Subdivision – end of the road? Options to purchase subdivision of agricultural land

Four Arrows Investments 68 v Abigail Construction **(SCA) (unreported case no 20470/2014, 17-9-2015) (Swain JA)**

By Adam Brink

The Supreme Court of Appeal (SCA), has resolved an uncertainty with respect to the Subdivision of Agricultural Land Act 70 of 1970 (the Act).

The Act was devised in order to control the subdivision (and, in connection therewith, use) of agricultural land in order to prevent agriculturally useful land being fragmented into uneconomic portions.

It does this by prohibiting the subdivision of agricultural land, save with the consent of the Minister of Agriculture.

The prohibition is not just against physical subdivision of undivided portions. In addition to providing that land shall not be subdivided the Act also provides at s 3(*e*)(i) that 'no portion of agricultural land ... shall be sold or advertised for sale …' unless the Minister has already consented in writing to the subdivision of the land into those portions.

From inception, attempts have been made to avoid the provisions of the Act.

An early method was to prepare contracts where the portion of land was sold subject to various suspensive conditions. The argument was that as the agreement is inchoate until the suspensive condition is met there was no 'sale' to speak of, and so the Act was not contravened. In March 1981, to meet the challenge to the Act's purpose that this practice constituted, a definition of 'sale' was inserted, which included 'a sale subject to a suspensive condition'.

Notwithstanding the new definition, contracts continued to be drafted with a specific sort of suspensive condition, which it was argued did not infringe the Act: That the sale was suspensively conditional on the Minister's approval being obtained. This seemed an attractive solution. It seemed to do what the Act wanted, which was to ensure that everyone knew that nothing could happen until the Minister approved. It locked both parties into the agreement. The legislature could never, so the argument went, have meant to include this particular suspensive condition when it broadened the definition of sale. In 2003, however, in *Geue and Another v Van*

der Lith and Another 2004 (3) SA 333 (SCA), the SCA found that even conditions of that sort were prescribed by the Act.

Suspensive conditions having been found to be offensive to the Act, lawyers retreated to what may prove to be the last defensive ditch for those wanting to sell portions of land where the Minister's approval has yet to be obtained. As 'sale' was defined merely to include 'a sale subject to a suspensive condition', with no mention of anything else, there was (so the reasoning went) no reason not to give a prospective purchaser a binding option to purchase the land once the approval had been obtained. With such an option at least the prospective purchaser might have something to enforce.

Such options were considered in two unreported decisions, both decided in 2007. In April 2007, in *Westraad NO en 'n Ander v Burger* (O) (unreported case no 5226/06, 13-4- 2007) (Van Zyl R) the Orange Free State Provincial Division, having considered the authorities, found unequivocally that the word 'sale' as used in the Act did not include an option. Options were thus not offensive to the Act. Conversely, in October of that year, in *Colchester Zoo SA Investments (Pty) Ltd v Weenen Safaris CC* (N) (unreported case no 2386/07, 16-10-2007) (Moosa AJ), having considered more or less the same authorities – but not the *Westraad* decision – the Natal Provincial Division found unequivocally that the word 'sale' did include an option and thus that such options were not, as it were, an option.

That dispute has now been resolved in the *Four Arrows* decision. In a judgment referring to *Geue*, but not to either of the unreported decisions that caused the controversy, the court considered not just what a 'sale' was, but what the implication was of the Act prohibiting land being 'sold or advertised for sale'. Following the court in *Geue's* finding that 'the target zone of the Act is much wider' than simply preventing alienation of undivided portions, the court found (para10):

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

Having considered the possibility of severing the offending option from the deed of sale (and choosing not to) the court declared the contract null and void.

It is not immediately obvious why it would be necessary to prohibit any precursor to the sale of an undivided portion of agricultural land in order to prevent fragmentation of the land. Fragmentation of land could be prevented simply by preventing actual subdivision (either by transfer or by actual use). Nor is it obvious why an agreement to sell explicitly made suspensively conditional on the minister's consent being obtained, should be prohibited. Obtaining ministerial consent to the subdivision of land is expensive and time-consuming and it is not obvious why it is necessary, in order to prevent fragmentation of land, that it should be done first in circumstances where it is being done for the purpose of selling land to a specific person (a neighbour, for example) in the mere hope that that person will not renege and will buy the portion.

What is clear though is that the SCA has now found that all precursors are prohibited. The court's approach (informed no doubt by the approach to interpretation mandated in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)) is broadly purposive following what it believes the legislature's purpose to be.

It appears to have brought to a close any contractual structure seeking to escape the strictures of the Act.

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