ATTEMPTED CIRCUMVENTION OF ADDO NATIONAL PARK'S EXPANSION – BLATANT MANIPULATION BY OFFICIALS OF THE LAND-REFORM (REDISTRIBUTION) PROGRAMME AND WANTON DISREGARD OF SOUTH AFRICAN NATIONAL PARKS' CONTRACTUAL RIGHTS: *SOUTH AFRICAN NATIONAL PARKS V ADDO AFRIQUE ESTATE (PTY) LTD* (1201/2010) [2011] ZAECGHC 40

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SUMMARY

The focus of the Provision of Land and Assistance Act 126 of 1993 is on land reform. It aims to ensure the beneficial use, development and improvement of land as

referred to in the Act, contribute to bring about poverty alleviation, promote economic growth, and empower historically disadvantaged persons. However, this Act has recently been manipulated in order to develop a luxury tourist facility. In *South African National Parks v Addo Afrique Estate (Pty) Ltd* (1201/2010) [2011] ZAECGHC 40, the Eastern Cape High Court had to decide on the applicability of the Act on a luxury tourist development, as well as on the requirements for an interim interdict and the rights acquired through a right of pre-emption.

1 THE FACTS OF THE CASE

South African National Parks v Addo Afrique Estate (Pty) Ltd[1] revolved around a property that abuts the Addo National Park and which had been utilized for agricultural purposes, namely commercial farming. According to the Applicant, South African National Parks, it had a right of pre-emption over the property. This right was established in the deed of sale of another erstwhile portion of the property concerned that was bought by the Applicant from the Fourteenth Respondent in 2001. It was submitted by the Applicant that, as a result, it had the right to have the property offered to it before it was sold and transferred to any third party or parties.

However, in spite of the alleged right of pre-emption, the property was sold and transferred to a number of third parties. The seller (the Fourteenth Respondent) had obtained permission to subdivide the land into smaller portions, purportedly in terms of the Provision of Land and Assistance Act 126 of 1993 (hereinafter "the PLAA") prior to selling and transferring same. In 2006, the seller and the Fifteenth Respondent obtained permission from the then Department of Land Affairs (the Sixteenth Respondent) in terms of section 10 of the PLAA to rezone and subdivide the property into 48 portions. Approval of certain building plans were granted by the Sundays River Valley Municipality (the Seventeenth Respondent) and consent was granted by the Eastern Cape Department of Roads and Transport for the construction of certain access points. The Surveyor-General approved the general plan in respect of the development (also purportedly acting in terms of section 10(3) of the PLAA).

The property was transferred to Addo Afrique Estate (Pty) Ltd (hereinafter "the First Respondent") in February 2008 after a letter was sent by the Deputy-Director of the Department of Land Affairs (Sixteenth Respondent) to the Registrar of Deeds which stated, amongst other things, that the project was approved in terms of section 10(3) of the PLAA. On the same day, certain other portions of the property were transferred to some of the other Respondents.

Four of the Respondents (the Eighth to Eleventh Respondents) were landless farmworkers, and land was donated and transferred to them in terms of the PLAA. The other portions of land did not fall within the ambit of the PLAA.[2]

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1 (1201/2010) [2011] ZAECGHC 40.

2 *South African National Parks v Addo Afrique Estate (Pty) Ltd supra* 7–17. See below for a discussion on the PLAA.

In 2009, the Applicant, through its legal representatives, got in touch with the First Respondent and averred that the reliance on the PLAA for the rezoning and subdivision was an abuse of the PLAA, and expressed its concern about the fact that certain portions had been rezoned and designated for the erection of a hotel, resort or associated facility. The Applicant demanded an undertaking that the First Respondent would not proceed with the development. The First Respondent refused. In 2010, the Applicant referred to its right of pre-emption and its intention to enforce same. The Applicant again demanded an undertaking, and, as such undertaking was not provided, an application was launched by the Applicant on 20 April 2010.[3]

2 THE APPLICATION TO THE EASTERN CAPE HIGH COURT

The Applicant approached the Eastern Cape High Court for an interim interdict restraining the First to Seventh and Twelfth to Thirteenth Respondents[4] from:

- disposing of, transferring or encumbering any of the properties constituting subdivisions or portions of the property; and
- effecting any improvements or developments thereon,

pending the outcome of another action by the Applicant.

The Applicant would subsequently approach the court to:

- review or set aside the rezoning, subdivision and transfer of the subdivisions and/or portions; and
- order that the property be transferred to the Applicant at a stipulated purchase price.[5]

3 THE LEGAL ISSUES

The question in law was whether the Applicant could prove a strong *prima facie* case in order to obtain an urgent interdict. The Applicant's case was based on, *inter alia*, its alleged contractual right of pre-emption, as the Fourteenth Respondent sold and transferred the property to the First Respondent without first offering it to the Applicant. In addition, the Applicant argued that the approval granted by the Department of Land Affairs (the Sixteenth Respondent) in terms of section 10(3) of the PLAA to rezone and subdivide the property was unlawful, and had to be reviewed and set aside.[6]

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3 *South African National Parks v Addo Afrique Estate (Pty) Ltd supra* 19–20.

4 No relief was sought in respect of certain portions of the land, registered in the names of the Eighth and Ninth Respondents, as the Applicant accepted that the relevant subdivisions fell within the ambit of the Provision of Land and Assistance Act 126 of 1993 (as it was transferred to landless farm workers) – see *South African National Parks v Addo Afrique Estate (Pty) Ltd supra* 3.

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6 *South African National Parks v Addo Afrique Estate (Pty) Ltd supra* 2 and 4.

