NOT REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 1624/05

In the matter:

PETRUS CORNELIUS JORDAAN N.O. **Plaintiff**

And

WILLEM MARTHINUS SNYMAN **First Defendant**

HUIBRECHT ELIZABETH SNYMAN **Second Defendant**

Neutral citation: *Jordaan NO v Snyman* (I 1624-2005) [2015] NAHCMD 17 (6 February 2015)

Coram: VAN NIEKERK J

Heard: 21 – 24 October 2008; 8 – 10 September 2014

Delivered: 6 February 2015

Flynote: **Land –** Sale – Agricultural land – Agricultural (Commercial) Land Reform Act, 1195 (Act 6 of 1995) providing that agreement of alienation of agricultural land of no force and effect until land first offered to State and certificate of waiver furnished – In terms of section 17(3) this provision does not apply where land alienated in administration of deceased estate – *In casu* option granted in respect of farm – Option exercised after death of grantor but before appointment of executor – Farm not offered to State and no certificate of waiver furnished – Held that granting of option not an alienation under Act – Upon exercise of option agreement of alienation comes into being – When option exercised no executor appointed and no deceased estate being administered – *In casu* alienation not in administration of deceased estate - Farm also not alienated by duly appointed executor in order to cover debts of estate or to give effect to wishes of testator as expressed in will - Had option grantor not died, agreement of alienation would have been of no force and effect - Mere fact of his death and timing of acceptance of option do not change position - Mere coincidence with no legal significance as far as the provisions of section 17 are concerned.

ORDER

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1. The plaintiff's claims are upheld with costs, such costs to include the costs of one instructing and one instructed counsel.

2. The costs of the application for absolution are awarded in favour of the plaintiff, such costs to include the costs of one instructing and one instructed counsel.

JUDGMENT

VAN NIEKERK, J:

[1] In this trial action an application for absolution from the instance at the close of the plaintiff's case was refused on 28 August 2012. The trial continued during September 2014 when the defendants each testified. It is convenient to deal with some of the facts and the pleadings by quoting from the previous judgment as follows:

> "[1] During their life the now late Albertus Jacobus Jordaan (hereinafter "Mr Jordaan") and the now late Susara Helena Jordaan (hereinafter "Mrs Jordaan") were married to each other in community of property. During their marriage the farm Marwil No. 541, situated in the Republic of Namibia, was registered in the name of Mr Jordaan in 1984. On 3 March 1993 Mr Jordaan and his wife signed a joint will in terms of which they bequeathed the estate and the effects of the first dying to the survivor. During early 2000, a second joint will was

prepared, but it was only Mr Jordaan who signed this will. Mrs Jordaan passed away on 20 February 2000 before she could sign the will.

[2] On 4 July 2000, before any executor was appointed in the estate of the late Mrs Jordaan, Mr Jordaan and the first defendant entered into a written lease agreement ("the lease agreement") in terms of which the former leased the farm Marwil to the latter. The lease agreement also contained an option clause in terms of which it was provided that *"in the event of the Lessee wanting to exercise this option to purchase the property, he shall notify the Lessor in writing on or before 1 March 2003 of his intention."*

[3] At a later stage Mr Jordaan caused a codicil to be executed to the 2000 will in terms of which he appointed Waldemar Strauss, an attorney practicing in the town of Schweizer Reneke, South Africa, as executor of his estate with power of assumption to appoint an agent in Namibia to assist him with the liquidation of the estate in Namibia. Mr Strauss declined to accept the appointment.

[4] On 20 February 2001 Mr Jordaan was appointed as executor in the estate of the late Mrs Jordaan, as I understand it, in South Africa.

[5] On 25 September 2002 Mr Jordaan passed away and since then the rent for the farm Marwil was received by Mr Strauss, the executor testamentary, although never appointed by the Master.

[6] On 19 February 2003 the first defendant telephoned Mr Strauss and informed him that he intended exercising the option to purchase Marwil. A letter dated 17 February 2003 in which the first defendant gives notice that he intends exercising the option was posted by registered post on 20 February 2003 from Potchefstroom, South Africa to Mr Strauss in Schweizer Reneke. The letter was received at the post office of Schweizer Reneke on 27 February 2003 and collected by Mr Strauss' staff on 4 March 2003.

