

27010110

**HAVE THE GOALS OF SECTION 2(1) OF THE ALIENATION OF
LAND ACT BEEN SUCCESSFULLY ACHIEVED?**

by

MELANDIE BUITENDAG

Submitted in fulfilment of the requirements for the degree

LLM LAW OF CONTRACTS

in the

FACULTY OF LAW

UNIVERSITY OF PRETORIA

(FEBRUARY 2015)

Supervisor: PROFESSOR DJ LÖTZ

Co-supervisor: PROFESSOR P STOOP

TABLE OF CONTENTS

CHAPTER 1 : HISTORICAL DEVELOPMENT AND AIMS OF FORMALITIES PERTAINING TO CONTRACTS.....	5
1.1 Introduction.....	5
1.2 Historical development of formalities and section 2(1) of the Alienation of Land Act 68 of 1981.....	7
1.2.1 Introduction.....	7
1.2.2 Cape Colony and Cape Province.....	8
1.2.3 Natal.....	9
1.2.4 Transvaal.....	9
1.2.5 Orange River Colony.....	10
1.2.6 Uniform applicability of the new legislation.....	10
1.3 Aims of formalities in general and in terms of section 2(1) of the Alienation of Land Act 68 of 1981.....	12
1.3.1 Self-Imposed Formalities.....	13
1.3.2 Statutory formalities required by law.....	15
CHAPTER 2 : PROBLEM ANALYSIS OF THE POSITIVE LAW	16
2.1 Introduction.....	16
2.2 Written deed of alienation.....	17
2.2.1 Identity of the parties.....	19
2.2.2 Identity of the <i>res vendita</i>	22
2.2.2.1 Existing property.....	22
2.2.2.2 Future sectional title unit.....	26
2.2.3 Purchase price.....	34
2.2.4 Material terms.....	35
2.2.5 Amendments and revival of a cancelled contract.....	40
2.3 Signed by the parties.....	43
2.4 Agents.....	45

2.5	Section 29(A) of the Alienation of Land Act 68 of 1981.....	47
2.6	Consequences of non-compliance with the prescribed formalities.....	53

CHAPTER 3 : FORMALITIES IN TERMS OF THE CONSUMER PROTECTION ACT 68 OF 2008..... 55

3.1	Introduction.....	55
3.2	General aims and purposes of the CPA.....	55
3.3	Application of the CPA.....	56
3.3.1	Definitions.....	57
3.4	Formalities in terms of the CPA.....	58
3.4.1	Written agreement.....	58
3.4.2	Plain and understandable language.....	60
3.5	“Cooling-off” Right in terms of the CPA.....	60
3.6	Conclusion.....	61

CHAPTER 4 : COMPARATIVE 62

4.1	Introduction.....	62
4.2	Categories of property in Scotland	62
4.2.1	Formalities for the sale of corporeal heritable property.....	63
4.2.2	Conclusion.....	65
4.3	Belgium Law.....	66
4.3.1	Categories of property in Belgium.....	66
4.3.2	Formalities for the sale of property.....	66
4.3.2.1	The negotiations.....	66
4.3.2.2	Preliminary sales agreement.....	67
4.3.2.3	The notarial deed	68
4.4	Conclusion.....	68

CHAPTER 5 : CRITICISM, RECOMMENTAITONS & CONCLUSION..... 70

5.1	Summary of judicial treatment of formalities.....	70
------------	--	-----------

5.1.1	Written deed of alienation.....	70
5.1.1.1	Identity of the parties.....	70
5.1.1.2	Identity of the land sold.....	71
5.1.1.3	Purchase price.....	72
5.1.1.4	Material terms.....	72
5.1.2	Signed by the parties.....	73
5.1.3	Authorized agents.....	73
5.2	Cooling-off right in terms of the Alienation of Land Act and the Consumer Protection Act.....	73
5.3	Comparative Study.....	74
5.4	Recommendations and Conclusion.....	74
	BIBLIOGRAPHY.....	77
	Books.....	77
	Cases.....	78
	Journal Articles.....	84
	Legislation.....	86
	Websites.....	87
	Other.....	87

CHAPTER 1: HISTORICAL DEVELOPMENT AND AIMS OF FORMALITIES PERTAINING TO CONTRACTS

1.1 Introduction

A contract is generally called an obligatory agreement ('verbintenisskepende ooreenkoms').¹ Today the technical term "obligation" is widely used to refer to a two-ended relationship which appears from the one end as a personal right² to claim performance and from the other a duty to render performance.³ In order to ensure that an obligatory agreement entailing the subsequent consequences comes into existence, one has to take a closer look at the subject and nature of that agreement, to ascertain whether formalities are applicable or not.

The development of formalities necessitating a written recordal of a transaction was at odds with the notion that informal agreements should be binding on parties,⁴ creating a trend away from stringent formalities.⁵ In the South African contract law it is accepted that a valid and binding contract can be defined as an agreement between two or more persons,⁶ who have the capacity⁷ to do so, with the intention⁸ of creating a legal⁹ obligation that is possible¹⁰ and certain,¹¹ which complies with the

¹ Van der Merwe SWJ, LF Van Huysteen, MFB Reinecke & GF Lubbe *Contract General Principles* (2012) 7.

² See Hutchison D and Pretorius C *The Law of Contract in South Africa* (2012) at 8, an obligation creates a personal right (*ius in personam*) as opposed to a real right (*ius in rem*).

³ Zimmermann R *The Law of Obligations Roman Foundations of the Civilian Tradition* (1990) 1.

⁴ Myburg *Statutory Formalities in South African Law* (LLD thesis 2013 University of Stellenbosch) 13; Zimmermann 78-82 & 542-544.

⁵ See Hutchison and Pretorius at 7.

⁶ See Hutchison and Pretorius at 6 stating that our law does not recognise a unilateral promise.

⁷ See Hutchison and Pretorius at 6 stating that the parties must have the necessary capacity to contract.

⁸ Hutchison and Pretorius at 6 stating that the parties must have *consensus* on all the material aspects of their agreement.

⁹ Hutchison and Pretorius at 6 stating that the agreement must be lawful, not prohibited by statute or common law.

¹⁰ Hutchison and Pretorius at 6 stating that the obligations undertaken must be capable of performance at the time when the agreement is concluded.

¹¹ Hutchison and Pretorius at 6 stating that the agreement must have a definite or determinable content.

formalities¹² prescribed,¹³ if any. If compliance with these requirements are met, then one can refer to the *nexus* between the parties as a binding contract.¹⁴

As a general rule in South African contract law, no special formalities are required for the making of an enforceable contract between parties.¹⁵ Contracts, as a general rule, do not depend on compliance with formalities for their validity.¹⁶ Frequently valid agreements are concluded without any formalities applicable thereto. In *Goldblatt v Fremantle*¹⁷ Innes CJ stated the following:

“Subject to certain exceptions, mostly statutory, any contract may be verbally entered into; writing is not essential to contractual validity.”

There is however a proviso to the general rule that in the event where statutes prescribe formalities for specific types of contracts, these formalities are generally obligatory which have to be complied with to ensure contractual validity.¹⁸ There are two exceptions to the general rule above.¹⁹

Firstly certain statutory requirements for certain types of contracts, which may prescribe writing, notarial execution and registration of the contract.²⁰ The understanding and practical application of these statutes and their successors are not without difficulties as recent case law reveals the conundrum of these statutes.²¹

¹² Hutchison and Pretorius at 6 where the specific type of agreement requires compliance with formalities, these formalities must be observed.

¹³ Hutchison and Pretorius 6.

¹⁴ Hutchison and Pretorius 6.

¹⁵ Christie RH & GB Bradfield *The Law of Contract in South Africa* (2011) 109 and Hutchison and Pretorius 159.

¹⁶ GF Lubbe & CM Murray *Farlam and Hathaway Contract Cases, Materials and Commentary* (1988) 182.

¹⁷ *Goldblatt v Fremantle* 1920 AD 123-128.

¹⁸ The most important for this paper the Alienation of Land Act 68 of 1981; See also other Acts i.g. section 6 of the General Law Amendment Act 50 of 1956 for suretyships and section 1 of the Formalities in Respect of Leases of Land Act 18 of 1969.

¹⁹ Hutchison and Pretorius 159.

²⁰ Hutchison and Pretorius 159.

²¹ Nagel & Lötze *De Jure* 169.

It is particularly clear in the amount of legal disputes arising from sale agreements of immovable property which are subject to statutory formalities.²² Secondly the parties may agree, *inter partes*, to reduce the terms of the contract to writing, as a pre-requisite for a valid and binding agreement between them.²³ Latter will be briefly discussed below.²⁴

This chapter will primarily provide the background and justification of formalities in general and specifically in terms of section 2(1) of the Alienation of Land Act²⁵ applicable to all sales of immovable property in South Africa. Subsequent chapters will examine each requirement individually and explore the challenges faced by, *inter alia*, the parties to the agreement, legal practitioners and the judicial system. Latter will be illustrated at the hand of a generous amount of reported cases.

1.2 Historical development of formalities and section 2(1) of the Alienation of Land Act 68 of 1981.

1.2.1 Introduction

Our contract law is in essence a modern version of the Roman-Dutch law of contract and a fair amount of borrowing from English law.²⁶ Form has been described as the oldest norm.²⁷ Even in classical Roman law a document recording the content of the stipulation was usually drawn up.²⁸ Such a document had a purely evidentiary function and was neither required for the validity of the transaction nor could it replace the oral exchange of question and answer.²⁹

²² See section 2(1) of the Alienation of Land Act 68 of 1981.

²³ Christie & Bradfield 110 and Hutchison and Pretorius 159.

²⁴ See 1.3.1.

²⁵ Act 68 of 1981.

²⁶ Hutchison and Pretorius 11.

²⁷ Zimmermann 82.

²⁸ Zimmermann 79.

²⁹ Zimmermann 79.

At common law, a contract for the sale of land, as with any other sale, requires no formality for its validity.³⁰ The sale of land may be concluded informally.³¹ The sale could validly be entered into orally, by conduct, in writing duly signed, in writing without the deed being signed or by an orally authorised agent.³² The written record is only required for particular transactions, contrast to the general rule that all formless agreements are enforceable.³³ A contract of sale of land is imposed with certain formalities usually warranted by the consideration of the property subject to the sale.³⁴

Various successive South African legislatures³⁵ imposed certain formal requirements applicable to sales of land.³⁶ Almost all pre-union legislation prescribing formalities for contracts of sale of land was contained in statutes aimed at the collection of transfer duty by the state.³⁷

1.2.2 Cape Colony and Cape Province

In the Cape Colony and Cape Province the common law applied until the General Law Amendment Act 68 of 1957 was promulgated.³⁸ Until the promulgation, sale of land could be valid whether it was oral, tacit or written.³⁹ There were however exceptions applicable to sales of land through agents.⁴⁰

³⁰ Wulfsohn PM *Formalities in respect of Contracts of Sale of Land Act (71 of 1969) (1980) 2.*

³¹ Wulfsohn 2.

³² Wulfsohn 2.

³³ Zimmermann 85.

³⁴ Zimmermann 85.

³⁵ See 1.1.3-1.1.7 for a brief discussion of the applicable legislation.

³⁶ Myburg 15.

³⁷ Van Rensburg ADJ & Treisman SH *The Practitioner's Guide to the Alienation of Land Act (1984) 21*; Myburg 15; sections 7 and 9 of Act 15 of 1855; sections 26 and 27 of Act 5 of 1884; sections 3 and 4 of Act 7 of 1903; Law 20 of 1895; section 25 of Proclamation 8 of 1902; section 34 of Chapter LXVII of the Law Book; section 44 of the Transfer Duty Ordinance 12 of 1906.

³⁸ Wulfsohn 2.

³⁹ Wulfsohn 2.

⁴⁰ Wulfsohn 2; Sections 3-9 of Act 15 of 1855 and sections 24-30 of Act 5 of 1884.

1.2.3 Natal

In Natal the common law applied, except where statutes specifically applicable to sales of land applied.⁴¹ Of particular interest was Law 12 of 1884 (known as the “Statute of Frauds”) which did not declare oral sales of immovable property or any interest therein to be invalid.⁴² It merely provided that no action could be instituted based on the oral sale solely.⁴³ There were however exceptions being, that if a party could prove the oral sale substantiated by some writing and signed by or on behalf of the party sought to be bound by it, or if there had been at least part performance by either of the parties.⁴⁴

1.2.4 Transvaal

In the Transvaal, the common law applied until Law 20 of 1895 and section 30 of Transvaal Duty Proclamation 8 of 1902 applied.⁴⁵ Section 17 of Law 20 of 1895 provided as follows:

“No property shall be considered to be lawfully sold until a proper memorandum or declaration has been duly signed by both parties”.

The Transvaal Duty Proclamation⁴⁶ defined fixed property and subsequently required sales thereof to be written and duly signed by the parties or by their duly authorised agents.⁴⁷

⁴¹ Wulfsohn 3; Act 7 of 1903 and Law 12 of 1884.

⁴² Wulfsohn 3.

⁴³ Wulfsohn 3.

⁴⁴ Van Rensburg & Treisman 21; Wulfsohn 3 and the cases cited therein.

⁴⁵ Wulfsohn 4.

⁴⁶ Proclamation 8 of 1902.

⁴⁷ Wulfsohn 4.

1.2.5 Orange River Colony

In the Orange River Colony, the common law applied until the formalities legislation were introduced.⁴⁸ Section 49 Of the Free State Ordinance 12 of 1906 provided as follows:

“No contract of sale of fixed property shall be of any force and effect unless it be in writing and signed by the parties thereto, or by their agents duly authorised in writing.”

The wording of section 49 is strikingly similar to current legislation applicable to sales of land.⁴⁹ It seems that a fore runner to this proviso, namely Volksraad Besluit 1432 of 12 August 1886, enacting that a mineral contract, unless notarially executed, should be void *ab initio*, had a vital influence on section 49 as quoted above.⁵⁰

It seems as though the main objective for imposing such formalities during this period was not to prevent “fraudulent practices” but rather to allow the *fiscus* to keep track of any transactions pertaining to land for the purpose of imposing transfer duty.⁵¹

1.2.6 Uniform applicability of new legislation

The above stated legislation were later variously repealed and replaced by section 1(1) of the General Law Amendment Act 68 of 1957, section 1(1) of the Formalities

⁴⁸ See Wulfsohn 4-5 for a summary of the applicable formalities legislation; sections 34-37 of Chapter LXVII of the Law Book; Transfer Duty Ordinance 12 of 1906; Transfer Duty Act 40 of 1949; General Law Amendment Act 68 of 1957; Formalities in Respect of Contracts of Sale of Land Act 71 of 1969; Pre-Union Statute Law Revision Act 36 of 1976; draft bill published in the Government Gazette, which we called Sale of Land Act 71 of 1969.

⁴⁹ Myburg 15.

⁵⁰ Nagel & Lötze *De Jure* 173-174.

⁵¹ Van Rensburg & Treisman 22; *Brink v Wiid* 1968 1 SA 536 (A) 541 D-E; Myburg 15.

in respect of Contracts of Sale and Land Act 71 of 1969⁵² and finally section 2(1) of the Alienation of Land Act 68 of 1981. These Acts all provided that an agreements for sale of land must be in writing in order to be valid.⁵³ The purpose of formal requirements can no longer be attributed to the collection of transfer duty, as this was by now regulated in a separate statute.⁵⁴ Section 2(1) of the Alienation of Land Act⁵⁵ provides as follows:

“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 the deed of alienation signed by the parties thereto or by their agents acting on their written authority.”

Alienation of land must now be stipulated in a ‘deed of alienation’, and not merely be in writing.⁵⁶ The types of contracts included in the concept ‘alienation’ now also include donations and contracts of exchange.⁵⁷ An important amendment is the definition of ‘land’ which is broader than the prior definition of land as ‘land or any interest in land’ in terms of the Sale of Land Act.⁵⁸ The most important change in the legislation brought about by the latter provisions is that the consequences of non-compliance with the prescribed formalities are now explicitly set out in detail, whereas contracts governed by the former legislation, which failed to comply with requirements as to form were simply declared not to be “of any force or effect”.⁵⁹ It seems like the main motivation for prescribing such formalities was to ensure uniformity and legal certainty.⁶⁰ This role will be investigated throughout this paper to address the questions surrounding the effectiveness thereof.

⁵² See Van Rensburg & Treisman at 1 where Act 71 of 1969 is described as “*ill-conceived, theoretically unsound and poorly drafted.*”

⁵³ Myburg 15.

⁵⁴ Transfer of Duty Act 40 of 1949.

⁵⁵ Act 68 of 1981.

⁵⁶ See section 1 for the definition of “deed of alienation” of Act 68 of 1981.

⁵⁷ See section 1 for the definition of “alienate” of Act 68 of 1981.

⁵⁸ De Jager T *Alienation of Land* (1982) 204; Sale of Land Act 71 of 1969.

⁵⁹ Van Rensburg & Treisman 22 and section 2(1) of Act 68 of 1981 where it is stated that unless a deed of alienation complies with the formalities, no alienation of land shall be of “any force or effect”.

⁶⁰ I.e. *Ferreira and another v SAPDC (Trading) Ltd* 1983 (1) SA 235 (A); *Clements v Simpson* 1971 (3) SA 1 (A) and *Philmat (Pty) Ltd v Mosselbank Developments CC* 1996 (2) SA 15 (A).

1.3 Aims of formalities in general and in terms of section 2(1) of the Alienation of Land Act 68 of 1981

The Appellate Division in *Conradie v Rossouw*⁶¹ accepted into our modern law the simple Roman-Dutch concept of a contract as a serious and deliberate agreement, requiring no special formalities for the establishment of an enforceable contract.⁶² Thereby endorsing the general rule. However, as stated above,⁶³ formalities may be decided between the parties themselves, particularly where the terms are intricate or the subject-matter is of commercial importance.⁶⁴ In addition to the latter, statutory formalities are prescribed in certain instances by law and compliance therewith is a prerequisite for contractual validity.⁶⁵ A written contract undoubtedly offers apparent advantages to all the contracting parties involved in the following distinct ways.⁶⁶ Firstly the preparation of the contract gives the parties time to consider the terms and implications thereof before committing themselves; secondly the burden of proof⁶⁷ is simplified by both parties signatures, and thirdly the scope for disagreement about the terms thereof is significantly narrowed.⁶⁸ In the case of notarial authentication, to provide for legal consultation.⁶⁹ For the same reason the law, usually by statute, imposes the requirement of writing or some greater degree of formality for certain types of contract.⁷⁰

Justification for prescribing formalities can be summarized as to ensure reliable evidence of the terms of the contract and to subsequently cut out wasteful litigation caused by faulty memory or attempts to maintain fraudulent claims or defences.⁷¹ It

⁶¹ *Conradie v Rossouw* 1919 AD 279.

⁶² Christie & Bradfield 109.

⁶³ See 1.1 where the two exceptions to the general rule are identified.

⁶⁴ Lubbe & Murray 182-183.

⁶⁵ Hutchison and Pretorius 159.

⁶⁶ Christie & Bradfield 109.

⁶⁷ See Lubbe & Murray 183 where it is stated that “a written document... more substantial proof of the verbal agreement.”

⁶⁸ Christie & Bradfield 109.

⁶⁹ Zimmermann 86.

⁷⁰ Christie & Bradfield 109.

⁷¹ Christie & Bradfield 113; *Clements v Simpson* 1971 (3) SA 1 (A) and *Philimatt (Pty) Ltd v Mosselbank Developments CC* 1996 (2) SA 15 (A).

has also become generally accepted that the object of the Alienation of Land Act⁷² is to promote legal certainty, to thwart fraud and perjury, to minimize disputes and litigation in connection with fixed property transactions which are usually of considerable value and which terms, as a rule, are relatively intricate.⁷³ Various *dicta*⁷⁴ in case law endorse the purpose of formalities legislation. It has been submitted that in no case was it intended to give a *numerus clausus* of the objects of such legislation.⁷⁵ In *Ferreira and another v SAPDC*⁷⁶ Botha JA said:

“The certainty which the Legislature has as its object to achieve by means of enactments of the kind under consideration is directly related to the terms of the contract in question. Hence, the disputes, the possibility of which the Legislature seeks to avoid or to minimize, are disputes concerning the contract in question.”

1.3.1 Self-Imposed Formalities

It has to be distinguished from the outset whether the written document is only intended to facilitate as proof of the agreed terms of the contract, or whether the contract is only valid and enforceable until the written document has been drawn up and executed.⁷⁷ In the latter instance the prior informal agreement lacks contractual force and will only become enforceable once compliance has been effected.⁷⁸

In *Shaik & others v Pillay & others*⁷⁹ the court envisaged three scenarios. In the first instance, no binding agreement between the parties comes into existence until the agreed formalities have strictly been complied with. Secondly, the parties intend that the sole purpose of the agreed formalities is merely to facilitate proof of the agreed terms and conditions. Thirdly, the parties reach an oral agreement which includes an

⁷² Act 68 of 1981.

⁷³ Van Rensburg & Treisman 22 and the authorities cited therein.

⁷⁴ I.e. *Ferreira and another v SAPDC (Trading) Ltd* 1983 (1) SA 235 (A); *Clements v Simpson* 1971 (3) SA 1 (A) and *Philmatt (Pty) Ltd v Mosselbank Developments CC* 1996 (2) SA 15 (A).

⁷⁵ Wulfsohn 11.

⁷⁶ *Ferreira and another v SAPDC (Trading) Ltd* 1983 (1) SA 235 (A) 245H-246A.

⁷⁷ Hutchison and Pretorius 164-165 and Wulfsohn 1.

⁷⁸ Hutchison and Pretorius 164.

⁷⁹ *Shaik & others v Pillay & others* 2008 (3) SA 59 N.

obligation that a written record of the transaction must be produced and signed by them. In latter instance, a breach of the oral agreement occurs if the written record is not produced and signed.⁸⁰ In *Goldblatt v Fremantle*⁸¹ Innes CJ stated the following:

“Subject to certain exceptions, mostly statutory, 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 it is clear that the parties intended that the writing should embody the contract. (Grotius 3.14.26 etc). At the same time it is always open to parties to agree that their contract shall be a written one (see Voet 5.1.73; V. Leeuwen 4.2, sec. 2, Decker’s note); and in that case there will be no binding obligation until the terms have been reduced to writing and signed. The question is in each case one of construction.”

*Goldblatt v Fremantle*⁸² was followed in *Woods v Walters*⁸³ where Innes CJ added⁸⁴

“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 the legal validity should be postponed until the due execution of a written document, lies upon the party who alleges it...”

