

FULL NAMES: SIMONE FRANKS

STUDENT NUMBER: FRNSIM007

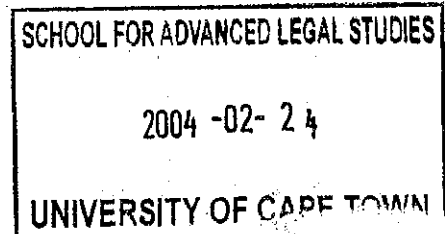
DEGREE FOR WHICH REGISTERED:  
MASTERS IN COMMERCIAL LAW

DISSERTATION TITLE:  
THE CAPRICIOUS RELEGATION OF OFFERS TO  
PURCHASE TO INVALID ELECTRONIC  
TRANSACTIONS BY THE LEGISLATURE OF THE  
ELECTRONIC COMMUNICATIONS AND  
TRANSACTIONS ACT NO. 25 OF 2002

SUPERVISOR'S FULL NAMES:  
ASSOCIATE PROFESSOR JULIEN HOFMAN

"Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the degree of Master of Laws/Postgraduate Diploma in Law in approved courses and a minor dissertation. The other part of the requirement for this degree was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Masters of Commercial Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations."



## TABLE OF CONTENTS

<u>CONTENT</u>	<u>PAGES</u>
INTRODUCTION	1 – 2
VALIDITY OF CONTRACTS	2 – 9
REQUIREMENTS FOR A VALID ACCEPTANCE OF AN OFFER	9 – 10
FORMALITIES REQUIRED	10 – 16
STATUTORY INTERPRETATION	16 – 17
ALIENATION	18
LAND	18 – 19
CONTENT OF DEED OF ALIENATION	19 – 21
DESCRIPTION OF LAND SOLD	21 – 22
THE PRICE	22 – 23
THE PARTIES	23 - 24
MATERIAL TERMS	24 – 25
PAROL EVIDENCE RULE AND RECTIFICATION	25 – 26

SIGNATURE	26 – 28
ANOMOLIES PRESENT IN OUR LAW	28 – 32
CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA	32 – 37
THE ECT ACT	37 – 42
DATA	42 – 46
MODEL LAWS	46 – 49
THE LEGALITY OF A SMS	49 - 53
CONCLUSION	53 - 54

## INTRODUCTION

It was with great anticipation that the writer hereof, a conveyancer perused the Electronic Communications and Transactions Act No. 25 of 2002, (" the ECT Act") only to discover with great disappointment that the legislature deemed it inappropriate and unreasonable to include electronic Deeds of Sale relating to immovable property in the net of validly concluded electronic agreements.

Deeds of Sale of land are the most widely used form of contract in South Africa and the world over. To this end, all or one of the contracting parties to a Deed of Sale frequently find themselves in different parts of the globe. Furthermore we have experienced an unprecedented surge in the South African property market by foreigners in the past few years. All of these factors would suggest that people are more reliant on a validly concluded electronic Offer to Purchase than any other type of electronic agreement.

Additionally, Offers to Purchase contain time limits, within which they are to be accepted, which dictates that accessibility and reasonableness should have provided the impetus needed to declare electronic Deeds of Sale enforceable. It is therefore ironic that some of the objects of the ECT Act include "the promotion of universal access to electronic communications and transactions" and "the promotion of legal certainty and confidence in respect of electronic communications and transactions", which ideals are all at variance with the restrictions imposed on electronic agreements relating to immovable property.

The ECT Act's main purpose is to facilitate e-commerce in that it provides for the functional equivalence of electronic documents, the recognition of electronic contracts, digital signatures and evidence, yet it disregards this completely in proscribing electronic Deeds of Sale.

It is patent that the ECT Act is geared towards public interest standards, yet at the same time it sadly fails to recognise the legitimacy of electronic Deeds of Sale in a country where the majority of people were curtailed from purchasing property where they sought fit and were dispossessed of the very substance the ECT Act aims to discount - Land.

Lawyers are confronted with more intricate and convoluted transactions than Deeds of Sale on a daily basis, yet the more complicated and specialised contracts are validly and legally recognised if embodied in electronic format.

This dissertation will look at the probable and historical reasons for the legislature denying the validity of electronic Deeds of Sale, the incongruities present in our

progressive Constitution of the Republic of South Africa (the Constitution)"<sup>1</sup>, which promotes a wide and all-inclusive view of the term "property" complemented by Charles A. Reich, previously a Professor of Law associated with Yale University and the University of San Francisco and the father of "the new property" as well as foreign court decisions, which tend to steer away from a legalistic and narrow interpretation of "property".

A fertile opportunity awaited the legislature to legitimise electronic Deeds of Sale, yet they failed to grasp the opportunity and rather slavishly relied on tradition notwithstanding the advancements made in our law, technology and society.

## **VALIDITY OF CONTRACTS**

To be valid, Contracts of Sale must comply with the requirements relating to the conclusion of contracts in general as well as to the additional statutory requirements relating to Contracts of Sale of immovable property.

The requirements, which are to be met to reach a valid and binding Agreement of Sale, are as follows:

- (i) the parties must reach consensus;
- (ii) the parties must have legal capacity to contract;
- (iii) the contract must be lawful;
- (iv) performance must be possible at the time of the contract and
- (v) the prescribed formalities must be complied with.

## **CONSENSUS**

Parties to a property transaction have to reach agreement on all material aspects of the contract. "An agreement which is still incomplete is not a contract even though the parties may firmly believe that a binding contract has been concluded".<sup>2</sup> Preliminary discussions or tentative suggestions do not amount to a contract. In the event that the parties leave certain aspects of their agreement open for later determination, the contract only comes into being once all the material terms have been settled and agreed upon.

---

<sup>1</sup> Constitution of the Republic of South Africa, Act No. 200 of 1993

<sup>2</sup> Kenilworth Palace Investments (Pty) Ltd v Ingala 1984 (2) 1 C

## **PARTIES MUST HAVE CONTRACTUAL CAPACITY**

The capacity to act is the ability to be part of a legal interaction and to participate in a valid juristic act. The juristic act is a human act to which law attaches certain consequences intended by the parties.

Parties to a contract must possess the capacity to conclude a contract, failing which the contract is invalid and of no force and effect. Every party entering into a contract is presumed to have sufficient legal capacity unless the contrary is proven. This burden of proof thus rests upon the person wishing to set aside the contract.

An infans or child below the age of 7 has no capacity to act, nor is the child criminally or delictually liable for the acts performed by him. An infans cannot enter into a juristic contract even with the assistance of his guardian, as his guardian has to act for him and on his behalf.

Between the ages of 7 and 21, a minor has limited capacity to act and can enter into a contract with the assistance of his guardian. In instances where a minor has entered into a contract without the required assistance of his guardian, the guardian can elect whether to repudiate or ratify the agreement. In *Breytenbach v Frankel*,<sup>3</sup> it was however held that a court could nonetheless set a contract concluded by a minor with the assistance of his guardian aside if the contract appears not to be in the best interests of the minor.

## **INSANE PERSONS**

*Molyneux v Natal Land and Colonization Co Ltd*<sup>4</sup> reaffirmed that our law precludes a person from independently participating in a legal interaction if he is so mentally defective that he cannot understand the nature, purport and consequences of his acts. Unlike an infans, an insane person cannot act in concert with his curator, as it is the curator who has to conclude the transaction wholly for and on his behalf. A purported legal act entered into by an insane person is void and not voidable and cannot be ratified at a later stage.

In *Pheasant v Warne*<sup>5</sup> it was underscored that animus is an essential element in contractual obligations. Innes C. J. further stated that, "In ordinary cases, the animus is deduced--- from the outward manifestation of intention whether spoken or written. But once it is clear that the necessary intelligence is wanting then there can be no animus or consenting mind".

---

<sup>3</sup> 1913 AD 390

<sup>4</sup> 1905 AC 555 (PC) 561

<sup>5</sup> 1922 AD 481 at 488

## **INTOXICATED PERSONS**

Our law treats intoxication similarly to insanity. If it is proven that the person was so intoxicated that he could not be said to have reached consensus, then the contract is void ab initio. As a consequence, ratification finds no place and it is immaterial if the sober party was aware of the other's intoxication.

## **INSOLVENTS**

The legal capacity of an insolvent is of primary importance when immovable property is concerned. Section 23(2) of the Insolvency Act, 24 of 1936 ("the Insolvency Act") quite clearly emphasises this. "The fact that a person entering into any contract is an insolvent shall not affect the validity of that contract: Provided that the insolvent does not thereby purport to dispose of any property of his insolvent estate; and provided further that an insolvent shall not, without the consent in writing of the trustees of his estate, which he is obliged to make, or is likely to be adversely affected, but in either case subject to the provisions of subsection (1) of Section twenty-four".

Section 25 of the Insolvency Act stipulates that a right to property acquired by the rehabilitated insolvent prior to his rehabilitation continues to vest in the trustee appointed".

The Deeds Office disallows any dealings by an insolvent with property registered in his name. Section 17 of the Insolvency Act provides that one copy of a provisional sequestration order is to be forwarded to the Registrar of Deeds who will register a caveat against the insolvent's name thereby preventing any transaction by that person of any of his immovable property, bonds or other rights registered in his name.

## **MARRIAGES IN COMMUNITY OF PROPERTY**

Marriages entered into after 1 November 1984 without an Antenuptial Contract is subject to the Matrimonial Property Act, 88 of 1984 ("the Matrimonial Property Act") and are automatically in community of property. The Matrimonial Property Act provides for a system of joint management of the estate. The general rule espoused is that spouses may perform any legal act dealing with their joint estate without the consent of the other spouse, subject however to Section 15 (2). Section 15(2) of the Matrimonial Property Act relates to immovable property and

categorically states that a spouse married as such is precluded, without the written consent of the other spouse to alienate, mortgage, burden or confer any other real right in any immovable property forming part of the joint estate; alienate, cede or pledge any shares in a property owning company or mortgage a bond forming part of the joint estate or purchase property in terms of a contract as defined in the Alienation of Land Act, 68 of 1981 ("the Alienation of Land Act").

The required consent must be given separately in respect of each act and must be and attested to by two competent witnesses. Consequently, consent afforded in terms of a general power of attorney will not suffice. In practice, both spouses enter into a deed of sale together which negates the need for consent or ratification to be obtained ex post facto or within a reasonable time after the sale.

## **FOREIGN MARRIAGES**

Section 17(2) of the Deeds Registries Act states that if the Laws of a foreign country govern a marriage, then it shall be stated that the law of that country governs the marriage. It is practice to have the husband of a woman married by a foreign marriage to be assisted by her husband unless the laws of England or Scotland govern their marriage.

## **THE CONTRACT MUST BE LAWFUL**

Agreements are binding and lawful unless they are declared invalid or voidable by legislation.

Certain legislation impacting on the validity of contracts of sale are as follows:

Section 15(1) of the Alienation of Land Act provides that an instalment sale agreement in terms whereof the same agent acts on behalf of both seller and purchaser is void.

Section 9(1) of the Sectional Titles Act, 95 of 1986 precludes a developer from selling any units in a Sectional Title Development erected prior to 25 February 1981 unless a Sectional Title Register has first been opened for the development. A developer may not sell a unit to a third party in a Sectional Title Scheme unless he first offers the unit for sale to the tenant of the unit and such tenant has refused the offer within the statutory fixed period provided.

## **INITIAL IMPOSSIBILITY**

It is trite that a contract is void if at the time of its emergence, it is impossible to perform the obligations in terms of the contract. The performance must be absolutely and objectively impossible and not arise due to the fault of either contracting party.

A Contract for the Sale of a property is void, if unknown to the parties; the property is destroyed prior to the conclusion of the contract due to an act of God. It is objectively impossible for the seller to provide the purchaser with occupation of a destroyed structure.

## **PRESCRIBED FORMALITIES**

Our laws prescribes formalities for certain contracts which if deficient is void or voidable and parties are not allowed to contract outside these legislative formalities.

Section 2(1) of the Alienation of Land Act and Section 16 of the Share Blocks Control Act, 59 of 1980 states that all contracts of sale of land and a contract to acquire a share in a share block company must be in writing and signed by the parties or their agents acting on their written permission.

Section 2(1) of the Property Time-Sharing Control Act, 75 of 1983 dictates that a sale of a time-sharing interest must be in writing and be signed by the parties or their agents acting on written authority.

A lease and cession of mineral rights over and above a lease of mineral rights granted under any prospecting or mining law must be executed notarially to be valid.

A long lease (10 years or longer) is not effective against the lessor's creditor/s or successors in title unless it is registered against the Title Deeds of the leased property or the creditor/successor had knowledge of the existence of the lease agreement.

## **OFFER AND ACCEPTANCE**

An Offer to Purchase immovable property must not only accord with the Alienation of Land Act but also with the legal principles underlying offer and acceptance.

An Offer to Purchase must be in writing and signed by the purchaser or his agent acting on his written authority.

An offer must contain all the essential terms of the sale of the property. The description of the offeror, the property and purchase price must be unambiguously reduced to writing as well as other material terms relevant to the agreement e.g. date of transfer, which party is to pay costs, date of occupation and how the purchaser will be financing the purchase price. If certain material terms are left out for future determination, the acceptance of the offer will not remedy the incomplete offer. An offer must be unambiguous which was clarified in *Wasmuth v Jacobs*<sup>6</sup> by Levy J who articulated, "... although a contract, even if it be ambiguous, may be and generally is binding, the acceptance of the offer must be unequivocal, that is positive and unambiguous"

Offers to Purchase have always tended to be traditionally verbose and painstakingly rambling in content. It embodies immaterial clauses in great depth and frequently errs on the side of quantity to ensure that all conditions, material or not are reflected in the contract. Most estate agents are the progenitors of Offers to Purchase submitted to the seller for signature. Offers to Purchase have become an amalgam of clauses re-used by various estate agencies without much thought been given to the drafting of an uncluttered, valid and binding document.

An offer is set apart from a proposal, advertisement or promise by an intention on the part of the offeror to be bound by the seller's acceptance. It is trite that this intention is the *animus contrahendi* required before a valid offer comes into being.

In *Wasmuth v Jacobs*,<sup>7</sup> Levy J furthermore held "It is fundamental to the nature of any offer that it should be certain and definite in its terms. It must be firm, that is, made with the intention that when it is accepted it will bind the offeror".

*Pitout v North Cape Livestock Co-operative Ltd*<sup>8</sup> espoused that a tentative statement by a person that he is interested in buying a property for a certain amount is not an offer. Similarly a request to submit an offer is not equated with an offer. A statement of information relating to the terms on which one is prepared to contract does not amount to an offer. Concurrently statements of intention, stating that one intends to contract does not amount to a firm offer. One has to rely on whether the offeror indicated an intention to be bound to the statement. Similarly an advertisement is an announcement of intention to sell at the price advertised.