4 THE PARTIES

South African National Parks was the Applicant in this case. Twenty Respondents were cited: Addo Afrique Estate (Pty) Ltd (First Respondent), Ridge Farm CC (Second Respondent); Mark Anthony Biggs (Third Respondent); Lara Jean Biggs (Fourth Respondent): Gary John Logan (Fifth Respondent); Leslie Dawn Logan (Sixth Respondent); Addo Afrique Safari Lodge CC (Seventh Respondent); Jerof Ngquse (Eighth Respondent); Nothini Ngquse (Ninth Respondent); Joey Pieterse (Tenth Respondent); Florence Pieterse (Eleventh Respondent); Robert John Tapson N.O. (Twelfth Respondent); Belinda Tapson (Thirteenth Respondent) (Trustees of the Marize Trust, IT 469/2009); Anthony Lauriston Biggs (Fourteenth Respondent); Gysbert Jacobus van Deventer (Fifteenth Respondent); Department of Land Affairs (Sixteenth Respondent); Sundays River Valley Municipality (Seventeenth Respondent); Registrar of Deeds, Cape Town (Eighteenth Respondent); First National Bank Limited (Nineteenth Respondent); and ABSA Bank Limited (Twentieth Respondent). The First to Thirteenth and the Twenty-First Respondents were, at the time of the judgment, owners of different portions of the property.

5 THE JUDGMENT

The court heard the case on 29 July 2011, and delivered its judgment on 25 August 2011.

5 1 The requirements for an interim interdict

The court listed the legal requirements for an interim interdict, namely:

> "(a) A *prima facie* right;
> (b) A well grounded apprehension of irreparable harm if the interim rule is not grounded (*sic*) and the ultimate relief is eventually granted;
> (c) That the balance of convenience favours the granting of the interim interdict; and
> (d) That the Applicant has no other satisfactory remedy",[7]

and confirmed that it is a discretionary remedy. The court therefore had to view these requirements holistically, and, as a result, less emphasis could be placed on the other requirements if a strong *prima facie* right had been established.[8] In order to ascertain whether the Applicant had a *prima facie* right, the court had to "consider the facts set out by the Respondent which the Applicant cannot dispute" and "decide whether, with regard to the inherent probabilities and the ultimate onus, the Applicant should on those facts obtain relief at the trial".[9]

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[7] *South African National Parks v Addo Afrique Estate (Pty) Ltd supra* 21.

[8] The court referred to *Erasmus v Senwes Ltd* 2006 (3) SA 529 (T) 54; and *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 D 383E–F.

[9] *South African National Parks v Addo Afrique Estate (Pty) Ltd supra* 23, with reference to *Webster v Mitchell* 1948 (1) SA 1186 (W) 1189; *Ferreira v Levin NO*; and *Vryenhoek v*

5 2 The right of pre-emption and prior knowledge thereof

There was a contractual obligation on the seller (the Fourteenth Respondent) to first offer the property to the Applicant for sale. The court described a right of pre-emption as:

> "a personal right which entitles the purchaser to step into the shoes of the third party by unilateral declaration of intent, where a seller concludes a contract of sale with the third party contrary to such right. In such a case a contract of sale will be deemed to have been concluded between the seller and the holder of the right of pre-emption".[10]

In order for the Applicant to be able to claim from those respondents who purchased portions of the land, it had to show that they (the said respondents) had knowledge of the right of pre-emption.[11] As the seller (the Fourteenth Respondent) was at all material times a Director of the First Respondent, the Applicant argued that knowledge should be imputed to said Respondent.[12]

The legal representative of the First to Seventh and Fourteenth to Fifteenth Respondents submitted that the Applicant had to show that circumstances entitled it to claim specific performance against the present holders of title; otherwise it might be limited to a damages claim. However, the court stated that the Applicant might probably be able to prove knowledge of the right of pre-emption by some of the Respondents in due course. The Applicant submitted that the knowledge of the pre-existing right of pre-emption should be imputed on the First, Second and Seventh Respondents.[13] The Third, Fourth, Sixth, Twelfth and Thirteenth Respondents were regarded as *bona fide* purchasers – there was no evidence of prior knowledge by these Respondents of the right of pre-emption or the alleged irregular rezoning and subdivision of the property.[14]

Powell NO 1995 (2) SA 813 (W) 817F–H. A preliminary assessment of the merits of the Applicant's case had therefore to be undertaken.

10 *South African National Parks v Addo Afrique Estate (Pty) Ltd supra* 25–26.

11 The court referred *to Associated South African Bakeries (Pty) Ltd v Oryx and Vereinigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A) in which it was stated at par 907G that in the event that delivery had taken place, the holder of the pre-emptive right could only claim the relevant goods from the third party if the third party had knowledge of the existence of the pre-emptive right.

12 *South African National Parks v Addo Afrique Estate (Pty) Ltd supra* 25–27. In addition, the Fifteenth Respondent was a director of the First Respondent, and the seller was therefore "aware of the alleged fraudulent breach of the right of pre-emption" (par 8).

13 The Seventh Respondent was one of only two members of the First Respondent, the Fourteenth Respondent was a member of the Second Respondent.

14 *South African National Parks v Addo Afrique Estate (Pty) Ltd supra* 27–30.

5 3 The rezoning and subdivision of the land: the validity of the approval in terms of section 10(3) of the PLAA

The court examined the circumstances surrounding the case in order to ascertain whether the approval in terms of section 10(3) of the PLAA was valid. The Applicant argued that if the transfer of the property to the First Respondent was a nullity as a result of non-compliance with the PLAA, the subsequent sales and transfers would also be null and void and liable to be set aside. In addition, the Applicant submitted that it would only be required to establish knowledge by the First Respondent when initial transfer took place, and then claim specific performance. The Applicant also argued that in accordance with the judgment in *Campbell v Botha*,[15] the *bona fide* Respondents would not have had an absolute defence.

The court agreed that there was merit in the Applicant's argument that the purported rezoning and subdivision in terms of the PLAA was null and void.[16] The purpose of the PLAA, as it was in 2008, was to "facilitate the settlement of persons who have no land or have limited access to land, on land designated for this purpose by the Minister (then of Land Affairs) in terms of s. 2 of the Act [PLAA]", and not for upmarket commercial developments. The court stated that "[t]here are numerous indications in the Act [PLAA] that it was meant to facilitate the settlement or securing of tenure right of deserving individuals".[17]

The court made it clear that that there was no provisions in the PLAA which purported to empower the (then) Department of Land Affairs (the Sixteenth Respondent) to approve the rezoning and subdivision of agricultural land other than that designated by the Minister in terms of section 2. In paragraph 36 the court listed the three classes of land that might be designated for purposes of settlement (in terms of section 2(1)):

> "(a) state land which is controlled by the Minister and made available by him or her for those purposes;
> (b) land which is purchased or acquired by the Minister for the purposes of settlement [and] made available by him or her for those purposes;
> (c) any land which has been made available for the purposes of settlement by the owner thereof."

