

The decisions in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC): Be wary of these holdings

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1. INTRODUCTION

At the centre of the private dispute in *Wary v Stalwo* lies a contested vision of the new local government dispensation. *Wary*, the seller of a portion of farm, can escape from an unprofitable sale if the national Minister responsible for agriculture is still in charge of the subdivision of agricultural land and not the municipality. If the buyer can hold the reluctant seller to the sale, the powers of local government would have significantly increased at the expense of the Minister. The case is not only important for the development of South Africa's decentralised system of government, but also for the way in which the Constitutional Court approaches statutory interpretation. The split Constitutional Court decision not only reflects different visions of local government but also how to resolve division of powers questions through statutory interpretation.

1.1 Legislative story

Our story formally commences in 1970 when the Subdivision of Agricultural Land Act 70 of 1970 (referred to as the Agriculture Land Act) was enacted to prevent the fragmentation of agricultural land into small uneconomic units. The aim was to preserve agricultural sector from, among other things, the carving up of the family farm into economically unviable farming units for each son, and preventing urban sprawl into agricultural land. The purpose was achieved by requiring permission from the national Minister responsible for agriculture for any subdivision of land deemed agricultural.

The definition of agricultural land was relatively straightforward, namely all areas falling outside municipalities.¹ This definition was an accurate measure because municipalities, as then configured,² encompassed mainly urban or semi-urban areas. Excluded from the definition of municipality were the rural forms of local government - divisional councils and, later, regional services councils. The distinction between agricultural land and municipal areas was not always watertight as limited portions of actual agricultural land could be found in a municipal area. In such a case the Minister could declare such land as agricultural.

The Interim Constitution of 1993 subjected state institutions to decentralisation. One of the key elements of the negotiated settlement was the establishment of provinces with a list of competencies.³ “Agriculture” became a concurrent function of the national and provincial governments, and the question of who would administer Acts dealing with agriculture (national or provincial government), was determined by presidential proclamation. By a presidential order the administration of the Agricultural Land Act was assigned to the national minister responsible for agriculture.

The second step in the decentralisation process was the establishment of a new system of local government which would occur in two phases – the interim phase as negotiated and expressed in the Local Government Transition Act 209 of 1993, and a final phase that would be implemented in terms of the final Constitution. Prior to the first democratic local government elections in 1995⁴ transitional municipalities were demarcated to end the apartheid configuration of local authorities. The thousands of apartheid local authorities were reduced to 842 local authorities, which included authorities for both urban/semi-urban areas as well as rural areas. Innovative were the new rural transitional councils. They replaced the previous Regional Service Councils (and Joint Services Councils in KZN). However, not the entire surface of South Africa was covered – areas in the previous homelands falling outside municipalities remained unincorporated into local authorities.

The introduction of municipal authorities in rural areas, it was eventually realised, would negate the previously neat division envisaged in the Agricultural Land Act between municipal areas and agricultural land. A proviso was thus inserted in the Act on 31 October

¹ S 1 Act 70 of 1970, with some further exceptions, such as state land.

² Municipal council, city council, town council, village council, village management board, village management council, local board, health board or health committee (s 1 Agricultural Land Act).

³ S 126(1) interim Constitution.

⁴ Elections were held on 1 November 1995 except for certain portions of the Western Cape and the entire KwaZulu-Natal where they were held in 1996.

1995, one day before the establishment of the new transitional councils – to the effect that the establishment of transitional councils in terms of the LGTA would not affect the classification of agricultural land as it then stood.

The final phase of local government transformation was the implementation of the 1996 Constitution. The central tenet was that there would be “wall-to-wall” local government,⁵ thus doing away with an urban/rural divide. The entire land surface was demarcated into metropolitan areas and districts, the latter being divided into local municipalities. Local government’s status was elevated as it was no longer a competence of provincial governments and its power and functions were listed in Schedules 4B and 5B, including “municipal planning”.

Unlike the amendment of the Agricultural Land Act in 1995, no changes were effected to accommodate the implementation of the 1996 Constitution, in terms of which local government was established across the entire face of the country on 5 December 2000. This would, in any event, have been rather problematic since the Agricultural Act was by then already repealed,⁶ but the repealing Act was awaiting the promulgation by the President, a situation that still prevails a decade later. The reason was clear. The Agricultural Act could only be effectively repealed if some other legislation came in its place as there was no change in the national policy relating to the preservation of agricultural land.⁷

1.2 Personal story

Against this legislative backdrop, where agricultural regulation had to be adjusted to a new decentralised form of government and local government settling into a new elevated position, people, in carrying out their every business, negotiate and, at times, draw upon the murky legal canvas .

