the doj & cd
Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF STATE LAW ADVISER
Private Bag X81, PRETORIA, 0001, Tel (012) 315 1130, Fax (012) 315 1628, Momentum Centre East Tower 12th Floor , Pretorius Street (c/o Pretorius and Sisulu Streets); Central Email: ocsla@justice.gov.za

Ref: **383/2019/20**
Enq: **Ms C Nicholson**
Tel: **(021) 441-4933**
e-mail: **CNicholson@justice.gov.za**
website: http://www.justice.gov.za
Date: **03 April 2020**

Mr M Shabane
Director-General
Department of Rural Development & Land Reform
Private Bag X918
PRETORIA
0001
BY ELECTRONIC MAIL

ATTENTION: **Ms AS Reynolds**
Antoinette.reynolds@drdlr.gov.za

Dear Mr M Shabane

LEGAL OPINION ON THE INTERPRETATION OF THE WORD "ALIENATE" AS FAR AS IT RELATES TO MORTGAGING OF IMMOVABLE PROPERTY: YOUR 1/3 DATED 14/02/2020 REFERS

INTRODUCTION

1. The Office of the Chief State Law Adviser has been requested by the Department of Rural Development and Land Reform ("the Department") to provide it with a legal opinion on the interpretation of the word "alienate" as far as it relates to mortgaging of immovable property.

BACKGROUND

2. The Department provided the following background:

> "Title Deeds often contain restraint conditions (which are regarded [as] special conditions) in terms of which the person, in whose favour such restraint is registered, must consent to the alienation of the relevant property. However, it has become practice in view of [the] Registrar's Conference Resolutions for Registrars to call for the consent of the person in whose favour such restraint is registered, in instances where an owner merely wants to mortgage the relevant property.

The following Registrar's Conference Resolutions (RCR's) have been taken in the above regard:

"*RCR 2/2006; RCR 35/2005; RCR 4/2011: Alienation includes the passing of a mortgage bond:*
RCR 2/2006 (RCR 35/2005): RCR 4/2011 must be withdrawn. A definition given in the Alienation of Land Act 68 of 1981 is being ignored. The argument provided to interpret it as including mortgage is wrong in law. A mortgagor does not mortgage his/hers/its property with the intention to have it sold in execution by the bank. There is no intention to pass transfer. The Registrars Resolution is causing improper hardship to mortgagors who have every right to mortgage their property without having to obtain the permission of not directly involved in the transaction and increasing their costs, whilst there is an outcry to reduce costs. Our resolution is contra bonos mores as it is not only bad in law but adds to the costs of registrations and allowing Home Owners' Associations to earn fees. See the definition of "alienate" in the Alienation of Land Act 68 of 1981, which reads as follows: 'alienate', in relation to land, means sell, exchange or donate, irrespective of whether such sale, exchange or donation is subject to a suspensive or resolutive condition and 'alienation' has a corresponding meaning.
Resolution: A legal opinion must be obtained to get clarity in this regard.""

3. The legal questions posed to us in this matter are—

(a) What is the correct interpretation of the word "alienate" as far as it relates to mortgaging of immovable property?

(b) *Does a title deed condition that relates to the restriction on alienation of a property, also include restriction to mortgage such property?*

LEGISLATIVE FRAMEWORK AND DISCUSSION

4. The purpose of definitions of terms (words) or expressions in statutes is to circumscribe the meaning of that term or expression for the particular statutory instrument or Act in which it appears. In certain circumstances such definitions are helpful but not necessarily decisive in determining the meaning of the term or expression used outside of the statutory instrument or Act[1]. In respect of the question at hand, one is dealing with a restriction to alienate immovable property in a title deed. Essentially one is dealing with the meaning of "alienation" in respect of immovable property.

5. When one deals with the alienation of land, one must do so in terms of the Alienation of Land Act, 1981 (Act No. 68 of 1981) ("Alienation of Land Act"). This is so, since section 2 of the Alienation of Land Act provides as follows:

"(1) No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.

(2) The provisions of subsection (1) relating to signature by the agent of a party acting on the written authority of the party, shall not derogate from the provisions of any law relating to the making of a contract in writing by a person professing to act as agent or trustee for a company not yet formed, incorporated or registered.

(2A) The deed of alienation shall contain the right of a purchaser or prospective purchaser to revoke the offer or terminate the deed of alienation in terms of section 29A."

6. It is clear from section 2 of the Act that the alienation of land must be executed in terms of the provisions of the Alienation of Land Act. Therefore, if a restriction in a title deed is placed upon the alienation of the land described therein, it follows that the restriction refers to the alienation of land in terms of the Alienation of Land Act.