The Minister must designate land for settlement purposes (in terms of section 2) before land earmarked for development in terms of PLAA will be exempted from the provisions of laws governing the subdivision of agricultural land and establishment of townships, for example, the Subdivision of Agricultural Land Act 70 of 1970 (hereinafter "SALA") (unless the Minister directs otherwise).[18] In this regard, the Minister must comply with certain notice requirements, and must consider all representations

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[15] 2009 (1) SA 238 (SCA).
[16] *South African National Parks v Addo Afrique Estate (Pty) Ltd supra* 31–33.
[17] *South African National Parks v Addo Afrique Estate (Pty) Ltd supra* 34.
[18] S 2(4).

received.[19] With regard to the property in question, no designation was made, and no notices were published. The court even stated that "[i]n fact it appears quite likely that the Minister may well not even have been aware of the rezoning and subdivision of land".[20]

The provisions of, amongst others, SALA would by virtue of a designation in terms of the PLAA, not be applicable to designated land. This was, according to the court, the reason why the Minister had to invite representations regarding the proposed designation. In this regard, the court stated that "[i]t is common cause that these procedures were not followed. This is in my view a fundamental irregularity which may well render the whole process a nullity".[21] A strong *prima facie* case was therefore made out by the Applicant.[22]

With regard to the argument by the Respondents that there was an undue delay in bringing the proceedings and that the court should not grant the interim relief, the court stated that such argument could not avail the First, Second and Seventh Respondent at that stage of the proceedings. The court also stated that the review court would probably also take the stance that invalid decisions should not stand, and that the interests of justice and the principle of legality should be advanced.[23]

5 4 Harm and the balance of convenience

The court found that the Applicant did not establish entitlement for interim relief against the Third, Fourth, Sixth, Twelfth (the court erroneously referred to Fourteenth) and Thirteenth Respondents (the *bona fide* purchasers) who have averred that they would suffer serious financial harm if such an order was granted against them. The balance of convenience favoured these Respondents.[24]

The court also made it clear that if Applicant could establish that the rezoning, subdivision and sale of individual erven to third parties were null and void, the subsequent sale by these Respondents (the Third to Sixth and

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[19] *South African National Parks v Addo Afrique Estate (Pty) Ltd supra* 36–37. See s 2(2) for notice in the *Gazette*, and s 2(3) for notice in a newspaper circulation in the district in which the designated land is situated, calling on interested parties to submit written representations within 21 days. However, if no substantial change in land use is likely to occur as a result of the proposed settlement, the Minister may direct that no publication is necessary. Before the Minister may designate any land, he or she must consider all the representations received.

[20] *South African National Parks v Addo Afrique Estate (Pty) Ltd supra* 38.

[21] *South African National Parks v Addo Afrique Estate (Pty) Ltd supra* 39–40.

[22] The court stated that it was not able to make a finding regarding prescription, as the issue was not "sufficiently ventilated" in court papers (*South African National Parks v Addo Afrique Estate (Pty) Ltd supra* 41).

[23] *South African National Parks v Addo Afrique Estate (Pty) Ltd supra* 42–46, with reference to *Oudekraal Estate (Pty) Ltd v The City of Cape Town* 2010 (1) SA 333 (SCA). The court also referred to *Associated Institutions Pension Fund v Van Zyl* 2005 (2) SA 302 SCA (where the court made it clear that two questions needed to be answered: (1) Whether there was an unreasonable delay (entirely dependent on the facts and circumstances of each case), and (2) if so, whether the delay should be condoned in all circumstances (discretion)).

[24] The court added that if the Applicant was able to establish that the rezoning, subdivision and sale were null and void, subsequent sales by said Respondents would also be null and void.

Twelfth and Thirteenth Respondents) would also be null and void.[25] The court made it clear that, with regard to the Eight to Eleventh Respondents (the landless farm workers), if the rezoning of the property was declared to be invalid as a result of non-compliance with peremptory statutory procedures, the subdivision and disposal of these portions would also be null and void – the entire development would be invalid if the Applicant's argument was upheld by the review court.[26]

The court concluded by stating that the balance of convenience favoured the Applicant. The Applicant undertook to the Nineteenth and Twentieth Respondents (bondholders) and the other Respondents who would be able to prove that they were *bona fide* unaware to indemnify them from losses they might not be able to recover from the First, Second, Fourteenth and Fifteenth Respondents. The court stated clearly that "[t]he potential prejudice to the Applicant if an undesirable and illegal development is allowed to continue along the boundaries of a national park far outweighs the potential financial losses which the Respondents may suffer if the interim relief is granted".[27] According to the court, the Applicant proved a *prima facie* right, and upon consideration of all the facts, should obtain final relief.

5 5 Alternative remedy

The Applicant did not have an alternative remedy, and the court found that less emphasis should be placed on the balance of convenience.[28]

6 THE COURT ORDER

The court made the following order:

1 The First, Second and Seventh Respondents were interdicted and restrained from disposing of, transferring, encumbering or effecting improvements or developments on any properties constituting sub-divisions of portions of the land pending the outcome of an application or action to be instituted by the Applicant within 30 days to review and set aside the rezoning, subdivision and transfer of the subdivisions and/or portions of the property and for an order that the property be transferred to the Applicant at a certain purchase price. The question as to costs against these Respondents was reserved for decision by the court considering final relief.

2 The application against the Third to Sixth and Twelfth and Thirteenth Respondents was dismissed with costs.

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[25] *South African National Parks v Addo Afrique Estate (Pty) Ltd supra* 49.
[26] *South African National Parks v Addo Afrique Estate (Pty) Ltd supra* 50.
[27] *South African National Parks v Addo Afrique Estate (Pty) Ltd supra* 51.
[28] *Ibid*.