Thus it can be concluded that the law presumes, in the absence of contrary evidence that the parties’ common intention was to facilitate mere proof of the terms of their agreement. If a party alleges that writing was a requirement for the validity, the party who alleges bears the *onus* of proving such a common intention.⁸⁵ One should always take cognisance of the facts of each case.

⁸⁰ Lötzt DJ “The Law of Purchase and Sale” 2008 *Annual Survey of South African Law* 1066.

⁸¹ *Goldblatt v Fremantle* 1920 AD 128-129.

⁸² *Goldblatt v Fremantle* 1920 AD 128-129.

⁸³ *Woods v Walters* 1921 AD 303.

⁸⁴ *Woods v Walters* 1921 AD 305-306 and at Lubbe & Murray 184.

⁸⁵ Hutchison and Pretorius 164.

1.3.2 Statutory formalities required by law

The sale of immovable property is explicitly regulated by legislation.⁸⁶ The Alienation of Land Act⁸⁷ plays a pivotal role in the regulation of the former mentioned sales. The requirements of a written contract and additional pre-requisites⁸⁸ for sales of land have been adopted on ground of public policy, and not for the advantage of any class of persons, like sellers or purchasers.⁸⁹ Accordingly, the parties to the sale of immovable property may not waive the requirements of the legislation⁹⁰ as compliance is obligatory. The consequences of non-compliance with the provisions of sections 2(1), 2(2), 2A read together with sections 28(1) and 29A of the Alienation of Land Act⁹¹ will be critically assessed against the backdrop of the legislature's aims for the prescribed formalities legislation.

In the chapters to follow an in depth evaluation of section 2(1) of the Alienation of Land Act⁹² will be formed as to whether the act has successfully achieved its ambitions as intended by the legislature.

⁸⁶ Section 2(1) of the Alienation of Land Act 68 of 1981.

⁸⁷ Act 68 of 1981.

⁸⁸ Signed by the parties or their authorized agents.

⁸⁹ Wulfsohn 14; *Da Mata v Otto* 1971 (1) SA 473 (T).

⁹⁰ Wulfsohn 14; *Da Mata v Otto* 1971 (1) SA 473 (T) at 772A-F.

⁹¹ Act 68 of 1981.

⁹² Act 68 of 1981.

CHAPTER 2: PROBLEM ANALYSIS OF THE POSITIVE LAW

2.1 Introduction

In this chapter the problems surrounding the stringent requirements of the Alienation of Land Act⁹³ are scrutinized at the hand of each requirement. Section 2(1) of the Alienation of Land Act⁹⁴ provides as follows:

“No alienation⁹⁵ of land⁹⁶ 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 the deed of alienation signed by the parties thereto or by their agents acting on their written authority.”

The section can be divided into three main parts, requiring that the agreement of sale should be contained in a written deed of alienation; signed by the parties or their duly authorized agents. It seems quite simple at face value but upon closer investigation it becomes clear that this section unveils a series of cumbersome difficulties. It seems that the root of the notion that non-compliance with the prescribed statutory formalities rendered a deed of alienation null and void, originated from the judgment of *Wilken v Kohler*⁹⁷. Each of these prescribed requirements at the hand of adjudicated cases will be individually discussed below.

⁹³ Act 68 of 1981.

⁹⁴ Act 68 of 1981.

⁹⁵ See section 1 of Act 68 of 1981 for the definition of ‘alienate’. It is defined as sell, exchange or donate, irrespective whether latter is subject to a suspensive or resolutive condition. See Van Rensburg & Treisman at 32 on a discussion pertaining to the motive for the inclusions of the stipulations of suspensive or resolutive conditions. Also see *Scholtz v Scholtz* 2012 (5) SA 230 (SCA) regarding the donation of land and the applicable formalities.

⁹⁶ See section 1 of Act 68 of 1981 for the definition of ‘land’. The definition includes, *inter alia*, any unit, any right to claim transfer of land and any undivided share in land. Also Van Rensburg & Treisman at 23 where it is stated that ‘land’ must be interpreted according to its ordinary meaning namely immovable property. Latter is or intended to become the subject of a separate title deed and the buildings or structures permanently attached thereto.

⁹⁷ *Wilken v Kohler* 1913 AD 135 and LötZ DJ “The Law of Purchase and Sale” 2009 *Annual Survey of South African Law* at 980.

2.2 Written deed of alienation

It is a generally accepted rule of our law that if a contract has been reduced to writing, the writing is regarded as the sole embodiment of the contract and no evidence may be put before a court of any additional agreement allegedly entered into before or contemporaneously with the making of the subject contract, which would have the effect of contradicting, deleting, adding to or varying any of its terms.⁹⁸ This rule is known as the parol evidence rule.⁹⁹ An exception to the said rule is applicable in instances where the written contract does not accurately reflect the agreement which the parties intended, either of them may apply to court and request the court rectify the written contract.¹⁰⁰ Latter is however subject to the proviso that the terms of a contract that is required to be in writing must appear ex facie from the document itself.¹⁰¹

One should bear in mind the requirements applicable to contracts in general, as they also apply concurrently with the statutory requirements pertaining to a deed of alienation. The essentials of a valid contract are those elements which must be present before a valid contract can be said to exist.¹⁰² These essentials apply to every contract including a deed of alienation.¹⁰³ The essentials of a valid contract can be summarized as *consensus*¹⁰⁴ between the parties; contractual capacity of each party;¹⁰⁵ possibility of performance¹⁰⁶ and legality.¹⁰⁷ In addition to the latter

⁹⁸ Van Rensburg & Treisman 39; Myburg 94; *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A); *Johnston v Leal* 1980 (3) SA 927 (A).

⁹⁹ Van Rensburg & Treisman 39; Myburg 9; *Johnston v Leal* 1980 (3) SA 927 (A). It should be pointed out that there has been a recent judgment in the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 ZASCA 13 where the approach of interpretation in South African law of documents are set out.

¹⁰⁰ Van Rensburg & Treisman 40.

¹⁰¹ Myburg 93 and the authorities cited therein.

¹⁰² See 1.1 above and Hutchison and Pretorius at 6.

¹⁰³ Van Rensburg & Treisman 37;44-45. The essentials of sale are; a term that arranges the delivery of the subject matter to the other party; a term that the party receiving the subject matter shall in return pay a sum of money to the seller and a clear indication that both parties intend to sell and purchase the subject matter respectively.

¹⁰⁴ Van Rensburg & Treisman 37; There must be agreement between the parties that one or more of them shall be bound to performance to the other.

¹⁰⁵ Van Rensburg & Treisman 37; Contracting parties must have the capacity to perform juristic acts.

¹⁰⁶ Van Rensburg & Treisman 37; Performance must be objectively possible at the time of contracting.

requirements, compliance with the prescribed statutory formalities are compulsory to ensure a valid and binding deed of alienation. Now that it has been established that the sale should be recorded in a deed of alienation, the question arises as to what exactly should be recorded therein. With regard to the required content of a deed of alienation,¹⁰⁸ the Act does no more than to provide that an alienation of land be contained in a document or documents, the so-called deed of alienation, signed by each party or his agent acting on his written authority.¹⁰⁹ This entails that the following must appear from the writing; the identities of the seller and purchaser; the essential elements namely the identity of the land sold;¹¹⁰ the amount of the purchase price and every other material terms.¹¹¹ Terms that are *naturalia* do not have to be in writing.¹¹² Thus, where the Alienation of Land Act¹¹³ prescribes that the contract must appear in a deed of alienation, it also means that the recordal itself must embody the parties' *animus contrahendi*.¹¹⁴ This may be achieved either by incorporating the parties' common intention to be bound in one document or by recording the parties' respective declarations of intention so that a contract is constituted by reading the two documents together.¹¹⁵

In the case of *Herselman v Orpen*¹¹⁶ the court found that the following must appear from the written agreement: the parties, the *res vendita* and the amount of purchase

¹⁰⁷ Van Rensburg & Treisman 37; Performance and object must not be contrary to legislation, good morals of public policy.

¹⁰⁸ Section 1(1) of Act 68 of 1981 defines "deed of alienation" as a document or documents under which land is alienated.

¹⁰⁹ Van Rensburg & Treisman 39.

¹¹⁰ Also referred to as the "*merx*" or "*res vendita*".

¹¹¹ Van Rensburg & Treisman 12.

¹¹² Lötze DJ "The Law of Purchase and Sale" 2011 *Annual Survey of South African Law* at 1013 and *Botha v Swanepoel* 2002 (4) SA 577 (T).

¹¹³ Act 68 of 1981.

¹¹⁴ Myburg 45; Hutchison and Pretorius 13; their mutual intention to purchase and sell the subject property.

¹¹⁵ Myburg 45-46.

¹¹⁶ *Herselman v Orpen* 1989 (4) SA 1000 (OK). In this case a document was drafted which declared the *merx* as "erf 1675 Walmer" and that the 'seller' accepted the offer in the amount of R100 000-00 made by the 'purchaser'. Both parties signed the said document. The seller contended, *inter alia*, that the agreement was a *pactum de contrahendo*; the signatures were unqualified, it failed to disclose a method of payment and did not contain the clauses usually present in a deed of alienation. Court found that a valid deed of alienation was concluded by the parties, and therefore binding on them.

price.¹¹⁷ In the event where the parties agree otherwise, all material terms have to be included in the written agreement.¹¹⁸

2.2.1 Identity of the parties

Although section 2(1) does not say so in so many words, written identification of the parties are necessary.¹¹⁹ The question however arises as to what constitutes proper identification to ensure compliance with the said provision. It must be apparent and sure from the deed of alienation itself, who is the alienator (seller) and who is the alienee (purchaser) to whom the land is subsequently alienated.¹²⁰ The respective capacities of the contracting parties must be clearly indicated.¹²¹ There is authority in our case law¹²² supporting the view that an indication in a contract of sale that land is for example sold to “M or his nominee” constitutes sufficient identification of the purchaser for purposes of the formalities legislation.¹²³ If evidence outside the deed of alienation is necessary to establish the name of the seller or the purchaser it will be invalid.¹²⁴ Our courts have however illustrated that meticulous accuracy in the recordal of the identity of the contracting parties are not required.¹²⁵ In *Levin v Drieprok Properties (Pty)*¹²⁶ Corbett JA said:

“In cases where the offer is contained in a written document the extraneous evidence that may be taken into consideration will be circumscribed by the rules relating to the admissibility

¹¹⁷ Lötz DJ “Ten Brink NO v Motala 2001 (1) SA 1011 (D) – Koopkontrak van Grond – kontrakspartye en formaliteite waar ‘n verteenwoordiger namens die koper optree 2002 (35) *De Jure* 365.

¹¹⁸ Lötz 2002 (35) *De Jure* 365 at 367; *Johnston v Leal* 1980 (3) SA 927 (A); *Smit v Walles* 1985 (2) SA 189 (T) and *Jones v Wykland Properties* 1998 (1) SA 355 (K).

¹¹⁹ Kerr AJ *The Law of Sale and Lease* (2004) 85.

¹²⁰ Van Rensburg & Treisman 40.

¹²¹ De Jager 212; *Papenfus v Steyn* 1969 (1) SA 91 (T); *Rheeder v Kruger* 1972 (3) SA 912 (O).

¹²² *Hughes v Rademeyer* 1947 (3) All SA 288 (A); *Berman v Teiman* 1975 (1) SA 756 (W) but see *Botha v Van Niekerk* 1983 (3) SA 513 (A) at 526C-527C where it was held that such a nomination does not amount to a delegation but to a “kontraksoorname”.

¹²³ Van Rensburg & Treisman 42; See also *Rasmussen & another v Clear Mandate Properties CC & others* (2007) JOL 19406 (W) 1, where the purchaser nominated his daughter as his nominee.

¹²⁴ Van Rensburg & Treisman 40; *Grossman v Baruch* 1978 (4) SA 156 (W) AT 341G and 343A.

¹²⁵ Myburg 59; *Van Wyk v Rottcher’s Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A) at 989; *Credit Guarantee Insurance Corporation of SA Ltd v Schreiber* 1987 (3) SA 523 (W) at 525C; *Clements v Simpson* 1971 (3) SA 1 (A) at 198.

¹²⁶ *Levin v Drieprok Properties (Pty) Ltd* 1975 (2) SA 397 (A) at 408.

of parol evidence; and where the written offer relates to a sale of land to which the provisions of s 1 of Act 68 of 1957 (or in the case of contracts concluded after 1 January 1970, the provisions of s 1 of Act 71 of 1969) apply, the requirement that the essential terms of the sale, including the identity of the parties, must appear ex facie the writing may also limit the admissible evidence.”

The formal validity of the sale agreement pertaining to the parties’ identities must be determined *ex facie* by a court.¹²⁷ In *Spiller v Lawrence*¹²⁸ Didcott J, in support of the above view, said the following¹²⁹

“The two situations are fundamentally different. In the one..., when the question of validity relates to the substance of the transaction and not its form, nullity is an illusion produced by a document testifying falsely to what was agreed. In the other ... the cause of nullity is indeed to be found in the transaction’s form. When it is said to consist of a failure to observe the law’s requirement that the agreement be reflected by a document with particular characteristics, the document itself is necessarily decisive of the issue whether the stipulation has been met; for it has been only if this emerges from the document”

In the case of *Scheepers v Strydom*¹³⁰ Van Coller AJ disagreed with the court *quo’s* judgment that the purchaser cannot be identified *ex facie* from the written agreement. He established that the purchaser could be accurately identified even though it was a juristic person duly represented by its two directors. The two directors only contracted in their respective individual capacities should the situation ever arise where the juristic person was never duly incorporated. The court in this matter considered the true intention of the parties, and subsequently concluded that

¹²⁷ *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) All SA 304 at par 13.

¹²⁸ *Spiller and others v Lawrence* 1976 (1) SA 307 (N) at 312B-D.

¹²⁹ *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) All SA 304 at par 13, Smalberger JA referring to Didcott J.

¹³⁰ *Scheepers v Strydom* 1994 (2) All SA 240 (A) at 242. In this case the purchasers bought a farm from the seller in their capacities as co-directors of pre-incorporated company namely Long Valley (Pty) Ltd, alternatively in their personal capacities jointly and severally. The name Long Valley was not available and it was subsequently registered as Strydberg (Pty) Ltd.

it could never have been their intentions to create three alternative purchasers. The contract was therefore declared valid.¹³¹

In the recent case of *Booyesen v Booyesen*¹³² the applicants argued that the deed of alienation disregarded the provisions of section 2(1) of the Alienation of Land Act¹³³ by way of failure to identify the seller correctly.¹³⁴ The court found that the seller did not have legal capacity to sell the property as ownership had not passed at the time of contracting, unless the seller acted as the executor's agent.¹³⁵ The deed of alienation was found to be *void ab initio*.¹³⁶ In this case the deed of alienation was found to be void not on the grounds of an incorrect description of one of the parties, but mainly because one of the parties did not have the necessary legal capacity to enter into the agreement.

An incorrect description of a party can be excised, leaving a valid contract, if after the excision there remains a contract that "forms a coherent and logical whole."¹³⁷ Applying decisions on suretyship in regards to which the prescribed requirements are similar, in appropriate circumstances the omission of such a description can be rectified.¹³⁸

¹³¹ *Scheepers v Strydom* 1994 (2) All SA 240 (A) at 242.

¹³² *Booyesen and Others v Booyesen and Others* 2012 (2) SA 38 (GSJ). In this matter a property was sold by a sole heir of a joint estate, before the estate had been finalised. The applicants contended that the seller was a joint owner and not the sole owner of the said property.

¹³³ Act 68 of 1981

¹³⁴ Löt DJ "The Law of Purchase and Sale" 2012 *Annual Survey of South African Law* 814.

¹³⁵ *Booyesen and Others v Booyesen and Others* 2012 (2) SA 38 (GSJ) par 13 and Löt 2012 *Annual Survey of South African Law* 814.

¹³⁶ *Booyesen and Others v Booyesen and Others* 2012 (2) SA 38 (GSJ) par 12 and Löt 2012 *Annual Survey of South African Law* 814. Note that the deed of alienation was also void for non-compliance with section 2(1) and the Administration of Estates Act 66 of 1965.

¹³⁷ *Twenty Seven Bellevue CC v Hilcove* 1994 2 All SA 293 (A); 1994 3 SA 108 (A) 115E per Van den Heever JA.

¹³⁸ Kerr 88; *Johnston v Leal* 1980 (3) SA 927 (A) at 943F and 945E; See also Löt DJ, Nagel CJ & Joubert EP *Specific Contracts in court* (2010) 28 where it is stated that where an essential or material terms has not been reduced to writing, the contract is not susceptible to rectification.

2.2.2 Identity of the *res vendita*

The description of an existing property and a future sectional title unit will be addressed separately as these respective descriptions are surrounded by their own requirements and identification difficulties.

2.2.2.1 Existing property

In *Clements v Simpson*¹³⁹ the court set out guidelines to be followed and the relevant principles to be applied during the consideration process to ascertain whether a contract complies with section 1(1) of General Law Amendment Act.¹⁴⁰ Firstly, a faultless description of the property, couched in meticulously accurate terms, is not required.¹⁴¹ Secondly the foregoing does not mean that the court will formulate a contract for the parties where their intention cannot be ascertained with a reasonable degree of certainty.¹⁴² Thirdly the test for compliance with the statute, in regard to the *res vendita*, is whether the land sold can be identified on the ground by reference to the provisions of the contract, without recourse to evidence from the parties as to their negotiations and *consensus*.¹⁴³

It is thus fully compliant if the deed itself stipulates adequate description of the subject land to be capable of being related to a particular entity of immovable property.¹⁴⁴ It is however possible that the parties agreed that the purchaser, seller or a third party would choose the *res vendita* from a *genus* or class.¹⁴⁵ Although the choice of a specific piece of land falls within the discretion of one of the parties or a

¹³⁹ *Clements v Simpson* 1971 (3) SA 1 (A).

¹⁴⁰ Act 68 of 1957.

¹⁴¹ *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A) 989.

¹⁴² *Clements v Simpson* 1971 (3) SA 1 (A) at 198.

¹⁴³ *Clements v Simpson* 1971 (3) SA 1 (A) at 198 and *Van Aardt v Galway* 2012 (2) All SA 78 (SCA).

¹⁴⁴ Van Rensburg & Treisman 45.

¹⁴⁵ Myburg 75; *Clements v Simpson* 1971 (3) SA 1 (A) 6G-H; *JR 209 Investments (Pty) Ltd v Pine Villa Country Estate (Pty) Ltd*; *Pine Villa Country Estate (Pty) Ltd v JR 209 Investments (Pty) Ltd* 2009 4 SA 302 (SCA).

third party, the description of land remains objectively ascertainable.¹⁴⁶ In *Odendaalsrust Municipality v New Nigel Estate*¹⁴⁷ Van den Heever J said:

“The contract in itself must place the subject-matter of the transaction, the price and the fact of consensus out of range of the clash of will of the parties. Where the complex of rights flowing from the agreement is such that it is entirely within the discretion of one of the parties to acquire at his election any portion of a particular and defined piece of land and such that the objection or reluctance of the other party cannot thereafter influence or obstruct the selection, the matter has been placed beyond the reach of consensus or cavil and the principle applies: certum est quod certum reddi potest.”

In recent case law¹⁴⁸ the Supreme Court of Appeal scrutinized the inadequate description of the *res vendita* in a deed of sale, which may render it null and void.¹⁴⁹ In this matter the seller argued that the agreement was invalid because it failed to comply with the provisions of section 2(1) of the Act.¹⁵⁰ The seller argued that the agreement was null and void *ab initio* for non-compliance with section 2(1) inasmuch as the latter piece of land¹⁵¹ could not be identified with reference to the provisions of the agreement alone.¹⁵² For the seller’s argument to be sustainable, the Supreme Court of Appeal held that the seller had to rely on tacit terms, which were in conflict with the express terms. The court held that it would be artificial to redefine the *res*

¹⁴⁶ Myburg 75.

¹⁴⁷ *Odendaalsrust Municipality v New Nigel Estate Gold Mining Co Ltd* 1948 2 SA 656 (O) at 665.

¹⁴⁸ *JR 209 Investments (Pty) Ltd v Pine Villa Country Estate (Pty) Ltd; Pine Villa Country Estate (Pty) Ltd v JR 209 Investments (Pty) Ltd* 2009 4 SA 302 (SCA). The facts are shortly that the seller namely Pine Villa Estates sold a certain Portion 7 to JR 209 Investments as the purchaser. The land was to be developed and subsequently sub-divided at the costs of the purchaser. Once the sub-division had taken place, the sole shareholder and director of the seller was entitled to the transfer of a residential home and a portion of the land. This portion was only part of the subject land to be sold. The question arose whether the subject land was properly identified, to comply with the requirements of the Alienation of Land Act 68 of 1981.

¹⁴⁹ Nagel & Lötj 2010 *De Jure* 169.

¹⁵⁰ Act 68 of 1981.

¹⁵¹ The seller argued that although Portion 7 as stated *supra* had been adequately identified, which ultimately forms the subject land of the contract, the area to be excluded and re-transferred to the sole shareholder and director of the seller, the smaller portion, was not properly identified.

¹⁵² Nagel & Lötj 2010 *De Jure* 170.

vendita as suggested.¹⁵³ The court found that the parties created a contract for the benefit of a third party.¹⁵⁴ An additional agreement separate from the deed of alienation forming the subject-matter of the dispute. Therefore cancellation of the agreement was not an option available to the seller. The remedies available to the third party were specific performance or damages pertaining to the smaller portion.¹⁵⁵ It is however noteworthy to take a closer look at the court *a quo*'s interpretation of the description of the property. Rabie J found that the description of a portion of the property, which had to be re-transferred to the third party, was inadequate and did not comply with the requirements of section 2(1). It was found that the contract was void for want of compliance with section 2(1).¹⁵⁶ Rabie J however mistakenly elevated the smaller portion as a separate *res vendita*, which also had to comply with the prescribed formalities. Botha J, however, held that the property was adequately described. The fact that the shape and exact configuration of the smaller portion of land were left in the purchaser's discretion, did not invalidate the agreement.¹⁵⁷

The description of the *res vendita* in the deed of alienation therefore complied with the prescribed formalities, and the portion which, according to the seller, was not adequately described, only found application in the subsequent contract for the benefit of the seller. In latter agreement the portion would be required to be properly described. What is important from this judgment is that the Supreme Court of Appeal's approach is one of substance over form and it would rather be the exception than the rule that a deed of alienation would be deemed null and void because of technicalities.¹⁵⁸

¹⁵³ Nagel & Lötze 2010 *De Jure* 171; *JR 209 Investments (Pty) Ltd v Pine Villa Country Estate (Pty) Ltd; Pine Villa Country Estate (Pty) Ltd v JR 209 Investments (Pty) Ltd* 2009 4 SA 302 (SCA) at 36-37 par 14.