In protracted negotiations, parties might record their established terms in a partial agreement in order to deal with the undecided issues at a later stage. In determining the legality of such a subsequent recordal of an agreement, one has to ascertain whether the surrounding circumstances show that the offeree knew

---

<sup>6</sup> 1987 (3) SA 629 (SWA)

<sup>7</sup> *ibid*

<sup>8</sup> 1977 (4) SA 842 (A)

or should reasonably have known that it was intended to be accepted on a provisional basis only. An addendum containing further terms does not always indicate that an offer was intended to be provisional only.

In *Pitout v North Cape Livestock Co-Operative Ltd*,<sup>9</sup> the court pondered whether the undertaking was an offer made or merely a proposal advanced prior to them reaching agreement on material terms of their negotiations. An immaterial term settled at a later stage does not affect the validity of the main contract. The first agreement does not have legal force if it is incapable of being read without the settling of other subsequent issues.

Further terms and conditions incorporated into the agreement will not per se indicate a provisional unenforceable contract. Certain terms may be agreed upon or inserted at a later stage in that they are reasonable and standard terms relating to the contract at hand. In *Belmore v Minister of Finance*,<sup>10</sup> the court held that parties to a contract are able to agree on additional terms at a later stage, failing which the original agreement would stand to be enforceable.

A mere puff or exaggerated "salestalk" does not amount to an offer as it is understood that all salespersons praise their goods which have become part and parcel of a trade custom that has developed.

Mass communication has become easier and faster with the introduction of electronic forms of communication which in turn affects the speed at which agreements come into being.

Placing an offer before the public at large or recipient of your communication does not in itself amount to an offer. Each matter depends on the surrounding circumstances, the terms of the publication and the nature of the communication.

## **TERMINATION OF OFFER**

An offer terminates after the period prescribed by the offeror in the offer has lapsed. If the offer has not been accepted during the stipulated time period, the contract terminates and is not revived upon a subsequent acceptance of the offer. If no time period is prescribed in the offer, a reasonable time period is provided to the offeree to accept the offer. A reasonable time period would hinge on all surrounding circumstances of each matter. The nature and method of communication would dictate what is a reasonable time period. One would therefore find that a reasonable time period attached to a written offer would be longer than a reasonable time period attached to an electronic offer submitted.

---

<sup>9</sup> *Supra* Fn 8, 850 D

<sup>10</sup> 1948 (2) SA 852 (SR)

An offer terminates upon rejection of the offer by the offeree. Once rejected it cannot be accepted or revived at a later stage. Rejection can take place expressly or tacitly indicating that the offer has not been accepted.

An offeror may revoke his offer at any time before acceptance by the seller and the period stipulated in the offer as long as the withdrawal comes to the notice of the offeree. The revocation need not be in writing but it must be brought to the attention of the offeree.

## **REQUIREMENTS FOR A VALID ACCEPTANCE OF AN OFFER**

Acceptance to purchase immovable property must accord with the Alienation of Land Act in that the acceptance must be in writing and signed by the offeree or his agent acting on his written authority.

## **ACCEPTANCE MUST BE UNEQUIVOCAL AND UNAMBIGUOUS**

A provisional or conditional acceptance does not correspond with an unequivocal acceptance required by our law. The offeree must intend to make the acceptance and it cannot amount to further negotiations or particulars on any term. This was considered in *Boerne v Harris*,<sup>11</sup> where Greenberg JA stated, "It seems to me that the letter, in order to be effective as an exercise of the right of renewal, must be unequivocally conveyed to the recipient, using ordinary reason and knowledge, that it is intended to be such an exercise. It must leave not room for doubt. The recipient is not required to apply any special knowledge or ingenuity in ascertaining the meaning of the letter". It is thus trite that the acceptance must be clear and not difficult or doubtful to ascertain.

The offer can only be accepted by the person to whom it has been submitted or his authorized agent for approval. An acceptance by some other person is invalid and does not conclude a contract. There can be ascribed no intention on a party to contract with someone else regardless of how closely the parties are related or the subject matter involved.

Acceptance must be brought to the attention of the offeror. *Smerman v Volkertsz*<sup>12</sup> clearly indicated that a contract is concluded only when the offeree has communicated his acceptance of the offer to the offeror. This communication

---

<sup>11</sup> 1949 (1) SA 793 (A)

<sup>12</sup> 1954 (4) SA 170 (C)

may be dispensed with if the offeror states that the offer will be deemed to be accepted upon signature by the seller. This results in a contract being concluded upon assenting of the offer by the seller by signing the offer and the acceptance does not need to be communicated to the purchaser.

The acceptance of the offer must correspond to the offer advanced. Any attempt to alter the terms of the agreement whilst accepting it will not amount to acceptance as required by the Alienation of Land Act. A minor lack of correspondence of an immaterial term will be overlooked in determining whether the acceptance corresponds with the offer made.

## **FORMALITIES REQUIRED**

As previously stated, Contracts of Sale of land are wholly governed in all material respects by the Alienation of Land Act in terms whereof the prescribed formalities of writing and signature are non-negotiable and cannot be waived by the parties. The Legislature first prescribed these formalities in certain provinces and then in the Republic of South Africa. Sales of land were stipulated to be in writing by The Transvaal Proclamation 8 of 1902 (S30) and Free State Ordinance 12 of 1906 (S49). These sections were replaced by Act 68 of 1957 in terms whereof Section 1 prescribed that all deeds of sale in respect of property are to be in writing which was subsequently replaced by a further Act, culminating in the Alienation of Land Act.

Our law reports are brimming with cases indicating negative viewpoints on the introduction of legislation calling for formalities regarding Deeds of Sale.

In *Wilken v Kohler*,<sup>13</sup> Innes J warned against the implementation of legislation calling for formalities. "The idea no doubt, was the same which underlay the English Statute of Frauds. Recognising that contracts for the sale of fixed property, were as a rule, transactions of considerable value and importance and that conditions attached were often intricate, the legislature, in order to prevent litigation and to remove a temptation to perjury and fraud insisted upon their being reduced to writing. Whether all things considered such a provision is desirable, whether it does not create as great hardships as it prevents, is a matter upon which opinions may well differ".

In *Conroy, NO v Coetzee*,<sup>14</sup> an option exercised by plaintiff had been signed by Defendant who had provided it with an incorrect description of the extent of the farm. The purchase price stated did not show how the terms of payment were to be made. Defendant denied the Plaintiff taking transfer of the property, as the option document did not accord with the requirement of Section 49 of Ordinance

---

<sup>13</sup> 1913 AD 135

<sup>14</sup> 1944 OPD 207

12 of 1906. The section invoked stated, "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 authorized in writing". Van Den Heever J stated,<sup>15</sup> "I cannot imagine how a piece of land can possible be described in a document so as to be readily determinable on the earth's surface without more ado, unless perhaps it be bounded on all sides by natural features such as rivers and even then evidence may be necessary, since disputes may arise as to the names or designation of topographical features. If it is described in terms of diagrams and title we again have symbols, which require interpretation in relation to facts and points in situ contemplated by co-ordinance. For these reasons I do not think that Stratford JA in the Coronation Syndicate case intended, or could have intended, that in cases such as these the description of the subject matter of the contract must ex facie the document be such that its translation into physical fact is possible without reference to other facts". He went further to state that, "if one considers the wording of the statute we seem in danger of drifting away from its provisions and turning a measure, which was designed in repression of deceit into a ready instrument for fraud. In terms it contains only two commands: the first determines the medium in which offer and acceptance (or consensus) should be expressed or conveyed i.e. in writing and not orally; the second determines who shall be signatories and, if they are agents, how their capacity shall be authenticated without applying the Roman device of postulating the unexpressed sententia of the statute, which is inconsistent with modern legislative methods and constitutional principles. I can see no direction in the clause that demands greater exactitude of expression from a contracting party using the obligatory medium of writing, which was theretofore demanded of him when he concluded oral contracts. One would have thought that, save insofar as the legislature expressly restricted the subject's contractual anatomy, he was still free to contract".

"It seems to me trite law, that where a contract is capable (Page 214 of report) of supporting more than one construction, and it is a lawful and valid contract on one of these constructions, it should when attacked on exception, be given that innocent interpretation. If, moreover, it is capable of adequately defining the subject matter if complemented by external facts – that is without varying or altering the written contract – it must on exception be held to comply with the requirements of the statute".<sup>16</sup>

In *Sapirstein v Commerford*,<sup>17</sup> the court discussed the inequalities inherent in the legal requirements of writing and Blackwell J stated that, "It has been held, however, and I take it that it is good law, that the court is not governed absolutely by equitable considerations in dealing with claims to set aside otherwise legitimate transactions in that they do not conform to the provisions of the

---

<sup>15</sup> P213

<sup>16</sup> P214

<sup>17</sup> 1944 TPD 182

Transfer Duty Proclamation. In the case, for instance, of *Estate du Toit v Coronation Syndicate* (1929, AD 219) there was a document drawn up between the parties, which the court of appeal held it could not enforce because of the vagueness of the description of the property sold. I am prepared, therefore to admit, however my judicial conscience might have revolted against it, if in fact this property was inadequately described in terms of the Transfer Duty Proclamation, my duty might have compelled me to decline to enforce the contract of sale".<sup>18</sup>

In *Oberholzer v Gabriel*,<sup>19</sup> Van den Heever J succinctly places his views on the statutory formalities of writing and signature in context. "Here we have a contract in writing duly signed by the parties, but that does not end the matter. The statute prescribes a special form, writing, on pain of nullity – nothing more; but it would be difficult to find another example of a crisp and clear statutory provision which has to the same extent been wrested from its context and made gravid by interpretation. It is not often that so much has been read into a simple statutory provision – not because of its words and context, but on the ground of speculation as to Parliament's true motives and intentions when it was enacted. Again, subsequently, there has been extensive interpretation, not of the words of the statute, but of its unexpressed and presumed mens acententia – and all this happened in respect of a statutory provision inhibiting the subject's rights of contracting freely".<sup>20</sup>

In *Mattheus v Stratford and Another*,<sup>21</sup> Clayden J expressed, "Strict compliance with those formalities is insisted upon, but no Court will be astute to find non-compliance; rather it will seek for a way in which compliance may be found"<sup>22</sup>.

In *Glover v Bothma*,<sup>23</sup> the court acknowledged the hardship placed on parties by the then statutory requirement. "In view of the hardship which may be, and often is, caused by the terms of the Section as interpreted by the Courts and the opportunities which it provides unscrupulous persons for the evasion of contracts on technical grounds, its provisions should not in my view be extended further than is necessary, and I wish to guard myself from the proposition that it is necessary in every case that the property to be sold shall be defined in an agent's written authority to sell or to buy with the same particularity as is necessary in a document of sale".<sup>24</sup>

In *Du Plessis v Nel*,<sup>25</sup> the plaintiff declared her entitlement to a servitude of right of way on a portion of property not sold to the defendant. She based her

---

<sup>18</sup> P184

<sup>19</sup> 1946 OPD 56

<sup>20</sup> P58

<sup>21</sup> 1946 TPD 498

<sup>22</sup> P501

<sup>23</sup> 1948 (1) SA 611 (W)

<sup>24</sup> P620

<sup>25</sup> 1952 (1) SA 513 A

entitlement on a verbal agreement entered into by her and the defendant in terms whereof the defendant granted her the servitude. This was never recorded in the subsequent written agreement entered into by the parties.

In accordance with the provisions of Section 30 of proclamation 8 of 1902 (Transvaal), the deed of sale relating to the immovable property had to be in writing. The question the court had to consider in this matter hinged on whether evidence of the parol agreement vis a vis the servitude granted to plaintiff would be admissible.

The Court stated, "In support of my view that there is no such conflict I instance the case where A, by parol, agrees with B that if B will sell his land to A for x pounds A will give him an option for some later period to repurchase the land at x + y pounds and where a written agreement of sale is then entered into without mentioning the option. In order that in form this parol agreement should be valid, I situate this land in the Cape Province, which is free from the tyranny of any provision such as Section 30. It seems to me indisputable that such an option would be valid and it is a right to acquire the whole of the "globular dominium of fixed property".

In *Hutchings v Satz*<sup>26</sup>, de Vos J quoted from *Conroy, N O V Coetzee* 1944 OPD 207 with approval when announcing that the property had been sufficiently identified in a Deed of Sale. "It seems to me trite law that, where a contract is capable of supporting more than one construction, and it is a lawful and valid contract on one of these constructions, it should, when attacked on exception, be given that innocent interpretation. If, moreover, it is capable of adequately defining the subject matter if complemented by external facts – that is without varying or altering the written contract – it must on exception be held to comply with the requirements of the Statute".

In *Magwaza v Heenan*<sup>27</sup>, Hoexter AJA stated, "In my view little is to be gained in the present inquiry by a minute examination of anomalies likely to result from the principle in question. For the reasons set forth in *Wilken v Kohler* and in many decisions of our courts since – the statute in question insists upon writing, on pain of nullity, in contracts for the sale of land. The legislature doubtless recognised that its requirement of writing for such contracts would not infrequently enable a contracting party acting in bad faith to dishonour a bargain made by word of mouth. But the legislature – wisely or unwisely – was prepared to countenance such a situation rather than expose the courts to the alternative evils of perjured evidence and increased litigation; and it is necessary to give effect to the plain wording of the statute despite the anomalies and incongruities that come in its wake."<sup>28</sup>

---

<sup>26</sup> 1965 (4) SA 640 W

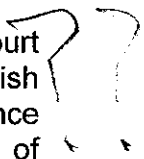
<sup>27</sup> 1979 (2) SA 1019 A

<sup>28</sup> P1030

Our prescription of formalities stem from the English statute of Frauds of 1677, which required certain categories of contracts to be reduced to writing. This obviously eliminated certain uncertainties, narrowed the chances of disagreement, promoted reliable evidence, all of which in turn reduced the incidence of litigation over disputed terms.

Quite ironically the Statute of Frauds also encouraged fraud in that certain parties to a contract might have performed only to be told by the other contracting party that the agreement is unenforceable, as it was not reduced to writing.

The English courts have relaxed the consequences of non – compliance with the formality of rendering the contract voidable and not void. A party to an informal contract may evoke the doctrine of part performance in order to render a Deed of Sale enforceable. A party may therefore apply to court to declare a contract valid in the event that the other contracting party partially performed its obligations.

Our courts strictly followed the English rules of evidence and English court decisions until 1961. Pursuant to South Africa becoming a republic, English decisions still had persuasive value in our courts. South African rules of evidence have certainly grown and evolved giving rise to an established body of procedures which has to a large extent eliminated fraud and acts of perjury, which the legislature was concerned about when originally enacting the formalities relating to the sale of immovable property. It therefore appears inconclusive why our courts have not similarly relaxed the strict adherence to the Alienation of land Act by failing to incorporate a doctrine of part performance into our law. 

Our law of evidence and procedure is far more sophisticated and developed than the inchoate practices allowed to be incorporated into the court's procedures when the formalities, were enacted. Furthermore, our body of evidence is used with success in many more intricate and complicated oral agreements than Deeds of Sale of immovable property could ever provide for.