Before 1995, Farm 8 Port Elizabeth did not, despite its name, fall within the jurisdiction of the old Port Elizabeth Municipality. It was thus deemed agricultural land. After the first round of demarcations in 1995, the farm fell within the jurisdiction of the Port Elizabeth Rural Council, established in terms of the LGTA. Thus, in terms of the 1995 amendment to the Agricultural Land Act, Farm 8 remained agricultural land. The second round of

⁵ S 151(1) Constitution.

⁶ Subdivision of Agricultural Land Act Repeal Act 64 of 1998.

⁷ See the comments by Kroon AJ in *Wary v Stalwo* para 86 on the possible reasons for the state of limbo.

demarcations saw the inclusion of Farm 8 in the jurisdiction of the newly established Nelson Mandela Metropolitan Council (NMMC), with its very much enlarged municipal boundaries.

Plot 54, a subdivision of Farm 8, was sold by Wary to Stalwo for R500 000 subject to a suspensive condition of sale that Wary would get permission for the subdivision. On 19 July 2004 Wary applied to the NMMM for the subdivision of Farm 8, and to sell plot 54 thereof to be used for industrial purposes. The municipality agreed provided that Wary effected substantial improvements to the property (including a storm water drainage system). This requirement imposed considerable costs while, at the same time, the value of the land increased. Wary wanted a way out of the sale when Stalwo refused to agree to an increased purchase price. In his quest to escape the unprofitable sale, Wary found to his delight a piece of old order legislation; the sale was contrary to the Agricultural Land Act, as the national Minister had not given permission for the subdivision. Stalwo would have none of this exit strategy and applied to the Eastern Cape High Court for a declarator that the agreement is binding and for an order transferring the property.

The High Court found in favour of Wary and let the reticent seller escape an unfavourable deal. Stalwo felt aggrieved and appealed to the SCA where success was achieved – the sale must go through as the land could no longer be regarded as agricultural land. Now, not only was Wary dismayed, but the national Minister saw the power of controlling the subdivision of agricultural land disappear and joined in the fray to convince the Constitutional Court to come to the national government's assistance. Wary (and the Minister) were victorious by a margin of six to three judges – Wary was not bound by the unprofitable sale agreement as it was invalid and the Minister retained the power. Of the fifteen judges considering the matter, eight decided against him, but seven (with the casting vote of six Constitutional Court justices) were decisive. By relying on the torturous evolution of local government as a sphere of government and its relations to provincial and national government, Wary eventually escaped an unprofitable sale. The larger question to be addressed is whether local government was the loser. Moreover, does the judgment provide guidance on how to solve disputes relating to the vexed problem of distribution of powers and function in our decentralised system of government?

2. ISSUES

The case raises two interlinked questions. The first is the substantive constitutional question: who should be entrusted with making decisions about the subdivision of agricultural land –

the national government (alternatively the provinces) or local government? This entails an analysis of the constitutional distribution of powers and functions. On this question, the court is split – the majority favouring the national minister and the minority (and the SCA) local government . The second question is how judges reached their conclusion. As the matter turned on the interpretation of a statutory proviso, the approach to statutory interpretation is again split – the majority (and the SCA) favouring to fathom the intention of the legislature, while the minority approached the interpretation from a constitutional analysis point of view. It will be argued that the latter approach was correct, but that the minority came to the wrong conclusion on the substantive issue. While the majority came to the correct substantive conclusion, the methodology followed (also by the SCA) is questioned.

3. SCA JUDGMENT

Maya JA, delivering the unanimous decision for the Court,⁸ approached the problem as a simple matter of statutory interpretation. The definition of agricultural land in the Agricultural Land Act refers to local authorities. Section 93(8) of the Municipal Structures Act⁹ provides that references in surviving old order legislation to local authorities¹⁰ should be deemed to refer to municipalities established in terms of 1996 Constitution. The reference to local authorities in the Act thus refers to NMMM, and, consequently, in terms of the definition of ‘agricultural land’, the portion of land in question is no longer deemed agricultural land. Unless, of course, the proviso still applies.