¹⁵⁴ The third party being the sole shareholder and director of the seller.

¹⁵⁵ *JR 209 Investments (Pty) Ltd v Pine Villa Country Estate (Pty) Ltd; Pine Villa Country Estate (Pty) Ltd v JR 209 Investments (Pty) Ltd* 2009 4 SA 302 (SCA) at 37 par 15. The seller's remedies were applicable to the contract for the benefit of a third party, and in the event were the benefit was declined, the seller could not claim from the purchaser.

¹⁵⁶ Nagel & Lötze 2010 *De Jure* 172.

¹⁵⁷ Nagel & Lötze 2010 *De Jure* 172.

¹⁵⁸ Nagel & Lötze 2010 *De Jure* 173.

In the matter of *Van Aardt v Galway*¹⁵⁹ the description of the *res vendita* was the “bone of contention” between the parties.¹⁶⁰ The question arose on whether an option clause, specifically the description of the property subject to the option, was also subject to the same stringent prescribed formalities. The court however found that the option clause was not void for vagueness and therefore complied with section 2(1) Alienation of Land Act.¹⁶¹ It was common cause between the parties that the short description in the option referred to an identifiable farm, as per a previous clause. Wallis JA endorsed the well-known principle that, had it been necessary, evidence of identification of the property could have been led, as it serves to identify the thing that corresponds to the idea expressed in the words of the written contract.¹⁶²

The soundest approach, however, is to identify the land in terms of the description contained in the relevant deed of transfer;¹⁶³ reference to its physical location;¹⁶⁴ reference to its popular name;¹⁶⁵ reference to its objectively determinable relation to

¹⁵⁹ *Van Aardt v Galway* 2012 (2) All SA 78 (SCA). In this matter the parties, both dairy farmers, entered into a lease agreement which contained an option to purchase the respondent’s farm. The appellant purported to exercise this option which the respondent disputed on the ground that the clause containing the option, failed to adequately describe the property. The property was described as “the farm property”. The court found that although the option clause lacked a proper description of the said property, an earlier clause sufficiently identified the property, therefor resulting in proper compliance with the prescribed formalities pertaining to the alienation of land.

¹⁶⁰ LötZ 2012 *Annual Survey of South African Law* 809.

¹⁶¹ Act 68 of 1981 and *Van Aardt v Galway* 2012 (2) All SA 78 (SCA) at 85 par14.

¹⁶² *Van Aardt v Galway* 2012 (2) All SA 78 (SCA) at 84; *Van Wyk v Rottcher’s Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A) at 990-991 as stated by Watermeyer CJ and LötZ 2012 *Annual Survey of South African Law* 810.

¹⁶³ Van Rensburg & Treisman 46; e.g. number of an erf; specific township; specific portion of a farm with reference to its name and district.

¹⁶⁴ Van Rensburg & Treisman 46; e.g. street address; description of properties bordering on it.

¹⁶⁵ Van Rensburg & Treisman 46; e.g. “die plaas Blaaubank” (*Conroy NO v Coetzee* 1944 OPD 207 at 215).

a particular person;¹⁶⁶ reference to a diagram or plan;¹⁶⁷ reference to a description contained in a particular deed of transfer¹⁶⁸ or reference to beacons¹⁶⁹.

2.2.2.2 Future sectional title unit

In terms of the preamble of the Sectional Titles Act¹⁷⁰ the purpose and underlining philosophy of the act is:

To provide for the division of buildings into sections and common property and for the acquisition of separate ownership in sections coupled with joint ownership in common property; the control of certain incidents attaching to separate ownership in sections and joint ownership in common property; the transfer of ownership of sections and the registration of sectional mortgage bonds over, and real rights in, sections; the conferring and registration of rights in, and the disposal of, common property; the establishment of bodies corporate to control common property and for that purpose to apply rules; and the establishment of a sectional titles regulation board; and to provide for incidental matters.

The Sectional Titles Act¹⁷¹ defines 'land' as the land comprised in a scheme as shown on a sectional plan. The Sectional Titles Act¹⁷² does not deal with the validity of an agreement pertaining to the purchase and sale of a unit in an existing or

¹⁶⁶ Van Rensburg & Treisman 46; e.g. "sy plaas" i.e. with reference to a particular person's ownership of the land (*Hutchings v Satz* 1965 (4) SA 640 (W), *Fismer v Roux* 1965 (2) SA 468 (C) and *Cromhout v Afrikaanse Handelaars en Agente (Edms) Bpk* 1943 TPD 302).

¹⁶⁷ Van Rensburg & Treisman 46; does not have to be drawn up by a land surveyor but which must mark the boundaries of the land with reasonable clarity. (*Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A)).

¹⁶⁸ Van Rensburg & Treisman 46; or deed of grant; registered title or even reference to a description contained in another contract – these descriptions are said to be incorporated into the deed of alienation by reference. (*Grobler v Naude* 1980 (3) SA 320 (T) and *Trust Bank of Africa Ltd v Cotton* 1976 (4) SA 325 (N)).

¹⁶⁹ Van Rensburg & Treisman 46-47; provided that the beacon or beacons are erected before the contract is entered into and can be identified with sufficient certainty. (*Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A)).

¹⁷⁰ Act 95 of 1986.

¹⁷¹ Act 95 of 1986.

¹⁷² Act 95 of 1986.

prospective sectional title scheme. The Alienation of Land Act¹⁷³ however includes a sectional title in its definition of land.¹⁷⁴ Therefore the Alienation of Land Act¹⁷⁵ also regulates the validity of agreements pertaining to the purchase and sale of immovable property in a sectional titles scheme. Latter includes the option to purchase a future sectional title.¹⁷⁶ Thus the test for compliance is the same as in the case of existing property.¹⁷⁷ Most of the problems surrounding the purchase and sale of land pertain to the purchase of land where the property is bought off plan. After the development of the said property the purchaser comes to the cold realization that the *res vendita* is not what he or she agreed upon.¹⁷⁸

A sale of a sectional title unit does not include the sale of the participation quota¹⁷⁹ that accompanies the unit.¹⁸⁰ The participation quota is merely the formula to calculate the size of the section's undivided share in the common property.¹⁸¹ What is sold, as a unit, is a section¹⁸² plus the section's undivided share in the common property,¹⁸³ apportioned to the section in accordance with the participation quota of the section. The undivided share in the common property does not constitute a particular portion of land and thus falls outside the scope of the definition of an

¹⁷³ Act 68 of 1981.

¹⁷⁴ Act 68 of 1981. Section 1 defines 'land' as any unit as defined in section 1 of the Sectional Titles Act 95 of 1986 and includes any proposed unit.

¹⁷⁵ Act 68 of 1981.

¹⁷⁶ See *Du Plessis NO & Another v Goldco Motor & Cycle Supplies (Pty) Ltd* 2009 (6) SA 617 (SCA).

¹⁷⁷ See *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A) at 989 and *Clements v Simpson* 1971 (3) SA 1 (A) at 198.

¹⁷⁸ Löt DJ "Koper van Grond se Afkoelreg: Warm Patat of Koue Pampoen?" 2000 (327) *De Jure* 334.

¹⁷⁹ In terms of Act 95 of 1986 it defines 'participation quota' in relation to a section or the owner of a section, as the percentage determined in accordance with the provisions of section 32 (1) or (2) in respect of that section for the purposes referred to in section 32 (3), and shown on a sectional plan in accordance with the provisions of section 5 (3) (g); Also see *Erf 441 Robertsville Property CC v New Market Developments (Pty) Ltd* 2007 (2) SA 179 (W) at par 3.

¹⁸⁰ See Delport H "Description of a Sectional Title Unit in a Deed of Sale" 2008 29(1) *Obiter* at 91.

¹⁸¹ Löt DJ 2008 *Annual Survey of South African Law* 1064.

¹⁸² Act 95 of 1986 defines 'section' as a section shown as such on a sectional plan.

¹⁸³ In terms of Act 95 of 1986 it defines 'common property', in relation to a scheme as (a) the land included in the scheme; (b) such parts of the building or buildings as are not included in a section; and (c) land referred to in section 26;

‘erf’.¹⁸⁴ This has the result that future units on unproclaimed land can legally be sold.¹⁸⁵

In the matter of *Orkin v Phone-A-Copy Worldwide*¹⁸⁶ Le Roux J was called on to decide whether the agreement between the parties was valid as the *res vendita* did not exist at the time of entering into the agreement. The units still had to be brought into existence after submission, approval and due registration of the Sectional Title plans and the opening of the Sectional Title Register.¹⁸⁷ The court found that there was an indication of the *genus* and not of the actual *res vendita* itself. The *res vendita* had therefore been properly described¹⁸⁸ as it was left to a third person to determine. The court drew a clear distinction between a specified *res vendita*, in which instance the *res vendita* has to be sufficiently described in the deed of alienation without recourse to evidence, and a deed of alienation where one of the parties may elect the *res vendita* out of a genus or class.¹⁸⁹ In the latter instance a valid deed of alienation is concluded as the *res vendita* would be identified at a later stage. This decision was taken on appeal¹⁹⁰ but the court accordingly confirmed Le Roux’s J finding. Both courts applied the principles relating to *genus* sales.¹⁹¹ Unfortunately it was not expressly confirmed by the Supreme Court that it was the

¹⁸⁴ Lötž 2008 *Annual Survey of South African Law* 1064; Section 67(1) of the Town Planning and Townships Ordinance 15 of 1987; The ordinance defines ‘erf’ ‘as land in an approved township registered in a deeds registry as an erf, lot, plot or stand or as a portion or the remainder of any erf, lot, plot or stand or land indicated as such on the general plan of an approved township, and includes any particular portion of land laid out as a township which is not intended for a public place, whether or not such township has been recognized, approved or established as such in terms of this Ordinance or any repealed law; Also see *Erf 441 Robertsville Property CC v New Market Developments (Pty) Ltd* 2007 (2) SA 179 (W) par 7-9.

¹⁸⁵ Lötž 2008 *Annual Survey of South African Law* 1064

¹⁸⁶ *Orkin & another v Phone-A-Copy Worldwide (Pty) Ltd* 1983 (3) SA 881 (T). In terms of the agreement, the *res vendita* (collectively referred to as “the Unit”) comprises (a) “The Section” and (b) “an undivided share in the common property”.

¹⁸⁷ J Schawartzman in *Rasmussen & another v Clear Mandate Properties CC & others* [2007] JOL 19406 (W) 19 at par 8.2 refers to the *Orkin* matter.

¹⁸⁸ *Orkin & another v Phone-A-Copy Worldwide (Pty) Ltd* 1983 (3) SA 881 (T) at 895H.

¹⁸⁹ Pienaar G “*Phone-a-Copy Worldwide (Pty) Ltd v Orkin* 1986 (1) SA 729 (A) – Formaliteite met betrekking tot koopkontrak van deeltiteleenheid 1986 (49) *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* at 480.

¹⁹⁰ *Phone-A-Copy Worldwide (Pty) Ltd v Orkin & another* 1986 (1) SA 729 (A).

¹⁹¹ Lötž 2008 *Annual Survey of South African Law* 1065.

position pertaining to *genus* sales only.¹⁹² Nicolas AJA concluded that there was no problem in identifying the flats as it was marked by numbers on the doors without the necessity of evidence from the parties.¹⁹³ Therefore the description of the units complied with the statutory requirements.¹⁹⁴ He further went on to state that even though the undivided share in the common property could not be ascertained at the date of the agreement, it would become ascertainable once the sectional plan was registered.¹⁹⁵ That in itself does not render the description insufficient.¹⁹⁶ Such share could be ascertained without reference to the parties, which rendered the description legally adequate.¹⁹⁷

There are however academic authors¹⁹⁸ who are of the opinion that the parties never intended a *genus* sale. Such an intention must be clear from the wording of the contract and that the court cannot draw such an inference without a clear indication that the parties intended such a sale.¹⁹⁹ A valid contract comes into being because the *res vendita* is determined through individualization after the conclusion, only if such an intention can be determined.²⁰⁰ In this instance the *res vendita* came into being only after the opening of a sectional title register, it did not exist at the conclusion of the contract, no such intention to conclude a *genus* sale can be

¹⁹² Pienaar 1986 (49) *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* at 481.

¹⁹³ See Pienaar *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* at 481 where it is expressed that reference to *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A) and *Forsyth & others v Josi* 1982 (2) SA 164 (N) creates the impression that it is sufficient, in all contracts pertaining to the sale of sectional titles, that reference is made to flat numbers where the building is already erected.

¹⁹⁴ Lötzt 2008 *Annual Survey of South African Law* 1065.

¹⁹⁵ In *Forsyth & others v Josi* 1982 (2) SA 164 (N) the court held that if the area of the unit had been agreed upon and the total size of the sectional title development was known, the undivided share in the property could be calculated by reference to the Sectional Titles Act 95 of 1986. In this matter the sectional title registered was only opened five years after the conclusion of the agreement. See Pienaar *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* at 482, where the practical implication thereof is briefly discussed.

¹⁹⁶ *Phone-A-Copy Worldwide (Pty) Ltd v Orkin & another* 1986 (1) SA 729 (A) at 15, the Appellate Division applied the *Clements v Simpson* test and found that in the case of the sale of units in a Scheme still to be registered, if the units sold could be identified without recourse to evidence from the parties as to their negotiations and consensus, the sale was valid.

¹⁹⁷ Lötzt 2008 *Annual Survey of South African Law* 1065.

¹⁹⁸ I.g. DJ Lötzt and G Pienaar.

¹⁹⁹ See *Den Dunnen v Kreder* 1985 (3) SA 616 (T) where the parties intended the sale of a specific property and not a *genus* sale and Pienaar 1986 (49) *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* at 480.

²⁰⁰ Lötzt 2008 *Annual Survey of South African Law* 1065.

inferred and therefore extrinsic evidence is necessary to determine the *res vendita* as the flat numbers do not suffice.²⁰¹ It is also challenged on the basis that the cases referred to by Nicolas AJA are distinguishable from the *Phone-A-Copy v Orkin*²⁰² matter.²⁰³ In the cases of *Clements v Simpson*²⁰⁴ and *Van Wyk v Rottcher's Saw Mills*,²⁰⁵ the *res vendita* was already in existence, while a sectional title only comes into existence after a sectional title register is opened. In *Forsyth & others v Josi*²⁰⁶ it was never ascertained whether the parties intended a *genus* sale, which existence is material before deviating from the requirement that the *res vendita* has to be identifiable with reference to the deed of alienation alone.²⁰⁷

In the matter of *Erf 441 Robertsville v New Market*²⁰⁸ Goldstein J found that the *res vendita*²⁰⁹ could be identified without recourse to a diagram, which was not attached to the deed of alienation albeit referred thereto and consequently not included in the agreement of sale, and subsequently reinforcing the requirements laid down in *Clements v Simpson*.²¹⁰ There are however questions raised by the judgment, *inter alia*, the issue regarding what exactly the purchasers bought, being either a unit comprising of mini units or specific individual units.²¹¹ If the latter applied, then the

²⁰¹ Lötz 2008 *Annual Survey of South African Law* 1065.

²⁰² *Phone-A-Copy Worldwide (Pty) Ltd v Orkin & another* 1986 (1) SA 729 (A).

²⁰³ Pienaar *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* at 481

²⁰⁴ *Clements v Simpson* 1971 (3) SA 1 (A).

²⁰⁵ *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A).

²⁰⁶ *Forsyth & others v Josi* 1982 (2) SA 164 (N).

²⁰⁷ Pienaar *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* at 481.

²⁰⁸ *Erf 441 Robertsville Property CC v New Market Developments (Pty) Ltd* 2007 (2) SA 179 (W). In this matter the applicants sought a declaratory order that an agreement of sale of a sectional title unit was valid and binding. The agreement described the property by way of reference to an attached diagram. No diagram was attached. The building in question had been erected and was physically in existence, but the sectional plan had not been registered at the time of the sale and the agreement of sale did not contain any reference to a sectional plan. One of the respondent's arguments was that the property which was sold was insufficiently described. Counsel for the respondent relied on the cases of *Naude v Schutte* 1983 (4) SA 74 (T) and *Den Dunnen v Kreder* 1985 (3) SA 616 (T) but Goldstein J found that they were distinguishable from the current facts.

²⁰⁹ See *Erf 441 Robertsville Property CC v New Market Developments (Pty) Ltd* 2007 (2) SA 179 (W) at par 1 where the merx is defined as "Sectional title unit 12 Mini units Northlands Deco Park, measuring approximately 750m² and more fully indicated on the draft diagram attached hereto".

²¹⁰ *Clements v Simpson* 1971 (3) SA 1 (A) at 7F-G; *Erf 441 Robertsville Property CC v New Market Developments (Pty) Ltd* 2007 (2) SA 179 (W) at 875 par 4.

²¹¹ Delpont 2008 29(1) *Obiter* at 91.

description of the property failed to comply with the Alienation of Land Act,²¹² except if a *genus* sale was intended and the category of individual units were properly identified.²¹³

In the matter of *Rasmussen v Clear Mandate Properties*²¹⁴ the description of a future unit in a sectional title scheme was yet again addressed²¹⁵. The court examined the provisions of the Sectional Titles Act.²¹⁶ The test for due compliance with the Sectional Titles Act²¹⁷ is whether the subject unit can be identified with reference to the agreement between the parties alone, without taking into consideration the negotiations between them. There are however case law²¹⁸ where the courts held that the description of a unit should include a reference to its length, breadth and height and that this could be done only after the particulars of the proposed sectional plan were fully known.²¹⁹ The respondent in that matter argued that any sale of a section in a scheme to be or in the process of development is invalid. He went as far as submitting that all “off plan” sales by developers without a sectional plan are

²¹² Act 68 of 1981.

²¹³ Delport 2008 29(1) *Obiter* at 91.

²¹⁴ *Rasmussen & another v Clear Mandate Properties CC & others* [2007] JOL 19406 (W). In this matter a unit was bought by the applicant from a site plan, drawn to scale. At a later stage, the plans were substantially amended in that the common area changed and the unit which the applicant bought, no longer existed. The respondent amended the site plan in December 2002. None of these facts were disclosed to the applicant. The applicant was advised to sign an amendment as the unit number had changed, which he never did. The agreement does not record either the floor to ceiling dimension of the unit or the participation quota attaching to the unit. Schwartzman J at par 13 referred to a statement made by Thirion J in *Forsyth & others v Josi* 1982 (2) SA 164 (N) at 174B-C where he said that in such circumstances the respondent would have been in breach of its agreement with the applicants in the same way that a seller would be who, having sold a property with a house on it were to demolish the house before transferring the property.

²¹⁵ Lötž 2008 *Annual Survey of South African Law* 1063.

²¹⁶ Sectional Titles Act 95 of 1986. The Act regulates the creation and registration of a sectional title scheme, makes provision for the ownership of a unit, joint ownership of the common areas and membership of the body corporate.

²¹⁷ Act 95 of 1986.

²¹⁸ *Botes & another v Toti Developments Co (Pty) Ltd* 1978 (1) SA 205 (T) at 210H; *Richtown Development (Pty) Ltd v Dusterwald* 1981 (3) SA 691 (W) at 698H-699C; *Naude v Schutte* 1983 (4) SA 74 (T) at 76E-78B and *Kendrick v Community Development Board* 1983 (4) SA 532 (W) at 537D-539A.

²¹⁹ Lötž 2008 *Annual Survey of South African Law* 1064.

subsequently invalid.²²⁰ To be identifiable the area and shape of the unit would have to be known.²²¹

Following *Forsyth v Josi*²²² and *Phone-A-Copy Worldwide v Orkin*²²³ Schwartzman J found that the agreement between the parties was valid and binding. He stated that the requirement of the Sectional Titles Act²²⁴ that a unit be defined three dimensionally is directory and not peremptory, and does not mean the sale is invalid.²²⁵ Turning to the question pertaining to the failure to insert the participation quota of the undivided share in the common property, he stated that the Sectional Titles Act²²⁶ provides that failure to mention the quota renders the agreement voidable at the instance of the purchaser and not automatically void.²²⁷

In the matter of *Exdev v Pekudei*²²⁸ a future office unit and an option to acquire additional office space were embodied in the same deed of sale.²²⁹ The *res vendita* in the option to purchase, in contrast to the future office unit, was vaguely

²²⁰ *Rasmussen & another v Clear Mandate Properties CC & others* [2007] JOL 19406 (W) 15 par 8.

²²¹ *Rasmussen & another v Clear Mandate Properties CC & others* [2007] JOL 19406 (W) 11-12; *Botes & another v Toti Developments Co (Pty) Ltd* 1978 (1) SA 205 (T) at 209C.

²²² *Forsyth & others v Josi* 1982 (2) SA 164 (N). In this matter, six applicants in their capacities as purchasers of units in a sectional title scheme sought a declaratory order declaring their agreements to be valid and binding. The agreements were mainly attacked on two grounds, namely that the agreements failed to define the units three-dimensionally and secondly that a material term was not inserted. The written agreement failed to incorporate a building plan. Thirion J stated at 17-18 “*If there are building plans for the erection of the house in existence at the time of the sale and if they are sufficiently accurate and detailed to enable a builder to proceed with the construction of the house to its completion it seems to me that the subject-matter of the sale is 'objectively ascertainable' and the requirements of Act 71 of 1969 are therefore satisfied... To my mind the same considerations would apply to the case of a sale of a unit under Sectional Titles Act.*” (Also referred to *Conroy NO v Coetzee* 1944 OPD 207 at 212).

²²³ *Phone-A-Copy Worldwide (Pty) Ltd v Orkin & another* 1986 (1) SA 729 (A) at 743J–744J.

²²⁴ Sections 5(3)(d) and 5(4)(a) of Act 95 of 1986.

²²⁵ See *Rasmussen & another v Clear Mandate Properties CC & others* [2007] JOL 19406 (W) at 22 par 10.2; *Maharaj & others v Rampersad* 1964 (4) SA 638 (A) at 643F to G; *Forsyth & others v Josi* 1982 (2) SA 164 (N) at 170H – 171H and *Exdev (Pty) Ltd and Another v Pekudei Investments (Pty) Ltd* 2011 (2) SA 282 (SCA).

²²⁶ Act 95 of 1986.

²²⁷ *Rasmussen & another v Clear Mandate Properties CC & others* [2007] JOL 19406 (W) at 24 par 11.3.

