

LEGAL ASPECTS OF CONTRACTUAL FORMALITIES

BY

THAMI HENSFORD MTHEMBU

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A. PLAGIARISM DECLARATION

UNIVERSITY OF PRETORIA

FACULTY OF LAW

I, THAMI HENSFORD MTHEMBU

Student Number: **10671146**

Declare the following:

I understand what plagiarism entails and am aware of the University's policy in this regard.

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I did not make use of another student's previous work and submitted it as my own and I did not allow and will not allow anyone to copy my work with the intention of presenting it as his or her own work.

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B. ACKNOWLEDGEMENTS

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C. EXECUTIVE SUMMAR

A clear reason for the creation and inclusion of the contractual formality requirements in law is to protect the parties when they are concluding a legally binding instrument or contract. They protect the parties against any fraud, deception, hoax or embezzlement that may result from concluding an agreement.

Contractual formalities are there to serve as a guide to the parties against any unforeseen circumstances that may lead to litigation. They serve to protect the parties upon concluding a legally binding contract and serve as proof if a dispute of facts arises from the contract.

As a general rule, no contractual formalities are required to conclude a legally binding contract, provided all the requirements are met by the parties. Parties are at liberty to choose whether to conclude their contract with adherence to formality requirements or not; it is solely up to them to decide which form the requirements should take when they are concluding a contract.

CHAPTER ONE: INTRODUCTION

1.1 Introduction

Our law of contract is essentially a modernized version of the Roman-Dutch law of contract, but strongly influenced by English law. It has vacillated between a subjective and an objective approach to contract. It is now clear, however, that in cases of dissensus, subjective will theory is the point of departure, the shortcomings of which are corrected by the application of the reliance theory.

1.2 Roman law

When considering Roman law, we must remember that we are dealing with six centuries of legal development, progressing from the strict formality of the early *strict iuris* contract to the sophisticated informality of the later consensual contracts, based on good faith.

Under Roman law there were very formalistic *contracts*; Romans only recognized particular transactions as contracts, referred to as *iusta causa*, which simply meant serious intention to create contract and that the agreement should be binding.

The transactions that were recognized are:¹

- (i) Real contracts (*contractus rei*),
- (ii) Oral contracts (*contractus verbis*),
- (iii) Written contracts (*contractus litteris*), and
- (iv) Consensual contracts (*contractus consensus*).

1.3 Roman-Dutch law

Roman-Dutch law was less formalistic than Roman law. All contracts were entered and concluded based on consensus between the parties involved. All contracts were based on good faith. *Iusta causa* was a necessary element of contract. The Roman-Dutch law of contract recognized the canon law principle that all serious agreements

¹ D Hutchison C Pretorius T Naude J du Plessis S Eiselen T Floyd L Hawthorn *The Law of Contract in South Africa* (3rd ed) (2017) pp 11–13.

ought to be enforced, *pacta servada*.

Adopting the canonist position, all contracts were said to be an exchange of promises that were consensual and *bona fide*, that is, based simply on mutual assent and good faith. Under the *causa* theory, for the contract to be binding it had to have a *causa*, or lawful contractual motive.

Under Roman law, the broad notion of cause was necessary to create obligations and could include love, affection, moral consideration, or past services, among other things. Contractual relationships required *iusta causa* rising from a lawful or just right, title, or *causa* of action. Therefore, for a contract to be enforceable, it had to be shown to be based on *iusta causa*, or reasonable motive.

Lingering views which suggested that *iusta causa* was still a necessary element of contract during English rule gave rise to a famous dispute in early South African law. In the late 19th century, under the general influence of English law and the particular dominating influence of Lord Henry de Villiers CJ, the courts reinterpreted *iusta causa* to be a valuable consideration, *causa* lucrative, a *quid pro quo*, and necessary for a valid contract. This was met with fierce resistance by northern jurists like John Gilbert Kotze, and later rejected outright by the Transvaal Supreme Court in the case of *Rood v Wallach*. De Villiers, however, refused to concede the point, so the dispute continued until, almost 50 years after it commenced, it was settled in the famous case of *Conradie v Rossouw*, where the court took the view that a binding contract may be constituted by any serious and deliberate agreement made with the intention of creating a legal obligation, rejecting consideration of the doctrine of English law.

It seems now to be clear that *iusta causa*, in whatever form, is not a separate requirement in South African law of contract. That a contract must have been seriously intended by the parties in order to be valid (as well as the other obvious elements, such as being lawful and performable), is a matter of course and does not need *causa* as an independent element.

1.4 Theories of contract

1.4.1 Will theory

According to this theory, the basis of contract is to be found in the will of the individual. The parties are bound by their contract because they have chosen to be bound. It gives effect to the subjective will of the parties.

1.4.2 Declaration theory

The inner wills of the parties are irrelevant, what is important for contract is not what the parties think but what they say or do, the external manifestation of their will. It gives effect to will as expressed.

1.4.3 Reliance theory

The basis of the contract is to be found in detrimental reliance on the appearance of agreement, or, in simple terms, in the reasonable belief in the existence of consensus, induced by the conduct of the other party. It gives effect to reasonable belief.

In the case of *Kwazulu-Natal Liaison Committee v MEC for Education*,² Cameron J stated that our law of contract, unlike English law, enforces promises seriously made, not bargains. Not all promises are enforced, only those made seriously and deliberately and with the intention that lawful obligation should be established. Mere serious agreement between parties is sufficient to constitute a contract. Our law is also practical enough to recognize that it must, as a general rule, concern itself with the external manifestations, and not the person who expresses his or her intention in relation to the formation of a contract. The decisive question is often not what he or she subjectively intended, but what it lead the other party, as a reasonable person, to believe was his or her intention.

*Be Bop ALula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd*³ states that in accordance with reliance theory, there was quasi mutual assent. Cheque marked in full and final settlement. The recipient may not impose conditions when

² KZN 2013 4 SA 262 (CC).

³ 2008 (3) SA 327 (SCA).

accepting payment and must accept payment unconditionally or reject payment.

In the case of *Cecil Nurse (Pty) v Nkola*⁴ it was stated that, in accordance with reliance theory, there was quasi mutual assent. An assistant accidentally returned a signed credit application and suretyship. The return of the signed documents created a reasonable impression that the respondent had accepted the terms of the suretyship.

1.5 The formation of a contract

Before the formation of a contract, there must be consensus. Once consensus is realised, offer and acceptance come into play.

In the case of *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty)*⁵ the standard conditions were not checked.

In *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty)*⁶ it was held that there was not merely defective performance, but unlawful performance.

1.6 Conclusion

South African law of contract seems to have reached the point where, on the basic assumption that the objective considerations that serve to recognize and protect the reasonable expressed in various alternatives, it is being assimilated into a unitary qualification of consensus. Such a development need not, in itself, run contrary to the values of individual autonomy and freedom of contract and consensuality.

It is compatible with a process of setting the parameters of such values against other values, such as good faith in human relations and the interests of society in general. The position taken by the courts does not militate against positive duty to uphold values and develop the common law according to such values. The qualification of *pacta servanda sunt*, inter alia by means of a relaxation of the *caveat subscriptor* rule and recognition of the effectiveness of a reasonable reliance or a reasonable error, is a justifiable limitation in keeping with the constitutional values of dignity,

⁴ 2008 (2) SA 441 (SCA).

⁵ 2010 (1) SA 8 (GSJ).

⁶ 2011 (4) SA 276 (SCA).

equality and freedom.

1.7 Research question

Are formalities required for the formation of a valid contract, and in what ways can formalities ensure that a contract is valid and enforceable?

1.8 Research statement

This research canvasses the development of contractual formalities in South African law and illustrates the fundamental difference between formalities as required by the parties and formalities required by the law.

1.9 Research aim

South African contract law in general accepts that no formalities are required for the formation of a valid contract. This rule has developed over the years and it is evident that there are instances where formalities are required by the law or by the parties. This study therefore attempts a historical overview of the development of contractual formalities through statute and case law.

