STUDY UNIT 2

Formalities required for the conclusion of a binding contract of sale

Sec 2 & 3 of the Alienation of Land Act regulated formal requirements

Formalities are only one of the requirements for a valid contract. The requirements for a contract of sale are, amongst others, compliance with formalities, capacity to act, consent, possibility of performance, etc.

- Formalities prescribed by the A of L Act 68 of 1981
Formal requirements for contracts for the sale of land prescribed by Sections 2 & 3 of the A of L Act.
Sections 2 & 3: (1) No alienations of land shall be of any force or effect unless it is contained in a deed signed by the parties or by their agents.
- (2) A signature of a party acting on written authority of another party shall not derogate from any law relating to making of contract in writing by a person professing to be an agent for a company formed.

Section 3: (1) Sec 2 does not apply to sale of land by public auction.
Section 3 (2) Sale of land by public auction
purchase price payable in more than 2 installments
over period exceeding 1 year.

(a) Provisions of act apply to sale as if under a contract
(b) Conditions determined must be read in public
immediately before 1 auction.
(c) After auction Seller must furnish purchaser
with a copy of contract failing, 1 purchaser
may cancel 1 sale.

Purposes of 1 of Land - to attain
Certainty and to avoid disputes &
unfair practices.

The types of contract to which 1 provisions of 1
A of land Act apply.

Every alienation of land must be contained in deed of alienation
Deed of alienation: "a document or documents in which
land is alienated, and to alienate is defined as "
to sell, exchange or donate, irrespective of
whether such sale, exchange or donation is
subject to a suspensive or resolutive condition

Condition: Scya (Pty) Ltd vs Tucker's Land & Development Corp
A suspensive condition in a contract of sale is law
does not become a contract of sale until 1
condition is fulfilled.
Exchange

Roman cluch law exchange meant exchange of one particular thing for another particular thing.

"Exchange" in alienation has wider meaning.

Hockema v Hockema: Any contract in terms of which one party undertakes to deliver land and another party undertakes to deliver an asset in a person's estate as counter-performance will qualify as a contract of exchange.

Counter-performance - Money - Contract of sale

Concept of land: means

1. Any unit (as defined in sectional titles Act 95 of 1986)
2. Any right to claim transfer of land
3. Any undivided share in land
4. Any interest in land (other than a right on interest registered or capable of being registered Mining Titles Reg Act 16 of 1967)

Any contract of sale, donation or exchange contains 1 above and must be contained in deed of alienation.

An undertaking by 1 donor to transfer land to 1 donee by 1 party intention = 1 donee will render no counter-performance.
sec 2(1) any alienation of land must be contained in a deed of alienation which may consist of more than 1 doc. must be signed by 1 parties or their agents acting on their written authority. 

The contents of 1 deed of alienation must appear in any doc which deals with alienation of land.

1) identity of parties 

it must be clear from 1 doc who 1 alienator of land is & who 1 alienee is. If it cant be ascertained From 1 doc Alienation Void. (appear from deed)

Signature by both parties not sufficient, must be clear from 1 doc parties intented to contract with each other. Alienation will also be void if eg P makes written offer to S to buy A farm & the thinks belongs to S. O I true owner accepts I offer and affixes his signature to I doc as Seller ... (contract void (Hersch v Nel)

One may also make an offer to buy property to an estate agent who must submit I offer to I owner for acceptance (Hill v Faiga).

2) essentialia of 1 alienation 

For Deed of alienation to be valid it must embody essentialia of a contract of sale, exchange & donation,

An undertaking by one party, 1 alienator to deliver land to 1 other party & an undertaking by 1 other party to deliver an asset in a persons estate as counter performance
Performance not clear
If it does not appear from a purported deed of alienation that there has been a sale, donation or exchange.
No valid alienation

Description of land
A land must be described in a deed of alienation in such a manner that it is capable of objective identification without recourse to extrinsic evidence to establish real intent of parties.

Objective Identification can be achieved by (i) a description related to a particular entity of immovable property; or (ii) by indication of a person who has a right to select one from a list e.g. one erf out of 11 erven in 1 township.

Always safer to rely on a description of land that appears and is typed in deed.

Not in deed of alienation.
Formulations such as "I portion pointed out to buyer" or "I portion which was agreed upon" are not sufficient.

Counterperformance.
Counterperformance must be identifiable from deed of alienation.
3) Other Material Terms

Material Terms in writing

All 1 material terms of sale, exchange e donation must be in writing ie contained in 1 doc. Terms must appear in doc when signed cannot sign blank doc & complete later... Not valid.

Unclear Essentialia

Although it is unclear what a material term embraces it is certain 1 essentialia are material terms. A doc contains 1 essentialia & has been signed by parties will constitute a valid Deed of A if all req of a contract have been met. Duties of 1 parties are del by 1 naturalia.

Incidentalia 2 approaches:

Sometimes parties dont want to have their relationship determined by 1 naturalia of 1 contract. They prefer to do this by means of incidentalia they agree on in addition to 1 essentialia they agree on.

