

Alienation of Land Act 68 of 1981: The glitches continue

DJ Lötzt
Blur LLB LLMLLD
Professor of Law, University of Pretoria

SC Gerber
LLB LLM
Postgraduate Student, University of Pretoria

OPSOMMING

Wet op Vervreemding van Grond 68 van 1981: Die haakplekke bestaan steeds

Litigasie rondom die formaliteitsvoorskrifte kragtens die bepalings van artikel 2(1) van die Wet op Vervreemding van Grond 68 van 1981 blyk epidemies te wees. Gedurende die afgelope vier jaar is daar nie minder nie as negentien sake hieroor gerapporteer. Hierdie artikel is daarop gemik om die haakplekke, soos byvoorbeeld die omskrywing van die koopsaak en koopprys, skrifstelling en skriftelike volmaggewing te identifiseer en konsepoplossings aan die hand te doen oor hoe die aangeleentheid moontlik aangespreek kan word. Hiermee saam word daar ook kursories gekyk na die invloed van die Wet op Verbruikersbeskerming 68 van 2008 en die nuwe Maatskappywet 71 van 2008 op die bestaande formaliteitsvoorskrifte. Die werkswyse wat gevolg word, is om die betrokke sake waarop die probleem betrekking het, te ontleed en vandaar die voorgestelde submissies in perspektief te plaas.

1 BACKGROUND

Section 2(1) of the Alienation of Land Act¹ was again the fly in the ointment in *Lombaard v Droprop CC*,² *Lombaard v Droprop CC*,³ *Du Plessis NO v Goldco Motor and Cycle Supplies (Pty) Ltd*,⁴ *JR 209 Investments (Pty) Ltd v Pine Villa Country Estate (Pty) Ltd*; *Pine Villa Country Estate (Pty) Ltd v JR 209 Investments (Pty) Ltd*,⁵ *Exdev v Pekudei Investments*,⁶ *Chretien v Bell*,⁷ *Janse van Rensburg v Koekemoer*⁸ and *Northview Shopping Centre (Pty) Ltd v Revelas Properties Johannesburg CC*.⁹ It seems that the problems surrounding

1 Act 68 of 1981, hereafter "the Act".

2 2009 6 SA 150 (N).

3 2010 5 SA 1 (SCA).

4 2009 6 SA 617 (SCA).

5 2009 4 SA 302 (SCA).

6 2011 2 SA 282 (SCA).

7 2011 1 SA 54 (SCA).

8 2011 1 SA 118 (GSJ).

9 2010 3 SA 630 (SCA).

section 2(1) of the Act are epidemic. Over the last four years no less than nineteen cases dealing with section 2(1) of the Act were reported.¹⁰

Problems relating to section 2(1) are, *inter alia*, the description of the *res vendita* and the purchase price, the writing provisions of section 2(1) and written authority required where a representative acts on behalf of the seller or purchaser. These problems, together with the influence of the Consumer Protection Act,¹¹ and Companies Act,¹² on section 2(1) of the Act, are investigated in this article.

2 DESCRIPTION OF RES VENDITA

The description of the *res vendita* was recently contested in no less than six cases which are analysed below.¹³

2.1 *Lombaard v Droprop CC*¹⁴

2.1.1 Facts

In this case the applicant was the lessee of immovable property. In terms of the written lease agreement the applicant was entitled to an option to purchase the leased property, which was described as “Certain portion 526 of Lot 432 (of the farm Melk Houte Kraal No 789)”.¹⁵ The lease was signed by the applicant and third respondent on behalf of the first respondent, namely the close corporation. On exercising this option to purchase, the respondents alleged that the sale arising from the lease agreement was null and void for non-compliance with section 2(1) of the Act in so far as the description of the property in the lease agreement was imprecise and inadequate (“certain portion 526” compared to the title deed description being “portion 526”) and, secondly, by signing the lease agreement the third respondent was not authorised thereto in writing by the first respondent (the close corporation). Ndlovu J held that the crux of the dispute was the

10 See eg *Engelbrecht v Merry Hill (Pty) Ltd* 2006 3 SA 238 (E); *Just Names Properties 11 CC v Fourie* 2007 3 SA 1 (W); *Manna v Lotter* [2007] 3 All SA 50 (C); *Reivelo Leppa Trust v Kritzingen* [2007] 4 All SA 794 (SE); *Thorpe v Trittenwein* 2007 2 SA 172 (SCA); *Balduzzi v Rajah* [2008] 4 All SA 183 (W); *Fairoaks Investment Holdings (Pty) Ltd v Olivier* 2008 4 SA 302 (SCA); *Fraser v Viljoen* 2008 4 SA 106 (SCA); *Just Names Properties 11 CC v Fourie* 2008 1 SA 343 (SCA); *Lancino Financial Investments (Pty) Ltd v Bennet* [2008] 4 All SA 220 (SCA); *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* 2008 1 SA 654 (SCA); *Waterval Joint Venture Property Co (Pty) Ltd v City of Johannesburg Metropolitan Municipality* [2008] 2 All SA 700 (W). S 2(1) provides as follows: “No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.”

11 68 of 2008 (hereafter Consumer Protection Act).

12 71 of 2008 (hereafter new Companies Act).

13 *Lombaard v Droprop CC supra* fn 2; *Lombaard v Droprop CC supra* fn 3; *Du Plessis NO v Goldco Motor and Cycle Supplies (Pty) Ltd supra* fn 4; *JR 209 Investments (Pty) Ltd v Pine Villa Country Estate (Pty) Ltd*; *Pine Villa Country Estate (Pty) Ltd v JR 209 Investments (Pty) Ltd supra* fn 5 and *Exdev (Pty) Ltd v Pekudei Investments (Pty) Ltd supra* fn 6.

14 *Supra* fn 2.

