

### GENERAL RULE

There are *no prescribed formalities* for the formation of a valid contract.

A contract can take any form - *verbal, in writing* or even *tacit* (e.g buying a newspaper)

Formalities are categorised as:

- self-imposed formalities
- statutory formalities

### FORMALITIES PRESCRIBED BY STATUTES

Prescribed Formalities required for Validity:

*The Alienation of Land Act 68 of 1981* provides that a contract for the sale, exchange or donation of land should be *in writing (S2)*

*General Law Amendment Act 50 of 1956* - contracts of suretyship must be *in writing* and signed by or on behalf of the surety in order to be binding on the surety. (S6)

& an *executory contract of donation* must be *in writing* and signed by or on behalf of the donor. If someone signs *on behalf of the donor*, he must have *written authority* granted in the presence of **two** witnesses. (S5)

Consequences of Non-compliance with the ALIENATION OF LAND ACT

*in terms of s28:*

- non-compliance with the formalities renders the contract *null and void*

### FORMALITIES PRESCRIBED BY STATUTES (cont)

- if only one party has performed in terms of a contract that does *not comply* with the formalities, that performance can be **recovered**.

- **the buyer** may *recover interest* on payments made as well as *compensation for necessary expenditure and useful improvements*.

- **the seller** may claim compensation for the *occupation, use or enjoyment* of the land by the purchaser. She may also *claim compensation* for any *intentional or negligent damage* to the land of the purchaser or any person in respect of whom she is responsible.

Prescribed Formalities required for Enforcement against 3rd Parties:

(1) *Deeds Registries Act 47 of 1937- antenuptial contracts* must be notarially executed **before** the marriage and **registered within 3 months** from its execution to be *binding against 3rd parties*. [s87(1)]

(2) *Leases of Land Act 18 of 1969-* a long-term lease must be registered against the title deed of the land to be enforceable against 3rd parties. [s1(2)]

Formalities in Electronic Contracts

(1) *Electronic Communications and Transactions Act 25 of 2002:*

- document is in the form of data message and is accessible (s12)

### FORMALITIES PRESCRIBED BY STATUTES (cont)

- in cases where the law requires the contract to be signed, the electronic document must be signed with an *'advanced'* electronic signature (s13)

*provision does not apply to [s4(4)]:*

- alienation of land
- long-term lease of *immovable property*

Consumer Protection Act 68 of 2008

- The Minister responsible for *consumer protection issues* can prescribe categories of consumer agreements' that must be in writing [s50(1)]

- any consumer agreement that is in writing will apply even if not signed by the consumer [s50(2)(a)]

- the supplier must make a free copy of the *written agreement* readily available to the consumer [s50(2)(a)]

- the written agreement must be in *plain and understandable* language and must clearly set out the consumers' financial obligations under agreement [s50(2)(b)(i) & (ii)].

National Credit Act 34 of 2005:

- the formalities for these agreements aim to prevent the exploitation of the consumers by reducing certain information to writing. (s93)

- *consequences of non-compliance with formalities:*

### FORMALITIES PRESCRIBED BY STATUTES (cont)

(1) non-compliance with the requirements stipulated in **s93 does not** render the contract void.

(2) they are not requirements for the validity of such contracts.

(3) instead, criminal penalties (*finest/imprisonment*) may be imposed on the credit provider for non-compliance (s161)

Variation and Cancellation of a Contract

A contract that is required by law to be in **writing** may be **cancelled verbally** (*unless the contract contains a 'non-cancellation issue'*).

**However**, any variation (ie changes to the agreement between the parties) of such a contract must, *as a general rule*, also **comply** with the formalities prescribed by law.

*Impala Distributors v Taurus Chemical Manufacturing Co (Pty) Ltd*

**the court held:** "*formalities prescribed by law generally require that the whole contract must be in writing. If there is a verbal variation of the contract, the whole contract will not be in writing and this would be contrary to the law. A verbal cancellation, however, will not be contrary to the law because cancellation of a contract does not amount to a variation of the contract.*"

### FORMALITIES PRESCRIBED BY THE PARTIES

*Parties are free to agree on whatever formalities they wish*, but at most, commonly required formalities are writing and signature.

It always depends on the intentions of the parties.

#### 3 possible scenarios can be distinguished:

(1) the parties **agree** that their agreement will **not be binding** unless and until it is reduced to writing.

(2) the parties require their contract to be reduced to writing simply to *record their agreement*.

(3) the parties may have a contract that is **partly verbal** and **partly in-writing**.

#### The Parties can impose Formalities for the Following:

- valid **formation** (conclusion) of the contract.

- valid **variation** (change of the terms after conclusion) of the contract by a *non-variation clause*.

- valid **waiver of rights** (the relinquishing of rights) by a *non-waiver clause*.

- valid **cancellation** (agreement terminating all obligations) of the contract by a *non-cancellation clause*.

#### Variation of a Contract

Parties can vary a contract **informally**. Sometimes they prescribe formalities for the variation of the contract.

### FORMALITIES PRESCRIBED BY THE PARTIES (cont)

A **non-variation clause** unduly restricts the parties' freedom to change their minds. The parties themselves agreed to the **non-variation clause** and should be bound by it.

#### The Shifren Principle

**Facts:** Shifren leased property to SA Sentrale. **Clause 11** forbade any cession or sub-letting of the premises without the **written consent** of Shifren.

**Legal Issue:** was it possible impliedly to change **clause 11** in the light of the *non-variation clause (clause 19?)*

#### Court Held:

- non-variation clauses are **valid and enforceable** in our law.

- promotes certainty

- **does not limit freedom** of contract but gives effect to it because the parties chose to include it in their contract.

- accordingly, a failure to enforce the *non-variation clause* would undermine the principle of **pacta sunt servanda**.

#### Limiting the Shifren Principle

**(a) Informal agreement is not a variation**

It may be possible to escape a *non-variation clause* if the informal conduct is not a variation, but some other type of transaction. *For example - cancellation, waiver, pacta de non petendo*

### FORMALITIES PRESCRIBED BY THE PARTIES (cont)

#### (b) Estoppel

*Estoppel* is a *defence* which may be used to **prevent** the other party from relying on the *non-variation clause*.

**However**, the defence of estoppel will **not succeed** where parties have varied their contract by **oral agreement**.

#### (c) Public Policy

A *non-variation clause* may be unenforceable if it is against public policy.

Fraud exists where a party deliberately leads the other party to believe that he will not **enforce the written contract**.

#### Cancellation of a Contract

**Generally**, parties can cancel a contract **informal**.

The parties can, however, *prescribe formalities* for the cancellation of the contract, by way of a *non-cancellation clause*.

A *non-cancellation clause* can be **informally varied**, unless the contract also contains a *non-variation clause*.

**Impala Distributors v Taurus Chemical Manufacturing Co (Pty) Ltd 1975 (3) SA 273 (T)**

**court held:** if it wasn't for the *non-variation clause* the parties would have been free vary the *non-cancellation clause* **informally** by dropping the requirement of writing.

### FORMALITIES PRESCRIBED BY THE PARTIES (cont)

#### Non-Waiver Clause

A *waiver* is a **deliberate abandonment**, or **surrender** of an existing legal right by the right holder, acting with full knowledge of that right. *Waiver* can be **express or tacit (by conduct)**.

If the conduct amounts to a waiver instead of a variation, the *non-variation clause* will not apply to it. It is, however, difficult to distinguish between these two concepts.

#### The main difference between a waiver and a variation is that:

- a **waiver** relates to the rights that have already accrued (*ie past obligations*), whereas;
- a **variation** changes the future obligations of the parties.