Two approaches with regard to which incidentalia should be regarded as material terms

Wide approach all terms agreed to:

Regarding all 1 terms agreed to by 1 parties as material terms incl
(1) 1 content & properties of every performance to be rendered
(2) When, where & how 1 performance is to be rendered.
(3) Cooperation bet parties regarding performance
(4) 1 remedies available if a party commits B.O.C & 1 requirements for 1 remedies.
Test to determine if term is material
Jones v Wykland properties
(i) Did / parties apply their minds to / term?
(ii) Did they agree tacitly or expressly =
(a) I term should form part of their contract
(b) I term be binding on them

A non-material term is one / contains info only, not
meant to bind / party eg: Address

Restrictive Approach regards not all / terms agreed by / parties as material. Only essentialities are reg as Material
Trustees v Mitchell's Plain Trust v Weedon
Certain terms are well established as material terms
in Sale of Land agreements eg: date of transfer,
I duty to renovate / premises etc.
In borderline cases to det if / term is material or
not I court will regard I object of formalities
legislation & also weigh I importance of / term in I contract under consideration.
Court regarded a term det which party could
appoint a conveyancer as not material.

4) Signature of / parties or their agents
aryl Van Niekerk v Smith
Court held a signature does not necessarily
mean writing ones full name. Pencil signatures,
Signatures by initials, stamp, mark or party's
writing below printed heading all sufficient
affixing
Signature may be affixed anywhere as long as it was
clear it was intended to cover whole doc.
Normally parties sign at 1 end. If Deed of A
more than 1 page advisable 1 each page be signed &
initialed. If seller signs inadvertently by buyers place
Deed can be rectified ... prima facie there is a Valid
contract. Person signing as agent must indicate their
Representative Capacity

Alienation Through Representative

Meaning of agent: A person who has been authorised by another,
principal to conclude an alienation on his behalf.
Sec 2(1) Agent can only conclude 1 alienation if 1
principal authorized him in writing to do so.

1) ffg people who act on behalf of others are not agents Sec 2(1)
Do not require written authority.
1) A Father as natural guardian of his child
2) Guardian of a minor
3) Husband or wife who is Married in COOP
4) A partner who acts on behalf of his co-partners
5) Curator of a person unfit to manage his own affairs
6) Executor of a deceased estate
7) Trustee of an insolvent estate
8) Liquidator of a Co.

I above people derive their authority from
common law ex lege authority (authority derived
directly from law)
Nature Extent of Agents Required Written Authority

1) Agent's authority must be in writing - as long as its form is immaterial & authorisation is legibly written, typed or printed sec 2(c) complied with. Eg it can be Telegram, informal doc, letter etc.

2) A doc in which authority is granted need not be signed - sec 2(c) does not require signature

3) Agent need not be named - it is sufficient if her identity can be objectively determined.

4) Agent needs to know written authority exists before she can act on it. She doesn't have to have it authority in her possession when she signs. She just needs to know it exists.

5) An agent may derive her authority to act on behalf of a principal from general authorisation or she may be specially authorised to conclude a particular Alienation. A special authority should contain just basic info. An authorisation to sell land must be described so land can be identified & need not be as precise as Deed of A. Purchase Price may be left to discretion of agent. If deed of Alienation exceeds 1 authority of 1 agent, 1 principal is not bound.

6) 1 principal cannot ratify a Deed of A which was entered into on her behalf by someone who didn't have written authority when she signed. Deed or who exceeded her authority when she signed.

7) "Doctrine of undisclosed principal" doesn't apply to Alienation of land. If an agent enters into a Deed of A without disclosing ± she is acting as representative. ±
undisclosed principal cannot derive any direct benefit from the contract. An agent shall be personally bound by a deed of alienation. The principal will be entitled to cession of rights if agent acquired provided he compensates the agent for any expenses incurred in the transaction.

Representatives of Companies

1. Organs of a company are not agents of the company and do not need written authority when they enter into a deed of alienation on the company's behalf. However, a company like a natural person, can act through an agent and an agent requires written authority see 2(r).

Unincorporated Co.

Law of Agency - No one can represent a co not yet formed.

Sec 35 of the Companies Act 61 of 1973. It is possible for a person to conclude a contract as agent for a company still to be incorporated. Sec 2(z) of the Act provides that Sec 2(r) shall not derogate from any law. This means, a person who professes to act as an agent of a co not yet formed, does not need written authority required by Sec 26A. If a co is not yet in existence, it's unable to grant authority.

Sales of land by public auction (Sec 3(z)) does not apply where land is sold by public auction & I purchase price paid any other charges are payable by the purchaser are paid in more than 2 installments over a period exceeding 1 year. One of the formalities is the seller must provide purchaser.
with copy of contract of sale immediately after sale. 

which does not mean if contract is ratified by its 
reduction to writing. Even if seller fails to furnish 
buyer with copy of contract, oral contract 
still valid. Buyer has right to cancel contract.