CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 78/07
[2008] ZACC 12

WARY HOLDINGS (PTY) LTD	Applicant
versus	
STALWO (PTY) LTD	First Respondent
REGISTRAR OF DEEDS, CAPE TOWN	Second Respondent
together with	
TRUSTEES OF THE HOOGEKRAAL HIGHLANDS TRUST and SAFAMCO ENTERPRISES (PTY) LTD	Amici Curiae
and	
MINISTER OF AGRICULTURE AND LAND AFFAIRS	Intervening Party

Heard on : 4 March 2008

Decided on : 25 July 2008

JUDGMENT

KROON AJ:

Introduction

[1] The applicant seeks leave to appeal to this Court against the decision of the Supreme Court of Appeal, handed down on 28 September 2007,[1] which unanimously upheld the first respondent's appeal against the decision of the Port Elizabeth High Court.[2]

[2] At issue in this matter is the validity of a written agreement concluded between the applicant and the first respondent on 6 December 2004 in terms of which the former sold to the latter "PLOTS 5, 6, 7 AND 8 OF PROPOSED SUBDIVISION PORTION 54 OF THE FARM NO 8 PORT ELIZABETH FOR THE SUM OF R550 000-00". As will appear below, the resolution of this issue depends essentially on whether the land embracing the property sold was at the time of the conclusion of the contract 'agricultural land' as envisaged in the Subdivision of Agricultural Land Act 70 of 1970[3] (the Agricultural Land Act).

[3] The first respondent intended to use the property purchased for industrial purposes (and indeed the property had been advertised as such). Portion 54 was, however, at the time zoned as 'agricultural land', but the applicant had lodged an application with the relevant local authority for the rezoning and subdivision of the land. Subdivision was in fact a suspensive condition of the sale. The subdivision was approved on 26 August 2005, such approval, however, being subject to certain

[1] Reported as *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Another* [2007] ZASCA 133; 2008 (1) SA 654 (SCA).

[2] The High Court decision was handed down on 26 January 2006, under case no. 5349/2005 (unreported).

[3] The Act was repealed by the Subdivision of Agricultural Land Act Repeal Act 64 of 1998 (the Repeal Act), but this latter Act has not yet come into operation. The Repeal Act provides that it will come into operation on a date fixed by the President.

conditions, which included a requirement that the applicant effect substantial improvements to the land relating to an access way, a storm water drainage system and other essential services. In order to cover the substantial costs that the improvements would entail (much higher than the applicant had initially anticipated), coupled with the fact that the property had in the interim increased in value, the applicant sought to increase, substantially, the purchase price of the property sold to the first respondent. The latter was, however, not prepared to entertain an increase in price. The applicant then adopted the stance that the agreement was invalid and unenforceable.

[4] The first respondent approached the High Court for a declaratory order that the agreement was binding and an order that the applicant effect transfer of the property purchased to it.

[5] The applicant's defence that the agreement was invalid and unenforceable was founded on two bases: alleged non-compliance with the provisions of section 2(1) of the Alienation of Land Act 68 of 1981,[4] and alleged non-compliance with the provisions of section 3 of the Agricultural Land Act.[5] The first basis does not feature in the present proceedings: the applicant was unsuccessful thereon in the High Court

[4] Section 2(1) provides that:

> "No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."

[5] Section 3 of the Agricultural Land Act provides, in effect, that no agricultural land may be subdivided or sold unless the Minister has consented thereto in writing.

as well as in the Supreme Court of Appeal, and the applicant did not seek to pursue the issue in this Court.

[6] The High Court, however, upheld the second defence and dismissed the first respondent's application. It held that the property sold was 'agricultural land' as envisaged in the Agricultural Land Act. Accordingly, the Minister of Agriculture not having consented in writing to the subdivision and sale of the land, the agreement was invalid and unenforceable for want of compliance with the provisions of section 3(a) and (e)(i) of the Agricultural Land Act.[6]

[7] The first respondent appealed to the Supreme Court of Appeal. That court (per *Maya* JA, *Farlam*, *Lewis*, *Jafta et Ponnan* JJA concurring) held that the land was not 'agricultural land'. Accordingly, the provisions of section 3(a) and (e)(i) of the Agricultural Land Act did not apply to the agreement between the applicant and the first respondent. It set aside the order of the High Court, and substituted for it a declaratory order that the written agreement was binding on the parties and an order that the applicant effect transfer of the property purchased to the first respondent.

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[6] Section 3 of the Act provides that subject to the provisions of section 2 (not relevant for the present purposes)—

> "(a) agricultural land shall not be subdivided;
>
> . . . .
>
> (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 (Act No 27 of 1956);
>
> . . . .
>
> unless the Minister has consented in writing."

In terms of the relevant definition in section 1 'Minister' means the Minister of Agriculture.

[8] It is that decision that the applicant seeks to assail in the present proceedings.

Further parties

[9] Although the Registrar of Deeds, Cape Town was cited as the second respondent in the proceedings in the High Court, the Supreme Court of Appeal and in the present application, he abided the decision in the High Court and did not seek thereafter to be involved in the proceedings.

[10] Two entities were admitted as *amici curiae* in the present proceedings, namely the Trustees of the Hoogekraal Highlands Trust and Safamco Enterprises (Pty) Ltd. Each of them is a party, as seller, to an existing written agreement for the sale of land. The issues that arise for decision in the present proceedings arise in respect of those agreements as well, and their validity is dependant on the decision reached in the present matter. The *amici curiae* align themselves with the stance of the applicant.

[11] The Minister of Agriculture and Land Affairs (the Minister) sought leave to be admitted as *amicus curiae* in the matter, alternatively as an intervening party in terms of Rule 8 of the Rules of this Court. The latter prayer was granted. Her interest in the matter, shortly stated, relates to the proper administration of the functional area of agriculture in the country. She, too, aligns herself with the stance of the applicant.

The definition of agricultural land

[12] Insofar as is relevant the definition of 'agricultural land' in section 1 of the Agricultural Land Act 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".[7]

The purpose of the Agricultural Land Act

[13] The essential purpose of the Agricultural Land 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.[8] In order to achieve this purpose, the legislature curtailed the common law right of landowners to

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[7] In terms of the definition section, as amended by section 1 of the General Law Amendment Act 49 of 1996, 'executive committee' means the executive committee of a province. The proviso (hereinafter referred to as such) was added to the definition by Proclamation R100 of 31 October 1995, issued by the President of South Africa in terms of section 235(9) of the interim Constitution (Act 200 of 1993). The antecedent history of the addition of the proviso to the definition is referred to below.

[8] See for example Geue and Another v Van der Lith and Another [2003] ZASCA 118; 2004 (3) SA 333 (SCA) at 338E-F; Tuckers Land and Development Corporation (Pty) Ltd v Truter 1984 (2) SA 150 (SWA) at 153H-154A; Sentraalwes Personeel Ondernemings (Edms) Bpk v Wallis 1978 (3) SA 80 (T) at 84E-F; Van der Bijl and Others v Louw and Another 1974 (2) SA 493 (C) at 499C-E.

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.[9] That it was the intention of the legislature to accord the Minister wide-ranging and flexible powers of regulation and control in order to achieve the purpose of the Act appears from section 4 of the Act, which makes provision for the following:

(a) The Minister may "in [her] discretion" refuse an application for her consent (subsection (2)).

(b) The Minister also has the discretion to grant an application for her consent subject to the imposition of conditions, including conditions as to the purpose for or manner in which the land may be used (subsection (2)(a)).

(c) The Minister has the power to enforce any conditions so imposed (subsection (3)).

(d) The Minister may also vary or cancel any such condition (subsection (4)).

(e) The Minister may consider whether or not the land is to be used for agricultural purposes and, if satisfied that it will not be so used, she must consult with the relevant provincial authority before granting her consent to the application. In such cases the provincial authority has the power to determine conditions with regard to the purpose for or manner in which the land may be used, and to enforce them, or to vary or cancel them (subsections (2)(b), (3) and (4)).

[9] *Geue* above n 8 at 338F-G.

Legislation in regard to local government

[14] Section 174 of the interim Constitution provided in part as follows:

> "(1) Local government shall be established for the residents of areas demarcated by law of a competent authority.
>
> (2) A law referred to in subsection (1) may make provision for categories of metropolitan, urban and rural local governments with differentiated powers, functions and structures according to considerations of demography, economy, physical and environmental conditions and other factors which justify or necessitate such categories."

[15] Local Government Transition Act 209 of 1993 (the Transition Act):

(a) The long title recorded that the Act was to provide inter alia for revised interim measures with a view to promoting the restructuring of local government, including the establishment of transitional councils in the interim phase.

(b) 'Interim phase' was defined in section 1 as meaning:

> "the period commencing on the day after elections are held for transitional councils as contemplated in section 9, and ending with the establishment of final arrangements to be enacted by a competent legislative authority".

(c) 'Transitional council' was defined as including: " . . . a transitional local council and a transitional metropolitan council for the interim phase".

(d) Sections 8 and 9 made provision for the implementation of transitional councils and the first elections of the members thereof.

(e) Section 9D(1)(a) (inserted by Proclamation R65 of 30 June 1995[10] and by section 9(1) of the Local Government Transition Act Second Amendment Act 89 of 1995) provided as follows:

> "The following principles shall apply in respect of rural local Government, namely—
>
> (a) provision shall be made for the division of the whole area of each province into areas of jurisdiction of transitional metropolitan councils, if any, and areas of district councils".

[16] The Constitution:

(a) Section 151(1) reads as follows: "The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic."

(b) Section 155 made provision inter alia for the establishment of various categories of municipalities (subsection (1)), and prescribed—

(i) that national legislation must define the different types of municipalities that may be established in each category, establish the criteria for determining when an area should have a particular category of municipality and establish criteria and procedures for the determination of municipal boundaries by an independent authority (subsections (2) and (3));

(ii) that provincial legislation must determine the different types of municipalities to be established in the province (subsection (5));

[10] GG 16521 of 30 June 1995.

(iii) that each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) (subsection (6)).

(c) Section 156 provides:

(i) that a municipality has executive authority in respect of, and has the right to administer, the local government matters listed in Parts B of Schedules 4 and 5, and any other matter assigned to it by national or provincial legislation (subsection (1));

(ii) that a municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer (subsection (2));

(iii) that the national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Parts A of Schedules 4 and 5 which necessarily relates to local government, if the matter would most effectively be administered locally and if the municipality has the capacity to administer it (subsection (4)).

(d) Schedules 4 and 5, respectively, set out the functional areas of concurrent national and provincial legislative competence and the functional areas of exclusive provincial legislative competence. The functional area of agriculture is listed in Part A of Schedule 4.

[17] Section 21 of the Local Government: Municipal Demarcation Act 27 of 1998 (the Demarcation Act) provides inter alia that the Municipal Demarcation Board (established in terms of section 2) must determine municipal boundaries in the territory of the Republic and may re-determine any municipal boundaries so determined by it.

[18] Local Government: Municipal Structures Act 117 of 1998 (the Municipal Structures Act):

(a) Section 2 prescribes which areas must have a single category A municipality.[11]

(b) Section 4 provides for the Municipal Demarcation Board to determine, applying the criteria set out in section 2, whether a particular area must have a single category A municipality (or, alternatively, municipalities of both categories B and C) and to determine the boundaries of the area.

(c) Section 12 provides that the Member of the Executive Council for Local Government in a province must establish a municipality in each area demarcated by the Demarcation Board.

[11] The section reads:

> "An area must have a single category A municipality if that area can reasonably be regarded as—
> (a) a conurbation featuring—
> (i) areas of high population density;
> (ii) an intense movement of people, goods and services; extensive development; and
> (iii) multiple business districts and industrial areas;
> (b) a centre of economic activity with a complex and diverse economy;
> (c) a single area for which integrated development planning is desirable; and
> (d) having strong interdependent social and economic linkages between its constituent units."

History of the addition of the proviso to the definition of agricultural land

[19] Section 235(8) of the interim Constitution:

(a) Section 235(8)(a), which formed part of the transitional arrangements, made provision for the President, by proclamation in the *Gazette*, to assign (either generally or to the extent specified in the proclamation) to a competent authority within the jurisdiction of the government of a province, *which had the required administrative capacity*, the administration of a law referred to in subsection (6)(b).[12]

(b) Subsection (8)(b) empowered the President, on such assignment or thereafter, and to the extent necessary for the efficient carrying out of the assignment, to amend or adapt such law in order to regulate its application or interpretation.

[20] Section 235(9) of the interim Constitution:

(a) Section 235(9)(a) made provision, in the event of a provincial government being unable to assume responsibility for a law referred to in subsection (6)(b), for the President, by proclamation in the *Gazette*, to assign (either generally or to the extent specified in the proclamation) the administration of such law to an authority within the jurisdiction of the national government until such time as the provincial government became able to assume such responsibility.