15 The title deed description, however, was “Portion 526 (of 432) of the farm Melk Houte Kraal No 789”.

inclusion of the word “certain” in the property description in the lease agreement, contrary to the title deed description where the word “certain” is absent.¹⁶

2.1.2 Judgment of the trial court

The principle that an option to purchase constitutes a *pactum de contrahendo*, which has to comply with the formalities prescribed for the substantive contract envisaged by the parties, was reaffirmed by the court.¹⁷ Hence, the option *in casu* had to comply with section 2(1) of the Act, which requires a deed of alienation to be in writing and signed by the parties thereto or by their agents acting on their written authority.¹⁸ The court further held that a deficient description of the *res vendita* will result in nullity for non-compliance with section 2(1).¹⁹

After a detailed semantic and case law²⁰ analysis of the term “certain” in the property description, Ndlovu J pointed out that the word “certain” may refer to something that is uncertain, unsure, indefinite or imprecise, depending on the context in which the word is used.²¹ In determining such context, the surrounding circumstances, including the *ex post facto* conduct of the parties relating to the envisaged agreement, must be taken into consideration. The court held that the word “certain” in the description of the property *in casu* did create confusion and ambiguity as to the precise piece of land which forms the *res vendita* and that the intention of the parties was of no relevance for the purpose of compliance with section 2(1) of the Act.²² Therefore the land sold could not be identified by reference to the contract *per se* without recourse to evidence from the contractual parties as to their negotiations and consensus, failing the test set in *Clements v Simpson*.²³

Ex post facto conduct considerations which the court took into account were the sublease of a portion of the property by the applicant to a third party and a second (conflicting) lease agreement which the first respondent concluded with another lessee over the same portion of the property under consideration.²⁴

Hence, the court concluded that the word “certain” could only mean that the property which was the subject-matter of the lease and sale was not the entire property as described in the title deed, but only a part thereof.²⁵ This was the reason, so the court held, why the word “certain” was included in the property description, deviating from the title deed description where the word “certain” was absent.

16 Para 10.

17 Para 12.

18 *King v Potgieter* 1950 3 SA 7 (T); *Meyer v Kirner* 1974 4 SA 90 (N); *Johnston v Leal* 1980 3 SA 927 (A); *Van Leeuwen Pipe and Tube (Pty) Ltd v Mulroy* 1985 3 SA 396 (D) and *Hirschowitz v Moolman* 1985 3 SA 739 (A); *Krauze v Van Wyk* 1986 1 SA 158 (A).

19 *Supra* fn 2 para 26. This is in accordance with *Magwaza v Heenan* 1979 2 SA 1019 (A) and *Fraser v Viljoen supra* fn 10.

20 *Lugtenborg v Nichols* 1936 TPD 76; *Cromhout v Afrikaanse Handelaars and Agente (Edms) Bpk* 1943 TPD 302; *Blundell v Blom* 1950 2 SA 627 (W); *Van Niekerk v Smit* 1952 3 SA 17 (T); *Coopers and Lybrand v Bryant* 1995 3 SA 761 (A).

21 *Supra* fn 2 para 35.

22 Para 41.

23 1971 3 SA 1 (A); see also *Headerman (Vryburg) (Pty) Ltd v Ping Bai* 1997 3 SA 1004 (SCA); *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 3 SA 986 (SCA).

24 *Supra* fn 2 paras 43–45.

25 Para 41.

As a result, the *res vendita* was not clearly identifiable with reasonable certainty from the contract, disqualifying it from the requirements prescribed by section 2(1) and resulting in the contract being null and void.

2 1 3 *Judgment of the Supreme Court of Appeal*

On appeal²⁶ it was held that the root of the problem regarding the property description hinged on the word “certain”.

The Supreme Court of Appeal, contrary to the trial court, did not take *Cromhout v Afrikaanse Handelaars en Agente (Edms) Bpk*²⁷ and *Lugtenborg v Nichols*²⁸ into account, but relied on *Van Niekerk v Smit*²⁹ and *Bundell v Blom*,³⁰ where it was held³¹ that “the primary meaning of the word ‘certain’ is something definite, something prescribed, something determined, fixed or settled”. Navsa and Malan JJA held, with Heher, Shongwe and Mhlantla JJA concurring, that:

“The fact that the description of the property in the lease, and consequently the deed of alienation, does not correspond precisely with the title deed description is of no consequence, just as the omission of the extent of the property does not affect the matter. The property was thus sufficiently described to render the agreement of sale concluded when the option was exercised, at least on the face of it, valid. To hold otherwise would mean that the words ‘of portion’ must be read into the description of the property sold before the figures ‘526’. There is no compelling reason to do so. The description of the property is unambiguous and speaks for itself. Thus, in this specific regard, no evidence ought to be admitted to interpret the wording.”³²

An important factor to be considered is that the *res vendita* was occupied by the purchaser as a tenant. Consequently the transaction might have qualified as a generic sale in which the *res vendita* was identified (individualised) on date of occupation. For this reason the *res vendita* was most probably certain and would fall within the requirements of section 2(1) of the Act.³³ Alternatively, the approach by Lewis JA in *Du Plessis NO v Goldco Motor and Cycle Supplies (Pty) Ltd*³⁴ might be appropriate *in casu* as far as the purchaser’s occupancy as tenant was objective evidence to adduce identification of the *res vendita*. Hence, a meticulous description of the *res vendita* in the deed of alienation to identify it was in this instance pointless. This has long been settled law.

2 1 4 *Compliance with the Subdivision of Agricultural Land Act*

One should also observe that the *res vendita* in *Lombaard v Dropprop CC*³⁵ involved the alienation of an undivided portion of agricultural land. A question thus to be answered is whether this agreement was not void from the start since it

26 *Supra* fn 3.

27 *Supra* fn 20.

28 *Ibid.*

29 *Ibid.*

30 *Ibid.*

31 *Bundell v Blom* fn 20 630.

32 *Supra* fn 3 para 11.

33 See *Phone-A-Copy Worldwide (Pty) Ltd v Orkin* 1986 1 SA 722 (A) and Pienaar “*Phone-A-Copy Worldwide (Pty) Ltd v Orkin* 1986 1 SA 729 (A)” 1986 *THRHR* 479.

34 *Supra* fn 4. See discussion below.