Zimbabwe has no prescribed formalities relating to the sale of immovable property although contracts of property are reduced to writing due to considerations of convenience and practicality.

"Regenstein v Brabo Investments (Pty) Ltd,<sup>29</sup> is an instructive case. There being no Rhodesian legislation requiring sales of land to be in writing, the court was able to go further than a South African court in ascertaining and enforcing the true common intention of the parties to an erroneous written contract. The fact that, arguably the court abused its freedom by going too far into the forbidden ground of making a contract for the parties is immaterial. The point is that the

---

<sup>29</sup> 1959 3 SA 176 (FC)

court's endeavour to provide a just result was not hampered by any statutory restriction".<sup>30</sup>

Our courts have always stated that non-compliance with the formalities laid down by the legislature is void and not voidable.

The reasoning and rationale given for the persistence of the formalities relates to all contracts alike, which one encounters in law, yet no formalities are prescribed to uphold the legitimacy of such contracts. The section is directed against uncertainty, disputes and possible malpractices.

In *Da Mata v Otto*<sup>31</sup> Boshof J discussed Section 1(1) of the General Law Amendment Act, 68 of 1957, which governed deeds of sale of immovable property and which prescribed that "no contract of sale in respect of land is of any force or effect unless it is reduced to writing and signed by the parties thereto or by their agents acting on their written authority". It was agreed that the rationale of this section was to prevent uncertainty and disputes relating to the substance of such an agreement as far as possible and to eliminate the temptation to perjury and fraud. The legislation was not promulgated for the benefit of any particular group of people but was brought into force due to reasons of public policy. The court therefore concluded that all material terms of a deed of sale must be recorded in writing, which cannot be amended by a subsequent oral agreement. The grounds of public policy meant that either party to the contract could not expressly or impliedly waive its requirement and neither is it possible for a party to allege any kind of principle, which precludes him from rousing the invalidity of that which the statute has on the grounds of public policy legislated. "Dit kan aangeneem word, meen ek, dat die oogmerk van hierdie artikel is om, sover doenlik altans, onsekerheid en geskille omtrent die inhoud van sulke kontrakte te voorkom en moontlike wanpraktyke teen te werk .... Die wetgewer kon nouliks gemeen het dat die mate waarin die oogmerk bereik is en bereik word, heelwat te wense oorlaat, maar dit neem nie weg nie dat bogenoemde wel die oogmerk is." <sup>32</sup>

In *Johnston v Leal*<sup>33</sup>, Corbett JA stated, "The reason why the legislature selected, inter alia, contracts for the sale of land for such special treatment as far as formalities of contract are concerned, was, no doubt, that it recognised that such contracts are generally transactions of considerable value and importance and that the terms and conditions attached thereto are often intricate.... One of the consequences of the application of S 1(1) of Act 71 of 1969 is that where the parties have entered into a written Contract for the Sale of land, but it appears ex facie the writing that a material term has been left inchoate, as for example,

---

<sup>30</sup> Christie RH, *The Law of Contract in South Africa*, 2ed, P128

<sup>31</sup> 1971 (1) SA 763 (T)

<sup>32</sup> Christie RH, *The Law of Contract in South Africa*, 2ed, P129

<sup>33</sup> 1980 (3) SA 927

where the writing expressly states that the term is to be agreed upon later by the parties, the contract by itself is of no force or effect and cannot sustain a cause of action."

## **STATUTORY INTERPRETATION**

The general Rule of Statutory Interpretation is that non-compliance with a statutory prescription makes a contract void and not voidable. Notwithstanding this, the critical issue of concern is always the intention of the legislature in enacting the relevant provision, which is to be determined in accordance with the established principles of statutory interpretation. On investigating the intention of the legislature one must ascertain the language used, the scope and object of the Act and the consequences in relation to justice and convenience of adopting one view rather than the other.

Our law has looked towards semantic and jurisprudential guidelines in determining the intention of the legislature, in instances where the legislature has not unequivocally clarified the consequences of non-compliance with a statute. If the Act is affirmative in character in that the words "shall" or "must" is used, it is regarded as an indication that the legislature required the provision to be peremptory and non-compliance thereof to result in a void transaction. On the other hand, the use of the words, "may" in enactments, indicate a level of discretion on the part of the contracting partners which indicate that non-compliance with such a provision will not result in its invalidity and the provision is considered to be directory in nature. Notwithstanding the language used by the legislature, it is not conclusive when ascertaining the intention of the legislature.

"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 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.

However, the courts act with circumspection in these circumstances. Therefore, in *Eland Boerdery (Edms) Bpk v Anderson* 196 (4) SA 400 T at 405 D-E, the court made the observation that "(t) rouens die toevoeging van so 'n sanksie is dikwels 'n aanduiding dat die wetgewer die straf, waarvoor voorsiening gemaak word in die wet, as genoegsame sanksie beskou end dat hy nie bedoel het, as 'n bykomende sanksie, dat die handeling self nietig sou wees nie".

(iv) Where the validity of the act despite disregard of the prescription, would frustrate or seriously inhibit the object of the legislation, there is obviously a presumption in favour of nullity.<sup>34</sup>

A further indication of a peremptory provision arises where the legislature created a right, privilege or immunity by the enactment. Furthermore, where our legislature prevents the right, privilege or immunity to be waived, it is clear that a peremptory provision was intended to be enacted.

In *Philmatt (Pty) Ltd v Mosselbank Development CC*,<sup>35</sup> Grosskopf JA stated, "the general object of section 2 (1) of the (the Alienation of land Act 68 of 1981) and similar enactments which preceded it, has been considered in a number of cases, and it is generally accepted that the policy underlying this legislation is to prevent disputes, uncertainties and possible malpractices in respect of transactions which, as a rule, are of considerable value and importance."<sup>36</sup>

The wording of section 2 of the Alienation of land Act is imperative in character (No alienation of land...shall...be of any force and effect.) and suggests that the legislature intended non-compliance with the provision to result in a nullity. Furthermore a penalty exists in the event that the provision is not complied with (...be of any force and effect) which indicates the importance of compliance by the legislature.

The history and background to the Alienation of Land Act, summarised above indicates that the intention of the legislature was to enact a peremptory provision to prevent uncertainties and disputes and to curtail possible malpractices.

## **ALIENATION**

Alienation is defined in Section 1(1) of the Alienation of Land Act as a sale, exchange or donation irrespective of whether it is subject to a suspensive or resolute condition. Under earlier formalities legislation, contracts of exchange and donation were exempted from the requirements of writing.

<sup>34</sup> Devenish, *Interpretation of Statutes*, 1992

<sup>35</sup> 1996 (2) SA 15

<sup>36</sup> 25 C-D

If parties contemplate the transfer of land under their contract, the term alienation should be applied with the minimum of change to the existing common law. Thus in *Lograd properties (Pty) Ltd v Padachy*,<sup>37</sup> a contract of services in terms whereof an employee was remunerated by means of the transfer of land was held to fall outside the meaning and scope of the Alienation of land Act. A sale of shares in a property owning company also falls outside the scope of the Alienation of Land Act as well as an agreement between heirs to divide land bequeathed to them under an ambiguous will.

An alienation of land must now be included in a "Deed of Alienation" and not merely in writing. A "Deed of Alienation" is defined as "a document or documents under which land is alienated";<sup>38</sup> thereby indicating that more than one document read together may constitute the contract between the parties.

## LAND

The definition of land includes:-

- "(a) (i) any unit;
- (ii) any right to claim transfer of land;
- (iii) any undivided share in land;
- (iv) initial ownership referred to in Section 62 of the Development Facilitation Act, 1995
  
- (b) Includes in Chapters I and III, any interest in land, other than a right or interest registered or capable of being registered in terms of the Mining Titles Registration Act, 1967 (Act No 16 of 1967)"<sup>39</sup>

Land is to be given its ordinary meaning, which includes not only soil, but buildings and other permanent fixtures attached to it. This does not imply that fixtures must be classed as land when considered separately from the soil to which they are attached. "To regard the sale of a building for demolition and removal, or the sale of standing crops for reaping and removal, as a sale of land would be straining of language, and if the legislature had intended to include such sales it could have made its intention clear by using the words immovable property instead of land".<sup>40</sup>

An interest in land has been held to mean a praedial servitude, an exclusive right to grant leases and receive rental, the right to use clay, lime and stone and

---

<sup>37</sup> 1988 3 SA 541 (D)

<sup>38</sup> Section 1

<sup>39</sup> Section 1

<sup>40</sup> Christie RH, *The law of Contract in south Africa* 2ed, P 131

occupy a selected portion of a piece of land for the erection of buildings and machinery for the purpose of a prospecting contract.

The definition of land also refers to any right to claim transfer of land. This right is not a future right but one existing at the time the agreement was entered into. Thus in *Jassat v Jassat*,<sup>41</sup> the question the court had to consider was whether an oral agreement relating to a future right must presently be regarded as an alienation of land. In the matter a nominee applied to the Community Development Board for a house. It was agreed that the nominee would purchase the property but the principal would pay for the house and the nominee would request that the property be registered in the principal's name. Contrary to the verbal agreement, the nominee took transfer into his name verifying the invalidity of the oral agreement. The court however held that the agreement between the parties was not a sale of land and therefore was not a nullity.

## **CONTENT OF DEED OF ALIENATION**

It is clear that the writing must be embodied in the Deed of Alienation and the deed must be signed by the contracting parties or their authorized agents. The Alienation of Land Act is however not instructive on what must be embodied in writing and one has to look at decisions relating to this point to provide us with clarity.

*Johnston v Leal*,<sup>42</sup> dealt with this question in depth and many subsequent cases relied on the court's interpretation to arrive at their legal judgement. The formalities the court had to consider required the whole contract or at least all the material terms to be reduced to writing. It is not necessary that all the terms of the agreement must be contained in one document but in the event of more than one document being in existence, all the documents together must encompass the contract. The material terms of a contract are not confined to the essentialia – the parties, the merx and the pretium but also include other material terms determined by the parties. These material terms must be set out with sufficient accuracy and particularly to enable the identity of the parties, the amount of the purchase price and the identity of the subject matter to be ascertained without recourse to evidence of an oral nature between the parties.<sup>43</sup>

"It might also be said that Section 1(1) has not been complied with in that the section contemplates a Contract for the Sale of land, not an inchoate agreement. Where, on the other hand, the parties have reached a subsequent agreement in regard to the term in question, but have done so orally only, then the contract is no longer incomplete or inchoate, but then of course there is a non-compliance

---

<sup>41</sup> 1980 (4) SA 321 (W)

<sup>42</sup> *Supra* fn 33

<sup>43</sup> P927 of *Johnston v Leal*

with Section 1(1) in that the whole contract is not in writing. The consequences of this, is that the Contract of Sale is null and void. If, however, the subsequent agreement is in writing, then it would seem the inchoateness of the original contract is cured and Section 1(1) is complied with."<sup>44</sup>

Section 3 of the Interpretation Act<sup>45</sup> states that an expression in a statute relating to writing shall unless the contrary intention appears, include also references to typewriting, lithography, photography and all other methods of representing or reproducing words in visible form. A Deed of Alienation may be written or printed on a document or a combination of documents.

"The verb 'to write' relates to forming letters, words, symbols, etc., whether by marking, carving, engraving or incision. 'Writing' is the use of letters, words etc., for purposes of record, the transmission of ideas, etc., in visible form. As the definition of 'writing' indicates, the writing need not necessarily be on paper, a telegram or the writing on the back of a cheque may suffice as the writing for a sale."<sup>46</sup>

The language used may be any language as long as the "reasonably intelligent reader" may be able to understand it or taught to understand it.

The computer has ushered in a new language e.g. Cobol. The computer is a mechanical means of recording data. "The information is "fed" into the computer, it is "stored" therein and is recalled by the "print out" which contains, not words but figures in code language. The computer language must in turn be translated into a recognizable language. Each such step of "feeding" and "print out" constitutes "writing". Just as a director may sign on behalf of a company by the use of a rubber stamp, so the party to the writing may sign by taking part in the "feeding" of the computer, with his name being "fed" as being his signature effected by someone under that party's direction and control."<sup>47</sup>

The court in *Clements v Simpson*<sup>48</sup> analysed whether the content of a written contract was sufficiently embodied to comply with the Alienation of Land Act. "The Section being directed against in the description of the subject-matter of the sale, the parties, the price or the method of payment is not required. This does not mean that the court is to make a contract for the parties where their intention cannot be ascertained with a reasonable degree of certainty. In endeavouring to ascertain the intention of the parties, no recourse may be had to evidence from the parties as to their negotiations and consensus, but evidence of identification or of an explanatory nature is admissible. The point is that, to fulfill the intention of the legislature, the written contract must place the essentials of a contract of

---

<sup>44</sup> P939 of *Johnston v Leal*

<sup>45</sup> Act No. 33 of 1957

<sup>46</sup> Wulfsohn PM, *Formalities in respect of Contracts of Sale of Land Act (71 of 1969)* P37

<sup>47</sup> *ibid*

<sup>48</sup> 1971 3 SA 1 (A)

sale, and all the material matters with which it deals, out of range of the clash of will of the parties.”

## **DESCRIPTION OF LAND SOLD**

The Alienation of Land Act does not supply any requirements as to how the land being sold must be described in order to comply with the formalities. Our courts have implemented all recognised means of interpretation before declaring a sale to be invalid due to it being void for vagueness. It is a question of fact whether the description of property recorded is sufficient. Meticulous accuracy in the description of the property is not required. It suffices if the intention of the parties may be ascertained from the writing with a reasonable degree of certainty, even if the language therein is inelegant, clumsy or loosely used. The principle is that sufficiency, not perfection is the essential requirement.<sup>49</sup>

“The test for compliance--- 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.”<sup>50</sup>

In *Van Wyk v Rottcher's Saw Mills (Pty) Ltd*,<sup>51</sup> Schreiner JA stated, “there are various ways in which identification may be achieved. For example, a house may be identified if the contract gives its address, such as its number, street and city or a farm may be identified if the document mentions its name---. Or it may be identified by reference to a specified adjoining property. Then there may be identification by reference to the relationship of some person to the property. So it may be described as “my property”---. Another common way of identifying property is by stating its boundaries. This may be done by reference to a plan, mention features on the land, which may be natural or artificial such as fences, buildings and beacons---. (ii) The test for compliance with the statute 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---. For it to be identified, not only its area of size, but its shape would have to be described---. (iii) This does not however mean that no extrinsic evidence of any kind is admissible to identify the property. Oral evidence is admissible to locate an external phenomenon referred to or incorporated by reference in the contract where this is not self-identifying---. (iv) Nor is meticulous accuracy in the description of the merx required. In constructing an earlier corresponding enactment Watermeyer CJ discussed, “Clearly if Section 30 be construed so as to require a written contract of sale to contain, under pain of nullity, a faultless description of the property sold couched in meticulously accurate terms, then such a construction would merely be an encouragement to

<sup>49</sup> *Party Investments (Pty) Ltd v Padayachey* 1975 (3) SA 891 (N)

<sup>50</sup> *Clements v Simpson* 1971 (3) SA 1 (A)

<sup>51</sup> 1948 (1) SA 983 AD

a dishonest purchaser to escape from his bargain on a technical defect in the description of the property, even in cases where there was really no dispute at all between the parties. Such a construction would be an encouragement to dishonesty and cause loss of revenue to the State, and it should be avoidable if possible---."