7. In section 1 of the Alienation of Land Act the words—
"alienate" and "land" are defined, respectively, as follows:

"'alienate', in relation to land, means sell, exchange or donate, irrespective of whether such sale, exchange or donation is subject to a suspensive or resolutive condition, and 'alienation' has a corresponding meaning;" and

""land"—

(*a*) includes—
  (i) any unit;
  (ii) any right to claim transfer of land;
  (iii) any undivided share in land;
  (iv) initial ownership referred to in section 62 of the Development Facilitation Act, 1995;

(*b*) includes, in Chapters I and III, any interest in land, other than a right or interest registered or capable of being registered in terms of the Mining Titles Registration Act, 1967 (Act No. 16 of 1967);

(*c*) in section 3 (2) and Chapter II—
  (i) means any land used or intended to be used mainly for residential purposes;
  (ii) excludes—
    (*aa*) agricultural land as defined in section 1 of the Subdivision of Agricultural Land Act, 1970 (Act No. 70 of 1970);

---

[1] *Legislative Drafting*: *4th Edition* by *Thornton*, G. C., pg 145 - 154

(*bb*) land which forms part of any scheduled Black area as defined in section 49 of the Development Trust and Land Act, 1936 (Act No. 18 of 1936), or of a released area contemplated in section 2 of the said Act;

(*cc*) land to which the provisions of the Rural Coloured Areas Act, 1963 (Act No. 24 of 1963), apply;

(*dd*) land which is held in trust by the State or a Minister for any person;

(*d*) in section 29A—

(i) includes—

(*aa*) land, whether or not registrable, used or intended to be used mainly for residential purposes;

(*bb*) any housing interest as defined in section 1 of the Housing Development Schemes for Retired Persons Act, 1988 (Act No. 65 of 1988), and any proposed housing interest;

(*cc*) any share in a share block company as defined in section 1 of the Share Blocks Control Act, 1980 (Act No. 59 of 1980), and any proposed share, which confers on the holder of such share the right to occupy land owned or leased by the share block company and which is used or intended to be used mainly for residential purposes;

(*dd*) any unit as defined in section 1 of the Sectional Titles Act, 1986 (Act No. 95 of 1986), and includes any proposed unit;

(ii) excludes agricultural land;".

8. In turn the expression "agricultural land" is defined in section 1 of the Alienation of Land Act as follows:

> ""agricultural land" in paragraph (*d*)(ii) of the definition of "land" means any land used or intended to be used mainly for commercial farming operations;".

9. It is clear from the definitions quoted above that the meaning of the word "alienate" as defined in the Alienation of Land Act would apply to a restriction to alienate land (as defined in section 1 of the Alienation of Land Act).

10. In respect of the interpretation of statutes, statutory instruments and documents, Wallis JA, in *Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZASCA 13 (15 March 2012)* ("*the Natal Joint Municipal Pension Fund judgement*"), at paragraph 18, held the following:

> *"The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever*

> *the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production."* (Our underlining)

11. The *Natal Joint Municipal Pension Fund* judgment also endorsed *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another 1950 (4) SA 653 (A)*, in which Schreiner JA, at page 421, held the following in respect of language and context regarding the principles of interpretation:

> *"Certainly no less important than the oft repeated statement that the words and. expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background. The second point is that the approach to the work of interpreting may be along either of two lines. Either one may split the inquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confining a consideration of the context only to cases where the language appears to admit of more than one meaning; or one may from the beginning consider the context and the language to be interpreted together." (*Our underlining)

12. In order to arrive at the true meaning of the word "alienate", the word must be interpreted and read in the light of the ordinary rules of grammar, syntax (sentence structure), the context in which the word appears and the purpose to which it is directed. Therefore the point of departure is the language of the word itself read in context and having regard to the purpose of the word. Applying the rules of interpretation discussed above, the definition of "alienate" is clear and unambiguous.

13. Definition of the word "alienate" in the Alienation of Land Act:
If we follow a strict approach in interpreting the definition of "alienate", we can see that the word "means" is contained in the definition. The word "means" can be defined to indicate that what follows are the only things that fall within that definition.

14. Holmes AJA in *Rogut v Rogut 1982 (3) SA 928 (A) at 937G* said the following:

> *"First, the opening word in the definition is 'means'. As Broome JP observed in another context in Warwick Investments (Pty) Ltd v Maharaj 1954 (2) SA 470 (N) at 4728, that word 'indicates that what follows is in the nature of a precise definition. Obviously it is not as expansive as 'includes'."* Therefore, it is submitted that because "mortgage" was not expressly included in the definition of "alienate" in the Act, the legislature did not intend to include it.

15. It is clear from the definition of "alienate" that its meaning is convoluted in the sense that its meaning is dependent upon the meaning of the words "sell", "exchange" or "donate".