1.10 Methodology

This research is about the legal aspects of contractual formalities. This research is literature-based and will therefore include reference to relevant legal writings including case law, legislation and academic writings in dealing with its content.

1.11 Chapter overview

Chapter one provided a brief historical background of the development of contract. Chapter two will deal at length with the requirements and processes involved in addressing the aspects of legal contractual formalities determined by the parties and by law respectively. It will also elaborate on the approach used to achieve these aims.

The third and final chapter will comprise a summary of all the preceding chapters and will include my perception on the legal aspects of contractual formalities.

CHAPTER TWO: LEGAL ASPECTS OF CONTRACTUAL FORMALITIES

2.1 Introduction

As a general rule, no formalities are required for the formation of a valid contract provided that all requirements are met by parties and their intentions are well expressed in whatever form they choose.⁷ Consensus amongst parties need not be articulated in a distinct and peculiar form to constitute a contract. The law recognizes both express contracts and terms (where the intentions of the parties are articulated verbally, whether orally or in writing), and tacit contracts and terms (where the intention is inferred from unarticulated conduct of the parties). In light of the above rule, the following two exceptions apply:⁸

- (a) The first exception is that, in respect of certain types of contracts, the law may require that the parties express their intentions in a prescribed manner or formal way, of which statutory formalities may include writing, notarial execution, registration and signature.
- (b) The second exception is that parties themselves may enter into an agreement that their contract will be binding on them only when certain contractual formalities have been observed, mainly in the form of the agreement being reduced to writing and signed by the parties. The parties may also be allowed to prescribe similar formalities for any variation or consensual cancellation of the contract, or for any waiver of rights that may arise from the contract.

In *Conradie v Rossouw*,⁹ the Appellate Division accepted into our modern law the simple Roman-Dutch concept of a contract as a serious and deliberate agreement, and it allows that, as a general rule, there are no special formalities required for the making of an enforceable contract.

It is prudent and expedient to formulate significant contracts into writing in order to facilitate proof of their existence and terms. Any party who wants to enforce the contract bears the onus in this regard.

If the parties, or one of them, or a statute, makes writing and or signature a

⁷ Hutchison et al (2017) p 163.

⁸ Hutchison et al (2017) p 163.

⁹ 1919 AD 279.

requirement, that requirement must be complied with if the contract is to come into effect.¹⁰ In the absence of any such requirement, any contract may be orally entered into. Writing is not essential to contractual validity.

The two exceptions can be broken down further:¹¹

Firstly,

- (a) Law-prescribed formalities.
 - (i) Merely to facilitate proof; or
 - (ii) As requirement for validity.

Secondly,

- (b) The parties agree on formalities.
 - (i) Merely to facilitate proof; or
 - (ii) As requirement for validity.

In this chapter, I will focus on the aspects of contractual formalities determined by the law and by the parties.

2.2 Contractual formalities determined by the parties

There is a presumption that parties who resort to writing on their own contracts do so for evidential reasons and not to impose formalities upon each other.¹² If the parties intend writing to be the basis of formulating a legally binding contract, then no legal consequences may come into force and no contract is in existence before the document is executed as such.

A party to the agreement may not be compelled to comply with the formalities; however, parties may conclude an oral contract with the intention that the agreement shall be or will be reduced to writing by them. A party to a contract can be compelled to execute the requirement, provided that such party, wishing to enforce the oral contract, alleges that he or she is willing to produce the same document.

Parties who want to enter into a contract may themselves prescribe formalities for the creation, variation or cancellation of their contract. No party may depart unilaterally from these formalities.¹³ Regardless of whether parties resort to writing

¹⁰ AJ Kerr *The Principles of the Law of Contract* (6th ed) Butterworths (2002) p139.

¹¹ https://en.wikipedia.org/wiki/south=africa_law [accessed 06 May 2016].

¹² LF van Huyssteen GF Lubbe MFB Reinecke *The General Principles of Contract* (5th ed) Juta (2016) p 147.

¹³ Van Huyssteen et al (2016) pp 147–148.

for the creation of a contract, or merely for purposes of proof, such agreement can be varied by informed agreement.

2.3 Formalities determined for validity

In terms of the so-called non-variation clause, where parties have prescribed writing as a formal prerequisite for the variation of their contract, such position may be different if the non-variation clause is part of the contract and if it is phrased widely enough to enrich itself, that no part of the contract, including the non-variation clause itself, may be varied in anyway other than in writing. A non-variation clause may also serve to prevent oral variation of a clause, which prescribes formalities for cancellation. Non-variation clauses are enforced by the courts as long as doing so is not in conflict with the requirement of public policy that the agreement was freely concluded.¹⁴

In *SA Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren*,¹⁵ the court held that a non-variation clause was not against public policy and that no oral variation of the contract is effective if the enrichment was itself and all the other clauses were to prevent disputes and problems of proof that might otherwise arise if oral variations were to be permitted, and it operated in favour of both parties. This clause is in line with the fundamental principle of *pacta sunt servanda* (agreements that are freely and seriously entered into must be enforced in the public interest).

There are various arguments and disagreements about the Shifren principle. The arguments for it state that when parties have agreed to the terms of an agreement, they want to avoid further disputes by including a non-variation clause that entails that the parties will be bound to the written terms of the agreement and that any oral variation will not be valid, thus eliminating disputes caused by oral variations.¹⁶ Arguments against the principle state that freedom of contract of the parties to an agreement is hampered when parties include a non-variation clause, because parties should be allowed to change their minds and alter or vary the agreement

¹⁴ Hutchison et al (2017) p 170.

¹⁵ 1964 4 SA 760 (A).

¹⁶ A Jansen Van Rensburg 'Fixed or flexible: Shifren 'shackle'' *De Rebus* 2015 p 32.

orally.¹⁷

This conflict cannot be resolved with reference to the principle of freedom of contract alone. A court decision to enforce non-variation clauses is a public policy decision, which is apparently based on a commercial certainty preference and avoidance of further litigation.

In *Brisley v Drosky*,¹⁸ the court set out the principle that the contracting parties may validly agree in writing to an enumeration of their rights, duties and powers in relation to the subject matter of a contract, which they may alter only by resorting to writing. This principle is commonly known as the enforcement of non-variation clauses on the parties. Recent developments in the law have seen courts loosening the Shifren 'shackle' on some agreements through the application of public policy.

In scrutinizing the Shifren principle, we will interrogate the three most recent cases where the courts have repeatedly refused to enforce a non-variation clause on the basis that it was against public policy.

In *Nyandeni Local Municipality v Hlazo*,¹⁹ Mr Hlazo, a municipal employee, was discovered through forensic accounting to be involved in fraudulent activities, pocketing certain funds. The court held that the general rule stemming from the common law is that an agreement may not be enforced if it offends public policy. This general rule has been applied in the decisions of various courts.

The Constitutional Court case of *Barkhuizen v Napier*²⁰ confirmed this, but held that the general rule that an agreement must be honoured cannot be applied to immoral agreements that violate public policy. The court held that Mr Hlazo did not have a bona fide defence as he was trying to use the Shifren principle not for a legitimate purpose, but for the ulterior purpose of delaying his dismissal for his financial benefit. In the end, the court ruled that the public policy, as expressed by the constitutional values and norms, does not tolerate the abuse of the process of law, and thus the facts and circumstances of this case justified a departure from the Shifren principle.

¹⁷ Jansen Van Rensburg (2015) pp 32–33.

¹⁸ 2002 (4) SA 1 (SCA).

¹⁹ 2010 (4) SA 261 (ECM).

²⁰ 2007 (5) SA 323 (CC).

The case of *GH v SH*²¹ concerned a written maintenance settlement. The parties made changes to the residence and maintenance arrangements after the agreement was made an order of court. SH wanted to enforce the agreement with regard to the maintenance and GH objected that the agreement had been varied by the parties. SH then relied on the Shifren principle to argue that because there was a non-variation clause in the settlement agreement, the agreement could not be changed or varied.