The proviso reads as follows:

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

The Court’s point of departure is that the purpose of the proviso had to be determined “in the light of the legislative scheme which guided the restructuring process of local government; from the promulgation of the first statute in the exercise, the Transition Act of 1993, through to the final demarcation brought about by the Local Government: Municipal Demarcation Act

⁸ *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Another* 2008 (1) SA 654 (SCA).

⁹ 117 of 1998.

¹⁰ Item 2 of Schedule 6 of 1996 Constitution.

27 of 1998 and the Municipal Structures Act which established new categories of municipalities – to use existing statute provision until new once could be enacted.”¹¹

Commencing with the LGTA, the Court was of the opinion that the proviso applied only to the interim period because local authorities would for the first time be established in rural areas. Maya JA thus wrote:

From the ordinary grammatical meaning of the words, I am unable to read any meaning other than that the proviso was meant to operate only for as long as the land envisaged therein remained situated in the jurisdiction of a transitional council. It was a simple matter for the legislature to say so expressly if it intended such land to retain the classification after the transitional councils ceased to exist.¹²

For the Court, then, the intention of the legislature was to provide “a stopgap measure” for the interim period, as rural areas would be placed, for the first time, under municipal governance. Then, when municipalities would be established under the final Constitution, the concerns that prompted the proviso, would by then have been addressed. With reference to the court a quo’s decision which found the proviso still operative, the judge replied as follows:

[T]he approach adopted by the court below is incompatible with and does not give credence to the radically enhanced status and power of the new constitutional order accorded to local government. Municipalities are no longer the pre-constitutional creatures of statute confined to delegated or subordinate legislative powers, which could be summarily terminated and their functions entrusted to administrators appointed by central and provincial governments. They have mutated to interdependent and, subject to permissible constitutional constraints, 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. To my mind, this status necessarily includes the competence and capacity on the part of municipalities to administer land falling within their area of jurisdiction without executive oversight.¹³

¹¹ Para 23.

¹² Para 24.

¹³ Para 26.

The logic of the argument is that the outcome of the 1995-6 constitution-making process, is to be attributed to the intention of the legislature in 1995. This after-the- fact ascription of what the intention of the legislature had been is difficult to sustain.¹⁴ At the time the proviso was inserted, there was no firm ideas yet about what would be the shape of local government under the final Constitution. All that was on the table was the Interim Constitution that placed local government as a competence of provinces¹⁵ and the Constitutional Principle that the powers of provinces could not be substantially reduced in the final Constitution. The Constitutional Principles spelt out no clear vision of local government,¹⁶ as it ultimately materialised. What the Court in effect does is to impose an intention on the legislature in light of subsequent development that was not (and could not have been) foreseen.

Although fine sentiments are expressed about the radically changed nature of local government, the dictum glibly glides over the substantive powers of local government. There is no attempt to show why municipalities have “the competence and capacity” to administer land falling in their jurisdiction. In the minority judgment of the Constitutional Court, Yacoob J at least places the competence issue under the broad rubric of “municipal planning”. The putative “capacity” of municipalities to administer land is both irrelevant and inaccurate. It is irrelevant because the question is whether or not a municipality has the power to perform the function, not whether it has the capacity in terms of personnel and skills. It is inaccurate because in the area of agriculture, municipalities would not have the skills because they are not required by the Constitution to develop such in the functional area of agriculture.

Finally, the Court held that, despite its holding that the classification of agricultural land for purposes of the Act has lapsed, the purpose of the Act would not be nullified; the Minister still has the power in terms of section 3 of the Act to proclaim ‘municipal’ land to be agricultural. Coming from a shallow and erroneous analysis of the constitutional position of local government, the Court must inevitably contradict itself. If a municipality could “administer land falling within their areas of jurisdiction without executive oversight”, how come the Minister may thwart that power by simply categorising land falling in a municipal area in terms of section 3 of the Act as ‘agricultural’. On the Court’s own analysis that power would be unconstitutional.

¹⁴ See *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein, and Others* 1985 (4) SA 773 (A) establishing the principle that legislation should be interpreted to mean what it meant when it was promulgated.

¹⁵ Schedule 6 Constitution of the Republic of South Africa, Act 200 of 1993.

¹⁶ See Steytler and Visser *Local Government of South Africa* ch 1 para 3.3.1.

Proceeding from a literalist interpretation, airbrushing the conclusion with an unnuanced view of the constitutional status of local government, the decision was ripe for consideration by the Constitutional Court.