[7] On 20 March 2003 the plaintiff was appointed in South Africa as executor in the estate of his late father, Mr Jordaan. On 3 August 2004 he was appointed as such in Namibia. On the same date he was also appointed as executor in Namibia of the estate of his late mother, Mrs Jordaan.

> [8] On 25 July 2005 the plaintiff instituted action against the defendants in his capacity as executor. In his amended particulars of claim filed on 17 September 2007 he sets out two claims. The first is a claim for ejection of the defendants from the farm Marwil. In the second claim he pleads that the defendants are "in unlawful possession and/or occupation" of the farm Marwil since 1 March 2004; that despite demand the defendants have failed to vacate or return the farm to the plaintiff; that as a result the plaintiff has suffered damages in the amount of N$240 480 being the fair and reasonable rental for the farm for the period 1 March 2004 to 1 March 2007 and that he continues to suffer damages in the amount of N$6 680 per month for the continued unlawful occupation of the farm. He therefore claims the amount of N$240 280 plus interest thereon, as well as the monthly amount, plus interest, for each month that the defendants continue their unlawful occupation of the farm until the date of delivery of the property to the plaintiff. "

[2] The defendants' plea essentially amounts thereto that their possession of the farm arises by virtue of the lease agreement and by virtue thereof that the first defendant duly exercised the option contained in clause 19 of the agreement, but that, despite the exercise thereof, the plaintiff "frustrates" transfer of the property to the defendants. In the particulars of claim the plaintiff alleges that the defendants are married in community of property. Although the first defendant denies that the marriage is in community of property and the second defendant denied that she is married at all, it became common cause during the trial, or it is, at least, not disputed, that the defendants are married out of community of property.

[3] The plaintiff filed a replication, the relevant part of which reads as follows:

> "2. Plaintiff pleads that:
>
> 2.2.1 The late SUSARAH HELENA JORDAAN ("the first deceased") died on 20 February 2000.
>
> 2.2.2 The first deceased was in life married to ALBERTUS JACOBUS JOHANNES JORDAAN in community of property and the said ALBERTUS JACOBUS JOHANNES JORDAAN died on 25 September 2002. (To the said ALBERTUS JACOBUS JOHANNES JORDAAN will herein further be referred to as "the second deceased".)

2.2.3 On the 4th July 2000 and at Aranos the second deceased purported to enter into a lease agreement with first defendant, a copy whereof is attached to the plea as Annexure "A" (and to which purported lease agreement will herein be referred to as "the purported lease agreement"), the express terms whereof are:

2.2.3.1 The second deceased lets to the first defendant certain portions of the farm Marwil, in the district of Aranos, Namibia, being:

First year:	1 000 hectares
Second year:	2 000 hectares
Third year:	3 000 hectares
Fourth year:	4 008 hectares

2.2.3.2 The lease starts on the 1st March 2000 and expires on the 28th February 2004.

2.2.3.3 The rental amount is N$20.00 plus General Sale Tax or other tax, if applicable, per hectare.

2.2.3.4 Rental is payable yearly in arrears.

2.2.3.5 The second deceased chooses as his *domicilium* c/o Waldemar Strauss Attorney, P O Box 368, Schweizer-Reneke 2780 and the First Defendant chooses as *domicilium* the farm Marwil, Aranos, Namibia.

2.2.3.6 The second deceased gives first defendant an option to buy the farm Marwil (Herein further referred to as "the said immovable property") from the second deceased at the expiry of the lease agreement at an amount of N$200.00 per hectare. In the event of any taxes payable, first defendant will be liable for such taxes.

2.2.3.7 The price for the said immovable property is the sum of N$801 600.00 plus any taxes.

2.2.3.8 The full purchase price is payable by first defendant to the second deceased at date of transfer of the said immovable property.

2.2.3.9 In the event of first defendant intending to exercise the option to buy the said immovable property, first defendant will give written notice of his intention to do so on or before the 1st March 2003.

2.2.4 Herein further the option referred to here above will be referred to, for sake of brevity, as "the purported option."

2.2.5 On the 4th July 2000 no executor of the estate of the first deceased had been appointed and only on the 22nd February 2001 the second deceased

was appointed as the executor of the estate of the first deceased. A copy of the Letters of Executorship is attached hereto as Annexure "PJ1"

2.2.6 When the second deceased purported to enter into the purported lease agreement, the second deceased had no authority to deal in any way with the assets of the erstwhile joint estate of the first deceased and with the estate of the second deceased.

