

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 (**finances/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 Taunus 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.