²²⁸ *Exdev (Pty) Ltd and Another v Pekudei Investments (Pty) Ltd* 2011 (2) SA 282 (SCA).

²²⁹ Lötz DJ “The Law of Purchase and Sale” 2011 *Annual Survey of South African Law* at 1014.

described.²³⁰ Leach JA however found that two separate and independent contracts were concluded, and both should be individually evaluated against the statutory formalities.²³¹ The court found that the description of the future office unit complied section 2(1) of the Alienation of Land Act.²³²

It can thus be concluded that it is not sufficient to describe a sectional title unit with reference to the unit number only, in the instance where the sectional title registered has not been opened.²³³ The requirements are that the unit has to be described three dimensionally with reference to its length, breadth and height or reference to a diagram where these measurements are indicated.²³⁴ Additional to this, the undivided share in the common property has to be indicated with either reference to the participation quota or a diagram where such a share is ascertainable by calculations.²³⁵

In the instance where the parties intended a genus sale pertaining to sectional title units, it is not required to fully describe the *res vendita* as it would be identified at a later stage.²³⁶ It is however disappointing that the courts in *Phone-A-Copy Worldwide*²³⁷ failed to confirm that the latter position is only applicable in genus sales and not on all sectional title sales.²³⁸

²³⁰ Lötz DJ “The Law of Purchase and Sale” 2011 *Annual Survey of South African Law* at 1014.

²³¹ Lötz *Annual Survey of South African Law* at 1015 and *Exdev (Pty) Ltd and Another v Pekudei Investments (Pty) Ltd* 2011 (2) SA 282 (SCA) at paras 13-15.

²³² *Hartland Implemente (Edms) Bpk v Enal Eiendomme BK* 2002 (3) SA 653 (NC) 20.

²³³ Pienaar *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* at 483 where Pienaar compare this scenario with the description of a future sectional title unit in an existing building where the sectional title register has not been opened; *Botes & another v Toti Developments Co (Pty) Ltd* 1978 (1) SA 205 (T); *Richtown Development (Pty) Ltd v Dusterwald* 1981 (3) SA 691 (W); *Naude v Schutte* 1983 (4) SA 74 (T).

²³⁴ Pienaar *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* at 483.

²³⁵ Pienaar *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* at 483.

²³⁶ Pienaar *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* at 483.

²³⁷ *Orkin & another v Phone-A-Copy Worldwide (Pty) Ltd* 1983 (3) SA 881 (T) and *Phone-A-Copy Worldwide (Pty) Ltd v Orkin & another* 1986 (1) SA 729 (A).

²³⁸ Pienaar *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* at 483.

2.2.3 Purchase price

It would be adequate to fix the amount of the purchase price and method of payment in the written agreement, or an objectively ascertainable formula to calculate the price without recourse to the oral consensus²³⁹ between the parties. Failure to do so would render the agreement void for want of compliance with section 2(1) of the Alienation of Land Act.²⁴⁰

In *Patel v Adam*²⁴¹ Rabie JA stated the following²⁴²:

“A written agreement which purports to be a contract of sale but which fails to record a price, either definitely or in such a way as to render it possible to apply the maxim certum est quod certum reddi potest²⁴³, would, therefore, not be a valid sale in terms of sec. 1 (1) of Act 71 of 1969.”

In the matter of *Van Aardt v Galway*²⁴⁴ one of the parties argued that the purchase price was not accurate, as it did not stipulate whether Value-Added Tax was excluded or included.²⁴⁵ Wallis JA held that the solution depended on whether the

²³⁹ In *Johnston v Leal* 1980 (3) SA 927 (A) at 938 at par D the court stated that the oral consensus included “earlier contemporaneous, or (and) subsequent oral agreements”.

²⁴⁰ *Hartland Implemente (Edms) Bpk v Enal Eiendomme BK* 2002 (3) SA 653 (NC) 20.

²⁴¹ *Patel v Adam* 1977 (2) SA 653 (A) at 32. Facts are briefly that on 5 May 1970, and at Pretoria, plaintiff and defendant entered into a written contract in terms whereof plaintiff purported to sell to defendant, who purported to purchase from plaintiff certain freehold plot No. 428, situated in the township of Laudium, City of Pretoria. The court *a quo* by way of Williamson AJ held that the agreement was of no force or effect for want of compliance with the formalities in respect of Contracts of Sale of Land Act 71 of 1969. On appeal Rabie JA upheld the court *a quo*'s finding and stated that the agreement leaves the purchaser alone to decide what amount he wishes to pay every month, which renders the monthly amount payable undeterminable.

²⁴² *Patel v Adam* 1977 (2) SA 653 (A) at 34.

²⁴³ Latin rule which states “that which can be deduced with certainty is certain”.

²⁴⁴ *Van Aardt v Galway* 2012 (2) All SA 78 (SCA).

²⁴⁵ *Van Aardt v Galway* 2012 (2) All SA 78 (SCA) at par 19 and Löt DJ “The Law of Purchase and Sale” 2012 *Annual Survey of South African Law* 809.

inclusion or exclusion of VAT could be classified as an implied or tacit term.²⁴⁶ Wallis JA found that it was neither an implied or tacit term.²⁴⁷

Apart from agreeing on a fixed price indicated in the contract, the parties may make use of certain methods to establish the price.²⁴⁸ One being that the fixing of the price may be left to an independent third party²⁴⁹ and the other that the price may be fixed in the contract by incorporation by reference of a price contained in some other document.²⁵⁰ A contract of sale will not be valid if the price has to be agreed upon in the future or one of the parties or his nominee will determine the price.²⁵¹

2.2.4 Material terms

In *Johnston v Leal*²⁵² Corbett JA expressed the view that 'it is not easy to define what constitutes a material term' but did not find it necessary, for the purposes of that judgment, to do so.²⁵³ Corbett AJ²⁵⁴ importantly said the following:

"It is not necessary that the terms of the contract be all contained in one document, but, if there are more than one document, these documents, read together, must fully record the contract. The material terms of the contract are not confined to those prescribing the essentialia of a contract of sale, viz the parties to the contract, the merx and the pretium, but include, in addition, all other material terms."

²⁴⁶ *Van Aardt v Galway* 2012 (2) All SA 78 (SCA) at par 23 and Lötze DJ "The Law of Purchase and Sale" 2012 *Annual Survey of South African Law* 811.

²⁴⁷ *Van Aardt v Galway* 2012 (2) All SA 78 (SCA) at par 24-25

²⁴⁸ *Van Rensburg & Treisman* 49.

²⁴⁹ *Dublin v Diner* 1964 (1) SA 799 (D) and *Gillig v Sonnenberg* 1953 (4) SA 675 (T).

²⁵⁰ *Van Rensburg & Treisman* 49 and *Coronel v Kaufman* 1920 TDP 207 at 209.

²⁵¹ *Van Rensburg & Treisman* 49; *OK Bazaars v Bloch* 1929 WLD 37 and *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 1977 (2) SA 425 (A).

²⁵² *Johnston v Leal* 1980 (3) SA 927 (A).

²⁵³ *Johnston v Leal* 1980 (3) SA 927 (A) at 937H and *Jones v Wykland Properties* 1998 (2) SA 355 (K) at 358. See also *Van Rensburg & Treisman* at 52 where it is stated that "material term" is used in more than one sense in the law of contract which adds to the uncertainty.

²⁵⁴ *Johnston v Leal* 1980 (3) SA 927 (A) at 937 par H.

In *Jones v Wykland Properties*²⁵⁵ Knoll AJ was faced with the task to define the meaning of the words 'material term'.²⁵⁶ Knoll AJ stated that the following principles may be regarded as settled: (i) all material terms must be reduced to writing;²⁵⁷ (ii) the court must be able to ascertain with reasonable certainty the terms of the contract;²⁵⁸ (iii) where a material term has not been finally agreed upon and left open for further negotiations, there is no valid contract;²⁵⁹ (iv) the material term is not confined to the *essentialia* of the contract²⁶⁰. He further stated that in order to decide whether a term of a contract is material the following questions required to be answered positively:²⁶¹

“(a) did the parties apply their minds to the term? (b) did they agree, either expressly or impliedly, (i) that the term should form part of their contract; and (ii) be binding on them?”

These latter principles played a pivotal role in subsequent cases pertaining to material terms. In the matter of *Fraser v Viljoen*²⁶² failure by the parties to record the date of their signatures resulted in non-compliance with the Act.²⁶³ Pillay J in the

²⁵⁵ *Jones v Wykland Properties* 1998 (2) SA 355 (K). In this case the appellant appealed to a Provisial Division for the repayment of agent's commission in respect of a deed of alienation. It was common cause that the commission was only payable in the event of a valid contract of sale being concluded. The appellant alleged that the deed of sale was void as a material term relating to possession and occupation was required to be contained in the deed of alienation. The court *a quo* found the deed of sale to be valid and enforceable as the date of possession and occupation was not a material term. The appeal court found the deed of sale void as a material term was not reduced to writing. See *King v Potgieter* 1950 (3) SA 7 (T) at 10D where the date of possession was a matter of 'prime importance to the parties' and *Mulder v Van Eyk* 1984 (4) SA 204 (SE) at 206C-D where the omission of the date of possession was found not to be fatal to the validity of the deed of sale.

²⁵⁶ See Wulfsohn at 75 where he makes the observation that the concept 'material term' has not been defined for purposes of the legislation and Van Rensburg and Treisman at 51 where they describe a material term as the essential terms together with the additional terms incorporated into the contract as the material terms.

²⁵⁷ *Johnston v Leal* 1980 (3) SA 927 (A) at 937C–G.

²⁵⁸ *Clements v Simpson* 1971 (3) SA 1 (A) at 7E.

²⁵⁹ *Jammie v Lowrie* 1958 (2) All SA 427 (T).

²⁶⁰ *Johnston v Leal* 1980 (3) SA 927 (A) at 937H and *Jones v Wykland Properties* 1998 (2) SA 355 (K) at 357-358.

²⁶¹ *Jones v Wykland Properties* 1998 (2) SA 355 (K) at 358-359. See also *King v Potgieter* 1950 (3) SA 7 (T) where it was found that the date of occupation was material.

²⁶² *Fraser v Viljoen* 2008 (4) SA 106 (SCA); *Fraser v Viljoen* 2008 (3) All SA 233 (SCA)

²⁶³ Act 68 of 1981; The document was inchoate containing neither the name of the purchasers, nor their signature, nor a description of the property. The appellants (as the purchasers) then obtained the

Durban High Court held that the date of conclusion of the agreement was material as it impacted on other terms and the omission was fatal to the validity of the agreement.²⁶⁴ In the Supreme Court of Appeal the appellants argued that the respondent appointed them as her agent for the purpose of completing the offer by inserting their names and the property description.²⁶⁵ The Supreme Court of Appeal considered the cases of *Fourelmel v Maddison*²⁶⁶ and *Jurgens v Volkskas Bank*²⁶⁷ Combrink JA accepted, without deciding, that the respondent authorized the appellants to fill in the description of the property, but emphasized that the question was whether section 2(1) was satisfied if the deed was completed by the appellants, after the respondent had already signed the document.²⁶⁸ He however found that where the one party to an agreement of sale of immovable property appoints the other party to be its agent for the purpose of completing the description of the property and the name of the purchaser, the object of the legislation would be nullified. It would open the door to uncertainty as to precisely what the parties orally agreed upon and what the party was authorized to do. He found that the agreement was void for non-compliance with the Act, without any further consideration of the vital question whether the date of conclusion of the particular case was material.²⁶⁹

full description of the property, inserted it in the document and they both signed it omitting, however, to record the date of signature, at 235.

²⁶⁴ *Fraser v Viljoen* 2008 (3) All SA 233 (SCA) 235.

²⁶⁵ Lötze 2008 *Annual Survey of South African Law* 1059.

²⁶⁶ *Fourelmel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A). This matter dealt with a deed of suretyship. Neither the name of the co-surety or his signature appeared on the document when the surety signed the document. Neither the names of the creditor or debtor had been filled in. These details were inserted at a later stage after the surety signed. It was held that compliance with the act required that all the material terms had to be contained in the document at the time of signature.

²⁶⁷ *Jurgens & others v Volkskas Bank Ltd* 1993 (1) SA 214 (A). This matter also dealt with a deed of suretyship. The sureties signed an incomplete deed, which blank spaces were later completed by secretaries and delivered to the bank for its signature. It was held that it is immaterial when the document was signed by the first party, whether before or after the missing terms had been filled in or alterations made, as long as all the material terms were contained in the document when it was delivered to the other party. The time of delivery to the other party for signature is therefore, crucial and not the time of signature by the first party. It was common cause that the reasoning in these cases is equally applicable to incomplete deeds of sale of immovable property. (*Fraser v Viljoen* 2008 (3) All SA 233 (SCA) 236).

²⁶⁸ *Fraser v Viljoen* 2008 (3) All SA 233 (SCA) 236 par 6.

²⁶⁹ *Fraser v Viljoen* 2008 (3) All SA 233 (SCA) 237.

It has been said by the Supreme Court of Appeal that parties signing blank pieces of paper, and not an agreement, was fatal to the whole agreement.²⁷⁰ The agreement has to contain the material terms to constitute a valid agreement.²⁷¹ The Supreme Court of Appeal, in the *Chretien v Bell*²⁷² case, referred with approval to the *Dijkstra v Janowsky*²⁷³ matter where the requirements in respect of a deed of alienation in terms of section 2(1) of the Alienation of Land Act²⁷⁴ were identified. These requirements echoed the list of Knoll AJ in *Jones v Wykland Properties*²⁷⁵ *supra*. It has further been stated that the manner of payment is also ordinarily regarded as a material term.²⁷⁶

In the matter of *Stalwo v Wary Holdings*²⁷⁷ one of the parties contended that the deed of alienation failed to comply with section 2(1) of the Act²⁷⁸ *inter alia*,²⁷⁹ in that a material term to the agreement namely a suspensive condition that the land was to be subdivided, expressly agreed by the parties was not reduced to writing.²⁸⁰ It was

²⁷⁰ *Just Names Properties 11 CC V Fourie* 2008 (2) All SA 487 (SCA) 492 par 21. See also *Van Rooyen v Hume Melville Motors (Edms) Bpk* 1964 (2) SA 68 (C) 71 at C-E where Van Winsen J said “What defendant signed was not an agreement but a piece of paper. It is true that the placing on such piece of paper of a number of terms not embodied therein in writing at the time that the defendant signed the paper might in form turn the piece of paper into an agreement but it was certainly not an agreement when the defendant signed it and accordingly it cannot be regarded as an agreement having force and effect.”

²⁷¹ *Jones v Wykland Properties* 1998 (2) SA 355 (K) at 357J.

²⁷² *Chretien & another v Bell* (2009) JOL 24628 (SCA) 5.

²⁷³ *Dijkstra v Janowsky* 1985 (3) SA 560 (C).

²⁷⁴ Act 68 of 1981.

²⁷⁵ *Jones v Wykland Properties* 1998 (2) SA 355 (K).

²⁷⁶ *Patel v Adam* 1977 (2) SA 653 (A) at 666A–C and referred to in *Chretien & another v Bell* (2009) JOL 24628 (SCA) 5 at par 9. In the latter case the Supreme Court of Appeal concluded that the time of payment was a material terms of the agreement and therefore failed to comply with section 2(1) of the Alienation of Land Act 68 of 1981. See further LötZ DJ “The Law of Purchase and Sale” 2011 *Annual Survey of South African Law* at 1012.

²⁷⁷ *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* 2008 (1) SA 654 (SCA).

²⁷⁸ Act 68 of 1981.

²⁷⁹ It was further contended that the agreement was in contravention of section 3(a) and s 3(e)(i) of the Subdivision of Agricultural Land Act 70 of 1970 which prohibit the subdivision of agricultural land and the sale of a portion of agricultural land, without the written permission of the Minister of Agriculture.

²⁸⁰ *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* 2008 (1) SA 654 (SCA) par 4. Note the endorsement of the *Corondimas* principle in *Paradyskloof Golf Estate v Stellenbosch Municipality* 2011 (2) SA 525 (SCA) at par 17. In latter case it was reiterated that a deed of sale of immovable property, subject to a suspensive condition does not create a contract of sale but rather a contractual relationship. Further note the definition of “alienate” in section 1 of Act 68 of 1981, including a sale “subject to a suspensive condition”.

argued on the appellant's behalf that the suspensive condition was implicit in the description of the *res vendita* and that it should be read into the agreement as a tacit term. Respondent's counsel contended that having expressly agreed on the suspensive condition, the parties' failure to reduce it to writing precluded the appellant from importing it into the agreement as a tacit term.²⁸¹ Maya JA referred to the *dicta* made by Nienaber JA in *Wilken v Voges*;²⁸²

"A tacit term in a written contract, be it actual or imputed, can be the corollary of the express terms – reading, as it were, between the lines – or it can be the product of the express terms read in conjunction with evidence of admissible surrounding circumstances. Either way, a tacit term, once found to exist, is simply read or blended into the contract: as such it is 'contained' in the written deed. Not being an adjunct to but an integrated part of the contract, a tacit term does not in my opinion fall foul of either the clause in question or the (Alienation of Land) Act"

It was found by the court that there was indeed a tacit term on which the success of the agreement depended on,²⁸³ and that the agreement therefore complied with section 2(1) of the Act.²⁸⁴ In *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration*²⁸⁵ Corbett AJ distinguished between terms implied by law, which is often referred to as "implied term" and implied terms based upon the actual or imputed intention of the parties, which if referred to as "tacit term".²⁸⁶ The court does not freely import a tacit term and therefore make or supplement an agreement between parties. Before it will do so, it will consider various factors²⁸⁷ to ascertain whether the parties intended to contract on the proposed tacit terms.

²⁸¹ *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* 2008 (1) SA 654 (SCA) par 8.

²⁸² *Wilkins NO v Voges* 1994 (2) All SA 349 (A) 144C-D.

²⁸³ Lötze 2008 *Annual Survey of South African Law* 1063.

²⁸⁴ Act 68 of 1981.

²⁸⁵ *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 521.

²⁸⁶ In *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 521 Corbett AJ states: "The significance of this distinction is not merely academic. The implied term (in the above-defined sense) is essentially a standardised one, amounting to a rule of law which the Court will apply unless validly excluded by the contract itself. While it may have originated partly in the contractual intention, often other factors, such as legal policy, will have contributed to its creation. The tacit term, on the other hand, is a provision which must be found, if it is to be found at all, in the unexpressed intention of the parties. Factors which might fail to exclude an implied term might nevertheless negate the inference of a tacit term."

²⁸⁷ *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 521-522. The reasonable and businesslike manner of the terms of the contract and the admissible

An important exception to the parol evidence rule was confirmed in *Johnston v Leal*²⁸⁸ that if a clause in a printed contract form has been, for some inexplicable reason left incomplete, evidence may be led to enable the court to determine whether the parties intended that specific clause to be part of their contract and, if so, why it was left blank.²⁸⁹ In such an instance, the contract is invalid until rectification occurs.²⁹⁰ The mere fact that the court would allow an unrecorded term to be part of the deed of alienation raises the question whether this approach upholds the objectives of the formality requirement of the Act.²⁹¹

2.2.5 Amendments and revival of a cancelled contract

An amendment which includes deleting, adding or varying any of the material terms of a deed of alienation will only be valid if parties to the deed of alienation agree in writing to such an amendment and sign same.²⁹² Deviations which do not constitute a variation of the terms of the deed of alienation, is not required to be in writing in order to be valid.²⁹³ Amendments to a deed of sale of land were before the court in *Waterval Joint Venture v City of Johannesburg*.²⁹⁴ One of the contracting parties contended that there was an oral variation of the agreement which invalidated the deed of alienation. Sutherland AJ held that the oral agreement did not undo the written agreement, but rather, the oral agreement was never in competition with the

evidence of surrounding circumstances.

²⁸⁸ *Johnston v Leal* 1980 (3) SA 927 (A). See also *KPMG Chartered Accountants v Securefin Ltd and another* 2009 (2) All SA 523 (SCA) at par 39 for a discussion regarding the admissibility of extrinsic evidence.

²⁸⁹ Van Rensburg & Treisman 40; *Johnston v Leal* 1980 (3) SA 927 (A) at 943F and 945E.

²⁹⁰ *Johnston v Leal* 1980 (3) SA 927 (A) at 943F and 945E.

²⁹¹ Act 68 of 1981.

²⁹² Van Rensburg & Treisman 71-72.

²⁹³ See Van Rensburg & Treisman at 72 where such instances are identified.

²⁹⁴ *Waterval Joint Venture Property Co (Pty) Ltd v City of Johannesburg Metropolitan Municipality* 2008 (2) All SA 700 (W). An agreement between the applicant and the respondent, a municipality, was entered into in 2005. In terms of the agreement, the applicant purchased certain immovable property from the respondent. The respondent sought to prevent transfer on various grounds *inter alia* that the *merx* was not properly described and that there was an oral variation of the agreement.

terms of the written agreement.²⁹⁵ In principle an informal, invalid variation should not affect the validity of the original deed of alienation.²⁹⁶

The question whether a lapsed contract due to the non-fulfillment of a suspensive condition is susceptible to revival was examined in *Fairoaks Investment Holding v Oliver*.²⁹⁷ The parties agreed to revive a lapsed agreement of sale by way of the exchange of an offer and acceptance letter.²⁹⁸ The agreement of sale lapsed due to the non-fulfillment of a suspensive condition. To address the obvious issue of non-fulfillment of the suspensive condition, the parties amended the said condition. Counsel for the appellants submitted that the case of *Neethling v Klopper*²⁹⁹ supported the notion that the revival of a lapsed agreement did not constitute a fresh agreement of sale. The *Neethling v Klopper*³⁰⁰ matter, however dealt with a cancelled agreement and Steyn CJ said that at common law, a party who validly cancelled a contract, may with the consent of the other party undo his cancellation with the result that the contract is no longer affected by such a cancellation.³⁰¹ In *Fairoaks Investment Holding v Oliver*³⁰² Streicher JA stated that in order to determine whether an agreement should comply with formalities, one has to

²⁹⁵ Lötzt 2008 *Annual Survey of South African Law* 1060; *Waterval Joint Venture Property Co (Pty) Ltd v City of Johannesburg Metropolitan Municipality* 2008 (2) All SA 700 (W) par 10.

²⁹⁶ Van Rensburg & Treisman 72.

²⁹⁷ *Fairoaks Investment Holdings (Pty) Ltd v Olivier* 2008 (4) SA 302 (SCA). See also *DS Enterprises (Pty) Ltd v Northcliff Townships (Pty) Ltd* 1972 (4) SA 22 (W) at 26F-H, where the parties conduct amounted to an affirmance of the contract and a dispensation of the termination of it.