2.2.7 No deceased estate may be administered or disturbed in the absence of duly issued Letters of Executorship to an executor.

2.2.8 In view of the facts pleaded herein earlier, the second deceased was not entitled and could not validly enter into the purported leased agreement.

2.2.9 In addition, the purported option in law has to comply with the provision of *Section 1* of the *Formalities in respect of Contracts of Sale of Land Act, No 71 of 1969*.

2.2.10 As at the 4th July 2000 the second deceased had no authority to an could not lawfully grant the purported option in the absence of a duly appointed executor for the estate of the first deceased and could not enter into the purported lease agreement without consent thereto by the High Court.

2.2.11 No new written option, in substation of the purported option, was granted by the second deceased to first defendant after the appointment of the second deceased as executor of the estate of the first deceased.

2.2.12 In the premises, the purported option at all relevant times was invalid and of no force and effect.

2.2.13 In a letter dated the 17th February 2003 first defendant purported to accept the purported option, a copy of the purported acceptance is attached hereto as Annexure "PJ2" and will be referred to as "the purported acceptance".

2.2.14 The purported acceptance is in view of the facts pleaded above, invalid and of no force or effect.

2.2.15 In the alternative to paragraph 2.2.5 – 2.2.14 above and in the event of it being found that the purported option was valid and of full force and effect (all allegations which are still denied), plaintiff pleads that:

2.2.15.1 The purported option was not brought to the notice of the duly appointed executor of the estate of both first and second deceased, being plaintiff, timeously.

2.2.15.2 Plaintiff only received notice of the purported acceptance of the purported option on or about the 4th March 2003 when plaintiff's attorney at Schweizer-Reneke, Republic of South Africa, Mr Waldemar Strauss, received the purported acceptance.

2.2.15.3 In terms of clause 19 of the purported lease agreement the period for acceptance of the option expired on the 1st March 2003.

2.2.15.4 By the 4th March 2003 the purported option had already expired and the purported acceptance is accordingly of no force or effect.

2.2.15.5 In the premises first and second defendants are in unlawful occupations of the farm Marwil since the 1st March 2004.

2.2.16 In any event and in addition to what has been pleaded in 2.2.5 to 2.2.15 above, plaintiff pleads that:

2.2.16.1 By virtue of the provisions of *Section 17(2)* of the *Agricultural (Commercial) Land Reform Act, 1995 (Act 6 of 1995) (hereinafter "the Act)*, subject to *subsection (3)*, no agreement of alienation of agricultural land entered into by the owner of such land after the date of commencement of *Part III* of the Act shall be of any force and effect until the owner of such land:

(a) Has first offered such land for sale to the State; and

(b) has been furnished with a certificate of waiver in respect of such land.

2.2.16.2 *Part III* of the aforesaid Act, including in particular *Section 17*, come into force on 17 October 1996;

2.2.16.3 The purported lease agreement in terms of which the purported option was granted was entered into on 4 July 2000 after the coming into force of *Section 17* of the Act.

2.2.16.4 As at 4 July 2000, when the second deceased purported to enter into the lease agreement in question and purportedly granted the option the second deceased (totally apart from his lack of authority as pleaded above) had not offered the land to the State, nor had he done so afterwards and no certificate of waiver had been issued in respect of such land as contemplated by *Section 17(2)* of the Act.

2.2.16.5 Furthermore, but virtue of the second deceased's lack of authority the second deceased in any event could not, prior to his death have exercised any of the acts provided for in *Section 17(4)* prior to his death;

2.2.16.6 The second deceased passed away on the 25 September 2002.

2.2.16.7 In a letter dated 17 February 2003 (i.e. after the death of the second deceased) the first defendant purported to accept the purported option.

2.2.16.8 The purported lease agreement and purported option as well as the purported acceptance of such purported option are, in view of the above provisions of no force and effect."

[4] The plaintiff testified and called Mr Strauss as a witness. The defendants both testified as part of their case. For reasons which should become apparent, I do not think it is necessary to deal with their evidence, except in a few instances, as the case is to be determined on a few common cause facts and legal argument.

