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Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & Another (Trustees of the Hoogekraal Highlands Trust & SAFAMCO Enterprises (Pty) Ltd (amicus curiae); Minister of Agriculture & Land Affairs (intervening)) [2008] JOL 22099 (CC)

Summary

In terms of the *Subdivision of Agricultural Land Act* 70 of 1970, the (national) Minister of Agriculture, Forestry and Fisheries has to authorise, in writing, every application for the subdivision of agricultural land. The following proviso was added to the definition of 'agricultural land' in the *Act* in 1995: "Provided that land situated in the area of jurisdiction of a transitional council as defined in section 1 of the Local Government Transition Act, 1993 (Act No. 209 of 1993), which immediately prior to the first election of the members of such transitional council was classified as agricultural land, shall remain classified as such." The question that arose in this case was whether the proviso only existed during the lifetime of transitional councils. An affirmative answer to the above question would result in the *de facto* and *de jure* implicit termination (and disappearance) of agricultural land as a category in South African law and, consequently, of the Minister's power to approve any subdivision of agricultural land. A negative answer would imply that agricultural land remains as a category, that the provisions of SALA need to be complied with, and that the Minister's written approval needs to be obtained for each and every application for subdivision of agricultural land. This article contends that the Constitutional Court was correct in finding that the proviso (and the *Act*) is still applicable today.

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Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & Another (Trustees of the Hoogekraal Highlands Trust & SAFAMCO Enterprises (Pty) Ltd (amicus curiae); Minister of Agriculture & Land Affairs (intervening)) [2008] JOL 22099 (CC)

Ingevolge die *Wet op die Onderverdeling van Landbougrond* 70 van 1970 moet die (nasionale) Minister van Landbou, Bosbou en Visserye alle aansoeke vir die onderverdeling van landbougrond skriftelik goedkeur. Die volgende voorbehoudsbepaling is tot die definisie van "landbougrond" in die *Wet* in 1995 gevoeg: "Met dien verstande dat grond geleë in die regsgebied van 'n oorgangsraad soos omskryf in artikel 1 van die Oorgangswet op Plaaslike Regering, 1993 (*Wet* 209 van 1993), wat onmiddellik voor die eerste verkiesing van die lede van so 'n oorgangsraad as landbougrond geklassifiseer was, as sodanig geklassifiseer bly". Die vraag wat in hierdie saak beslis moes word, is of die voorbehoudsbepaling slegs tydens die bestaan van die oorgangsrade gegeld het. 'n Bevestigende antwoord sou die *de facto* en *de jure* geïmpliseerde beëindiging (en verdwyning) van landbougrond as 'n kategorie in die Suid-Afrikaanse reg en, gevolglik, van die Minister se mag om die onderverdeling daarvan goed te keur, tot gevolg hê. 'n Negatiewe antwoord sou impliseer dat landbougrond as 'n kategorie bly voortbestaan, dat daar aan die bepalings van die *Wet* voldoen moet word, en dat die Minister se skriftelike toestemming steeds vereis word vir elke aansoek vir die onderverdeling van landbougrond. Hierdie artikel doen aan die hand dat die Konstitusionele Hof die korrekte beslissing gemaak het deur te bevind dat die voorbehoudsbepaling (en die *Wet*) steeds vandag van toepassing is.

1. Introduction

In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & Another (Trustees of the Hoogekraal Highlands Trust & SAFAMCO Enterprises (Pty) Ltd (amicus curiae); Minister of Agriculture & Land Affairs (intervening))*¹ the Constitutional Court² for the first time had to pronounce on the interaction between the *Subdivision of Agricultural Land Act (SALA)*³ and the constitutional development of local government structures within South Africa.⁴

The majority decision, handed down by Kroon AJ and supported by six other judges, is to the effect that the 1996 constitutional order (as provided for in the *Constitution of the Republic of South Africa*, 1996),⁵ the final phase of democratically elected wall-to-wall local government and the enactment of the suite of national local government legislation, did not do away with the category of 'agricultural land', did not repeal any of the provisions of SALA and, consequently, that SALA had to be complied with, also by local government. The minority judgment, handed down by Yacoob J,⁶ took an opposite view, finding that the requirement of ministerial consent for the subdivision of agricultural land ceased to exist with the introduction of the final phase of local government as provided for in the 1996 Constitution.

1 [2008] JOL 22099 (CC), hereinafter referred to as 'the judgment'.

2 Hereinafter referred to as 'CC'.

3 Act 70/1970, hereinafter referred to as 'SALA'.

4 Paragraph 53 of the judgment.

5 Hereinafter referred to as 'the 1996 Constitution'.

6 Supported by two other CC judges.

As it is trite law that a majority decision of the CC can only be amended or overturned by legislation enacted by a competent legislative authority or another majority decision of the CC, this case note focuses primarily on the reasoning of the majority decision. Consequently, the minority decision is only briefly referred to in order to provide a summary of the reasoning of the minority (which reasoning was rejected by the majority). This is followed by a brief comparison between the two judgments. The present authors are of the opinion that the majority decision is the correct decision as it is in their view sound in law, taking into account, among other things, the background to SALA, the history, content and manner of its assignment in terms of the (interim) *Constitution of the Republic of South Africa, 1993*,⁷ the circumstances surrounding the enactment of the *Subdivision of Agricultural Land Act Repeal Act*⁸ (and the fact that its commencement date has not yet been determined), and the 1993 and 1996 Constitutional arrangements regarding the continuation of old-order legislation and state practice regarding the application of SALA (by the Department of Agriculture, Forestry and Fisheries and the Deeds Office).

In terms of SALA, the (national) Minister responsible for Agriculture, Forestry and Fisheries has to authorise, in writing, every application for the subdivision of agricultural land. The long title states that the aim of SALA is “to control the subdivision and, in connection therewith, the use of agricultural land”.

The definition of ‘agricultural land’ in section 1 of SALA reads as follows:

‘agricultural land’ means any land, except –

(a) land situated in the area of jurisdiction of a municipal council, city council, town council, village council, village management board, village management council, local board, health board or health committee ... but excluding any such land declared by the Minister after consultation with the executive committee concerned and by notice in the Gazette to be agricultural land for the purposes of this Act;

...

(f) land which the Minister after consultation with the executive committee concerned and by notice in the Gazette excludes from the provisions of this Act;

*Provided that land situated in the area of jurisdiction of a transitional council as defined in section 1 of the Local Government Transition Act, 1993 (Act No. 209 of 1993), which immediately prior to the first election of the members of such transitional council was classified as agricultural land, shall remain classified as such.*⁹

7 Act 200/1993, hereinafter referred to as ‘the 1993 Constitution’.

8 Act 64/1998, hereinafter referred to as ‘the *Repeal Act*’.

9 Our emphasis. This proviso was added by Proclamation R100 in *Government Gazette* 16785 of 31 October 1995 (hereinafter referred to as ‘PR100’), issued by the President in terms of section 235(9) of the 1993 Constitution. According to the 2007 Department of Agriculture National Policy on the Preservation of Agricultural Land, there are three types of agricultural land, namely (a) Agricultural Land (“Any land which is or may be used for agricultural purposes excluding land which the Minister, after consultation with Ministers responsible for Land Affairs, Water Affairs,

The question that arose in this case was whether the proviso inserted by PR100¹⁰ only existed during the lifetime of transitional councils (which were the local government structures during the interim phase of the transformation of local government). On 5 December 2000 this phase was replaced by the final phase (i.e. the phase of fully democratically elected wall-to-wall municipalities). An affirmative answer to the above question would result in the *de facto* and *de jure* implicit termination (and disappearance) of agricultural land as a category in South African law and, consequently, of the Minister's power to approve any subdivision of agricultural land. A negative answer (i.e. that the 1995 proviso remains in force during this current, final phase of local government) would imply that (a) agricultural land remains as a category, (b) the provisions of *SALA* need to be complied with, and (c) the Minister's written approval needs to be obtained for each and every application for subdivision of agricultural land.

The facts of the case, its history, the majority judgment and the minority judgment are discussed, followed by a brief evaluation of the two contrasting judgments. The authors conclude by setting out the current legal position with regard to the continued existence of old-order legislation, the three spheres of government, the assignment of old-order legislation (with the concomitant transfer of the administration thereof), as well as the manner in which legislation can be repealed. Finally, a recommendation is made with regard to the identification of all existing land use conversions that have taken place contrary to the provisions of *SALA* (taking into account the majority judgment) and the regularisation thereof.