It is not necessary to refer to a diagram when describing the property but many parties find it convenient to do so. The parties therefore describe the property by incorporating a reference to the diagram or plan into their Deed of Sale. "If a diagram be so referred to, any diagram may suffice, whether it be a land surveyor's diagram drawn up according to scale or a mere rough sketch plan, so long only as it marks the plot of land sold or the boundary line or angles or points, with reasonable clarity"<sup>52</sup>.

In *Tuckers Land and Development Corporation (Pty) Ltd v Kruger*,<sup>53</sup> incorporation by reference was instituted by referring to a provisional plan on which an application to open a Township was based. This sufficed as a valid description of the property in the proposed Township.

## THE PRICE

The price is a material term of the sale of the property, without which the sale is void ab initio. The Alienation of Land Act makes no mention of the price relating to deeds of sale, it is implied from the word "sale" which indicates that there should be a price attached to the subject matter. It is therefore clear that a written contract for the sale of land that is silent on the purchase price or leaves it to be determined at a later stage or left open for future deliberation is void. The price must be reduced to writing, as it is an essential element of a contract of immovable property.

The price need not be stated in perfectly accurate terms but it will suffice if the price is recorded with reasonable clarity and certainty that a reasonably intelligent reader is able to determine the price after perusing the agreement.

In the case of the price being determined or ascertainable the legislature does not require faultless determination to be stated in meticulously accurate terms. If this were required, it would encourage dishonesty or disputes by unscrupulous parties wishing to resile from an otherwise complete contract. As long as the purchase price can be reasonably determined from the contract by reference to the common law or the general laws applicable to the formation of contracts, the price is sufficiently recorded for the purpose of the Alienation of Land Act.

---

<sup>52</sup> Wulfsohn PM Formalities in respect of Contracts of Sale of Land Act (71 of 1969) P115

<sup>53</sup> 1973 (4) SA 741

"The purchase price must be serious, be fixed or capable of ascertainment, and must be sound in money. The parties must either fix the price or they must agree on a method by which it is to be fixed. Where they do not fix it, it must be possible to determine the price by the method agreed upon. The price so fixed must therefore be capable of independent determination, without further reference to the parties or to future agreement between them. Thus the parties may fix the price by reference to an amount in some other document by means of a formula, or by agreement to have an independent third person fix it."<sup>54</sup>

"A written sale of land may state that the price or the property is as elsewhere described e.g. as in a newspaper advertised or in a bond. *Stricto sensu*, that written sale has failed to record an essential element, and yet, if such other document may be referred to, it may adequately be able to fill the hiatus. Such extraneous matter is properly "incorporated by reference" if the written sale is linked thereto so that by the mere production of such other document, and by its mere comparison with the written sale, such other document may readily be identified; on reading the written sale and such other document together, the "missing term" is then ascertained".<sup>55</sup>

## **THE PARTIES**

The Alienation of Land Act provides that the identities of the parties are an essential term of the Agreement and must thus appear *ex facie* the contract with reasonable certainty so that the parties can be ascertained without resorting to parol evidence. It is not required that the actual name of the party be indicated on the contract as long as that party is identifiable with reasonable clarity on the face of the written document.<sup>56</sup>

If the name of a party is not stated in the deed of sale, the sale may still be enforceable if the party's name is ascertained from another document in the case of proper incorporation by reference.

It must be clear from the agreement that the parties intended to contract with each other. If the offer is made to a specific person, that specific person must accept the offer. Notification of acceptance of the offer must be brought to the attention of the offeror and needs not be in writing to constitute a deed of sale.

If a party to a contract is described in such a way that he cannot be identified without the assistance of oral evidence, then the contract is void as the evidence needed to identify the party can be disputed and is thus inadmissible.

---

<sup>54</sup> Aronstam PJ, *The Alienation of Land* P35

<sup>55</sup> Wulfsohn PM, *Formalities in respect of Contracts of Sale of Land Act (71 of 1969)* P29

<sup>56</sup> *Steyn v McDonald* 1965 (3) SA 738 A

However, a contract that leaves no doubt as to what was agreed may be augmented with parol evidence to place beyond dispute who the party agreed upon in the contract is. Thus an offer made to the owner of certain property may be supplemented by evidence showing that the person who accepted the offer was the owner in accordance with the Title Deeds. If the written sale is on the face of it formally valid, parol evidence is admissible to ascertain whom in reality the party is.<sup>57</sup>

## **MATERIAL TERMS**

The Alienation of Land Act requires the agreement containing the essential and material terms to be reduced to writing. Parol evidence will once again not be acceptable to cure the contract or to revive a material term.

In practice the parties incorporate their own material terms to the contract, which have a binding effect on the parties. Typical material terms relating to immovable property are the period within which and amount of the mortgage bond required by the purchaser, security of the balance of purchase price, the payment of the deposit, remedies at the parties disposal in the event of breach of contract by the other contracting party and date of transfer/occupation or possession. A material term is a term that parties deem to be important enough to insert into their contract and thus material terms may differ from each contract. In *Rustein v Elandsheuwel Farming (Pty) Ltd & Another*,<sup>58</sup> Bliss AJ stated, “--- the materiality of the method of payment of the purchase price was not dependent on the intention of the parties or even on the circumstances of the case. Prima facie, in law, the method of payment of the purchase price is a material and essential term in a contract of sale relating to fixed property--- . As all the material terms of a contract of sale of fixed property have to be in writing, the contract relied upon in the instant case is of no force and effect. If the method of payment was not material the onus would surely be on applicant to establish that fact”.<sup>59</sup>

In *King v Potgieter*,<sup>60</sup> Roper J stated, “It is I think clear upon authority that in order to satisfy the statute whatever the parties have agreed upon must be set out in the written contract and is not sufficient that the essentials of the contract of sale – the parties, the property sold and purchase price – are set out with the necessary particularity, while the document on its face is incomplete in respect of other terms of the agreement. The statute requires the contract to be in writing and the contract is the whole contract and not a part of it”.

---

<sup>57</sup> Hill v Faiga 1964 (4) SA (W)

<sup>58</sup> 1971 (1) SA 268 (T)

<sup>59</sup> P275

<sup>60</sup> 1950 (3) SA 7 (T)

## PAROL EVIDENCE RULE AND RECTIFICATION

The Parol Evidence rule means that a document is ordinarily conclusive as to the nature and terms of the transaction embodied therein, if the parties intended the document to be the exclusive memorial of their agreement, or if a statute so requires.<sup>61</sup>

Generally a contract must speak for itself and no oral evidence may be admissible to add, modify or contradict the terms and obligations of the written recordal. Parol evidence is ineffective to prove negotiations leading up to the written agreement or to establish an oral consensus on which the written contract is based.<sup>62</sup>

The Rule excludes extraneous oral evidence as it relates to evidence that is immaterial due to parties. Thus in *Johnston v Leal*,<sup>63</sup> Corbett JA pronounced, "In many instances recourse to evidence of an earlier or contemporaneous oral agreement would, in any event, be precluded by the so-called "Parol evidence Rule" ... or, more correctly, that branch of the rule which prescribes that, subject to certain qualifications ... when a contract has been reduced to writing, the writing is regarded as the exclusive embodiment or memorial of the transaction and no extrinsic evidence may be given of other utterances or jural acts by the parties which would have the effect of contradicting, altering, adding to or varying the written contract. The extrinsic evidence is excluded because it relates to matters, which by reason of the reduction of the contract to writing and its integration in a single memorial have become legally immaterial or irrelevant".

There is however exceptions to the parol evidence rule not being of application in Deeds of Sale. Oral evidence may be adduced to prove absence of consent and voidness due to a fundamental error, illegality, impossibility of performance, misrepresentation or undue influence.<sup>64</sup>

"The fact that a transaction has been embodied in a document does not preclude a party from attacking its validity. For example, evidence may be adduced to prove that it was induced by fraud, duress or misrepresentation, or that it is void for mistake, illegality or failure to comply with the terms of a statute".<sup>65</sup> Thus parol evidence may be adduced to prove a collateral oral agreement as long as that oral agreement was not required to be in writing and does not relate to any material terms of the written agreement. "Extrinsic evidence may be admitted to clarify latent ambiguities in the written agreement,

<sup>61</sup> *Du Plessis v Nel* 1952 (1) SA 513 AD

<sup>62</sup> *Union Government v Vianni Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43

<sup>63</sup> *Supra* Fn 33, P 938 D-F

<sup>64</sup> *Supra* Fn 54, P42

<sup>65</sup> Hoffmann LH Zeffertt D, *The South African Law of Evidence*, 4ed, P215

where otherwise the agreement complies with the formalities prescribed by law. Such evidence could, for example, clarify the identity of the land being sold, where the description contained in the deed could apply to more than one piece of land".<sup>66</sup>

Parol evidence may also be acceptable to permit rectification of an agreement where evidence led can show that the agreement does not accurately reflect the agreement between the parties. The requirement for rectification is that the deed of sale must be valid and all requirements of the Alienation of Land Act must have been met. If this is not the case, the sale is void ab initio and no rectification by the introduction of oral evidence can revive the agreement.

In *Johnston v Leal*,<sup>67</sup> the court used oral evidence to consider the question of why the contracting parties failed to fill in the blank and used this to determine the validity of the deed of sale.

## **SIGNATURE**

The Alienation of Land Act does not specify the definition of signature or what constitutes a signature. One must therefore be guided by the common usage of the word and by case law.

"The verb 'to sign' is derived from the Latin word 'signum', meaning a mark. Dictionaries show that, in current usage, the word retains that meaning. Any such mark on the document made by a person to attest it or to identify it as his act, constitutes his signature".<sup>68</sup>

"A signature is a distinguishing mark made by a person with the intention that it be identified as his mark. That mark may be his ordinary signature, his initials, and his thumbprint or be made with an inked stamp. The person may make the mark alone or, where he is handicapped or illiterate, with the assistance of another person. The mark may be in ink, pencil, printed, stamped or typed, and may be legible, illegible or even inaccurate".<sup>69</sup>

The Alienation of Land Act does not specify where the signatures are to be located on the document. A Deed of Sale has been held to be valid if the signatures are embodied on one or more pages of the agreement if it was the intention of the signatory to authenticate or cover the whole contract.

---

<sup>66</sup> Supra Fn 54, P42

<sup>67</sup> Supra Fn 33

<sup>68</sup> Supra Fn 46, P45

<sup>69</sup> Supra Fn 54, P38

In *Matanda and Others v Rex*<sup>70</sup> the court held that a signature can be made with the assistance of another. Thus a signatory may make his mark by his assistant holding the pen, whilst the signatory touches the pen or places his own hand on his assistant's hand or the assistant guides the pen whilst holding the signatory's hand.

A signatory may write his name by printing it in capital letters or elect to use cursive. It is however vital that the signatory intends his mark or signature to constitute his signature.<sup>71</sup>

In *Van Niekerk v Smit*,<sup>72</sup> Murray J pronounced, "Signature does not necessarily mean writing a person's Christian name and surname but any mark which identifies it as the act of the party---. To sign, as distinguished from writing one's name in full is to make such a mark as will represent the name of the person signing---. Pencil signatures, signatures by initials or by means of a stamp, or by mark or by a party's writing below a printed heading are all sufficient under the statute of Frauds".

It is affirmed that the signatures of the parties need not be made simultaneously, whether the sale be in one document or in more than one.<sup>73</sup> "There seems with respect, to be nothing against the offeror signing only his offer and the offeree signing only his separate acceptance for a valid sale of land to arise".<sup>74</sup>

In *Standard Bank of South Africa (Pty) Ltd v Bhamjee and Another*<sup>75</sup> it was held that normally signatures would be incorporated at the end of the document but it does not need to be so. Each of the other and preceding pages may but do not necessarily need to be initialed by the contracting parties.

In *Magwaza v Heenan*,<sup>76</sup> it was held that, "The requirement in Section 1(1) signifies something more than just merely having a party's signature or mark on a deed of sale. This is particularly so if the object of Section 1 is to be attained (i.e. prevention of unnecessary disputes and litigation). The party's signatures should be presumed to be attached or relate to the particular contents of the contract they append their signature to; their minds should be presumed to accompany their signatures and they should therefore be bound by the particular contents of the document they sign. It accordingly follows that, if a completely new document with a completely different content is substituted, one cannot speak of the existence of a document, which was 'signed by the parties', concerned and there would thus be no existence of a contract, which can be rectified".

---

<sup>70</sup> 1923 AD 435

<sup>71</sup> *Philips v Mroqoza* (1908) 22 S.C. 22

<sup>72</sup> 1952 3 SA 17 (T)

<sup>73</sup> *Montesse Township & Investment Corporation (Pty) Ltd v Standard Bank Ltd & Ano* 1964 (3) SA 221 (T)

<sup>74</sup> *Supra* Fn 46, P48

<sup>75</sup> 1978 (4) SA 39 (W)

<sup>76</sup> *Supra* Fn 27, P1020

## ANOMOLIES PRESENT IN OUR LAW

### EXPROPRIATION:

The expropriation of property is governed by the Expropriation Act No. 63 of 1957, ("the Expropriation Act"), where the conditions relating to the procedure of expropriation and compensation are reflected. The ordinary meaning of expropriate signifies dispossession of property. The statutory context implies "it is generally used in a wider sense as meaning not only dispossession or deprivation but also appropriation by the expropriator of the particular right and abatement or extinction, as the case may be, of any other existing right held by another which is inconsistent with the appropriated right".<sup>77</sup>

The right of expropriation been seen as a necessary corollary of state notwithstanding the fact that it constitutes a drastic interference with the right of a property owner.

Expropriation means that the owner becomes dispossessed of his property, which becomes vested in the state or some other public authority empowered by the state to acquire ownership of the property. The authority to expropriate includes the dispossession of all rights, which originally formed part of the dominium over the land. Consequently, minerals, which have been separated from ownership, may be included in the expropriation. The rights of a tenant are also not taken into consideration and the maxim "huur gaat voorkoop" finds no legal relevance.

The definition of property, means both movable and immovable property, which includes both real and personal rights.

An owner is described as "in relation to land or a registered right in or over land, the person in whose name such land or right is registered and (a) if the owner of any property is deceased, the executor in his estate---".<sup>78</sup> It is clear that "owner" has been given a wide meaning and includes not only the registered owner of property but also persons appointed to administer the affairs of the registered owner e.g. Trustee of Insolvent Estate or authorised agent of the owner.

Section 7 (1) states,

"If the Minister has decided to expropriate, or to take the right to us temporarily, any property in terms of the provisions of Section 2, he shall, subject to the provisions of subsection (5), cause to be served upon the owner in question an appropriate notice in accordance with the provisions of subsection (3)".