[5] It is common cause that the plaintiff if the duly appointed executor on both the deceased estates of the late Mr and Mrs Jordaan. The plaintiff's claim is based on the *rei vindicatio*. It is trite that the plaintiff bears the onus to prove (i) ownership of the immovable property and (ii) that the defendants are in possession of the property (*Shinyenge v Hamunyela* 2004 NR 1 (HC) at 3I-J; *Shukifeni v Tow-in-Specialist CC* 2012 (1) NR 219 (HC) at 224I-225E; *Kalipi v Hochobeb and Another* 2014 (1) NR 90 (HC) 96A-B). The second requirement is common cause. In the absolution judgment I stated the following in regard to the first requirement:

> "[14] Counsel for both parties spent some time on the issue of the juristic nature of a deceased estate and on the issue of where the *dominium* in the estate resides during the period immediately after the death of the testator and before delivery or transfer to the heirs and legatees, and also on the question in whom the *dominium* vests before an executor is appointed. The consensus was that these matters are subject to much uncertainty. I do not think that it is necessary to resolve this issue in this case. It is clear to me that the plaintiff, by virtue of his appointment as executor in the deceased estates of both Mr and Mrs Jordaan, is, in principle, the person who has *locus standi* to bring a vindicatory action in respect of any asset that forms part of the estate but which is in the hands of, or may be owed by, third parties. (*Krige v Scoble* 1912 TPD 814; Meyerowitz, The Law and Practice of Administration of Estates and their Taxation, (2010 ed.) § 12.26)."

[6] The two requirements having been met, the onus is on the defendants to prove their right of possession of the property in order to ward off the vindication (*Council of the Municipality of Windhoek v Bruni N.O. and Others* 2009 (1) NR 151 (HC) 164E-F;H-I; *Shukifeni v Tow-in-Specialist CC, supra,* 225E-G; *Kalipi v Hochobeb, supra,* 96B-C).

[7] As can be seen from the replication, the plaintiff denies the existence of a valid option and that the first defendant duly exercised the option. The plaintiff also raises several matters, which the plaintiff avers renders the granting of the option and/or the exercise thereof illegal. These may be summarised as follows:

(i) At a time when an executor had not yet been appointed in the estate of the late Mrs Jordaan, Mr Jordaan and the first defendant purported to enter into a lease agreement which included an option to purchase the farm Marwil. The plaintiff's case is that Mr Jordaan had no authority to deal with assets of the joint estate and therefore the option is of no force and effect.

(ii) The purported option did not comply with the provisions of section 1 of the Formalities of contracts of sale of Land Act, 1969 (Act 71 of 1969) and is therefore of no force and effect.

(iii) The option was not validly exercised as the written notice in which the option is accepted was received late.

(iv) The late Mr Jordaan did not comply with the provisions of section 17(2) of the Agricultural (Commercial) Land Reform Act, 1996 (Act 6 of 1995) (hereinafter "the Land Reform Act") and therefore the sale of the farm is of no force and effect.

[8] In my view it is not necessary to deal with all these matters. In stating this I mean no disrespect to counsel on both sides who have shown great industry in presenting thought provoking, thorough and helpful argument on a wide range of interesting issues, some of which do not have easy answers. I thank them. However, the fact is, even if I assume, without actually deciding, that all the issues mentioned in (i) – (iii), including that the first defendant effectively exercised the option on 27 February 2003 (as submitted by their counsel), are to be determined in favour of the defendants, it seems

to me that the last matter set out in (iv) should be decided in favour of the plaintiff. My reasons are set out below.

[9] There have been several amendments to the Land Reform Act. At the times relevant to this case sections 17(1), (2) and (3)(b) read as follows:

> "**17 Vesting in State of preferent right to purchase agricultural land**
>
> (1) Subject to subsection (3), the State shall have a preferent right to purchase agricultural land whenever any owner of such land intends to alienate such land.
>
> (2) Subject to subsection (3), no agreement of alienation of agricultural land entered into by the owner of such land after the date of commencement of this Part shall be of any force and effect until the owner of such land-
>
> (a) has first offered such land for sale to the State; and
>
> (b) has been furnished with a certificate of waiver in respect of such land.
>
> (3) Subsections (1) and (2) shall not apply where agricultural land is alienated -
>
> (a) ……
>
> (b) in the administration of a deceased estate or in accordance with a redistribution of assets in such estate between heirs and legatees;"

[10] The definition of "alienate" in relation to agricultural land at that time was "sell, exchange or otherwise dispose of against any valuable consideration of whatever nature" and "alienation" had a corresponding meaning. "Owner" in relation to land or any registered right over land, meant "the person in whose name such land or right is registered."