The court held that the agreement in question could be distinguished from other agreements where Shifren normally applies in that this was not a commercial agreement, thus there were considerations that had to be taken into account. In this instance the best interests of the child would play a paramount role in deciding whether the Shifren principle should be applied or not.

Furthermore, the court held that in this instance public policy demanded that the Shifren principle not be applied. This case was appealed, and the Supreme Court of Appeal took a different approach to the amendment made, ruling that the parties never intended that the variation in fact be a variation of the agreement, and thus Shifren would play no part. The court further held that both parties were aware of the non-variation clause and that in no order for the maintenance agreement to be varied it needed to be in writing and signed by both parties.

Thus, the arrangement made between the parties did not constitute a variation, but was merely a trial period, after which a formal variation of the agreement would take place.²²

In *Steyn and another v Karee Kloof Melkery (Pty) Ltd and another*,²³ the agreement in question was commercial in nature, namely the sale of a business. The Steyns were the farm owners and Karee Kloof Melkery wanted to buy the farm and the business on the farm. The agreement contained a non-variation clause. There were numerous complications with the transaction, and to resolve some of the disputes two settlement agreements were entered into. A year after the last settlement

²¹ 2011 (3) SA 25 (GNP).

²² Jansen Van Rensburg (2015) pp 32–33.

²³ (GSJ) (2009/45448).

agreement was entered into, the Steyns instituted an action for payment of an arrears amount for the sale of the business in terms of the sale of business agreement.

Karee Kloof Melkery pleaded that the parties agreed to a settlement and the settlement agreement was adhered to, and thus they owed nothing to the Steyns. The Steyns relied on the Shifren principle and argued that the settlement agreements could not have been seen as variations of the original agreements.²⁴ The question before the court was whether or not the second settlement agreement should enjoy efficacy and be primary over the original agreement, thereby defeating the claim, that is, whether the Shifren principle should be enforced. The court assessed what would occur if the settlement agreement was enforced, and decided it would lead to a conclusion of the litigation process currently pending in the Magistrate's Court and other disputes that could arise.

The court ruled that three public policy considerations warranted that the Shifren principle be relaxed and be applied.²⁵ First, public policy interest demands that there be an end to litigation and thus the settlement agreement cannot be ignored, as this would bring an end to the pending litigation. Second, public policy demands that the parties to a dispute avoid litigation and solve their differences amicably. Third, *pacta sunt servada* would be violated if the settlement agreement were ignored as it related not only to the original agreement, but to the other collateral agreements or disputes. Therefore, the court held that upholding the Shifren principle would be against public policy.

The cases described above illustrate the notion that when public policy demands, the Shifren principle will not be applied, and effectively, a variation to an agreement done contrary to the requirement of a non-variation clause will be able to escape from the shackles of the Shifren principle.²⁶

The strict enforcement of non-variation clauses by the courts often causes problems

²⁴ Jansen Van Rensburg (2015) pp 32–33.

²⁵ Jansen Van Rensburg (2015) pp 32–33.

²⁶ Jansen Van Rensburg (2015) pp 32–33.

for parties. In *Brisley v Drosky*,²⁷ where a tenant sought to preclude a reliance on a non-variation clause on the basis that to do so would, under the circumstances, be “onredelik, onblik en in stryd met die beginsel van bona fides (goeietrou)”.

This argument, derived from the case of *Miller v Dannecker*²⁸ and some other decisions to this effect, that considerations of good faith are relevant in assessing whether an agreement or term meets the creation of public policy, was widely rejected by the majority of the Supreme Court of Appeal, where it was held that there was no general equitable discretion on the strength of which a court could decide not to enforce a non-variation clause merely because it was unconscionable or against good faith. The majority stated that good faith does not constitute an independent²⁹ “or free floating” basis for the setting aside or non-enforcement of contractual terms. Good faith is a foundational principle underlying the law of contract which finds expression in the specific rules and principles thereof.

The ethical principle of good faith does not, therefore, intervene in law of contract directly, but it is realized through the instrumentality of the technical, black-letter rules and institutions of contract doctrine in which it is discounted and balanced out with other principles and policy concerns.³⁰

2.4 The creation of the contract

The parties to an oral agreement will often agree that their consensus should be reduced to writing and sometimes be signed. In so doing, they have two different purposes in mind:

1. They may wish to have the writer record their agreement to serve as proof of its terms, so that the agreement is binding even if it is not reduced to writing.³¹
2. Alternatively, they may view their oral agreement as not binding upon them unless it is reduced to writing and also signed by them. This inevitably alludes to the notion that the first oral acceptance lacks contractual force and will only

²⁷ 2002 (4) SA 1 (SCA).

²⁸ 2001 (1) SA 928 (C).

²⁹ Van Huyssteen et al (2016) p 149.

³⁰ Van Huyssteen et al (2016) p 149.

³¹ Hutchison et al (2017) p 168.

become a contract once it complies with the stipulated contractual formalities. No party can compel the other party to sign the agreement. The main reason for such prescribed contractual formalities is to protect the parties against the lack of evidence that presumes that the intention was merely to facilitate proof in the terms of their agreement.³²

The leading case in this regard, upon which I will be basing my discussion as prescribed and reported, is *Goldblatt v Fremantle*,³³ with a special focus on the attention of the parties with regard to writing. Furthermore, the case of *SA Kooperatiewe Graamaatskappy Bpk v Shifren*³⁴ will be delved into as part of the procedure for formulating and apprehending the requirements and their formalities with regard to a contract.

In *Goldblatt v Fremantle*,³⁵ Fremantle undertook orally to supply Goldblatt lucerne at intervals. The parties agreed that Fremantle would reduce their oral agreement to writing and that Goldblatt would confirm in writing. Fremantle set out the terms of their agreement in a letter and asked Goldblatt to confirm the terms in writing. When Goldblatt failed to do so, Fremantle stopped supplying Goldblatt with lucerne. Goldblatt claimed contractual damage from Fremantle. The Appellate Division held that no contract existed because the parties intended their agreement to be concluded in writing, which also involved signing by both parties.

The court adopted the principle that the burden of proof is on the party who asserts that an informal contract was not intended to be binding until reduced to writing and signed. Any contract may be verbally entered into, writing is not essential to contractual validity, and if during negotiations mention is made of a written document, the court will assume that the object was merely to afford facility of proof of the verbal agreement, unless the parties intended that the writing should embody the contract. The parties have the option to agree that their contract shall be a written one.

³² Hutchison et al (2017) p 168.

³³ 1920 AD 123.

³⁴ 1964 4 SA 760 (A).

³⁵ 1920 AD 123.

In *Woods v Walters*,³⁶ Innes stated that: 'it follows of course that where the parties are shown to have been *ad idem* as to the material conditions of the contract, the onus of proving an agreement that legal validity should be postponed until the due execution of a written document lie upon the party who alleges it.'

In *Goldblatt v Fremantle*,³⁷ agreement was explained by Blaine J in *De Bruin v Brink*³⁸ as follows:

'An agreement to confirm in writing the written terms of a contract implies that what was arranged prior thereto was merely introductory and provisional, and of no binding force, and on that accord furnishes very strong evidence of intention that the writings containing the terms and the confirmation should alone form the contract.

'As such there is no implication would, I think, arise merely from an agreement to embody in a written document terms which had been previously verbally arranged, as such an undertaking would be quite consistent with an intention to be bound by the verbal agreement, while a condition requiring confirmation in writing of written terms would not.'

2.5 Contractual formalities determined by the law

Various statutes require that certain types of contracts comply with prescribed contractual formalities. These contractual formalities usually require that the contract be in writing and signed by one or more of the parties, and sometimes that the contract also be notarially executed and registered if it is to be effected against the parties.