<sup>77</sup> Jacobs M, The Law of Expropriation in South Africa, P1

<sup>78</sup> Section 1

The notice of expropriation shall -

- (a) contain a clear and full description of the property in question---;<sup>79</sup>
  - (b) state the date of expropriation or, as the case may be, the date as from which the property will be used, as well as the period during which it will be used---<sup>80</sup> and
  - (c) state the amount, which is offered as compensation for the property or for the use thereof.<sup>81</sup>
- (3) "Subject to the provisions of subsection (5), the Minister shall cause the notice of expropriation to be served by causing the original or a true copy thereof to be delivered or tendered or sent by registered post to the owner in question."<sup>82</sup>
- (4) If the whereabouts of the owner or of every owner of the property in question or any person or every person having an interest therein, is not readily ascertainable by the Minister or, if by reason of number of such owners or persons having such an interest or for any other reason, he is satisfied that service of a notice in accordance with subsection (3) is not practicable, he shall, instead of or in addition to causing a notice or notices to be published in accordance with subsection (3), cause to be published once in the Gazette and once a week during two consecutive weeks in an Afrikaans and in an English newspaper circulating in the area in which the property in question is situated, an appropriate notice complying with the provisions of subsection (2).<sup>83</sup>

Section 7(2)(a) requires a clear and full description of the property to be expropriated where only a portion of the property is to be expropriated. In *Stellenbosch Divisional Council v Shapiro*,<sup>84</sup> the mere prior pointing out of the property to be expropriated was deemed to be sufficient for the provisions of the Expropriation Act.

In terms of Section 8(1), "The ownership of property expropriated in terms of the provisions of this Act, shall subject to the provisions of Section 3(3) and on the date of expropriation, vest in the State, released from all mortgage bonds (if any) but if such property is land, it shall remain subject to all registered rights (except mortgage bonds) in favour of third parties with which it is burdened, unless or until such rights have been expropriated from the owner thereof in accordance with the provisions of this Act."

---

<sup>79</sup> Section 7 (2)(a)

<sup>80</sup> Section 7 (2)(b)

<sup>81</sup> Section 7(2)(c)

<sup>82</sup> Section 7 (3)

<sup>83</sup> Section 7(5)

<sup>84</sup> 1953 (3) SA 418 C

In *Mathibe and others v Moschke*,<sup>85</sup> Jura AJA remarked, "The effect of expropriation is to vest the ownership of land in the Government notwithstanding that the land still stands registered in the plaintiff's name and has not been transferred to the Government. No doubt dominium in land does not as a rule pass without transfer coram lege loci and in movables it does not pass without such delivery. But the principle that such dominium may pass without such delivery or transfer by mere operation of law is well known to the common law, though it applies in certain definite cases only...."

The Registrar of Deeds must be given a certified copy of the notice of expropriation and the expropriator is not entitled to have any further transactions relating to the property to be registered in the Deeds Office until the expropriated property is registered in the name of the expropriator.

In South Africa our courts have distinguished expropriation from the sale of land – "It is, in my opinion, an illegitimate use of language to say that because an acquisition under the procedure of the Lands Clause Act is spoken of as a compulsory sale, therefore the transaction is a sale".<sup>86</sup>

"The distinctions between the two concepts (sale and expropriation) leap to mind. Consensus is the foundation of sale and nihil consensui tam contrarium est quam vis atque metus (D50 17.116). A party to the contract may safeguard his interests by seeing to it that adequate provisions are incorporated in it, for conventio legem dat contractui. In expropriation that is obviously not the case. The purchaser pursues his private interests and is himself to blame if he ineptly neglects them; the expropriating authority aims at the well being of the State or community and the conditions governing expropriation are beyond the control of either party. Consequently the analogy of sale is completely false ..."<sup>87</sup>

## **PRESCRIPTION**

Prescription is a method in terms whereof a person acquires ownership. Acquisitive prescription is a continuous process and comes into being by the possession by one person of another person's immovable property for an uninterrupted period of 30 years, nec vi, vec clam nec precario and with the intention of acquiring ownership or openly as if the person was the owner of the property.

It is of no consequence if the possessor of the property bona fide or mala fide believes that he is the owner of the property.

---

<sup>85</sup> 1920 AD 354

<sup>86</sup> *Kirkness V John Hudson & Co Ltd* 1955 AC 696

<sup>87</sup> *Pahad v Director of Food Supplies and Distribution* 1949 (3) SA 695 AD

The rationale for this obscurity is that "prescription is based on the principle that penalties should be imposed on those who, through their negligence and carelessness about their own affairs and property, do an injury to the State by introducing an uncertainty as to the ownership and an endless multiplicity of lawsuits".<sup>88</sup>

A person who acquires physical control of property and who possesses such property must also have the intention of an owner with regard to such property.

The possession of the person who claims acquisitive prescription must have been *nec vi* – without force or peaceably and *nec clam* – openly. *Nec clam* is possession, "so patent that the owner, with the exercise of reasonable care would have observed it"<sup>89</sup> although actual knowledge is not required on the part of the registered owner.

The "nec precario" element does not mean without permission or consent but is given a narrow meaning – "not by virtue of a precarious consent / not by virtue of a revocable permission or not on sufferance".<sup>90</sup>

The possession and all the elements peculiar to prescription must be in place for 30 years without interruption or suspension.

Section 1 and Section 2(2) of the Prescription Act, 68 of 1969 provides that the possessor becomes the owner of the property as soon as the 30-year period expires. The possessor may demand that the property be registered in his name in the Deeds Office and any attempt to transfer the property to a third party by the registered owner is invalid.

Section 33 of the Deeds Registries Act makes provision for the registration of the property into the name of the possessor of the property.

## **SALES BY PUBLIC AUCTION**

Section 3(1) of the Alienation of Land Act provides that the provisions of Section 2 (which prescribes all the formalities), do not apply to the sale of land by public auction.

Section 3(2) prescribes, "If in terms of a sale of land by public auction the purchase price or any other charges is or are payable by the purchaser in more than two instalments over a period exceeding one year –

---

<sup>88</sup> Silberberg and Schoeman, *The Law of Property*, 4ed P154

<sup>89</sup> *Smith v Martin's Executor* Dative 1899 16 SC 148

<sup>90</sup> *Malan v Nabygelegen Estates* 1946 AD 562

- (a) The provisions of this Act apply to that sale as if it were a sale under a contract”.

## **RETROSPECTIVE VALIDATION**

Section 28(2) of the Alienation of Land Act states: “Any alienation which does not comply with the provisions of Section 2(1) shall in all respects be valid ab initio if the alienee had performed in full in terms of the deed of alienation or contract and the land in question has been transferred to the alienee”.

All that is required is that the alienee has performed in full in terms of the Deed of Sale and the “seller” has transferred the property to the “purchaser”. It is not required of the parties to amend their Deed of Alienation to comply with the formalities of Section 2(1) of the Act. This section is still of application notwithstanding the alienator not having performed his contractual obligations.

## **CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA**

Section 28 of our Constitution deals with rights in property.

Section 28 states

- “(1) every person shall have the right to acquire and hold rights in property and to the extent that the nature of the rights permits, to dispose of such rights.
- (2) no deprivation of any rights in property shall be permitted otherwise than in accordance with a law.
- (3) where any rights in property are expropriated pursuant to a law referred to in subsection (2) such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation.”

In the Articles entitled “The future of Private Ownership of Land”<sup>91</sup> and “Tradition on Trial: A critical analysis of the Civil Law tradition in South African Property Law”<sup>92</sup>, Van Der Walt AJ, discusses the impact of Section 28 of the Constitution and the meaning of the phrase “rights in property”.

<sup>91</sup> Codicillus XXXV No 2

<sup>92</sup> SA Journal on Human Rights, 1995, Vol II, P169

"Section 28(1) provides a guarantee for every individual to hold and acquire rights in property and (within reason) to dispose of that property. In terms of traditional constitutional learning the property guarantee in s 28 comprises two elements. Firstly, such a constitutional property clause means that the government cannot make laws which effectively undermine the free market system, because that would make it impossible for individuals to acquire, hold and dispose of rights in property – a right which is guaranteed by Section 28(1). In this perspective the constitutional guarantee of rights in property entails a guarantee of a certain kind of economic system"<sup>93</sup>.

"The term "rights in property" as used in section 28(1) is not an acknowledged or technical term with a clear legal meaning, which means that there is not yet certainty about its exact meaning and scope. When confronted with this section the appropriate courts, including the constitutional court, will have to find the proper meaning of the term "rights in property". It is clear, however, that this term refers not only to rights in land, but to rights in all kinds of property, including land, movables and incorporeal or immaterial property. Similarly, it will probably be interpreted widely as referring not only to real rights in property, but to all patrimonial rights, including personal or creditors' rights. This means that s 28 provides a guarantee for an extraordinary wide category of rights in property"<sup>94</sup>.

"This guarantee clause virtually ensures a very wide interpretation of the property clause because of the term "rights in property". Its formulation is unique in the sense that it has not been used in any of the better known property clauses and it actually came as a surprise that such a formulation was opted for. In a sense this formulation avoids the US and German "new property" debate about the inclusion or exclusion of non-corporal rights because the formulation itself more or less explicitly opts for a wider rather than a narrow interpretation of the rights in property that are to be included in the constitutional guarantee. In fact this formulation seems to envisage an even wider protection of property rights than was achieved in the US by way of "the new property" theory."<sup>95</sup>

In the case of *Transkei Public Servants Association v Government of Republic of South Africa and others*,<sup>96</sup> Pickering J stated, "To those schooled in traditional notions of "property" the idea that "property" might encompass interests against the state such as employment, benefits and subsidies might, at first blush, seem somewhat startling. However as pointed out by Cachalia et al: *Fundamental Rights in the New Constitution*, at 92, the concept of property has been broadened particularly as a result of the influential article by Charles A Reich: "The new property"

---

<sup>93</sup> Bobbert MCJ, *The Property Clause in the interim Constitution*, Butterworths Conveyancing Bulletin, December 1995, Volume 9, No. 3, P70

<sup>94</sup> *ibid*, P70-71

<sup>95</sup> *ibid*, P72-73

<sup>96</sup> 1995 (9) BCLR 1235 (TK)

“According to this theory, the property clause originally guaranteed rights with regard to corporeal things, but this kind of “thing”- ownership has been replaced in modern society by a variety of social and economic interests and benefits so that it became necessary to attach an increasingly wider interpretation to the property clause in order to secure constitutional protection for the new forms of social benefits such as state contracts, pension and medical benefits, employment rights, and so on, but it can also be applied to social rights such as workers’ rights, political rights, such as the right to vote and others”.<sup>97</sup>

In *Jack R. Goldberg Commissioner of Social Services of the City of New York v John Kelly et al.*<sup>98</sup> the court pronounced, “It may be realistic today to regard welfare entitlements as more like “property” than a “gratuity”. Much of the existing wealth in this country takes the form of rights which do not fall within traditional common law concepts of property”.

In *Laverne Logan v Zimmerman Brush Company et al.*<sup>99</sup> the trend of a widened concept of property was strengthened – “The hallmark of property— is an individual entitlement grounded in state law which cannot be removed except “for cause”... . Once that characteristic is found, the types of interest protected as “property” are varied and, as often as not, intangible relating to the whole domain of social and economic fact”.

In *Nobrega v AG Guyana*,<sup>100</sup> the Court held that state employment was akin to property and the reduction of a civil servants remuneration was likened to depletion of property.

“The brief overview of issues regarding land in current South African Law illustrates the need for a theory of property that can accommodate a wide variety of problems, issues and solutions with the maximum of flexibility. In fact, it is possible that South Africa property law and the transformation it is going through presents a clear case for a diversified system of property rights that is not dominated either terminologically or systematically by one concept or idea---. The needs and aspirations of the heterogeneous society of property users require a variety of property rights, solutions and approaches that need not be logically or conceptually coherent”.<sup>101</sup>

“A related aspect of the legitimacy crisis facing South African property law is the fact that the “standard view” of what property law is, what it deals with and how it should be applied and developed is often regarded as ‘White, rich man’s law’, which means nothing to the majority of the population. The much praised Roman-Dutch heritage of the South African law of property is also seen as

---

<sup>97</sup> Supra Fn 91, P71

<sup>98</sup> 397 US 254, argued 13 October 1969, decided 23 March 1970

<sup>99</sup> 455 US 422, 262, argued 14 October 1981, decided 24 February 1982

<sup>100</sup> (1967) 10 WIR 187 (GCA)

<sup>101</sup> Supra Fn 93, P74

irrelevant to the majority of the people, who do not share any of its Roman law-based western European traditions or values. One of the complaints, namely that most of the energy and creativity of property lawyers over the last few decades have been spent on improving the upper-class property market is based upon an analysis of recent South African developments, which are largely concerned with the provision, development and statutory regulation of upper-class property institutions such as sectional-title ownership and property time-sharing arrangements. The Eurocentricity of modern South African property law theory can hardly be denied in the face of the evidence provided by the textbooks and journal articles, not to mention case law. In this respect the legitimacy crisis of property law often takes the form of a call for the abolition of Roman-Dutch or European property law".<sup>102</sup>

"South African property law can benefit from the alternative dialogic, socially and politically based approach to property suggested by the likes of Michelman, Underkuffler, Singer and others. Moreover, such an alternative vision of property would seem to fit in very well with the values embodied in the new Constitution. The Constitution seems to make it clear that reform and transformation are to take place, which means that property has to be reinterpreted so as to make room for the necessary social and state programmes and actions. The phraseology of the constitution, and especially s 28, allows for the required changes."<sup>103</sup>

"However such an alternative approach to property would require a very decisive move away from the civil-law tradition, both with regard to its methodology and its substance. What seems to many to be the strongest point of the civil-law tradition, its conceptualist methodology, poses perhaps the greatest threat for the new legal order. The new legal order cannot afford to "use tradition as a substitute for value choices", while covertly still relying on the seedy and seamy underside of the seemingly respectable pre 1994 civil-law tradition. Property lawyers will have to "search for social conditions, including cultural understandings of law, legality and rights, under which collective determinations of aspects of social life are consistent with personal freedom". Property, property legislation and property adjudication would have to be redefined with due regard for its origin, function and appearance in "the middle ground" of a "politically infiltrated legality". Real choices would have to be made with references to real contextualised situations".<sup>104</sup>

"The advent of "the new property" has had a profound impact on constitutional jurisprudence and is illustrative of a paradigm shift that has affected American political, moral and social thought. Law is not stagnant, it is a dynamic field that deals with changing times – but law does so through analogy and reference to past experience--- . Further, the concept of "the new property" provides a blue

<sup>102</sup> Supra Fn 93, P73-74

<sup>103</sup> SA Journal on Human Rights, 1995, Vol II, P 205-206

<sup>104</sup> *ibid*, P206

print for the legal recognition of the Internet era, and thus the foundation upon which to build the information Superhighway".<sup>105</sup>

Charles A. Reich ("Reich") has become the father of "the new property", which states that the modern state's ubiquitous nature has resulted in an overwhelming source of wealth and control. This control and wealth is premised on welfares, government pension, government grants, licenses and medical insurance. Once people receive these government payouts, one forms the reasonable expectation that they have an entrenched right to these government entitlements and rely on that right. "The guarantee of procedural due process recognizes this reliance interest like it were a property right without the protection of the law".<sup>106</sup>

The essence of "the new property" advances society's recognition of reasonable expectations that stem from different sources of property rights in an all-encompassing manner. Further impetus and meaning is garnered to this shift in tradition with the advent of the computer age and the understanding that technology has become a sine qua non of our existence. Technology has firmly integrated itself into our society, our culture and our very fabric, which has further enhanced society's reasonable and fair expectation interest.