[12] The subsection provided inter alia that a law which fell within the functional area of agriculture (being one of the functional areas specified in Schedule 6 under the heading of 'Legislative Competence of Provinces') and was immediately prior to the commencement of the interim Constitution administered by or under the authority of the Minister (being a functionary referred to in subsection (1)(a)), was to continue to be administered by a competent authority within the jurisdiction of the national government until the assignment in terms of section 235(8)(a) of the administration of such law to a competent authority within the jurisdiction of the government of a province.

(b) In terms of subparagraph (b), the provisions of subsection (8)(b) applied *mutatis mutandis* in respect of such assignment.

[21] By Proclamation R102 of 1994[13] the President, acting in terms of section 235(9), assigned temporarily the administration of a number of laws referred to in section 235(6)(b) to appropriate authorities within the jurisdiction of the national government. Included therein was the assignment, generally, of all laws falling within the functional area of agriculture to the Minister. The proclamation recorded that the assignment of a law in terms thereof was, in respect of a province, to remain in force until the assignment, in terms of section 235(8), of the administration of such law, or part thereof, to a competent authority within the jurisdiction of the government of that province.

[22] By Proclamation R100 of 1995[14] the President added the proviso to the definition of 'agricultural land' under a preamble reading as follows:

> "Under section 235(9) of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), and in order to provide for the continued efficient carrying out of the functional area of Agriculture as assigned to the Minister of Agriculture by Proclamation No. R.102 of 1994, I hereby amend the Subdivision of Agricultural Land Act, 1970 (Act No. 70 of 1970), by the addition in section 1 of the following proviso to the definition of 'agricultural land'".

Factors common cause

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[13] GG 15781, 3 June 1994.

[14] GG 16785, 31 October 1995.

[23] The following was common cause:

(a) As at the date of the conclusion of the agreement between the applicant and the first respondent, Portion 54 fell within the area of jurisdiction of the Nelson Mandela Metropolitan Municipality (the NMMM), a single category A municipality, the successor to the Metropolitan Municipality of Port Elizabeth (the MMP).[15]

(b) Prior to the establishment of the MMP, and at the time Proclamation R100 was issued, the land in question was situated within the area of jurisdiction of the Port Elizabeth Transitional Rural Council (the PETRC), and immediately prior to the first election of its members, the land in question was classified as 'agricultural land'.[16]

[24] The MMP was also a transitional council as envisaged in the Transition Act.[17]

The High Court judgment

[25] The High Court held as follows:

> "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

[15] In terms of Provincial Notice No. 22 of 2000, published in Provincial Gazette No. 486 (Extraordinary) of 28 February 2000, the Demarcation Board, acting in terms of section 21(1)(b) of the Demarcation Act, re-determined the boundaries of the then MMP. The result thereof was that Portion 54 fell within the boundaries of that municipality.

In terms of Provincial Notice No. 85 of 2000, published in Provincial Gazette No. 654 of 27 September 2000, the NMMM was established, in terms of the Municipal Structures Act, as a single category A municipality, with the same boundaries as those of its predecessor, the MMP.

[16] The PETRC was a transitional council as envisaged in section 1 of the Transition Act. Consequently, the proviso was applicable to Portion 54.

[17] See above [15](c).

> 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 agricultural land. It follows that it remained so and still was agricultural land at the time the agreement was entered into."[18]

Hence, the conclusion that (absent the Minister's consent in writing to the subdivision and sale of the land in question) the agreement between the applicant and the first respondent was invalid and unenforceable.

[26] In adopting the above approach the High Court in general aligned itself with the reasoning in *Kotzé v Minister van Landbou en Andere*.[19] That reasoning included the following comments:

(a) One could possibly accept or at least speculate that the purpose of section 3 of the Agricultural Land Act was to protect agriculture as an economic activity, by inter alia preventing agricultural land being cut up into units too small to be economically viable or being reduced in consequence of urban extension, without the written consent of the Minister as the custodian or protector of agriculture and agricultural land. The long title of the Act reflects its purpose as being the control of the subdivision and use of agricultural land.

(b) Since 1970 constitutional changes in South Africa have, however, included various changes in respect of local government. The preamble to Proclamation R100 of 1995 (which added the proviso to the definition of agricultural land) reflected that provision was being made for the continued

[18] Above n 2 at para 64.

[19] 2003 (1) SA 445 (T).

efficient carrying out of the functional area of agriculture as assigned to the Minister by Proclamation R102 of 1994. The legislature had accordingly seen fit to enact the proviso at a time when transitional councils had been established with areas larger than the previous municipal areas.

(c) The transitional councils were a phase in the development of the local government system in South Africa. The implementation of the subsequent legislation, culminating in the Municipal Structures Act, resulted in the establishment of 'wall-to-wall' municipalities throughout the territory of the Republic, with the consequence that there was now no longer any land that did not fall within municipal jurisdiction. That did not mean, however, that there was no longer any agricultural land to which the provisions of section 3 of the Agricultural Land Act could be applied, nor could the argument be upheld that matters such as the subdivision of land then fell within the domain of the municipality in question as the successor to the various local authorities referred to in paragraph (a) of the definition of agricultural land. (It could not be accepted that the Agricultural Land Act had, without anything more and in an indirect manner, been repealed or abrogated by other legislation which did not refer thereto.)

(d) The Agricultural Land Act required to be interpreted to mean what it meant when it was promulgated (as to which, see *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein, and Others*).[20]

[20] 1985 (4) SA 773 (A) at 804D-E.

(e) Accordingly, 'agricultural land' still existed for the purposes of the Act, and consisted of all land, except that situated within the jurisdiction of the structures named in paragraph (a) of the definition at the last moment when those structures actually existed. Agricultural land, classified as such and which fell within the jurisdiction of an earlier transitional council, is accordingly still 'agricultural land'. Therefore, until the repeal of the Agricultural Land Act is put into operation, the Minister's written permission for the subdivision of such land remains necessary.

The judgment of the Supreme Court of Appeal

[27] The first question addressed by the Supreme Court of Appeal was whether the NMMM is a 'municipal council, city council or town council', as referred to in the definition of 'agricultural land' in the Agricultural Land Act. The question was answered in the affirmative on the following reasoning:[21] Section 93(8)(a) of the Municipal Structures Act provides that—

> "[w]ith effect from 5 December 2000 . . . any reference in a law referred to in item 2 of Schedule 6 to the Constitution of the Republic of South Africa, 1996 . . . to a municipal council, municipality, local authority or another applicable designation of a local government structure, must be construed as a reference to a municipal council or a municipality established in terms of this Act, as the case may be."

In terms of item 2 of Schedule 6 to the Constitution—

> "all law that was in force when the new Constitution took effect continues in force, subject to any amendment or repeal and consistency with the new Constitution, and 'old order legislation' does not have a wider application, territorially or otherwise,

[21] Above n 1 at para 16.

> than it had before the [interim] Constitution took effect unless subsequently amended to have a wider application and continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new Constitution."

The Agricultural Land Act is a piece of the 'old order legislation' envisaged by the Constitution and section 93(8) of the Municipal Structures Act. That being so, the words 'municipal council, city council, town council' in the definition of 'agricultural land' in the Agricultural Land Act must be construed to include a category A municipality such as the NMMM.[22]

[28] The Supreme Court of Appeal then directed its attention to the issue whether the land in question retained its status as 'agricultural land' by virtue of the proviso, and its classification as such immediately prior to the election of the first members of the PETRC, notwithstanding that it now falls within the area of jurisdiction of a municipal council (ie the NMMM).

[29] The Court disapproved of the approach (in effect) in *Kotzé* that, on an application of *Finbro*, and to avoid a result that could not have been intended (the Agricultural Land Act being rendered ineffective as a result of all land falling within municipal jurisdiction consequent upon the establishment of 'wall-to-wall' municipalities), a narrow interpretation of 'municipal council', so as to exclude latter-day municipalities such as the NMMM, was required; since all land fell within the jurisdiction of transitional councils when these were established, all land classified as

[22] Id at para 17.

'agricultural land' immediately prior to the election of the first members of the transitional councils retained that classification for as long as the proviso remains in force.

[30] The Court held that on a proper, narrow interpretation of the proviso it simply served to preserve the status quo until the demarcation and establishment of the final new order local government structures, at which time the land fell within the jurisdiction of the NMMM and lost its historical character. A different approach would result in the status of 'agricultural land' remaining perpetually frozen from the time of the establishment of transitional councils and not being determined by whether or not it is situated within the jurisdiction of the local government structures now embraced in the definition of 'agricultural land'. It would also fail to recognise that the intention of the framers of the Agricultural Land Act contemplated the concept of 'agricultural land' as being fluid rather than static, changing with the expansion of local authorities and the creation of new ones. In this regard the Court referred to section 3(f) of the Agricultural Land Act.[23] In cases where the Minister granted permission, the land obviously ceased to be 'agricultural land'. Logically, therefore, the narrow approach of the High Court (as to the interpretation of 'municipal council') was not permissible. Thus, any exercise in the interpretation of the proviso cannot ignore present-day municipal structures created by the Municipal Structures Act. Similarly, the purpose of the proviso had to be determined 'in the light of the

[23] In terms of the section—

> "no area of jurisdiction, local area, development area, peri-urban 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 . . . unless the Minister has consented in writing" (the emphasis is that of the Supreme Court of Appeal).

legislative scheme which guided the restructuring process of local government', from the establishment of transitional councils to the establishment of the final structures. Accordingly, the principle set out in *Finbro* had been misapplied in *Kotzé*.[24]

[31] The Court added that the proviso was enacted within the context of the Transition Act, which was intended to provide interim measures such as the establishment of interim municipal structures to promote the contemplated constitutional restructuring of local government. The proviso itself refers specifically to 'land situated in the area of jurisdiction of a transitional council' which it states 'shall remain classified as such'. The plain meaning of these words was that the proviso was meant to operate only as long as the land affected remained situated within the jurisdiction of a transitional council. Had the legislature intended the classification to survive after transitional councils had ceased to exist, it would have been a simple matter for it to have said so expressly.[25]

[32] The Court further referred to the interpretative principle that exceptions to general rules (of which, it said, the proviso was an example) are to be read restrictively. The proviso was enacted as a stopgap measure, based on the realisation that the effect of the Transition Act, which would establish municipalities for rural areas for the first time, would be to include transitional councils within the meaning of 'municipal council' envisaged in the definition of 'agricultural land', thus excluding certain agricultural land from the definition – clearly, an untenable situation.

[24] Above n 1 at paras 20-23.

[25] Id at para 24.

Therefore, once the PETRC was disestablished and the land fell within the jurisdiction of the NMMM it ceased to be 'agricultural land' within the meaning of the Agricultural Land Act. The fact that the proviso was still on the statute book was neither here nor there.[26]

[33] The Court found support for its approach in the following considerations. First, in its view, the approach of the High Court was incompatible with, and did not give credence to, the radically enhanced status and powers which the new constitutional order accorded to local government structures. They are no longer the pre-constitutional creatures of statute confined to delegated or subordinate legislation, but have mutated, subject to permissible constitutional constraints, to inviolable entities with latitude to define and express their unique character, and derive power direct from the Constitution or from legislation of a competent authority or from their own laws.[27] This status necessarily includes the competence and capacity on the part of municipalities to administer land falling within their areas of jurisdiction without executive oversight.[28]

[34] Second, in terms of paragraph (a) of the definition of 'agricultural land', the Minister retains the power to exclude any land from the exception set out therein and

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[26] Id at para 25.

[27] Reference was made to CDA Boerdery (Edms) Bpk and Others v Nelson Mandela Metropolitan Municipality [2007] ZASCA 1; 2007 (4) SA 276 (SCA) at paras 33-40; City of Cape Town and Another v Robertson and Another [2004] ZACC 21; 2005 (3) BCLR 199 (CC); 2005 (2) SA 323 (CC) at para 60; Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others [1998] ZACC 17; 1998 (12) BCLR 1458 (CC); 1999 (1) SA 374 (CC) at paras 31 and 38. (All of these cases concerned a municipality's power to impose rates or levies.)

[28] Above n 1 at para 26.

declare it 'agricultural land' for the purposes of the Agricultural Land Act. The High Court and the Court in *Kotzé* overlooked this fact in reasoning that another interpretation of the proviso would lead to the emasculation of the Agricultural Land Act. Section 3 of the Act still prohibits the subdivision of 'agricultural land'. In the light of the above there is no possibility of the objective of the Act being thwarted.[29]

[35] The Supreme Court of Appeal finally made the observation that the disputed land is in fact no longer used as 'agricultural land'.[30]

Condonation

[36] In terms of directions issued by the Chief Justice on 8 November 2007, the applicant was required to lodge the record with the Registrar by Friday 30 November 2007. In fact, the record was filed on 12 December 2007 and the applicant seeks condonation of the late filing. The papers reflect the following: The directions of 8 November were telefaxed by the Registrar to the applicant's attorneys at the incorrect telefax number, with the result that the directions were not received by the attorneys. The error was only discovered on 3 December 2007 when the Registrar telephonically enquired of the attorneys why there had been a failure to file the record by 30 November 2007. At the request of the attorneys, the directions were telefaxed to them afresh and the matter was thereafter attended to expeditiously. In the circumstances the explanation proffered is an adequate one, and a proper case for condonation is made out.

