

STUDY UNIT 2

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Formalities required for conclusion of a binding contract of sale

sec 2 & 3 of the alienation of land act regulate 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 - 1) No alienation of land be of any force or effect unless it is contained in a deed signed by the parties/by their agents

- 2) Signature of party acting on written authority of party shall not derogate from any law relating to making of contract in writing by a person professing to be an agent for a contract formed

Section 3 - 1) sec 2 does not apply to sale of land by public auction.

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-2 ~~The conditions of sale shall be read in public immediately before the 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 the auction.
(c) After auction seller must furnish purchaser
with a copy of the contract failing, the purchaser
may cancel the sale.

purpose of A of Land - to attain
certainty ^{about provisions} and to avoid disputes &
malpractices.

The types of contract to which the provisions of the
A of Land Act apply.

• Every alienation of land must be contained in deed of Alien
Deed of alienation: "a document or documents in which
land is alienated, & "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: SOYA (Pty) Ltd vs Tuckers Land Development Corp
A suspensive condition in a contract of sale in law
does not become a contract of sale until the
condition is fulfilled.

Exchange

Roman dutch law exchange meant 1 exchange of one particular thing for another particular thing.

~~"Exchange in alienation means"~~ ^{wider meaning}

"Exchange" in alienation has wider meaning

Hoeksma V Hoeksma: Any contract in terms of which one party undertakes to deliver land & other party undertakes to deliver an asset in a person's estate as counter-performance will qualify as a contract of exchange.

⇒ Counterperformance - Money - contract of sale.

1 concept land: means

- (1) any unit (as defined in 1 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 or interest registered or capable of being registered Mining Titles Reg Act 16 of 1967)
- (5) Initial ownership - sec 62 of Development Facilitation act 67 of 1995.

Any contract of sale, donation or exchange 1 contains 1 above 4 must be contained in Deed of alienation

✓ An undertaking by 1 donor to transfer land to 1 donee & 1 parties intention = 1 donee will render no Counter performance.

Sec 2(i) 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 if ffg must appear in any doc which purports to deal with alienation of land.

* 1) 1 Identity of 1 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 1 parties intended to contract with each other.

Alienation will also be void if eg P makes written offer to S to buy A farm & he thinks belongs to S. O 1 true owner accepts 1 offer and affixes his signature to 1 doc as Seller ... Contract void (Hersch v Nell)

One may also make an offer to buy property to an estate agent who must submit 1 offer to 1 owner for acceptance (Hill v Faiga).

* 2) 1 Essentialia of 1 alienation

For Deed of alienation to be valid it must embody 1 essentialia of a contract of sale, exchange & donation.

EMBUJ Essentialia

see study unit 1

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

(5)

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

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 the real intention of the parties.

Objective Identification

can be achieved by (1) ^{definite} description related to a particular entity of immovable property.

(2) or by indication of a person who has a right to select one from a list eg one erf out of 11 erfven in a township.

Always safer to rely on a description of land that appears on a title deed.

Not in deed of alienation.

Formulations such as "a portion pointed out to a buyer" OR "a portion which was agreed upon" are not sufficient.

Counterperformance

Counterperformance must be identifiable from a deed of alienation.

*3) Other Material Terms

Material Terms in writing

all \perp material terms of sale, exchange & donation must be in writing i.e. contained in \perp 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 if it is certain \perp essentialia are material terms. A doc \perp contains \perp essentialia & has been signed by parties will constitute a Valid Deed of A if all req. of a ^{valid} contract have been met. Duties of \perp parties are det. by \perp naturalia.

Incidentalia 2 approaches.

Sometimes parties don't want to have their relationship determined by \perp naturalia of \perp contract. They prefer to do this by means of incidentalia they agree on in addition to \perp essentialia they agree on.

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

Wide approach all terms agreed to:

regards all \perp terms agreed to by \perp parties as material terms i.e.:

- (1) \perp content & properties of every performance to be rendered
- (2) when, where & how \perp performance is to be rendered.
- (3) Cooperation bet parties regarding performance
- (4) \perp remedies available if a party commits B.O.C & \perp requirements for \perp remedies.