Minerals & Energy, Housing, and Environmental Affairs and the MECs concerned, has excluded by notice in the Gazette from the provisions of an appropriate Act"), (b) Unique Agricultural Land ("Land that is or can be used for producing specific high value crops. It is not usually high potential but important to agriculture due to a specific combination of location, climate or soil properties that make it highly suited for a specific crop when managed with specific farming or conservation methods. This includes land of high local importance where it is useful and environmentally sound to encourage continued agricultural production, even if some or most of the land is of mediocre quality for agriculture and is not used for particularly high value crops"), and (c) High Potential Agricultural Land ("The best land available for, suited to and capable of consistently producing optimum yields of a wide range of agricultural products (food, feed, forage, fibre and oilseed), with minimum damage to the environment"). Agricultural land is classified as such, notwithstanding the use of the land concerned (in addition, the specific land use is not necessarily an indication of the classification of the land ([i.e. whether the land is used for agricultural or farming purposes]) (see 3.3.8 and 4.5). Agricultural land is in most (but not in all) instances also farmland.

10 Hereinafter referred to as 'the 1995 provision'.

2. Facts

This case concerns the meaning and scope of the 1995 proviso to the definition of 'agricultural land' in *SALA*, which provides that land within a transitional council's area of jurisdiction that was classified as 'agricultural land' immediately prior to the first election of the members of the transitional council would retain such classification.

The applicant entered into a contract with the first respondent in 2004 in terms of which it agreed to sell land situated within the Nelson Mandela Metropolitan Municipality to the first respondent. Because the Minister of Agriculture had not consented to the sale of the land as required by section 3 of *SALA*, the applicant adopted the view that the contract was invalid as the land was zoned and classified as 'agricultural land' by virtue of the 1995 proviso. The validity of the contract was therefore at issue.¹¹

The case history is as follows. The High Court was approached by the first respondent for a declaratory order that the agreement was binding. The applicant's defence was founded on two bases: (a) the alleged non-compliance with the provisions of section 2(1) of the *Alienation of Land Act*,¹² and (b) the alleged non-compliance with the provisions of section 3 of *SALA*. Only the second basis was considered by the High Court. The High Court upheld the second defence, and dismissed the first respondent's application. It held that the land was 'agricultural land' and, because the Minister had not consented, the agreement was invalid and unenforceable. The first respondent then appealed to the Supreme Court of Appeal,¹³ which held that the land was not 'agricultural land' and that *SALA* consequently did not apply. A declaratory order was granted to the effect that the written agreement was binding on the parties. The applicant sought to assail the SCA's decision in the CC.

At the time the 1995 proviso was inserted, local government was being restructured as required by the *Local Government Transition Act*.¹⁴ The process of reconstruction of local government was to end with the establishment of full-fledged democratically elected municipalities. The elections of members to the final phase local government councils took place on 5 December 2000. Only urban and semi-urban areas had local government structures prior to the restructuring. Transitional councils had to be elected.¹⁵ According to the applicant's argument, the Minister's consent would remain an essential prerequisite to a valid sale even after the transitional councils were replaced by more permanent structures. The respondent was of the opinion that the consent of the Minister was only required during the period that transitional councils remained in existence, and that the requirement fell away with the replacement of the transitional councils with permanent structures.¹⁶

11 Paragraphs 2-3 of the judgment.

12 Act 68/1981.

13 Hereinafter referred to as 'the SCA'. See in this regard Anon 2007; West 2008a:32.

14 Act 209/1993, hereinafter referred to as 'the LGTA'.

15 Paragraph 102 of the judgment.

16 Paragraph 103 of the judgment.

Further parties included the following:¹⁷ The Registrar of Deeds, Cape Town, was cited as the second respondent, but abided in the decision in the High Court and did not seek thereafter to be involved in the proceedings. The *amici curiae* were the Trustees of the *Hoogekraal Highlands Trust* and *Safamco Enterprises (Pty) Ltd*, both of which were parties to similar agreements for the sale of land. The then Minister of Agriculture and Land Affairs was admitted as an intervening party in terms of Rule 8 of the Rules of the Constitutional Court. Her interest related to the proper administration of the functional area of agriculture. The *amici curiae* and the Minister aligned themselves with the stance of the applicant.

3. Constitutional Court judgment (the majority judgment)

The CC majority judgment was handed down by Kroon AJ, with Langa CJ, Madala J, Mokgoro J, Ngcobo J, Skweyiya J and Van der Westhuizen J concurring. A minority judgment was handed down by Yacoob J, with Nkabinde J and O'Regan ADCJ concurring.¹⁸

The CC stated that the purpose of SALA is a measure whereby the (national) Legislature, in the national interest, sought to prevent the fragmentation of agricultural land into small uneconomic units by curtailing landowners' common law right to subdivide their agricultural property.¹⁹ Wide-ranging and flexible powers of regulation and control are given to the Minister to achieve the purpose of SALA.

The Court considered the relevant legislation with regard to local government,²⁰ namely section 174 of the 1993 Constitution;²¹ the LGTA;²² the 1996 Constitution;²³ the *Local Government: Municipal Demarcation Act*;²⁴ and the *Local Government: Municipal Structures Act*.²⁵

The President, acting in terms of section 235(9) of the 1993 Constitution, assigned temporarily the administration of, among others, all laws falling within the functional area of agriculture to the (national) Minister responsible for

17 Paragraphs 9-11 of the judgment.

18 See also Rautenbach 2009:323; West 2008b:23.

19 Paragraph 13 of the judgment.

20 Paragraphs 14-18 of the judgment.

21 This provides for different categories of municipalities.

22 This provides, *inter alia*, for the establishment of transitional councils in the interim phase.

23 This provides, *inter alia*, for wall-to-wall municipalities, the assignment of matters as well as functional areas of concurrent national and provincial legislative competence and functional areas of exclusive provincial competence.

24 Act 27/1998, which provides, *inter alia*, for the establishment of the Municipal Demarcation Board.

25 Act 117/1998, hereinafter referred to as 'the MSA'. The MSA provides, *inter alia*, for category A, B and C municipalities.

Agriculture.²⁶ This temporary assignment would remain valid until such time that the administration of any such law (or part thereof) has been assigned²⁷ to the provincial government(s) concerned. However, *SALA* was never assigned to any province, and hence the administration thereof remained in the national sphere of government. In order to provide for the continued efficient carrying out of the functional area concerned, the power to amend any section 235(9) assigned legislation was also vested in the President (by means of section 235(9)). Within this context, PR100 was issued by the President, providing for the amendment of *SALA*. The 1995 proviso referred to in the introduction²⁸ was added to the definition of 'agricultural land' by PR100.²⁹

At the time PR100 was issued, the land in question was situated within the Port Elizabeth Transitional Rural Council, and immediately prior to the election of its members, the land was classified as 'agricultural land'. The Metropolitan Municipality of Port Elizabeth (also a transitional council) was then established, and thereafter the Nelson Mandela Metropolitan Municipality (a single category A municipality).³⁰

3.1 The High Court judgment³¹

The CC majority judgment indicated that the High Court in general aligned itself with the reasoning in *Kotzé v Minister van Landbou*³² that 'agricultural land' still existed for purposes of *SALA*, and consisted of all land, except land situated within structures named in paragraph (a) of the definition immediately prior to the restructuring in terms of the *Local Government Transition Act*. Land that was classified as agricultural land and that fell within the jurisdiction of an earlier transitional council is therefore still 'agricultural land':

The proviso ... provides a point in time with reference to which it must be established if land qualifies as agricultural land. If at that point in time, it is to be regarded as agricultural land it remains so notwithstanding any changes to local government structures and their boundaries. This point in time is the first election of the members of the transitional council ... [I]t is common cause that at this point in time Portion 54 qualified as

26 Proclamation R102 in *Government Gazette* 15781 of 3 June 1994.

27 In terms of section 235(8) of the 1993 Constitution.

28 "Provided that land situated in the area of jurisdiction of a transitional council as defined in section 1 of the *Local Government Transition Act*, 1993 (Act 209/1993), which immediately prior to the first election of the members of such transitional council was classified as agricultural land, shall remain classified as such".