The words “sell”, “exchange” and “donate” are not defined in the Alienation of Land Act. However, they are terms of art, the meaning of which the courts have defined in the following case law:

15.1 *In Loggenberg NO & others v Maree* (286/2017) [2018] ZASCA 24 (23 March 2018), the Supreme Court of Appeal considered whether an alleged oral agreement between the Respondent and Applicant in which the Respondent would purchase a farm at a sale in execution for the benefit of a new trust to be created to protect the interests of the Applicant and his family**, was an alienation of land in the form of a sale.** The Supreme Court of Appeal stated in this case the following regarding the definitions of “alienate” and **“sale”:**

> “[14] The Act [Alienation of Land Act] defines ‘alienate’ as meaning ‘sale, exchange or donation’. It was not suggested that this transaction was either an exchange or a donation, which left only a sale.
>
> [15] **A contract of sale is a consensual agreement by which one of the contracting parties (the seller) binds itself to the other (the buyer) to exchange a thing for a definite sum of money (the price) which the buyer promises to pay to the seller. The essentials of the contract are agreement upon the *merx*, the price and the obligation of the seller to deliver the *merx* to the buyer.”** (Our emphasis.) (Footnotes omitted)

15.2 In *The 3 Tenners Properties CC v The Trustees for the Time Being of the Atlantic Seaboard Trust (9478/2008) [2011] ZAWCHC 51* the Western Cape High Court had to determine whether an oral agreement to which the parties agreed was not a sale as envisaged in s 1 (1) of the Alienation of Land Act, constituted a “donation” or an “exchange”.
In this case Cloete AJ in discussing the definition of a **“donation”** referred to the case of *Ovenstone v Secretary for Inland Revenue* 1980 (2) SA 721 (AD) at 736H-737A where the court put it as follows:

> “**In a donation the donor disposes of the property gratuitously out of liberality or generosity, the donee being thereby enriched and the donor correspondingly impoverished, so much so that, if the donee gives any consideration at all therefore. it is not a donation** (see *The Master v Thompsons Estate* **1961 (2) SA 20 (FC)** at 24F026C. 48F-49C, where all the authorities are collected). It can therefore be regarded as a unilateral contract in the sense that the donor is the only party upon whom any obligation lies.” (Our emphasis.)

15.3 Cloete AJ further also referred to *Hoeksma and Another v Hoeksma* 1990 (2) SA 893 (AD) at 897A-C in defining the word **“exchange”** where the court put it as follows:

> “The oral agreement was clearly not a sale or donation. The question, indeed the

> only real question in this appeal, is whether it entailed an exchange. 'Exchange' is not defined in the Act [Alienation of Land Act]. It therefore bears its ordinary meaning. In its most rudimentary form, exchange (barter, 'ruil', *permutatio)* marks a transaction between two people **whereby each gives to the other, as his own, one thing in return for another.** (De Groot *int* 3.31.6; *Voet* 19.4.1.) **Exchange differs from sale, historically its precursor and now its counterpart, in the nature of the reciprocal consideration which is promised for the *res* sold or exchanged: with sale the agreed co-ordinate is essentially the payment of money; with exchange it is the delivery or transfer of another asset**." (Our emphasis.)

16. In considering the definitions of "sell", "exchange" and "donate" as discussed above, it is clear that the definition of "alienate" in the Alienation of Land Act above does not include the concept of "mortgage".

17. The Department also brought to our attention that: "Besides the definition given by the legislature in the Alienation of Land Act, section 15(2) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984) ("Matrimonial Property Act"), specifically refers to "alienate" and "mortgage" separately, thus clearly indicating that the legislature intended to have meanings exclusive of each other. Section 15(1) and (2) (*a*) and (*b*) of the Matrimonial Property Act reads as follows:

> (1) Subject to the provisions of subsections (2), (3) and (7), a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.
>
> (2) Such a spouse shall not without the written consent of the other spouse—
>
> (a) alienate, mortgage, burden with a servitude or confer any other real right in any immovable property forming part of the joint estate;
>
> (b) enter into any contract for the alienation, mortgaging, burdening with a servitude or conferring of any other real right in immovable property forming part of the joint estate". (Our underlining.)

18. We have considered the reference to the Matrimonial Property Act and it is clear that the legislature intended that the terms "alienate" and "mortgage" to have different meanings and should not be considered as one and the same thing, eg. for "alienate" to include "mortgage". Therefore in the definition of "alienate" in the Alienation of Land Act there is also no reference made to "mortgage" as it can be concluded that it was not the intention of the Legislature to include "mortgage" under the definition of "alienate".

