REPORTABLE

CASE NO.: SA 44/2009

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

WALDEMAR STRAUSS **FIRST APPELLANT**
BAREND NICOLAAS VENTER **SECOND APPELLANT**

and

JAN HARM LABUSCHAGNE **RESPONDENT**

CORAM: Shivute CJ, Maritz JA *et* O'Regan AJA

Heard on: 13/07/2011

Delivered on: 21/06/2012

APPEAL JUDGMENT

O'REGAN AJA:

[1] This appeal concerns the validity of several contracts entered into between Mr Jan Labuschagne, the respondent in this Court, and Mr Waldemar Strauss, the first appellant in this Court. Mr Barend Venter, the second appellant, is a lawyer who drafted the contracts. Mr Labuschagne argues amongst other things that the contracts are void, on the grounds that they are *in fraudem legis* of the provisions of the Agricultural (Commercial) Land Reform Act, 6 of 1995, as amended ("the Land Reform Act"). The High Court

upheld his argument and it is against the order of the High Court that the appellants now appeal.

Factual Background

[2] Mr Labuschagne is a retired farmer. He is the owner of two farms in the Omaheke Region, one called "Haarlem"[1] and the other called "Sukses".[2] In about 2007, Mr Labuschagne decided to retire to Henties Bay, more than 750km away from where the two farms are situated. As he found it difficult to manage the farms from this distance, he decided to sell them. Mr Labuschagne was aware that the provisions of the Land Reform Act constituted an obstacle to his plan to sell his farms.

[3] Towards the end of 2008, Mr Venter approached Mr Labuschagne and introduced Mr Strauss to Mr Labuschagne as a potential buyer for the farms. When Mr Labuschagne enquired about whether such a sale would be possible given the provisions of the Land Reform Act, Mr Venter informed him that there was a way of avoiding the obstacles created by the Act.

[4] In due course, Mr Labuschagne and Mr Strauss reached an agreement on the farms and Mr Venter then drew up the contracts. The first contract was a loan agreement whereby Mr Strauss loaned Mr Labuschagne N$8 700 000

1 Farm Haarlem No 391, Registration Division "L", Omaheke Region, measuring 4310,4080 hectares.

2 Portion 1 of the Farm Sukses No 426, Registration Division "L", Omaheke Region, measuring 2992, 2544 hectares.

"being monies lent and advanced". The key terms of the loan agreement were that:

1. N$3 100 000 would be advanced on or before 1 January 2009;

N$1,5 million would be advanced on or before the last day of March 2009;
The balance would be advanced in five tranches before the 1 January each succeeding year, commencing in 2010 and ending in 2014;
The five tranches would be made up of a capital amount of N$1 120 000 as well as, unusually, "interest calculated at 10% per annum on the outstanding balance" of advances still to be made;
Once the first amount of N$3 100 000 had been paid, a mortgage bond in an amount of N$3 000 000 would be registered over the two farms in favour of Mr Strauss and additional bonds might be registered as further advances were made, at the discretion of Mr Strauss; and
The capital would only be repayable to Mr Strauss with 20% compound interest per annum in the event of the two farms not being bequeathed to Mr Strauss upon the death of Mr Labuschagne.

[5] The second agreement was an agreement of lease. It provided that Mr Strauss would lease the two farms from Mr Labuschagne for a period of nine years and eleven months at the nominal rental of N$1 000 per month. The properties leased included "all implements, cattle, game and any other moveable property, grazing thereon and water installations as inspected by the parties on 25 October 2008". The lease agreement also contained an option in favour of Mr Strauss to purchase the farms for the sum of N$8 700 000, (i.e. the same amount as had been loaned to Mr Labuschagne by Mr Strauss in terms of the loan agreement). The lease agreement also provided that Mr Strauss may at his own expense "erect any structures of whatsoever description as may be useful for the conduct of the farms and improve the facilities" of the farms. It was further agreed that at the end of the lease period, Mr Labuschagne could either request Mr Strauss to remove the structures at his own expense or could choose to become the owner of the improvements

in which event he agreed to compensate Mr Strauss in an amount equal to half the construction costs.

[6] The third agreement was described as a “further agreement” to establish rights and obligations additional to those provided for in the other two agreements. The most notable provisions of this agreement were that Mr Labuschagne was “not entitled to amend his Last Will” without giving prior written notice to Mr Strauss and any amendments made without notice to Mr Strauss would, according to the agreement, not be enforceable.