4. THE CONSTITUTIONAL COURT MAJORITY

In deciding whether to allow the appeal from the Supreme Court of Appeal, the majority decision of the Constitutional Court, delivered by Kroon AJ,¹⁷ already answered, albeit obliquely, the question at hand. The Constitutional Court's jurisdiction is limited to "constitutional matters, and issues connected with decisions on constitutional matters."¹⁸ Although the appeal involved the interpretation of a statute, if such interpretation involved "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",¹⁹ the Court has jurisdiction. The Court held that in as much as the SCA reading of the proviso could result in the removal of a national minister's power, it raises a constitutional matter. In addition, the Court agreed that the interpretation of the statute could be influenced by the demands of three rights in the Bill of Rights, namely, the right to a protected environment,²⁰ land²¹ and sufficient food.²² Once the constitutional dimension of the dispute was established, considering the matter must further also be in the interest of justice.²³ The significant consequences of the judgment left little doubt that the Court should hear the matter, as Kroon AJ explained:

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

¹⁷ Signed by Langa CJ, Madala J, Mokgoro J, Ngcobo J, Skweyiya J and Van der Westhuizen J.

¹⁸ S 167(3)(b) Constitution.

¹⁹ Para 43, quoting from *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* 2007 (3) SA 484 (CC) para 38.

²⁰ S 24(b)(iii) Constitution.

²¹ S 25(5) Constitution.

²² S 27(1)(b) Constitution.

²³ S 167(6) Constitution.

to play a role in decisions to reduce agricultural land and for consistency as part of a national agricultural policy.²⁴

The Court correctly framed the dispute as one dealing with the constitutional distribution of powers between the different spheres of government, but then does not follow through on its own analysis. Instead it sought, like the SCA, the intention of the legislature with regard to the meaning of the proviso and only peripherally deals with the constitutional framework, and then only with respect to a Bill of Rights dimension, which is further removed from the main issue.

The judge commenced with the usual tools of statutory interpretation. The plain reading of the proviso, garnering the intention of the legislature from the words used, was, however, inconclusive. The reading of both the High Court and the SCA was plausible.²⁵ Then a purposive reading of the Agricultural Land Act followed. The “essential purpose” of the Act, noted the judge, was a measure by which “the legislature sought in the national interest to prevent the fragmentation of agricultural land into small uneconomic units.”²⁶ The Minister would decline a proposed subdivision that would have the unwanted result of uneconomic fragmentation. There was thus no compelling reason why this purpose would have remained current only during the life of the transitional councils.²⁷ The proviso was thus not tied to the transitional councils. They merely indicated a point in time to which the classification of “agricultural land” had to be tied. The argument of the SCA that the purpose of the Act remained intact because the Minister could still exclude agricultural land from the control municipalities of the Act,²⁸ Kroon AJ dismissed since it failed to appreciate the impossibility of such an undertaking, given the necessary application of the Promotion of Administrative Justice Act²⁹ to all previously classified agricultural land in the country.

The judge also found additional contextual indicators of the legislature’s intention. First, the transitional provisions in the interim Constitution and the reference to transitional councils in the proviso, did not refer to the restructuring of local government but dealt with the rearrangement of powers between the national and provincial government relating to

²⁴ Para 53.

²⁵ Para 59.l

²⁶ Para 13, with reference to, among others, *Geue and Another v Van der Lith and Another* 2004 (3) SA 333 (SCA) para 5.

²⁷ Para 61(a).

²⁸ Para (f) of the definition of agricultural land.

²⁹ Act 3 of 2000.

concurrent competences. There was thus no indication that any part of the agricultural functional area was to be administered by a future local government.³⁰ There is also no suggestion that the functional area of agriculture was assigned to local government.³¹

Second, in response to the SCA's view and arguments by counsel on the enhanced status of local government, Kroon J contended that it cannot be "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."³² The judge reasoned as follows:

[L]and, agriculture, food production and environmental considerations are obviously important policy issues on a national level. An interpretation of the Agriculture 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.³³

An event occurring after the enactment of the proviso - the enhanced status of local government in terms of the 1996 Constitution - could not be used as an indicator of what the legislature may have reasonably contemplated. Kroon AJ pointed out that in the "uncertainty in 1995, when *Proclamation R100* was issued [adding the proviso] 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" because it would have left the policy on agriculture "to the, as yet undetermined, municipal structures to be established in the future."³⁴

The final interpretation device used, which does use post hoc indicators, is the principle that the legislature is aware of case law interpreting a statute in a particular way and the lack of any legislative corrective action indicates that the judicial interpretation is the appropriate one. Accordingly, Kroon AJ was of the view that decisions on the application of the

³⁰ Paras 67 and 69.