[11] Mr *Dicks* submitted that the granting of an option to purchase does not amount to an "alienation" under the Land Reform Act. He relied on the following extract from *Strauss and Another v Labuschagne* 2012 (2) NR 460 (SC) (at 474E-475I):

“[39] It is necessary now to determine whether the scheme constitutes an 'alienation' of land within the meaning of the Land Reform Act. The Act defines 'alienate' as meaning, 'sell, exchange, donate or otherwise dispose of whether for any valuable consideration or otherwise. . .' One of the dictionary meanings of the word 'alienation' is 'the action of transferring ownership to another' and 'to alienate' has an equivalent meaning. This meaning, too, has been attributed to the term 'alienate' by South African courts. Sale and exchange (the two specific categories of alienation mentioned in the Act's definition of 'alienate') also involve the effective transfer of ownership. One of the purposes of both sale and exchange is to transfer ownership. What of the category 'dispose of'? Again, the Shorter Oxford English Dictionary definition of 'to dispose of' is 'to deal with definitely; to get rid of; to get done with; to finish' as well as, in a secondary meaning, 'to make over by way of sale or bargain' or to 'sell'. The common theme that unites the instances of 'alienate' in the statutory definition (sale, exchange and disposition) is the principle that ownership in the land is to be transferred to a new owner.

[40] This ordinary textual understanding of the word 'alienate' is also consistent with the statutory context in issue here, and in particular with the purpose of s 17 of the Act. Section 17 affords the state a preferent right to purchase agricultural land to be used for land reform purposes, before agricultural land is 'alienated' by its owner. This purpose fits neatly with an interpretation of 'alienate' that is based on the transfer of ownership by one owner to another, so that the state can acquire land before another person acquires it. It sits less easily with an interpretation that would include the granting of a lease over the land, an interpretation that the respondent suggested. Although it may well be that there are circumstances where it is appropriate to interpret 'alienate' with a broader meaning, such a broad interpretation does not seem to be appropriate here. To do so would result in s 17 requiring owners to offer to sell their land, in circumstances where they have not decided to transfer ownership in the land, but merely to lease it or perhaps grant a right of way over it. Such a result does not seem to fit well with the clear purpose of the section. In the circumstances, respondent's argument that 'alienate' has a broader meaning than its ordinary dictionary meaning cannot be accepted, as the ordinary meaning of 'alienate' fits more easily within the context of s 17 of the Act.

> [41] The question that then arises is whether, on a reading of the express terms of the contractual scheme, it can be said that they constitute an agreement to alienate the farms. As is apparent from the analysis of the contractual scheme above, it is not an ineluctable consequence of the scheme in issue in this case that ownership of the farms will be transferred from Mr Labuschagne to Mr Strauss. That consequence is certainly possible, indeed probable, but it is not inevitable. As transfer of ownership of the property is not a necessary consequence of the scheme, it cannot be said to constitute an 'alienation' of land within the meaning of the Land Reform Act. As reasoned above, an 'alienation' of land implies the transfer of ownership from an existing owner to a new owner. Such a transfer might well happen, and indeed even be intended (a matter to which I turn below), in terms of the contractual scheme here, but it is not the only outcome consistent with the terms of the scheme. For it expressly contemplates and permits Mr Labuschagne to change his will and bequeath the farms to someone other than Mr Strauss, though if he does so, it regulates the terms for the repayment of the loan.
>
> [42] Accordingly, the high court's conclusion that the contractual scheme entered into by Mr Labuschagne and Mr Strauss constituted an 'alienation' of land within the meaning of the Land Reform Act, cannot be accepted as correct. It is necessary, therefore, to turn to the next question that arises and that is whether the scheme is in *fraudem legis*." (footnotes omitted)

[12] I pause to note that the definition of "alienation" quoted in this extract is a later definition brought about by an amendment to the Land Reform Act, but this does not affect the point made by Mr *Dicks*. Based on the reasoning in the extract I agree with Mr *Dicks* that the granting of an option to purchase does not amount to an "alienation" under the Land Reform Act. Indeed, this follows in any event from the very nature of an option granted, because until acceptance it is merely-

> "……. a form of *pactum de contrahendo*, an agreement to make a contract in the future. An option has two components: an offer proposing the conclusion of a specific contract, and an agreement not to revoke the offer."