35 *Supra* fn 2.

did not comply with section 3(e)(i) of the Subdivision of Agricultural Land Act.³⁶ In the event of property being agricultural land, the Minister's consent is required in terms of section 3(e)(i) to sell a subdivision of such land. In *Geue v Van Der Lith*³⁷ the Supreme Court of Appeal ruled that an agreement which constituted a clear contravention of section 3(e)(i) is void *ab initio*, notwithstanding a suspensive or resolutive condition precedent to the Minister's consent.

2.2 *Du Plessis NO v Goldco Motor and Cycle Supplies (Pty) Ltd*³⁸

2.2.1 *Facts*

In this case the respondent leased a certain premises from the appellants' trust. The key question was whether an option to purchase a future sectional title unit, contained in the said lease agreement, complied with section 2(1) of the Act. The terms of the option were briefly that it should be exercised by way of a written deed of sale to be drawn up by the appellants' attorney, provided that the sectional title diagrams were approved and the sectional title register was opened. The time limit set for all this to happen, was twenty-four months from the conclusion of the lease.

Notwithstanding the approval of the sectional title diagrams and various requests to the appellants' attorney to draw up the deed of sale as envisaged in the option, enabling the respondent to exercise the option, the appellants failed to do so. The respondent successfully applied to the High Court for an order compelling the appellants to draw up the contract pursuant to the option. The trial court held that the appellants deliberately frustrated performance under the option and had to be compelled to perform by virtue of the doctrine of fictional fulfilment. An appeal was lodged against this decision, contending that the option did not comply with section 2(1) of the Act and was not exercised timeously in the prescribed manner.

2.2.2 *Judgment*

Referring to *Cairns (Pty) Ltd v Playdon*³⁹ and *The law of contract in South Africa*⁴⁰ Lewis JA confirmed the trite principle that the essence of an option is to bind the option grantor not to revoke an offer and it is the option holder's choice whether to accept or reject such offer.⁴¹ Hence the appellants were not entitled, without impunity, to revoke the offer stipulated in the option within the 24-month period. The written contract envisaged in the option was, according to the Supreme Court of Appeal, no more than a prescribed mode of acceptance.⁴² If so, Lewis JA asked, what would the contents be of the contract envisaged by the parties? Usually the option *per se* reflects all material terms of the envisaged agreement. The Supreme Court of Appeal held that the option *in casu*, although

³⁶ 70 of 1970.

³⁷ 2004 3 SA 333 (SCA).

³⁸ *Supra* fn 4.

³⁹ 1947 EDL 145.

⁴⁰ Christie and Bradfield *Christie's The law of contract in South Africa* (2011) 56–57.

⁴¹ *Supra* fn 4 para 15.

⁴² Para 17. See *Driftwood Properties (Pty) Ltd v Mclean* 1971 3 SA 591 (A); *Withok Small Farms (Pty) Ltd v Amber Sunrise Properties 5 (Pty) Ltd* 2009 2 SA 504 (SCA) and *Pillay v Shaik* 2009 4 SA 74 (SCA).

very cursory, contained all the essential terms of a deed of sale, such as the *res vendita* and *pretium*.⁴³

It was further held that in these circumstances it was unnecessary to determine what the other additional terms, envisaged by the parties, might have been.⁴⁴ Be it as it may, the court held that the appellants were still bound by their undertaking to sell the premises to the respondent at the agreed price.⁴⁵ If the appellants deliberately frustrated the exercise of the option as per the prescribed mode it would not cause the option to fall away, but would result in the prescribed mode of acceptance to cease. Since the option embodied all essential terms of the contract of sale it had to be enforced on those terms.

Lewis JA rejected the appellants' contention that the *res vendita* (as premises in a building to be erected and pointed out by the seller to the purchaser) was unidentifiable without parol evidence.⁴⁶ The reason for this rejection was that, although section 2(1) of the Act requires the *res vendita* to be identifiable from the description in the contract itself, it has long been settled law that objective evidence may be adduced to identify the *res vendita*. According to *Hirschowitz v Moolman*,⁴⁷ these principles are also applicable to options. Lewis JA also employed *Vermeulen v Goose Valley Investments (Pty) Ltd*,⁴⁸ where *Van Wyk v Rottcher's Saw Mills (Pty) Ltd*⁴⁹ was quoted with approval, as authority to motivate her judgment that a statutory provision which compels a contract of sale to be in writing, cannot imply that only evidence by which the *res vendita* can be identified must be contained in writing. Since the respondent had in fact occupied the *res vendita* pursuant to the lease, clear and objective evidence was present to ascertain the *res vendita* precisely without resorting to the negotiations between the parties. Moreover, the *res vendita* was also contractually described as "Shop 1 Prosperitas Building" with reference to its street address. Thus, according to Lewis JA, there could be no uncertainty as to what the *res vendita* was. Unfortunately this approach was not followed in *Lombaard v Droprop CC*.⁵⁰

Griesel AJA, in a minority decision, disagreed with the above findings and held that for an option to be enforceable, it has to be constructed in such a manner that it reflects the substantive contract per se in such a manner that the mere acceptance of the option will constitute the envisaged agreement.⁵¹ In order to comply with section 2(1) of the Act, Griesel AJA further held that a deed of sale of land, including an option, must not only contain all *essentialia*, but also all other material terms.⁵² Although the option clause *in casu* contained all *essentialia*, it was uncertain what other material terms could be applicable. Griesel AJA

43 *Supra* fn 4 para 17. See *Herselman v Orpen* 1989 4 SA 1000 (SE) where the same approach was followed.

44 *Supra* fn 4 para 18.

45 *Ibid.*

46 Paras 19–20.

47 *Supra* fn 18. See also *Lombaard v Droprop CC supra* fn 2, *Krauze v Van Wyk supra* fn 18 and Van Rensburg "Formaliteitsvoorskrifte, voorkeopsregte en opsies" 1986 *THRHR* 208.

48 *Supra* fn 23.

49 1948 1 SA 983 (A).

50 *Supra* fn 2.

51 *Supra* fn 4 para 34. See *Brandt v Spies* 1960 4 SA 14 (E), quoted with approval in *Venter v Birchholtz* 1972 1 SA 276 (A).