³¹ Para 75. The judge refers only to the assignment of executive authority in terms of s 156(4) of the Constitution. The relevant form of assignment would be legislative, which would have entail assignment by stealth or default.

³² Para 80.

³³ Para 80.

³⁴ Para 81, emphasis in the original.

Agricultural Land Act,³⁵ pronouncing on a deed of sale concluded in 2001, is consistent with the intention ascribed to the legislature in the judgment.³⁶ In contrast, the fact that the Agricultural Land Act was repealed in 1998 but the repeal Act has yet to be promulgated, provides no firm indicator of the fate of the Act.

As a parting shot, and only “briefly”, the judge returned to the Constitution in response to the Minister’s contention that the proviso had to be interpreted in a manner that promoted “the spirit, purport and objects of the Bill of Rights”,³⁷ namely the right to sufficient food. The judge agreed 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 the necessary control.”³⁸

What is missing from the judgment, is a proper analysis of the functional division of powers between the three spheres of government. Without having to strain the concept of the intention of the legislature, the proviso had to be interpreted in compliance with the constitutional division of powers. This principle the Court accepted as by now axiomatic,³⁹ but did not apply. This is precisely what Yacoob J did in the minority judgment, but, as will be argued below, arrived at the wrong conclusion.

5. THE CONSTITUTIONAL COURT MINORITY

The minority judgment of Yacoob J⁴⁰ would have refused leave to appeal because the matter, in his view, did not raise a constitutional issue. Where more than one interpretation of a statutory provision is plausible, the judge held, then, “whether the one interpretation is more in accordance with the spirit, purport and objects of the Constitution than the other, does raise a constitutional question.”⁴¹ In this case, Yacoob J reasoned there was only one possible interpretation to the proviso, which therefore made the matter not a constitutional matter subject to an appeal to the Constitutional Court. This is ironic because, in arriving at this interpretation of the proviso, Yacoob J embarked on a constitutional analysis of the

³⁵ *Kotze v Minister van Landbou en Andere* 2003 (1) SA 445 (T) (a judgment of Van der Westhuizen J, now one of the concurring judges in the majority judgment) and *Geue and Another v Van der Lith and Another* 2004 (3) SA 333 (SCA).

³⁶ Para 93.

³⁷ S 39(2) Constitution.

³⁸ Para 85, emphasis in the original.

³⁹ Para 44 with reference to *Affordable Medicines Trust v Minister of Health for the Republic of South Africa* 2006 (3) SA 247 (CC) and others.

⁴⁰ Joined by Nkabinde J and O’Regan ADCJ.

⁴¹ Para 107.

distribution of powers and functions, giving a definition of “municipal planning”, a task only the Constitutional Court could definitively do.

To arrive at the unambiguous interpretation of the proviso, Yacoob J also commenced with a literal interpretation. The proviso relates to agricultural land as it was before 1995, but the continued classification is linked to the transitional local authorities created in terms of the LGTA. Thus, once the tenure of these transitional authorities expired, so does the proviso and the continued classification of the land as agricultural.

This literal interpretation is bolstered by contextual considerations. The first consideration, Yacoob J advanced, is that agricultural land was not limited to land falling outside urban or semi-urban local government structures: “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.”⁴² This is indeed correct, and for that very purpose, the Minister could classify by specific proclamations such “urban or semi-urban” land as agricultural. Although this is the exception and not the rule, it lays the basis for the relevance of the next contextual consideration.

The proviso was inserted, according to Yacoob J, “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.”⁴³ When the transitional councils were established their powers were not yet defined: “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 land-use planning amongst all three spheres of government had been properly regulated by national legislation.”⁴⁴

The reason for the Minister’s continued control of the subdivision of agricultural land was that in the functional areas of agriculture there was “the absence of capacity of any other institution to make appropriate decisions in relation to agricultural land”. Thus, “[o]nce permanent municipalities had been established and structured, it would become possible for

⁴² Para 123.

⁴³ Para 125.

⁴⁴ Para 125

these municipalities to carry out their functions in relation to municipal planning without adversely affecting the effective administration of the agricultural competence.”⁴⁵

Implicit in this reasoning is the assumption that by 1995, in terms of a constitution yet to be drafted, local government would be the appropriate state structure to make all land-use planning decisions. As argued above in respect of the SCA judgment, all that the interim Constitution clearly allocated was the concurrent power of agriculture to the national and provincial governments and that the administration of specific pieces of legislation relating to agriculture was to be allocated between the national government and provinces. The powers of local government were to be determined by “a competent authority”. That would be either the national or provincial government, assigning any of their own powers to local government. The notion of a strong local government was simply not on the cards in 1995.