²⁹⁸ *Fairoaks Investment Holdings (Pty) Ltd v Olivier* 2008 (4) SA 302 (SCA).

²⁹⁹ *Neethling v Klopper & Others* 1967 (4) SA 459 (A). In this case the seller claimed he validly cancelled the sale but the purchaser disputed his right to do so. The seller contended that the sale had lapsed and that the agreement was therefore invalid with the formalities prescribed by section 1(1) of Act 68 of 1957, the precursor of section 2(1) of Act 68 of 1981. The arrangement did not comply with formalities by reason of lack of authority in that letters were exchanged by the parties, signed by their attorneys without the written authority of their clients. The court held that the subsequent agreement did not have to comply with the formalities. The letters between the parties could not be regarded as a fresh offer to purchase and the acceptance thereof. Only amendments of material provisions had to comply with formalities. However, in *Fairoaks Investment Holdings (Pty) Ltd v Olivier* 2008 (4) SA 302 (SCA) 310 at par 19 Streicher JA stated that in each case the true nature of the transaction will have to be investigated in order to determine whether it constitutes an agreement of purchase and sale. If it was indeed the intention to enter into a new contract, the agreement will have to comply with the prescribed formalities. It was however found that the amendment was material in this matter.

³⁰⁰ *Neethling v Klopper & Others* 1967 (4) SA 459 (A).

³⁰¹ *Neethling v Klopper & Others* 1967 (4) SA 459 (A) 466C-467C.

³⁰² *Fairoaks Investment Holdings (Pty) Ltd v Olivier* 2008 (4) SA 302 (SCA).

determine what the intentions of the parties were.³⁰³ He subsequently found that the parties, by agreeing to revive the lapsed agreement with an express term pertaining to the amendment of the suspensive condition, entered into an agreement to buy and sell on terms different from the terms previously agreed to. Such an agreement has to comply with the provisions of section 2(1) of the Act.³⁰⁴

A cancelled deed of alienation may be informally revived³⁰⁵ as confirmed in *Sewpersadh v Dookie*³⁰⁶ by Swain J stating that:

“I am satisfied that these facts prove on a preponderance of probabilities unequivocal conduct on the part of the parties from which a compelling inference may be drawn, that they concluded a tacit contract to revive the original sale agreement.”

The informal revival is however subject to the proviso that it does not involve the alteration of any of the material terms of the original agreement.³⁰⁷ However, informal revival of a deed of alienation is not possible where it had been extinguished retrospectively due to the fulfilment of a resolutive condition or failure of a suspensive condition.³⁰⁸ Thus it can be said that compliance with prescribed formalities are compulsory if the intention is to proceed with the initial transaction by way of withdrawing the cancellation and entering into a new contract on the same terms and where the parties, after a contract of sale of land has lapsed for non-fulfillment of a suspensive condition, agree to revive the lapsed contract with amendments.³⁰⁹

³⁰³ *Fairoaks Investment Holdings (Pty) Ltd v Olivier* 2008 (4) SA 302 (SCA) 309 par 19.

³⁰⁴ Act 68 of 1981; *Fairoaks Investment Holdings (Pty) Ltd v Olivier* 2008 (4) SA 302 (SCA) 311 par 21.

³⁰⁵ Van Rensburg & Treisman 72.

³⁰⁶ *Sewpersadh & another v Dookie* 2008 (1) All SA 286 (D) at 292 par 29. In this case the applicants applied for the eviction of the respondent from a property owned by them. The applicants contended that the agreement had been cancelled. The respondent disputed this fact and alleged that the applicants continued to receive payments after the purported cancellation and thereby impliedly waived any right they may have had to cancel the agreement.

³⁰⁷ *Neethling v Kloppe & Others* 1967 (4) SA 459 (A) at 465H-466A; *Cronje v Tuckers Land and Development Corporation* 1981 (1) SA 256 (W) at 259F.

³⁰⁸ Van Rensburg & Treisman 73.

³⁰⁹ Lötze 2008 *Annual Survey of South African Law* 1061.

2.3 Signed by the parties

Section 2(1) of the Act³¹⁰ declares a contract for the sale of land as invalid unless it is contained in a deed of alienation which is ‘signed by the parties thereto’.³¹¹

The purpose of the parties respective signatures has been stated as to signify that the written offer to which the signatures pertained, met with the offeree’s agreement.³¹² In the case of *Chisnall v Sturgeon*³¹³ Flemming DJP stated that the last words of section 2(1) of the Act³¹⁴ raised two enquiries namely: First who are the parties to the contract, which can be ascertained with reference to the deed of alienation and the secondly whether those parties signed the contract, which entails a factual question.³¹⁵ He makes the following remark:³¹⁶

“For the very reason that it is a factual question, the search for the correct answer cannot be avoided by priori rules. What convinces in one case may have little cogency in an analogous case. Reliance on reported decisions therefore requires circumspection.”

He goes further to investigate the law’s understanding of what constitutes the signing of a contract.³¹⁷ The court found that regard must be given to the deed of alienation as a whole to ascertain whether there has been due compliance with statutory

³¹⁰ Act 68 of 1981.

³¹¹ *Chisnall and Chisnall v Sturgeon and Sturgeon* 1993 (2) SA 642 (W) at 645.

³¹² *Van Rooyen v Hume Melville Motors (Edms) Bpk* 1964 (2) SA 68 (C) 492 par 22; LötZ 2008 *Annual Survey of South African Law* 1061.

³¹³ *Chisnall and Chisnall v Sturgeon and Sturgeon* 1993 (2) SA 642 (W). The facts are briefly that the parties are described as ‘seller’ and ‘purchaser’ although each party respectively, consisted of married spouses. The wives both signed in their capacities as spouses of either the seller or purchaser who consents to the purchase and sale agreement. It was contended that the deed of alienation was not signed by all the contracting parties as the spouses were co-sellers and co-purchasers and not only the spouses of the seller and purchaser.

³¹⁴ Act 68 of 1981.

³¹⁵ *Chisnall and Chisnall v Sturgeon and Sturgeon* 1993 (2) SA 642 (W) at 645A-B;

³¹⁶ *Chisnall and Chisnall v Sturgeon and Sturgeon* 1993 (2) SA 642 (W) at 645B-C; LötZ 2002 (35) *De Jure* at 366.

³¹⁷ *Chisnall and Chisnall v Sturgeon and Sturgeon* 1993 (2) SA 642 (W) at 645D where Flemming DJP states that “signing is achieved by a mark or marks intended to represent the relevant person if the making of the mark is done with the function of making the document an act of the writer, of signifying the assent of the party to that which is embodied in the document.”

requirements.³¹⁸ It subsequently found that that the requirements of the statute have been met.³¹⁹

Thus it can be summarized that each case should be adjudicated on its own merits, and that previous decisions should be considered as directive and not binding.³²⁰ The purpose of signing a document is to represent a person with the function of making the document an act of the writer and to assent to the contents of the deed of alienation.³²¹ An enquiry concerning assent must not be subjectively about what the signatory planned, but what this act signifies to the other contracting party, thus an objective enquiry.³²² The capacity in which a person signs does not have to be indicated.³²³ Inaccuracy in the description of the person's capacity, as a general rule, does not affect the validity of the signature.³²⁴ It must be ascertained whether it is an instance of error or whether the designation of the signature proves something with deeper significance.³²⁵ A single signature in certain instances may indicate assent to more than one contract or capacities.³²⁶ The obvious indication of the capacity in which such a signature is made cannot be conclusive, it is purely indicative.³²⁷ The deed of alienation should be considered as a whole taking into consideration all probabilities and surrounding circumstances.³²⁸

³¹⁸ *Chisnall and Chisnall v Sturgeon and Sturgeon* 1993 (2) SA 642 (W) at 645G; *Lötz* 2002 (35) *De Jure* at 365; Also see *Van der Merwe v Kenkes (Edms) Bpk* 1983 (3) SA 909 (T).

³¹⁹ *Chisnall and Chisnall v Sturgeon and Sturgeon* 1993 (2) SA 642 (W) at 647D.

³²⁰ *Lötz* 2002 (35) *De Jure* at 366.

³²¹ *Lötz* 2002 (35) *De Jure* at 366.

³²² *Lötz* 2002 (35) *De Jure* at 366 and *Chisnall and Chisnall v Sturgeon and Sturgeon* 1993 (2) SA 642 (W) at 645E.

³²³ *Lötz* 2002 (35) *De Jure* at 366; *Chisnall and Chisnall v Sturgeon and Sturgeon* 1993 (2) SA 642 (W) at 645F and *Herselman v Orpen* 1989 (4) SA 1000 (OK) at 1003-1004.

³²⁴ *Lötz* 2002 (35) *De Jure* at 366; *Chisnall and Chisnall v Sturgeon and Sturgeon* 1993 (2) SA 642 (W) at 645F.

³²⁵ *Chisnall and Chisnall v Sturgeon and Sturgeon* 1993 (2) SA 642 (W) at 645G.

³²⁶ *Lötz* 2002 (35) *De Jure* at 366; *Chisnall and Chisnall v Sturgeon and Sturgeon* 1993 (2) SA 642 (W) at 645G.

³²⁷ *Lötz* 2002 (35) *De Jure* at 366; *Chisnall and Chisnall v Sturgeon and Sturgeon* 1993 (2) SA 642 (W) at 645H.

³²⁸ *Lötz* 2002 (35) *De Jure* at 366; *Chisnall and Chisnall v Sturgeon and Sturgeon* 1993 (2) SA 642 (W) at 645I; *Steenkamp v Webster* 1955 (1) SA 524 (A) at 531B and *Van der Merwe v Kenkes (Edms) Bpk* 1983 (3) SA 909 (T).

2.4 Agents

The concluding part of section 2(1) of the Act³²⁹ states that no alienation of land shall be of any force or effect unless it is signed by the parties thereto or by their agents acting on their written authority. An agent signing on behalf of one of the contracting parties must have been given written authority³³⁰ by the principal to do so.³³¹ The agent does not have to be named specifically as long as his identity can be objectively determined.³³² The agent must have knowledge of the existence of the written authority, it is not required for the agent to have it in his possession at the time signing on behalf of the principal.³³³ Section 2(1) of the Act³³⁴ does not mention the signature of the principal as a requirement for the validity of the authority.³³⁵

There are numerous cases dealing with scenarios where parties attempt to exploit the consequences resulting from non-compliance with section 2(1) of the Act³³⁶ and to utilise these requirements as a juristic weapon to attack the validity of a deed of alienation.³³⁷ Lack of written authority has become the subject of many cases where this so-called weapon was used.³³⁸

In the matter of *Ten Brink v Motala*³³⁹ it was contended that the deed of alienation was void for non-compliance with section 2(1) of the Act³⁴⁰ on the following grounds:

³²⁹ Act 68 of 1981.

³³⁰ See Van Rensburg & Treisman at 13 where it is stated that the so-called written authority does not have to be signed but that it may take any form, for example a letter, power of attorney etcetera.

³³¹ Van Rensburg & Treisman 13.

³³² Van Rensburg & Treisman 60 and *Odendaal v Maartens* 1979 (4) SA 237 (T) at 238B-H.

³³³ Van Rensburg & Treisman 13.

³³⁴ Act 68 of 1981.

³³⁵ Van Rensburg & Treisman 60.

³³⁶ Act 68 of 1981.

³³⁷ Lötze 2002 (35) *De Jure* 361.

³³⁸ See Van Rensburg & Treisman at 58 for a list of representatives who derive their authority *ex lege*.

³³⁹ *Ten Brink NO v Motala* 2001 (1) SA 1011 (D). In this matter a building was sold to the first respondent, the minor daughter of the second respondent. The minor was cited as the daughter of the second respondent, who duly signed the deed of alienation. The signature was however not qualified as the signature of the father and natural guardian of the first respondent. The seller was subsequently placed under liquidation. The liquidator contends that the deed of alienation is void for non-compliance with section 2(1) of the Alienation of Land Act 68 of 1981.

Firstly that the purchaser who was cited as such, did not sign the agreement herself but rather her representative; secondly the signature was not qualified and thirdly that the person who duly signed on behalf of the purchaser was not authorized in writing to do so.³⁴¹ Galgut J made the following statement:³⁴²

“A father and natural guardian, when acting on behalf of his minor child, is clearly not an agent. On the contrary, his power to enter into a contract on behalf of his minor child requires no authority, written or otherwise, from such child, but is an incident of his position as father and natural guardian.”

Even though the signatory’s capacity cannot be ascertained *ex facie* from the deed of alienation itself, the court refers to *Cook v Aldred*³⁴³ where Innes CJ stated the following:

“Though a contract purports to be entered into in the name of the agent, parol evidence may be led to show that it was entered into on the principal’s behalf. Such evidence does not in truth vary the written contract, because the liability of the other party to the contract remains. It simply informs the Court that some other person is entitled to sue upon it, and that the principal desires to enforce his rights under it.”

Galgut J stated that if such evidence is permissible in the case of an agent, then same must apply to the current facts.³⁴⁴ With reference to the case of *Van der Merwe v Kenkes*³⁴⁵ he concluded that the agreement between the parties complied with section 2(1) of the Act³⁴⁶ and that parol evidence was admissible to qualify the signature.

³⁴⁰ Act 68 of 1981.

³⁴¹ Lötz 2002 (35) *De Jure* 361.

³⁴² *Ten Brink NO v Motala* 2001 (1) SA 1011 (D) at 1013.

³⁴³ *Cook v Aldred* 1909 TS 150 at 151.

³⁴⁴ *Ten Brink NO v Motala* 2001 (1) SA 1011 (D) at 1013 and *Booyesen and Others v Booyesen and Others* 2012 (2) SA 38 (GSJ) at par 13 where the principle is endorsed.

³⁴⁵ *Van der Merwe v Kenkes (Edms) Bpk* 1983 (3) SA 909 (T). In this case the deed of alienation was signed by one of the spouses who were married out of community of property. The signature was not qualified as being one of the spouses on behalf of the other. The court concluded that parol evidence was allowed to prove that the spouse signed as representative of the other spouse.

³⁴⁶ Act 68 of 1981.

2.5 Section 29(A) of the Alienation of Land Act³⁴⁷

Section 2(2A) of the Act³⁴⁸ requires that 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 29(A) of the Act.³⁴⁹ Thus the contents of the latter section should be stated in the deed of alienation. This statutory requirement is applicable to a purchaser who is a natural person, in his personal capacity, who privately purchases land with a value of R250 000-00 or less, for the first time and primarily for residential purposes.³⁵⁰

The main goal of stipulating the ‘cooling-off’ right in the deed of alienation is to make the purchaser aware of such a right and to acknowledge same.³⁵¹ The existence of this right is not dependant of the purchaser’s knowledge thereof, it exists regardless.³⁵² The intention of the legislature can be stated as the following.³⁵³

“A cooling-off right erodes the common law rule that all contracts validly entered into are enforceable and should be adhered to (pacta sunt servanda). Accordingly it is not in the public interest to introduce a cooling-off right for every person who enters into a deed of alienation. The right should be confined only to persons who are truly in need of statutory protection. For this reason the Amendment Bill does not confer a cooling-off right on sellers of

³⁴⁷ Act 68 of 1981. This section came into operation on 28 October 1998.

³⁴⁸ Section 2(2A) was inserted into the Act by section 2 of the Alienation of Land Amendment Act 103 of 1998, which came into operation on 27 November 1998. Section 2(2A) must be read together with the definition of “land” contained in section 1 of the Act and, more specifically, in paragraph (d) of such definition, as inserted by section 1(b) of Act 103 of 1998. Paragraph (d) refers to land used or intended to be used mainly for residential purposes.

³⁴⁹ Act 68 of 1981, read together with sections 1(d), 2(1) and 2(2A). It is noteworthy to mention that these provisions also applies to a ‘share’ in a share block company as defined in Share Blocks Control Act 59 of 1980; a ‘housing interest’ as defined in Housing Development Schemes for Retired Persons Act 65 of 1988 and a ‘sectional title’ as defined in the Sectional Titles Act 95 of 1986; See Lötzt 2000 (327) *De Jure* 327-328.

³⁵⁰ Stoop PN “Artikel 29A van die Wet op Vervreemding van Grond” 2008 *The Journal of South African Law* 745. See section 1(d) of the definition of land which includes land used or intended to be used for residential purposes.

³⁵¹ See Stoop 2008 *The Journal of South African Law* at 746, the right is created by section 29(A) and section 2(2A) ensures that the purchaser is aware of this right.

³⁵² Stoop 2008 *The Journal of South African Law* 744.

³⁵³ Stoop 2008 *The Journal of South African Law* 744-745; GG 18882 of 1998-08-08.

land. A seller, as a general rule, is not acquiring a basic need by entering into a long-term financial obligation. He is furthermore not subjected to questionable marketing techniques.”

One might feel as though this provision might prejudice the seller in certain instances but the Supreme Court of Appeal has stated that the perceived prejudice to the seller is more “illusory than real”.³⁵⁴ Section 29(A) of the Act³⁵⁵ provides that a purchaser or prospective purchaser of land may within five days³⁵⁶ after signature revoke the offer³⁵⁷ or terminate the deed of alienation,³⁵⁸ by written notice delivered to the seller or his or her agent, at the seller’s chosen *domicilium citandi et executandi*, within that period. This section goes on to prescribe further formalities pertaining to the required written notice and the subsequent implications and consequences.³⁵⁹

It is noteworthy to mention that this subsection contains exclusions as to which agreements this so-called ‘cooling-off right’ does apply and not apply to. The ‘cooling-off right’ is not applicable in instances where (a) the purchase price of the land, or the price offered exceeds R250 000-00 or such higher amount as the Minister may prescribe; (b) if the purchaser or prospective purchaser is a trust or a person other than a natural person; (c) if the land was purchased at a publicly

³⁵⁴ *Gowar Investments (Pty) Ltd v Section 3, Dolphin Coast Medical Centre CC & Another* 2007 (3) SA 100 (SCA) par 15.

³⁵⁵ Act 68 of 1981.

³⁵⁶ In calculating the said period of five days, the day upon which the offer was made or the deed of alienation entered into, as the case may be, as also any Saturday, Sunday or public holiday, must be excluded. Take note that there is a distinction between a signature pertaining to an offer to purchase and the signing of the deed of alienation. It is not the intention of the legislature that a further period of five days, after the offer’s *dies* has lapsed and a deed of alienation has been entered into, starts *ab initio*.

³⁵⁷ In terms of section 29A(1)(a): an offer to purchase land.

³⁵⁸ In terms of section 29A(1)(b): a deed of alienation in respect of land.

³⁵⁹ Sections 29(4), 29(6) and 29(7)(a)-(b) of Act 68 of 1981 states that; where an offer is revoked or deed of alienation is terminated every person who received any amount from the purchaser or prospective purchaser shall refund the full amount within 10 days of the date on which the notice was delivered; no person shall be entitled to remuneration payable in respect of an offer or deed of alienation which has been revoked or terminated or to claim damages from any person; and any provision in any document or agreement entered into by the purchaser or prospective purchaser whereby a penalty fee imposed should the purchaser exercise such a right or waiver of such a right shall be void.

advertised auction;³⁶⁰ (d) if the seller and purchaser have previously entered into a deed of alienation pertaining to the same land and on substantially the same terms;³⁶¹ (e) purchaser or prospective purchaser reserved the right in terms of the deed of alienation/offer to nominate or to appoint another person to take over the rights and obligations of the purchaser³⁶² and (f) in the event where a purchaser purchases the land by exercise of an option.³⁶³

In the instance where a purchaser purchases or signs a second offer to purchase within five days after having signed an offer or deed of alienation in respect of other land, before he or she has exercised his or her 'cooling-off' right, upon signature of the latter transaction deemed to have revoked the earlier transaction and shall notify the seller of the earlier transaction of the revocation or termination.³⁶⁴ It is considered that in such an instance, the purchaser has exercised his or her 'cooling-off' right albeit in a different manner, except where the purchaser had the *bona fide* intention to conclude both deeds of alienation.³⁶⁵ The question then arises on the provability of such a *bona fide* intention in the light of the fact that it is not possible for the purchaser to waive his or her rights as envisaged in section 29(A).³⁶⁶ The practical problem with the latter provision is that the seller does not always get notified of any subsequent deeds of alienation, which plays to the purchaser's advantage as he or she may exercise the 'cooling-off' right to any deed of alienation that is less advantageous.³⁶⁷ Also in the instance where a purchaser makes an offer to a seller, which is open for the seller's acceptance for a significant period, the purchaser is

³⁶⁰ Section 29(A) is applicable if it is a private sale and not a public auction.

³⁶¹ Section 29(A) is applicable if the purchaser is a first time buyer.

³⁶² Section 29(A) is applicable if the purchaser contracts in his or her personal capacity. See Stoop 2008 *The Journal of South African Law* at 746 where it is stated that investors who purchases more than one portion of land within five days, forfeits his or her 'cooling-off' right. This problem could have been circumvented by utilising a nomination clause where a third party could be nominated as purchaser, but such a nomination is regarded as an exclusion in terms of this section.

³⁶³ Sections 29(A)(5)(a)-(f) of Act 68 of 1981.

³⁶⁴ Section 29(8)(b) of Act 68 of 1981; See Stoop 2008 *The Journal of South African Law* 746 where it is stated that there is no obligation on the purchaser to notify the the second seller of the first transaction; however failure to notify the first seller of the revocation or termination is an offense as envisaged in section 29(9)(a).

³⁶⁵ LötZ 2000 (327) *De Jure* 328; Section 29(A)(10) of Act 68 of 1981.

³⁶⁶ LötZ 2000 (327) *De Jure* 328; Section 29(A)(7)(b) of Act 68 of 1981.

³⁶⁷ LötZ 2000 (327) *De Jure* 334

unaware of his ‘cooling-off’ right, opens the door to problematic cases.³⁶⁸ Unlike the provisions of section 2(1) of the Act,³⁶⁹ the consequences of non-compliance with the provisions of section 2(2A) are not expressly stipulated in the Act.³⁷⁰

In the case of *Sayers v Khan*,³⁷¹ which is the first reported case pertaining to the consequences of non-compliance with section 2(2A) of the Act,³⁷² the facts³⁷³ warranted a thorough investigation and adjudication on the consequences of non-compliance with section 2(2A) of the Act.³⁷⁴ The court departed to ascertain the intention of the legislature. In South African case law there are semantic³⁷⁵ and jurisprudential³⁷⁶ guidelines to assist in the determination thereof, specifically where

³⁶⁸ Lötz 2000 (327) *De Jure* 334.