7 KEY ISSUES

7 1 Right of pre-emption

Although there are many similarities between an option and a right of pre-emption (also known as a right of first refusal), there are a number of fundamental differences. Within this context, Christie and Bradfield[29] refer to *Owsianick v African Consolidated Theatres (Pty) Ltd*,[30] where the following was said:

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

As regards the remedies available to the grantee of a right of pre-emption, Christie and Bradfield are of the opinion that, if the common intention of the parties concerned is clear, the right of pre-emption can be "enforced by specific performance, damages or interdict".[31]

In principle, the purchase price should be determined or determinable. A right of pre-emption (in respect of which no period had been fixed), must be exercised "within a reasonable time after the happening of the specified event, which will normally be the notification by the grantor of the receipt of an offer to buy from a third party".[32] It is still undecided whether a right of pre-emption may be freely ceded (which is the case as regards an option), and although Christie and Bradfield[33] are of the opinion that both options and rights of pre-emption should be freely cedable, they indicate that cognisance should be taken of the opposite view in *Hersch v Nel,*[34] where it was said as follows:

> "If … an option without a covenant to that end is capable of cession, then a right of pre-emption must be so too, and if that is so the result is preposterous. Whereas I have given you the contractual right inhibiting my private autonomy only in this respect, that I must prefer you as purchaser to all the world, you can now by unilateral action enlarge the inhibition by putting any other person or persons in such a privileged position as against the rest."

As the Applicant in the case under discussion was able to prove its right of pre-emption, it is clear that the court was correct in finding that it had certain remedies available. However, as the court stated, it had to prove knowledge of this right prior to claiming from the individual Respondents. This would be decided in a later application or action to be instituted by the Applicant to

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29 Christie and Bradfield *Law of Contract in South Africa* 6ed (2011) 58.

30 1967 (3) SA 310 (A) 316.

31 Christie and Bradfield *Law of Contract in South Africa* 58.

32 Christie and Bradfield *Law of Contract in South Africa* 59, with reference to *Caltex Oil SA Ltd v Waller* 1968 1 PH A 36 (D).

33 Christie and Bradfield *Law of Contract in South Africa* 60.

34 1947 (3) SA 365 (O) 373.

review and set aside the rezoning, subdivision and transfer of the subdivisions and/or portions of the property and for an order that the property be transferred to the Applicant at a certain purchase price.

7 2 Land reform: Provision of Land and Assistance Act 126 of 1993

The emphasis in the court's discussion of the PLAA was on the non-compliance with its procedural requirements (and consequential invalidity of the administrative steps taken by the DLA official concerned). However, it is suggested that the PLAA should never have been used by the DLA in the case under discussion, as, since 2000, the PLAA was refocused to be used as one of the key tools for the implementation of the redistribution programme.

The redistribution programme is one of the three land-reform programmes provided for in sections 25(5), (6) and (7) of the Constitution of the Republic of South Africa 1996 (hereinafter "the Constitution"). Section 25(6) provides for tenure reform, and section 25(7) deals with restitution. Section 25(5), which deals with redistribution, puts an obligation on the state to effect equitable access to land in respect of citizens:

> "(5) 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."

Within this context, section 25(8) declares that the state may take legislative and other measures to achieve land, water and related reforms, "in order to redress the results of past racial discrimination", subject to the general limitations clause as provided for in section 36(1).

At a policy level, the April 1997 White Paper on South African Land Policy,[35] discusses the three abovementioned land-reform programmes as imperatives, and states as follows[36] as regards the focus of the redistribution programme:

> "The purpose of the Land Redistribution Programme is to provide the poor with access to land for residential and productive uses, in order to improve their livelihoods. The government provides a single, yet flexible, redistribution mechanism which can embrace the wide variety of land needs of eligible applicants. Land redistribution is intended to assist the urban and rural poor, farm workers, labour tenants, as well as emerging farmers."

In similar vein, the 2011 Green Paper on Land Reform,[37] which refers to "democratic and equitable land allocation and use across race, gender and class" as one of the three principles underlying land reform,[38] emphasizes the need for beneficiary selection in the case of land redistribution, and the

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[35] Department of Land Affairs *White Paper on South African Land Policy* (1997).

[36] Department of Land Affairs (1997) 12.

[37] Department of Rural Development and Land Reform *Green Paper on Land Reform, 2011* (2011).

[38] Department of Rural Development and Land Reform 4.

need to ensure that land redistribution generates sustainable employment, incomes and livelihoods.[39]

The facts of (and the decision in) the case under discussion clearly indicate that predominantly wealthy "beneficiaries" were to benefit from the rezoning, subdivision and development, and that the few "land-reform beneficiaries" (only four of the Respondents (the Eighth to Eleventh Respondents, being landless farmworkers)) were arguably just a ploy to create the impression that the development concerned was done within the ambit of the PLAA.

As regards the refocusing of the PLAA, it is necessary to give a brief overview of the legislative history of the significant shift that was implemented in order to align the PLAA with the White Paper on Rural Development, Agrarian Transformation and Land Reform and, subsequently, the Proactive Land Acquisition Strategy (hereinafter "PLAS"),[40] which has been developed to give content to PLAA at the operational level. Within this context, the PLAS also needs to be analysed in order to determine the legality of the DLA decision to, in effect, simulate the steps taken as if the enabling legislative framework was the PLAA, and the implementation steps had been done in accordance with the Manual for the Implementation of the Pro-active Land Acquisition Strategy (hereinafter "the Manual"),[41] which was developed to give clear guidance to officials on how to deal with applications submitted in accordance with the PLAA and its related operational strategy, PLAS.

The title of the Provision of Certain Land for Settlement Act 126 of 1993 was changed to the Provision of Land and Assistance Act 126 of 1993 by means of the Land Affairs General Amendment Act 11 of 2000, and again, by means of the Provision of Land and Assistance Amendment Act 58 of 2008 to the Land Reform: Provision of Land and Assistance Act 126 of 1993 (PLAA). (Further amendments were brought about by the Rural Development and Land Reform General Amendment Act 4 of 2011.)