29 The purpose of the amendment was to ensure that all land previously classified as agricultural land would remain classified as such notwithstanding the introduction of new interim local government structures (and, eventually, the final phase of local government) – see discussion of paragraph 62 of the judgment below.

30 Paragraphs 23-24 of the judgment.

31 *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Registrar of Deeds, Cape Town* Case number 5349/2005 (Port Elizabeth High Court) (unreported).

32 2003 (1) SA 445 (T), hereinafter referred to as 'the *Kotzé* case'.

agricultural land. It follows that it remained so and still was agricultural land at the time the agreement was entered into.³³

3.2 The SCA judgment³⁴

In its discussion of the judgment of the SCA, the CC referred to the following questions and related answers formulated by the SCA:

- a) Is the Nelson Mandela Metropolitan Municipality a 'municipal council, city council or town council'? Yes. Section 93(8)(a) of the MSA and item 2 of Schedule 6 to the 1996 Constitution is relevant. As SALA is a piece of old-order legislation, the words 'municipal council, city council, town council' must be construed to include a category A municipality such as the Nelson Mandela Metropolitan Municipality.
- b) Did the land retain its status as 'agricultural land' by virtue of the 1995 proviso and the classification as such immediately prior to the election of the first members of the Port Elizabeth Transitional Rural Council? No. The SCA disapproved of the approach in the *Kotzé* case, as any exercise in the interpretation of the 1995 proviso cannot ignore present-day municipal structures created by the MSA. The SCA stated that the principle in *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein*³⁵ was misapplied in the *Kotzé* case. The plain meaning of the words was that the 1995 proviso was meant to operate only as long as the land affected remained situated within the jurisdiction of a transitional municipal council. The Legislature would have stated expressly if it had intended the classification to survive after transitional councils had ceased to exist. Exceptions to general rules³⁶ have to be read restrictively.

The SCA decided that once the Port Elizabeth Transitional Rural Council was disestablished, the land would fall within the jurisdiction of the Nelson Mandela Metropolitan Municipality and ceased to be 'agricultural land'. The SCA found support for its approach in the following three considerations:

- a) Local government structures were accorded radically enhanced status and powers by the new constitutional order. This status includes the competence and capacity of municipalities to administer land falling within their areas of jurisdiction without executive oversight.
- b) The Minister retains the power to exclude any land from the exception, and declare it 'agricultural land'.
- c) The disputed land is no longer used as 'agricultural land'.³⁷

33 *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Registrar of Deeds, Cape Town* Case number 5349/2005 (Port Elizabeth High Court) (unreported) at paragraph 64 as referred to in paragraphs 25-26 of the judgment.

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

35 1985 (4) SA 773 (A).

36 E.g. the 1995 proviso.

37 Paragraph 7 of the judgment.

3.3 The Constitutional Court majority judgment

In order to give a structured overview of the majority judgment,³⁸ the following issues will be addressed: the constitutional issue; the finding with regard to the status of the Nelson Mandela Metropolitan Municipality and its predecessors; the interpretation of legislation (and specifically of *SALA*); the co-existence of administration of functional areas within the context of inter-governmental relations; the assignment of Schedule 4 (Part A) matters to a municipality; the effect of the final phase of local government on the existence of *SALA*; the role of current use; the implications of the interpretation of the Bill of Rights clause;³⁹ the impact of the *Repeal Act*; the role of consistency as part of coherent construction when interpreting legislation, and the fact that the Legislature is deemed to have taken note of decisions of courts.

3.3.1 Constitutional issue

With regard to the granting of leave to appeal, a key question that had to be answered was whether the appeal involved a constitutional issue.⁴⁰ This question was answered in the affirmative. The issue at hand was whether, whatever the powers of present-day municipalities are, the Minister still retains the power to approve of or reject subdivisions of land classified as 'agricultural land' in terms of the 1995 proviso. This judgment would therefore be a pronouncement on the power of an organ of state, and was a constitutional issue.⁴¹ The recognition of the rights in sections 24(b)(iii),⁴² 25(5)⁴³ and 27(1)(b)⁴⁴ of the Bill of Rights⁴⁵ also made this a constitutional issue.⁴⁶ In addition, it could not have been said that the applicant did not have any reasonable prospects of success.⁴⁷

The CC also found that:

[W]here two conflicting interpretations of a statutory provision could both be said to be reflective of the relevant structural provisions of the Constitution as a whole, read with other relevant statutory provisions, the interpretation which *better* reflects those structural provisions should be adopted.⁴⁸

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

38 After its above overview of the factual situation, the legal background and the High Court and SCA judgments.

39 In the 1996 Constitution.

40 Paragraphs 39-48 of the judgment.

41 Paragraph 45 of the judgment.

42 The right to have the environment protected.

43 Access to land.

44 The right to access to sufficient food and water.

45 1996 Constitution.

46 Paragraphs 50-51 of the judgment.

47 Paragraph 52 of the judgment.

48 Paragraph 47 of the judgment.

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.⁴⁹

3.3.2 The 'municipality finding'

The SCA was correct in finding that a transitional council as well as a present-day single category A municipality is embraced within the terms 'municipal council, city council, town council'. Therefore, the Nelson Mandela Metropolitan Municipality, the Port Elizabeth Transitional Rural Council and the Metropolitan Municipality of Port Elizabeth all fall within these terms.⁵⁰

3.3.3 The interpretation of legislation (and specifically of *SALA*)⁵¹

The 1995 proviso was introduced as a measure to ensure that 'agricultural land' retained its status, despite its falling within the jurisdiction of a transitional council. The functional area of agriculture, as a consequence, continued to repose in the Minister. The Legislature realised the necessity of the existence of 'agricultural land' and the Minister's control and administration thereof to continue in order to achieve the purposes of *SALA*. This was needed in order to ensure that 'agricultural land' and its productive capacity would not be eradicated as a result of the transition to democracy.⁵²

The question at hand was therefore whether the land was, by virtue of the 1995 proviso as well as its classification as 'agricultural land' immediately prior to the election of the first members of the Port Elizabeth Transitional Rural Council, still 'agricultural land' when the contract was entered into.⁵³

The intention of the Legislature had to be sought in the words used in the legislation. The textual reading of the 1995 proviso renders it capable of bearing the meanings attributed to it by both the High Court and the SCA. The ordinary words in a statute must be determined in the context of the statute read in its entirety.⁵⁴ The CC was of the opinion that there is no reason why the purpose of *SALA* should have been intended to remain current only during the life of transitional councils. The context of the exercise of the powers accorded to the President by section 235(9) of the 1993 Constitution was the anticipated future ability of provincial governments to assume responsibility for the administration of laws falling within the functional area of agriculture.⁵⁵

49 Paragraph 53 of the judgment.

50 Paragraph 55 of the judgment.

51 Paragraphs 55-74 of the judgment.

52 Paragraph 56 of the judgment.

53 Paragraph 57 of the judgment.

54 Paragraphs 58-67 of the judgment.

55 Paragraph 61 of the judgment.

The CC found that:

In my view, therefore, the interpretation to be given to the proviso is that the duration of the classification of land as 'agricultural land' was not tied to the life of transitional councils, and that the reference therein to 'land situated within the jurisdiction of a transitional council' was dictated by the factual position which then obtained and which had to be addressed, and the way that was done was, as found by the High Court, by pinpointing the stage from which land classified as 'agricultural land' would remain so classified.⁵⁶

The CC also stated that:

The notion that the classification as 'agricultural land', which the proviso sought to keep in place, would come to an end when transitional councils would be replaced by the final structures fails to appreciate that the transitional provisions of the 1993 Constitution sought to achieve a systematic allocation of the 'power to exercise executive authority' in respect of 'old laws' to an authority within the national government or authorities within the provincial governments, and did not deal with local government.⁵⁷

The next question that had to be answered was for how long it was intended that that position continue.⁵⁸ The finding by the SCA that the purpose of the 1995 proviso included the promotion of the contemplated constitutional restructuring of local government was regarded by the CC as the fundamental flaw in the SCA's approach. The 1995 proviso had to do with agriculture, not the restructuring of local government.⁵⁹ There was no provision in section 235(6)(b) for the administration of any part of the functional area of agriculture by a local government structure.