[7] In addition to the three agreements, there were two further documents: a new Will and Testament, drawn up for Mr Labuschagne to sign, that provided that Mr Venter would be the Executor of his estate and that Mr Strauss would inherit the two farms. Beyond this bequest, the remainder of Mr Labuschagne’s estate was, in terms of the Will, bequeathed to members of his family. The second document was a power of attorney authorizing the passing of a mortgage bond over the farms in favour of Mr Strauss as provided for in the loan agreement, as described above.

[8] There were two further relevant provisions in the scheme of agreements, according to Mr Labuschagne. The first was that the purchase price for the farms had originally been agreed at N$8 600 000 but had been increased by N$100 000 so that Mr Venter could be paid commission on the transaction. The second was that, according to Mr Labuschagne, he agreed to

give Mr Venter one of his tractors, worth approximately N$70 0000 as part of the commission.

[9] It is common cause between the parties that there was a subsequent oral agreement between them that the initial payment would be N$1 500 000 not N$3 100 000 as originally agreed, but there is a dispute between the parties as to whether there was a further oral agreement varying the date of the initial payment. Nothing turns on this dispute.

[10] Mr Labuschagne left the farms at the beginning of December 2008. In his founding affidavit, he states that he expected the initial payment on 1 January 2009 and when it had not been deposited by 12 January, he approached his current legal representatives for advice. He was then informed that the scheme was contrary to the provisions of the Land Reform Act. His legal representatives wrote to Mr Venter on 14 January 2009 cancelling the agreements in the light of the breach of the agreement by Mr Strauss in failing to pay the initial instalment on time. Mr Venter replied stating, amongst other things, that Mr Strauss did not accept the cancellation of the agreements. Mr Labuschagne's legal representatives then instructed his bank not to accept any payments from Mr Strauss since the agreements had been cancelled.

[11] Some days later, Mr Labuschagne's legal representatives discovered that Mr Strauss was selling some of Mr Labuschagne's cattle at auction. Given that Mr Strauss had gone ahead and sold cattle from the farms at auction despite the cancellation of the agreements, Mr Labuschagne feared that his

farms would be depleted of livestock and game and therefore far diminished in value before he could regain control of them. It was in the light of these events that Mr Labuschagne approached the High Court for relief on an urgent basis.

Proceedings in the High Court

[12] The application was launched in the High Court on 2 February 2009. The relief sought was the issue of a rule *nisi* requiring Mr Strauss and Mr Venter to show cause why relief in the following terms should not be granted:

1. That Mr Strauss be evicted from the two farms within seven days of the confirmation of the rule *nisi*;

2. That Mr Strauss be interdicted from selling or disposing of any of the game or cattle situated on the farms;

3. A declaration that the agreements between Mr Labuschagne and Mr Strauss are cancelled, alternatively that they be declared void;

4. That Mr Labuschagne repay all monies he had received in terms of the contracts to Mr Strauss; that Mr Strauss pay to Mr Labuschagne all the

proceeds from the sale of game and livestock and that Mr Venter hold any monies he had received from Mr Strauss regarding the agreements in trust until the resolution of the application;

5. That an interdict be granted preventing the registration of mortgage bonds over the farms by Mr Strauss and Mr Venter; and

6. That Mr Venter return the tractor that he had received from Mr Labuschagne as commission.

[13] The rule *nisi* was issued on 5 February 2009, and a return date was set of 26 March 2009. That return day was extended several times until Mainga J in the High Court heard the matter on 26 October 2009. By the time of the hearing in the High Court, it was common cause between the parties that the farms did constitute "agricultural land" within the meaning of the Agricultural Land Reform Act. There were thus two main issues before the Court: were the agreements void *ab initio* in view of the provisions of the Land Reform Act; and, if not, whether the agreements had been cancelled by Mr Labuschagne.

[14] The High Court handed down judgment on 26 November 2009. It held that the question whether the agreements were void turned upon the true nature of the agreement between Mr Strauss and Mr Labuschagne. The High

Court held that the applicable legal principle is that parties may arrange their affairs to remain outside of the provisions of legislation, but if the design of their transaction is intended to disguise its true nature, the Court will give effect to the true nature of the transaction.[3] The High Court held that the true agreement between the parties was one of purchase and sale, and that the scheme provided in the agreements had been adopted only to avoid the provisions of the Land Reform Act.[4] Given this conclusion, the Court did not consider whether the agreements had been validly cancelled or not. The Court accordingly confirmed the order set out in the rule *nisi* with minor amendments and ordered the respondents in that Court to pay the costs of the applicant such costs to include the costs of two instructed counsel.