The 2008 amendment was effected to accommodate the change in focus of the original 1993 Act, which emphasized the designation of certain land, as well as the subdivision thereof for purposes of the settlement of persons, primarily in the rural areas.[42] The current (amended) PLAA is "a vehicle to provide land and assistance for land-reform projects in mainly rural areas".[43] According to Mostert and Pope,[44] the Act forms part of a range of land reform legislation which has been introduced since 1994 in order to give effect to section 28 of the (interim) Constitution of the Republic of South Africa, 200 of 1993.[45] This range consists of, amongst others, the Restitution

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39 Department of Rural Development and Land Reform 5.

40 See discussion below.

41 Department of Land Affairs *Manual for the Implementation of the Proactive Land Acquisition Strategy* Version 2 (2007).

42 Badenhorst, Pienaar and Mostert *The Law of Property* 5ed (2006) 604.

43 *Ibid*.

44 Mostert and Pope *Beginsels van die Sakereg in Suid-Afrika* (2010) 118 fn 114.

45 The property clause of the interim Constitution.

of Land Rights Act 22 of 1994, the Extension of Security of Tenure Act 62 of 1997, the Land Reform (Labour Tenants) Act 3 of 1996, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, the Transformation of Certain Rural Areas 94 of 1998, the Interim Protection of Informal Land Rights Act 31 of 1996, the Communal Properties Association Act 28 of 1996 and the Development Facilitation Act 67 of 1995.

Since 2008, the long title of PLAA sets out its main focus as follows:

> "To provide for the designation of certain land; to regulate the subdivision of such land and the settlement of persons thereon; to provide for the acquisition, maintenance, planning, development, improvement and disposal of property and the provision of financial assistance for land reform purposes; and to provide for matters connected therewith."

The objects of the PLAA clearly indicate that, since 2008, the focus of the Act is on land reform, and to ensure the beneficial use, development and improvement of land as referred to in the Act; contribute to bring about poverty alleviation; promote economic growth; and empower historically disadvantaged persons:[46]

> "(a) give effect to the land and related reform obligations of the State in terms of section 25 of the Constitution of the Republic of South Africa, 1996;
> (b) effect, promote, facilitate or support the maintenance, planning, sustainable use, development and improvement of property contemplated in this Act;
> (c) contribute to poverty alleviation; and
> (d) promote economic growth and the empowerment of historically disadvantaged persons".

Within the context of the case under discussion, the Minister of Rural Development and land Reform (hereinafter "the DRDLR Minister") is empowered to designate private land, for purposes of settlement, in cases where land has been purchased or acquired by the DRDLR Minister, or where the owner has made available land to the DRDLR Minister, for these purposes.[47] It is clear from the findings of the court that no evidence was provided of such designation.

Section 3 compels the DRDLR Minister to publish a notice in least one newspaper circulating in the district in which the land to be designated in accordance with the PLAA is situated, requesting interested parties to comment on the designation of the land concerned within a period not shorter than 21 days. The designation may only be effected by the DRDLR Minister after all representations have been considered.[48] Also, in this instance, the court found that there was no compliance with these requirements.

According to section 4, the development of designated land must be undertaken by (a) the DRDLR Minister or a person with whom the DRDLR Minister has entered into an agreement in respect of section 2(1)(a) land

[46] S 1A of the PLAA.
[47] S 2(1)(b)–(c) of the PLAA.
[48] S 3(2) of the PLAA.

(State land) or section 2(1)(b) land (land acquired or purchased by the Minister), or by (b) the owner (or the person with whom the owner has entered into an agreement) in respect of section 2(1)(c) land. The court did not deal directly with the question regarding whether such an agreement had been entered into, and it is assumed that such an agreement was lacking.

Designated land may be subdivided (subject to the section 2(3) conditions) into smaller portions for business, community, public, residential, small-scale farming or similar purposes.[49] Such subdivision must be reflected in a partition plan, which must be submitted to the Minister for his or her approval (where the DRDLR Minister is not the developer).[50] Following the approval of the partition plan by the DRDLR Minister, surveying needs to take place, and after approval of the plans and diagrams by the Surveyor-General, these must be submitted to the Deeds Registry for registration.[51] The document issued by the DLA Deputy Director, which purported to indicate that the subdivision and related plans had been effected in accordance with the PLAA, was correctly found by the court to be without any legal effect, as the statutorily prescribed preceding steps had not been complied with at all.

The developer may alienate or lease any piece of such subdivided land to any person; however, settlement may only take place after the designated land has been surveyed and the beacons have been placed (except in those cases where the DRDLR Minister determines that settlement may take place even prior to the placement of beacons) – section 8. The process for the registration of ownership is provided for in section 9. The alienation of land concerned by the owner was – correctly – also found to be without any legal effect on the basis of the foregoing required steps (publication, consideration of comments, determination, *etcetera*,[52] not having been complied with.

Section 10(1) empowers the DRDLR Minister to, amongst others, acquire property,[53] to maintain such property,[54] conduct a business or other economic enterprise[55] or to exercise the rights of a holder of shares or as a party to a juristic person, other entity or trust in respect of such property.[56] The PLAA also provides that, notwithstanding section 14 of the Deeds Registries Act 47 of 1937, transfer may be passed (and registered) directly from the (previous) owner to the person to whom the DRDLR Minister has disposed of the property concerned, without any transfer stamp or other duties, fees and charges being payable.[57]

Section 10(2) determines that legislation regulating land use, the subdivision of land, the consolidation of land, or the establishment of

[49] S 5 of the PLAA.
[50] S 6 of the PLAA.
[51] S 7 of the PLAA.
[52] See above.
[53] S 10(1)(a) of the PLAA.
[54] S 10(3)(a) of the PLAA.
[55] S 10(3)(b) of the PLAA.
[56] S 10(3)(c) of the PLAA.
[57] S 10(4) of the PLAA.

townships does not apply to any land contemplated in the PLAA – unless the DRDLR Minister directs otherwise in writing. This means that, in principle, SALA, the Development Facilitation Act 67 of 1995, as well as provincial and municipal legislation relating to rezoning and land use, are in principle not applicable (unless the DRDLR Minister directs otherwise). Within this context, the DLA Deputy Director, by invoking section 10(3) of the PLAA as the (purported) legal basis for the development, ostensibly succeeded in excluding any possible application (and the concomitant need for authorizations) of national legislation dealing with the subdivision and rezoning of agricultural land (SALA) and provincial legislation dealing with spatial planning and rezoning (the Land Use Planning Ordinance 15 of 1985 (hereinafter "LUPO"). Within this context, the decision of the court that the abovementioned DLA letter could in law not enable the application of the PLAA, is correct.