[29] Id at para 27.

[30] Id at para 28.

[37] In terms of directions issued on 22 and 25 February 2008, respectively, the *amici curiae* were required to file their written submissions by 26 February and the Minister her written submissions by 27 February. In each case the first respondent was required to file its written submissions in response to those of the *amici curiae* and the Minister by Friday 29 February 2008. It only did so on Monday 3 March 2008 (having electronically submitted the submissions to the other parties and the Registrar on 29 February). The first respondent seeks condonation of its non-compliance with the relevant directions. The constraints of time to which the first respondent was subject clearly afforded it a limited opportunity for lodging its written submissions, and in the particular circumstances its non-compliance is properly to be condoned.

The application for leave to appeal

[38] The requirements for the grant of an application for leave to appeal to this Court are now well settled in several decisions of this Court. The application must raise a constitutional matter,[31] which includes any issue involving the interpretation, protection or enforcement of the Constitution.[32] Further, it must be in the interests of justice to grant leave to appeal.[33] Whether it is in the interests of justice that leave to appeal be granted depends on a careful weighing-up of all relevant factors, including the importance of the constitutional issue raised. These considerations could be varied

[31] Section 167(3)(b) of the Constitution provides that the Constitutional Court "may decide only constitutional matters, and issues connected with decisions on constitutional matters".

[32] Section 167(7) of the Constitution.

[33] Section 167(6) of the Constitution.

and are often case specific, but the assessment thereof will be informed by the broad requirement of whether the interests of justice will be advanced by this Court hearing the matter. The prospects of success in the envisaged appeal, although not the only factor, are obviously an important consideration. Similarly, the fact that the appeal raises a constitutional matter is not a decisive factor on its own in the decision whether leave to appeal should be granted or not.[34]

Has a constitutional issue been raised?

[39] As to the threshold jurisdictional requirement in applications for leave to appeal set out in section 167(3)(b), that the issues to be decided must be constitutional matters or issues connected with constitutional matters, the Constitution offers no definition of what a constitutional matter or an issue connected with a decision on a constitutional matter is (save for the provision in section 167(7) that included in the concept of a constitutional matter is any issue involving the interpretation, protection or enforcement of the Constitution). Those questions are left ultimately to this Court to decide.[35] In *Fraser v Absa Bank Ltd*[36] this Court stated the following:

> "To attempt to define the limits of the term 'constitutional matter' rigidly is neither necessary nor desirable. Philosophically and conceptually it is difficult to conceive of

[34] See for example *Shaik and Others v S* [2007] ZACC 19; 2007 (12) BCLR 1360 (CC); 2008 (2) SA 208 (CC) at para 15; *Armbruster and Another v Minister of Finance and Others* [2007] ZACC 17; 2007 (12) BCLR 1283 (CC); 2007 (6) SA 550 (CC) at para 24; *Magajane v Chairperson, North West Gambling Board and Others* [2006] ZACC 8; 2006 (10) BCLR 1133 (CC); 2006 (5) SA 250 (CC) at para 29; *Phillips and Others v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (2) BCLR 274 (CC); 2006 (1) SA 505 (CC) at paras 30 and 32; *Radio Pretoria v Chairman of the Independent Communications Authority of South Africa and Another* [2004] ZACC 24; 2005 (3) BCLR 231 (CC); 2005 (4) SA 319 (CC) at para 19; *NEHAWU v University of Cape Town and Others* [2002] ZACC 27; 2003 (2) BCLR 154 (CC); 2003 (3) SA 1 (CC) at para 25.

[35] Section 167(3)(c) provides that the Constitutional Court "makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter."

[36] [2006] ZACC 24; 2007 (3) BCLR 219 (CC); 2007 (3) SA 484 (CC).

> any legal issue that is not a constitutional matter within a system of constitutional supremacy. All law is after all subject to the Constitution and law inconsistent with the Constitution is invalid . . . . In a system of constitutional supremacy it is inappropriate to construe the term 'constitutional matter' narrowly."[37]

Nevertheless, while the concept of a constitutional issue is broad, the term is of course not completely open: the jurisdiction of this Court is expressly restricted to only those matters outlined in section 167(3)(b) and that limitation presupposes that a meaningful line must be drawn between constitutional and non-constitutional matters, and it is the responsibility of this Court to do so.[38]

[40] One aspect may be shortly disposed of. A submission raised on behalf of the *amici* and the Minister pointed to the source of the legislative power exercised by the President when he amended the Agricultural Land Act by adding the proviso to the definition of 'agricultural land'. It was argued that the Supreme Court of Appeal failed to appreciate that it was the President, and not parliament, who enacted the proviso. The Court therefore adopted an interpretation which ignores the fact that the President introduced the proviso while exercising limited legislative power conferred on him under the transitional provisions of the interim Constitution for a particular purpose. Insofar as it was intended to contend that, apart from the question of what the correct interpretation of the proviso is, the circumstance that the source of legislative power exercised by the President was the interim Constitution renders the

[37] Id at paras 36-37. See too *S v Boesak* [2000] ZACC 25; 2001 (1) BCLR 36 (CC); 2001 (1) SA 912 (CC) at para 14, where this Court stated that if regard is had to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.

[38] *Fraser* above n 36 at paras 36, 37 and 39.

interpretation of the proviso a constitutional matter, I record that I am not persuaded that the source of the power to legislate bears on the issue whether the interpretation of the proviso raises a constitutional matter. The purpose of the proviso is, however, a relevant consideration, an aspect dealt with below.

[41] The application essentially concerns the interpretation of a statute. Clearly, not all statutory interpretation raises a constitutional matter. On the other hand, it cannot be gainsaid that there are undoubted instances where the interpretation of a law will constitute a constitutional matter.

[42] The applicant contended that the application for leave to appeal involves a constitutional matter or an issue connected with a decision on a constitutional matter as it is concerned with the meaning and effect of the definition of 'agricultural land' in the Agricultural Land Act, read and interpreted in the constitutional context of the development of local government structures within South Africa, and the impact thereof on the constitutional functional areas of different organs of state. It was further argued that, in part, constitutional issues will be determinative of this question.

[43] Section 167(4)(a) of the Constitution provides as follows:

> "Only the Constitutional Court may decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state."

While the section provides that only this Court has jurisdiction to decide disputes *between specified organs of state* concerning the issues referred to, it recognises that disputes concerning those issues are constitutional matters. This has also been recognised in decisions of this Court. In *Fraser* it was stated:

> "This Court has held that a constitutional matter is presented where a claim involves:
>
> (a) the interpretation, application and upholding of the Constitution itself, including issues concerning the status, powers or functions of an organ of state and disputes between organs of state".[39]

By way of example reference was made to *Boesak* where, with reference to section 167(4)(a), it was stated that "constitutional matters must include . . . issues concerning the status, powers and functions of an organ of State."[40]

[44] An allied principle is that enunciated for example in *Affordable Medicines Trust v Minister of Health of the Republic of South Africa*:[41]

> "It is by now axiomatic that, where possible, legislation ought to be construed in a manner that is consistent with the Constitution."[42]

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[39] Id at para 38.

[40] Above n 37, the reference being to para 14 in *Boesak*. See too the reference in that paragraph to the "detailed provisions of the Constitution such as the allocation of powers to various legislatures and structures of government".

[41] Affordable Medicines Trust and Others v Minister of Health and Another [2005] ZACC 3; 2005 (6) BCLR 529 (CC); 2006 (3) SA 247 (CC).

[42] Id at fn 31. See too Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others [2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC) at para 22 where it was stated that courts are under a duty to read the provisions of legislation, so far as is possible, in conformity with the Constitution. Cf Nel v Le Roux NO and Others [1996] ZACC 6; 1996 (4) BCLR 592 (CC); 1996 (3) SA 562 (CC) at para 8 where it was held that certain provisions of the Criminal Procedure Act 51 of 1977 can and must be construed in such a way that their application does not unjustifiably infringe the fundamental constitutional rights of the person affected.

Where this question arises a constitutional matter is at issue.

[45] In amplification of the contention of the applicant set out in paragraph 42 above, it may be added that at issue is whether, whatever the powers of present-day municipalities are (an aspect to which I revert later), the Minister still retains the power to approve of or reject subdivisions of land classified as 'agricultural land' in terms of the proviso. The effect of the judgment in this matter will be to remove or confirm that power. It will, therefore, be a pronouncement on the power of an organ of state. The decision will, in part, be informed by an interpretation of the relevant provisions of both the interim Constitution and the Constitution. In the light of the authorities referred to above, the issue is thus a constitutional matter.

[46] A further aspect arises. I deal below with the interpretative principle that a statutory provision should be interpreted in accordance with the spirit, purport and objects of the Bill of Rights. This Court has not yet been called upon to deal with the situation where two conflicting interpretations of a statutory provision could both be said to promote the spirit, purport and objects of the Bill of Rights and the decision to be made is whether the one interpretation is to be preferred above the other. It seems to me that it cannot be gainsaid that this Court is required to adopt the interpretation which *better* promotes the spirit, purport and objects of the Bill of Rights. That would, after all, be a more effective "[interpretation] through the prism of the Bill of Rights".[43]

[43] *Hyundai* above n 42 at para 21.

[47] By the same token, where 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. Whether the interpretation of the proviso contended for by the applicant meets that requirement is a constitutional matter.

[48] I therefore conclude that the applicant has raised a constitutional issue.

[49] The *amici* and the Minister raise a further consideration. Its foundation is the principle reiterated in *Fraser*, namely:

> "This Court has held that a constitutional matter is presented where a claim involves:
> . . . .
> (d) the interpretation of a statute in accordance with the spirit, purport and objects of the Bill of Rights (or the failure to do so)".[44] (Footnote omitted.)

The further comment was that this Court has made it clear that section 39(2) fashions a mandatory constitutional canon of statutory interpretation.[45] A later paragraph in the judgment reads as follows:

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[44] Above n 36 at para 38. Section 39(2) of the Constitution provides that: "[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[45] Above n 36 at para 43.

> "The question raised by this application is whether the Supreme Court of Appeal's interpretation of section 26 [of the Prevention of Organised Crime Act 121 of 1998] has failed to promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2). This differs from an attack on an allegedly wrong factual finding or incorrect interpretation or application of the law, as in the cases referred to earlier. Section 39(2) requires more from a court than to avoid an interpretation which conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights. These are to be found in the matrix and totality of rights and values embodied in the Bill of Rights. It could also in appropriate cases be found in the protection of specific rights, like the right to a fair trial in section 35(3), which is fundamental to any system of criminal justice, and of which the rights to legal representation and against unreasonable delays are components. The spirit, purport and objects of the protection of the right to a fair trial therefore have to be considered. A constitutional matter has thus been raised, and this Court accordingly has jurisdiction to hear the matter."[46]

[50] The contentions of the *amici* and the Minister, read together, invoke the following provisions of the Bill of Rights:

(i) section 24(b)(iii);[47]

(ii) section 25(5); and[48]

(iii) section 27(1)(b).[49]

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[46] Id at para 47.

[47] "Everyone has the right—

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

[48] "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."

[49] "Everyone has the right to have access to—

(b) sufficient food and water".

Section 27(2) provides that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of the rights referred to in subsection (1). The right to food is one underscored by General Comment 12 of the United Nations Committee on Economic, Social and Cultural Rights.

The submission is that the interpretation accorded to the proviso by the Supreme Court of Appeal failed to give proper recognition to these rights. The alternative argument is that the interpretation of the High Court better accords recognition to them. This is so because an interpretation of the proviso which would continue to repose a right of control over the subdivision of 'agricultural land' in higher tiers of government would better serve the dictates of section 39(2). Reliance was placed inter alia on the decision in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*.[50]

[51] I conclude that the submissions of the *amici* and the Minister raise a constitutional issue.

The prospects of success

[52] At this stage it is necessary only to state that on a consideration of the submissions placed before this Court by the applicant, the *amici* and the Minister, it cannot be said that they have no reasonable prospects of success.

Other considerations

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[50] [2007] ZACC 13; 2007 (10) BCLR 1059 (CC); 2007 (6) SA 4 (CC) at para 40 which reads:

> "Section 24 of the Constitution guarantees to everyone the right to a healthy environment and contemplates that legislation will be enacted for the protection of the environment. [The Environment Conservation Act 73 of 1989] and [the National Environmental Management Act 107 of 1998] are legislation which give effect to this provision of the Constitution. The question to be considered in this application is the proper interpretation of the relevant provisions of ECA and NEMA and, in particular, the nature of the obligations imposed by these provisions on the environmental authorities. The proper interpretation of these provisions raises a constitutional issue . . . It follows therefore that the present application raises a constitutional issue." (Footnote omitted.)