[15] The order made by the High Court was, in effect the following (for convenience, the parties are described as they are described in this appeal):

1. That the first appellant and everyone occupying through him be evicted from farms “Haarlem” No. 391 and “Sukses” No. 427 situated in the district of Gobabis, and shall vacate the said farms within 14 days of this order.

2. That the first appellant be interdicted and restrained, whether by

3 See the High Court judgment *Labuschagne v Strauss and Others*, Case A 24/2009, as yet unreported, handed down on 26 November 2009 at paras 24 – 26. The High Court relied, inter alia, on the decisions of the South African Appellate Division in *Zandberg v Van Zyl* 1910 AD 309 (per Innes J), *Erf 3183/1 Ladysmith (Pty) Ltd and Another v CIR* 1996(3) SA 942 (A) at 953 A – C;

4 Id. at para 27.

himself, his servants or agents, from selling or disposing of any cattle or game situated on the aforesaid premises;

3. That it be declared that all agreements between the respondent and the first appellant referred to in the founding affidavit are cancelled; alternatively that it be declared that all agreements between the respondent and the first appellant referred to in the founding affidavit be declared null and void and of no force and effect.

4. That the respondent repays to the first appellant all monies that the first appellant has paid to the second appellant in terms of the aforesaid agreement;

5. That the first appellant and the Registrar of Deeds are prohibited from registering or causing to be registered any bond or bonds on farms “Haarlem” or “Sukses” in first appellant’s name or any of its nominees;

6. That the first appellant be ordered to pay to the respondent forthwith all monies received by him or his agents in respect of the sale of respondent’s cattle and/or game situated on the aforesaid farms since 1 December 2008 (provided that the respondent deducts the amount of a lien over the properties in the amount of N$124 061,77) and provides the respondent with full particulars of such sales within seven days of service of this Order.

7. That the second appellant returns forthwith the tractor of the respondent received by him as part of his commission in respect of such agreement mentioned above;

8. That the first and second appellants pay, jointly and severally, the costs of this application on an attorney and client scale, including the costs of 5 February 2009 relevant to the urgent application.

[16] The High Court did not set out the order in terms but, following ordinary practice, merely identified the paragraphs in the rule *nisi*, which were confirmed. From the reasoning in the judgment, it is plain that the High Court did not conclude that Mr Labuschagne had cancelled the agreements as the first part of the order in paragraph 3 suggests, but concluded that the agreements were void *ab initio,* which is the second and alternative ground in paragraph 3. This is a matter to which I return in the last paragraphs of this judgment.

[17] The appellants noted an appeal against the judgment of the High Court to this Court on 9 December 2009. The record of appeal was lodged eight courts days late. The effect of lodging the appeal record late is that the appeal lapses automatically. Accordingly the appellants seek condonation for the late filing of the record, and the reinstatement of the appeal. Before turning to the issues raised in the appeal, it will be helpful to set out the relevant provisions of the Land Reform Act.

Legislative purpose and framework of the Land Reform Act

[18] The Preamble to the Land Reform Act states that the purpose of the Act is:

> "To provide for the acquisition of agricultural land by the State for the purposes of land reform and for the allocation of such land to Namibian citizens who do not own or otherwise have the use of any or of adequate agricultural land, and foremost to those Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices; to vest in the State a preferent right to purchase agricultural land for the purposes of the Act; to regulate the acquisition of land by foreign nationals …".

[19] The Preamble makes plain that the Act seeks to pursue a land reform programme in order to address one of the persistent and unjust consequences of Namibia's history – the fact that many Namibian citizens remain without access to adequate agricultural land. The Preamble also makes clear that the primary beneficiaries of the land reform process are to be "those Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices".