Given the difficulty to pin down the legislative intent of 1995, Yacoob J finally comes to the heart of the matter: how did the 1996 Constitution distribute authoritatively the powers between national, provincial and local government in Schedules 4 and 5, and how best should the proviso be interpreted in accordance with such a division? “Agriculture” is a concurrent competence listed in Schedule 4A. In so far as land-use is concerned, “regional planning and development” is also a Schedule 4A function. “Provincial planning”, on the other hand, is an exclusive provincial competence while “municipal planning” is a local competence listed in Schedule 4B. The question is, then, where do decisions relating to the division of agricultural land properly fall.

Recognising that “agriculture” is a concurrent competence, Yacoob J correctly observes that it

cannot be said to exist in a hermeneutically 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 on municipalities.⁴⁶

While not addressing the more important content of the frameworks and policy, Yacoob J went on to define “planning” expansively:

⁴⁵ Para 126.

⁴⁶ Para 128.

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.⁴⁷

Given the broad definition of planning, the next question should concern the pith and substance of the legislative provision in question. Here Yacoob J takes the bold step by categorising the provisions in question as planning: “to the extent that the Act is concerned with zoning, subdivision and sale of land, it is not concerned with agriculture but with the functional area of planning.”⁴⁸

While recognising that there is an overlap between functional areas set out in Schedules 4 and 5, and, with reference to the *Liquor Bill* judgment⁴⁹ that the main substance of legislation should be determined, Yacoob J proceeded as follows:

“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 Schedules 4 and 5 to 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.”⁵⁰

The argument thus runs as follows: planning deal essentially with land, and therefore municipal planning is concerned with land use in all its manifestations. Before 1995 there were no local government structures that could make those decisions. Now, with the establishment of wall-to-wall local government, municipalities can exercise that function.

The judge’s initial premise must be questioned. Before 1995 there were local government structures in rural areas - divisional councils in the Cape Province, and after 1986, Regional

⁴⁷ Para 128.

⁴⁸ Para 129.

⁴⁹ *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (3) SA 732 (CC).

⁵⁰ Para 131.

Services Councils and, in the Natal, Joint Services Councils. The Minister was entrusted with the decision-making not because there were no local authorities, but because the interest at stake was agriculture. The reference in the Act to municipal areas, as then defined and demarcated, was merely a convenient way of defining “agricultural land”.

Despite contested historical contexts, approaching the matter through the prism of defining functional areas is correct; it places the dispute in the appropriate constitutional space where one can debate the policy imperatives of one definition over another. On the demarcation of the fuzzy boundaries of “municipal planning” opinions may differ.

“Municipal planning” is defined by two concepts – the meaning of “planning” and the reach of the qualifier “municipal”.⁵¹ Given the broad definition of planning, there are bound to be overlaps with other functional areas. Agriculture also deals with land use planning and so does “environment” and “nature conservation”, all Schedule 4A functional areas. The qualifier “municipal” is then key to the proper demarcation of a municipality’s land use planning powers.

In the recent decision of *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*,⁵² Nugent JA defined “municipal planning” as follows:

It is clear that the word ‘planning’, when it is used in the context of municipal affairs, is common understood to refer to the control and regulation of land use, and I have no doubt that it was used in the Constitution with that common usage in mind. The prefix ‘municipal’ does no more than to confine it to municipal affairs.

Municipal affairs must necessarily relate to matters that fall within the competence of a municipality. Planning is an instrumentality in the service of other substantive local government functional areas. They relate mainly to the built environment – zoning, building regulations and so forth. The question is, then, whether deciding on subdivisions of agricultural land, is part of municipal affairs. It is difficult to conceive of the municipal interest at stake when a decision is to be made whether a farmer may bequeath his far-flung farm to his children by fragmenting the farm in small holdings. The result of such a subdivision, agri-economics have taught us, may be that the fragmented farm inevitably leads to unproductive land portions, which eventually impacts on food security. Food security is

⁵¹ See Steytler and Fesha “Defining local government powers and functions” 124 (2007) *SALJ* 320, 327.