This militates against any suggestion that the intention behind the proviso was that a future local government structure would assume administration over land classified as 'agricultural land' in terms of the proviso, which would then cease to be so classified.⁶⁰

The CC went on to state that there is no reason why the Minister's control over land cannot co-exist with that of present-day municipalities.⁶¹ With regard to the SCA's argument that the objects of *SALA* are not thwarted as provision is made for the Minister to exclude any land from the exception and declare it 'agricultural land' and a prohibition against subdivision without the Minister's consent exists, the CC stated that absent any declaration by the Minister there would be no agricultural land. There would be no sense in providing for a declaration if there is no general body of 'agricultural land' in respect of which it could be invoked. There exists serious doubt that a declaration was intended

56 Paragraph 62 of the judgment.

57 Paragraph 62 of the judgment (footnote omitted).

58 Paragraph 64 of the judgment.

59 Paragraph 66 of the judgment.

60 Paragraph 67 of the judgment.

61 Paragraph 69 of the judgment.

by the Legislature to be the only means whereby there would be “agricultural land” to which SALA would be applicable. The CC also questioned why it was ever necessary to enact the 1995 proviso if the declaration procedure would exclude the possibility of the objective of SALA being thwarted.⁶²

3.3.4 The assignment of the administration of an issue listed in Schedule 4 (Part A) to a municipality

Section 156(4) of the 1996 Constitution provides for the assignment of the administration of a Schedule 4 (Part A) issue (including the functional area of agriculture) by national and provincial governments to a municipality. There are certain prerequisites for such assignment and, according to the CC, there was no suggestion that any attempt to effect such an assignment had been essayed.⁶³

3.3.5 The approach followed by the CC majority

The SCA stated that an approach different from that adopted by it would result in the status of ‘agricultural land’ remaining “perpetually frozen”, but the CC regarded this as an overstatement. The 1995 proviso envisaged that the *status quo* be maintained and that the land’s classification as ‘agricultural land’ be maintained with whatever “fluidity” in respect of the urbanisation of land SALA otherwise entailed.⁶⁴

3.3.6 Impact of enhanced status of final phase local government

When the final phase of local government took effect on 5 December 2000, the new municipalities retained in principle the administrative powers relating to planning, zoning, rezoning and approval of applications for subdivision (emanating from pre-1994 provincial ordinances providing for municipal governance). (According to the first respondent, this meant that municipalities would henceforth be entitled to use these powers also in respect of land that was formerly categorised as ‘agricultural land’).⁶⁵ The CC found that this did not mean that national powers emanating from national legislation as regards the subdivision of agricultural land were replaced by municipal powers referred to in the provincial ordinances. It consequently supported the interpretation adopted by the High Court, namely that the two spheres of control can (and should) co-exist even if they overlap, as the one sphere operates from a municipal perspective and the other from a national perspective (each having its own constitutional and policy considerations). This interpretation attributes to the Legislature the intention to retain the national government’s role in

62 Paragraphs 70-74 of the judgment.

63 Paragraph 75 of the judgment.

64 Paragraphs 77-78 of the judgment.

65 Paragraph 79 of the judgment.

formulating national policy and to recognise the need for national policy to play a role in decisions to reduce 'agricultural land' and for consistency in agricultural policy throughout the country.⁶⁶

[G]iven the uncertainty in 1995, when *Proclamation R100* was issued, concerning the face of future municipal structures, it is unlikely that the legislature would have intended to tie the life of the proviso to the life of the initial interim structures.⁶⁷

3.3.7 Exceptions to general rules

When it is uncertain what the general rule and what the exception is, it is unhelpful to rely on interpretative principles that exceptions to general rules are to be read restrictively, as was done by the SCA. In this regard, the CC asked the following rhetorical question: "Is the position not that the general rule in the Agricultural Land Act is that all land is 'agricultural land' and the reference to municipal land an exception thereto, and the proviso therefore an exception to the exception, to be accorded a wide interpretation?"⁶⁸

3.3.8 Role of current use

The manner in which the land is currently being used is irrelevant to the matter at hand.⁶⁹ Therefore, whether land is used for agricultural purposes or not does not have any effect on its categorisation as 'agricultural land'.

3.3.9 Implications of section 39(2) of the 1996 Constitution

An interpretation which accords a role to national government in the administration of 'agricultural land' through the provisions of *SALA* is one which better promotes the spirit, purport and objects of the Bill of Rights. Excessive fragmentation of 'agricultural land' may result in an inadequate availability of food. *SALA* enables the state to carry out controls. The content of the right to food has two elements, namely availability and accessibility. There is a measure of overlap with regard to both these elements with the state's obligation to facilitate equitable access to 'agricultural land' under section 25(5) of the 1996 Constitution and with the state's obligation to conserve the environment under section 24 of the 1996 Constitution.⁷⁰

66 Paragraphs 79-80 of the judgment.

67 Paragraph 81 of the judgment.

68 Paragraph 82 of the judgment.

69 Paragraph 83 of the judgment. Also see footnote 10.

70 Paragraphs 84-85 of the judgment.

3.3.10 Impact of the *Repeal Act* 64 of 1998⁷¹

The question that arises is, what is one to make on the one hand of the fact of the Repeal Act and, on the other hand, of the fact that this Act has not yet been put into operation, notwithstanding the passage of an unprecedented period of some 10 years without an Act, duly assented to, being put into operation.⁷²

The Court was of the opinion that it would be simplistic to contend that, while it is obvious that it was the intention of the Legislature to remove *SALA* with the passing of the *Repeal Act*, it was the intention to put an end to the concept of a general body of 'agricultural land' or to effective national or provincial government control over the subdivision thereof.⁷³ The CC aligned itself with the comment in the *Kotzé* case that it cannot be accepted that without anything more *SALA* was repealed or abrogated in an indirect fashion by other legislation dealing with local government, without specific reference thereto.⁷⁴

3.3.11 Coherent construction when interpreting legislation

The CC (with reference to *Shaik v Minister of Justice and Constitutional Development*⁷⁵ footnote 14 where *Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics*⁷⁶ was quoted) found that "(o)ne of the rules of statutory construction is that every part of a statute must be construed, as far as possible, as to be consistent with every part of that statute as well as with every other unrepealed statute enacted by the same Legislature". According to the CC, this was also applicable to an Act of Parliament (the *MSA*) and a provision introduced by a competent authority (the President) into another, unrepealed, Act.⁷⁷

3.3.12 Possible arrangements prior to the commencement of the *Repeal Act*

An inference that the Legislature accepted that some time would pass before the repeal would take effect is justified in light of a provision in the *Repeal Act* that the date of commencement would be fixed by the President. The probable explanation is that this was done with the view of making provision for other arrangements to be put in place first. The *MSA* did not constitute these arrangements. The provision for such arrangements is still awaited as Parliament has not sought to pass further legislation to effect the immediate

71 Not yet commenced.

72 Paragraph 86 of the judgment.

73 Paragraph 87 of the judgment.

74 Paragraph 88 of the judgment.

75 2004 (3) SA 559 (C).

76 1911 AD 13 24.

77 Paragraph 89 of the judgment.

repeal of *SALA*.⁷⁸ Three possible arrangements were examined by the Court: other provisions in terms of which national government would have other means to control the subdivision of 'agricultural land'; the development of the capacity of provincial governments so as to undertake responsibility for the administration and assignment of the functional area of agriculture, and the assignment of the administration of the functional area of agriculture to municipal authorities provided that the prerequisites are satisfied.⁷⁹

3.3.13 Legislature deemed to have taken note of Court decisions

The Legislature must be taken to have been aware of the decisions in the *Kotzé* case and in *Geue v Van der Lith*.⁸⁰ Despite such awareness there has not been any legislative action in response to the decisions. The Deeds Registry, legal practitioners and the Minister have continued to conduct affairs on the basis that the essential effect of the judgment in the *Kotzé* case represented what the law is (at least until the SCA's judgment).⁸¹

The judgment of the SCA was set aside, and the High Court order reinstated.⁸²

4. Constitutional Court judgment (the minority judgment)

In order to facilitate the comparison between the CC majority and minority judgments (see below),⁸³ the brief overview of the CC minority judgment is structured to reflect its views on the constitutional issue, the 'municipality finding', the impact of the High Court decision in the *Kotzé* case, the interpretation of *SALA* and the 1995 proviso, the role of current use, the impact of the enhanced status of the final phase of local government, and its view that the main substance of *SALA* is planning (and not agriculture). The structure of the minority judgment differs slightly from that of the majority judgment, but for ease of reference, similar headings as for the discussion of the majority judgment have been used by the current authors.