Certain statutory provisions also apply to formalities in electronic contracts. Although there are many different policy considerations regarding the setting of formalities, each statute has its own objectives that are also used to interpret its provisions. As much as the wording of each provision prescribing writing as a formality determines the actual scope of the provision, the following comment may arise: that all material

³⁶ 1921 AD 303.

³⁷ 1920 AD 123.

³⁸ 1925 OPD 68, 73.

terms of the contract must be in writing, not just the essentialia.³⁹

Terms implied and inferred by law, for instance naturalia, need not be in writing, and tacit terms are generally not reduced to writing. Any variation of the material terms of the contract has to be in writing to be effective.⁴⁰ There is a tendency to clamp down this rule by restrictively interpreting the statutes in question. Where a subsequent agreement may be oral, this is the case where the arian grants an extension of time or parties cancelled their contract and where the parties to a cancelled contract of sale of land revive their cancelled contract. If the formalities are not complied with, the contract will be void.

2.6 Formalities prescribed by law

The law requires certain types of contract to be in writing and to be signed by the parties involved in order for the contract to be regarded as valid and enforceable. Failure to comply with the prescribed formalities in such an instance will render the contract void *ab initio*.⁴¹

The purpose of this dissertation is to reflect on formalities. While I will look mostly at the variation of land, I will focus more on alienation because it is such a good example.

2.6.1 Alienation of land

Section 2 (1) of the Alienation of Land Act 68 of 1981 provided that: '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 written authority. Alienation includes sale, exchange and donation.'

The purpose and objective of the legislator is to promote legal certainty regarding the authenticity and contents of the contracts, by limiting litigation and preventing malpractice such as fraud. The provisions of section 2 do not

³⁹ Hutchison et al (2017) p 164.

⁴⁰ Hutchison et al (2017) p 164.

⁴¹ Hutchison et al (2017) p 164.

apply to the sale of land by auction;⁴² however, where the purchase price is payable in more than two instalments over a period of more than one year in an instalment sale, the conditions of sale must be read in public immediately before the auction and the seller must provide the purchaser with a copy of the contract of sale immediately after the auction.⁴³

2.6.2 Alienation⁴⁴

The types of contract to which the section applies now cause less difficulty than before. Alienation is defined in section 1(1) to mean a sale, exchange or donation, regardless of whether it is subject to a suspensive or resolutive condition.⁴⁵ A contract of service by which an employee is to be remunerated by the transfer of land to him, or an agreement between heirs to divide land bequeathed to them under an ambiguous will, falls outside the scope of the above definition. A *pactum de contrando* to alienate land must be in writing, as must an agreement to create a personal servitude of occupational land.

2.6.3 Land

According to section 1(1), land is defined as:⁴⁶ ‘any unit or purposed unit as defined in section 1 of the Sectional Titles Act, as any unit to claim transfer of land, any undivided share in land, and any interest in land, other than a right or interest registered or capable of being registered in terms of the Mining Title Registration Act of 1967.’

According to this definition, the word land should be given its ordinary meaning. It includes not only the soil but buildings and anything else permanently attached to it, but it does not necessarily follow that such fixtures must be classed as land when considered separately from the soil to which they are attached. A sale of all shares in a land-owning company is obviously not a sale of land, but it might be argued that it is a sale of an interest in land

⁴² Hutchison et al (2017) p 165.

⁴³ Hutchison et al (2017) p 166.

⁴⁴ Act 68 of 1981.

⁴⁵ Christie (2011) p 116.

⁴⁶ Christie (2011) p 117.

because the controlling shareholder has an interest in the land his company owns.⁴⁷

This argument appears to be precluded by the Companies Act 61 of 1973 and section 9, which reads as follows: 'The shares of other interest which any member has in a company shall be movable property, transferable in the manner provided by this Act and the articles of the company.'

In *Macura v Northern Assurance Co Ltd*,⁴⁸ it was said that a shareholder has no insurable interest in his company's property. Lord Buckmaster said: 'no shareholder has any item or property owned by the company, for he has no legal or equitable interest therein. The shares in a land-owning company cannot, therefore, be classed as an interest in a land.'

2.6.4 Deed of alienation⁴⁹

A deed of alienation is defined as a document or documents under which land is alienated, so it is clear that the requirements of section 2(1) can be met by two or more documents read together.

2.6.5 Signature

The requirement in section 2(1) of the Act⁵⁰ which states that a contract must be signed is not fulfilled by the inclusion in an oral contract of a term that the contract will be reduced to writing. Nor is it fulfilled by a written document signed by any one of the parties, nor by a written offer tacitly or orally accepted, since this would be admitting the very mischief which the law was passed to exclude. Nor is it fulfilled by the signature of a blank page which the law completes with the terms of the contract. This difficulty cannot be overcome by appointing the party to the contract as the agent of the other, but if the offer and acceptance are in writing, the acceptance may be communicated by telegram, telephone or orally.

⁴⁷ Christie (2011) p 117–118.

⁴⁸ 1925 AC 619.

⁴⁹ Act 68 of 1981.

⁵⁰ Act 68 of 1981.

It does not matter whether the signed written document describes itself as the contract itself or as a memorandum or confirmation of a prior oral agreement, especially if it was drawn up by a layman.

Subsequent to evidence adduced and available, statutory requirements create conflicting decisions on whether a document that fails to comply with the requirements may be validated by ratification to make it conform with a prior oral agreement; however, this situation must be distinguished from one where the contract as a whole complies with the statutory requirements, but the clause is severable, because it is entirely for the benefit of one party.

Evidence adduced that the contract was concluded and formulated by misrepresentation is inadmissible where the alleged misrepresentation is in truth a prior oral agreement. In instances where there is subsequent evidence that the written contract does not reflect the agreement but mentions a lower purchase price in order to incur lower transfer duty, the statutes vividly allude to the written contract being enforceable as it stands. The danger of injustice is obvious, and consciousness of this danger has led to inharmonious decisions on the question of whether effect can be given to a subsequent oral variation of the written contract.⁵¹

There are some cases where it was decided that no effect must be given to an essential or material variation that does not comply with the statutory requirements of writing and signature.⁵² In some cases, the courts have avoided the otherwise inevitable injustice of enforcing the written contract and ignoring the subsequent informal variation by calling in aid from English law cases which draw a distinction between variation, which must conform to the statutory formalities, and waiver, which need not.⁵³

In *Neethling v Klopper*,⁵⁴ the court held that a valid contract which had been cancelled could be revived, where both parties waived their rights created by

⁵¹ Christie (2011) p 119.

⁵² Christie (2011) p 119.

⁵³ Christie (2011) p 119.

⁵⁴ 1967 (4) SA 459 (A).

the cancellation of the agreement, and that the agreement does not constitute a fresh agreement of sale.

In *Venter v Birchholtz*,⁵⁵ the court held that section 1(1) of Act 71 of 1969 was applicable, and section 1(1) of Act 68 of 1957 was not. The verbal agreement could not be regarded as severable from the alleged contract of sale and the contract was not valid.

Neethling v Klopper goes a long way towards permitting the informal revival of a contract which originally complied with the Act and waiver of the rights arising from termination of the contract, but it does not permit an informal revival which alters any of the material terms of the original contract. Cancellation is not the same as subsequent variation, and may be done orally.

2.6.6 Signature by agents

The principle that a contract must be signed by parties, and if not by them by agents acting on their written authority, has caused more difficulty than anything.⁵⁶ It is inadequate that there must be written authority if the agent acts on oral authority in ignorance of the fact that he or she has also been given written authority. If authority is given by telegram or phonogram, it has been held to be sufficient since it is written, and section 2(1) does not require the agent's written authority in the presence of the principal.⁵⁷

In *Thabethe v Mtetwa*,⁵⁸ the issue to be decided upon was whether, on the construction of the document recording the terms of the agreement, the signatory thereto was an executrix of the deceased's estate, sold the property in her own capacity, or in her capacity as representative of the estate. The court held that if it was to be found that a contract was intended to record a sale of the property by the two executrices of the estate, both their signatures had to appear on the deed of sale.