The DRDLR Minister may, subject to conditions as determined by him or her, sell, exchange, donate, lease, award or otherwise dispose of or encumber any such property. In the event that the land concerned is no longer required for purposes of the PLAA, the DRDLR Minister may dispose thereof.[58]

The power to make regulations is vested in the DRDLR Minister.[59] Only one set of Regulations has been published,[60] and only deals with applications for subsidies and advances.

Section 15 enables the DRDLR Minister to delegate, on conditions as may be determined by him or her, to delegate any power contained in the PLAA (except the section 14 power to make regulations) to "any officer in the Department of Rural Development and Land Reform", and authorize any such officer to perform any duty imposed on the DRDLR Minister as contemplated in the PLAA. Although the delegation was not in issue in the current case, the DLA as Sixteenth Respondent should have been expected to provide proof that the DLA Deputy Director had in actual fact been delegated the necessary powers, and consequently had the required mandate to consider applications submitted in accordance with the PLAA.

The discussion above, comparing the requirements as spelled out in the PLAA with the actual administrative actions implemented by the DLA Deputy Director, clearly indicates that the court was correct in finding that the PLAA was not applicable to the case under discussion. In addition, it must be clearly stated that, although the court did not deal with the in principle point of departure of PLAA (the provision of land for redistribution to land-reform beneficiaries), same was not complied with at all – as the development was to be conducted as a "business of a luxury tourist facility".[61]

It is also clear that the DLA official concerned did not bother to comply with all the detailed prescripts of the Manual. Within this context, it is useful

[58] S 11 of the PLAA.
[59] S 14 of the PLAA.
[60] GN R1846 of in *GG* 17570 of 1996-11-15.
[61] *South African National Parks v Addo Afrique Estate (Pty) Ltd supra* 17.

to give a brief overview of the relevant provisions of the Manual in order to determine the extent of non-compliance by the DLA of its own detailed guidelines and procedures document.

The April 2007 version 2 of the Manual was published by the then Department of Land Affairs (DLA, now DRDLR). A policy decision was reached to move away from the demand-driven approach (provided for in LRAD programme) to the supply-driven ("state driven") approach of PLAS, in terms of which Government would acquire land for redistribution purposes pro-actively. The Preamble to the Manual states as follows:[62]

> "The manual outlines guidelines and procedures that are necessary to implement all PLAS. While the manual serves as a guide to implementation, implementers are requested to adjust these guidelines to local conditions and experience. The manual does, however, indicate certain non-negotiable procedures that must be strictly adhered to, during the course of implementation."

According to the Manual, one of the main advantages of the new state-driven approach is to accelerate the land-redistribution process.[63] It is clearly stated that the PLAS approach is "primarily pro-poor" and that the normal land-disposal application process is not applicable.[64] All delegations made in terms of section 15 to sell, exchange or donate designated land as provided for in section 11, are subject to terms and conditions as set by the Minister. It is evident that the target groups are defined to be beneficiaries in terms of the redistribution programme:[65]

> "The approach is primarily **pro-poor** and is based on purchasing advantageous land i.e. either because of the property's location, because it is especially amenable to subdivision, because it is suitable for particular agricultural activities that government would like to promote *vis-à-vis* redistribution, and/or because it is an especially good bargain."

The facts of the case under discussion gives clear evidence that the "pro-poor approach" was not present at all; on the contrary, it was intended to bring about a luxury tourist facility.[66]

Beneficiary selection is a prerequisite for settlement. Until 2009, the policy was to make the land available on the basis of a lease contract with an option to purchase.[67] However, since 2009, DRDLR has implemented a new policy that does not allow conversion from leasehold into full ownership. Appropriate beneficiary selection, as required by the PLAA and its implementation strategy (PLAS), as well as the detailed non-negotiable operational guideline document, the Manual, did not take place at all. The same disregard of complying with the prescribed seven resettlement

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62 Department of Land Affairs (2007) 3.
63 Department of Land Affairs (2007) 6.
64 Department of Land Affairs (2007) 7.
65 *Ibid*.
66 *South African National Parks v Addo Afrique Estate (Pty) Ltd supra* 17.
67 Department of Land Affairs (2007) 11 and 17–19.

models[68] is evident – a luxury tourist facility was to be developed instead of one of the following approved settlement types:

- Agri-villages.
- Smallholdings.
- Settlement and commonage.
- The establishments of black commercial farmers.
- Sustainable human settlements.
- Commonage.
- Kibbutz type development.

Finally, it must also be stated that the DLA official did not implement the prescribed PLAS-project cycle which consists of the following non-negotiable six phases:[69]

- Pre-phase: needs analysis and project identification.
- Phase 1: land acquisition.
- Phase 2: project planning and land development.
- Phase 3: trial lease period.
- Phase 4: transfer/disposal of land.
- Phase 5: post settlement support.

In conclusion, the above comparison of the unambiguous requirements of PLAA, the concomitant implementation strategy (PLAS) and the project-level operational Manual, on the one hand, and the administrative steps executed to bring about the establishment of a development which predominantly consists of a luxury tourist facility, clearly indicates the total lack of compliance by the DLA, both with the non-negotiable focus of the redistribution programme and the detailed sequenced steps prescribed at statutory, strategic and operational level.

7 3 Subdivision of Agricultural Land Act 70 of 1970

It is clear from the court's reasoning that Subdivision of Agricultural Land Act 70 of 1970 (SALA) is applicable to agricultural land. However, in the event that the requirements set out in the PLAA are met and land is designated as contemplated in the PLAA, SALA would not be applicable to designated land.