"The new property" has been entrenched by governments overarching power and control. This was brought to the fore quite distinctly in Reich's essay "The New Property"<sup>107</sup> - "The public interest State is not with us yet. But we are left with large questions. If the day comes when most private property ownership is supplanted by Government largess, how then will Government power over individuals be contained? What will dependence do to the American character? What will happen to the Constitution and particular teh (sic) Bill of Rights, if their limits may be bypassed by purchase, and if people lack an independent base from which to assert their individuality and claim their rights? Without the security of the person which individual wealth provide and which largess fails to provide, what indeed, will we become"<sup>108</sup>

Reich clearly argues that government creates new forms of wealth through institutional and legal arrangements that bestows a certain status on those individuals, which is similar to the status bestowed upon land barons. This results in the wealth of those citizens being directly attributed to government involvement in the form of government benefits. Thus the income of many citizens depends on these government entitlements. The continued retention of this income and ones status is contingent on one's continued enjoyment of the government entitlements. Reich was concerned that this created an unhealthy dependence

---

<sup>105</sup> Eldred V. Reno, New Property and why this concept is relevant to copyright law, P1  
<http://cyber.law.harvard.edu/openlaw/eldredvashcroft/cyber/pubtrst3.html>

<sup>106</sup> *ibid*

<sup>107</sup> The Yale Law Journal, 1994, Vol 73, No. 5, P733

<sup>108</sup> <http://cp.yahoo.net/search/cache?p=Reich%27s+The+New+Property&ei=UTF-8&url>

on government, which could be terminated at government's will. Reich pondered government reneging on its provision of benefits in a capricious manner. He feared that the absence of property rights in government entitlements being entrenched would sound a curtailment of individual rights and freedom. Reich advanced that these government "perks" and entitlements should be enshrined as part of the constitution by bestowing upon them the same protection provided to more traditional types of property in particular the guarantee of due process.

Reich's "dephysicalisation" of property is a necessary concept in the transformed economic base of society and the revolutionisation of technology. Many court decisions have given the definition of property a wide berth in protecting an individual's right e.g. *Barry v Barchi*,<sup>109</sup> where the termination of a horse trainer's licence was held to be akin to the deprivation of property and in *Bell v Burson*,<sup>110</sup> the suspension of a licence in terms of a statute which provided for automatic suspension if the licensee was not insured was also held to be a deprivation of property.

In *Transkei Public Servants Association v Government of the Republic of South Africa*,<sup>111</sup> it was held that a right to a housing subsidy is protected property.

In *S v Zuma and others*<sup>112</sup> the Constitutional Court contended that a wide rather than a restricted legalistic interpretation is to be given to the Bill of Rights. The Bill of Rights must be interpreted widely enough to provide for the full benefit of the guarantees to be given to all individuals.

## **THE ECT ACT**

The ECT Act gives legal impetus to data. Data is described as "electronic representations of information in any form".<sup>113</sup>

Chapter II, Part 1 Section 11(1) – "Information is not without legal force and effect merely on the grounds that it is wholly or partly in the form of a data message."<sup>114</sup> Notwithstanding this, the sphere of application of our ECT Act must not be construed as giving validity to any transaction arising outside an Agreement for Alienation of immovable property as provided for in the Alienation of Land Act. The ECT Act does not also give validity to an agreement for a long term lease of immovable property in excess of 20 years, the execution, retention and presentation of a will as defined in the Wills Act 7 of 1953 ("Wills Act") and the

---

<sup>109</sup> 443 US 55 (1979)

<sup>110</sup> 402 US 535 (1970)

<sup>111</sup> 1995 (9) BCLR 1235 (TK)

<sup>112</sup> 1995 (2) SA 642 (CC)

<sup>113</sup> Chapter I Section I

<sup>114</sup> Chapter III, Part I, S11(1)

execution of a bill of exchange as defined in the Bills of Exchange Act 34 of 1964 ("Bills of Exchange Act").<sup>115</sup>

In terms of Section 12 of the ECT Act –

"A requirement in law that a document or information must be in writing is met if the document or information is –

- (a) in the form of a data message; and
- (b) accessible in a manner usable for subsequent reference"

A data message is described as "data generated, sent, received or stored by electronic means and includes –

- (a) voice, where the voice is used in an automated transaction; and
- (b) a stored record;"<sup>116</sup>

As such, soft copy documents, like scanned images, e-mails and document files would amount to data messages.

Section 13 of the ECT Act deals with the requirement of writing in our law and states –

"13(1) Where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced electronic signature is used.

(2) Subject to subsection (1), an electronic signature is not without legal force and effect merely on the grounds that it is in electronic form.

(3) Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signatures to be used, that requirement is met and in relation to a data message if –

- (a) a method is used to identify the person and to indicate the person's approval of the information communicated; and
- (b) having regard to all the relevant circumstances at the time the method was used; the method was as reliable as was appropriate for the purpose for which the information was communicated.

(4) Where an advanced electronic signature has been used, such signature is regarded as being a valid electronic signature and to have been applied properly, unless the contrary is proved".

---

<sup>115</sup> Schedule 2

<sup>116</sup> Chapter 1, Section 1

Notwithstanding the above, Sections 12 and 13 of the ECT Act do not apply to the Alienation of Land Act, Bills of Exchange Act and Wills Act.

An anomalous situation however arises in Section 18 of the ECT Act which provides, Section 18 "(1) Where a law requires a signature, statement or document to be notarised, acknowledged, verified or made under oath, that requirement is met if the advanced electronic signature of the person authorised to perform those acts is attached to incorporated in or logically associated with the electronic signature or data message." An electronic copy of the document is certified to be a true copy thereof and the certification is confirmed by the use of an advanced electronic signature".<sup>117</sup>

An advanced electronic signature is defined as "an electronic signature, which results from a process which has been accredited by the Authority as provided for in Section 37".<sup>118</sup>

Section 37 of the ECT Act provides for an Accreditation Authority who is responsible for accrediting authentication products and services used in support of advanced electronic signatures.

The duty of a notary is regarded as a traditional and solemn execution, highly accredited and accepted throughout the world. Confirmation by a commissioner of oaths would be insufficient in many instances where a notary public's accreditation would suffice. Documents confirmed by a notary public must be beyond dispute as they are heavily relied on to contain the very facts that the original document embodied. Many intricate documents relied on by different jurisdictions would only be accepted if the documents have been witnessed in front of a notary public or if the notary public confirms a document to be a true copy of the original.

Furthermore, a notary public has passed a notary public examination enabling the attorney to execute notarial documentation and perform specific functions outside the realms of an attorney.

Consequently the legislature has empowered the notary public to execute (sign) documents in electronic format, which is essentially relied upon throughout the world in more complicated transactions than Deeds of Sale.

The requirement of writing in Section 12 is ordinarily met if Deeds of Sale were to be given validity in terms of the ECT Act. A Deed of Sale is in electronic format if it is in e-mail or short message service ("SMS") form. To this end most attorneys use e-mail to generate contracts, which are then transmitted to the relevant parties. The data message is transmitted between the seller and the purchaser

---

<sup>117</sup> Section 18(2)

<sup>118</sup> Chapter 1, S 1

and it is capable of being stored by either or both parties. Furthermore the data message transmitted by e-mail or SMS is capable of being retrieved for subsequent use indefinitely. Thus but for the restriction given to deeds of alienation, contracts of sale in electronic format would fulfill the requirements of writing provided for in Section 12 of the ECT Act.

The ECT Act gives validity to both ordinary and advanced electronic signatures. A greater evidentiary value is placed on advanced electronic signatures and is a prerequisite where the law requires a document to be signed but is silent upon the type of signature to be advanced. It is thus clear that data messages constitute writing for the purposes of the ECT Act and the traditional sense of ink applied to paper has been debunked.

The ECT Act presumes that a data message has been received by the addressee when the complete data message enters the information system designated for that purpose by the addressee and is capable of being retrieved and processed by the recipient.<sup>119</sup> The ECT Act further provides that a data message is deemed to be that of the originator if it was sent by the originator personally, by a person who had authority to act on behalf of the originator or by an information system programmed by or on behalf of the originator to operate automatically and the information system operated in accordance with such programming unless the information system did not properly execute such programming.<sup>120</sup>

The ECT Act regards a data message having been sent by the originator when it enters an information system outside the control of the originator or if the originator and addressee are in the same information system, when it is capable of being retrieved by the addressee.<sup>121</sup>

It is apparent that the ECT Act makes a revolutionary development in our law of contract in that it recognises electronic documents, electronic signatures and facilitates the use of electronic communications in businesses. It however fails to allow Deeds of Sale to be validly concluded in an electronic fashion.

In our South African Law of Contract, where an offeror expressly or tacitly authorises the offeree to make use of a postal service to communicate acceptance, a contract is formed when the offeree posts his acceptance or where the telegram of acceptance has been handed in at the post office. Where contracts are concluded by means of a telephone, such contracts arise as if the parties were in each other's presence. It is however, clear that if electronic deeds of sale were accepted by our law, the contract would arise at the time and place where the acceptance of the offer was received by the offeror. This is fulfilled when the complete message has entered the information system

---

<sup>119</sup> S23

<sup>120</sup> S25

<sup>121</sup> S23

designated or used for that purpose by the offeror and is capable of being retrieved and processed by the offeror.

A further anomaly in our ECT Act involves documents, which will suffice in court as the best evidence available. Section 15 of the ECT Act provides, "In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence –

- (a) on the mere grounds that it is constituted by a data message; or
  - (b) If it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.
- (2) Information in the form of a data message must be given due evidential weight". The above implies that data messages will be admissible in Court if it is the best evidence available. As such a printed e-mail or scanned document will be allowed and admissible as evidence where the original thereof is unavailable.

Section 14 of the ECT Act states, "Where a law requires information to be presented or retained in its original form, that requirement is met by a data message if –

- (a) the integrity of the information from the time when it was first generated in its final form as a data message or otherwise has passed assessment in terms of Subsection (2); and
- (b) that information is capable of being displayed or produced to the person to whom it is to be presented".

Subsection 2 stipulates that integrity must be assessed by considering whether the information has remained complete and unaltered except for changes which arises in the normal course of communication; in the light of the purpose for which the information was generated and having regard to all other relevant circumstances.

It seems that the legislature has been progressive in accepting electronic documents in court where the original is not available or to be regarded as an original document under certain prevailing conditions. Notwithstanding this the legislature has failed to equate electronic Deeds of Sale with its paper-based counterpart. The legislature requires one to ignore the rules of evidence so as not to deny the admissibility of a data message, in evidence whereas the very same data is denied legal impetus if it is embodied in a deed of sale.

The ECT Act states that information is not without legal force and effect merely as a result that it is wholly or partially in the form of a data message. The extent

of the ambit of this has yet to be seen, but until our courts deliberate on this provision, it must be interpreted widely in uniform with the objects of the ECT Act. Thus where a contract provides that a certain consent needs to be in writing, e-mail would suffice notwithstanding, the party's subsequent non reliance thereon, arguing the fact that the consent was never valid in terms of the underlying agreement as it was not in writing in the traditional sense. A court would pronounce that the consent has been validly given in writing as it would constitute indelible evidence of an expression of intent which is the reason that the parties would agree to grant and receive written consent in the first place.

A requirement by the parties that a document be signed before it becomes valid will be met merely by the parties typing their names at the foot of the e-mail embodying their contract. Section 24 of the ECT Act stipulates,

"As between the originator and the addressee of a data message an expression of intent or other statement is not without legal force and effect merely on the grounds that –

- (a) it is in the form of a data message; or
- (b) it is not evident by an electronic signature but by other means from which such person's intent or other statement can be inferred".

## **DATA**

In numbers, characters or other methods of recording in a form which can be assessed by a human or (especially) input into a computer, stored and processed there or transmitted on some digital channel. "Computers nearly always represent data in binary". Data on it's own has no meaning. Only once interpreted by a data processing system does it become information"<sup>122</sup>

## **BACKGROUND TO DATA STORAGE**

Modern information systems represent information as digital signals stored in binary devices. These devices exist in one of two states and thus information is represented in them as either the presence or the absence of energy. In binary devices binary digits (bits), one (1) and zero (0) designates these two states. Alphabetic symbols of natural writing systems can in this manner be represented digitally by ones and zeros. "Tables of equivalences of alphanumeric characters and strings of binary code are called coding systems, the counterpart of writing

---

<sup>122</sup> **Data** FreeOn-lineDictionary of Computing.2004.5 Jan 2004  
<http://foldoc.doc.ic.ac.uk/foldoc/foldoc.cgi?data>

systems". The adoption of a particular coding system depends on the size of the character set to be represented. The two prominent systems today are the American Standard Code for Information Interchange (ASCII) and the Extended Binary Coded Decimal Interchange Code ("EBCDIC").

## **RECORDING MEDIA**

Modern day media incorporate electromagnetic & electro-optic technologies except in a few special applications. Storage media are one of two types: random- and serial-, or sequential-, access. The typical serial access medium is magnetic tape supplanted in the 1990's by video recording tape and digital audiotape. Another type of magnetic storage medium, the magnetic disk, provides random access to data. The optical disc became available in the 1980's, making use of laser technology. "Since the introduction of this technology, three main types of optical storage media has become available: (1) rewritable, (2) write-once-read-many (WORM) and (3) compact disc read-only memory (CD-ROM)".

## **RECORDING TECHNIQUES**

Digitally stored information is commonly referred to as data. The capture of information generated by humankind is increasingly being automated with the use of keyboards, touch-computer-screens and pen computers. Document imaging utilises digital scanners to generate a digital representation of a document page. Digital scanning is also used for transmission of documents via facsimile, in satellite photography and in other applications. An image scanner digitises an entire document page for storage as an image, not recognising characters and words of text. Consequently the stored material cannot be linguistically manipulated

The digital camera captures an image into the computer random-access memory bypassing the film/paper step completely. "The digital recording of sound is important because speech is the most frequently used natural carrier of communicable information". Direct capture of sound onto a PC is via a digital signal process (DSP) chip. "Although the resultant digital sound track can be edited, automatic speech recognition-analogous to the recognition of characters and words in text by means of optical character recognition is still being developed".<sup>123</sup>

---

<sup>123</sup> "Information Processing" *Encyclopedia Britannica*.2004. *Encyclopedia Britannica Premium Service*. 6 Jan 2004 <http://www.britannica.com/eb/article?eu=409480>

## **THE TECHNICAL DETAIL**

A computer drive contains several platters coated on both sides with a magnetic material designed to store information as binary numbers. The surface of each platter can hold billions of “bits” of data. Groups of “bits” form a “byte” representing an alphabetical letter or numerical number. The recording surface of each platter is divided into tracks, data being stored in all sectors of each track, except parts of the outside track, generally reserved for the file allocation table (FAT) directory. The file allocation table tells the computers operating system which sectors in the track contain data.