19. The Collins English Dictionary[2] defines "mortgage" as follows:

> "**'mortgage'**, an agreement under which a person borrows money to buy property,

esp. a house, and the lender may take possession of the property if the borrower fails to repay the money; the deed effecting such an agreement; the loan obtained under such an agreement; to pledge (a house or other property) as security for the repayment of a loan."

20. In *Britz NO v Sniegocki and Others [1989] 4 All SA 163 (D)* the following is stated regarding mortgages:

> "The agreement to pledge or mortgage creates rights in *personam* to claim delivery or registration but, for it to be effective against third parties without knowledge thereof, **delivery or registration is essential. Such delivery and registration creates real rights in the mortgaged or pledged properties. The purpose and effect of such real rights are to furnish security for the secured debt. The *dominium* in the property remains in the pledger or mortgagor. The pledgee or mortgagee's rights are limited during the debtor's solvency, to securing under order of the court a sale of the property for the purpose of satisfying the debt and upon insolvency to a preference to the proceeds of the property as a secured creditor**." (Our emphasis.)

21. The matter between *Standard Bank of South Africa v Hunkydory Investments 188 (Pty) Ltd and Others, (No 2) 2010 (1) SA 634 (WCC) ("the Hunkydory case")* provides an analysis of the reason why the mortgage of immovable property does not amount to alienation. Owen Rogers AJ stated as follows:

> *"[12] The ordinary meaning of the phrase "dispose of" is "to make over or part with by way of sale or bargain, sell", "to transfer into new hands or to the control of someone else (as by selling or bargaining away)" (see Kinloch NO and Another v Kinloch 1982 (1) SA 679 (A) at 697H-698C). I do not think that one would ordinarily describe a transaction whereby a debtor agrees to the hypothecation of his property as one whereby the debtor disposes of the property to the creditor or to anybody else. True, if the debtor defaults and the creditor become entitled to execute on his security the property may then be transferred and lost to the debtor, but the object of the transaction from the debtor's perspective is not to part with his property and if all goes well the property will stay with him. If the property is eventually disposed of, that is not because that is the wish or intention of the debtor but because the creditor has rights under the bond which, because of the debtor's default, the creditor can enforce whatever the debtor's wish may be. Moreover, when property is sold in execution, the person who sells the property is the sheriff, not the debtor.*
>
> *[15] Ex Parte De Jager (1926) 47 NPD 413 concerned a will which created a fideicommissum. In terms of the will the fiduciaries were not to sell or dispose of the*

[2] Collins English Dictionary, 12th ed, 2014, Collins Reference, UK

property in any manner. The court held that the will prohibited the mortgaging of the property, since a mortgage "is a first step to a sale in execution, if the debt is not repaid". …I do not find the meaning attached to the will in that case to be of much assistance in interpreting s228. It is true that a mortgage might result in a sale in execution, but whether this potential result means that the creation of the mortgage is itself a disposal depends on the proper interpretation of the relevant provision. While a mortgage might eventually result in a forced sale, is not a transaction which has a sale as its object and the forced sale, if it eventuates, is not one to which the mortgagor is party. This is, to my mind, a material distinction.

[16] In any event, I consider that the description of a mortgage as the first step towards a disposal of the hypothecated property is not really accurate. Whenever a company borrows money or incurs a debt the company's assets are exposed to the risk of attachment and disposal by judicial sale. To take the present case as an example, the bank – even if there were not a mortgage – could take judgment on its loan and then attach the property for sale in execution. The only real difference which the mortgage makes is that if the defendant were to have other creditors apart from the bank, the mortgage would give the bank preference in the judicial sale whereas without the mortgage the bank would have to share pro rata with other judgment creditors (if there were any). With or without the mortgage, the property would be "disposed of" (though by the sheriff, not the company). Thus the transaction which exposes the company's assets to the risk of forced disposal is the borrowing of money or the incurring of debt, not the mortgage per se.

[17] ***The mortgage is not the component of the transaction which creates the risk of forced disposal; the mortgage merely determines who benefits first from the forced disposal."*** (Our emphasis.)

CONCLUSION

22. We conclude as follows:

(a) What is the correct interpretation of the concept "alienate"? Does it include mortgage?

In view of our discussion above of the definition of the word "alienate" as contained in section 1 of the Alienation of Land Act and the discussion above of the word "mortgage", we are of the view that "alienation" of land does not include the "mortgage" of land.

(b) Does a title deed condition that relates to the restriction on alienation of a property, also include restriction to mortgage such property?

In view of our conclusion in paragraph (*a*) above, we are of the view that a title deed condition

that relates to the restriction on alienation of land does not include a restriction to mortgage such land.

Yours sincerely

SENIOR STATE LAW ADVISER
C. NICHOLSON / J NURSE / A JOHAAR