The aim of SALA is to control the subdivision, and, in connection therewith, the use of agricultural land. SALA was specifically assigned by the President in terms of section 235(9) of the 1993 Constitution to the national sphere of government.[70] Although the Subdivision of Agricultural Land Act

[68] Department of Land Affairs (2007) 12.
[69] Department of Land Affairs (2007) 23–35.
[70] By means of Proclamation R100 in *GG* 16785 of 1995-10-31.

Repeal Act 64 of 1998 was enacted to repeal SALA *in toto*, the Repeal Act has not yet been put into force.

Section 1 defines agricultural 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, 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;

(d) ...

(e) ...

(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."

The proviso was added by means of Proclamation R100 in *GG* 16785 of 31 October 1995 by the President in terms of section 235(9) of the 1993 Constitution, in order to ensure that the status of land categorized as agricultural land prior to the implementation of the interim phase of local government (i.e. the establishment of transitional councils in terms of the Local Government Transition Act 209 of 1993) would be retained for purposes of the application of SALA.

Section 2 provides for the exclusion of a number of actions from SALA's application. These include the subdivision of land, the transfer of an undivided share in land, or the sale or grant of any right to any portion of agricultural land in order to transfer such portion, undivided share or right to

the state or a statutory body; as well as a number of activities that have taken place prior to the commencement of SALA.

Section 3 of SALA prohibits certain actions regarding agricultural land without the prior written consent of the DAFF Minister:

> "Subject to the provisions of section 2 –
> (a) agricultural land shall not be subdivided;
> (b) no undivided share in agricultural land not already held by any person, shall vest in any person;
> (c) no part of any undivided share in agricultural land shall vest in any person, if such part is not already held by any person;
> (d) no lease in respect of a portion of agricultural land of which the period is 10 years or longer, or is the natural life of the lessee or any other person mentioned in the lease, or which is renewable from time to time at the will of the lessee, either by the continuation of the original lease or by entering into a new lease, indefinitely or for periods which together with the first period of the lease amount in all to not less than 10 years, shall be entered into;
> (e) (i) no portion of agricultural land, whether surveyed or not, and whether there is any building thereon or not, shall be sold or advertised for sale, except for the purposes of a mine as defined in section 1 of the Mines and Works Act, 1956 (Act 27 of 1956); and
> (ii) no right to such portion shall be sold or granted for a period of more than 10 years or for the natural life of any person or to the same person for periods aggregating more than 10 years, or advertised for sale or with a view to any such granting, except for the purposes of a mine as defined in section 1 of the Mines and Works Act, 1956;
> (f) no area of jurisdiction, local area, development area, peri-urban area or other area referred to in paragraph (a) or (b) of the definition of 'agricultural land' in section 1, shall be established on, or enlarged so as to include, any land which is agricultural land;
> (g) no public notice to the effect that a scheme relating to agricultural land or any portion thereof has been prepared or submitted under the ordinance in question, shall be given,
> unless the Minister has consented in writing."

The format of applications is prescribed in section 4 of SALA. The Minister of Agriculture, Forestry and Fisheries (hereinafter "the DAFF Minister") may either grant an application (if he or she is satisfied that the land is not to be used for agricultural purposes and after consultation with the MEC concerned (on conditions determined by the MEC regarding the purpose for or manner which such land may be used)); refuse an application; or impose conditions when granting an application. The DAFF Minister is also authorized to amend or cancel any conditions imposed by him or her. In instances where the MEC has determined the conditions, such conditions may be amended or cancelled by the MEC concerned.

Section 6 determines that the DAFF Minister's written authorization is required for any subsequent surveying and/or registration of deeds. In addition, all the conditions imposed by the Minister must be endorsed on the title deed of the land concerned.

Even though the court did not specifically deal with the requirements that needed to be complied with in terms of SALA, it is important to note that a number of issues and shortcomings can be identified with regard to SALA. As stated above, SALA controls the subdivision, and, in connection

therewith, the use of agricultural land. Applications relating to the change of land use *per se* (that is applications for change in land use not resulting from proposed subdivisions) are not regulated by the provisions of SALA, and therefore do not require the input or consent of the DAFF Minister in terms of said legislation. However, the DAFF Minister is currently approached for a recommendation where change in land-use applications impact on agricultural land. The current situation creates a vacuum, emphasizing the need to review the provisions of SALA by providing for written approval to be given by the DAFF Minister for both subdivision and change in land-use applications that impact on agricultural land.

Certain agricultural land is excluded from the provisions of SALA. This includes all land in the former homelands (Transkei, Bophuthatswana, Venda and Ciskei and the self-governing territories), land formerly administered by the South African Development Trust (SADT), all state land, and municipal land which formed part of the jurisdictional areas of all pre-5 December 2000 municipalities (that is, before the introduction of wall-to-wall municipalities).[71] The exclusion of state land from the provisions of SALA also implies that agricultural land acquired by organs of state (including state departments and public enterprises) falls outside the ambit of said legislation. Organs of state may, in effect, subdivide and/or convert such land to non-agricultural uses without the approval of the DAFF Minister. Therefore, if the Applicant acquired the land in question, it would not have been required to seek written authorization by the DAFF Minister in terms of SALA if it wanted to subdivide the land.

SALA does not provide for the allocation of legislative and executive powers between national and provincial government, which is contrary to the provisions of Schedule 1 Part A of the Constitution which determines that agriculture is a functional area of concurrent national and provincial legislative competence. Taking into account that the Department of Agriculture, Forestry and Fisheries (DAFF) has not assigned or delegated SALA (or parts thereof) to any of the provinces, no SALA-based activities undertaken by Provincial Departments responsible for Agriculture can have any binding legal effect, and can only be deemed to be advisory in nature.

SALA also does not make provision for the principles of co-operative government and inter-governmental relations as provided for in section 41 of the Constitution. Certain other government departments are increasingly of the opinion that SALA is not applicable to them, to such an extent that this has now become administrative practice (in general terms, see the discussion of the *Maccsand* case below for an example where a certain government department was of the opinion that its authorization in terms of one piece of legislation, trumped the need for authorization by another department in terms of other legislation). In addition, the subdivision and change in land use (to residential and industrial development) of agricultural land is increasingly authorized by municipalities, without the approval of the DAFF Minister.