[53] Further factors favouring a finding that it would be in the interests of justice to grant the leave to appeal sought are the following:

(a) The present matter is the first occasion on which this Court's pronouncement has been sought on the interaction between the Agricultural Land Act and the constitutional development of local government structures within the country, and specifically the impact thereof on the interpretation of the proviso. The resolution of the dispute is not only of obvious importance in relation to the contract between the applicant and the first respondent (and to the contracts to which the *amici* are parties), but it also speaks for itself that the Supreme Court of Appeal's interpretation could potentially have far-reaching effects on agricultural policy in the country, far beyond the narrow facts of this case. Land, agriculture, food production and environmental considerations are obviously important policy issues at national level. The question is not whether the municipalities should not have a say in these matters. The question is rather whether the legislature intended to do away with the powers of the national Minister of Agriculture to preserve 'agricultural land' or whether the Agricultural Land Act, and specifically the proviso, recognises the need for national control, oversight and policy to play a role in decisions to reduce agricultural land and for consistency as part of a national agricultural policy.

(b) This Court is not being asked to make its pronouncement as a court of first instance. It has the benefit of the decision of the High Court and the contrary decision of the Supreme Court of Appeal which overturned the former.

[54] In the result, I conclude that it would be proper for leave to appeal to be granted to the applicant.

The interpretation of the Agricultural Land Act

[55] The finding of the Supreme Court of Appeal that the words 'municipal council, city council, town council' in paragraph (a) of the definition of 'agricultural land' must be construed as including a present-day single category A municipality, such as the NMMM, was, correctly, not attacked in this Court: the reasoning of the Supreme Court of Appeal on this score is unassailable.[51] The same comments apply to the similar finding by the Supreme Court of Appeal that the PETRC, a transitional council, had been embraced within the term 'municipal council' envisaged in the definition of 'agricultural land'.[52] It may be added that the MMP, too, was a 'municipal council'.[53]

[56] The introduction of the proviso into the definition of 'agricultural land' was dictated by the fact that, in terms of the Transition Act, transitional councils were established resulting in the then existing 'agricultural land' falling within the jurisdiction of the transitional councils and thereby becoming municipal land. It was in order to ensure (at least *pro tempore*) that 'agricultural land' retained its status, despite its falling within the jurisdiction of a transitional council, that the proviso was

[51] Above [27].

[52] Above [32].

[53] Above [24].

added to the definition. The corollary thereof, having regard to the wording of Proclamations R102 and R100, read together (Proclamation R100 was in terms linked to Proclamation R102), is that the intention was that the functional area of agriculture continue (at least *pro tempore*) to repose in the Minister, including the administration of the Agricultural Land Act. No doubt it was realised by the legislature that, despite the establishment of transitional councils, it was necessary for the existence of 'agricultural land', and the Minister's control and administration thereof in order to achieve the purpose of the Agricultural Land Act, to continue, so as to ensure that 'agricultural land', and its productive capacity, would not be eradicated as a result of the transition to democracy. This fact was recognised by the Supreme Court of Appeal in terms of its comment that the situation would otherwise have been untenable.[54]

[57] The question to be answered is whether, despite the circumstance that the land in question fell within the area of jurisdiction of the NMMM, it was, by virtue of the proviso and its classification as 'agricultural land' immediately prior to the election of the first members of the PETRC, still 'agricultural land' at the time the agreement between the applicant and the first respondent was entered into, or whether it had lost that status by virtue of its inclusion within the area of jurisdiction of the NMMM (or, perhaps more accurately, when the existence of the MMP came to an end).

[54] Above [32].

[58] A cardinal rule in the construction of any legislation is that the intention of the legislature must be sought in the words employed in the legislation. The first step in this exercise is a determination of the plain meaning to be ascribed to the words. Two competing arguments on this score were presented:

(a) The first respondent supported the approach of the Supreme Court of Appeal[55] to the effect that the plain meaning of the wording of the proviso was that the proviso was meant to operate only as long as the land affected remained situated within the jurisdiction of a transitional council.

(b) The counter-argument supported the approach of the High Court[56] that the proviso identified "a point in time" with reference to which it was to be determined whether land qualified as 'agricultural land', and, if so, it retained that status notwithstanding any subsequent changes in local government structures and their boundaries.

[59] It is so that, on a purely textual interpretation, the proviso is capable of bearing the meaning ascribed to it by the Supreme Court of Appeal; and, as the Supreme Court of Appeal correctly commented,[57] an intention that the classification as 'agricultural land' was to survive after transitional councils had ceased to exist could easily have been reflected by express language to that effect.

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[55] Above [31].

[56] Above [25].

[57] Above [31].

[60] On the other hand, however, it cannot be gainsaid that, on a purely textual interpretation, the proviso is also capable of bearing the meaning ascribed to it by the High Court. Again, had the intention been that the classification as 'agricultural land' was to terminate once the land no longer fell within the area of jurisdiction of a transitional council, express appropriate language reflecting that intention could easily have been utilised.

[61] It is, however, a further canon of statutory interpretation that the ordinary meaning of the words in a statute must be determined in the context of the statute (including its purpose) read in its entirety.[58] That context is the following:

(a) The purpose of the Agricultural Land Act is as recorded earlier,[59] and includes empowering the Minister as set out in the definition of 'agricultural land' and

[58] See *Mistry v Interim National Medical and Dental Council of South Africa and Others* [1998] ZACC 10; 1998 (7) BCLR 880 (CC) at paras 10-11; 1998 (4) SA 1127 (CC) at paras 17-18 where it was indicated that the meaning of particular provisions in an Act must be construed within the scheme of the Act as a whole, having regard to the object and purpose of the legislation underpinning the provisions to be interpreted. See too *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (7) BCLR 687 (CC); 2004 (4) SA 490 (CC) at para 90, which reads as follows:

> "The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous. Recently, in *Thoroughbred Breeders' Association v Price Waterhouse*, the SCA has reminded us that:
>
> > 'The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the face of it to have a readily discernible meaning. As was said in *University of Cape Town v Cape Bar Council and Another* 1986 (4) SA 903 (A) at 914D-E:
> >
> > > "I am of the opinion that the words of s 3(2)(d) of the Act, clear and unambiguous as they may appear to be on the face thereof, should be read in the light of the subject-matter with which they are concerned, and that it is only when that is done that one can arrive at the true intention of the Legislature."
> >
> > The well-known passage in the dissenting judgment of Schreiner JA in *Jaga v Dőnges NO and Another; Bhana v Dőnges NO and Another* 1950 (4) SA 653 (A) at 662G-663A was also quoted with approval. It is of course clear that the context to which reference is made in the latter case must include the long title and chapter headings. (Compare *Swart en 'n Ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202C.)'" (Footnotes omitted.)

[59] Above [13].

section 4 of the same Act. No compelling reason presents itself as to why that purpose should have been intended to remain current only during the life of the transitional councils. (I deal more fully with this aspect below.)

(b) The proviso was introduced in terms of powers accorded to the President by section 235(9) of the interim Constitution. As set out earlier,[60] the context of the exercise of the powers 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. (This aspect too will be more fully dealt with below.)

[62] 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. As was pointed out in *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others*,[61] the laws governing the matters to be assigned in terms of section 235 had not been designed for the new constitutional order and the purpose of the President's power to amend or adapt laws to the extent that he considered it "necessary for the efficient carrying out of the assignment" was "to provide a mechanism whereby *a fit*

[60] Above [19]-[22].

[61] [1995] ZACC 8; 1995 (10) BCLR 1289 (CC); 1995 (4) SA 877 (CC) at paras 91 and 84.

can be achieved between the old laws and the new order". The new situation *in casu* was the establishment of transitional councils embracing 'agricultural land'. 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 interim 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,[62] and did not deal with local government.

[63] However, on the premise that the proviso is ambiguous (counsel for the Minister conceded that to be the case) regard must be had to other indicators of the legislature's intention.

[64] As recorded earlier,[63] the intention of the legislator with the introduction of the proviso was to ensure the continued existence of 'agricultural land' and the Minister's control over it through the provisions of the Agricultural Land Act (thereby achieving the purpose of the Act[64]), despite the establishment of transitional councils. The question that arises is for how long it was intended that that position continue. It is with regard to that question that I turn to address certain comments in the judgment of the Supreme Court of Appeal.

[62] Id at para 84.

[63] Above [56].

[64] Id.

[65] Reference was made to the fact that the proviso itself referred to "land situated in the area of jurisdiction of a transitional council". That is, of course, the basis on which I have accepted that, on a textual reading, the proviso is capable of bearing the meaning attributed to it by the Supreme Court of Appeal. However, as I have further recorded, a textual reading of the proviso also renders it capable of bearing the meaning attributed to it by the High Court.[65]

[66] The comment that the proviso was enacted within the context of the Transition Act, which was intended to provide interim measures such as the establishment of interim municipal structures to promote the contemplated constitutional restructuring of local government, is correct, as far as it goes. But the further implied corollary that the *proviso was intended to promote the contemplated constitutional restructuring of local government*, cannot be endorsed. Indeed, in my judgement, the finding that the purpose of the proviso included the promotion of the contemplated constitutional restructuring of local government was the fundamental flaw in the approach of the Supreme Court of Appeal. As recorded earlier,[66] the proviso was enacted, first, in the context of the purpose of the Agricultural Land Act, and, secondly, in terms of section 235(9) of the interim Constitution, in the context of the need to provide for the continued efficient carrying out of the functional area of agriculture assigned to the Minister and the anticipated future acquisition by a provincial government of the ability to assume responsibility for the administration of laws falling within the

[65] Above [59]-[60].

[66] Above [61]-[62].

functional sphere of agriculture. It is to be emphasised that in contradistinction to express statements in the proclamations relating to these aspects, there is no reference in either proclamation to the final local government structures to come into being in the future. In short, the proviso had to do with agriculture, not restructuring of local government.

[67] In this regard it is apposite to refer to certain other provisions of the interim Constitution (current at the time Proclamation R100 was issued).

(a) The transitional arrangements enacted as part of the interim Constitution were contained in Chapter 15 thereof. Section 229 provided as follows:

> "Subject to this Constitution, all laws which immediately before the commencement of this constitution were in force in any area which forms part of the national territory, shall continue in force in such area, subject to any repeal or amendment of such laws by a competent authority."

The Agricultural Land Act is such a law.

(b) The effect of the provisions of section 235(6)(b) has already been set out above.[67] There was no provision therein for any part of the functional area of agriculture to be administered 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.

[67] Above [19](a) and n 12.

[68] The arrangement put in place by Proclamations R102 and R100 was not affected by the 1996 Constitution. Schedule 6 contains the transitional arrangements. The following items are relevant:

Item 2(1):

> "All law that was in force when the new Constitution took effect, continues in force, subject to—
>
> (a) any amendment or repeal; and
>
> (b) consistency with the new Constitution."

Item 2(2)(b):

> "Old order legislation that continues in force in terms of subitem (1)—
>
> (b) continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new Constitution."

Item 14(1) and (2)(a):

> "(1) 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.
>
> (2) To the extent that it is necessary for an assignment of legislation under subitem (1) to be effectively carried out, the President, by proclamation, may—
>
> (a) amend or adapt the legislation to regulate its interpretation or application".

[69] It is accepted that present-day municipalities have the enhanced status referred to by the Supreme Court of Appeal.[68] I join issue, however, with the comment that this status necessarily includes the competence and capacity to administer land falling within their areas of jurisdiction *without executive oversight*, insofar as these last words are invoked in support of the finding that the consequence of the new local government dispensation is that land classified as 'agricultural land' in terms of the proviso has, subject to the exceptions noted by the Court (as to which, see below), been removed from the domain of the Minister's control through the Agricultural Land Act. As I will endeavour to show later, whatever the ambit of the control of present-day municipalities over such land, there is no reason why the Minister's control thereof cannot co-exist therewith.

[70] Allied thereto is the reliance in the judgment of the Supreme Court of Appeal on the provision in paragraph (a) of the definition of 'agricultural land' for the Minister to exclude any land from the exception set out therein and declare it 'agricultural land'. This provision, read with the still operative prohibition in section 3 against the subdivision of 'agricultural land' without the permission of the Minister, so it was reasoned, excluded the possibility of the objective of the Act being thwarted.[69] It was argued on behalf of the first respondent, in support of this approach, that the provision for such declaration is now the *raison d'être* for the Agricultural Land Act. In my judgement, however, there are a number of counters to this contention.

[68] Above [33].

[69] Above [34].

[71] That the proviso is still operative provides a more persuasive *raison d'être* for the Agricultural Land Act. Absent any declaration as referred to in the preceding paragraph, on the first respondent's argument and the decision of the Supreme Court of Appeal, there would be no land to be the subject of the functional area of agriculture, legislative competence in respect of which is assigned by Part A of Schedule 4 to the Constitution to the national and provincial tiers of government (and not, subject to what follows below, to the local government tier). This is not a situation that commends itself for acceptance.

[72] An allied aspect is that the as yet unrepealed Agricultural Land Act contains the provision in paragraph (f) of the definition of 'agricultural land' for the Minister to exclude land from the provisions of the Act.[70] Counsel for the Minister validly argued that there would be no sense in the provision unless there is a general body of 'agricultural land' in respect of which it could be invoked.