³⁶⁹ Act 68 of 1981. In terms of this section non-compliance with the provision clearly stipulates that no alienation of land shall be of any force or effect.

³⁷⁰ Act 68 of 1981.

³⁷¹ *Sayers v Khan* 2002 (5) SA 688 (C) 57.

³⁷² Act 68 of 1981.

³⁷³ *Sayers v Khan* 2002 (5) SA 688 (C) 57. Plaintiff and Defendant entered into a written agreement of sale whereby Plaintiff purchased a vacant piece of land from the Defendant for the sum of R80 000,00. The Plaintiff instituted action against the Defendant who raised a special plea that the agreement was null and void in that it failed to comply with section 2(2A) of the Alienation of Land Act 68 of 1981. The court *a quo* upheld the special plea.

³⁷⁴ Act 68 of 1981.

³⁷⁵ See *Sayers v Khan* 2002 (5) SA 688 (C) at 60-61 where Van Heerden J stated “As regards the semantic guidelines, a distinction is often drawn between a “peremptory” statutory provision, on the one hand, and a “directory” statutory provision, on the other. Thus, if the statutory provision is couched in words which have an affirmative or imperative character (for example, the words “shall” or “must”), this is regarded as an indication that the legislature intended the provision to be peremptory and that non-compliance with such provision should result in nullity. On the other hand, when permissive or facultative words such as “may”, which reflect an element of discretion, are used, such words are *prima facie* regarded as an indication that the legislature intended the relevant statutory provision to be directory only, and that non-compliance with such provision should not result in nullity.”

³⁷⁶ See *Sayers v Khan* 2002 (5) SA 688 (C) at 61-62; *Pio v Franklin NO and another* 1949 (3) 442 (C); *Sutter v Scheepers* 1932 AD 165 at 173 and 174; Devendish GE *The interpretation of statutes* (1992) 231-234 where the jurisprudential guidelines are summarized as follows: “(i) If, on weighing up the ambit and aims of a provision, nullity would lead to injustice, fraud, inconvenience, ineffectiveness or immorality and provided there is no express statement that the act would be void if the relevant prohibition or prescription is not complied with, there is a presumption in favour of validity . . . Also where ‘greater inconvenience would result from the invalidation of the illegal act than would flow from the doing of the act which the law forbids’, the court will invariably be reluctant – unless there is some other more compelling argument – to invalidate the act. Effectiveness and morality are *inter alia* also considerations that the courts could use in the process of evaluation, in order to decide whether to invalidate an act in conflict with statutory prescription . . . (ii) The history and background of the legislation may provide some indication of legislative intent in this regard (iii) The presence of a penal sanction may, under certain circumstances, be supportive of a peremptory interpretation, since it can be reasoned that the penalty indicates the importance attached by the legislature to compliance.”

the legislature has failed to indicate the consequences of non-compliance. Van Heerden J stated the following:³⁷⁷

“Although section 2(2A) also uses the words “shall contain”, there is no provision in the Act equivalent to section 24, insofar as non-compliance with the provisions of section 2(2A) of the Act is concerned. To my mind, this is a further indication that the legislature intended non-compliance with the provisions of section 2(2A) to render the relevant deed of alienation null and void.”

There are opinions that support the finding of Van Heerden J, that the deed of alienation is void *ab initio* if no reference is made to the ‘cooling-off’ right. These opinions are based on the argument that a material terms is not contained therein.³⁷⁸ This judgment was however held by the Supreme Court of Appeal to be wrongly decided. The issue before the Supreme Court of Appeal was whether failure to comply with section 2(2A) results in the deed of alienation to be void or voidable. In the matter of *Gowar Investments v Section 3*³⁷⁹ the court declared that non-compliance with section 2(2A) does not result in a nullity but rather in voidability at the instance of the purchaser.³⁸⁰ Combrinck AJA duly stated the following:³⁸¹

“The answer to the question posed at the beginning of this judgment is therefore that a deed of alienation which does not comply with ss 2(2A) is not ipso facto void but at the instance of the purchaser.”

³⁷⁷ *Sayers v Khan* 2002 (5) SA 688 (C) at 64.

³⁷⁸ Lötz 2000 (327) *De Jure* 327.

³⁷⁹ *Gowar Investments (Pty) Ltd v Section 3, Dolphin Coast Medical Centre CC & Another* 2007 (3) SA 100 (SCA); *Gowar Investments (Pty) Ltd v Section 3 Dolphin Coast Medical Centre CC & another* [2006] JOL 18799 (SCA). In this case the second applicant purchased a sectional title unit, consisting of doctors consulting rooms. The second applicant applied to court for an order to compel the respondent to transport the unit and open a sectional title register. The agreement between the parties failed to disclose the ‘cooling-off’ right, and based thereon the respondent argued that the agreement was void for non-compliance with the statutory requirements of section 2(2A).

³⁸⁰ Lötz 2008 *Annual Survey of South African Law* 1058.

³⁸¹ *Gowar Investments (Pty) Ltd v Section 3, Dolphin Coast Medical Centre CC & Another* 2007 (3) SA 100 (SCA) par 19.

He further stated that the court *a quo* adopted a narrow semantic and linguistic approach in interpreting the section instead of determining the overall intention of the legislature and to interpret the section in such a way as to give effect thereto.³⁸²

Section 29 has been heavily scrutinized and criticized by our courts and academic writers. It can be said that the underlying goal of this statutory requirement is to curb malpractices and to avoid disputes.³⁸³ The advantages of this section are firstly that the purchaser is entitled to the reciprocal return of performance and that no further performance is required, thus no costs implication in the event of a purchaser exercising his or her right under this section.³⁸⁴ Secondly that the purchaser enjoys protection even though the purchaser may have initiated the conclusion of the agreement.³⁸⁵

The disadvantages of this section can be summarized as follows: If an agent is involved in the facilitation of the conclusion of the agreement, the agent's commission will be forfeited in the event of the purchaser exercising his or her 'cooling-off' right;³⁸⁶ in the event where a purchaser purchases more than one portion of land in the five period day frame, it is considered that the purchaser exercised his or her 'cooling-off' right;³⁸⁷ because of this section's aim to primarily protect the purchaser, in some instances it may place the seller at a disadvantage;³⁸⁸ it is also not a requirement that a purchaser has to be aware of his or her 'cooling-off' right.³⁸⁹ It has further been stated that the only effective legal input which this 'cooling-off' right provides is to assist unethical speculators to manipulate deeds of alienation to their own advantage and is the source of unnecessary litigation.³⁹⁰

³⁸² *Gowar Investments (Pty) Ltd v Section 3 Dolphin Coast Medical Centre CC & another* [2006] JOL 18799 (SCA) at 10 par 16.

³⁸³ Stoop 2008 *The Journal of South African Law* 744.

³⁸⁴ Stoop 2008 *The Journal of South African Law* 753.

³⁸⁵ Stoop 2008 *The Journal of South African Law* 754.

³⁸⁶ Stoop 2008 *The Journal of South African Law* 753.

³⁸⁷ Stoop 2008 *The Journal of South African Law* 753-754.

³⁸⁸ Stoop 2008 *The Journal of South African Law* 754.

³⁸⁹ Stoop 2008 *The Journal of South African Law* 754.

³⁹⁰ Lötz 2000 (327) *De Jure* 334.

The general principles of contract law and the law of delict sufficiently offers protection to the disadvantaged purchaser and the same result can be achieved by way of inserting a *lex commissoria* in the deed of alienation.³⁹¹

2.6 Consequences of non-compliance with the prescribed formalities

Section 28(1) of the Act³⁹² deals with the situation where the deed of alienation pertaining to the sale of land does not comply with the prescribed statutory formalities and both parties have not yet carried out their main obligations under the subsequent deed of alienation, the respective parties are entitled to the return of that which the party has performed under the alienation and compensation for benefits which the other party derived from the transaction.³⁹³ The purchaser may recover interest at the prescribed rate on any payment made,³⁹⁴ reasonable compensation for necessary expenditure in regard to the preservation or improvements on the land.³⁹⁵ The seller may recover reasonable compensation for the occupation, use or enjoyment the purchaser may have had of the land³⁹⁶ and compensation for damages caused intentionally or negligently to the land.³⁹⁷

Section 28(2) of the Act³⁹⁸ regulates the situation where a deed of alienation is invalid for want of compliance with the prescribed statutory requirements where both parties have performed in full in terms of their obligations. The deed of alienation becomes valid retrospectively in the event where the seller has transferred the land to the purchaser and latter has performed in full.³⁹⁹ The effect of such a retrospective validation is that neither party may reclaim rendered performance and the respective

³⁹¹ Lötzt 2000 (327) *De Jure* 334.

³⁹² Act 68 of 1981.

³⁹³ Van Rensburg & Treisman 13 and Section 28 of Act 68 of 1981.

³⁹⁴ Section 28(1)(a)(i) of Act 68 of 1981.

³⁹⁵ Section 28(1)(a)(ii)(aa)-(bb) of Act 68 of 1981.

³⁹⁶ Section 28(1)(b)(i) of Act 68 of 1981.

³⁹⁷ Section 28(1)(b)(ii) of Act 68 of 1981.

³⁹⁸ Act 68 of 1981. Section 28(2) regulates the situation where the purchaser had performed in full and the seller transferred the land to the purchaser. Such alienation shall be valid *ab initio*.

³⁹⁹ Van Rensburg & Treisman 77.

parties become entitled to all the contractual remedies as if the deed of alienation had been valid from the start.⁴⁰⁰

Recently the Supreme Court of Appeal⁴⁰¹ reiterated the purported “rule” in *Wilken v Kohler*⁴⁰² which provides that if both the purchaser and seller to an invalid deed of alienation had performed in full, neither party can claim his or her performance on the basis that the underlying agreement was invalid.⁴⁰³ The validity of the transfer of land and henceforth the ownership is not reliant upon the validity of an underlying agreement provided that both parties performed in full and that the lawful purpose of the agreement has been achieved.⁴⁰⁴ This rule cannot not find application in instances where the transaction is prohibited by law.⁴⁰⁵

⁴⁰⁰ Van Rensburg & Treisman 77.

⁴⁰¹ *Legator McKenna Inc and another v Shea and others* 2010(1) SA 35 (SCA) 55 at par 26. Also referred to by Shongwe JA in *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC & others* (2010) JOL 26586 (SCA).

⁴⁰² *Wilken v Kohler* 1913 AD at 144 where Innes JA made the *obiter*.

⁴⁰³ Kruger L “Is your Title Deed Invalid?” : property 2011 (370) *Personal Finance Newsletter* 9.

⁴⁰⁴ I.e. Deed of Alienation; See Kruger 2011 (370) *Personal Finance Newsletter* 9 and *Legator McKenna Inc and another v Shea and others* 2010(1) SA 35 (SCA) where the court stipulates the requirements for the passing of ownership as being “twofold” namely delivery which is achieved by registration in the Deeds Office and that the parties are *ad idem* to the transfer and acquisition of ownership.

⁴⁰⁵ I.e. Illegal agreement; Kruger 2011 (370) *Personal Finance Newsletter* 9-10.

CHAPTER 3: FORMALITIES IN TERMS OF THE CONSUMER PROTECTION ACT 68 OF 2008

3.1 Introduction

The Consumer Protection Act⁴⁰⁶ (hereafter referred to as the “CPA”) has been branded with the aspirations as the act to change the face of business in South Africa⁴⁰⁷, which includes the sphere of the law of purchase and sale. The CPA replaced all preceding legislation,⁴⁰⁸ which have been described as “outdated” and “fragmented”,⁴⁰⁹ resulting in a single regulatory statute in consumer protection legislation.⁴¹⁰ The CPA is however, not a full codification of the South African consumer law and the common law should be kept in mind when faced with a consumer related situation.⁴¹¹ The CPA is applicable to the sale of immovable property and therefore relevant to a proper study pertaining to the latter prescribed statutory requirements.

3.2 General aims and purposes of the CPA

Section 3 of the CPA stipulates the purpose and policy of the act, which attempts to provide extensive protection of the economic welfare and interests of consumers.

⁴⁰⁶ Act 68 of 2008.

⁴⁰⁷ Melville NJ *The Consumer Protection Act made easy* (2010) at 1 where reference is made to the Cape Times, 1 May 2009, Edition 1.

⁴⁰⁸ Merchandise Marks Act 17 of 1941; Business Names Act 27 of 1960; Price Control Act 25 of 1964; Trade Practices Act 76 of 1976 and Consumer Affairs Act 71 of 1988.

⁴⁰⁹ Jacobs W, Stoop P & Van Niekerk R “Fundamental consumer rights under the Consumer Protection Act 68 of 2008 : a critical overview and analysis” 2010 (13) *Potchefstroom Electronic Law Journal* 303. Also for in depth discussions about the Consumer Protection Act refer to Van Eeden EP *Consumer Protection law in South Africa* (2013) and Van Eeden EP *A guide to the Consumer Protection Act* (2009).

⁴¹⁰ Lötj DJ “The Law of Purchase and Sale” 2011 *Annual Survey of South African Law* 996. Most provisions came into operation on 31 March 2011. Sections 7 and 61 came into operation on 25 April 2010

⁴¹¹ Hutchison and Pretorius 432.

The aims are, *inter alia*, establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;⁴¹² reducing any disadvantages experienced by consumers in accessing goods or services;⁴¹³ promoting fair business practices;⁴¹⁴ protection of consumers from unfair, unreasonable, unjust practices and deceptive, misleading and fraudulent conduct;⁴¹⁵ improving awareness⁴¹⁶; promoting consumer confidence;⁴¹⁷ providing for a consistent, accessible and efficient system of consensual resolutions of disputes⁴¹⁸ and providing for an accessible, consistent, harmonised efficient system of redress for consumers.⁴¹⁹ Contrary to the common law, the CPA contains means to address unfairness in contracts between consumers and suppliers.⁴²⁰

3.3 Application of the CPA

The CPA applies to every transaction occurring within South Africa for the supply of goods or services or the promotion of goods or services and the goods or services themselves, unless the subject transaction is exempted from the application of the CPA.⁴²¹ Not only does the CPA regulate market practices but also contracts between consumers and suppliers.⁴²² In terms of the CPA procedural fairness and contractual terms *per se* are regulated.

⁴¹² Section 3(1)(a) of Act 68 of 2008.

⁴¹³ Section 3(1)(b) of Act 68 of 2008.

⁴¹⁴ Section 3(1)(c) of Act 68 of 2008.

⁴¹⁵ Section 3(1)(d)(i)-(ii) of Act 68 of 2008.

⁴¹⁶ Section 3(1)(e) of Act 68 of 2008.

⁴¹⁷ Section 3(1)(f) of Act 68 of 2008.

⁴¹⁸ Section 3(1)(g) of Act 68 of 2008.

⁴¹⁹ Section 3(1)(h) of Act 68 of 2008.

⁴²⁰ Lötž 2011 *Annual Survey of South African Law* 997.

⁴²¹ Section 5(1)(a)-(d) of Act 68 of 2008 and Jacobs, Stoop & Van Niekerk 2010 (13) *Potchefstroom Electronic Law Journal* 309. Take note that section 5(2) stipulates the transactions to which the CPA does not apply.

⁴²² Lötž 2011 *Annual Survey of South African Law* 997.

3.3.1 Definitions

Before one can ascertain the applicability of the CPA one has to thoroughly examine relevant parts of certain key definitions in the CPA. The definition of “transaction” refers, *inter alia*, to an agreement between a person or persons for the supply of any goods in exchange for consideration or the supply of any goods to or at the direction of a consumer for consideration, in respect of a person acting in the ordinary course of business.⁴²³ The definition of “consumer” is any person to whom goods are supplied in the ordinary course of the supplier’s business.⁴²⁴ The definition of “goods” includes a legal interest in land or any other immovable property.⁴²⁵ The definition of “supplier” means a person who markets goods, which includes to sell goods in the ordinary course of business for consideration.⁴²⁶

The ambit of the CPA therefore includes the alienation of land, especially where developers⁴²⁷, speculators⁴²⁸ or estate agents⁴²⁹ are involved.⁴³⁰ The reason for specifically identifying the latter categories are that they usually deal with immovable property in the ordinary course of business. The so-called once-off private

⁴²³ See section 1 for the definition of “transaction” together with section 5(6) of Act 68 of 2008 and Jacobs, Stoop & Van Niekerk 2010 (13) *Potchefstroom Electronic Law Journal* 312.

⁴²⁴ See section 1 of Act 68 of 2008 for the definition of “consumer” and Jacobs, Stoop & Van Niekerk 2010 (13) *Potchefstroom Electronic Law Journal* 313.

⁴²⁵ See section 1 of Act 68 of 2008 for the definition of “goods” and Jacobs, Stoop & Van Niekerk 2010 (13) *Potchefstroom Electronic Law Journal* 314.

⁴²⁶ See section 1 of Act 68 of 2008 for the definition of “supplier” and Jacobs, Stoop & Van Niekerk 2010 (13) *Potchefstroom Electronic Law Journal* 315.

⁴²⁷ I.e. a developer of properties, as the supplier, offers units in a development to a member of the public, whom qualifies as a consumer.

⁴²⁸ I.e. speculator sells his house to a member of the public, whom qualifies as a consumer.

⁴²⁹ I.e. estate agents are governed by the provisions of the CPA where they market and negotiate the sale of immovable property between the seller and purchaser. Estate agents are seen as ‘intermediary’ as defined in the CPA. Take note that in a situation where the sale is a once-off transaction, the deed of alienation is not subject to the CPA but only the mandate agreement between the seller and estate agent and the marketing practices pertaining to such a sale.

⁴³⁰ McCaul E and Canterbury D “The effect of the Consumer Protection Act will have on the sale of property” <http://www.lexisnexis.co.za/our-solutions/private-sector/research-solutions/newsletter-articles/effect-of-CPA-on-property.aspx> (accessed on 06-09-2014).

transactions between a purchaser and seller will not be subject to the CPA⁴³¹ or where the consumer is a juristic person with an asset value or annual turnover that exceeds the threshold determined by the Minister of Trade and Industry.⁴³²

3.4 Formalities in terms of the CPA

Up until the enactment of the CPA the parties to an agreement, inclusive of an agreement for the sale of immovable property, enjoyed unrestricted freedom to contract, even if certain terms were unfair and unreasonably cumbersome.⁴³³ The CPA seeks to limit and regulate such unrestricted rights and subsequently prescribes fair practices.⁴³⁴

3.4.1 Written agreement

A distinction can be made between procedural requirements and the regulation of contractual terms *per se*. In terms of the CPA, ensuring fair contractual terms requires certain categories of consumer agreements to be in writing.⁴³⁵ Consumer agreements are not in all instances statutorily required to be in writing and find application irrespective of the agreement being signed by the consumer or not.⁴³⁶

⁴³¹ McCaul E and Canterbury D “The effect of the Consumer Protection Act will have on the sale of property”<http://www.lexisnexis.co.za/our-solutions/private-sector/research-solutions/newsletter-articles/effect-of-CPA-on-property.aspx> (accessed on 06-09-2014).

⁴³² Barnard J “The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoets clauses and the liability for damages” 2012 (3) *De Jure* 455

⁴³³ McCaul E and Canterbury D “The effect of the Consumer Protection Act will have on the sale of property”<http://www.lexisnexis.co.za/our-solutions/private-sector/research-solutions/newsletter-articles/effect-of-CPA-on-property.aspx> (accessed on 06-09-2014).

⁴³⁴ McCaul E and Canterbury D “The effect of the Consumer Protection Act will have on the sale of property”<http://www.lexisnexis.co.za/our-solutions/private-sector/research-solutions/newsletter-articles/effect-of-CPA-on-property.aspx> (accessed on 06-09-2014).

⁴³⁵ Lötž 2011 *Annual Survey of South African Law* 997 and 1004.

⁴³⁶ Sections 50(1)-(2) of Act 68 of 2008 and Naude 2009 (126) *The South African Law Journal* 513 where Naude states that it seems that writing may be an incorporation requirement but not signature.

The supplier must provide the consumer with a free copy of the agreement.⁴³⁷ If a written recordal of the agreement is however required, section 50(1) fails to address the consequences of non-compliance.⁴³⁸

The requirements of a 'written' and 'signed' agreement in terms of the CPA is in stark contrast to the formalities prescribed in terms of section 2(1) of the Alienation of Land Act,⁴³⁹ which requires same to ensure contractual validity.⁴⁴⁰ Section 2(1) of the Alienation of Land Act⁴⁴¹ is preemptory regarding formalities and the contents of a deed of alienation. If there exists any inconsistencies between the Alienation of Land Act⁴⁴² and the CPA, the provisions of both Acts apply concurrently to the extent that it is possible to apply and comply with one of them without contravening the other.⁴⁴³ If latter is not possible section 2(9)(a)-(b) of the CPA applies and subsequently the provision that imposes greater protection to the consumer prevails.⁴⁴⁴ This method of interpretation gives statutory authority to the *contra proferentem* rule of interpretation.⁴⁴⁵ One should bear in mind that transactions that do not fall within the ambit of the CPA and the Alienation of Land Act⁴⁴⁶ are governed by the common law.⁴⁴⁷

⁴³⁷ Section 22 and 50(2)(b) of Act 68 of 2008.

⁴³⁸ Lötž 2011 *Annual Survey of South African Law* 1006.

⁴³⁹ Act 68 of 1981.

⁴⁴⁰ Lötž 2011 *Annual Survey of South African Law* 1005.

⁴⁴¹ Act 68 of 1981.

⁴⁴² Act 68 of 1981.

⁴⁴³ Lötž 2011 *Annual Survey of South African Law* 999; Section 2(9)(a) of Act 68 of 2008.

⁴⁴⁴ Lötž 2011 *Annual Survey of South African Law* 999; Section 2(9)(b) of Act 68 of 2008.

⁴⁴⁵ Section 4(4)(a) of Act 68 of 2008 and Naude T "The consumer's 'right to fair, reasonable and just terms' under the new Consumer Protection Act in comparative perspective" 2009 (126) *The South African Law Journal* 506.

⁴⁴⁶ Act 68 of 1981.

⁴⁴⁷ Section 2(10) of Act 68 of 2008 and Melville 22.