52 *Supra* fn 4 para 35.

consequently reasoned that it was unnecessary for the court to speculate on what those other material terms might be and it was for the respondent to prove the contract which it sought to enforce.⁵³ Griesel AJA found that the respondent had failed to discharge that onus.

Griesel AJA further held that the crux of the matter was whether the option clause embodied all material terms and not just the *essentialia*.⁵⁴ He reasoned that this was not the situation *in casu*. The option granted in the present case was, according to Griesel AJA, nothing more than an agreement to agree, which is insufficient to serve as a basis for a binding agreement of sale or option.⁵⁵ In conclusion he held that without a complete offer it was impossible to have a valid contract of sale complying with section 2(1) of the Act.⁵⁶ For this reason the option in question was unenforceable. With reference to *Soteriou v Retco Poyntons (Pty) Ltd*,⁵⁷ where it was held that the court was neither the destroyer nor the creator of contracts, Griesel AJA was convinced that both the trial court and Lewis JA in the majority decision erred in their attempts to create an agreement of some sort on behalf of the parties.⁵⁸

Since the appellants did not contend that there were any other terms over and above those contained in the option, Navsa JA, in a separate judgment, disagreed with the above conclusion of Griesel AJA.⁵⁹ Navsa JA also held that the option was similar to and compatible with that in *Driftwood Properties (Pty) Ltd v Mclean*⁶⁰ and was therefore correctly enforced by the Supreme Court of Appeal.⁶¹ Thus, according to Navsa JA, Lewis JA in the majority judgment appropriately relied on the correct authority and he agreed with her that the property description complied with section 2(1) of the Act.⁶² Navsa JA further argued that Griesel AJA was not entitled to take the “background circumstances” into account when he interpreted the option. Consequently the option was clear, unambiguous and correctly interpreted by Lewis JA.

2 3 JR 209 Investments (Pty) Ltd v Pine Villa Country Estate (Pty) Ltd; Pine Villa Country Estate (Pty) Ltd v JR 209 Investments (Pty) Ltd⁶³

2 3 1 Facts

The facts of this case can briefly be summarised as follows. Pine Villa Estates (Pty) Ltd sold a certain portion 7 of the farm Swartkop 383 JR⁶⁴ to JR 209 Investments (Pty) Ltd to be developed by M and T Development (Pty) Ltd into a proposed township known as Monavoni Extension 18. The proposed township

53 Para 36.

54 Para 38.

55 Para 39. Cf *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* 1993 1 SA 768 (A); *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* 1997 2 SA 548 (A); *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 4 SA 413 (SCA).

56 *Supra* fn 4 para 40.

57 1985 2 SA 922 (A).

58 *Supra* fn 4 paras 41–42.

59 Para 46.

60 *Supra* fn 42.

61 *Supra* fn 4 para 47.

62 Paras 48–49.

63 *Supra* fn 5.

64 Hereafter Portion 7.

consisted of a number of properties including Portion 7. The sole shareholder and director of Pine Villa Estates (Pty) Ltd was one Oberem. Clause 11.2 of the agreement provided as follows:

“Both parties take note that a portion of this property between 5 000m² and 5 653m² in extent and including the residential house on this property is to be transferred into the name of . . . Oberem . . . as soon as sub-divisional diagrams are available to effect this transfer. The Purchaser shall be liable for all costs relating to this subdivision and hereby guarantees that these diagrams will be available not later than 7 (seven) months after date of this agreement. The Seller shall be liable for all costs regarding the transfer of this property into the name of . . . Oberem.”⁶⁵

Portion 7 was transferred to the purchaser against full payment of the purchase price. However, the purchaser was unable to make available the diagrams referred to in clause 11.2 within the agreed period. As a result the 11.2 Property was not transferred into the name of Oberem. Because of this breach and the purchaser’s failure to rectify same within the contractually agreed period, the seller alleged that the agreement was cancelled and claimed retransfer of Portion 7, alternatively, payment of damages being the difference between the present market value and the purchase price of Portion 7.

Relying on *Parsons v MCP Bekker Trust (Edms) Bpk*,⁶⁶ the seller argued that although Portion 7 had been adequately identified, the area to be excluded and retransferred to Oberem in terms of clause 11.2 (the 11.2 Portion) had not. Therefore, the agreement was null and void *ab initio* for non-compliance with section 2(1) inasmuch as the latter piece of land could not be identified with reference to the provisions of the agreement alone.

2 3 2 Judgment

The Supreme Court of Appeal held that the purchaser had complied with “all obligations” in terms of the agreement relating to Portion 7 and that section 2(1) of the Act was no longer relevant to the 11.2 Property.⁶⁷ These facts, so the court held, were in line with the judgment in *Olifants Trust Co v Pattison*.⁶⁸ In the latter case the court concluded that although the envisaged 10 acres to be transferred back to the seller could not have been clearly defined, such further agreement to achieve this did not infringe on section 1(1) of the General Law Amendment Act.⁶⁹

During the interdict procedure in the court *a quo*, Rabie J held that the description of the 11.2 Property, which could not be severed from the remaining part of the contract, was inadequate and did not comply with the requirements of section 2(1). Accordingly it was found that the contract was *prima facie* void for want of compliance with section 2(1).

Botha J, on the other hand, during the amendment of pleading procedure in the court *a quo*, held that the property was adequately described. The fact that the shape and exact configuration of the 11.2 Property were left entirely to the purchaser’s discretion depending on the layout of the township did not invalidate the

65 Hereafter the 11.2 Property.

66 1978 3 SA 101 (T).

67 *Supra* fn 5 para 14.

68 1971 3 SA 888 (W).

69 68 of 1957. One of the forerunners of s 2(1) of the Act.

agreement. Hence the contract was valid and in compliance with section 2(1) of the Act.