[73] Any declaration by the Minister that a particular piece of municipal land is to be excluded from the exception relating to municipal land referred to in paragraph (a) of the definition would entail far-reaching implications arising out of the Promotion of Administrative Justice Act.[71] It is open to serious doubt whether the coming into existence of 'agricultural land' by way of a declaration by the Minister, beset by such hurdles, was intended by the legislature to be the only means whereby there would be

[70] The relevant portion of the definition is set out above at [12].

[71] Act 3 of 2000.

'agricultural land' to which the provisions of the Agricultural Land Act would be applicable.

[74] If, indeed, the procedure providing for the Minister to exclude land from the exception and to declare it 'agricultural land' would exclude the possibility of the objective of the Act being thwarted, one questions why it was ever thought necessary for the proviso to be enacted.

[75] It is so that in terms of section 156(4) of the Constitution, provision is made for the national and provincial governments to assign to a municipality the administration of a matter listed in Part A of Schedule 4, which includes the functional area of agriculture.[72] However, there are prerequisites for such assignment, namely the agreement of the municipality; and the requirements that the matter must necessarily relate to local government, that it would most effectively be administered locally; and that the municipality must have the capacity to administer the matter (aspects on which there is no evidence before this Court); and the assignment will be subject to any conditions imposed. There is also no suggestion that any attempt to effect such an assignment has been essayed.

[76] It would be convenient at this stage to interpose a reference to a further submission raised on behalf of the applicant during argument. Attention was drawn to

[72] Above [16](c)(iii).

the fact that in terms of section 5(1) of the Share Blocks Control Act,[73] no share block scheme may be operated on 'agricultural land' as defined in the Agricultural Land Act unless consent for the sale or the granting of a right to a portion of such agricultural land has previously been obtained from the Minister. The effect of the Supreme Court of Appeal's judgment is that there is now no room (save in the event of a declaration by the Minister as referred to in paragraph 70 above) for any application of section 5(1) and for practical purposes it is superfluous. I perceive the purpose of the provision to be related to that of the Agricultural Land Act. The fact that the section is still on the statute book supports the stance of the applicant. I do not consider, however, that the point, which was not raised in the papers, should be emphasised.

[77] The statement in the judgment of the Supreme Court of Appeal that an approach different from that adopted by it would result in the status of 'agricultural land' remaining 'perpetually frozen' from the time of the establishment of transitional councils, irrespective of whether the land in question falls within the jurisdiction of the local government structures now embraced in the definition of 'agricultural land'[74], is unpersuasive. The same comment falls to be made concerning the further statement that a different approach would fail to recognise that the intention of the framers of the Agricultural Land Act contemplated the concept of 'agricultural land' as being 'fluid rather than static', changing with the expansion of local authorities and the creation of new ones.

[73] 59 of 1980.

[74] Above [30].

[78] The term 'frozen in perpetuity' is an overstatement. The contention of the applicant, the *amici* and the Minister is, on analysis, no more than that the proviso envisaged that the status quo be maintained, ie the land's classification as 'agricultural land' be maintained with whatever 'fluidity', in respect of the urbanisation of land the Agricultural Land Act otherwise entailed. (The Minister's consent in terms of section 3(f) was obviously not required for the *constitutional* expansion of municipal 'areas of jurisdiction' in terms of the Municipal Structures Act.) In my judgement, the contention is a valid one.

[79] Taking the reliance of the Supreme Court of Appeal on the enhanced status of present-day municipalities a step further, counsel for the first respondent argued that it was the intention of the legislature that what was formerly 'agricultural land' would now be administered by municipalities inter alia in terms of the still operative municipal ordinances which accord the municipalities various powers including those of planning, zoning and rezoning of land and approval of applications for subdivision.

[80] I am not persuaded, however, that the enhanced status of municipalities and the fact that they have such powers is a ground for ascribing to the legislature the intention that national control over 'agricultural land' through the Agricultural Land Act, effectively be a thing of the past. There is no reason why the two spheres of control cannot co-exist even if they overlap and even if, in respect of the approval of subdivision of 'agricultural land', the one may in effect veto the decision of the

other.[75] It should be borne in mind that the one sphere of control operates from a municipal perspective and the other from a national perspective, each having its own constitutional and policy considerations. As adverted to earlier,[76] land, agriculture, food production and environmental considerations are obviously important policy issues on a national level. An interpretation of the Agricultural Land Act that would attribute to the legislature the intention to retain the national government's role in effectively formulating national policy on these and other related issues, 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, is an interpretation that can and should properly be adopted. That interpretation is the one effectively applied by the High Court.

[81] A consideration in support of the comments in the preceding paragraph is that it may legitimately be contended that given 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. That would have dealt at least a substantial blow to the role of national policy in serving the purpose of the Agricultural Land Act, consequent upon

[75] Such co-existence of spheres of control was in fact earlier in operation. For example, the Land Use Planning Ordinance 15 of 1985 (Cape) provided, in section 8, that the Administrator shall with effect from the date of commencement of the Ordinance make scheme regulations as contemplated in section 9 in respect of *all* land situated in the Province of the Cape of Good Hope *to which the provisions of section 7 did not apply*. The latter section referred to land embraced in a town-planning scheme. Section 9(1) provided that "[c]ontrol over zoning shall be the object of scheme regulations, which may authorise the granting of departures and subdivisions by a council". In terms of section 2, council meant "the council of a municipality or of a division". The existence of the control provided by these provisions over land outside a town-planning scheme was side-by-side with that of the control of the Minister through the Agricultural Land Act over the 'agricultural land' that was embraced in such land.

[76] Above [53](a).

the termination of the concept of a general body of 'agricultural land' in the country, and would instead have left policy to the, as yet undetermined, municipal structures to be established in the future. This consideration would also render unattractive any speculative suggestion that the proximity in time between the dates on which the Repeal Act and the Municipal Structures Act were assented to (16 September 1998 and 11 December 1998, respectively), is indicative thereof that the first mentioned Act was passed in recognition of the (perceived) fact that with the implementation of the latter Act the concept of 'agricultural land' would disappear. (This, too, is an aspect to which I revert later.)

[82] The reference in the Supreme Court of Appeal's judgment to the interpretative principle that exceptions to general rules are to be read restrictively[77] is also unpersuasive. It is unhelpful to rely on such a principle when the question arises what in fact is the general rule and what is the exception. 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?

[83] Lastly, the apparent reliance by the Supreme Court of Appeal on the fact that the disputed land is no longer being used as 'agricultural land'[78] is not persuasive. The manner in which the land is being used is irrelevant to the issues to be decided in this matter.

[77] Above [32].

[78] Above [35].

[84] I return briefly to deal with the reliance of the *amici* and the Minister on the provisions of section 39(2) of the Constitution. As far as section 27(1)(b) of the Constitution specifically is concerned (the fundamental right of everyone to have access to sufficient food and water), the question is not whether large or small agricultural units are preferable for food production, a question debated during argument but on which there is no evidence before this Court. The questions are rather whether an interpretation which, as indicated in paragraph 81 above, accords a role to national government in the administration of 'agricultural land' through the provisions of the Agricultural Land Act, is one which would promote the spirit, purport and objects of the Bill of Rights or, if necessary, one which would better promote those considerations.

[85] In my judgement, both of these questions are to be answered in the affirmative. Whatever powers of administration municipalities may have over land such as that in dispute, according a role to the national government in the administration thereof can only serve to advance the cause of the rights invoked by the *amici* and the Minister. It cannot be excluded that excessive fragmentation of 'agricultural land', be it arable land or grazing land, *may* result in an inadequate availability of food, and the Agricultural Land Act is a valuable tool enabling the state to carry out necessary controls. As the Minister pointed out, international law recognises that the content of the right to food has the twin elements of availability and accessibility.[79] The first

[79] Woolman et al, *Constitutional Law of South Africa*, 2nd ed, Vol 3 (Juta, Cape Town 2006) Chapter 56C.

element refers to a sufficient supply of food and requires the existence of a national supply of food to meet the nutritional needs of the population generally. It also requires the existence of opportunities for individuals to produce food for their own use. The second element requires that people be able to acquire the food that is available or to make use of opportunities to produce food for their own use. In respect of both elements there is a measure of overlap with the state's obligation under section 25(5) of the Constitution to facilitate equitable access to 'agricultural land', and with the state's obligation under section 24 of the Constitution to conserve the environment.

[86] 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. (The constitutional validity thereof was not challenged before us, and that question does not fall to be decided.)

[87] While it is obvious that with the passing of the Repeal Act it was the intention of the legislature to remove the Agricultural Land Act from the statute book, it would be simplistic to contend that therefore it was the intention to put an end to the concept of a general body of 'agricultural land' or to effective national government (through the Minister) or provincial government control over the subdivision of 'agricultural land'.

[88] Incidentally, had that consequence been the intended result of the establishment of the present-day municipal structures, as the judgment of the Supreme Court of Appeal would have it, there is no reason why the Repeal Act was not put into operation with the establishment of those municipal structures.[80] In this regard I also align myself with the comment in *Kotzé*[81] that it cannot be accepted that without anything more the Agricultural Land Act was, in indirect fashion, repealed or abrogated (thereby, in one fell swoop, doing away with the concept of a general body of 'agricultural land', otherwise preserved by the proviso) by other legislation, dealing with local government, which did not specifically refer thereto.

[89] It may be added that footnote 14 in *Shaik v Minister of Justice and Constitutional Development and Others*[82] reads as follows:

> "A well-recognised rule of statutory construction was formulated as follows in *Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics* 1911 AD 13 at 24:
>
>> '[E]very part of a statute should be so construed as to be consistent, so far as possible, with every part of that statute, and with every other unrepealed statute enacted by the same Legislature.'"

In my view, the latter portion of this rule is also applicable where one has to do with an Act of parliament (the Municipal Structures Act) and a provision introduced by a competent authority (the President) into another Act of parliament which remains

[80] Cf *Kotzé* above n 19 at 455H-I.

[81] Id at 455E.

[82] [2003] ZACC 24; 2004 (4) BCLR 333 (CC); 2004 (3) SA 599 (CC).

unrepealed. The interpretation propounded in this judgment is in accordance with this rule.

[90] The provision in the Repeal Act that the date of its commencement would be fixed by the President founds the inference that the legislature accepted that some period would have to pass before the time would be ripe for the repeal to take effect. The probable explanation is that it was with a view to making provision for other arrangements first to be put into place. As indicated above, the Municipal Structures Act did not constitute such arrangements. That provision for such arrangements is still being awaited is confirmed by the fact that Parliament has not, as it was competent to do, sought to pass further legislation to effect the immediate repeal of the Agricultural Land Act.

[91] The possible arrangements envisaged include the following:

(a) One possibility is that the legislature may seek to put other provisions in place in terms of which national government would have other means to control the subdivision of 'agricultural land'.

(b) A second possibility (having regard to the circumstances explained in paragraph 61(b) above, that the proviso was introduced as part of temporary arrangements pending provincial governments acquiring the required capacity to administer the functional area of agriculture and the assignment of such administration to them, read with the superseding provisions of item 14(1)

and (2) of Schedule 6 of the new Constitution)[83] is the development of the capacity of provincial governments so as to undertake responsibility for such administration and the assignment thereof to them.

(c) The third possibility is that, as envisaged in section 156(4) of the Constitution,[84] the administration of the functional area of agriculture could be assigned to municipal authorities, provided that, as explained earlier,[85] certain prerequisites are satisfied.

[92] It is, however, not necessary for present purposes to speculate further on, or make any finding as to, what future developments are likely to take place.

[93] The final aspect requiring mention is that the legislature must be taken to have been aware of the decision in *Kotzé*, as also that in *Geue* (which proceeded on the premise – not in issue – that the provisions of section 3 of the Agricultural Land Act were applicable to an agreement for the sale of subdivided agricultural land concluded on 19 June 2001). Despite such awareness there has not, over the supervening period of some years, been any legislative action in response to the decisions. That inaction is consistent with the intention ascribed to the legislature in this judgment. Indeed, the evidence before this Court is that the Deeds Registry, legal practitioners and the Minister have conducted affairs on the basis that the essential effect of the decision in

[83] Above [68].

[84] Above [16](c)(iii).

[85] Above [75].

Kotzé represented what the law is, at least until the Supreme Court of Appeal's judgment was handed down.

Conclusion

[94] I therefore conclude that the judgment of the Supreme Court of Appeal falls to be set aside, and the order of the High Court reinstated.

Costs

[95] It is appropriate that the applicant's costs in this Court be paid by the first respondent, but that there be no costs order made in respect of the participation of the *amici curiae* or the Minister in the proceedings.

Order

[96] In the result, the following order will issue:

(a) The failure of the applicant and the first respondent, respectively, to comply with the directions of the Chief Justice is condoned.

(b) Leave to appeal to this Court is granted.

(c) The appeal is allowed, the order of the Supreme Court of Appeal is set aside and for it is substituted the following order: "The appeal is dismissed with costs".