(*Southline Retail Centre CC v BP Namibia* (Pty) Ltd 2011 (2) NR 562 (SC) at 576D)

[13] However, upon acceptance of the option in the present case, the agreement of sale came into being as an "agreement of alienation." It is common cause that the farm was not first offered to the State for sale and that no certificate of waiver in respect of the farm had been furnished. Mr *Dicks* submitted that subsections 17(1) and (2) do not apply because of section 17(3)(b) which provides for an exception in the case where agricultural land is alienated "in the administration of a deceased estate or in accordance with a redistribution of assets in such an estate between heirs and legatees."

[14] In my view the alienation in this case did not occur "in the administration of a deceased estate." At the time the option was exercised there was no executor appointed to administer the estate. The estate was not being administered. Quite apart from this, the farm was not alienated by a duly appointed executor in order to cover the debts of the estate or to give effect to the wishes of the testator as expressed in a will, for instance that the farm be sold and that the proceeds be shared equally amongst the heirs. These are acts which, to my mind, would be alienations "in the administration of a deceased estate." It is so that the first defendant testified that the late Mr Jordaan indicated that the farm had to be sold because of estate duties which were payable in his wife's estate, but I agree with Mr *Vermeulen* that it is inherently highly improbable that a person wishing to raise funds for estate duty would enter into an uncertain arrangement by granting an option to purchase for a period of four years (bearing in mind the period originally intended when the agreement was drawn up), while not knowing whether it would actually ever be exercised.

[15] The fact of the matter is that both when the late Mr Jordaan granted the option to purchase and when the first defendant exercised the option, the farm had not first been offered to the State, no certificate of waiver had been furnished and no estate was being administered. Had Mr Jordaan not died, the agreement of alienation would have been of no force and effect. In my respectful view the mere fact of his death and the timing of

the acceptance of the option do not change the position. It is mere coincidence with no legal significance as far as the provisions of section 17 are concerned.

[16] The result is therefore, that the defendants must fail in their defence to the plaintiff's claim for eviction.

[17] As far as the second claim is concerned, it is common cause that the lease agreement expired at the end of February 2004, that the defendants remained in possession of the farm and that they have not paid any rent since March 2004. It is clear that the plaintiff in his capacity as executor is entitled to claim damages for holding over. The basis of establishing and calculating the damages suffered is the rental value for the period that the defendants have been in unlawful occupation. In the amended particulars of claim the allegation is made that the damages claimed are based on the fair and reasonable monthly rental for the farm, which was N$6 680.00. It is common cause that this was indeed the monthly rental paid by the first defendant in terms of the lease agreement during the last year of the lease and that this amount is based on a sum of N$20 per hectare. Indeed, this rate per hectare was paid since 2000, but each year the number of hectares leased increased by 1 000 up to 4008 in the fourth and last year.

[18] Counsel for the defendants took the point during argument that there was no expert evidence presented to prove the allegation in the particulars of claim that the rental value claimed was fair and reasonable. During cross-examination the first defendant acknowledged that he agreed that the rental amount set out in paragraph 4 of the lease agreement was fair and reasonable. He was also referred to a letter written by his lawyers dated 25 February 2004 (Bundle "A(31A)") in which it was indicated that he would be willing to continue paying N$20 per hectare after the expiry of the lease agreement until payment of the purchase price in respect of the farm. Later during cross-examination, however, the first defendant was astute to decline to comment on more than one occasion when it was posed to him that a rental of N$20 per hectare is fair and reasonable. However, it is common cause that the farm is lettable, that the first defendant has been letting the farm to another lessee since 2008 and that the rent being earned by the first defendant at the time he testified was N$18 000 including VAT.

This amounts, rounded off to an amount of N$54 per hectare. The monthly rental claimed by the plaintiff would amount to N$7 682 if VAT is included, which is N$23 per hectare. I take note, however of the first defendant's evidence that he has effected improvements to the farm. On the other hand, I think it may be accepted that rental values of farmland generally tend to increase over the years. Bearing in mind, further, that leading counsel for the defendants expressly indicated that the application for absolution was confined only to claim 1, it seems to me that, all things being considered, it is fair to say that, in the absence of other evidence to the contrary, the rental value of the farm may be taken to be at least N$20 per hectare. In the premises the second claim is upheld.