With reference to *Clements v Simpson*⁷⁰ and *Van Wyk v Rottcher's Saw Mills (Pty) Ltd*⁷¹ the Supreme Court of Appeal again confirmed that the test for compliance with the provisions of section 2(1) is whether the land alienated 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.⁷² A faultless description of the property, couched in meticulously accurate terms, is not required.⁷³

With *Clements v Simpson*⁷⁴ in mind, Harms ADP distinguished the present case from *Parsons v MCP Bekker Trust (Edms) Bpk*⁷⁵ and *Botha v Niddrie*⁷⁶ on which the seller relied. In *Clements v Simpson*,⁷⁷ as was the position *in casu*, a formula to determine the configuration (that is the area and location) of the *res vendita* was adequately addressed in the contract to satisfy the relevant statutory formality requirements. This vital aspect was absent in both the *Botha*⁷⁸ and *MCP Bekker Trust*⁷⁹ cases. For the *res vendita* to be described adequately in order to comply with statutory formalities, the contract has to contain an indication as to how the configuration of the *res vendita* was to be determined. If not, the agreement will be legally ineffective.

In casu the court held that the formula in clause 11.2 to determine the shape and size of the erf was adequate and in compliance with section 2(1).⁸⁰ As a result, this ground of attack had no merit. Therefore, in the court *a quo*, Botha J correctly refused the amendment and Rabie J erred in finding that the seller had a right that could be protected by an interdict.

It is clear that the Supreme Court of Appeal's approach is one of substance over form and it would rather be the exception than the rule that a deed of alienation would be deemed null and void because of technicalities.⁸¹ However, it remains an open question whether this approach is conducive to the legislature's aims when it comes to formalities.

It appears that the root of the principle that non-compliance with statutory formalities renders the alienation of land null and void, originated in *Wilken v Kohler*.⁸² In this case a verbal agreement to purchase land was duly executed by payment of the purchase price against transfer of the property. The transaction

70 *Supra* fn 23.

71 *Supra* fn 49.

72 *Supra* fn 5 para 19.

73 *Supra* fn 49.

74 *Supra* fn 23.

75 *Supra* fn 66.

76 1958 4 SA 446 (A).

77 *Supra* fn 23.

78 *Supra* fn 76.

79 *Supra* fn 66.

80 *Supra* fn 5 para 22.

81 See *inter alia* *Herselman v Orpen* *supra* fn 43; *Chisnall and Chisnall v Sturgeon and Sturgeon* 1993 2 SA 642 (W); *Scheepers v Strydom* 1994 3 SA 101 (A); *Ten Brink v Motala* 2001 1 SA 1011 (D); Lötz "Ten Brink v Motala 2001 1 SA 1011 (D) – koopkontrak van grond – kontrakspartye en formaliteite waar 'n verteenwoordiger namens die koper optree" 2002 *De Jure* 361).

82 1913 AD 135.

was later contested on the basis that the *res vendita* did not contain twelve morgen under cultivation, as represented by the seller, but seven.

The trial court held that a provision of this nature might be waived and that non-compliance therewith rendered an agreement voidable at the option of either party. On appeal, Innes J touched on the possibility that a waiver of this nature could be tolerated if such statutory provision was for the benefit of an individual or a class and ruled that “a right given on those lines to treat a contract as void might be exercised or not at the pleasure of the party concerned; the agreement would in effect be voidable at his option”.

However, Innes J held that contracts of land were often intricate and of substantial value and importance. Therefore the legislature, in order to prevent litigation, perjury and fraud, in this instance, intended the contract to be reduced to writing. Failure to do so would render the contract void and not voidable at the option of either party. Innes J motivated this viewpoint as follows:

“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*; but I am satisfied that the provision was adopted not for the advantage of any particular class of persons, but on grounds of *public policy*.”⁸³

Considering the meaning of the term “void” and the effect of public policy, Solomon J remarked as follows:

“[W]here the enactment has relation only to the benefit of particular persons, the word *void* would be understood as *voidable* only at the election of the persons for whose protection it was made, and who are capable of protecting themselves; but that, when it relates to persons not capable of protecting themselves, or it has some object of public policy in view which requires the strict construction, the word receives its natural full force and effect.”⁸⁴

In conclusion Solomon J also held that public policy, in this instance, is directed at the prevention of lawsuits, fraud and perjury and that these objectives are an indicator to determine the contents and consequences of such legislation.⁸⁵

2 4 *Exdev (Pty) Ltd v Pekudei Investments (Pty) Ltd*⁸⁶

2 4 1 *Facts*

The gist of the dispute in this case was the purchase of a future office unit and an option to procure additional office space in the same prospective development.

The *res vendita* of the future office unit was described along the lines of an existing *res vendita* bought from the respondent and transferred to the appellant, namely: “[A]n office unit (at the same price for which sections 21, 22 and 23 were sold to you) of the same size and with a similar number of parking bays (8).”⁸⁷ The *res vendita* in the option to purchase, on the other hand, was described as: “[A] further 140 square metres at the market price prevailing when the new building is completed.”⁸⁸ Both the sale of the future office unit and option were contained in the same document.

83 *Supra* fn 82 142 (own emphasis).

84 *Supra* fn 82 148.

85 *Supra* fn 82 149.

86 *Supra* fn 6.

87 Para 3.

88 *Ibid*.

Once the respondent claimed damages, founded on the appellants' repudiation of the above sale and option, the appellants raised the validity of the contract as a defence. They argued that both the sale and option were part of a single unitary contract in which the *res vendita* and or purchase price were not adequately described. As a result, the deed of alienation failed to comply with the requirements set in section 2(1) of the Act, rendering it void.⁸⁹ Reasons put forward why the *res vendita* was inadequately described were, *inter alia*, the absence of a draft three-dimensional plan of the proposed development, leaving the selection of the shape, floor position, precise dimensions and architecture style of the unit in the sole discretion of the respondent.

The respondent challenged this contention and maintained that the option was separate and divisible from the sale and that both the *res vendita* and purchase price were adequately described.