⁵⁵ 1972 (1) SA 276 (A).

⁵⁶ RH Christie *Law of Contract in South Africa* (7th ed) (2016) p 137.

⁵⁷ Christie (2016) p 137.

⁵⁸ 1978 (1) SA 80 (D) 84.

Once the executrices were identified as being the seller of the property, in order to comply with the requirement in section 2(1) of the Alienation of Land Act,⁵⁹ namely that the deed of sale must be signed by the parties thereto, both had to append their signatures to the deed of sale, or in the absence thereof, an agent with written authority to represent the co-executor who did not sign the agreement had to do so. It is not enough that there be written authority, the agent needed to act on it; if the agent acted on oral authority in ignorance of the fact that written authority had been given, this is regarded to be insufficient.⁶⁰

The party signing the deed of alienation is acting on written authority, which arises only where the signatory is not a party to a contract but rather someone other than the party who purports to sign as an agent on the party's behalf. Executors are not in the same position as partners, and if all do not sign personally, the executor who does not sign must be authorized in writing by all his co-executors.⁶¹

Contracts on behalf of companies are governed by the Companies Act 71 of 2008. Section 1(a) states that: 'any contract which if made between individual persons would by law be required to be in writing and be signed by the parties to be changed therewith may be made on behalf of the company in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or be discharged.'

This overcomes the difficulty that the company itself can never authorize its agents in writing, since it cannot write, and the only question in sale of land, as in all other contracts made on behalf of a company, is whether the agent did in fact act under the company's authority.⁶²

Proof of a resolution of the company's board of directors is sufficient, provided the company's memorandum and articles have been complied with, as is

⁵⁹ Act 68 of 1981.

⁶⁰ 1978 (1) SA 80 (D) 84.

⁶¹ 1978 (1) SA 80 (D) 84.

⁶² Christie (2011) p 121.

proof that the agent was given the company's authority orally.⁶³ In *Northview Shopping Centre (Pty) Ltd v Revelas Properties Johannesburg*,⁶⁴ the court held that a member of a close corporation does not require written authority to conclude a contract for the sale of land on behalf of the close corporation of which he or she is a member because such member's authority to act is derived from the Close Corporation Act 68 of 1984, section 54(2). But where such member authorizes a non-member to conclude a contract for the alienation of immovable property on the close corporation's behalf, such authority must be in writing.

A corporation that is not covered by the Companies Act, the Close Corporation Act, or any special legislation, but which is a legal persona, has the same difficulty in that it cannot write, so the requirement that its agents be authorized in writing cannot be applied, and the only question is whether the agent or officer who signed was properly authorized.

2.6.7 Contents of the written contract

In terms of section 2(1), which requires a 'deed of alienation,' it is not necessary that the terms of the contract be contained in one document. A tacit term of the contract is also in a deed of alienation for the purpose of section 2(1). The question of how much of the contract must be in writing has led to indefinite predicaments; however, there is no doubt that the material and essential terms must be in writing.

A document signed by the offeror, and then amended in a material aspect by an agent orally authorized by and in the presence of the offeror, who signs, is valid. The question of what terms, if any, may be omitted from the writing and proved by extrinsic evidence has given rise to two lines of thought.⁶⁵

The first holds that because section 2(1) requires the contract to be in writing, it necessarily follows that the whole contract must be in writing and no

⁶³ Christie (2011) pp 121–122.

⁶⁴ CC 2010 (3) 630 (SCA).

⁶⁵ Christie (2011) pp 121–122.

additional terms whatsoever may be proved by extrinsic evidence.⁶⁶

The second line of thought is that only the essential and material terms of the contract need be in writing, so extrinsic evidence may be given of immaterial or minor terms without affecting the validity of the contract.⁶⁷

2.6.8 Description of the land

A sale of an identifiable piece of land together with a house in the course of erection on it, to be completed by the seller, is valid provided the nature of the house can be identifiable from the plans, which will enable the builder to complete it without further reference to the seller.⁶⁸

The name or street number of a piece of land is sufficient to identify it. A description only identifying land as having been pointed out in terms of the deeds, *inter alia* involving evidence of oral consensus, is therefore insufficient. Even if the unit is identifiable, inclusion in the contract of an identifiable parking space, if inseverable, renders the whole description insufficient.

In *Tsatsabane Municipality v Thabula Trade and Investment (Pty) Ltd*,⁶⁹ the issue was about the description of the property which was sold in two written sale agreements as “the old golf course and horse racing facility course”, the court held that both of them were insufficient for the purpose of the alienation of land.

2.6.9 Identity of the parties

The identity of the parties is an essential term of the contract, so the parole evidence rule is not admissible to vary the provisions of a written alienation of land insofar as they identify the parties.⁷⁰ Consequently, the parole evidence rule is not admissible to prove that one of the signatories, described in the contract as the buyer or the seller, was in truth an agent acting on

⁶⁶ Christie (2011) p 123.

⁶⁷ Christie (2011) pp 123–124.

⁶⁸ Christie (2011) p 125.

⁶⁹ 2012 (4) All SA 219 (NCK).

⁷⁰ Christie (2011) p 126.

behalf of the true buyer or seller.

2.6.10 Price

The price is an essential term of any contract of sale. A written contract for the sale of land that does not fix the price or leaves it for subsequent negotiation is void, though a properly signed written contract of sale of land together with the movable assets for a lump sum⁷¹ price is valid even though no specific portion of the price is allocated to the land. The method of payment may be made sufficiently clear by implied terms, provided that it can be inferred from the document itself.

In *Gandhi v Smp Properties (Pty) Ltd*,⁷² the court found that the contract was not validly cancelled because R20 000 was not paid on exercise of option or within a reasonable time, and accordingly a valid and enforceable contract of sale had not been concluded.

2.7 Other contracts and formalities concluded in terms of the law

2.7.1 The effect of non-compliance

The effect of non-compliance with the requirements of section 2(1) is that the contract shall not be of any force or effect.⁷³ One party may not enforce an informal contract against the other, even if he has performed fully his part of the contract, such as effecting transfer of land.

2.7.2 Donation

Section 5 of the General Law Amendments Act of 1956 states that:⁷⁴ 'no executory contract of donation shall be valid unless the terms thereof are embodied in a written document signed by the donor or by the person acting on his written authority granted by him in the presence of two witnesses.'

Moreover, where the asset in question is land, section 2 of the Alienation of

⁷¹ Christie (2011) p 128.

⁷² 1983 (1) SA 1154 (C).

⁷³ Christie (2011) p 128.

⁷⁴ Hutchison et al (2017) p 167.

Land Act, 1981 is also applicable, section 2(2) of which provides that:⁷⁵ ‘no alienation of land shall 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.’

The underlying purpose and objectives of these statutory provisions is to ensure that the association in question concludes an acquiescence of donation, where the asset being offered is land, and to ensure precise certainty of the terms of the legally binding instrument which will resonate with exception peculiar to the donor.

In *Scholtz v Scholtz*,⁷⁶ where the property was the subject of the executory donation, the question was over the price of land over which there was an existing mortgage bond of R2 million. The Supreme Court of Appeal held that the missing term in the contract of donation could in principle be imported by an interpretation of the expressed terms of the agreement or as tacit terms. Appeal was upheld.

2.7.3 Suretyship

Contract of suretyship is covered within the ambit of Act 50 of 1956,⁷⁷ section 6 of which reads as follows: ‘no contract of suretyship entered into after the commencement of this Act shall be valid, unless the terms thereof are embodied in a written document signed on behalf of the surety, provided that nothing in this section contained shall affect the liability of the signer of an oval under the laws relating to negotiable instrument.’

2.7.4 Miscellaneous contracts

Section 17(3) of the Skills Development Act⁷⁸ requires that some learnership contracts, previously referred to as apprenticeship contracts, be in writing and be registered as such. Act 98 of 1978 section 22(3) requires an assignment

⁷⁵ Act 68 of 1981.