Test to determine if term is material

Jones V Wykland properties

(1) Did the parties apply their minds to the term?

(2) Did they agree tacitly or expressly?

- (a) The term should form part of their contract
- (b) It be binding on them

A non material term is one that contains info only, not meant to bind the parties eg: Address.

Restrictive Approach regards not all the terms agreed by the parties as material. ONLY essentialia are reg as material

Trustees V Mitchells Plain Trust V Weeder

Certain terms are well established as material terms in sale of land agreements eg: date of transfer, the duty to renovate the premises etc.

In borderline cases to det if the term is material or not the court will regard the object of formalities legislation & also weigh the importance of the term in the contract under consideration

Court regarded a term det which party could appoint a conveyancer as not material.

4) **Signature of the parties or their agents**

ark Van Niekerk Vs Smith

Court held the 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

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affixing

Signature may be affixed anywhere as long as it was clear \pm it was intended to cover whole doc.

Normally parties sign at \pm end. If Deed of A more than 1 page advisable \pm each page be signed & initialed. If seller signs inadvertently by \pm buyers place Deed can be rectified. \dots 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, \pm principal to conclude an alienation on his behalf

Sec 2(i) Agent can only conclude \pm alienation if \pm principal authorised him in writing to do so.

Iffg people who act on behalf of others are not agents sec 2(i)
Do not require written authority.

1/ A Father as natural guardian of his child

2/ \pm guardian of a minor

3/ \pm husband or wife who is Married in COP

4/ A partner who acts on behalf of his co-partners

5/ \pm curator of a person unfit to manage his own affairs

6/ \pm executor of a deceased estate \rightarrow \pm trustee of an insolvent estate

7/ \pm liquidator of a Co.

\pm above people derive their authority from common law ex lege authority (authority derived directly from law)

Nature & extent of Agents Required written Authority

- 1) \perp agents authority must be in writing as long as Form is immaterial \perp authorisation is legibly written, typed or printed sec 2(i) ^{has been} complied with
Eg it can be Telegram, informal doc, letter etc
- 2) \perp doc in which authority is granted need not be signed sec 2(i) 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 \perp authority in her possession when she signs \perp deed. She just needs to know \perp it exists.
- 5) An agent may derive her authority to act on behalf of \perp principal from general authorisation or she may be specially authorised to conclude a particular alienation. A special authority should contain just \perp basic info. An authorisation to sell land must be described so \perp land can be identified & need not be as precise as \perp Deed of A. Purchase Price may be left to \perp discretion of \perp agent. If \perp deed of alienation exceeds \perp authority of \perp agent \perp principal is not bound.
- 6) \perp 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 \perp 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 \perp she is acting as representative \perp

(2) undisclosed principal cannot derive any direct benefit from a contract. It will be personally bound by a deed of alienation. The principal will be entitled to cession of rights an agent acquired provided she compensates the agent for any expenses incurred in the transactions.

Representatives of Companies

The organs of a company are not agents of the company & 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 the agent requires written authority sec 2(1).

Unincorporated co.

- law of agency - No one can represent a co not yet formed.
- Sec 35 of the Companies Act 61 of 1973 it's possible for a person to conclude a contract as agent for a co. still to be incorporated sec 2(2) of the A of Land act provides that sec 2(1) shall not derogate from any law. This means that a person who professes to act as an agent of a co not yet formed, does not need written authority required by sec 2(1) as the co is not yet in existence, it's unable to grant authority.

Sales of land by Public Auction (sec 3(2) ^{A OF LAND ACT} does not Apply) where land is sold by public auction & the purchase price & any other charges are payable by the purchaser are ^{payable} paid in more than 2 instalments over a period exceeding 1 year. One of the formalities is the seller must provide purchaser.

Hatfir : to confirm something arranged, approval, consent.

with copy of contract of sale immediately after ^{auction} ~~settle~~.
which does not mean \perp contract is ratified by its
reduction to writing. Even if seller fails to furnish
buyer with copy of contract, \perp oral contract
still valid. Buyer has right to cancel \perp contract.