3.4.2 Plain and understandable language

The CPA however goes further and stipulates, in the event that there exists a written agreement, such an agreement must comply with the requirement of plain and understandable language.⁴⁴⁸

3.5 'Cooling-off' Right in terms of the CPA

The CPA explicitly maintains the common law pertaining to *inter alia* a consumer's cooling-off right.⁴⁴⁹ In terms of the CPA, procedural fairness requires that suppliers make specific information available to consumers.⁴⁵⁰ A supplier is obliged to inform the consumer of his rights to rescind the agreement as envisaged in section 16 of the CPA as a result of direct marketing.⁴⁵¹ Latter section provides for a cooling-off right and the applicable execution procedure.⁴⁵² The CPA clearly states that this right is in addition to and not in substitution for any right that may otherwise exist in law between an supplier and a consumer.⁴⁵³

This section accords with sections 2(2A) and 29(A) of the Alienation of Land Act⁴⁵⁴ which provides for a similar cooling-off right which enables a purchaser or prospective purchaser, within 5 days, to terminate the deed of alienation.

⁴⁴⁸ Section 22 and 50(2)(b)(i) of Act 68 of 2008 and Lötzer 2011 *Annual Survey of South African Law* 1005. See also a comprehensive discussion about plain and understandable language in Gouws M "Information: Comments on the plain language provisions of the Consumer Protection Act" 2010 (22) *South African Mercantile Law Journal* 79

⁴⁴⁹ Section 16(2) of Act 68 of 2008 and Lötzer 2011 *Annual Survey of South African Law* 1001-1002.

⁴⁵⁰ Lötzer 2011 *Annual Survey of South African Law* 997.

⁴⁵¹ See section 1 of Act 68 of 2008 for the definition of 'direct marketing'.

⁴⁵² Section 16(1)-(4) of Act 68 of 2008.

⁴⁵³ Section 16(2) of Act 68 of 2008.

⁴⁵⁴ Act 68 of 1981.

3.6 Conclusion

General consequences for non-compliance with the provisions of the CPA range from administrative fines to invalidity of agreements and various other remedies.⁴⁵⁵ However, failure by the legislature to explicitly specify the consequences of non-compliance with the written and signature requirement is rather unsatisfactory and should in all probability be amended to clearly and unambiguously state the consequences to ensure legal certainty.⁴⁵⁶ Unfortunately failure to require a written recordal of an agreement between a consumer and supplier opens the door to a magnitude of disputes and uncertainty pertaining to the terms of an agreement. The requirement of plain and understandable language⁴⁵⁷ however, seems to be dictatorial and renders the agreement void for want of compliance with certain provisions of the CPA.⁴⁵⁸ The widened scope of the cooling-off right creates an unintended situation where purchasers who do not enjoy the cooling-off right in terms of the Alienation of Land Act⁴⁵⁹ are entitled to the cooling-off right in terms of the CPA.⁴⁶⁰ This was clearly not the intention of the legislature.

⁴⁵⁵ Hutchison and Pretorius 433 and see Chapter 3 of the CPA.

⁴⁵⁶ See Lötž 2011 *Annual Survey of South African Law* 1006 and Naude 2009 (126) *The South African Law Journal* 514 where Naude is of the view that this scenario is obstructive and that the applicable section should be re-formulated.

⁴⁵⁷ Section 22 and 50(2)(b)(i) of Act 68 of 2008.

⁴⁵⁸ See Lötž 2011 *Annual Survey of South African Law* 1006 and the authorities cited therein together with section 51(3); and section 3(1)(b)(iv) read with section 51(1)(a)(i); or section 50(2)(b)(i) read with section 51(1)(b)(i) of Act 68 of 2008.

⁴⁵⁹ Act 68 of 1981.

⁴⁶⁰ In terms of section 29(A)(5) of Act 68 of 1981 a cooling-off right is not available to purchasers where the purchase price of the land exceeds R250 000-00. Section 16 of the CPA does not contain such exclusion.

CHAPTER 4: COMPARATIVE STUDY

4.1 Introduction

The mainstream legal systems of the world are divided into two central categories, namely civil-law systems based on the Justinianic *Corpus iuris civilis* and common law systems derived from judicial English common law.⁴⁶¹ In addition to the two categories, there are also the mixed systems containing a mixture of civil and common law.⁴⁶² This chapter will provide a brief summary of the Scottish and Belgian law of sale of immovable property and how they compare with the South African approach. Both these countries form part of the European Union.⁴⁶³ The comparison is limited to the formalities pertaining to the sale of immovable property which does not include a comparison to consumer legislation.

4.2 Categories of property in Scotland

It has been argued that the legal systems of South Africa and Scotland are mixed systems, as they contain a mixture of civil⁴⁶⁴ and common law.⁴⁶⁵ The law of sale in Scotland, in contrast to South African laws, are divided into categories according to the nature of the property subject to the sale.⁴⁶⁶ The classifications can be listed as follows: heritable and moveable property; corporeal and incorporeal property and

⁴⁶¹ Van der Merwe V “The origin and characteristics of the mixed legal systems of South Africa and Scotland and their importance in globalisation” 2012 (18) *Fundamina : A Journal of Legal History* 91.

⁴⁶² Van der Merwe 2012 (18) *Fundamina : A Journal of Legal History* 91 and the legal authorities cited therein.

⁴⁶³ Barnard J *The influence of the Consumer Protection Act 68 of 2008 on the common law of sale* (LLD dissertation 2013 University of Pretoria) 4.

⁴⁶⁴ Van der Merwe 2012 (18) *Fundamina : A Journal of Legal History* 102 where it is stated that civil law is mainly derived from Roman Law.

⁴⁶⁵ Van der Merwe 2012 (18) *Fundamina : A Journal of Legal History* 102 where it is stated that common law is mainly derived from English law; Zimmermann R, Visser D & Reid K *Mixed legal systems in comparative perspective: property and obligations in Scotland and South Africa* (2004) 16.

⁴⁶⁶ Zimmermann *et al* (2004) 272.

fungible and non-fungible property.⁴⁶⁷ Of particular importance is the classification of heritable property which includes land and buildings.⁴⁶⁸ It can further be classified as corporeal heritable property,⁴⁶⁹ which compares to the South African concept of immovable property. In terms of the law of sale in Scotland, a contract may be a sale where the property is simultaneously transferred, or it may be agreed that the property be transferred at a later date.⁴⁷⁰ Both are classified as a contract of sale, although the former is both a contract and a conveyance the latter constitutes only a contract.⁴⁷¹

4.2.1 Formalities for the sale of corporeal heritable property

It should be stated from the outset that there are numerous ways in which a title to heritable property can be acquired which falls outside the scope of this paper.⁴⁷² The focus is solely on formalities pertaining to the sale of such property.⁴⁷³ In Scotland, the sale of property, also referred to as “the missives”⁴⁷⁴ and the subsequent passing of ownership, also referred to as “the conveyance or disposition”,⁴⁷⁵ are two separate distinctive acts.

The Requirements of Writing Act⁴⁷⁶ prescribes certain formalities to be complied with in both instances. The following sections find application: Section 1(2)(a)(i) reads as follows:

⁴⁶⁷ Robson P & McCowan A *Property Law* (1998) 12.

⁴⁶⁸ Robson & McCowan 1(998) 12-13.

⁴⁶⁹ See Robson & McCowan (1998) 16 for the classification of four respective groups in which property in Scotland can be classified.

⁴⁷⁰ Zimmermann *et al* (2004) 272 and sections 2(4)-(6) of the Sale of Goods Act 1979.

⁴⁷¹ Zimmermann *et al* (2004) 272.

⁴⁷² Robson & McCowan (1998) 44. See chapter 6 for an in depth discussion regarding the different manners in which a title can be acquired.

⁴⁷³ Take note that reference to property refers to corporeal heritable property.

⁴⁷⁴ Zimmermann *et al* (2004) 273.

⁴⁷⁵ Zimmermann *et al* (2004) 273.

⁴⁷⁶ Act 1995 (Scotland)

*“1(2) Subject to subsection (3) below, a **written document** complying with section 2 of this Act will be required for – (a) the constitution of – (i) a **contract** or unilateral obligation for the **creation, transfer, variation or extinction of an interest in land.**”*

The above section creates the requirement that a contract, whether it is the so-called “missive” and/or “conveyance”, to be in writing where the interest of land is concerned. Section 2(1) goes on to prescribe what should be in writing, which reads as follows:

*“2(1) No document required by section 1(2) of this Act shall be **valid** in respect of the formalities of execution **unless it is subscribed by the granter of it** or, if there is more than one granter, by each granter, but nothing apart from such subscription shall be required for the document to be valid as aforesaid.”*

It is thus further a requirement that the granter, whom would under South African law be referred to as the seller, subscribe same. It should be noted that the granter is required to sign at the end of the last page.⁴⁷⁷ Section 3(1) creates a presumption that a document shall be presumed to have been subscribed by the granter where:

*3(1)(a) a document bears to have been subscribed by a granter of it; (b) the document bears to have been **signed by a person as a witness** of that granter’s subscription ... bears to state the name and address of the witness and (c) nothing in the document ... indicates – (i) that it was not subscribed by that granter or (ii) that it was not validly witnessed for any reason ...”*

This section creates the requirement of a witness attesting to the granter’s signature to ensure validity.

⁴⁷⁷ Section 7(1) of the Requirements of Writing (Scotland) Act 1995.

4.2.2 Conclusion

It can be summarized that in terms of the prescribed formalities in Scotland the initial contract of sale of immovable property, to be considered valid, must be in writing and signed by the seller,⁴⁷⁸ creating personal reciprocal obligations⁴⁷⁹ between the parties.⁴⁸⁰ The second stage takes place once delivery and registration⁴⁸¹ of the deed of transfer,⁴⁸² duly signed by the seller, is effected.⁴⁸³ The seller's⁴⁸⁴ signature must be witnessed in both instances.⁴⁸⁵ Unlike section 2(1) of the Alienation of Land Act,⁴⁸⁶ both parties are not required to sign the preceding contract or subsequent deed to ensure validity. Furthermore, section 2(1) of the Alienation of Land Act⁴⁸⁷ permits either the seller or purchaser to authorise an agent to act on their behalf, if they wish to do so for whatever reason. In terms of the The Requirements of Writing Act,⁴⁸⁸ the Act only permits authorisation in the specific instances where the grantor is either blind or unable to write.

⁴⁷⁸ Robson & McCowan (1998) 47. Take note that contracts to buy and sell heritable property required probative writing to be effectual but has now been abolished, see section 1 Requirements of Writing (Scotland) Act 1995.

⁴⁷⁹ See Robson & McCowan (1998) 47, where it is stated that it creates a right against the seller for the delivery of a valid deed of transfer, failure to do so will result in a damages claim against the seller.

⁴⁸⁰ Robson & McCowan (1998) 47.

⁴⁸¹ See Robson & McCowan (1998) 56-57 for a discussion pertaining to the registration process. Traditionally deeds were recorded in the General Register of Sasines but is now regulated by the Land Registers (Scotland) Act 1868.

⁴⁸² Also referred to as the "conveyance" or "disposition".

⁴⁸³ Robson & McCowan (1998) 47.

⁴⁸⁴ Also referred to as the "grantor"

⁴⁸⁵ Registers of Scotland "Requirements of Writing (Scotland) Act 1995 Electronic Documents (Scotland) Regulations 2013 Consultation"

http://www.ros.gov.uk/pdfs/edocs_scot_regs_2013_Consultation.pdf (accessed on 09-09-2014)

⁴⁸⁶ Act 68 of 1981.

⁴⁸⁷ Act 68 of 1981.

⁴⁸⁸ Section 9 read together with schedule 3 of Act 1995 (Scotland).

4.3 Belgium Law

In Belgium, sale agreements are regulated by the provisions of the Belgian Civil Code with regard to the general principles of contract law, common law of sale and consumer sales.⁴⁸⁹ Property law is mainly based on the Civil Code.⁴⁹⁰

4.3.1 Categories of property⁴⁹¹ in Belgium

All things⁴⁹² and rights are categorised as either immovables⁴⁹³ or movables.⁴⁹⁴ Immovable can be defined as land and the attachments thereto.⁴⁹⁵ Property can be defined as an absolute right over a thing.⁴⁹⁶

4.3.2 Formalities for the sale property

4.3.2.1 The negotiations

Before the start of negotiations a 'letter of intent' is often signed between the parties to secure the prospective buyer exclusivity in order to perform a due diligence without the possibility of the seller negotiating with other interested parties.⁴⁹⁷ In Belgium, the sale is realised as soon as an agreement is made between the seller

⁴⁸⁹ Barnard 4 and the authorities cited therein.

⁴⁹⁰ Bocken H & De Bont W *Introduction to Belgian Law* (2001) 204.

⁴⁹¹ Art 544 of the Civil Code states that property includes the absolute right of use, enjoyment and alienation of a thing.

⁴⁹² See Bocken & De Bont (2001) at 205 for a discussion on what constitutes "things".

⁴⁹³ Commonly referred to as *immeubels/onroerend*.

⁴⁹⁴ Commonly referred to as *meubels/roerend*; Bocken & De Bont (2001) 207.

⁴⁹⁵ Bocken & De Bont (2001) 207.

⁴⁹⁶ Bocken & De Bont (2001) 208.

⁴⁹⁷ Belgian Real Property Law

<http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/Belgium.PDF> 15 (accessed on 19/10/2014).

and the purchaser on the sales object and the price.⁴⁹⁸ The negotiations between the seller and purchaser may be terminated at any stage prior to the signing of the preliminary sales agreement.⁴⁹⁹ As a result of a sale, property is immediately transferred without any formality.⁵⁰⁰

4.3.2.2 Preliminary sales agreement

However, in order to prove such a sale, it is advisable to enter into a written agreement, called the 'preliminary sales agreement'.⁵⁰¹ For the transfer of immovable property, difficulties may arise in establishing the transfer of the property towards third parties and new owners.⁵⁰² Thus, a so-called disclosure system exists where immovable property is transferred.⁵⁰³ This rule is only applicable to agreements or a judgment between living parties and a legatee.⁵⁰⁴ The said preliminary agreement is final and binding in the instance where it contains the agreed sales object and price.⁵⁰⁵ The agreement is required to be dated and signed by both parties.⁵⁰⁶

⁴⁹⁸ Belgian Real Property Law

<http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/Belgium.PDF> 14 (accessed on 19/10/2014); Article 1583 of the Civil Code.

⁴⁹⁹ Belgian Real Property Law

<http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/Belgium.PDF> 15 (accessed on 19/10/2014)

⁵⁰⁰ Bocken & De Bont (2001) 209.

⁵⁰¹ Belgian Real Property Law

<http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/Belgium.PDF> 14 (accessed on 19/10/2014).

⁵⁰² Bocken & De Bont (2001) 209.

⁵⁰³ Bocken & De Bont (2001) 206-207.

⁵⁰⁴ Bocken & De Bont (2001) 209-210.

⁵⁰⁵ Belgian Real Property Law

<http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/Belgium.PDF> 15 (accessed on 19/10/2014).

⁵⁰⁶ Belgian Real Property Law

<http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/Belgium.PDF> 17 (accessed on 19/10/2014).

4.3.2.3 The notarial deed

After signature of the preliminary agreement, a notarial deed shall be signed within four months. These categories of agreements embodying the agreed transfer or establishment of the real right are required to be entered in the Mortgage Register.⁵⁰⁷ Latter is intended to keep track of immovable property as far as the interests of the mortgage-holding creditor were concerned.⁵⁰⁸ The preliminary agreement is not enforceable against third parties, and only becomes enforceable once it has been registered with a competent mortgage registry office.⁵⁰⁹ The involvement of a notary public is mandatory in any acquisition of real property.⁵¹⁰ Interestingly, as an exception, the parties may agree between themselves to impose the requirement that the sale agreement be entered into the Mortgage Register.⁵¹¹

4.4 Conclusion

The consequences of non-compliance of the above is quite simply that the agreement is binding *inter-partes* and not against third parties.⁵¹² Only the buyer who has a registered notarial deed shall be considered the real owner of the immovable property.⁵¹³ The transfer of the ownership takes place upon the signing of the

⁵⁰⁷ Bocken & De Bont (2001) 209.

⁵⁰⁸ Bocken & De Bont (2001) 207.

⁵⁰⁹ Belgian Real Property Law

<http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/Belgium.PDF> 15 (accessed on 19/10/2014)

⁵¹⁰ Belgian Real Property Law

<http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/Belgium.PDF> 15 (accessed on 19/10/2014).

⁵¹¹ Bocken & De Bont (2001) 210.

⁵¹² Belgian Real Property Law

<http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/Belgium.PDF> 15-16 (accessed on 19/10/2014).

⁵¹³ Belgian Real Property Law

<http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/Belgium.PDF> 15-16 (accessed on 19/10/2014).

preliminary agreement alternatively upon the signing of the notarial deed.⁵¹⁴ Under Belgian law the prescribed formalities pertaining to the sale of land is far less stringent than under the Alienation of Land Act.⁵¹⁵ Parties subsequently conclude a binding agreement once they have agreed on the thing sold and the price thereof. It resembles some of the requirements under section 2(1) of the Alienation of Land Act,⁵¹⁶ but it seems as though the requirements are more simplistic.

⁵¹⁴ Belgian Real Property Law

<http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/Belgium.PDF> 15-16 (accessed on 19/10/2014).

⁵¹⁵ Act 68 of 1981.

⁵¹⁶ Act 68 of 1981.

CHAPTER 5: CRITICISM, RECOMMENDATIONS AND CONCLUSION

5.1 Summary of judicial treatment of formalities

The current approach pertaining to formalities applicable to agreements can be summarized as follows: Agreements in general allows that the parties may agree *inter partes* that their agreement is only valid if same is reduced to writing and signed by them, referred to as self imposed formalities. Agreements relating to the sale of immovable property are required to comply with prescribed formalities in terms of Section 2(1) of the Alienation of Land Act,⁵¹⁷ which requires that the sale of immovable property has to be (a) recorded in a deed of alienation; (b) signed by the parties; or (c) by their agents acting on their written authority. Latter prescribed formalities forms the subject of the conclusion below.

5.1.1 Written deed of alienation⁵¹⁸

The written deed of alienation should therefore contain: (i) the identity of the contracting parties; (ii) identity of the land sold; (iii) purchase price and (iv) material terms.

5.1.1.1 Identity of the parties⁵¹⁹

The identities of the contracting parties and the capacities in which they contract should be clearly indicate and ascertained *ex facie* from the deed of alienation. If

⁵¹⁷ Act 68 of 1981.

⁵¹⁸ See Chapter 2 par 2.2 at 17-19.

⁵¹⁹ See Chapter 2 par 2.2.1 at 19-21.

latter is not ascertainable the deed of sale will be of no force or effect. Thus the deed itself is decisive on the question of due compliance and subsequent validity.

5.1.1.2 Identity of the land sold⁵²⁰

The identity of the land sold can be divided into two sub-categories namely existing property and a future sectional title unit. Former category, as applied by our courts, does not require a meticulous description of the property but rather be identifiable by reference to the written deed without regard to the parties negotiations and *consensus*. The identity of the land can also be chosen from a particular *genus* or class by one of the parties or a third party which entails a less stringent description requirement. Last mentioned only finds application where it is clear that the parties intended such a construction.

Where the subject land is a future sectional title unit the position slightly deviates. The Sectional Titles Act⁵²¹ does not prescribe formalities resulting in the Alienation of Land Act⁵²² governing these types of land as the term sectional title is included in the definition of land in latter Act. The requirements are that the unit has to be described three dimensionally with reference to its length, breadth and height or reference to a diagram where these measurements are indicated. Additional to this, the undivided share in the common property has to be indicated with either reference to the participation quota or a diagram where such a share is ascertainable by calculations. In the instance where the parties intended a *genus* sale pertaining to sectional title units, it is not required to fully describe the *res vendita* as it would be identified at a later stage.⁵²³ It is however required that such an inference of a *genus* sale can only be made once it is clear and unambiguously certain that the contracting parties intended such a sale.

⁵²⁰ See Chapter 2 par 2.2.2 at 12-33.

⁵²¹ Act 95 of 1986.

⁵²² Act 68 of 1981.

⁵²³ See Chapter 2 par 2.2.2 at 26.

5.1.1.3 Purchase price⁵²⁴

The purchase price and the method of payment should be fixed. An objectively ascertainable formula should be included in the deed of alienation to calculate the price without recourse to the oral *consensus* between the parties. Parties may not state that a price will be agreed in future or that a third party will determine the price. Failure to properly indicate the price or formula to calculate same results in the deed of alienation being void for non-compliance with the prescribed formalities.

5.1.1.4 Material terms⁵²⁵

All material terms should be reduced to writing, failure to do so will result in an invalid agreement. It is evidently not easy to ascertain which terms can be regarded as material or not, creating an array of problematic situations and disputes. The findings in *Jones v Wykland Properties*⁵²⁶ paved the way for subsequent cases which dealt with material terms. It is therefore required that all material terms to be contained in the deed of alienation at the time of the parties conclusion of the agreement. In certain instances material terms may be included by way of tacit terms to the contract. The courts have indicated that in certain instances evidence may be led to enable the court to determine certain factual issues and adjudicate the matter based on such evidence for purposes of rectification. In latter instance, it is possible that an unrecorded material term may be included *ex post facto* the conclusion of the agreement.

⁵²⁴ See chapter 2 par 2.2.3 at 34-35.

⁵²⁵ See Chapter 2 par 2.2.4 at 35-40.

⁵²⁶ *Jones v Wykland Properties* 1998 (2) SA 355 (K).

5.1.2 Signed by the parties⁵²⁷

Each case should be adjudicated on its own merits and the deed of alienation should be considered as a whole. An objective enquiry into what the act suggest to the other contracting party rather than the subjective intention of the signatory. Validity therefore relies upon the objective enquiry.

5.1.3 Authorized agents⁵²⁸

Agents may act on written authority, on behalf of one of the contracting parties behalf. Possession of such authority is not required only knowledge of the existence thereof. Signature of the principal is not required for validity. It is however a recognised principle that parol evidence is admissable to qualify a signature, as it does not vary the rights and obligations under the written contract.

5.2 Cooling-off right in terms of the Alienation of Land Act and the Consumer Protection Act⁵²⁹

Section 2(2A) of the Alienation of Land Act⁵³⁰ requires that a deed of alienation contain the so-called cooling-off right as evisaged in section 29(A) of the Act.⁵³¹ This right is confided to a specific catergy of purchasers who are in need of statutory protection. The Supreme Court of Appeal has declared that non-compliance with section 2(2A) of the Alienation of Land Act⁵³² results in voidability at the instance of the purchaser and not *ipso facto* void.

⁵²⁷ See Chapter 2 par 2.3 at 43-44.

⁵²⁸ See Chapter 2 par 2.4 at 45-46.

⁵²⁹ See Chapter 2 par 2.5 at 47-53 and Chapter 3 par 3.5 at 60.

⁵³⁰ Act 68 of 1981.