2 4 2 Judgment

Leach JA explained that there is a distinction between the severance of a portion of a contract and the possibility that a contract may contain several distinct and separate agreements divisible from each other.⁹⁰ Relying on *Middleton v Carr*⁹¹ and *Nash v Golden Dumps (Pty) Ltd*⁹² the Supreme Court of Appeal held that the sale of the future office unit *in casu* created reciprocal rights and obligations which were entirely unrelated and separate from the option to purchase additional office space, which, on its own, also initiated a different independent set of rights and obligations.⁹³ It follows that, although the sale of the future office unit and option to purchase additional office space were incorporated in the same document, two separate and independent contracts were concluded. That being so, Leach JA held that it was pointless to consider whether the option to purchase additional office space was invalid in order to determine the validity of the sale of the future office unit. Thus, the only problem to solve was whether the sale of the future office unit was invalid due to the alleged vagueness of the description of the *res vendita*.

Leach JA confirmed that the established test to verify whether the description of a *res vendita* is in compliance with section 2(1) of the Act is whether it can be identified from the contract itself, without resorting to evidence from the parties about their negotiations and consensus.⁹⁴ Moreover, the Supreme Court of Appeal yet again endorsed the well-known principle that section 2(1) of the Act does not require "a faultless description of the property sold couched in meticulously accurate terms".⁹⁵ Leach JA furthermore highlighted the well-established notion to divide the possible property description, such as in the present situation, into two broad categories. First, those where the document itself sufficiently describes the *res vendita* to cause identification of it *per se*; second, those where

89 S 28(1).

90 *Supra* fn 6 para 10.

91 1949 2 SA 374 (A).

92 1985 3 SA 1 (A).

93 *Supra* fn 6 paras 13–14.

94 Para 15.

95 Para 16. See *Van Wyk v Rottcher's Saw Mills (Pty) Ltd supra* fn 49 989, cited with approval, *inter alia*, in *JR 209 Investments (Pty) Ltd v Pine Villa Country Estate (Pty) Ltd; Pine Villa Country Estate (Pty) Ltd v JR 209 Investments (Pty) Ltd 2009 supra* fn 5.

it appears from the contract that the parties intended that either the buyer or the seller should choose the *res vendita* from a genus or class. Confirmation of the latter category can be found in *Clements v Simpson*⁹⁶ and *JR 209 Investments*⁹⁷ where it was held that the intention of the parties may be of such a nature that it is not necessary for the *res vendita* to be identified by reference to the exact description thereof in the deed of alienation, as long as it is *identifiable* after the seller (or purchaser) decided upon the lay-out and shape of the *res vendita* in conformity with their agreed specified requirements. It follows that the parties' consensus will thus be complete and all that is still required for performance will be the intended physical and psychological unilateral act of the seller (or purchaser) individualising the *res vendita*.

Leach JA concluded that the above principles effectively dispose of the appellants' argument, since the size of the future office unit (260 m²) and location of it (within the new building that the respondents were constructing) were determined.⁹⁸ All that was left open was the discretionary and bona fide individualisation, in accordance with the parties' contractual arrangement, of the *res vendita* by the seller. As a result, the consensus of the parties was complete and the appeal had to fail.

The Supreme Court of Appeal also remarked in passing that the comments made by Lötzt and Nagel⁹⁹ that section 2(1) of the Act has failed to achieve its objectives and is often abused by unscrupulous seller and purchasers to rescind for a deed of alienation, although somewhat unfair, is not without substance.¹⁰⁰

3 DESCRIPTION OF THE PURCHASE PRICE

The description of the purchase price was the bone of contention in *Chretien v Bell*.¹⁰¹

3.1 Facts

In this case the purchase price payment details were not specified in writing. The deed of alienation provided that no deposit or loan was required and that the full purchase price, including all other disbursements for which the purchaser was liable, should have been paid in cash before he was entitled to take transfer of the property. It was further agreed that the purchase price payment details would be agreed upon in writing not later than 30 April 2005. This never happened.

3.2 Judgment

It was submitted that since the parties have stipulated that payment would be in cash the sellers could not, in the absence of any further agreement, have expected anything better than cash against transfer of the property into the purchaser's name. Tshiqi AJA recognised that this proposition echoes the common law

⁹⁶ *Supra* fn 23.

⁹⁷ *Supra* fn 5.

⁹⁸ *Supra* fn 6 para 19.

⁹⁹ Lötzt and Nagel "*JR 209 Investments (Pty) Ltd v Pine Villa Country Estate (Pty) Ltd* Case No 617/2007 (SCA) *Pine Villa Country Estate (Pty) Ltd v JR 209 Investments (Pty) Ltd* Case No 2/2008 (SCA) Section 2(1) of the Alienation of Land Act, description of *res vendita*" 2010 *De Jure* 169 (hereafter Lötzt and Nagel 2010 *De Jure* 169).

¹⁰⁰ *Supra* fn 6 para 1.

¹⁰¹ *Supra* fn 7.

position, but held that it was an express contractual term that the purchase price had to be paid before transfer and an agreement on the time of payment, which should not have been later than 30 April 2005, still had to be reached.¹⁰²

The Supreme Court of Appeal referred with approval to *Dijkstra v Janowsky*¹⁰³ where it was observed that the requirements in respect of a deed of alienation of land concerning section 2(1) of the Act could be recapped as follows: All material terms must be in writing;¹⁰⁴ a material term is not restricted to the *essentialia* of a contract;¹⁰⁵ the manner of payment is generally a material term;¹⁰⁶ there is no valid contract where a material term was left open for further negotiations and a final agreement thereon has not been reached;¹⁰⁷ and a court must be able to ascertain with reasonable certainty the terms of the contract.¹⁰⁸

The Supreme Court of Appeal concluded that the *time* of payment, as substantiated by the deed of alienation itself, was a material term of the agreement.¹⁰⁹ Consequently the deed of alienation did not comply with section 2(1) of the Act and was for this reason void.¹¹⁰

In order to determine whether a term is material or not, the following questions, according to the test laid down in *Herselman v Orpen*¹¹¹ and *Jones v Wykland Properties*,¹¹² must be answered in the affirmative, namely, did the parties apply their minds to the term and did they agree, either expressly or impliedly, that the term should form part of their contract, and be binding on them? Terms that are *naturalia* do not have to be in writing.¹¹³