⁷⁶ 2012 (1) SA 382 (WCC).

⁷⁷ General Law Amendment Act 50 of 1956.

⁷⁸ Act 97 of 1998.

of copyright to be in writing.

2.7.5 Notarial execution

Act 16 of 1967⁷⁹ section 41 requires servitudes over mining rights, and prospecting contracts, to be notarially executed, and section 46 prescribes the same formality for a mining lease.

2.7.6 Registration

Informal contracts may be binding between the parties, but require the formality of registration, with or without prior notarial execution, in order to convert the parties' personal contractual rights into real rights to be valid against third parties.

2.7.7 Consumer contracts

Distinct from this vintage of formality requirements are a number of statutes that provide for contracts to be reduced to writing, not for the mere purpose of validating the agreement or for its ability in relation to third parties, but simply to inform consumers and provide them with a measure of protection, by securing the advantages of written contracts.⁸⁰ In respect of credit agreements, section 93 (1) of the National Credit Act⁸¹ requires a credit provider to provide a copy of the document recording their agreement to a consumer.

2.7.8 Marriage

To regard marriage as a contract can only lead to confusion and error.⁸² The requirements of a contractual formality prescribe that the creation of the married state can only be regarded as a process called *sui genesis*, and such consequences of the creation of that state bear almost no resemblance to the consequences of the creation of a contract.

⁷⁹ Act 16 of 1967.

⁸⁰ Christie (2011) p 134.

⁸¹ Act 34 of 2005.

⁸² Christie (2011) p 134.

(i) Matrimonial property⁸³

Marriage in community of property: acting spouse requires consent from other spouse. 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. 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.
- (c) Alienate or pledge any jewellery, coins, stamps, paintings or any other assets forming part of the joint estate and held mainly as investments.
- (d) Alienate, cede or pledge any shares, stock, debentures, debenture bonds, insurance policies, mortgage bonds, fixed deposits or any similar assets, or any investments by or on behalf of the other spouse in a financial institution forming part of the joint estate.
- (e) Withdraw money held in the name of the other spouse in any account in a banking institution, a building society or the post office savings banks of the Republic of South Africa.

A spouse shall not without the consent of the other spouse –

- (a) Alienate, pledge or otherwise burden any furniture or other effects of the common household forming part of the joint estate.
- (b) Receive any money due or accruing to that other spouse or the joint estate by way of:

⁸³ Act 88 of 1984.

- (i). remuneration, earnings, bonus, allowance, royalty, pension or gratuity, by virtue of his profession, trade, business, or service rendered by him.
- (ii). Damages for loss of income contemplated in subparagraph (1).
- (iii). Inheritance, legacy, donation, bursary or prize left, bequeathed, made or awarded to the other spouse.

2.8 Contractual formalities required for enforcement against third parties

Some formalities are not requirements for the validity of the agreements in question between parties who are in agreement. A party will not be able to require on the contract or enforce it against third parties unless certain formalities have been observed first. These formalities are aimed at bringing the contract in question to the notice of third parties.

2.8.1 Antenuptial contracts⁸⁴

An oral antenuptial contract is valid between the parties involved, but it has to be notarially executed and registered within three months in order to have effect against third parties.

2.8.2 Long-term lease of land⁸⁵

Section 1 of the Lease of Land Act provides that an oral lease of land agreement is valid, but that long-term lease of land only has effect against the creditor or successor under onerous title of the lessor,⁸⁶ for a period of longer than ten years after it has been entered into and has been registered against the title deed of the leased land. The third parties will also be bound if they were aware of the long-term lease because of the operation and existence of the doctrine of notice principle.⁸⁷

⁸⁴ Deeds Registries Act 47 of 1937.

⁸⁵ Leases of Land Act 18 of 1969.

⁸⁶ Hutchison et al (2017) p 167.

⁸⁷ Hutchison et al (2017) p 167.

2.9 Contractual formalities in terms of electronic contracts

According to section 12 of the Electronic Communications and Transactions Act,⁸⁸ the requirement that a document or information should be in writing is met if the document or information is in the form of a data message and is accessible. The same provision does not apply to alienation of land and agreements for the long-term lease of immovable property in excess of 20 years.

However, it does apply to suretyships and to executors of donations of anything but land. Section 13(2) of the Act provides that an electronic signature can now serve as the functional equivalent of a 'wet' signature. In regard to signatures, the Act differentiates instances where a signature is required in terms of law and those in which it is required by the parties to a transaction.⁸⁹

In instances and circumstances where the signature is required by law and there is no specific inclination of the type of signature, the requirement is not met if an advanced electronic signature is used. When a signature is required by the parties to the electronic transaction and they do not agree on the type of electronic signature, the requirement is met if a method is used to identify the person and to indicate the person's approval of the information communicated, and having regard to all relevant circumstances at the time the method was used.

The case of *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash*⁹⁰ concerned the validity of the cancellation by exchange of emails of a number of agreements. The issue in dispute here was whether or not the names of the parties at the foot of each email constituted the requirement of signature. The court held that the typewritten names of the parties on the emails, which were used to identify the users, constituted 'data' that logically associated them with the data in the body of the emails as investigated, and conformed to the definition of an electronic signature. They therefore satisfied the requirement of signature, with the effect of authenticating the information contained in the emails.

⁸⁸ Act 25 of 2002.

⁸⁹ Hutchison et al (2017) p 168.

⁹⁰ 2015 (2) SA 118 (SCA).

2.10 The orientation and stature in the following legislation are as follows:

2.10.1 Attorneys Act⁹¹

Articles of clerkship contracts require that they be registered. Articles of clerkship shall contain the whole agreement entered into between the parties and shall be pledged with the secretary within one month of their execution. Should any subsequent agreement amending the articles be entered into, the amending agreement shall be lodged within 60 days of its execution. No candidate attorney shall so appear unless a certificate of right of appearance referred to in section 8(3) of this Act has been issued by the society. Articles of clerkship and contracts of service shall be substantially in the form set out in the Third Schedule of the rules of this Act.

2.10.2 Subdivision of Agricultural Land Act⁹²

This act prohibits the subdivision of agricultural land without first obtaining the consent of the Minister of Agriculture. Subject to the provisions of section 2:

- (a). Agricultural land shall not be subdivided,
- (b). No undivided share in agricultural land not already held by any person, shall vest in any person,
- (c). No part of any undivided share in agricultural land shall vest in any person, if such part is not already held by any person,
- (d). No lease in respect of a portion of agricultural land of which the period is 10 years or longer, or is the natural life of the lease or any other person mentioned in the lease, or which is renewable from time to time at the will of the lessee, either by the continuation of the original lease or by entering into a new lease, indefinitely or for periods which together with the first period of the lease amount in all to not less than 10 years, shall be entered into,
- (e). (i). No portion of agricultural land, whether surveyed or not and whether

⁹¹ Act 53 of 1979.

⁹² Act 70 of 1970.

there is any building thereon or not, shall be sold or advertised for sale, except for the purpose of a mine as defined in section 1 of the Mines and Works Act, and

(ii). No right to such portion shall be sold or granted for a period of more than 10 years or for the natural life of any person or to the same person for a period aggregating more than 10 years, or advertised for sale or with a view to any such granting, except for the purposes of a mine as defined in section 1 of the Mines and Works Act.

2.10.3 Foreign Exchange Act⁹³

The treasury must give approval in dealing with foreign currency through the South African Reserve Bank, which is the custodian of the monetary policy of the country, and gives indication of the value of foreign reserves available.

2.11 The current position of a signature in contractual formalities

With changing times, it has become custom and convention that contracts are based on consensus, which could be interpreted as being actual or apparent. As long as the parties reach agreement with the serious and deliberate intention to create obligations and be bound by them, that provides a sufficient basis for contractual liability, and it is not always necessary to reduce the contract to writing or to comply with other formalities such as signature.⁹⁴

2.11.1 Significance of a signature in contractual formalities determined by the parties

It has become inherent that contracts be reduced to a written instrument. The notion and rationale behind reducing contracts to a written document is primarily to enhance identification and proof of the existence of a contract with no bearing on the existence or validity of the contract.