[20] Accordingly, the Act seeks to pursue the objective of land reform by prohibiting the alienation of agricultural land in commercial farming areas unless it has first been offered to the State. Offering the land to the State provides the State with an opportunity to purchase land it considers suitable for land reform. It is only if the State issues a certificate of waiver in respect of

the land that the private landowner may alienate the land to a new owner that is not the State. Section 16 of the Act provides that the certificate of waiver is a statement in writing by the Minister certifying that the State does not intend to acquire the agricultural land in question at the time of the offer.[5] Section 14 provides that any land acquired by the State pursuant to section 17 will be used for land reform. It stipulates that the land will be acquired -

> "in order to make such land available for agricultural purposes to Namibian citizens who do not own or otherwise have the use of agricultural land or adequate agricultural land, and foremost to those Namibian citizens who have been socially economically ore educationally disadvantaged by past discriminatory laws and practices."[6]

Simply put, therefore, the purpose of the Act is to require owners of agricultural land in commercial farming areas to offer it to the State prior to alienating the land to enable the State to acquire suitable agricultural land for land reform purposes.

Key legal provisions

[21] The relevant provisions of section 17 of the Land Reform Act provide as follows:

> "(1) Subject to subsection (3), the State shall have a preferent right to purchase agricultural land whenever any owner of such land

5 Section 16 of the Land Reform Act.

6 Section 14 of the Land Reform Act.

intends to alienate such land.

...

(2) Notwithstanding anything to the contrary in any law contained but subject to subsection (3), no agreement of alienation of agricultural land entered into by the owner of such land, or, in the case where such land is alienated by a company or close corporation in the circumstances contemplated in paragraphs (a) and (b), respectively, of the definition of 'alienate', no agreement of sale or instrument of transfer or transfer otherwise of any shares of the company or of any member's interest in the close corporation or any portion of such interest which, but for this subsection, would have passed the controlling interest in the company or close corporation to another person, 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 –

...

(b) in the administration of a deceased estate or in accordance with a redistribution of assets in such an estate between heirs and legatees".

[22] Section 58(1) of the Land Reform Act provides that:

"Notwithstanding anything to the contrary in any other law contained, but subject to subsection (2) and section 62, no foreign national shall, after the date of commencement of this Part, without the prior written consent of the Minister, be competent –

(a) to acquire agricultural land through the registration of transfer of ownership in the deeds registry; or

(b) to enter into an agreement with any other person whereby any right to the occupation or possession of agricultural land or a portion of such land is conferred upon the foreign national –

(i) for a period exceeding 10 years; or

(ii) for an indefinite period or for a fixed period of less than 10 years, but which is renewable form time to time, and without it being a condition of such agreement that the right of occupation or possession of the land concerned shall not exceed period of 10 years in total."

[23] The relevant portion of the definition of "alienate" as defined in section 1 of the Land Reform Act, as amended, reads as follows:

> "alienate', in relation to agricultural land means sell, exchange, donate or otherwise dispose of, whether for any valuable consideration or otherwise...".

Issues on appeal

[24] The following issues arise in this appeal.

(a) Should the applications for condonation for late filing of the record, and for the reinstatement of the appeal be granted?

(b) Did the agreements entered into between Mr Labuschagne and

Mr Strauss constitute agreements to "alienate" land in contravention of the Land Reform Act?

(c) Were the agreements void *ab initio* on the basis that they were *in fraudem legis?*

(d) Has Mr Labuschagne validly cancelled the agreements?

[25] Question (b) will only need to be addressed if the applications for condonation of late filing of the record and reinstatement of the appeal are granted. Similarly, question (c) will only have to be answered if it is found that the contractual scheme between Mr Labuschagne and Mr Strauss did not constitute an alienation of land within the meaning of the Land Reform Act and question (d) will only have to be considered if it is concluded that the contractual scheme was neither an alienation of the land, nor void on account of being *in fraudem legis.*

Applications for condonation for late filing of appeal record and for reinstatement of the appeal

[26] As appears from what has been set out above, the appellants lodged the appeal record eight days late. Rule 5(5)(b) of the Rules of this Court provide that, save in circumstances not applicable in this case, an appeal record shall be lodged within three months of the date of the judgment or order appealed against. Barring certain exceptions not of relevance to this application, a noted appeal lapses if this sub-rule is not observed.

[27] The High Court handed down judgment on 26 November 2009 and the appeal record should therefore have been lodged on or before 25 February 2010. The appeal record was lodged on 10 March 2010, some eight court days late. On 8 November 2010, the Registrar informed the appellants that the appeal had been deemed to be withdrawn. Thereafter, some two weeks later, both appellants launched applications for condonation for the late filing of the appeal record and the reinstatement of their respective appeals. The respondent opposed both applications.