⁵³¹ Act 68 of 1981.

⁵³² Act 68 of 1981.

Section 16 of the Consumer Protection Act⁵³³ contains a consumer's 'cooling-off' right. This section accords with sections 2(2A) and 29(A) of the Alienation of Land Act⁵³⁴ which provides for a similar cooling-off right which enables a purchaser or prospective purchaser, within 5 days, to terminate the deed of alienation. The 'cooling-off' right in terms of the CPA protects a broader category of purchasers. It is clear that the legislature intended to confine the category of purchasers who are entitled to the protection of the 'cooling-off' right in terms of the Alienation of Land Act.⁵³⁵ With the inception of the CPA and its extension of such a right, it clearly undermines the intention of the legislature and more importantly the goals of the the Alienation of Land Act.⁵³⁶

5.3 Comparative Study⁵³⁷

A brief comparison was made between South African law pertaining to the sale of immovable property and the laws of Scotland and Belgium. It can be stated that it is notable that in terms of both systems, one immediately notices that the prescribed formalities are far less stringent than those imposed by Alienation of Land Act.⁵³⁸

5.4 Recommendations and Conclusion

Has the Alienation of land Act successfully achieved its aims? It is clear upon proper investigation that section 2(1) of the Alienation of Land Act,⁵³⁹ read together with sections 28 and 29A, that the legislature's aim as stated in chapter 1 is far from fulfilled.⁵⁴⁰ Parties to a deed of alienation pertaining to the sale of immovable

⁵³³ Act 68 of 2008, hereafter referred to as the 'CPA'.

⁵³⁴ Act 68 of 1981.

⁵³⁵ Act 68 of 1981.

⁵³⁶ Act 68 of 1981.

⁵³⁷ See Chapter 4 at 62-69.

⁵³⁸ Act 68 of 1981.

⁵³⁹ Act 68 of 1981.

⁵⁴⁰ Lötz DJ "The Law of Purchase and Sale" 2009 *Annual Survey of South African Law* at 981.

property more often than not have doubts about the transaction and therefore constantly explore quick escape routes. Unfortunately attorneys and the like are well read on the prescribe formalities and the result of non-compliance therewith.

Taking cognizance of public policy as stipulated by Sachs JJ in *Barhuizen v Napier*.⁵⁴¹

*"Like the concept of boni mores in our law of delict, the concept of good faith is shaped by the legal convictions of the community. While Roman-Dutch law may well supply the conceptual apparatus for our law, the content with which concepts are filled depends on an examination of the legal conviction of the community – a far more difficult task. This task requires that careful account be taken of the existence of our constitutional community, based as it is upon principles of freedom, equality and dignity. **The principle of freedom does, to an extent, support the view that the contractual autonomy of the parties should be respected and that failure to recognise such autonomy could cause contractual litigation to mushroom and the expectations of contractual parties to be frustrated.**"*

The abovementioned supports the notion that contractual autonomy should not be forgotten amidst the current flood of disputes between parties to a deed of alienation. The overly stringent requirements of section 2(1) of the Alienation of Land Act⁵⁴² undermines contractual autonomy as parties seek to escape from their contractual commitments. An urgent revision of the current legislation should be undertaken by the South African Law Reform Commission.

Examining the comparative formalities of Scotland and Belgium, it can be anticipated that less stringent requirements may not resolve the current issues as it will increase the disputes about what the parties exactly agreed upon. The terms of the agreement would be unsure and subsequently difficulty in proving agreed terms. If formalities are completely abolished the same difficulties in proving the terms of the

⁵⁴¹ *Barkhuizen v Napier* 2008 JOL 19614 (CC) AT 63 par 140 (own emphasis).

⁵⁴² Act 68 of 1981.

agreement would arise. Another suggestion of a rectification-windon period⁵⁴³ would undoubtedly encourage parties to abuse such a period as it creates possibility of undermining *pacta sunt servanda*. Support can however be given to academic writers,⁵⁴⁴ suggesting that non-compliance results in voidability rather than being *ipso facto* void with the addition of proving presence of prejudice, available to either the seller or purchaser.⁵⁴⁵ Latter will ensure that an agreement remains valid until a party thereto can prove that he or she has severely been prejudiced by failure by the other party to comply with the prescribed formalities. A party with cold feet will have to think twice before approaching a court with a prayer requesting a deed of alienation to be declared void. This can be effectively achieved by prescribing an additional requirement of notarial execution and subsequent registration. A movement driving parties to cautiously and sensibly enter into agreements should be on the forefront of any solution proposition.

⁵⁴³ Nagel & Lötzt *De Jure* at 175.

⁵⁴⁴ CJ Nagel & DJ Lötzt.

⁵⁴⁵ Nagel & Lötzt *De Jure* at 175.

BIBLIOGRAPHY

Books

Bocken H & De Bont W *Introduction to Belgian Law* (2001) The Hague, Netherlands: Kluwer Law International

Christie RH *The Law of Contract in South Africa* (2006) 5th Edition Durban: LexisNexis

Christie RH & GB Bradfield *The Law of Contract in South Africa* (2011) 6th Edition Durban: LexisNexis

De Jager T *Alienation of Land* (1982) Cape Town: Juta & Co Ltd

Devendish GE *The interpretation of statutes* (1992) Cape Town: Juta & Co Ltd

GF Lubbe & CM Murray *Farlam and Hathaway Contract Cases, Materials and Commentry* (1988) 3rd Edition Cape Town: Juta & Co Ltd

Hawthorne L & Lötze JG *Contract Law Case Book for Students* (1994) 1st Edition Cape Town: Juta & Co Ltd

Hutchison D, Pretorius C *The Law of Contract in South Africa* (2012) 2nd Edition Cape Town: Oxford University Press

Kerr AJ *The Law of Sale and Lease* (1996) 2nd Edition Durban: Butterworths

Kerr AJ *The Law of Sale and Lease* (2004) 3rd Edition Durban: Butterworths

Lötze DJ, Nagel CJ & Joubert EP *Besondere Specific Contracts in court* (2010) 3rd Edition Johannesburg: LexisNexis

Melville NJ *The Consumer Protection Act made easy* (2010) 1st Edition Pretoria: Book of Life Publications

Nagel CJ (red) *Kommersiële Reg* (2006) Derde Uitgawe Durban: LexisNexis

Reid E & Visser D *Private Law and human rights: Bringing rights home in Scotland and South Africa* (2014) UCT Press

Robson P & McCowan A *Property Law* (1998) 2nd Edition Edinburgh: W Green/Sweet & Maxwell

Sinclair JH *Handbook of Conveyancing Practice in Scotland* (1986) Durban and Pretoria: Butterworths

Van der Merwe SWJ, LF Van Huysteen, MFB Reinecke & GF Lubbe *Contract General Principles* (2012) 4th Edition Cape Town: Juta & Co Ltd

Van Eeden EP *Consumer Protection law in South Africa* (2013) Durban: LexisNexis

Van Eeden EP *A guide to the Consumer Protection Act* (2009) Durban: LexisNexis

Van Rensburg ADJ & Treisman SH *The Practitioner's Guide to the Alienation of Land Act* (1984) 2nd Edition Durban: Butterworths

Wulfsohn PM *Formalities in respect of Contracts of Sale of Land Act (71 of 1969)* (1980) Durban: Butterworths

Zimmermann R *The Law of Obligations Roman Foundations of the Civilian Tradition* (1990) 1st Edition Cape Town: Juta & Co Ltd

Zimmermann R, Visser D & Reid K *Mixed legal systems in comparative perspective: property and obligations in Scotland and South Africa* (2004) Lansdowne: Juta & Co Ltd

Case Law

A

Afrox Healthcare v Strydom 2002 (6) SA 21 (SCA)

Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A)

Amalgamated Bank of South Africa Bpk v De Goedere en Andere 1997 (4) SA 66 (SCA)

Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd 1977 (2) SA 425 (A)

B

Balduzzi v Rajah 2008 4 All SA 183 (W)

Barkhuizen v Napier 2007 (5) SA 21 (SCA); Barkhuizen v Napier 2008 JOL 19614 (CC)

Bedford Square Properties v Liberty Group Ltd 2010 (4) SA 99 (SGJ)

Berman v Teiman 1975 (1) SA 756 (W)

Booyesen and Others v Booyesen and Others 2012 (2) SA 38 (GSJ)

Botes & another v Toti Developments Co (Pty) Ltd 1978 (1) SA 205 (T)

Botha v Swanepoel 2002 (4) SA 577 (T)

Botha v Van Niekerk 1983 (3) SA 513 (A)

Brink v Wiid 1968 1 SA 536 (A) 541

Brisley v Drotsky 2002 (4) SA (1) (SCA)

C

Chisnall and Chisnall v Sturgeon and Sturgeon 1993 (2) SA 642 (W)

Chretien & another v Bell (2009) JOL 24628 (SCA)

Clements v Simpson 1971 (3) SA 1 (A)

Coetzee v Comititis 2001 (1) SA 1254 (C)

Conradie v Rossouw 1919 AD 279

Conroy NO v Coetzee 1944 OPD 207

Cook v Aldred 1909 TS 150

Coronel v Kaufman 1920 TDP 207 at 209

Credit Guarantee Insurance Corporation of SA Ltd v Schreiber 1987 (3) SA 523 (W)

Cromhout v Afrikaanse Handelaars en Agente (Edms) Bpk 1943 TPD 302

Cronje v Tuckers Land and Development Corporation 1981 (1) SA 256 (W)

D

D'Arcy v Blackburn, Jeffrey & Thorpe Estate Agency 1985 (2) SA 178 (E)

Da Mata v Otto 1971 (1) SA 473 (T)

Den Dunnen v Kreder 1985 (3) SA 616 (T)

Dijkstra v Janowsky 1985 (3) SA 560 (C)

DS Enterprises (Pty) Ltd v Northcliff Townships (Pty) Ltd 1972 (4) SA 22 (W)

Dublin v Diner 1964 (1) SA 799 (D)

Du Plessis NO & Another v Goldco Motor & Cycle Supplies (Pty) Ltd 2009 (6)
SA 617 (SCA)

E

Engelbrecht v Merry Hill (Pty) Ltd 2006 (3) SA 238 (E)

Erf 441 Robertsville Property CC v New Market Developments (Pty) Ltd 2007
(2) SA 179 (W)

Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2011 ZACC

Exdev (Pty) Ltd and Another v Pekudei Investments (Pty) Ltd 2011 (2) SA 282
(SCA)

F

Fairoaks Investment Holdings (Pty) Ltd v Olivier 2008 (4) SA 302 (SCA)

Ferreira and another v SAPDC (Trading) Ltd 1983 (1) SA 235 (A)

Fismer v Roux 1965 (2) SA 468 (C)

Forsyth & others v Josi 1982 (2) SA 164 (N)

Fourlamel (Pty) Ltd v Maddison 1977 (1) SA 333 (A)

Fraser v Viljoen 2008 (4) SA 106 (SCA); Fraser v Viljoen 2008 (3) All SA 233
(SCA)

G

Gillig v Sonnenberg 1953 (4) SA 675 (T)

Gowar Investments (Pty) Ltd v Section 3, Dolphin Coast Medical Centre CC &
Another 2007 (3) SA 100 (SCA); Gowar Investments (Pty) Ltd v Section 3
Dolphin Coast Medical Centre CC & another [2006] JOL 18799 (SCA)

Grobler v Naude 1980 (3) SA 320 (T)

Grossman v Baruch 1978 (4) SA 156 (W)

H

Herselman v Orpen 1989 (4) SA 1000 (OK)

Hughes v Rademeyer 1947 (3) All SA 288 (A)

Hutchings v Satz 1965 (4) SA 640 (W)

Hartland Implemente (Edms) Bpk v Enal Eiendomme BK 2002 (3) SA 653 (NC)

I

Intercontinental Exports (Pty) Ltd v Fowles 1999 (2) All SA 304

J

Jammine v Lowrie 1958 (2) All SA 427 (T)

Johnston v Leal 1980 (3) SA 927 (A)

Jones v Wykland Properties 1998 (2) SA 355 (K)

JR 209 Investments (Pty) Ltd v Pine Villa Country Estate (Pty) Ltd; Pine Villa Country Estate (Pty) Ltd v JR 209 Investments (Pty) Ltd 2009 4 SA 302 (SCA)

Jurgens & others v Volkskas Bank Ltd 1993 (1) SA 214 (A)

Just Names Properties 11 CC V Fourie 2007 (3) SA 1 (W)

Just Names Properties 11 CC V Fourie 2008 (1) SA 343 (SCA); Just Names Properties 11 CC V Fourie 2008 (2) All SA 487 (SCA) 492

K

Kendrick v Community Development Board 1983 (4) SA 532 (W)

King v Potgieter 1950 (3) SA 7 (T)

Knox D'Archy v Shaw 1996(2) SA 651 (W)

KPMG Chartered Accountants v Securefin Ltd and another 2009 (2) All SA 523 (SCA)

L

Lancino Financial Investments (Pty) Ltd v Bennet 2008 (4) All SA 220 (SCA)

Legator McKenna Inc and another v Shea and others 2010(1) SA 35 (SCA)

Levin v Drieprok Properties (Pty) Ltd 1975 (2) SA 397 (A)

M

Manna v Lotter 2007 (3) All SA 50 (C)

Maharaj & others v Rampersad 1964 (4) SA 638 (A)

Mulder v Van Eyk 1984 (4) SA 204 (SE)

N

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 ZASCA 13

Naude v Schutte 1983 (4) SA 74 (T)

Neethling v Klopper & Others 1967 (4) SA 459 (A)

Nyandeni Local Municipality v Hlazo 2010 (4) SA 261 (ECM)

O

Odendaal v Maartens 1979 (4) SA 237 (T)

Odendaalsrust Municipality v New Nigel Estate Gold Mining Co Ltd 1948 2 SA 656 (O)

OK Bazaars v Bloch 1929 WLD 37

Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC & others (2010) JOL 26586 (SCA).

Orkin & another v Phone-A-Copy Worldwide (Pty) Ltd 1983 (3) SA 881 (T)

P

Paradyskloof Golf Estate v Stellenbosch Municipality 2011 (2) SA 525 (SCA)

Patel v Adam 1977 (2) SA 653 (A)

Papenfus v Steyn 1969 (1) SA 91 (T)

Phone-A-Copy Worldwide (Pty) Ltd v Orkin & another 1986 (1) SA 729 (A)

Philmatt (Pty) Ltd v Mosselbank Developments CC 1996 (2) SA 15 (A)

Pio v Franklin NO and another 1949 (3) 442 (C)

R

Rasmussen & another v Clear Mandate Properties CC & others [2007] JOL 19406 (W)

ReiveloLeppa Trust v Kritzinger 2007 (4) All SA 794 (SE)

Rheeder v Kruger 1972 (3) SA 912 (O)

Richtown Development (Pty) Ltd v Dusterwald 1981 (3) SA 691 (W)

Rood v Wallach 1904 TS 201

S

Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A)

Sayers v Khan 2002 (5) SA 688 (C)

Scheepers v Strydom 1994 (2) All SA 240 (A)

Scholtz v Scholtz 2012 (5) SA 230 (SCA)

Sewpersadh & another v Dookie 2008 (1) All SA 286 (D)

Shaik & others v Pillay & others 2008 (3) SA 59 N

Smit v Walles 1985 (2) SA 189 (T)

Spiller and others v Lawrence 1976 (1) SA 307 (N)

Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd 2008 (1) SA 654 (SCA)

Standard Bank of SA v Jaap de Villiers Beleggings (Edms) Bpk 1978 (3) SA 955 (W)

Steenkamp v Webster 1955 (1) SA 524 (A)

Sutter v Scheepers 1932 AD 165

T

Ten Brink NO v Motala 2001 (1) SA 1011 (D)

Thorpe v Trittenwein 2007 (2) SA 172 (SCA)

Trust Bank of Africa Ltd v Cotton 1976 (4) SA 325 (N)

Tuckers Land and Development v Hovis 1980 (1) SA 645 (A)

Twenty Seven Bellevue CC v Hilcove 1994 2 All SA 293 (A)

V

Van Aardt v Galway 2012 (2) All SA 78 (SCA)

Van der Merwe NO and Others v Hydraberg Hydraulics CC and Others, Van der Merwe NO and Others v Bosman and Others 2010 (5) SA 555 (WCC)

Van der Merwe v Kenkes (Edms) Bpk 1983 (3) SA 909 (T)

Van Rooyen v Hume Melville Motors (Edms) Bpk 1964 (2) SA 68 (C)

Van Wyk v Rottcher's Saw Mills (Pty) Ltd 1948 (1) SA 983 (A)

W

Waterval Joint Venture Property Co (Pty) Ltd v City of Johannesburg Metropolitan Municipality 2008 (2) All SA 700 (W)

Wilken v Kohler 1913 AD 135

Wilkins NO v Voges 1994 (2) All SA 349 (A)

Woods v Walters 1921 AD 303

Journal Articles

Barnard J “The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoots clauses and the liability for damages” 2012 (3) *De Jure* 455D

Brand D “The role of good faith, equity and fairness in South African Law of contract – the influence of common law and the Constitution” 2009 (176) *The South African Law Journal* 71

Delport H “Description of a Sectional Title Unit in a Deed of Sale” 2008 29(1) *Obiter* 87

Du Plessis R “Good faith and equity in the law of contract in the civilian tradition” 2002 (65) *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 397

Gouws M “Information: Comments on the plain language provisions of the Consumer Protection Act” 2010 (22) *South African Mercantile Law Journal* 79

Haroun S “The Consumer Protection Act and your property rights : property” 2011 (364) *Personal Finance Newsletter*

Hawthorne “The principle of equality in the law of contract” 1995 (58) *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 157

Jacobs W, Stoop P & Van Niekerk R “Fundamental consumer rights under the Consumer Protection Act 68 of 2008 : a critical overview and analysis” 2010 (13) *Potchefstroom Electronic Law Journal* 301

Kruger L “Is your Title Deed Invalid?” : property 2011 (370) *Personal Finance Newsletter* 9

Lewis C “Fairness in South African Contract Law” 2003 (120) *The South African Law Journal* 330

Lötz DJ “Koper van Grond se Afkoelreg: Warm Patat of Koue Pampoen?” 2000 (327) *De Jure* 328

Lötz DJ “Ten Brink NO v Motala 2001 (1) SA 1011 (D) – Koopkontrak van Grond – kontrakspartye en formaliteite waar ‘n verteenwoordiger namens die koper optree 2002 (35) *De Jure* 361

Lötz DJ “The Law of Purchase and Sale” 2008 *Annual Survey of South African Law* 1058

Lötz DJ “The Law of Purchase and Sale” 2009 *Annual Survey of South African Law* 971

Lötz DJ “The Law of Purchase and Sale” 2011 *Annual Survey of South African Law* 996

Lötz DJ “The Law of Purchase and Sale” 2012 *Annual Survey of South African Law* 806

Miller DL “*Mala Fide* transferees in Scotland : the case of a registered " offside goal"” 2005 (16) *Stellenbosch Law Review* 318

Nagel CJ & Lötz DJ 2010, “JR 209 Investments (Pty) Ltd & Another v Pine Villa Country Estate (Pty) Ltd Case No 617/2007 (SCA) and Pine Villa Country Estate (Pty) Ltd v JR 209 Investments (Pty) Ltd Case No 2/2008 (SCA)”, *De Jure* vol. 1 169-176.

Naude T “The consumer's 'right to fair, reasonable and just terms' under the new Consumer Protection Act in comparative perspective” 2009 (126) *The South African Law Journal* 505

Pienaar G “Phone-a-Copy Worldwide (Pty) Ltd v Orkin 1986 (1) SA 729 (A) – Formaliteite met betrekking tot koopkontrak van deeltiteleenheid 1986 (49) *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 479

Stoop PN “Artikel 29A van die Wet op Vervreemding van Grond” 2008 *The Journal of South African Law* 744.

Van den Berg R “The Roman tradition in the South African contract of sale” 2012 (1) *Tydskrif vir die Suid-Afrikaanse Reg* 53

Van der Merwe V “The origin and characteristics of the mixed legal systems of South Africa and Scotland and their importance in globalisation” 2012 (18) *Fundamina : A Journal of Legal History* 91

Legislation

Administration of Estates Act 66 of 1965

Alienation of Land Act 68 of 1981

Alienation of Land Amendment Act 103 of 1998

Constitution of the Republic of South Africa, 108 of 1996

Consumer Protection Act 68 of 2008

Contracts of Sale and Land Act 71 of 1969

Formalities in Respect of Leases of Land Act 18 of 1969

Free State Ordinance 12 of 1906

General Law Amendment Act 68 of 1957

Housing Development Schemes for Retired Persons Act 65 of 1988

Land Registers (Scotland) Act 1868

Law 12 of 1884 (Natal)

Law 20 of 1805 (Transvaal)

Requirements for Writing (Scotland) Act 1995

Sale and Purchase of Land Act 7 of 1903

Sale of Goods Act 1979 (Scotland)

Sectional Titles Act 95 of 1986

Share Blocks Control Act 59 of 1980

Subdivision of Agricultural Land Act 70 of 1970

Town Planning and Townships Ordinance 15 of 1987

Transvaal Proclamation 8 of 1902

Transfer Duty Consolidation and Amendment Act 5 of 1884

Transfer of Duty Act 40 of 1949

Volksraad Besluit 1432 of 12 August 1886

Websites

Belgian Real Property Law

<http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/Belgium.PDF>

(accessed on 19/10/2014)

Civil Code of Belgium

www.legifrance.gouv.fr/content/download/1950/13681/.../Code_22.pdf

(accessed on 28/09/2014)

McCaul E and Canterbury D “The effect of the Consumer Protection Act will have on the sale of property” <http://www.lexisnexis.co.za/our-solutions/private-sector/research-solutions/newsletter-articles/effect-of-CPA-on-property.aspx>

(accessed on 06-09-2014)

Registers of Scotland “Requirements of Writing (Scotland) Act 1995 Electronic Documents (Scotland) Regulations 2013 Consultation”

http://www.ros.gov.uk/pdfs/edocs_scot_regs_2013_Consultation.pdf

(accessed on 09-09-2014)

Other

Barnard J *The influence of the Consumer Protection Act 68 of 2008 on the common law of sale* (LLD dissertation 2013 University of Pretoria)

Memorandum on the Objectives of the Alienation of Land Amendment Bill 1998 (GG 18882 of 1998-08-08) 7.

Myburg FE *Statutory Formalities in South African Law* (LLD dissertation 2013 University of Stellenbosch)

“Real Property Law and Procedure in the European Union: General Report” May 2005 published by the European University Institute (EUI) Florence