(d) The applicant's costs will be paid by the first respondent, such costs to include the costs attendant on the employment of two counsel.

(e) There will be no costs order in respect of the participation of the *amici curiae* and the Minister of Agriculture and Land Affairs in the proceedings.

Langa CJ, Madala J, Mokgoro J, Ngcobo J, Skweyiya J and Van der Westhuizen J concur in the judgment of Kroon AJ.

YACOOB J:

Introduction

[97] This application requires us to decide whether the Minister of Agriculture and Land Affairs (the Minister) continues to enjoy the wide powers conferred upon ministers of agriculture in the pre-constitutional order by the Subdivision of Agricultural Land Act (the Act).[1] The Act forbids the subdivision[2] or sale[3] of all land

[1] 70 of 1970.

[2] The relevant part of section 3 of the Act states:

> "Subject to the provisions of section 2—
> (a) agricultural land shall not be subdivided;
> . . . .
> unless the Minister has consented in writing."

[3] The relevant part of section 3 of the Act states:

> "Subject to the provisions of section 2—
> . . . .
> (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 (Act No. 27 of 1956);
> . . . .
> unless the Minister has consented in writing."

that falls outside the area of jurisdiction of local government structures without the consent of the Minister.

[98] The case comes before this Court for the resolution of a dispute concerning an agreement of purchase and sale[4] of certain land that falls within the Nelson Mandela Metropolitan Municipality. The subdivision of the land has been approved by that municipality. The debate presented to this Court turns on an interpretation of a Presidential Proclamation[5] that amended the definition of agricultural land in the Act by inserting a proviso (the proviso). This happened one day before the elections were held for most transitional councils[6] in terms of the Local Government Transition Act (the LGTA).[7] The land in question fell within the area of a transitional council at the relevant time. The applicant contended for the invalidity of the agreement on the basis that the Minister was required, on a proper construction of the proviso in all the relevant circumstances, to consent to the sale but had not done so. But the respondent urged that the consent of the Minister had been rendered unnecessary on account of the proviso and by reason of subsequent developments.

[99] Three other parties were granted leave to provide this Court with written and oral argument. The first two, who were admitted as amici, are entities that also sought to avoid the consequences of an agreement of purchase and sale of certain other land on the basis of the absence of the ministerial consent said to be required. The third is

[4] The agreement was concluded on 6 December 2004.

[5] Proclamation R100 of 1995, GG 16785, 31 October 1995.

[6] See n 8 below.

[7] 209 of 1993 at section 9.

the Minister, admitted as an intervening party, who sought to persuade us that ministerial consent was a pre-requisite to every agreement of purchase and sale in respect of every subdivision of land that prior to 1994 was classified as agricultural even if the land fell within the area of jurisdiction of a municipality that had approved the relevant zoning and subdivision.

Brief legislative history

[100] The dispute between the parties concerns the interpretation of the proviso. Since the amendment, the definition of agricultural land in the Act reads as follows:

> "'[A]gricultural land' means any land, except—
>
> (a) land situated in the area of jurisdiction of a municipal council, city council, town council, village council, village management board, village management council, local board, health board or health committee, and land forming part of, in the province of the Cape of Good Hope, a local area established under section 6(1)(i) of the Divisional Councils Ordinance, 1952 (Ordinance No. 15 of 1952 of that province), and, in the province of Natal, a development area as defined in section 1 of the Development and Services Board Ordinance, 1941 (Ordinance No. 20 of 1941 of the last-mentioned province), and in the province of the Transvaal, an area in respect of which a local area committee has been established under section 21(1) of the Transvaal Board for the Development of Peri-Urban Areas Ordinance, 1943 (Ordinance No. 20 of 1943 of the Transvaal), 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;
>
> (b) land—
>
> (i) which forms part of any area subdivided in terms of the Agricultural Holdings (Transvaal) Registration Act, 1919 (Act No. 22 of 1919); or

> (ii) which is a township as defined in section 102(1) of the Deeds Registries Act, 1937 (Act No. 47 of 1937), but excluding a private township as defined in section 1 of the Town Planning Ordinance, 1949 (Ordinance No. 27 of 1949 of Natal), not situated in an area of jurisdiction or a development area referred to in paragraph (a);
>
> (c) land of which the State is the owner or which is held in trust by the State or a Minister for any person;
>
> . . . .
>
> (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".

[101] The Proclamation inserted the proviso in the following terms:

> "TEMPORARY ASSIGNMENT OF THE ADMINISTRATION OF CERTAIN LAWS TO AN APPROPRIATE AUTHORITY WITHIN THE JURISDICTION OF THE NATIONAL GOVERNMENT IN TERMS OF SECTION 235(9) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1993
>
> Under section 235(9) of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), and in order to provide for the continued efficient carrying out of the functional area of Agriculture as assigned to the Minister of Agriculture by Proclamation No. R. 102 of 1994, I hereby amend the Subdivision of Agricultural Land Act, 1970 (Act No. 70 of 1970), by the addition in section 1 of the following proviso to the definition of 'agricultural land'".

The proviso reflected in the previous paragraph is then set out.

[102] The proviso was brought in at a time when local government was being restructured as required by the LGTA in terms of the interim Constitution. The LGTA provided a process for the reconstruction of local government that was to end with the establishment of fully-fledged democratically elected municipalities everywhere in South Africa. This happened on 5 December 2000[8] when elections of members to these permanent structures were held. Before this restructuring began, only urban or semi-urban areas had local government structures. The LGTA required transitional councils to be elected.[9] These elections would usher in the interim phase of local government restructuring.

[103] It was common cause that the proviso, at the very least, required ministerial consent for any sale or subdivision of agricultural land as defined in the Act and which fell within the area of a transitional council for so long as these temporary instruments of local government continued to exist. The applicant, the amici and the Minister contended that the proviso, properly interpreted, means that the Minister's consent would remain an essential pre-requisite to a valid sale even after transitional councils were replaced by more permanent structures. The respondent urged that ministerial consent was required only during the period that transitional councils

[8] The Local Government Elections under permanent municipal structures were held on 5 December 2000 in all nine provinces. See *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) at para 1. The Local Government Elections under the transitional arrangements were held on 1 November 1995 throughout South Africa except for certain portions of the Western Cape and the whole of KwaZulu-Natal where the elections were held in mid-1996. See *African National Congress and Another v Minister of Local Government and Housing, KwaZulu-Natal and Others* [1998] ZACC 2; 1998 (3) SA 1 (CC); 1998 (4) BCLR 399 (CC) at para 6.

[9] Section 9.

remained in existence and that the requirement fell away as soon as the transitional councils were replaced by permanent authoritative municipal entities.

[104] The Port Elizabeth High Court (the High Court) upheld the applicant's contention that the meaning of the proviso, on a proper construction, had the consequence that land that was agricultural land as defined in the Act immediately before the election of a transitional council, would remain agricultural land subject to the powers of the Minister even after transitional councils had ceased to exist.[10] The Supreme Court of Appeal reversed the finding of the High Court on appeal.[11] It held that the proviso is plain: agricultural land as defined would remain agricultural land only for so long as it fell within the areas of jurisdiction of transitional councils. It would cease to be agricultural land as soon as permanent local government structures had been established.[12]

A constitutional matter?

[105] We can grant leave to appeal only if the application raises a constitutional matter or an issue connected with a decision on a constitutional matter.[13] This case requires us to determine the correct meaning of legislation. Disputes about the correct interpretation of legislation do not in themselves normally raise constitutional matters

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[10] *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Registrar of Deeds, Cape Town* Case No: 5349/05, Port Elizabeth High Court, 26 January 2006, unreported at para 64.

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

[12] Id at para 25.

[13] Section 167(3)(b) of the Constitution.

or issues connected with decisions on them. Something more is required. The attempt to persuade us that this case raised a constitutional issue stood on four legs:

(a) The first, advanced by the applicant, was that it is necessary to have recourse to certain provisions of the interim Constitution as well as the Constitution to determine the meaning of the proviso.

(b) The second basis, relied on by the Minister, was that an interpretation that preserves national ministerial power over municipal agricultural land would certainly improve the capacity of the State to fulfil two obligations imposed on it by our Constitution. The one is the duty to ensure the progressive realisation of the right of access to food;[14] the other is the task to ensure access to land.[15]

(c) The amici assiduously backed the Minister and added two propositions of their own in the effort to prop up the submission that a constitutional issue had been raised. They brought some of the transitional provisions of the interim Constitution[16] to the fore and stressed that the purpose of the proviso was the preservation of national executive control over agricultural land until a province acquired the capacity to administer it. They also raised the state's duty to secure a healthy and safe environment.[17] It was accordingly submitted

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[14] Section 27 of the Constitution, to the extent relevant, provides:

> "(1) Everyone has the right to have access to—
> . . . .
> (b) sufficient food and water; and
> . . . .
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."

[15] Section 25(5) of the Constitution provides: "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."

[16] Sections 235(6) to 235(9) of the interim Constitution Act 200 of 1993.

[17] Section 24 of the Constitution provides:

that the application mandated a consideration of the scope and purpose of these provisions of the interim Constitution and the Constitution and was therefore a constitutional matter or an issue connected with a decision on one.

[106] All of these themes have two interrelated material features in common. To begin with, none of them embodies any suggestion that the meaning ascribed to the proviso by the Supreme Court of Appeal would render it inconsistent with the Constitution. The applicant, the Minister and the amici urged only that an interpretation that favours continued national control over agricultural land better accords with constitutional principle and the fulfilment of entrenched rights. The next characteristic, a consequence of the first, is that the proviso must at least be reasonably capable of the meaning contended for by the champions of the existence of national land control. The constitutional dimensions relied on cannot arise for adjudication unless the meaning sought to be given to the proviso is reasonable. This Court has no mandate, constitutional or otherwise, to afford to any law a meaning that it cannot reasonably bear. Courts ought never to go down that road, even to fulfil the laudable aim of achieving greater harmony between fundamental rights conferred by the Constitution and the law in question. As was said in *Hyundai*:[18]

"Everyone has the right—

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

[18] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC); 2000 (2) SACR 349 (CC) (*Hyundai*).

> "On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however, be unduly strained."[19]

[107] If a law is reasonably capable of two meanings, the question whether the one meaning better advances the constitutional project might raise a constitutional matter. It was contended in this case that the meaning sought to be given to the proviso by the applicant, the amici and the Minister would better promote the spirit, purport and objects of the Bill of Rights in that it would enable the state better to fulfil some of its constitutional obligations. I think the question whether the one interpretation is more in accordance with the spirit, purport and objects of the Constitution than the other does raise a constitutional matter. But the constitutional matter would be raised for decision only if the proviso is reasonably capable of having two meanings. This issue whether the proviso is reasonably capable of two meanings must be determined first, for if it is not, the constitutional question does not arise for decision. The question whether the proviso is reasonably capable of two constructions is therefore an issue connected with a decision on a constitutional matter and, in my view, we have the jurisdiction to decide it.

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[19] Id at para 24.

[108] I am satisfied that the proviso, in all the circumstances, is not reasonably capable of the construction that the applicant, the Minister and the amici wish us to sanction. Accordingly, in my view, the constitutional issue does not arise for consideration by this Court. The reasoning that drives me to the conclusion that the proviso is reasonably capable of bearing only that meaning given to it by the Supreme Court of Appeal follows.

The proviso is reasonably capable of one meaning only

[109] Ordinarily, the first step in any interpretive exercise is to determine the meaning of the words used literally or, as it were, on their face. In this case, however, the proper application of the proviso may well depend on one of the other conclusions of the Supreme Court of Appeal. In addition to the conclusion of that Court that the proviso did not retain the powers of the Minister over agricultural land as defined in the Act, the Supreme Court of Appeal held[20] that the Nelson Mandela Metropolitan Municipality was in fact a municipal council within the purview of that term contained in the definition of agricultural land in the Act.[21] I will refer to this conclusion of the Supreme Court of Appeal as the municipality finding. The finding is materially relevant to the application of the proviso. This matter is therefore investigated before examining the proviso itself.

Implications of the municipality finding

[20] Above n 11 at para 17.

[21] See above [4].

[110] As I have said, the Supreme Court of Appeal concluded that a municipal council as referred to in the Act included municipalities of the type with which we are here concerned: Category A municipalities as defined in the Constitution.[22] This finding was based on a provision in the Local Government: Municipal Structures Act (the Municipal Structures Act).[23] The judgment motivates this conclusion in the following terms:

> "The first question that arises is whether the [Nelson Mandela Metropolitan Municipality] is a 'municipal council, city council or town council' within the meaning of the definition of 'agricultural land' in the Agricultural Land Act. The latter Act does not define these terms. However, s 93(8) of the Municipal Structures Act provides that
>
> > (w)ith effect from 5 December 2000 . . . any reference in a law referred to in item 2 of Schedule 6 to the Constitution of the Republic of South Africa, 1996 . . . to a municipal council, municipality, local authority or another applicable designation of a local government structure, must be construed as a reference to a municipal council or a municipality established in terms of this Act, as the case may be.
>
> In terms of item 2 of Schedule 6 to the Constitution
>
> > all law that was in force when the new Constitution took effect, continues in force, subject to any amendment or repeal and consistency with the new Constitution and old order legislation . . . does not have a wider application, territorially or otherwise, than it had before the [interim] Constitution took effect unless subsequently amended to have a wider application and continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new Constitution.
>
> To my mind there is no question that the Agricultural Land Act is a piece of the 'old order legislation' envisaged by the Constitution and s 93(8) of the Municipal Structures Act. That being so, the words 'municipal council, city council, town council' in the definition of 'agricultural land' in the Agricultural Land Act must be

[22] Section 155(1)(a).