It appears in the above matter that the reasoning of Binns-Ward J in *Van der Merwe v Hydraberg Hydraulics CC and Van der Merwe v Bosman*¹¹⁴ again holds true where it was observed:

“When law and equity cannot concur, it is the law that must prevail . . . The formalities legislation, on which the result of these applications has ultimately turned, was evidently intended to promote certainty in regard to contracts in respect of the alienation of interests in land. The apparent legislative hope was that the imposition of formalities would lessen the scope for dispute and reduce the amount of litigation between parties to such contracts. Successive legislatures have persisted with the belief in that ideal, despite the observations by judges and academic writers over many years that the effect of the formalities has often been to bring about greater evils than those which it was hoped thereby to avoid. These evils include the resort by the dishonest and the unscrupulous to the formalities in order to avoid obligations seriously undertaken, which would otherwise be

102 *Supra* fn 7 para 12.

103 1985 3 SA 560 (C).

104 *Johnston v Leal* 1980 3 SA 927 (A).

105 *Ibid.*

106 *Patel v Adam* 1977 2 SA 653 (A).

107 *Jammie v Lowrie* 1958 2 SA 430 (T).

108 *Supra* fn 7 paras 9–10; *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 1 SA 669 (W); *Clements v Simpson supra* fn 23.

109 *Supra* fn 7 paras 11 and 13.

110 *Ibid.*

111 *Supra* fn 43.

112 1998 1 SA 355 (C).

113 *Botha v Swanepoel* 2002 4 SA 577 (T).

114 2010 5 SA 555 (WCC).

enforceable against them at common law, and a hampering of the ability of the courts to do justice.”¹¹⁵

4 WRITING PROVISIONS OF SECTION 2(1) OF THE ACT

The writing provisions of section 2(1) of the Act were the stumbling block in *Janse van Rensburg v Koekemoer*¹¹⁶ which is discussed below.

4.1 Should a *habitatio* be in writing?

4.1.1 Facts

The question to be answered in *Janse van Rensburg v Koekemoer* was whether an oral agreement (donation) granting a servitude of *habitatio* over immovable property infringes on the writing provisions of section 2(1) of the Act. In this case the applicants relied on an oral agreement (donation) to register a *habitatio* against the title deed of immovable property.

4.1.2 Judgment

Since a *habitatio* results in a subtraction from the *dominium*,¹¹⁷ Claassen J held, in accordance with the finding of the trial court, that a *habitatio* is a real right which can only be enforced against the grantor once it is registered against the title deed of the affected immovable property.¹¹⁸ It follows that an agreement to initiate a *habitatio*, though *inter partes* binding on the contractual parties, does not by itself vest the legal title to the servitude in the beneficiary. For the latter to be achieved, registration of the servitude against the title deed is required.¹¹⁹ This principle is analogous to the conclusion of a deed of sale of land, which only creates a personal right. It is the subsequent transfer of the property into the purchaser’s name that will transform this personal contractual right into a real right of ownership.

Claassen J concluded, which conclusion is fortified by *Felix v Nortier NO*¹²⁰ and *Registrar of Deeds (Transvaal) v The Ferreira Deep Ltd*¹²¹ that any right resulting in the deprivation of an owner’s *dominium* (title), such as a *habitatio*, *usus*, *usufructus* or mineral rights, construed an “interest in land” as envisaged by the definition of “land” in section 1 of the Act.¹²² For this reason any alienation, which includes a donation,¹²³ like the situation *in casu*, of an “interest in land”, which falls within the scope of the definition of “land”, has to comply with the writing and signature requirements of section 2(1) of the Act.

The court further held that notwithstanding the fact that the donation of the *habitatio* did not comply with section 2(1) of the Act, it also disregarded section 5

115 *Supra* fn 114 paras 42–45. Also see Lötze and Nagel 2010 *De Jure* 169 174 where this exact inadequacy of formalities legislation was amplified.

116 *Supra* fn 8.

117 See *Cape Explosive Works Ltd v Denel (Pty) Ltd* 2001 3 SA 569 (SCA) and *Erlax Properties (Pty) Ltd v Registrar of Deeds* 1992 1 SA 879 (A).

118 *Supra* fn 8 para 13.

119 See *Willoughby’s Consolidated Co Ltd v Cophall Stores Ltd* 1918 AD 1.

120 [1996] 3 All SA 143 (SE).

121 1930 AD 169.

122 *Supra* paras 16–17.

123 See s 1 of the Act on the definition of “alienation”.

of The General Law Amendment Act.¹²⁴ The latter Act requires a donation of future entitlements to be in writing. If not, such donation is void. The donation *in casu* did not meet this prerequisite and was also for this reason void.

We agree with the above subtraction of *dominium* test to establish whether a deed of alienation of an interest in land should comply with section 2(1) of the Act.

5 WRITTEN AUTHORITY BY A CLOSE CORPORATION

Written authority by a close corporation was the hub of the mess in *Lombaard v Droprop CC*¹²⁵ and *Northview Shopping Centre (Pty) Ltd v Revelas Properties Johannesburg CC*.¹²⁶

5.1 *Lombaard v Droprop CC*¹²⁷

One of the problems in this case was whether the third respondent¹²⁸ acted as the agent of the first respondent¹²⁹ and that a written authority to sign a deed of alienation was required in order to comply with section 2(1) of the Act.

The trial court held that section 54 of the Close Corporations Act¹³⁰ is not wide enough to exempt close corporations or its members, when acting as agents on behalf of a close corporation, from compliance with the provisions of section 2(1) of the Act, namely, to have written authority.¹³¹ Ndlovu J emphasised that contrary to the (now repealed) section 69(1)(a) of the Companies Act,¹³² which explicitly exempts an agent acting on behalf of a company to have written authority, the Close Corporations Act does not have a similar provision.¹³³

It was common cause that the third respondent did not have written authority to sign a deed of alienation on behalf of the first respondent. The court held that the applicant's lack of knowledge of the absence of the third respondent's written authority was irrelevant since the written authority requirement in terms of section 2(1) of the Act is a strict requirement, denying a defence of absence of knowledge as envisaged by section 54 of the Close Corporations Act.¹³⁴ In conclusion the court held that a member who signed a deed of alienation of land as an agent on behalf of a close corporation in terms of section 54 needs to have written authority to act in that particular matter.¹³⁵ If not, such act will be unlawful and not within the scope of section 54 which only permits lawful acts. It follows, so the court held, that the deed of alienation will be null and void for

124 50 of 1956; *supra* fn 8 para 20.