When one party signs the written contract, the signature indicates acceptance of its terms in accordance with the rule *caveat subscriptor*.⁹⁵ If the parties

⁹³ Act 9 of 1933.

⁹⁴ S Cornelius 'The Significance of Signature for the Validity of a Contract in South Africa' (2012) p 5.

⁹⁵ Cornelius (2012) p 6.

clearly agreed that their contract would not be binding against each other, and it is reduced to writing and signed by both of them, a court will give effect to the true intention of the parties in the following regard.

The parties may later undo their provisions and agree that their contract will not be binding as such, unless it complies with required formalities, and conclude the contract tacitly or verbally.⁹⁶ The presumption is that parties who resort to writing on their own do so precisely for evidential reasons rather than to impose contractual formalities against each other.⁹⁷

In *First National Bank v Avtjoglou*,⁹⁸ the court held that a prior agreement between the parties, that their contract would be valid if it was reduced to writing and signed by both parties, preceded and if either of the parties refused to sign the written contract, the doctrine of fictional fulfilment could be invoked to hold them liable in terms of the contract as if it had been signed.

On appeal, this inclusion was justifiably questioned, although it was not overturned by the full bench of the Western Cape High Court. A condition precedent, by definition, occurrence or non-occurrence of an uncertain future event and fulfilment cannot depend entirely on the will of either party. The decision of whether or not to sign the written instrument lies squarely with the will of each party and therefore the most significant element of a condition precedent is absent.

The most acceptable construction and formulation subsequent to reaching consensus is that the contract would be valid if it were reduced to writing and signed by both parties indicates that there is a pending compliance issue with formalities with no intention to create a binding obligation. At most, such an agreement amounts to a *pactum de contrahendo*, which does not give rise to any obligations until such time as the eventual instrument is reduced to writing and signed by both parties.⁹⁹

⁹⁶ Cornelius (2012) p 6.

⁹⁷ Cornelius (2012) p 6.

⁹⁸ 2001 (1) SA 989 (C).

⁹⁹ Cornelius (2012) p 6.

2.11.2 Position of a signature in contractual formalities determined by law

The nature and extent of such formalities and the consequences of non-compliance depend on the interpretation of the Act concerned. It must be stressed that any statutory provision must be interpreted in conformity with the common law rather than as acting against it, unless it is clear that the legislator's intention is to alter the common law beyond requirement.¹⁰⁰

It is a well-established principle of statutory interpretation that the statutes law does not alter the common law beyond requirement, or more than is necessary, and that this is clearly expressed in the provision concerned.¹⁰¹ When it comes to compliance with statutory formalities, the rules of common law, as unpacked above, still apply even today, unless the provision provides otherwise. This means that, as a general rule, a contract does not have to comply with formalities, unless clearly expressed in the statutory provision concerned.

Therefore, where section 15 (3) of the Matrimonial Property Act¹⁰² states that a spouse married in community of property may not enter into some contracts without the consent of the other spouse, such consent can be given informally or tacitly, as section 15 (3) does not prescribe any formalities.

Similarly, where a statutory provision provides that a contract must be in writing, this does not imply that the instrument must also be signed. For example, section 2 (1) of the Alienation of land Act¹⁰³ provides that any agent who signs a deed of alienation Act, acting on behalf of the purchaser or seller, must also act on the written instruction of either of the parties.

In *Hugo v Gross*¹⁰⁴ the court held that it can be accepted that the principal is not required to sign the agent's authority and that any form of writing is sufficient, and it is possible for such writing to take various forms, subject, of

¹⁰⁰ Cornelius (2012) p 7.

¹⁰¹ Cornelius (2012) p 7.

¹⁰² Act 88 of 1994.

¹⁰³ Act 68 of 1981.

¹⁰⁴ 1981 (1) SA 154 (C).

course, to authentication.

Obviously, if the principal himself decides to write the authority, it will be sufficient and accepted. Similarly, should the principal convey his instructions telephonically to his secretary, dictating an authority, such authorization, when typed, would probably constitute the principal's written authority.¹⁰⁵

In *Van der Merwe v D.S.S.M Boerdery B.K.*,¹⁰⁶ the agent, in the presence of the seller, wrote on the deed of alienation that he was acting on behalf of the seller in the sale of the property. The court held that this validity constituted the written instruction to sign alienation on behalf of the seller as required by section 2(1), despite the fact that it was not signed by the seller.

A similar provision is contained in section 5 of the General Law Amendment Act.¹⁰⁷ An executory donation is only valid if the terms of the donation are reduced to writing and signed by the donor or person acting on his or her written authority, granted in the presence of two witnesses. In circumstances where an agent is given explicit permission to sign on behalf of the donor, neither the signature of the donor nor of the witnesses is a prerequisite to validate of the authority.

Witnesses are part of the attestation¹⁰⁸ of the written contract. The signature of a written contract has become an important norm in modern commerce and attestation by witnesses has become an important component of that norm. However, the general rule is that it is not necessary to reduce a contract to writing or to comply with any other formalities, and similar principles in terms of signature are applicable to attestation by witnesses in order to create a legally binding agreement.

This means that it is generally not necessary for the parties to conclude an agreement in the presence of the witness, unless statutory provision clearly stipulates that attestation is a substantive requirement for validity of a

¹⁰⁵ 1981 (1) SA 154 (C).

¹⁰⁶ 1991 (2) SA 320 (T).

¹⁰⁷ Act 50 of 1956.

¹⁰⁸ Cornelius (2012) p 9.

contract.¹⁰⁹

2.12 Rectification

Contractants¹¹⁰ who reduce their agreement to writing run the risk that, either by accident or the design of one of them, the document may not give accurate expression to their common intention. From the subjective approach of our law to the basis of contractual liability, it follows that parties cannot be bound to a document which does not reflect their true agreement.

A party to an incorrectly recorded agreement must therefore be entitled to rely on real consensus and to have the document formally corrected to express their true common intention. What is rectified is not the contract itself as the juristic act, but the document, inasmuch as it does not express what the contractants intended to be the content of their juristic act. The court is only interested in altering the document.

Rectification maybe claimed without seeking ancillary relief, and a court may be requested merely to correct a document that records the common intention of the parties incorrectly. Since it is the document itself and not the juristic act expressed by the document that is corrected, rectification does not amount to a variation of the contract.

The court requires that a party claiming for rectification must establish that, as a result of error or mistake, the document does not reflect the common intention of the parties, and must indicate how the document is to be reformed to reflect their true intention.

In *Tesven CC v SA Bank of Athens*¹¹¹ it was finally settled that rectification is not restricted to cases where, contrary to the belief of the parties, the document is an inaccurate representation of the terms of their agreement. In order to prevent the enforcement of what was not agreed upon, the remedy was held to be competent also where, although there was no mistake in the expression of the agreement in

¹⁰⁹ Cornelius (2012) p 9.

¹¹⁰ Van Huyssteen et al (2016) p 172.

¹¹¹ 2000 (1) 268 (SCA) [1994] 4 ALL SA 396 (A).

the writing, the parties mistakenly thought that a prior or contemporaneous oral understanding, deliberately not recorded in writing, could apply concurrently with the document.

Rectification may also involve not only the correction of verbal error but also the insertion of clauses which were omitted, even though parties originally expressly agreed not to insert them in the written instrument. Rectification is not granted if the effect of it would be to prejudice a third party, for instance creditors of an insolvent party.

2.13 Revival

In *Sewpersadh and another v Dookie*,¹¹² the issue was whether the appellants' intention in entering a fresh agreement was to revive a cancelled agreement, and if so, whether such could be validly concluded in light of the Alienation of Land Act 68 of 1981, section 2. The court held that the revival of the agreement was not precluded by failure to comply with the provisions of the Act and dismissed the application. Such informal revival is possible only if it does not involve the alteration of any of the material terms of the original written agreement.