4.1 Constitutional issue

With regard to the question whether the issue at hand is a constitutional issue, Yacoob J (with Nkabinde J and O'Regan ADJC concurring)⁸⁴ stated

78 Paragraph 90 of the judgment.

79 Paragraph 91 of the judgment.

80 2004 (3) SA 333, hereinafter referred to as 'the *Geue* case'.

81 Paragraph 93 of the judgment.

82 Paragraph 94 of the judgment.

83 See 5 below.

84 Hereinafter referred to as 'the minority'.

that the question whether one interpretation is more in accordance with the spirit, purport and objects of the 1996 Constitution than the other does raise a constitutional issue. The question whether the 1995 proviso is reasonably capable of two meanings had to be decided first (this issue was connected with a decision on a constitutional matter, and the CC therefore had the jurisdiction to decide it).⁸⁵ The minority found that the 1995 proviso introduced by PR100 is not reasonably capable of the construction that the applicant wanted the CC to sanction (that is, the continued existence and applicability of *SALA*), and was reasonably capable of only one meaning. Therefore, the constitutional issue did not arise for consideration by the CC. The reasoning behind their argument followed.⁸⁶

4.2 The 'municipality finding'

The minority referred to the so-called 'municipality finding' of the SCA (the finding that the Nelson Mandela Metropolitan Municipality was a municipal council within the purview of the term contained in the definition of 'agricultural land' in the *Act*).⁸⁷ They aligned themselves with this finding, and stated that, on the literal meaning of the definition, agricultural land within the municipality no longer remained under ministerial control. Parliament's purpose was to reduce ministerial power over land situated within the restructured municipalities by enacting section 93(8) of the *MSA*.⁸⁸

4.3 The impact of the finding in the *Kotzé* case

The SCA's interpretation of the judgment in the *Kotzé* case was found by the CC minority to be incorrect. In the *Kotzé* case, the judge stated that the structures mentioned in the first exception were municipal bodies that existed at the time, and did not include the municipalities created in terms of the *MSA*. The SCA's finding that a municipality of today is a municipal council within the meaning of that term in the definition is therefore inconsistent with the *Kotzé* case. The CC minority further stated that if the 'municipality finding' stands, the judgment in the *Kotzé* case is overruled to this extent. It was made clear that "[t]he submissions of any party inconsistent with the conclusion of SCA that a municipal council contemplated by the definition of agricultural land includes a modern-day South African municipality cannot be entertained".⁸⁹

4.4 The interpretation of *SALA*

The text requires two separate conditions to be met before agricultural land shall remain classified as such: (a) the land must be situated within the area

85 Paragraph 107 of the judgment.

86 Paragraph 108 of the judgment.

87 Paragraph 109 of the judgment.

88 Paragraph 111 of the judgment.

89 Paragraphs 113-115 of the judgment.

of jurisdiction of a transitional council (structured and elected as required by the *Local Government Transition Act*), and (b) the land must have been classified as agricultural land immediately before the first election of the transitional council having jurisdiction. In order to remain agricultural land after the first election of a transitional council, the land must have been within the jurisdiction of a transitional council. The minority stated that “[t]hat status and the Minister’s control is, on the face of it, lost once the land falls within the area of a municipal structure other than a transitional council”.⁹⁰ Only for as long as agricultural land remained within the jurisdiction of a transitional council would it remain agricultural land.⁹¹

The minority aimed to explain their stance by setting out the context, purpose and consequence of the 1995 proviso.⁹²

4.5 Role of current use

The judgment by the minority confirmed that the definition of agricultural land is not related to the use to which the land concerned is subjected. As a result, agricultural land, in the sense of the land that was used for agriculture, would therefore not cease to exist at the establishment of transitional councils.⁹³ Only the requirement of ministerial consent to every sale and subdivision would disappear. The Minister’s powers would be limited (after consultation with the relevant executive committee) to (a) a declaration that land situated within the areas of certain local government structures was to be agricultural land for the purposes of the *Act*, and (b) the exclusion of what would otherwise be agricultural land.⁹⁴

4.6 Impact of enhanced status of final phase local government

The object of the 1995 proviso was to prevent the consequence that agricultural land would be left in the air as the newly established transitional councils would not have the capacity to administer the land (as their powers and functions had not yet been defined by statute). Until an appropriate division of powers and functions with regard to land, agriculture and land-use planning among the three spheres of government had been properly regulated by national legislation, the Minister had to retain the powers conferred by *SALA*. In contrast with the majority judgment, the minority stated that permanent municipalities would be able to carry out their municipal planning functions “without adversely affecting the effective administration of the agriculture competence”.⁹⁵

90 Paragraphs 117-120 of the judgment.

91 Paragraph 121 of the judgment.

92 Paragraph 121 of the judgment.

93 Paragraphs 123-124 of the judgment.

94 Paragraphs 123-124 of the judgment.

95 Paragraphs 125-126 of the judgment.

The 1996 Constitution defines the structure, functions and powers of municipalities. Agriculture, regional planning and development are concurrent functional areas. Provincial planning, which does not include municipal planning, is an exclusive provincial functional area. Municipal planning is a local government function, and both the national and provincial spheres exercise legislative competence. The functional area of agriculture is a concurrent national and provincial legislative competence and includes the determination of frameworks and policies that is binding on all provinces and municipalities, and legislation made by provinces concerning implementation that is binding on all municipalities. Land-use planning must be done at provincial, regional and municipal planning levels.⁹⁶

4.7 The main substance of *SALA* is planning (and not agriculture)

Although there is an overlap in relation to the Schedules 4 and 5 functional areas, Yacoob J was of the view that to the extent that *SALA* deals with the zoning, subdivision and sale of land it is concerned with the functional area of planning, and not of agriculture (as was stated in the majority judgment). According to the minority judgment, the approach in *Ex Parte President of the Republic of South Africa: In Re: Constitutionality of the Liquor Bill*⁹⁷ had to be followed. The main substance of legislation had to be determined, and the field of competence in which its substance falls had to be ascertained, as well as what it incidentally accomplishes. The minority concluded that the main substance of *SALA* was planning.⁹⁸

The argumentation in the minority judgment was based on, among others, the view that the zoning and subdivision of land is essentially a planning function. If the planning function in relation to agricultural land continues to be undertaken by the Minister of Agriculture instead of by municipalities, it would be at odds with the Constitution in two respects: (a) it would negate the municipalities' planning function and (b) it may trespass into the sphere of the exclusive provincial competence of provincial planning.⁹⁹

The national Legislature regards land-use planning as a municipal competence, as is confirmed by the provisions of the *MSA* and the *Local Government: Municipal Systems Act*.¹⁰⁰ This is also consistent with the 1996 Constitution. The executive committees of municipalities and executive mayors have to ensure that the integrated development plan takes cognisance of applicable national and provincial development plans. Each municipal council is compelled by legislation to adopt a single, inclusive and strategic plan for the development of the municipality, which has to be compatible with national

96 Paragraphs 127-128 of the judgment.

97 2000 (1) SA 732 (CC).