When a user clicks a file to open it, the application being used passes the file name to the computer operating system, which consults with FAT to determine the address where the file is located. Various parts of a file, such as this dissertation can be scattered randomly amongst hundreds of sectors on various tracks. Hence the term random access device, meaning a device that can retrieve or store data in any order to any location. In contrast to this, sequential access devices such a magnetic tapes store data in sequential order.<sup>124</sup>

## **DATA SECURITY AND INTEGRITY**

Data or communications can be secured from manipulation by various methods, the most common being encryption and use of software like Adobe Acrobat ® which uses the Portable Document Format (PDF) standard for the secure and reliable distribution and exchange of electronic documents and forms. For example, PDF is used for electronic case filing in U.S. federal courts.

## **DIGITAL SIGNATURES**

“Digital signatures are a form of electronic signature. The term electronic signature is used to describe the full range of electronic means to confirm the sender of the message. They range from a file including a graphical image of the sender’s handwritten signature (simple but unreliable) to biometric techniques, such as iris scans (complex but reliable)”.

“Digital signatures are based on public key technology, a special form of encryption invented in the 1970s, which uses two different keys (because two different keys are used, this form of encryption is also known as asymmetric cryptography). One key is kept secret (the private key), whereas the other key is

---

<sup>124</sup> **How Hard Drives Work” Computer Forensics International 2004.6 Jan 2004 [http://www.cfi-intl.com/evidence\\_recovery\\_basics.htm](http://www.cfi-intl.com/evidence_recovery_basics.htm)**

made publicly available (the public key). The two keys are generated simultaneously and collectively are known as a 'key pair.' Once a message has been encrypted using one of the two keys, it can only be decrypted by the other key".

When sending a message over an open network, such as the Internet, public key cryptography can ensure confidentiality of the message. Public key cryptography can also be used to verify the identity of the sender and the integrity of a message.

"The principle challenge is to ensure that public keys are, in fact, associated with the person or organization with which they claim to be associated and are not linked to a fraudster or sham organization. This is achieved by certification of an individual's public key by an independent trusted third party, commonly referred to as a certification authority. The digital certificate issued by a certification authority is signed with the certification authority's own digital signature to verify its authenticity".

*Are digital signatures admissible as evidence? If so, what criteria are they subject to?*

"Although this is arguably the most important question to answer before a company decides to use digital signatures when transacting, it is not specifically addressed in all jurisdictions. Before adopting digital signatures for use in a particular jurisdiction, it is important to obtain legal advice as to the admissibility, or otherwise, of digital signatures in that jurisdiction".

In the European Union for example, the European Union Directive provides that electronic signatures will not be denied legal effect or admissibility simply on the grounds that they are in electronic form.

In the United Kingdom, the Electronic Communications Act of 2000, which received Royal Assent on May 25, 2000 and transposed the European Union Directive into national law, provides that electronic signatures are admissible as evidence in any legal proceeding in relation to any question as to the authenticity of the communication or data, or as to the integrity of that communication or data.

*Are digital signatures equivalent to handwriting, or otherwise presumed valid?*

"Some jurisdictions afford enhanced protection to certain forms of electronic signatures. For example, the European Union Directive provides that "advanced electronic signatures" will be treated as a handwritten signature if they are,

- (a) backed by a qualified certificate;
- (b) provided by a certification service provider; and

(c) created by a secure-signature-creation-device.

In order to satisfy these points, there is a long list of requirements that such signatures must meet, especially in regards to the certification authority and the type of certificate issued. The above rule is expressly stated to be subject to the overriding principle that the European Union Directive does not affect national rules regarding the unfettered judicial consideration of evidence".<sup>125</sup>

## **MODEL LAWS**

Model Laws in particular United Nations Commission on International Trade Law ("UNCITRAL") have always spearheaded the legal recognition of electronic data by enacting legislation.

Article II (1) of UNCITRAL Model Law on Electronic Commerce states," In the context of contract formation, unless otherwise agreed by the parties, an offer and acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validly or enforceability on the sole ground that a data message was used for that purpose or stored by electronic, optical or similar means, including electronic mail".

In the United Kingdom, the courts have appeared to widen the definition of writing to include digital documents. "The Civil Evidence Act 1995 removed previous requirements that documents had to be original (in written form) in order to be admissible."<sup>126</sup>

The Copyright, Designs and Patents Act 1988, defines writing as, "any form of notation or code, whether by hand or otherwise and regardless of method by which, or medium in or on which, it is recorded".<sup>127</sup>

In *Derby & Co Ltd v Weldon*,<sup>128</sup> held that, "The database so far as it contains information capable of being retrieved and converted into readable form, is a document within the meaning of R.S.C. Ordinance 24 of which discovery must be given---."

Signature has also been broadened by the English courts far beyond the paper-based variety.

---

<sup>125</sup>

"Digital Signatures: Addressing the legal issues" May 2001. 19 Jan 2004  
<http://www.britannica.com/magazine/article?query=digital+signatures&id=1&smode=2>

<sup>126</sup> Chissick M, Kelman A, *Electronic Commerce Law and Practice*, P88

<sup>127</sup> S178

<sup>128</sup> (No. 9) (1991) *IW.L.R.* 652, P654

In *Goodman v J Eban Ltd*<sup>129</sup> the Court stated, "Where an Act of Parliament requires that any particular document be "signed" by a person, then, prima facie, the requirement of the Act is satisfied if the person himself places on the document an engraved representation of his signature by means of the affixing in some way, whether by writing with a pen or pencil or by otherwise impressing upon the document, one's name or 'signature' so as personally to authenticate the document".

The Court focuses on the authentication of the mark rather than the physical manifestation when considering whether a signature requirement had been fulfilled.

In the United Kingdom, typing of one's name at the end of a data message will suffice as a signature as long as there is an intention to authenticate. Although admissible however, the courts will place less evidentiary value on such a confirmation of authentication than if a digital signature was used. "Since these methods utilise secret information known only to the parties involved or only to the signer alone (in the case of digital signatures), they offer a far greater level of non-repudiation".<sup>130</sup>

UNCITRAL was established by the General Assembly on 17 December 1966. The General Assembly recognised that disparities in national laws governing international trade created obstacles to the flow of trade, and it regarded the Commission as the vehicle by which the United Nations could play a more active role in reducing or removing these obstacles.

The commission has formulated model laws aimed at the harmonization and unification of the Law of International Trade.

The UNCITRAL Model Law on Electronic Commerce, adopted in 1996 facilitated the use of modern means of communication and storage of information, such as electronic data interchange and e-mail. It is based on the establishment of a functional equivalent for paper-based concepts such as writing and signature.

In 2001, the UNCITRAL Model Law on Electronic signatures was produced to bring clarity and certainty to the use of electronic signatures. The Model Law establishes a presumption that, where they meet certain criteria of technical reliability, electronic signatures shall be akin to paper-based signatures.

UNCITRAL's Model Law on e-commerce attempted to remove the writing and signature requirements to provide certainty and legality to online contracts. The Model Law focuses on redrafting legislation to recognise the electronic equivalents of writing and signature.

---

<sup>129</sup> 1954 1 QB 550

<sup>130</sup> *Supra* Fn 118, P 90

Article 6(1) looks at the universal writing requirements and records, "where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference".

Similarly Article 7(1) comments on the formality of signature and pronounces, "where the law requires a signature of a person, that requirement is met in relation to a data message if:

- (a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and
- (b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement".

It is clear that UNCITRAL's approach is flexible and broad allowing for a range of technology depending on the requirements of the parties and it confirms that parties to a contract are able to agree on the technology to be used to verify identity.

The Model Law relies on the "functional equivalent approach" which analyses the purpose of functions of paper-based requirements with a view to establishing how those purposes and functions could be transposed onto electronic data.

"Among the functions served by a paper document are the following: to provide that a document would be legible by all, to provide that a document would remain unaltered over time--- ." <sup>131</sup> All functions of paper can be produced by electronic data and in some instances with a higher degree of accuracy and speed. The Model Law has ushered in a flexible functional equivalent approach, as electronic data can never fulfill all conceivable purposes and functions of a paper document. "When adopting the "functional-equivalent" approach, attention was given to the existing hierarchy of form requirements, which provides distinct levels of reliability, traceability and unalterability with respect to paper-based documents. For example, the requirement that data be presented in written form (which constitutes a threshold requirement) is not to be confused with more stringent requirements such as "signed in writing", "signed original" or "authenticated legal Act"<sup>132</sup>.

It is therefore clear that the "functional-equivalent" approach must not impose on electronic users a more severe and restricted standard or criteria than if one used the traditional written document.

---

<sup>131</sup> Hofman J, Cyberlaw, P184

<sup>132</sup> Supra Fn 123, P185

The Model law does not provide an electronic equivalent to any traditional document but ring-fences functions of paper-based requirements, which if met by electronic equivalents enables such data to be given the same legal recognition.

The Electronic Commerce and the United Nations Convention on Contracts for the International Sale of goods ("CISG") of 1980 looked at formalities of writing and signature. Electronic data such as e-mail and EDI were unknown at the time and therefore Article 13 of CISG only refers to telegrams and telex. Fax, e-mail and EDI have virtually replaced telegrams and telex as a tool of contracting. Article 13 is interpreted widely in favour of freedom of formalities, which indicates that the article includes all electronic forms of communication. The CISG does not require signature. Thus the requirement of an electronic signature will only become relevant where the parties themselves have required this formality of authentication by signature.

The convention applies to contracts of sale of goods between parties whose places of business are in different States and where the States are party to the convention or where the normal Private International Law rules lead to the application of the law of a contracting state or where the parties elect the CISG as the applicable law governing their contracts.

## **THE LEGALITY OF A SMS**

"Short messaging service, otherwise known as text messaging, mobile messaging, alphanumeric paging is a digital cellular network feature. It allows one to send short text and numeric messages to and from digital cell phones, cell phones and e-mail addresses, as well as cell phone and public SMS messaging gateways on the Internet".<sup>133</sup>

SMS messages are limited to 80 to 500 characters but usually consist of 120 characters in total.

SMS limits embodiment of content to text and numerical displays whereas e-mail enables one to attach files, images and uses HTML. SMS messages are immediate but do not occur simultaneously. The embodiment captured by the SMS is forwarded and processed by a short message service center, which on-forwards the embodiment to the intended recipient. If the recipient's telephone phone is deactivated, the short message service centre will redeliver it to the recipient for a period of 3 to 7 days depending on the relevant service provider.

---

<sup>133</sup> [www.zdnetindia.com/biztech/services/sms/stories/32480.html](http://www.zdnetindia.com/biztech/services/sms/stories/32480.html)

In order to dispatch a message to an intended recipient the addressor would key in the required message and forward it by cell-phone number or e-mail address to the recipient. It is possible to forward the message instantaneously or to store it for future transmission.

Upon receipt of the message, the recipient is able to display the message, store it, re-use it, reply to the message or forward it to a third party at any stage.

The number of mobile phone users were expected to reach 500 million worldwide by the end of 2003 and 75 per cent of all cellular phones will be Internet-enabled.<sup>134</sup>

The message produced and transmitted by an SMS falls within the parameters of a data message in that it consists of "electronic representation of information", "generated, sent, received or stored by electronic means" in the form of a "stored record".

Section 11(1) of the ECT Act clearly states, "Information is not without legal force and effect merely on the grounds that it is wholly or partly in the form of a "data message". An SMS consists wholly of a "data message" and by implication a valid agreement can be generated by the use of an SMS.

More citizens are owners of a cellular phone than any other electronic device in South Africa or the world, which furthermore cements the objects of the ECT Act, which "aims to promote universal access primarily in under-served areas" and "promotes the understanding and acceptance of growth in the number of electronic transactions in the Republic".

Using the medium of a cellular telephone to form a legally recognised contract is the most accessible, cost effective and time-effective manner available to us and will in time be heavily relied upon once the characters that can be achieved by using a cellular phone have increased with the advancement of technology.

Furthermore there is nothing precluding an SMS from being denied the status of a written document as the information captured on the screen is in the form of a "data message", is transmitted between the parties, and is capable of being stored and retrieved for subsequent reference.

Notwithstanding the preclusion of the ECT Act, an Offer to Purchase may be negotiated, captured and transmitted to an offeree. The parties are able to incorporate their signature to the electronic image, which indicates the party's approval and assent of the information contained with an intention to be bound by the electronic content.

---

<sup>134</sup> [www.webopediacomcom/term/s/short\\_message\\_service.html](http://www.webopediacomcom/term/s/short_message_service.html)

The only foreseeable drawback, which may present itself at this stage is the limitation placed on the amount of characters which one can use to generate the agreement. In my opinion, Deeds of Sale contain superfluous and immaterial information, which, have been placed in standard Deeds of Sale, developed by estate agents without being legally critical about the content of the agreement.

A valid and succinct offer to purchase may follow the following course: "I Seller offer to purchase Erf 132 from Purchaser at a purchase price of R500 000,00 payable on registration of transfer being 20 March 2004".

One does however realise that in many instances other pertinent terms may need to be incorporated in the agreement. The ECT Act however affirms the use of the common law concept of incorporation by reference.

Section 11(2) states that, "information is not without legal force and effect merely on the grounds that it is not contained in the data message purporting to give rise to such legal force and effect, but are merely referred to in such data message".

Section 11(3) goes on to acknowledge that "information incorporated into an agreement and that is not in the public domain is regarded as having been incorporated into a data message if such information is- (a) referred to in a way in which a reasonable person would have noticed the reference and incorporation thereof; and

(b) accessible in a form that can be read, stored and retrieved by the other party, whether electronically or as a computer printout as long as such information is reasonably capable of being reduced to electronic form by the party incorporating it".

Furthermore "where an electronic signature is not required by the parties to an electronic transaction, an expression of intent or other statement is not without legal force and effect merely on the grounds that-

- (a) it is in the form of a data message; or
- (b) it is not evidenced by an electronic signature but is evidenced by other means from which such person's intent or other statement can be inferred".<sup>135</sup>

The legislature has clearly realised the importance of incorporation by reference when using an electronic device to compose agreements.

Our courts have approved of incorporation by reference in matters relating to property as in the case of *Van den Heever v Vorster*<sup>136</sup> where the only description of the property was that it was "as pointed out and was "about 276 morgen in extent". The lack of clarity, was allowed to be cured by a reference that the property was bonded to the Land Bank. The court held that the

---

<sup>135</sup> S 13 (5)

<sup>136</sup> 1939 T.P.D. 64

description of the property could be accurately determined by reference to the Land Bank.