[19] Counsel for the defendants submitted that, in the event that the Court should find against the defendants, the estate should pay their costs. In this regard he relied on, *inter alia*, *Nurok v Nurok's Executors and others* 1916 WLD 125 at 126, where the following was said:

> "I come then to the question of costs. The principle, as I understand it, which guides the court in ordering costs to come out of the estate is that it does so where the person who makes the will, or persons who are interested in the residue, have really been the cause of the litigation, but if they are not the cause of the litigation and the circumstances lead reasonably to an investigation of the matter then costs may be left to be borne by each of the parties. In other cases costs follow the event. In the present case the testator was certainly to blame if he intended the will to be valid …."

[20] Mr *Dicks* submitted that the deceased, Mr Jordaan and his attorney were responsible for the lease agreement and the option clause contained therein; that, according to the first defendant's testimony, the attorney as testamentary executor, advised the first defendant on how to exercise the option and then later reneged on his arrangement with the first defendant by claiming that the option was exercised late. He pointed to further defences which arose as time went on and submitted that it was the deceased and the testamentary executor who caused the litigation.

[21] Counsel for the plaintiff, on the other hand, submitted that the principles on which counsel for the first defendant relied are not applicable to the facts of this case.

[22] Mr Strauss vehemently denied during cross-examination that he advised the first defendant how to exercise the option and that he indicated that the date of posting the registered letter of acceptance would be taken as the effective date. I must say that I find it improbable that he would have done so, as he was not the first defendant's attorney. Furthermore, counsel's suggestion that he reneged on his arrangement with the first defendant suggests that he deliberately misled the first defendant. The point is that Mr Strauss could not have known in advance how fact the postal service would process the registered letter and that it would arrive after 1 March 2003. Furthermore, in his letter dated 18 March 2003 to the first defendant (Bundle "A(65)") very soon after the event he already specifically emphasises the point that the letter was received on 4 March 2003. In my view it is improbable that he would have done so if he knew that he had advised the first defendant so shortly before that the date of posting would be the effective date.

[23] In *Götz v The Master NO* 1986 (1) SA 499 (N) the following was said (at 504H-J):

> "Although the general rule that costs follow the event applies in cases where the litigation concerns a deceased estate, there are instances where the appropriate order is that the costs be paid by the estate. Cilliers *Law of Costs* 2nd ed at para 10.09; *Bonsma NO v Meaker NO and Others* 1973 (4) SA 526 (R) at 531C. It is, however, only in an indirect sense that the present litigation concerns the administration of the deceased estate. It more directly concerns the manner in which the Master should perform the obligations imposed upon him by the Act. In the circumstances there is no reason why the ordinary rule that costs follow the event should not apply."

[24] It seems to me that also in this case the present litigation only indirectly concerns the administration of a deceased estate. The first defendant testified that when he exercised the option he did not think that a waiver in terms of the Land Reform Act was necessary. He also said that the question he posed in the acceptance letter, namely whether the executor would be willing to sell the farm to a close corporation was not

intended to be a circumvention of the requirement of a waiver. It is clear that he was either aware of the provisions of the Land Reform Act or that he obtained legal advice before he exercised the option. The fact that he is ultimately not successful on this issue should not be laid at the door of the deceased or the testamentary executor. In my view costs should follow the event.

[25] Furthermore, the plaintiff had to institute action to claim damages for the continued unlawful occupation by the defendants. I do not see why the estate should bear the costs of this claim.

[26] I previously ordered that the costs of the application for absolution from the instance stand over. In light of the outcome of the action, these should likewise follow the event.

[27] In the result the following order is made:

3. The plaintiff's claims are upheld with costs, such costs to include the costs of one instructing and one instructed counsel.

4. The costs of the application for absolution are awarded in favour of the plaintiff, such costs to include the costs of one instructing and one instructed counsel.

-------(Signed on original) ----------

K van Niekerk

Judge

Appearance for the parties

For the plaintiff: Adv J Schickerling

Instr. by Etzold-Duvenhage

And later Adv P J Vermeulen

Instr. by Van der Merwe-Greeff Andima Inc

For the defendants: Adv R Heathcote,

and with him, Adv G Dicks,

Instr. by Kirsten & Co.

And later Adv G Dicks

Instr. by Kirsten & Co