98 Paragraphs 129-130 of the judgment.

99 Paragraph 131 of the judgment.

100 Act 32/2000, hereinafter referred to '*MSysA*'.

and provincial development plans and planning requirements, which plans and requirements are binding on the municipalities in terms of legislation.¹⁰¹

According to Yacoob J, the MEC responsible for Local Government and the Minister responsible for Agriculture still retain certain powers. The MEC may facilitate the co-ordination and alignment of a municipality's integrated development plan with national and provincial organs of state's plans, strategies and programmes (in terms of *MSysA*), while the Minister responsible for Agriculture is entitled to make regulations and guidelines in respect of numerous aspects concerning the integrated development plan. As a result, national, provincial and local government are all involved in the process of municipal spatial planning (as provided for in the Constitution, relevant legislation and regulations). All rezoning decisions must be taken consistently with the integrated municipal plan which, in turn, must be consistent with national and provincial legislation.¹⁰² The minority stated that:

The retention of the power of the national Minister of Agriculture and Land Affairs to approve each and every sale and subdivision of land within an area that is under the control of elected and appropriately structured municipalities that are bound by relevant national and provincial legislation is inconsistent with the restructuring, decentralisation and democratisation of power that our Constitution requires. More importantly, the contention of the Minister disregards the fact that provision has already been made for appropriate national and provincial participation in the planning process.¹⁰³

4.8 The approach followed by the CC minority

According to the minority judgment, the preservation of the Minister's powers to approve every sale and subdivision of agricultural land is not the only way in which agriculture is to be developed and food made more readily available.¹⁰⁴

The MEC and the Minister were indirectly involved in the approval of the rezoning of the land in issue, as the decision was taken by a municipality consistently with its integrated plan and the spatial development framework contained within that plan (which plan would have been approved by the MEC of Local Government and would have been consistent with regulations promulgated by the Minister of Provincial and Local Government).¹⁰⁵

The judge concluded that the 1995 proviso is not reasonably capable of the meaning ascribed to it by the High Court. The application for leave to appeal was therefore dismissed.¹⁰⁶

101 Paragraphs 132 and 134 of the judgment.

102 Paragraphs 135 and 137 of the judgment.

103 Paragraph 138 of the judgment.

104 Paragraph 139 of the judgment.

105 Paragraph 140 of the judgment.

106 Paragraphs 141-142 of the judgment.

5. Evaluation of the contrasting CC majority and minority judgments

The majority and minority judgments have different points of departure. Where the majority judgment found *SALA* to be agricultural legislation (and therefore the responsibility of national and provincial government in terms of Schedule 4 (Part A) of the 1996 Constitution),¹⁰⁷ the minority found it to be (municipal) planning legislation (and therefore the responsibility of local government in terms of Schedule 4 (Part B) of the 1996 Constitution).¹⁰⁸

The majority judgment found the issue at hand to be a constitutional issue as the Court's decision would be a pronouncement on the power of an organ of state. In addition, recognition of the rights enshrined in sections 24(b) (iii), 25(5) and 27(1)(b) of the 1996 Constitution also made it a constitutional issue.¹⁰⁹ The minority stated that a matter is a constitutional issue when there is a need to ascertain whether one interpretation is more in accordance with the spirit, purport and objects of the Constitution than another interpretation. It was therefore necessary to determine whether the 1995 proviso was capable of bearing two meanings.¹¹⁰

Both judgments stated that the SCA was correct in finding that a present-day single category A municipality is embraced within the terms 'municipal council, city council, town council'.¹¹¹

According to the majority, the reasoning behind the 1995 proviso was the need to ensure that 'agricultural land' and its productive capacity would not be eradicated as a result of the transition to democracy.¹¹² No reason could be found as to why the purpose of *SALA* should have been intended to remain current only during the life of transitional councils.¹¹³ However, it was argued in the minority judgment that the 1995 proviso was only intended to be of force while transitional councils existed, as these councils did not have the legislative capacity to deal with matters concerning agricultural land.¹¹⁴ The minority also concluded that *SALA* was not the only way in which agricultural land could be developed and protected.¹¹⁵

107 The focus of *SALA* was, according to the majority judgment, on agriculture. As a result, the context of the exercise of powers accorded to the President by section 235(9) of the 1993 Constitution was the anticipated future acquisition of ability by a provincial government to assume responsibility for the administration of laws falling within the functional area of agriculture. Paragraph 61 of the judgment.

108 The minority judgment, however, stated that to the extent that *SALA* is concerned with zoning, subdivision and the sale of land, it is concerned with the functional area of planning, and not of agriculture. Paragraphs 129-131 of the judgment.

109 Paragraph 45 of the judgment.

110 Paragraph 107 of the judgment.

111 Paragraphs 55 and 109-111 of the judgment.

112 Paragraphs 61 and 81 of the judgment.

113 Paragraph 93 of the judgment.

114 Paragraphs 117, 121 and 125 of the judgment.

115 Paragraph 139 of the judgment.

The majority stated that the textual reading of the 1995 proviso renders it capable of bearing both meanings attributed to it by the High Court and the SCA.¹¹⁶ They also stated that the interpretation which better reflects the relevant structural provisions of the Constitution as a whole should be adopted.¹¹⁷ The minority, however, concluded that only the meaning attributed to it by the SCA was reasonably possible.¹¹⁸

It was expressed in the majority judgment that any other interpretation of the 1995 proviso will have the effect that agricultural land as a category will cease to exist.¹¹⁹ With regard to the SCA's (and the minority's) argument that the objects of *SALA* are not thwarted as provision is made for the Minister to exclude any land from the exception and declare it 'agricultural land' and a prohibition against subdivision without the Minister's consent exists, the majority stated that absent any declaration by the Minister there would be no agricultural land. There would be no sense in providing for a declaration if there is no general body of 'agricultural land' in respect of which it could be invoked. There exists serious doubt that a declaration was intended by the Legislature to be the only means whereby there would be 'agricultural land' to which *SALA* would be applicable. The majority also questioned why it was ever necessary to enact the 1995 proviso if the declaration procedure would exclude the possibility of the objective of *SALA* being thwarted.¹²⁰ The minority disagreed that agricultural land would cease to exist and stated that only the requirement of ministerial consent to every sale and subdivision (of agricultural land) would disappear.¹²¹

The majority decision stated that the duration of the classification of land as 'agricultural land' was not tied to the life of transitional councils. The transitional provisions of the 1993 Constitution sought to achieve a systematic allocation of the 'power to exercise executive authority' to the national and/or provincial spheres of government. *SALA* (and specifically the 1995 proviso) neither deals with local government, nor has anything to do with the restructuring of local government.¹²² The national powers emanating from national legislation as regards the subdivision of agricultural land were not replaced by municipal powers referred to in provincial ordinances.¹²³ Section 235(6)(b) does not provide for the administration of any part of the functional area of agriculture by local government structures.¹²⁴ Although section 156(4) provides for the assignment of the administration of a Schedule 4 (Part A) matter (including the functional domain of agriculture) by national and provincial governments to a municipality, the majority found that no such attempt was essayed.¹²⁵ The

116 Paragraphs 58-61 of the judgment.

117 Paragraph 47 of the judgment.

118 Paragraph 141 of the judgment.

119 Paragraph 67 of the judgment.

120 Paragraphs 70-74 of the judgment.

121 Paragraphs 123-124 of the judgment.

122 Paragraphs 62, 66 and 81 of the judgment.

123 Paragraph 80 of the judgment.

124 Paragraph 67 of the judgment.

125 Paragraph 75 of the judgment.

minority judgment stated that permanent municipalities would be able to carry out their municipal planning functions “without adversely affecting the effective administration of the agriculture competence”.¹²⁶ If planning functions in relation to agricultural land continues to be undertaken by the Minister responsible for Agriculture instead of by municipalities, it would be at odds with the 1996 Constitution in two respects: (a) it would negate the municipalities’ planning function, and (b) it may trespass into the sphere of the exclusive provincial competence of provincial planning. The minority found that *SALA* deals with planning, and the 1995 proviso, in effect, with the constitutional restructuring of local government.¹²⁷

The majority was of the view that other arrangements still had to be put in place before *SALA* can be repealed. The *MSA* did not constitute these arrangements.¹²⁸ The minority stated that Parliament’s purpose was to reduce ministerial power over land situated within the restructured municipalities by enacting section 93(8) of the *MSA*.¹²⁹ The national Legislature regards land-use planning as a municipal competence, as is confirmed by the provisions of the *MSA* and the *MSysA*. This is also consistent with the 1996 Constitution.¹³⁰ The final phase of local government was (and is) capable of dealing with these issues (and further legislation was (and is) therefore not required).¹³¹

According to both judgments, the current use of the (agricultural) land is irrelevant.¹³² The majority judgment considered the impact of the *Repeal Act*,¹³³ while the minority judgment did not.

The majority reinstated the High Court order,¹³⁴ while the minority concluded that leave to appeal should have been dismissed.¹³⁵

6. Discussion of key issues

The above overview of the majority and minority decisions gives rise to a number of key issues. For purposes of this case note, the discussion that follows focuses on aspects relating to old-order legislation, the relationship between the three spheres of government, the transfer of the administration of legislation, and the repeal of legislation.