The above court decision was reversed in the case of *Sewpersadh and another v Dookie*.¹¹³ The court held that the reference drawn by the court below from the late filing of the answering affidavit simply had no basis. There was no hint at all at the reason for such delay.

For these reasons, the court below was found to have erred in finding that the agreement of sale had been revived. This finding dispenses with the need to deal with the question of whether the agreement had to comply with the formalities prescribed in the Alienation of Land Act. The written contract of purchase and sale entered into by the appellant and the respondent on 7 October 2003 was declared null and void.

In *Marias v Kovacs Investments*,¹¹⁴ the case dealt with the sale of immovable

¹¹² 2008 (1) All SA 286 (D).

¹¹³ 2008 (1) All SA 286 (D).

¹¹⁴ 2009 (1) All SA 174 (C).

property, entered into by written agreement, for which the suspensive condition must be fulfilled. The court found that it could be said that the parties intended the suspensive condition to be fulfilled in any way other than what was expressly stipulated in the deed of sale. The court also found that the contract had therefore lapsed.

The case of *Kovacs Investments 724 (PTY) Ltd v Marias*¹¹⁵ dealt with the sale of immovable property, where written agreement was involved. The court found that securing a loan in an amount less than stipulated constitutes variation of terms and not waiver of rights, it is contrary to the provisions of section 2 (1) of the Alienation of Land Act and not to the variation clause. No express references to formalities are required.

The case of *Fairoaks Investments Holdings (Pty) Ltd and another v Oliver and others*¹¹⁶ involved a contract for the sale of land which had lapsed due to non-fulfilment of a suspensive condition, and parties thereafter agreed to revive the lapsed contract with amendments. They entered into an agreement to buy and sell on terms different from the original terms previously agreed to. Such an agreement has to comply with the provisions of section 2 of the Alienation of Land Act 68 of 1981;¹¹⁷ therefore, appeal was dismissed.

2.14 Conclusion

Contractual formalities are not a cast-in-stone requirement to conclude a legally binding contract; it is up to the parties to include any prescribed contractual formalities in order to be protected and to serve as a proof. Contractual formalities are not a requirement for every contract to be valid, but serve to guard parties in case there are disputes, and are available in specific contracts that are determined by the parties and by law.

Contractual formalities are there to protect parties against fraud, criminal activities and any delictual claims that may arise as a result of failing to honour a contract.

This may arise in a contract where one party may want to waive or cancel the

¹¹⁵ 2009 (6) SA 560 (SCA).

¹¹⁶ 2008 (4) SA 302 (SCA).

¹¹⁷ Act 68 Of 1981.

contract on the basis of its informal nature and claim that it did not comply with the formally prescribed requirements for the formation of a legally binding contract. Contractual formalities serve to guard parties against any short-changes that might occur. If the statutes stress that certain contractual formalities must be observed in order for the contract to be valid and the parties need to comply with formalities or requirements as prescribed, failing to comply will render their contract void.

CHAPTER THREE: CONCLUSION

The fundamental principle behind the crafting of contractual formalities into law of contract was to provide protection to contractual parties when they enter into a contractual agreement, or when they conclude a legally binding covenant. The inclusion of the contractual formalities as determined by the parties and by law is imperative because they entail forms and principles which the parties should adhere to when they opt to enter into a contractual agreement of which formalities are included as a requirement. Contractual formalities are there to serve as a guide to the parties in terms of what needs to be included in their agreement. In some cases, they prescribe the form which some of their contractual aspects should take in order to be regarded as binding.

It is important to mention that a contract is perfectly valid if crafted informally by words or conduct, but in proving its existence, the burden of proof is on the party who alleges the existence of a contract. A written contract offers various advantages. First, the preparation of the contract gives parties a chance to consider their positions before committing themselves with their signature.¹¹⁸ Second, the burden of proof is simplified. Once the defendant's signature is proved or admitted, the plaintiff has discharged his burden and the burden is then on the defendant to prove the existence of fraud, misrepresentation or whatever defence he might have.¹¹⁹ Third, the scope for subsequent disagreement about the terms of the contract is very much narrowed, since the terms are in writing for everyone to see.¹²⁰

In order for the parties to gain these advantages they will sometimes decide to make their contract in a formal manner, usually in writing and sometimes by notarial deed. The law, usually by statute, imposes the requirement of writing or some greater degree of formality for certain types of contract.

I am in agreement with Innes's position in the case of *Goldblatt v Fremantle*,¹²¹ that, subject to certain exceptions, mostly statutory, any contract may be verbally entered into, writing is

¹¹⁸ Christie (2011) pp 109–110.

¹¹⁹ Christie (2011) pp 109–110.

¹²⁰ Christie (2011) pp 109–110.

¹²¹ 1920 AD 123.

not essential to contractual validity, and if during negotiations mention is made of a written document, the court will assume that the object was merely to afford facility of proof of the verbal agreement, unless it is clear that the parties intended that the writing should embody their contract. The parties have the option to agree that their contract shall be a written instrument.

The research question was whether formalities are required for the formation of a valid contract, and in which ways formalities can ensure that a contract is valid and enforceable. Formalities are not a requirement for the formation of a valid contract. Provided all the other requirements for validity are met, the parties may express their intentions in whatever form they like. Formalities can ensure that the contract is valid and enforceable by compelling the parties to stick to prescriptions when they conclude a valid contractual agreement, where they opted to contract in terms of formalities. To establish whether statutory formalities apply in a particular case, the agreement must be interpreted to ascertain whether it contains the essential features of the type of transaction that the statute, on a proper interpretation thereof, seeks to regulate. The courts have held that, in order to avoid frustration of the objectives of the legislature, material variation to contracts for which writings is prescribed must also be in writing to be effective. Statutes which prescribe formalities for contracts may have different objectives, which are relevant to the interpretation of the provisions of the statutes. The objective of the Alienation of Land Act, is to promote certainty regarding transactions for the alienation of land, thereby limiting disputes and discouraging fraud and perjury in respect of an important class of transaction.

Such considerations are also important in respect of contracts of suretyship, but here the requirements of writings and signature serve in addition to make potential sureties aware of the dangers inherent in suretyship by bringing the terms of an often onerous transaction to the direct attention of the surety, and by demarcating the transition from negotiation to obligation. Formalities governing executory donation express the concern of the law to ensure the existence of a serious intention to conclude such a transaction. Legislative formalities provide a party with an opportunity to reconsider the execution of the agreement in writing. Statutory formalities may also serve to protect parties in danger of exploitation, in a case where the written instrument is required to embody terms protecting them. To establish whether statutory formalities apply in a particular case, the agreement must be

interpreted to ascertain whether it contains the essential features of the type of transaction that the statute, on a proper interpretation thereof, seeks to regulate.

However, exclusion of duties in terms of any provision of an agreement, the MOI or rules of a company, or a resolution adopted by a company, whether express or implied, is void to the extent that it directly or indirectly purports to relieve a director of a duty,¹²² in terms of sections 75 and 76, or liability in terms of section 77.¹²³ Contractual formalities ensure that the parties' agreement is binding and enforceable by creating, and ensuring that the parties adhere to all the required formalities aspects set out, such as reducing their contract to writing and being signed by both parties. If parties do not comply with any of the requirements of formalities set out, the contract is void and unenforceable.

Contractual formalities go a long way towards ensuring that parties are protected when concluding a legal valid instrument by guiding them to contract within the scope and ambit of formalities set out in certain contracts. They also play a significant role in ensuring that the contract is interpreted correctly, that the parties understand each other's true meaning and intention, with no ambiguity or confusion.

¹²² P Delport *New Entrepreneurial Law* (2014) pp 123–128.

¹²³ Companies Act 71 of 2008.

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