[28] In terms of Rule 18, this Court has the power to condone non-compliance with its rules on "sufficient cause shown". In *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and 5 Others*, as yet unreported judgment of this Court delivered on 19 May 2011, Shivute CJ noted that:

> "The principles relating to the consideration of an application for condonation are well-known. In considering whether to grant such, a court essentially exercises discretion, which discretion has to be exercised judicially upon consideration of all the facts in order to achieve a result that is fair to both sides. Furthermore, relevant factors to consider in the condonation application include the extent of non-compliance and the explanation given for it; the prospects of success on the merits; the importance of the case; the convenience of the court, and the avoidance of unnecessary delay in the administration of justice."

[29] In this case, the appeal record was lodged only eight days late, which

was not a substantial delay given that the rule provides three months for the filing of appeal records. Moreover, as soon as the late filing was drawn to the attention of the appellants, they filed applications for condonation of their late filing of the appeal record and sought the reinstatement of their appeals. The affidavits supporting the applications for condonation and reinstatement provided a full explanation for the late filing of the record. The delay occurred, it appears in both cases, because junior counsel who appeared for the appellants made a *bona fide* mistake in determining when the appeal record should be filed. Rule 5(5)(b) as explained above requires the appeal record to be lodged within three months of the *date of the judgment or order* against which an appeal is made. By contrast, the equivalent rule in South Africa requires the appeal record to be lodged within three months of the date *upon which the appeal is noted*.[7] According to the affidavits annexed to the condonation applications, the legal representatives calculated the date for filing of the record on the basis of the South African rule, not the rule of this Court.

[30] It is not the first time that this error has been made in this Court. A similar error was made by legal representatives in *Channel Life Namibia (Pty) Ltd v Otto* 2008(2) NR 432 (SC) at para 41. In that case, this Court found that the error was negligent, though *bona fide.* Nevertheless, given the fact that the non-compliance with the rule was not substantial and that the issues raised in the case were important and difficult, upon which it could not be said that there

7 Rule 8(1) of the Rules regulating the conduct of the Supreme Court of Appeal of South Africa, published under GN R1523 in Government Gazette 19507 of 27 November 1998, as amended by GN R979 published in Government Gazette 33689 of 19 November 2010.

were no prospects of success, the Court in *Channel Life Namibia* granted condonation for the late filing of the appeal record and reinstated the appeal.

[31] In our view, there is little to distinguish the facts in this case from the facts in *Channel Life Namibia (Pty) Ltd.* The mistake that led to the late filing of the appeal record, though a negligent one by a legal practitioner was not grossly negligent. The record was filed only eight days late, and once the attention of appellants was drawn to their non-compliance with the rule, both appellants filed applications for condonation for the late filing of the record, coupled with reinstatement of the appeal. These applications were supported by comprehensive and clear affidavits. The issues in the appeal are novel, complex and important and involve the interpretation of legislation. Although, as will become clear from this judgment, the appellants do not succeed on appeal, it cannot be said that their applications had no reasonable prospects of success and that their applications for condonation must be refused on that ground alone. In particular, the question of whether a contractual arrangement is simulated or not, is a question which raises difficult factual questions upon which courts often differ. In the circumstances, the appellants' applications for condonation for the late filing of the record and reinstatement of their appeals are both granted. I shall return to the question of costs relating to these applications at the end of this judgment.

Submissions of the parties on the merits of the appeal

[32] Counsel for both appellants argued that:

1. the contractual scheme between the first appellant and the respondent did not bring about an alienation of the farm within the meaning of section 1 of the Land Reform Act;

the parties legitimately arranged their affairs to avoid the provisions of the Land Reform Act, so the transaction was not *in fraudem legis* and the rights and obligations of the parties to the transaction are different to the rights and obligations that arise from a contract of purchase and sale; and
there was no valid cancellation of the contracts between the respondent and first appellant.

[33] Counsel for the respondent argued that the contractual arrangement between the first appellant and the respondent was void as it was in conflict with section 17 of the Land Reform Act, in two respects:

1. the Last Will and Testament made by the first appellant constituted a prohibited disposal as defined in the Act; and

the true nature of the contractual arrangement constituted a disguised alienation of agricultural land.

Did the contractual scheme entered into by Mr Labuschagne and Mr Strauss constitute the "alienation" of land within the meaning of the Land Reform Act?

