ring the death knell for pre-emptive rights in the present context as they would certainly be regarded as "preliminary steps" towards entering into a forbidden contract of sale.

4 4 Contracts of exchange and donations

It goes without saying that contracts of exchange and donations in respect of undivided portions of agricultural land are not – and will not – culminate in sales of such land, with or without ministerial approval. These contracts, therefore, escape invalidity pursuant to section 3(e)(i) of the Act, even if one were to agree with Swain JA's interpretation of "advertise for sale". However, as is indicated below, the deeds registration process eventually will take its toll also on these contracts as far as undivided portions of agricultural land are concerned.

5 Registration of deeds and ministerial consent

In this regard section 6(1) of the Act provides as follows:

> "Subject to the provisions of section 2 a Surveyor-General shall only approve a general plan or diagram relating to a subdivision of agricultural land, and a Registrar of Deeds shall only register the vesting of an undivided share in agricultural land referred to in section 3(b), or a part of any such share referred to in section 3(c), or a lease referred to in section 3(d) or, if applicable, a right referred to in section 3(e) in respect of a portion of agricultural land, if the written consent of the Minister in terms of this Act has been submitted to him."

This catch-all provision regarding ministerial consent will apply in all instances where the transfer and vesting of a share in the land in question are sought, regardless of the legal nature of the underlying transaction or other juristic act. Therefore, whether the latter is a sale, option, pre-emptive right, donation or barter, in the words of Swain JA "matters not". In the end, the requirement of ministerial consent in terms of the Act remains the same.

In addition, it is extremely unlikely that the Surveyor-General, in terms of section 20 of the Land Survey Act 8 of 1997 will approve a subdivision diagram of agricultural land without ministerial consent to the subdivision. Section 20(1) provides, *inter alia*, that

> "[w]henever the owner of a surveyed piece of land desires to subdivide that land and to effect separate registration of one or more portions of the land in a deeds registry, each of the portions to be so registered shall be surveyed and a diagram thereof shall be submitted for examination to the Surveyor-General, who shall approve every such diagram if it has been prepared in accordance with this Act".

6 Conclusion

The *Four Arrows* saga and its consequences outlined above indicate that the Subdivision of Agricultural Land Act is causing more problems than it is solving. The Act should be repealed as soon as possible. It is a failure as a consumer protective measure, which it was never intended to be, as is clear from the lengthy quotations in section 2 above. In this regard, McEwan J in *Tuckers Land and Development Corporation (Pty) Ltd v Wasserman* 1984 2 SA 157 (T) 162D correctly remarked that "the protection of 'unsuspecting' purchasers, if it was one of the purposes of the Legislature at all, was very much a secondary purpose".

The requirement of ministerial consent for the vesting and transfer of title in and to a divided portion of agricultural land could easily be incorporated into the relevant sections of the Deeds Registries Act 47 of 1937 and the Land Survey Act 8 of 1997.

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