This was followed by *Cromhout v Afrikaanse Handelaars en Agente*,<sup>137</sup> where the description of the property was defined as "gedeelte van Sandfontein". Notwithstanding the lack of precision provided, the court held that the property sold was the property owned by the seller and identified by reference to the Land Register, which verified these details.

In *Fourelamel (Pty) Ltd v Maddison*<sup>138</sup> Miler, JA articulated "--- the principle of incorporation by reference, as it has been recognised and applied in regard to contracts for the sale of land --- is equally applicable to contracts of suretyship governed by Section 6. It is a condition of the incorporation of other writing into a written document required by law to contain the terms of the contract, if such contract is to have validity that such other writing be referred to in the written document. *Certum est quod certum reddi potest*".<sup>139</sup>

UNCITRAL advances widespread use of incorporation by reference. Premised on the fact that incorporation by reference is inherent in the use of data messages, it is maintained that large amounts of data were by necessity incorporated by reference. Incorporation by reference can be fulfilled amongst other means by a uniform resource locator or object identifiers.

Advantages of incorporation by reference, includes recognising consumer protection and that other national or international laws of a mandatory nature should not be interfered with.

Certain standards exist before incorporation by reference will be recognised. These conditions state that the further information must be identified by a collective name or description code and specify the parts of the record containing the information and where the record is not publicly available, the place where it may be found. It must be expressly indicated that the data message is intended to have the same effect as if the further information were expressed in the data message. The identification may be made indirectly, by referring to the information recorded elsewhere, which contains the necessary identification.

Incorporation by reference is acceptable and practicable and is a necessary corollary of data messages. "In conventional paper communications it is relatively normal and possible to set out in full all or most of the information in the relevant documents. However in electronic communications, practitioners do not overload their data message with quantities of free-text when they can take advantage of extrinsic sources of information, databases, code list, glossaries, etc. by making

---

<sup>137</sup> 1943 T.P.D. 302

<sup>138</sup> 1977 (1) SA 333 A

<sup>139</sup> P345

use of abbreviations, codes and other references to such information. In fact practical electronic commerce depends on this to a great extent".<sup>140</sup>

Incorporation by reference is thus indelibly linked to the success of electronic deeds of sale whereby parties can refer to extrinsic and electronic means to legally complete Offers to Purchase.

## **CONCLUSION**

The court has sought fit to relax formalities present in our Wills Act on numerous occasions. In the matter of Ndebele and Others NNO v The Master and Another<sup>141</sup>, the court accepted an unsigned draft will as being that of the deceased. The deceased provided his attorney with instructions to draft a will, which he approved and accepted but failed to sign it before he died. The court stated that if the draft will was perused and approved by the deceased, it would be akin to him associating himself with it and adopting it as his own. This resulted in the court accepting and approving that the will was "drafted" by the deceased and that it had been established that the deceased had intended the draft will to be his final instruction with regard to the disposal of his estate.

It is clear that the courts are willing to relax formalities regarding wills as long as it can be adduced that there was no scope for fraud or irregularities. It is therefore an anomaly that the legislature of the ECT Act failed to accept electronic Deeds of Sale as valid documents. Deeds of Sale are still considered sacrosanct agreements notwithstanding the validity given to esoteric and more complex agreements embodied in electronic format. Furthermore, the legislature has failed to incorporate the wide meaning of "rights in property" adopted by the Constitution into the ECT Act. Varied "rights in property" should not be distinguished from each other on the basis of its physical composition. The legislature should guarantee all rights relating to various types of property in the same manner and prescribe identical formalities to contracts underlying those rights whether it be corporeal or incorporeal.

Previously one could ascertain wealth on the basis of the physical property registered in ones name. This is no longer an accurate factor to be taken into account and one would in all probability look towards incorporeal property owned to arrive at an accurate assessment of ones wealth. It is evident that there is a shift in the meaning of property and the effect thereof on our lives, which will become all the more transparent and meaningful with the advancement of technology.

---

<sup>140</sup> [www.uncitral.org/english/working\\_groups/wg/ec/wp074.htm](http://www.uncitral.org/english/working_groups/wg/ec/wp074.htm)

<sup>141</sup> 2001 (2) SA 102 CPD

Once an attorney receives a Deed of Sale from the parties to a transaction, further official documents are required e.g. a certified copy of an identity document, marriage certificate and confirmation of the parties' physical address as well as additional transfer documents and affidavits, which are to be signed by both parties. If the transaction was fraudulent or the parties involved did not have sufficient capacity to act, it would come to the conveyancer's attention very soon after receiving the electronic Deed of Sale and most certainly before registration of transfer is effected. There would also be pertinent information which conveyancers require from the seller, which information would only be in the seller's realm of knowledge. Registration of transfer would only take place once the purchaser has paid all outstanding monies over to the conveyancer, which implies that the security, being the property will not be lost until the purchaser has extinguished his obligations in terms of the Deed of Sale. Furthermore, in the event that an erroneous registration of transfer has indeed taken place, one is able to set it aside by application to the High court.

Taking all the above and the content of my dissertation into consideration, I deem electronic Deeds of Sale a necessary tool not only as a result of the information age we find ourselves in but also due to the developments and growth which has taken place in our law coupled with the procedures and practices we have in existence, all of which would mitigate against the original reasoning behind formalities being prescribed for Deeds of Sale in general.

As Van Der Walt AJ pertinently pointed out in his article entitled, "Tradition on Trial: A critical analysis of the Civil Law Tradition in South African Property Law, "The problem with tradition as was pointed out by Balkin, is that tradition always creates the temptation to view it as "presumptively normatively correct" based upon even deeper assumptions concerning the unity, the wisdom and the generality of a specific tradition"<sup>142</sup>.

-----

---

<sup>142</sup> Supra Fn 103 , P205

## BIBLIOGRAPHY

### Case Law

Barry v Barchi 443 US 55 (1979)

Bell v Burson 402 US 535 (1970)

Belmore v Minister of Finance 1948 (2) SA 852

Standard Bank of South Africa v Bhamjee 1978 (4)  
SA 39 (W)

Boerne v Harris 1949 (1) SA 793

Breytenbach v Frankel 1913 AD 390

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

Conroy v Coetzee 1944 OPD 207

Cromhout v Afrikaanse Handelaars en Agente 1943  
T.P.D. 302

Da Mata v Otto 1971 (1) SA 763 T

Derby & Co Ltd v Weldon (No 9) 1991 I.W.L.R. 652

Du Plessis v Nel 1952 (1) SA 513

Foullamel (Pty) Ltd v Maddison 1997 (1) SA 333 A

Glover v Bothma 1948 (1) SA 611

Goldberg v Kelly 397 US 254

Goodman v J Eban Ltd 1954 (1) QB 550

Hill v Faiga 1964 (4) SA (W)

Hutchings v Satz 1965 (4) SA 640 W

Jassat v Jassat 1980 (4) SA 321 (W)

Johnston v Leal 1980 (3) SA 927

Kenilworth Palace Investments (Pty) Ltd v Ingala  
1984 (2)1C

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

Kirkness v John Hudson & Co Ltd 1955 AC 696

Logan v Zimmerman Brush 55 US 422

Lograd Properties (Pty) Ltd v Padachy 1988 (3) SA  
541 (D)

Magwaza v Heenan 1979 (2) SA 1019 A

Malan v Nabygelegen Estates 1946 AD 562

Matanda and Others v Rex 1923 AD 435

Mathibe and Others v Moschke 1920 AD 354

Mattheus v Stradford and Another 1946 TPD 498

Molyneux v Natal Land and Colonisation Company Limited 1905 AC 555

Montesse Township & Investment Corporation (Pty) Ltd v Standard Bank Ltd & Another 1964 (3) SA 221 T

Ndebele and Others NNO v The Master and Another 2001 (2) SA 102 CPD

Nobrega v A G Guyana (1967) 10 WIR 187 (GCA)

Oberholzer v Gabriel 1946 OPD 56

Pahad v Direct of Food Supplies and Distribution 1949 (3) SA 695 AD

Pheasant v Warne 1922 AD 481

Philips v Mroqoza (1908) 22 S.C. 22

Pitout v North Cape Livestock Co-operative Ltd 1977 (4) SA 842

Regenstein v Brabo Investments (Pty) Ltd 1959 (3) SA 176 (FC)

Rustein v Elandsheuwel Farming (Pty) Ltd and  
Another 1971 (1) SA 268 T  
S v Zuma and Others 1995 (2) SA 642 (CC)

Sapirstein v Commerford 1944 TPD 182

Smerman v Volkersz 1954 (4) SA 170

Smith v Martin's Executor Dative 1899 16 S.C. 148

Stellenbosch Divisional Council v Shapiro 1953 (3)  
SA 418 C

Steyn v McDonald 1965 (3) SA 738 A

Transkei Public Servants Association v Government  
of Republic of South Africa and Others 1995 (9)  
BCLR 1235 (TK)

Tuckers Land and Development Corporation (Pty) Ltd  
v Kruger 1973 (4) SA 741

Union Government v Vianni Ferro-Concrete Pipes  
(Pty) Ltd 1941 AD 43

Van den Heever v Vorster 1939 T.P.D. 64

Van Niekerk v Smit 1952 (2) SA 17 T

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

Wasmuth v Jacobs 1987 (3) SA 629

Wilken v Kohler 1913 AD 135

## Legislation

Constitution of the Republic of South Africa Act No. 200 of 1993

Electronic Communications and Transactions Act No. 25 of 2002

Insolvency Act No. 24 of 1936

Matrimonial Property Act No. 88 of 1984

Property Time-Sharing Control Act No. 75 of 1983

Sectional Titles Act No. 95 of 1986

Share Blocks Control Act No. 59 of 1980

## Textbooks

Aronstam P.J. - The Alienation of Land, 1985

Badenhorst P.J; Pienaar J.M; Mostert H; Van Rooyen M. – The Law of Property, 2002

Barnard A.H; Cronje D.S.P; Olivier P.J.J. - The South African Law of Persons and Family Law, 1986

Butterworths Conveyancing Bulletin Volume 9, No 3  
of December 1995

Buys R. – Cyberlaw: The Law of the Internet in South  
Africa, 2000

Chissick M.; Kelman A - Electronic Commerce and  
Law and Practice, 2000

Christie R.H. - The Law of Contract in South Africa,  
1991

De Jager T. - Alienation of Land, 1982

Hofman J.; Johnston D.; Handa S.; Morgan C. –  
Cyberlaw: A Guide for South Africans doing Business  
Online, 1999

Hoffmann L.H.; Zeffertt D. - The South African Law of  
Evidence, 1989

Jacobs M. - The Law of Expropriation in South Africa,  
1982

Juta – South African Property Practice and Law, 1996

Miller C. - The Acquisition and Protection of  
Ownership, 1986

Shrand D. - Real Estate in South Africa, 1967

Silberberg H. - The Law of Property, 1975

Smith C. - The Law of Insolvency, 1988

Street F. Lawrence, Grant Mark P. – Law of the Internet, 2001

Van Zyl D.H. - History and Principles of Roman Private Law, 1983

Wulfohn P.M. - Formalities in Respect of Contracts of Sale of Land Act (71 of 1969), 1980

## ARTICLES

Cliffe Dekker Inc. - Commentary on the Electronic Communications and Transactions Bill, 2002,  
<http://www.cliffedekker.com/literature/commentary/index.htm>

Cliffe Dekker Inc. - Internet contracts – what on-line businesses need to know,  
[http://www.cliffedekker.com/a\\_sndmsg/news\\_view.asp?PG=24&l=16740&M=0&CTI](http://www.cliffedekker.com/a_sndmsg/news_view.asp?PG=24&l=16740&M=0&CTI)

Cliffe Dekker Inc. - Treat electronically generated contracts as you would any other legal document signed in ink,  
[http://www.cliffedekker.com/a\\_sndmsg/news\\_view.asp?PG=24&l=47864&M=0&CTI](http://www.cliffedekker.com/a_sndmsg/news_view.asp?PG=24&l=47864&M=0&CTI)

Codicillus XXXV, No. 2

Cooper J. - Digital signatures and electronic trading,  
[http://www.justis.com/news/jc\\_010515.html](http://www.justis.com/news/jc_010515.html)

CPTech – Uncitral Draft Convention of E-contracting,  
<http://www.cptech.org/ecom/uncitral/uncitraldraft.html>

CPTech – Uncitral E-Commerce Work,  
<http://www.cptech.org/ecom/uncitral>

Eiselen S. – Electronic Commerce and the UN Convention on Contracts for the International Sale of Goods (CISG) 1980,  
<http://www/cisg.law.pace.edu/cisg/biblio/eiselen1.html>

Eliakim D. - Protection of property rights,  
<http://www.derebus.org.za/archives/1998Jan/updte.protec.htm>

Jansen J. – A new era for e-commerce in South Africa,  
<http://www.derebus.org.za/archives/2002Oct/articles/E-commerce.htm>

Jerry Brown Archives, Jerry Brown & Charles Reich – Discuss "The System",  
<http://www.sonic.net/~doretk/Issues/96-12%20DEC/BrownReich.html>

Jones J. – Short Messaging Service (SMS) explained,  
<http://www.zdnetindia.com,biztech/services/sms/stories/32480.html>

MGX Solutions – NamITech sign first digital contract in SA,  
<http://www/itweb.co.za/office/mgx/0301160921.htm>

Molnar D - ACM Crossroads Student Magazine, Signing Electronic Contract,  
<http://www.acm.org/crossroads/xrds7-1/contract.html>

Promoting Electronic Commerce in South Africa:  
Some Academic Perspectives

<http://docweb.pwv.gov.za/Ecomm-Debate/myweb/greenpaper/academics/>

Reno E - New Property and why this concept is relevant to copyright law,

<http://cyber.law.harvard.edu/openlawe/eldredcashcroft/cyber/pubtrst3.html>

Shareef Dr R - The end of 'new property' rights for the poor,

<http://www2.roanoke.com/columnists/shareef/5709.html>

Search Engine Strategies. Conference & Expo Spring 2004 - Short Messaging Service,

[http://www.webopedia.com/TERM/S/short\\_message\\_service.html](http://www.webopedia.com/TERM/S/short_message_service.html)

South African Journal on Human Rights, 1995  
Volume II

Uncitral Uniform Rules on Electronic Signatures – WP.84,

<http://canada.justice.gc.ca/en/cons/un2000wp84.html>

United Nations Commission on International Trade Law Thirtyfirst session, New York, 1 – 12 June 1998,

[http://www.uncitral.org/english.workinggroups/wg\\_ec-bckdocs/acn9-446.htm](http://www.uncitral.org/english.workinggroups/wg_ec-bckdocs/acn9-446.htm)

United Nations Commission on International Trade Law (UNCITRAL). Privacy and Human Rights 2003: Republic of South Africa,  
<http://www.uncitral.org/en-main.htm>