[23] 117 of 1998 at section 93(8).

> construed to include a category A municipality such as the [Nelson Mandela Metropolitan Municipality]."[24]

[111] This conclusion is undoubtedly right. That the Nelson Mandela Metropolitan Municipality is a municipal council contemplated in the definition of agricultural land in the Act suggests that at least on the literal meaning of the definition, agricultural land within it no longer remained under ministerial control. On the literal meaning of the definition, the legislature, by enacting section 93(8) of the Municipal Structures Act, brought all municipalities structured in terms of that legislation within the purview of the first exception to the definition of agricultural land in the Act. In doing so, the literal meaning suggests that Parliament's purpose was to reduce ministerial power over land situated within restructured municipalities.

[112] A second consequence of the municipality finding concerns its impact on the status of the judgment in the case of *Kotzé*.[25] The Supreme Court of Appeal said in relation to *Kotzé*:

> "This conclusion was based on the judgment in *Kotzé v Minister van Landbou en Andere*. In this case Van der Westhuizen J considered whether 'agricultural land' as defined in s 1 of the Agricultural Land Act still exists in view of the constitutional changes to the system of local government in the context of category B and C municipalities. The learned judge found that the effect of s 151 of the Constitution, which provides that 'the local sphere of government consists of municipalities which must be established for the whole of the territory of the Republic', and the Municipal Structures Act, which established new, different categories of municipalities with extended boundaries, was to create 'wall to wall municipalities' such that all land

[24] Above n 11 at paras 16-7.

[25] *Kotzé v Minister van Landbou en Andere* 2003 (1) SA 445 (T) (*Kotzé*).

now falls within municipal jurisdictions, thereby rendering the Agricultural Land Act ineffective. He held that, as this could not have been the intended result, the local government structures referred to in s 1 had to be interpreted to mean what they meant when the Act was promulgated (which required a narrow interpretation of 'municipal council' to exclude latter-day municipalities such as the NMMM): in the event, the proviso meant that since all land within the Republic fell within areas of jurisdiction of transitional councils when these entities were established by the Transition Act, any land which was classified as 'agricultural land' immediately prior to the election of the first members of the transitional councils retains that classification, for as long as the proviso remains in force."[26] (Footnotes omitted.)

[113] This is not a correct rendition of the *Kotzé* judgment. Indeed, the case of *Kotzé* did not primarily address the proviso or its meaning. The judgment was essentially concerned with whether post-constitutional municipal structures were municipal councils contemplated in the definition of agricultural land in the Act. The Judge found that they were not. The judgment says:

> "The first respondent submitted, rightly in my view, that the wording in the law must be interpreted to mean what it meant when the law was made. Agricultural land therefore still exists for the purposes of the particular Act . . . It is all land, except land that was situated within the jurisdiction of the structures named in section 1 of Act 70 of 1970 at the last point of time at which these structures actually did exist. Agricultural land that had been classified as such and was situated within the area of jurisdiction of an earlier transitional council in terms of [the LGTA] therefore remains agricultural land."[27] (My translation.)

[26] Above n 11 at para 20.

[27] Above n 25 at 454J-455B which reads:

> "Namens die eerste respondent is myns insiens tereg aangevoer dat die bewoording van die Wet uitgelê moet word om te beteken wat dit beteken het toe die Wet gemaak is. (Vergelyk in hierdie verband *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein, and Others* 1985 (4) SA 773 (A) op 804D-E.) Landbougrond bestaan gevolglik steeds vir die doeleindes van die betrokke Wet. Dit is alle grond, behalwe grond wat geleë was binne die regsgebied van die strukture wat in art 1 van Wet 70 van 1970 genoem word, op die laaste tydstip wat daardie strukture inderdaad nog bestaan het. Landbougrond wat as sodanig geklassifiseer is en binne die regsgebied van ŉ vroeëre oorgangsraad in terme van Wet 209 van 1993 geleë is, is dus ook steeds landbougrond."

[114] According to the *Kotzé* judgment then, the structures mentioned in the first exception in the definition were municipal bodies that existed at the time; they were not the municipalities created in terms of the Municipal Structures Act. It follows that the finding by the Supreme Court of Appeal that a municipality of today is a municipal council within the meaning of that term in the definition is inconsistent with the judgment in *Kotzé*. Accordingly, if the municipality finding stands, the *Kotzé* judgment would be overruled to this extent.

[115] Yet no party contending for continued ministerial control over municipal agricultural land directly challenged the correctness of the finding by the Supreme Court of Appeal that the Nelson Mandela Metropolitan Municipality was a municipality within the contemplation of paragraph (a) of the definition of "agricultural land" in the Act. The reason for this may be that the conclusion of the Supreme Court of Appeal is inescapable. But some of the applicant's submissions were, to an extent, necessarily inconsistent with an acceptance of this finding. The applicant submitted that, on a proper construction of the definition of agricultural land in the Act, agricultural land is essentially all land except that which was within the area of jurisdiction of local government structures within the old order. This reliance on the reasoning in *Kotzé* does not square with any concession that the Supreme Court of Appeal was correct on the municipality finding. The submissions of any party inconsistent with the conclusion of the Supreme Court of Appeal that a municipal council contemplated by the definition of agricultural land includes a modern-day

South African municipality cannot be entertained. It is on this basis that the proviso must now be scrutinised. I examine the literal meaning in more detail before determining the effect of context and other relevant circumstances.

The literal meaning of the proviso

[116] It may be useful to repeat the proviso:

> "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".

[117] It does seem that the text requires two conditions to be met before agricultural land as defined in the Act "shall remain classified as such". The first of these is that the land must be situated within the area of jurisdiction of a transitional council structured and elected as required by the LGTA. The second wholly separate requirement, in my view, is that the land must have been classified as agricultural land immediately before the first election of the transitional council having jurisdiction over the land concerned. The first requirement is concerned with the land being within the jurisdiction of a specified local government structure; the second is expressly about timing. To put it differently, the first stipulation tells us within which local government structure the land must have been situated if the proviso is to be applicable to that land; the second prescribes precisely when the land should have been appropriately situated in order to remain agricultural land. In summary, to remain agricultural land beyond the first election of a transitional council, the land

must have been within the jurisdiction of a transitional council. That 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.

[118] The High Court concluded that the proviso was concerned with timing alone. The judge there said:

> "The proviso, in my view, 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. As stated above, it is common cause that at this point in time Portion 54 qualified as agricultural land. It follows that it remained so and still was agricultural land at the time the agreement was entered into."[28]

[119] The applicant, the Minister and the amici fervently defended the High Court approach. It was argued that the words "situated in the area of jurisdiction of a transitional council" talk merely to the physical location of the property. It will have been noted that the phrase concerning the situation of the land within the jurisdiction of a transitional council has nothing to do with timing at all – it is concerned with the municipal structure within which the targeted land fell. Nor, in my view, can the meaning of the phrase validly be restricted to a reference to the physical location of the property as distinct from its status in relation to the nature of the local government structure within the jurisdiction of which it falls.

[28] Above n 10 at para 64.

[120] There is some difficulty with the physical location approach. If the words are said to be necessary to indicate the mere physical location, they are not necessary at all. If one removes the words relating to situation from the proviso, the proviso would read: ". . . provided that land 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 truncated version of the proviso means exactly what the applicant, the Minister and the amici would like the whole proviso to mean. It was therefore, on the face of it, unnecessary for the legislature to have inserted the whole of the phrase relating to situation into the proviso, unless it was intended to add something to the definition. The words do indeed add a material circumstance that must be present for land to remain agricultural land as defined: the land must, in addition to having been agricultural land immediately before the first election of a transitional council, have been situated within the area of jurisdiction of a transitional council. A construction that does not give any meaning to these words and ignores their existence could ordinarily not be regarded as reasonable and would, absent indications to the contrary, be "unduly strained".[29]

[121] Accordingly, in my view, it is difficult, from the ordinary grammatical meaning of the words, to read any meaning other than that agricultural land would remain agricultural land only for so long as it remained within the jurisdiction of a transitional council.[30] If the purpose of the proviso was to ensure that land that was agricultural land retained that classification even after transitional councils ceased to exist, the

[29] *Hyundai* above n 18 at para 24.

[30] Above n 11 at para 24.

proviso would probably have been written differently. But this is not the end of the enquiry. It remains necessary to determine whether the context and other relevant circumstances render the construction contended for reasonable.

Context, purpose and consequence

[122] It has been submitted that the context in which the proviso was inserted into the definition of agricultural land in the Act, the purpose of the insertion as well as what are seen by some of the parties as the dire consequences of the interpretation supported in this judgment, lead to the inescapable conclusion that the meaning proffered by the High Court is preferable. I do not agree. The interpretation set out in this judgment is consonant with all the relevant circumstances that ought properly to be taken into account.

[123] There is nothing in the immediate contextual setting of the proviso that points to the incorrectness of the interpretation preferred in this judgment. Indeed the context is consistent with that meaning. It must be borne in mind that the Act is not necessarily concerned with all agricultural land. The definition of agricultural land is not related to the use to which the land concerned is subjected. Indeed, agricultural land is all land not situated within an urban or semi-urban local government structure. Although it may be true that most agricultural land will probably have been located in areas where no urban or semi-urban local government structures existed, it cannot be said that there was no agricultural land or land used for agricultural purposes within the area governed by local government structures at the time.

[124] That is why the effect of the restructuring of municipalities meant that all land would fall within the jurisdiction of transitional councils immediately at the time these councils had been established. The difficulty that had to be dealt with was not in reality that agricultural land as a fact would cease to exist as soon as the transitional councils came into being. No one suggested that and no one could. The consequence that needed attention was that some of the wide ministerial powers in relation to that land would be lost. Agricultural land, in the sense of land that was used for agriculture, would not cease to exist altogether. The requirement of ministerial consent to every sale and subdivision would disappear. In this sense ministerial power in relation to agricultural land would be reduced considerably. Ministerial power would now be limited to—

(a) a declaration after consultation with the executive committee concerned that land situated within the areas of certain local government structures was to be agricultural land for the purposes of the Act regardless;[31] and

(b) the exclusion of what would otherwise be agricultural land in terms of the definition from the provisions of the Act, again after consultation with the executive committee concerned.[32]

[125] The reason why it became essential to stop this consequence at the time transitional councils were being established is also plain. The power of which the

[31] Exception (a) to the definition ends with the following words "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".

[32] Exception (f) to the definition reads: "land which the Minister after consultation with the executive committee concerned and by notice in the Gazette excludes from the provisions of this Act".

Minister was to be deprived by the establishment of transitional councils would, consequent upon LGTA reconstruction, not be exercisable by any local government structure at all. It is relevant here that the proviso was inserted into the Act one day before municipal elections in respect of transitional municipal structures were held everywhere except in KwaZulu-Natal and certain parts of the Western Cape.[33] It is true that the proviso preserves the power of the Minister over agricultural land as defined. But the object of doing so, in my view, was to prevent the inevitable consequence that newly established transitional councils would not have the capacity to administer the land in question and agricultural land would be left in the air. We are indeed fortunate that it is not necessary to enter into an analysis of the various phases of the local government transition process. Suffice to say here that, when the elections for transitional councils took place on 1 November 1995, the powers and functions of these transitional councils had not yet been expressly defined by statute. Indeed, the LGTA gave provincial MECs wide powers in relation to the establishment, disestablishment, as well as the determination of powers and functions, of transitional councils.[34] The situation was fluid to say the least. The powers and functions of transitional councils were, for the most part, legislatively determined only on 22 November 1996.[35] The purpose of the proviso was to ensure that the Minister should retain the powers conferred by the Act while restructuring continued and until an appropriate division of powers and functions in relation to land, agriculture and

[33] Above n 8.

[34] Section 9B in relation to rural councils and section 10 in relation to all local government structures.

[35] By section 5 of the Local Government Transition Act Second Amendment Act 97 of 1996 which inserted Part VIA into the LGTA. Most of section 5 came into force on 22 November 1996, except for section 10G(2)(d) of Part VIA of the LGTA (a part inserted by section 5) which came into force earlier, on 1 July 1996.

land-use planning amongst all three spheres of government had been properly regulated by national legislation.