It is noteworthy that the Minister responsible for agriculture was neither a party in the Court *a quo* nor sought leave to be admitted as *amicus curiae* or as an intervening party in the SCA. It is to be hoped that Government would

126 Paragraph 126 of the judgment.

127 Paragraph 131 of the judgment.

128 Paragraph 90 of the judgment.

129 Paragraph 111 of the judgment.

130 Paragraph 132 of the judgment.

131 Paragraph 126 of the judgment.

132 Paragraphs 83 and 123-124 of the judgment.

133 Paragraphs 86-88 of the judgment.

134 Paragraph 94 of the judgment.

135 Paragraphs 141-142 of the judgment.

in future be joined as a party in all matters relating to land and agriculture, and that Government would establish the necessary structures and systems to ensure that it is informed as regards pending cases so as to be in a position to act timeously to protect its interests and, concomitantly, to make the appropriate representations to the courts concerned.

6.1 Old-order legislation

The 1996 Constitution provides for the continued application of pre-4 February 1997¹³⁶ legislation and the administration thereof by the authorities that were responsible for its implementation prior to this date. As regards the question whether all pre-1996 Constitution legislation remains in force, item 2 of Schedule 6 of the 1996 Constitution provides for the continuation of all (not yet repealed) old-order legislation,¹³⁷ as well as all transitional legislation.¹³⁸ This continuation is subject to any amendment or repeal of such law, and consistency with the 1996 Constitution. This implies that *SALA* is currently still in force. As regards the competent authority responsible for the administration of *SALA* on the commencement date of the 1996 Constitution, item 2(2) (b) of Schedule 6 determines that all old-order legislation “continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new Constitution”.

It follows that, in principle, the national sphere of government is still responsible for the administration of *SALA*, and the competent authority on 3 February 1997 was the national Minister responsible for Agriculture. This is on account of the fact that PR102 of 1994,¹³⁹ which temporarily assigned the administration of *SALA* to the national Minister of Agriculture, was not followed up by the permanent assignment of (relevant parts of) *SALA* to the provincial executives by means of an assignment proclamation issued in terms of section 235(8) of the 1993 Constitution.

The CC made it clear that national legislation enacted prior to 1994 cannot be deemed to have been repealed in an indirect manner on the basis of a specific interpretation of the constitutional scheme relating to the introduction of wall-to-wall democratically elected local government read with post-1994 national legislation dealing with local government, which does not explicitly repeal such pre-1994 legislation.¹⁴⁰ This approach confirms the finding that *SALA* was not repealed in an indirect manner by the enactment of the *MSA*. It is submitted that this approach will inform all future decisions regarding the continued validity and application of pre-1994 legislation, notwithstanding the enactment of post-1994 legislation that does not explicitly repeal such pre-1994 legislation.

136 Commencement date of the 1996 Constitution.

137 Legislation enacted prior to 27 April 1994.

138 Legislation enacted during the life of the 1993 Constitution: 27 April 1994 to 3 February 1997.

139 *Government Gazette* 15781 of 3 June 1994.

140 Paragraph 88 of the judgment.

6.2 The relationship between the three spheres of government

Chapter 3 of the 1996 Constitution provides for three spheres of government within a co-operative government framework:¹⁴¹ “In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, inter-dependent and interrelated”.

The role, powers, functions and duties of provincial government are determined in the 1996 Constitution (Chapter 6 and Schedules 4 (Part A) and 5 (Part A)), pre-1994 legislation assigned to provincial governments, pre-1994 legislation that should have been assigned to provincial governments (but still is at national level), as well as post-1994 national and provincial legislation.

The constitutional negotiations predating the drafting and commencement of the 1993 Constitution resulted in the acceptance of a three-phased approach to the transformation and democratisation of local government: (a) the pre-interim phase (the then current race-based local government structures, with vast areas of South Africa not falling under any local government); (b) the interim (transitional) phase of local government providing for the amalgamation of race-based local government structures and the establishment of transitional councils, and (c) the final phase of local government (consisting of wall-to-wall municipalities with democratically elected municipal councils).

The commencement of the 1996 Constitution¹⁴² was followed by the finalisation of the White Paper on Local Government¹⁴³ and the enactment by Parliament of a range of local government legislation. The first democratic elections resulting in the establishment of this new system of local government took place on 5 December 2000.

The role, powers, functions and duties of local government are determined in the 1996 Constitution,¹⁴⁴ the so-called suite of (national) local government legislation, pre-1994 legislation assigned to provincial government, post-1994 national and provincial legislation and pre- and post-1994 municipal by-laws.

6.3 The transfer of the administration of legislation

A key question is whether the 1996 Constitution provides for the transfer of the administration of (parts of) SALA to the provincial executives, and specifically the provincial member of the executive council responsible for agriculture. A related issue is the status of legislation which is currently administered by the national sphere of government but which falls outside Parliament's legislative power. Item 15(1) of Schedule 6 of the 1996 Constitution provides that the relevant national authority may continue to administer such legislation until

141 Section 40.

142 4 February 1997.

143 1998.

144 Chapter 7 and Schedules 4 (Part B) and 5 (Part B). For the objects of local government, see section 152 of the 1996 Constitution.

its assignment to provincial executive in accordance with item 14 of Schedule 6. However, item 15(2) provides that item 15(1) lapses two years after the commencement of the 1996 Constitution.¹⁴⁵ It can be argued that those parts of *SALA* (if any) that are within the concurrent provincial legislative domain (Schedule 4 (Part A) which determines that agriculture is such a concurrent functional area), could no longer after 3 February 1999 be administered by the national Minister of Agriculture.

As regards the post-4 February 1997¹⁴⁶ assignment to provincial executives of legislation dealing with functional areas within the concurrent domain of the national and provincial Legislatures (Schedule 4 (Part A)) or the exclusive domain of provincial Legislatures (Schedule 5 (Part A)), item 14 of Schedule 6 of the 1996 Constitution provides that:

Legislation with regard to a matter within a functional area listed in Schedule 4 or 5 to the new Constitution and which, when the new Constitution took effect, was administered by an authority within the national executive, may be assigned by the President, by proclamation, to an authority within a provincial executive designated by the Executive Council of the province.

This implies that the 1996 Constitution empowered the President to assign the administration of those parts of *SALA* falling within the concurrent provincial legislative domain to provincial executives. However, it would seem that no such assignment proclamation has been published. Consequently, *SALA* is in principle still within the national sphere of government.

The 1996 Constitution also provides for the performance of functions and execution of powers by executive organs of state in any sphere of government on behalf of another sphere of government by means of a delegation or an agency agreement.¹⁴⁷ It consequently has to be ascertained to what extent parts of *SALA* may be administered by provincial government departments responsible for agriculture in terms of a delegation by, or on an agency basis on behalf of, the national Minister responsible for Agriculture. This would require accessing information from the national Department of Agriculture, Forestry and Fisheries which is not necessarily within the public domain as the 1996 constitutional provision¹⁴⁸ providing for delegations and agency arrangements between the spheres of government does not expressly provide for the compulsory establishment of a publicly accessible register of delegations and agency arrangements.

A next question is whether the administration of *SALA* has been (or can be) transferred to the local sphere of government. Within this context, section 156(4) of the 1996 Constitution provides for the compulsory assignment of the administration of a Schedule 4 (Part A) or Schedule 5 (Part A) matter which

145 3 February 1999.

146 Commencement date of the 1996 Constitution.

147 Section 238.

148 Section 238.

necessarily relates to local government, to a municipality, by agreement and subject to any conditions, if:

- (a) that matter would most effectively be administered locally, and
- (b) the municipality has the capacity to administer it.

There is currently no information available on the existence of a publicly accessible database of any such agreements between any national or provincial government department and any municipality.

A key issue is the extent and interpretation of the municipal planning function. Taking into account that (a) municipal planning is a Schedule 4 (Part B) municipal functional domain, whereas agriculture is a concurrent national and provincial functional domain (Schedule 4 (Part A)), and, according to the majority decision, (b) that *SALA* is (i) still valid and legally enforceable, and (ii) administered by the national sphere of government, and specifically by the national Minister responsible for Agriculture (subject to the possible existence of delegations of relevant parts thereof to provincial executives), it follows that the municipal planning functional domain does not include the power to regulate or change the use of, or subdivide, land classified in terms of *SALA* as agricultural land.