⁵² [2009] ZASCA 106 (22 September 2009) at para 41.

hardly the business of local government. As agriculture is not a functional area for municipalities, they are permanently incapacitated (having no officials with the necessary skills) to make the call whether a subdivision would be detrimental to the agricultural value of the farming unit. Similar concerns are present with regard to the relentless march of urban sprawl onto the productive agricultural land on the urban edge.

The “municipal” qualifier to planning should further be read in conformity with the *Liquor Bill* judgment.⁵³ “Liquor licenses”, a provincial exclusive competence, the Constitutional Court held, are limited to licences that have no extra-provincial dimension, thus excluding any licence for the production of liquor that may be sold outside the province. Applying this principle, the “municipal” planning function should be limited to land use matters that have no extra municipal dimension. It is arguable that the productive use of agricultural land has indeed an extra-municipal or even an extra-provincial dimension. The optimisation of agricultural land, or any activities that may prejudice it, can only be assessed on a provincial, if not a national scale. No municipality would be in a position to make the call on the impact of subdivisions - not one, but large numbers spread over years – may have on the country’s productive agriculture. Each municipality would be convinced that an individual subdivision would have no impact on the national food security; it would do so from its narrow perspective without appreciation of the national picture. Moreover, the expansion of urban areas in the neighbouring agricultural land carries the incentive of greater property rates income for the municipality. Preserving agricultural land for the greater good of the country’s food security, is unlikely to feature strongly in the calculations of a council trying to be self-sufficient by increasing its revenue base.

Aware of the possible extra-municipal implication, Yacoob J sought solace in the famed municipal institution – the integrated development plan (IDP) – to accommodate national and provincial interests. The judge posited that because of the centrality of the IDP to municipal governance, planning was a core function of the municipality and this included a spatial development framework.⁵⁴ Such planning must, according to the Systems Act, “be compatible with national and provincial development plans and planning requirements binding on the municipality in terms of legislation.”⁵⁵ The province exercises some influence

⁵³ *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (3) SA 732 (CC).

⁵⁴ Item 2(4) Municipal Planning and Performance Management Regulations GN R796, GG 22605, 24 August 2001.

⁵⁵ S 25 Systems Act.

over the IDP through the MEC's interaction with and review of the IDP. The role of the national Minister for local government is confined to the issuing of regulations on the form and content of the IDP.

In Yacoob's view subdivision decisions are to be taken in terms of the IDP: "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."⁵⁶ This leads to the following conclusion:

"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 [about the loss of power] disregards the fact that provision has already been made for appropriate national and provincial participation in the planning process."⁵⁷

The problem with this sentiment is that IDP does not speak to the problem at hand. First, the IDP is unlikely to speak to issues of viable farming units because that is not municipal business. Second, the IDPs alignment with the provincial and national plans may be non-existent. There is no statutory requirement for such a plan, and provincial plans, commonly known as Provincial Growth and Development Strategies, are unlikely to address whatsoever the issue of viable farming units as that matter has not been assigned to this sphere of government. The same may be true of the plans of national sector departments; the departments are not compelled to participate in the IDP process. Furthermore, there is no national development plan and the National Spatial Development Framework is too general to address the issue. Third, and most importantly, the problem is that the alignment is a soft policy mechanism, not a hard requirement. Alignment can be achieved in varying degrees and provides no guarantee for the national/provincial interest to be secured. The alignment instruction applies only to plans "binding on the municipality in terms of legislation" and that is not provided for the IDP legislative framework.

⁵⁶ Para 137.

⁵⁷ Para 138.

Addressing directly the far-reaching implication of the expansive definition of “municipal planning” over all land use matters, the judge wrote:

“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 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.”⁵⁸

As intimated above, the judge’s argument for the extension of local powers over all land-use decisions is based on two questionable premises. First, is it an overstatement of “the importance and competence of the [national] executive head” to approve each and every sale in order to protect agriculture? Arguably, a province may pass competing legislation giving the MEC responsible for agriculture the power to approve agricultural subdivisions. The matter is then settled in terms of section 146 of the Constitution on the basis of whether or not the preservation of agricultural land should be approached from a national perspective. The envisaged new Act on the matter may well allocate this responsibility to the provinces. The rub of the matter is that agriculture is a national/provincial competence. Second, is the preservation of the Minister’s power unconstitutionally minimising “the role, importance and ability of municipal structures”? On my argument that subdivision of agricultural land deals with agriculture, the short answer must be that it does not affect the role of municipalities because it is not their competence. Because it is not their competence, municipalities simply do not have (and could not have acquired) the capacity to make informed and appropriate decisions.