[34] The High Court found that the true agreement between the parties was one of purchase and sale, rather than separate agreements of lease and loan, and that the scheme had been "designedly disguised to escape the provisions" of the Land Reform Act. It therefore held that the contracts that made up the scheme were void *ab initio.* The High Court also found that the

contractual scheme did constitute an "alienation" of the land within the meaning of the Land Reform Act.

[35] The question whether the contractual scheme entered into by Mr Labuschagne and Mr Strauss, viewed as a whole, constitutes an alienation of land within the meaning of the Land Reform Act is logically anterior to the question whether the contractual scheme is *in fraudem legis.* This is because it is clear that if the contractual scheme does constitute an alienation of agricultural land, it is clearly in breach of the Act on two grounds. The first is section 17 of the Act, which requires land to be offered for sale to the State before land is alienated. It is common cause, that Mr Labuschagne did not offer the land for sale to the State before entering into this scheme with Mr Strauss. Secondly, the scheme would be in breach of section 58(1) of the Act, which prohibits the acquisition of agricultural land by foreign nationals unless the Minister has given prior consent to the acquisition. The Act defines a "foreign national" as a person who is not a Namibian citizen[8] and it is common cause that Mr Strauss is not a Namibian citizen and did not receive the consent of the Minister to acquire the farms.

[36] In answering the question whether the contractual scheme constitutes an "alienation" of land within the meaning of the Land Reform Act, it will be useful to start by analyzing the express elements of the contractual scheme. In considering this question, the Court must consider the agreements as drafted,

8 See section 1 of the Act.

and not consider whether there were tacit agreements between the parties not disclosed in the language of the contracts as drafted. The question of whether the contracts as drafted are not a fair reflection of the actual agreement between the parties is a question that is considered in the next part of this judgment.

[37] The contractual scheme has four key elements: the first is the agreement of loan, whereby Mr Strauss agrees to lend Mr Labuschagne an amount of N$8 700 000 in various tranches. The second element of the scheme is that the loan is only to be repaid if Mr Labuschagne does not bequeath the farms to Mr Strauss. In those circumstances, the capital is repayable at a rate of 20% compound interest from the date of the loan agreement. The third key element of the scheme is the lease agreement whereby Mr Strauss leased the two farms from Mr Labuschagne for 9 years and 11 months at a low rental of N$1 000 per month. The fourth relevant element is the fact that Mr Labuschagne executed a new Will in terms of which Mr Strauss was to inherit the two farms and the second appellant was to be the executor of his estate. In addition, there was a further agreed term whereby Mr Labuschagne undertook not to amend his will without giving prior written notice to Mr Strauss.

[38] From this analysis of the scheme, it is plain that it was not an ineluctable consequence of the scheme, as expressed in the written contracts, that Mr Labuschagne would transfer ownership of the farms to Mr Strauss. Although the scheme contemplates that Mr Strauss may well become owner

of the farms in due course, transfer of ownership will, according to the agreement, only take place upon the death of Mr Labuschagne in terms of a bequest in his Will. The parties did however contemplate that Mr Strauss might well not inherit the farms in terms of Mr Labuschagne's Will. This is evident from the term that provided that if Mr Labuschagne did not bequeath the farms to Mr Strauss; the loan capital would be repaid in full together with compound interest at 20% per annum.

[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 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"[9] and "to alienate" has an equivalent meaning. This meaning, too, has been attributed to the term "alienate" by South African courts.[10]

[40] 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 Oxford Shorter

9 Shorter Oxford English Dictionary.

10 See, for example, *Crous NO v Utilitas Bellville* 1994(3) SA 720 (C) where Van Deventer J held that "Met inagneming van bostaande uitsprakereg en woordeboek-definisies, sou dit na my mening korrek wees om te se dat die algemeen-aanvaarde of gewone betekenis van "vervreem" ("alienate" op Engels) 'n vrywillige en "*willekeurige*" oordrag van eiendomsreg van 'n saak deur die eienaar daarvan na 'n nuwe eienaar impliseer". (At 725F – G) "Taking into account the above jurisprudence and dictionary definitions, in my opinion, it would be correct to say that the generally accepted or ordinary meaning of "alienate" ("vervreem" in Afrikaans) implies a voluntary and intentional transfer of ownership of a thing by its owner to a new owner."

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.