The Chief Registrar of Deeds' Circular 6 of 2002¹⁴⁹ stated,¹⁵⁰ with reference to the opinions of the State Law Advisors,¹⁵¹ that all farm property has to be regarded as agricultural land as defined in *SALA*. The interpretation of the Chief Registrar of Deeds is that Proclamation R100 of 1995 has had the effect "that all land which was agricultural land prior to the establishment of transitional councils remain classified as such".¹⁵² As a result, whenever any deed dealing with the subdivision of farm land is lodged with the Deeds Office, either ministerial *SALA* consent or a letter by the (national) "Department of Agriculture to the effect that the land in question is not agricultural land as defined in Act No. 70 of 1970" is required.¹⁵³

6.4 The repeal of legislation

The implications of the non-commencement of the 1998 *Repeal Act* and the introduction of draft national legislation on the existence of *SALA* also need to be determined. The fact that the *Repeal Act* was enacted by Parliament¹⁵⁴ and assented to on 16 September 1998, but has not yet been put into operation (as the commencement date has not yet been proclaimed by the President), is further support for the view that *SALA* is still in the national sphere of government.

149 CRC 6/2002 'Consents in terms of Act No. 70 of 1970' paragraph 4.

150 Kilbourn 2009.

151 553/2000 of 21 December 2000 and 408/2001 of 25 October 2001.

152 Paragraph 2.

153 Paragraph 5.

154 The *Act* was enacted by Parliament (the Legislature in the national sphere of government).

Within this context, the CC correctly pointed out¹⁵⁵ that the probable explanation for this “unprecedented period of some ten years without an Act, duly assented to, being put into operation”,¹⁵⁶ was the need to make provision for other arrangements to be put into place. Such other possible arrangements¹⁵⁷ include, among others, (a) the need for national government to be empowered by the enactment of other parliamentary legislation to control the subdivision of agricultural land; (b) the acquisition by provincial governments of the necessary capacity to administer the Schedule 4 (Part A) concurrent functional domain of agriculture and the subsequent assignment of the administration of the relevant legislation to them, or (c) the section 156(4) assignment of the administration thereof to a municipality (subject to the prerequisites spelled out in section 156(4) – see discussion above). In this regard reference should also be made to the related view of the CC that Parliament had not enacted new national legislation, notwithstanding that it should be deemed to have had knowledge of the decisions in the *Kotzé* and *Geue* cases (which determined that SALA was still operative and had not been repealed in an indirect manner by subsequent national local government legislation).¹⁵⁸

As regards the introduction of new national legislation [(a) above], clause 4(1) of the Land Use Management Bill¹⁵⁹ provides that all organs of state, when performing a function in terms of the Bill or any other legislation regulating land use management, must apply a number of directive principles, amongst others:

(d) the principle of sustainability to promote the sustainable management and use of resources, including the creation of synergy between economic, social and environmental concerns, the protection of natural, environmental and cultural resources in a manner consistent with applicable legislation, and the *sustainable use of agricultural land*.¹⁶⁰

Although clause 1 of LUMB does not contain a definition of agricultural land, clause 26 provides for the continuation of current land uses (the so-called “scheduled land use purposes” detailed in Schedule 1) in the absence of a town-planning or land-use scheme. One such scheduled land-use purpose is the use of land for agricultural purposes.¹⁶¹ Item 2 of Schedule 1 defines agricultural purposes as:

... purposes normally or otherwise reasonably associated with the use of land for agricultural activities, including the use of land for structures, buildings and dwelling units reasonably necessary for or related to the use of the land for agricultural activities.

155 Paragraphs 90-92 of the judgment.

156 Paragraph 86 of the judgment.

157 Paragraph 91 of the judgment.

158 Paragraphs 88 and 93 of the judgment.

159 B 27B-2008, hereinafter referred to as ‘LUMB’. The Bill is currently being redrafted.

160 Clause 4(1)(d). Our emphasis.

161 Item 1(a) of Schedule 1.

It is noteworthy that LUMB does not repeal *SALA*.¹⁶² This would imply that LUMB, once enacted, would co-exist with *SALA*, and that the competent authority responsible for the administration of *SALA* would have to align the performance of its functions with the LUMB directive principles.¹⁶³

7. Conclusion

Reference might usefully be made at this point to a number of recent reports on the conversion of the use (and subdivision) of agricultural land into categorised recreational, commercial and/or residential uses, without having obtained the necessary *SALA* authorisation.¹⁶⁴ A related matter, touched upon by the CC majority decision, but not conclusively decided, was the prohibition contained in section 5(1) of the *Share Blocks Control Act*¹⁶⁵ which prohibits the operation of a share block scheme on *SALA*-defined agricultural land without the prior consent of the Minister responsible for agriculture authorising the sale or granting of a right to a portion of such agricultural land.¹⁶⁶

Currently the *Development Facilitation Act*¹⁶⁷ is used, among others, for the reclassification of (and concomitant steps relating to) land uses by those provinces that do not have their own provincial planning and development legislation. As indicated above, LUMB, if enacted in a manner similar to the 2008 draft,¹⁶⁸ will repeal the *Development Facilitation Act*.

Taking all of the above into account, the majority judgment is to be preferred. The reasons for this approach are, among others, as follows:

- (a) Having regard to the principles of statutory interpretation, the approach followed by the majority in paragraph 88 is the correct one. *SALA* (or parts thereof) could not have been repealed or abrogated in an indirect fashion by other legislation dealing with local government, without specifically referring to it.
- (b) The enactment of the *Repeal Act* by Parliament presupposes (as indicated by the majority decision) knowledge of the High Court decisions in the *Kotzé* and *Geue* cases (that *SALA* was still operative).
- (c) National legislation is required to either repeal *SALA* (determining the commencement date of the *Repeal Act*) and/or vest the power to deal with all aspects of land currently classified as agricultural land in local government.

162 Schedule 2 read with clause 69 (Repeal of laws).

163 Clause 4(1) – which, as indicated above, includes the sustainable use of agricultural land (clause 4(1)(d)).

164 See Van Wyk 2010:227, Environment.co.za 2010; Department of Environmental Affairs and Development Planning (Western Cape) 2005.

165 Act 59/1980.

166 Paragraph 76 of the judgment.

167 Act 67/1995, hereinafter referred to as ‘the *Development Facilitation Act*’.

168 B 27B-2008.

- (d) In the case of any deed relating to the subdivision of farmland, state practice¹⁶⁹ requires the submission of a *SALA* ministerial consent or a Department of Agriculture letter that the land in question is not agricultural land as defined in *SALA*.
- (e) The national sphere of government is still responsible for the administration of *SALA* (and therefore for the protection of agricultural land against unnecessary fragmentation). This responsibility has not vested in local government structures. The majority was therefore correct in finding that the Minister responsible for Agriculture is still required to give permission for the subdivision and sale of (portions) of agricultural land.

The fact that the law as it stands (as a result of the majority CC judgment in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & Another (Trustees of the Hoogekraal Highlands Trust & SAFAMCO Enterprises (Pty) Ltd* (amicus curiae); *Minister of Agriculture & Land Affairs (intervening)*)¹⁷⁰ determines that the 1995 proviso continues to be in force during this current, final phase of local government, implies that (a) agricultural land remains as a category, (b) the provisions of *SALA* need to be complied with, and (c) that the Minister's written approval needs to be obtained for each and every application for subdivision of agricultural land.

It is therefore recommended that Parliament should consider the enactment of a framework that will result in the identification of all existing land use conversions that have taken place contrary to the provisions of *SALA* and the regularisation thereof in appropriate cases. This proposed framework should also be formulated in a manner that will result in the absolute *ab initio* invalidity of any future administrative and other related actions in all cases where the land use of agricultural land is changed without the prior written consent of the authority(ies) responsible for ensuring the sustainability of agriculture in South Africa.

169 As described in CRC 6/2002, which is based on, among others, two opinions of 2000 and 2001 of the State Law Advisors. See also footnote 10 above for a discussion on the relationship between 'agricultural land' and farmland.

170 [2008] JOL 22099 (CC).

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