[71] See, with regard to the exclusion of municipal land, the interpretation by the Constitutional Court in the *Wary* case below.

It is therefore clear that a need exists to review the provisions of SALA in order to ensure that the national DAFF Minister has the final authority as regards the subdivision and possible changes in the use of agricultural land. The definition of agricultural land, as contained in SALA, should be expanded to include all agricultural land, including land situated in the former homelands, state land, and land acquired or owned by organs of state. SALA also needs to be aligned with the principles of co-operative government and inter-governmental relations as provided for in section 41 of the Constitution. Finally, it is necessary to align SALA, existing planning legislation (for example, the PLAA and the Development Facilitation Act 67 of 1995) and envisaged planning legislation (for example, the Spatial Planning and Land Use Management Bill 2012) in such a manner to ensure that SALA remains relevant, applicable and effective in all instances where subdivision and/or change in land-use applications impact on agricultural land in order to preserve and protect agricultural land.

7 4 Related court cases

In *Maccsand v City of Cape Town*,[72] the Supreme Court of Appeal had to decide, amongst other things, whether the granting of a mining right or permit in terms of sections 23 and 27 of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA) (administered by national government) is sufficient, or whether authorization in terms of LUPO (provincial planning legislation, administered by local government) also has to be obtained. The court found that these two pieces of legislation do not displace each other, are directed at different ends, do not result in a duplication of administrative functions, and operate alongside each other. Therefore, authorization in terms of both Acts needs to be obtained before an applicant can commence mining operations. In paragraph 34, the court stated that "… dual authorisations by different administrators, serving different purposes, are not unknown, and not objectionable in principle – even if this results in one of the administrators having what amounts to a veto".

In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd (Trustees of the Hoogekraal Highlands Trust & SAFAMCO Enterprises (Pty) Ltd (*amicus curiae*); Minister of Agriculture & Land Affairs (intervening))*,[73] the court had to examine the interpretation to be given to the proviso to the definition of agricultural land, as such interpretation would determine whether the DAFF Minister's written consent would be required before agricultural land may be subdivided. The court had to decide whether the land, despite the fact that it fell within the area of jurisdiction of a metropolitan municipality, was by virtue of (a) the proviso and (b) its classification as "agricultural land" immediately prior to the election of the first members of the Traditional Rural Council, still "agricultural land", or whether it had lost that status by virtue of its inclusion

[72] SCA case number 709/2010&746/10.
[73] [2008] JOL 22099 (CC).

within the area of jurisdiction of a metropolitan municipality.[74] The court made it clear that the proviso was not limited to the life of transitional councils, but that it pinpointed the stage from which agricultural land would remain classified as such.[75] In this way, the Legislature ensured the continued existence of agricultural land, as well as the Minister's control over it.[76]

The court reiterated the fact that "[t]here is no reason why the two spheres of control [the national government in terms of SALA and local government in terms of competence regarding 'municipal planning' in terms of the Constitution] 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".[77] The two spheres operate from different perspectives, each with its own constitutional and policy considerations.[78] With regard to the relationship between SALA and LUPO, the court stated in footnote 75 as follows:

> "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".

From the judgment by the Constitutional Court in the *Wary* case, it is clear that SALA is still valid and enforceable, and must be complied with.

In the event that more than one piece of legislation (including SALA) is applicable to a certain piece of land, compliance with the requirements contained in all the legislation is necessary. As the reliance on the PLAA in

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[74] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd (Trustees of the Hoogekraal Highlands Trust & SAFAMCO Enterprises (Pty) Ltd (*amicus curiae*); Minister of Agriculture & Land Affairs (intervening)) supra* 57.

[75] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd (Trustees of the Hoogekraal Highlands Trust & SAFAMCO Enterprises (Pty) Ltd (*amicus curiae*); Minister of Agriculture & Land Affairs (intervening)) supra* 62.

[76] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd (Trustees of the Hoogekraal Highlands Trust & SAFAMCO Enterprises (Pty) Ltd (*amicus curiae*); Minister of Agriculture & Land Affairs (intervening)) supra* 64.

[77] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd (Trustees of the Hoogekraal Highlands Trust & SAFAMCO Enterprises (Pty) Ltd (*amicus curiae*); Minister of Agriculture & Land Affairs (intervening)) supra* 80, fn omitted.

[78] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd (Trustees of the Hoogekraal Highlands Trust & SAFAMCO Enterprises (Pty) Ltd (*amicus curiae*); Minister of Agriculture & Land Affairs (intervening)) supra* 80.

the case under discussion was invalid, the provisions of SALA still had to complied with by the developers before the land could be subdivided.

8 CONCLUSION

The implications of the decisions in the case under discussion are far-reaching. There can be no question that, at an administrative level, the unambiguous prescripts as contained within the interconnected statutory, strategic and implementation (project) framework provided for in the overarching redistribution programme, were flouted and abused for commercial gain. It is to be hoped that the DRDLR, the successor to the DLA, has taken note of the decision and that the necessary monitoring and evaluation systems as well as the appropriate compliance-enforcement mechanisms have been put in place to ensure the appropriate application of constitutional and concomitant legislative land-reform imperatives.

It is also a matter of grave concern that officially sanctioned actions by a regional official (with virtually unfettered delegated powers) nearly resulted in the *de facto* cancellation of the contractual right of pre-emption that vested in South African National Parks. Had it not been for the lodging of a successful application for an interdict, the subdivision and transfer of the land in question contrary to the established right of pre-emption would have been a foregone conclusion.

Finally, the decision and the related circumstances surrounding the public and private sector attempts to circumvent policy and legislation, emphasize the need to establish a coherent framework that would require each functionary, exercising the powers related to its allocated functional domain (for example, protection of agricultural land, rezoning, planning, subdivision, *etcetera*) to consider and to authorize (or reject) applications on its own. This will have the salutary result that the decisions of all stakeholders will have to be taken into account when a change of land use is to be considered.