[126] The terms of the Proclamation support this conclusion in relation to purpose. The proviso was introduced "in order to provide for the continued efficient carrying out of the functional area of Agriculture as assigned to the Minister of Agriculture".[36] The functional area of agriculture could not be efficiently carried out if the Minister's power in relation to the sale and subdivision of agricultural land was taken away in circumstances where no other entity would have the power to exercise it. The circumstance that created complications for the efficient carrying out of the functional area of agriculture was the absence of capacity of any other institution to make appropriate decisions in relation to agricultural land. Once permanent municipalities had been established and structured, it would become possible for these municipalities to carry out their functions in relation to municipal planning without adversely affecting the effective administration of the agriculture competence.[37]

[127] This did happen in due course. The structure, functions and powers of municipalities were defined in the Constitution[38] while the way in which the powers of the national, provincial and local spheres interrelated and came together was also authoritatively set out.[39] It is true that agriculture is, on the face of it, a functional area

[36] See above [5].

[37] See Part A of Schedule 4 of the Constitution.

[38] Chapter 7.

[39] Schedules 4 and 5.

of concurrent national and provincial legislative competence.[40] Crucial, however, for present purposes, is the way in which the power concerning planning is managed in our Constitution. Regional planning and development is, like agriculture, a concurrent functional area. However, provincial planning is an exclusive provincial functional area.[41] But provincial planning does not include municipal planning. Municipal planning is expressly stipulated as a local government function, over which both the national and provincial spheres exercise legislative competence.[42]

[128] The constitutional scheme is this. Agriculture is a concurrent national and provincial legislative competence. The functional area of agriculture cannot be said to exist in a hermetically sealed compartment. The functional area includes the determination of frameworks and policy that would be binding on all provinces and municipalities as well as legislation concerning implementation made by provinces binding upon municipalities. Planning entails land use and is inextricably connected to every functional area that concerns the use of land. There is probably not a single functional area in the Constitution that can be carried out without land. Land-use planning must be done at three levels at least: provincial planning, regional planning and municipal planning.

[129] Whatever the position may have been under the interim Constitution, I am of the view that to the extent that the Act is concerned with zoning, subdivision and sale

[40] Part A of Schedule 4.

[41] Part A of Schedule 5.

[42] Part B of Schedule 4 read with section 156.

of land, it is not concerned with agriculture but with the functional area of planning. As pointed out in the previous paragraph, there is an inevitable overlap in relation to the functional areas set out in Schedules 4 and 5 of the Constitution. As explained in the *Liquor Bill* case:[43]

> "The list of exclusive competences in Schedule 5 must therefore be given meaning within the context of the constitutional scheme that accords Parliament extensive power encompassing 'any matter' excluding only the provincial exclusive competences. The wide ambit of the functional competences concurrently accorded the national Legislature by Schedule 4 creates the potential for overlap, not merely with the provinces' concurrent legislative powers in Schedule 4, but with their exclusive competences set out in Schedule 5. Examples of concurrent Schedule 4 competences which could overlap with Schedule 5 competences include 'trade' and 'liquor licences'; 'environment' and 'provincial planning'; 'cultural matters' and 'provincial cultural matters' as well as 'libraries other than national libraries'; and 'road traffic regulation' and 'provincial roads and traffic'."

[130] The judgment in the *Liquor Bill* case further pertinently says:

> "Since, however, no national legislative scheme can ever be entirely water-tight . . . and since the possibility of overlaps is inevitable, it will on occasion be necessary to determine the main substance of legislation and hence to ascertain in what field of competence its substance falls; and, this having been done, what it incidentally accomplishes."[44]

This is the approach that must be followed.

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[43] *Ex Parte President of the Republic of South Africa: In Re: Constitutionality of the Liquor Bill* [1999] ZACC 15; 2000 (1) SA 732 (CC); 2000 (1) BCLR 1 (CC) at para 47 of the SA law reports and para 48 of the BCLR law reports.

[44] Id at para 62 of the SA law reports and para 63 of the BCLR law reports.

[131] The zoning of land and the question whether subdivision should be allowed in relation to any land is essentially a planning function in terms of Schedule 4 and Schedule 5 of the Constitution. Previously, the Minister was afforded a planning function in relation to agricultural land situated in areas where local government structures were absent. Our Constitution requires municipal planning to be undertaken by municipalities. To continue to accord this planning function to the national Minister of Agriculture and Land Affairs in relation to agricultural land would be at odds with the Constitution in two respects. First, it would negate the municipal planning function conferred upon all municipalities. Secondly, it may well trespass into the sphere of the exclusive provincial competence of provincial planning. I may add that legislation concerning zoning and subdivision of land was regarded as planning legislation even before the new Constitution came into operation.[45]

[132] The fact that the national legislature, consistently with the Constitution, regards land-use planning as a municipal competence is confirmed by those provisions of the Municipal Structures Act and the Local Government: Municipal Systems Act (the Municipal Systems Act)[46] that concern themselves with the powers and functions of municipalities.[47] The starting point is that all municipalities are given the powers conferred upon them by the Constitution.[48] As I have already pointed out, this includes the municipal planning power. Metropolitan municipalities exercise all these

[45] An example is the Land Use Planning Ordinance 15 of 1985 which was applicable in the then Cape of Good Hope province. There was equivalent planning legislation in all the other provinces and it applied to areas of the country that had local government structures.

[46] 32 of 2000.

[47] Municipal Structures Act at sections 83 and 84.

[48] Id at section 83(1).

powers, but provision is made for a division of powers between district and local municipalities.[49] The district municipality is expressly enjoined to "seek to achieve the integrated, sustainable and equitable social and economic development of its area as a whole by", amongst other things, "ensuring integrated development planning for the district as a whole".[50] Metropolitan municipalities have the same duties in relation to municipal planning because the Municipal Structures Act provides that the area of a metropolitan municipality must be "a single area for which integrated development planning is desirable".[51] All must engage in integrated development planning. What is more the executive committees of municipal councils[52] as well as executive mayors[53] are enjoined to ensure that the integrated development plan takes "into account any applicable national and provincial development plans".

[133] An integrated development plan is defined in the Municipal Structures Act as "a plan aimed at the integrated development and management of a municipal area".[54] Truly integrated planning is only possible if the municipality decides on land use within the bounds set by national and provincial legislation.

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[49] Id at section 83(2).

[50] Id at section 83(3)(a).

[51] Id at section 2(c).

[52] Id at section 44(2)(c) which provides:

> "The executive committee must—
>
> (c) recommend to the municipal council strategies, programmes and services to address priority needs through the integrated development plan and estimates of revenue and expenditure, taking into account any applicable national and provincial development plans".

[53] Id at section 56(2)(c).

[54] Id at section 1.

[134] This is made explicit in the Municipal Systems Act that was passed about two years later. This legislation compels each municipal council to adopt a single, inclusive and strategic plan for the development of its municipality.[55] That plan is expressly required to be "compatible with national and provincial development plans and planning requirements binding on the municipality in terms of legislation." This requirement accords with the constitutional allocation of the legislative power in relation to municipal planning concurrently to the national and provincial governments. The plan must, amongst other things, contain a "spatial development framework which must include the provision of basic guidelines for a land use management system for the municipality".[56]

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[55] Municipal Systems Act at section 25.

[56] Id at section 26(e). I set out the whole of section 26 in order to demonstrate the inter-relationships which necessitate the integrity of the plan:

> "An integrated development plan must reflect—
>
> (a) the municipal council's vision for the long term development of the municipality with special emphasis on the municipality's most critical development and internal transformation needs;
>
> (b) an assessment of the existing level of development in the municipality, which must include an identification of communities which do not have access to basic municipal services;
>
> (c) the council's development priorities and objectives for its elected term, including its local economic development aims and its internal transformation needs;
>
> (d) the council's development strategies which must be aligned with any national or provincial sectoral plans and planning requirements binding on the municipality in terms of legislation;
>
> (e) a spatial development framework which must include the provision of basic guidelines for a land use management system for the municipality;
>
> (f) the council's operational strategies;
>
> (g) applicable disaster management plans;
>
> (h) a financial plan, which must include a budget projection for at least the next three years; and
>
> (i) the key performance indicators and performance targets determined in terms of section 41."

[135] The Municipal Systems Act makes detailed provision for the process of the adoption of the plan,[57] its drafting,[58] as well as for provincial monitoring and support.[59] In particular the MEC of Local Government in the province may—

> "facilitate the co-ordination and alignment of . . . the integrated development plan of a municipality with the plans, strategies and programmes of national and provincial organs of state."[60]

The Municipal Systems Act also aims to ensure that the provincial government's exclusive competence in relation to provincial planning is respected. The Municipal Systems Act provides for the plan to be submitted to the MEC of Local Government in the province,[61] for the MEC to request the municipality to recommend adjustments to the plan,[62] for the municipal council to consider the MEC's proposals,[63] and for a mechanism to resolve the debate if the municipality and the MEC cannot agree on the content of the plan.[64] Finally, it must be pointed out that the national sphere of government has not been overlooked. The national Minister for Local Government is entitled to make regulations and guidelines in relation, amongst other things, to numerous aspects concerning the integrated development plan.

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[57] Id at section 28.

[58] Id at sections 29 and 30.

[59] Id at section 31.

[60] Id at section 31(c)(ii).

[61] Id at section 32(1).

[62] Id at section 32(2).

[63] Id at section 32(3).

[64] Id at sections 32(4) and 33.

[136] The national Minister has indeed made regulations.[65] These regulations also concern themselves with the integrated development plan and set out the detail that the plan must contain. Of particular relevance for present purposes is that the integrated development plan must include a "spatial development framework".[66] Some requirements of the spatial development framework must be emphasised. The framework must "set out the objectives that reflect the desired spatial form of the municipality".[67] The framework must also contain strategies to achieve the desired spatial form. These strategies must "indicate desired patterns of land use within the municipality"[68] and "address the spatial reconstruction of the municipality".[69] The strategy must also relate to the location and nature of development within the municipality.[70] The final requirement of the regulations worth mentioning is that the spatial framework must "set out basic guidelines for a land use management system in the municipality".[71]

[137] It will have been seen that the Constitution, the relevant legislation and the regulations provide a comprehensive and careful system for the involvement of national, provincial and local government in the process of municipal spatial planning. It must be emphasised that once it adopts an integrated development plan, a

[65] Local Government: Municipal Planning and Performance Management Regulations, GN R796 GG 22605, 24 August 2001.

[66] Id at item 2(4).

[67] Id at item 2(4)(b).

[68] Id at item 2(4)(c)(i).

[69] Id at item 2(4)(c)(ii).

[70] Id at item 2(4)(c)(iii).

[71] Id at item 2(4)(d).

municipality must give effect to it and conduct its affairs in a manner consistent with that plan.[72] Any rezoning decision like the decision in this case must be taken consistently with the integrated municipal plan. This plan must in turn be consistent with national and provincial legislation.

[138] It is in this context that the provision in the Municipal Structures Act that a municipality structured and established in terms of that Act, effectively included a municipal council in the Act must be evaluated. The inclusion of this provision is consistent with the legislative purpose of limiting the Minister's powers in the Act in order to ensure that a system consistent with the Constitution comes into force. That system is concerned with the appropriate national, provincial and local legislative and executive exercise of power. 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.

[139] The fear that agricultural land will disappear if the interpretation contended for in this judgment is accepted is wholly unjustified. The idea is based on the misplaced

[72] Municipal Systems Act at section 36.

notion that the only way in which agriculture is to be developed and food made more readily available would be to preserve the power of the Minister to approve each and every sale and each and every subdivision of agricultural land. This thesis overstates the importance and competence of the executive head and minimises the role, importance and ability of municipal structures, the provincial legislature as well as the national legislature.

[140] The application for rezoning in this case was made well after the relevant legislation came into force.[73] The letter of approval of the rezoning[74] is to the effect that the rezoning decision was made in terms of a provincial planning Ordinance that was in existence before democracy.[75] The decision to approve the rezoning was taken by a municipality consistently with its integrated plan and the spatial development framework contained within that plan. The plan would have been in effect approved by the provincial MEC of Local Government and would have been consistent with regulations promulgated by the national Minister of Provincial and Local Government. In the circumstances the desire of the national Minister of Agriculture and Land Affairs to also have a veto power in respect of the specific subdivision is, to say the least, entirely inappropriate.

Conclusion

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[73] The application was made on 30 July 2004. The date of commencement of the Municipal Systems Act was 1 March 2004.

[74] Dated 26 August 2005.

[75] Section 14(4) of the Land Use Planning Ordinance above n 45.

[141] I conclude therefore that an appropriate evaluation of the context, purpose and consequence supports the meaning that appears from a literal reading of the proviso. In all the circumstances, therefore, the proviso cannot be said to be reasonably capable of the meaning ascribed to it by the High Court.

[142] For these reasons, I would dismiss the application for leave to appeal.

[143] None of the parties to the litigation had, in my view, pointed to any of its constitutional rights relevant to the admittedly important power issues at stake in this case. All the applicant and the amici were interested in was to use their construction of the proviso to get out of an otherwise binding agreement of purchase and sale. I would therefore propose that the applicant pay the first respondent's costs.

Nkabinde J and O'Regan ADCJ concurred in the judgment of Yacoob J

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