Because the judge subsumed any land use decision under the wide umbrella of municipal planning, the impact of such a view would dramatically increase local government’s competences beyond the functional areas listed in Schedules 4B and 5B. The zoning or rezoning of conservation areas comes to mind. As this was a minority judgment, the future of agricultural land is still in the hands of the national government. However, the Court must

⁵⁸ Para 139.

soon pronounce on the definition of “municipal planning” as the invalidation of certain provision of the Development Facilitation Act is to be considered.

6. CONCLUSION

The end result of the case is that Wary was able to escape an unprofitable sale because the Constitution Court, to my mind, correctly entrusts the national Minister with the power to oversee the preservation of agricultural land. The majority decision reached this conclusion, however, without analysing the constitutional distribution of powers and functions. Instead, the focus was on locating the elusive intention of the legislature, with only a peripheral reference to the Constitution and then to the Bill of Rights rather than the provisions dealing with the division of powers and functions.

Seeking the intention of legislature may lead the interpreter astray in two respects. First, the case illustrates the temptation of deducting an intention from subsequent events. The intention was constructed in light of the enhanced status of local government, a development that was not apparent at all at the time the proviso was promulgated. Second, using contextual considerations allows an array of factors to come into play. That is not problematic in itself but here differences of opinion are bound to emerge. What is the correct interpretation of the surrounding circumstances and what is the weight or significance of a particular factor?

Even if the legislature’s intention was clear, and, say, the proviso was only a temporary measure, as the SCA held, the question still had to be answered whether deciding on agricultural land fell within the competence of local government or a concurrent competence of the national and provincial governments. Without having to strain the concept of the intention of the legislature, the legislation should be interpreted in harmony with the constitutional division of powers. The first question is then one of competence. If the provision cannot be interpreted in a manner compatible with the Constitution it is invalid. If it is reasonably open to a harmonious interpretation, then that should be done.

Addressing the question from the perspective of the division of powers and functions allows for a proper policy analysis of how, in a coherent manner, the lines between national, provincial and local competences can be drawn. The recent SCA decision of *City of*

*Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*⁵⁹ is instructive in this regard.

The Development Facilitation Act of 1995,⁶⁰ enacted at the same time as the transitional phase of local government commenced, provided for, among other things, the establishment of provincial development tribunals to fast track urban-based developments. When local government's powers, as listed in the 1996 Constitution, came on stream at the end of 2000, including powers relating to "municipal planning", a clash of competences inevitably materialised. The City of Johannesburg, still applying old order ordinances,⁶¹ sought to determine the establishment of new townships and the application of building regulations. The provincial development tribunal sought to do the same. A developer that failed to get permission from the City could conveniently turn to the provincial tribunal, often with success.

The question that confronted the SCA was who can make the final call – the City or the province. The Court correctly approached the matter from a division of powers angle. It defined "municipal planning", drawing on the dicta of Yacoob J in *Wary v Stalwo*,⁶² and found that decisions relating to the built-environment (the establishment of township and the condition under which they are established), as listed in the Ordinance, were properly located in the functional area of "municipal planning".⁶³ The provisions of the Development Facilitation Act according those powers to a provincial organ of state, were thus in conflict with the Constitution and invalid. The decision is awaiting confirmation from the Constitutional Court.

When the Constitutional Court addresses this question, the framework for analysis will be the constitutional division of powers and functions. While the control over agricultural land will not be in issue, a reasoned and comprehensive definition of "municipal planning" is eagerly awaited by local government.

⁵⁹ [2009] ZASCA 106 (22 September 2009).

⁶⁰ 67 of 1995.

⁶¹ Town-Planning and Townships Ordinance 15 of 1986.

⁶² Para 131.

⁶³ Nugent JA held (at para 43) that "the term 'municipal planning' as it is used in Part B of Schedule 4 includes the various functions that are assigned to municipalities under the Ordinance". To illustrate the breadth of control that might be asserted through a townplanning scheme in terms of the Town-planning and Township Ordinance, the judge quoted from regulation 3 made under the Ordinance: (b) the use of land for (i) new streets; (ii) the widening of existing streets; (iii) parking areas and public and private open spaces; (iv) residential areas ... (e) the zoning of land to be used for specific purposes, including agricultural purposes; (f) the area of erven; (g) the regulation of the erection of buildings".