125 *Supra* fn 2.

126 *Supra* fn 9.

127 *Supra* fn 2.

128 A member of the close corporation.

129 The close corporation.

130 69 of 1984.

131 *Supra* fn 2 para 55. In brief, s 54 stipulates that any member of a close corporation shall, in relation to any third party dealing with the corporation, be regarded as an agent of the corporation and any act of a member shall bind the corporation, unless the acting member has in fact no power to act and the third party with whom the member deals has, or ought reasonably to have, knowledge that the member has no such power.

132 61 of 1973.

133 *Supra* fn 2 para 54.

134 Para 56.

135 *Supra* fn 2 para 57.

non-compliance with the aforementioned section 54 of the Close Corporations Act and section 2(1) of the Act.¹³⁶ Acting without written authority in these circumstances, so Ndlovu J reasoned, is equivalent to an illicit drug smuggling or diamond transaction concluded by a member on behalf of a close corporation.¹³⁷ It seems that the latter remark is not in line with the principles regulating legality as a prerequisite for the formation of a contract *vis-à-vis* formalities.

Although in a different context, it was, notwithstanding a prerequisite to the contrary in terms of section 52 of the Close Corporations Act, held in *Hanekom v Builders Market Klerksdorp (Pty) Ltd*¹³⁸ that if a close corporation has only one member, written authority by the close corporation to conclude a deed of suretyship will not be required.¹³⁹ If written authority in these circumstances is compulsory, it will lead to an absurdity and nothing can possibly be achieved by requiring the sole member, before signing a suretyship on behalf of the close corporation, to give himself permission in writing to do so.¹⁴⁰ It is not farfetched to draw an analogy between this scenario and one where a sole member of a close corporation signed a deed of alienation of land on behalf of the close corporation without a written authority. In this instance the written authority would have been given by the sole member himself to himself to act on behalf of the close corporation. The object of section 2(1) of the Act should not be frustrated in these circumstances.

5 2 *Northview Shopping Centre (Pty) Ltd v Revelas Properties Johannesburg CC*¹⁴¹

5 2 1 *Facts*

The requirement of written authority in terms of section 2(1) of the Act concerning an agent, functionary and member of a close corporation was the centre of the problem in *Northview*.

Mr Christelis, the husband of the sole member of the first respondent, Revelas Properties Johannesburg CC, signed a deed of alienation on behalf of the close corporation without written authority. In defence to the appellant's claim for specific performance, the first respondent argued that the sale was invalid for want of formalities. The appellant, on the other hand, contended that written authority is not required when a close corporation is the principal. The issue therefore was whether Christelis, the second respondent, was duly authorised to sign the contract, as required by section 2(1) of the Act.

5 2 2 *Judgment*

Brett AJ in the trial court held that if a person other than a member acted on behalf of a close corporation, that person would constitute an agent within the meaning of section 2(1) of the Act and would not qualify as its functionary. Thus, such agent may not conclude a deed of alienation of land on behalf of the close corporation unless authorised thereto in writing. The exception was also

136 *Ibid.*

137 *Ibid.*

138 2007 3 SA 95 (SCA).

139 Para 8.

140 *Ibid.*

141 *Supra* fn 9.

upheld on the basis that there was no allegation with specific reference to the written authority given to Christelis as well as the fact that if there was written authority it should have been attached to the particulars of claim.

The provisions of section 2(1) of the Act originated from a *Volksraad Besluit*,¹⁴² section 30 of the Transvaal Transfer Duty Proclamation,¹⁴³ section 49 of the Free State Ordinance,¹⁴⁴ section 1(1) of the General Law Amendment Act,¹⁴⁵ and section 1(1) of the Formalities in Respect of Contracts of Sale of Land Act.¹⁴⁶ Judgments dealing with the prerequisite of written authority where a party to a sale is a juristic person or a partner acting on behalf of a partnership date back to *Potchefstroom Dairies and Industries Co Ltd v Standard Fresh Milk Supply Co*¹⁴⁷ where the so called *Potchefstroom Dairies* principle was established and reaffirmed in *Suid-Afrikaanse Sentrale Koöperatiewe Graanmaatskappy Beperk v Thanasaris*,¹⁴⁸ *Muller v Pienaar*,¹⁴⁹ *Trever Investments (Pty) Ltd v Friedhelm Investments (Pty) Ltd*¹⁵⁰ and in the present case.¹⁵¹

De Villiers JP held in the *Potchefstroom Dairies* case that the requirement of written authority does not apply where a partner signed on behalf of a partnership.¹⁵² The reason for this ruling was that partners were more than agents and sustain the double character of agent and principal in one and the same transaction. Hence a partner is not an agent of the partnership within the meaning of section 30 of the Transvaal Transfer Duty Proclamation¹⁵³.

Bristowe J in the same decision, however, expanded this no-written-authority requirement to other entities, such as companies, tutors, curators and corporations (co-operative societies).¹⁵⁴ The foundation for this expansion was that these entities cannot act unless it is through natural persons. Consequently, such entities are not in the position to authorise their representatives in writing and for this reason the written-authority requirement does not apply when a functionary of these entities signs a contract for the sale of land.

Trusts, then again, are treated differently. In *Thorpe v Trittenwein*¹⁵⁵ it was held that trustees, unlike partners, are required to act jointly and it is therefore compulsory for a trustee to have the written authority of his or her co-trustees to sign a contract for the sale of land.

This view, however, in our opinion, may be susceptible to the following criticism:

142 1432 of 12 August 1886.

143 8 of 1902.

144 12 of 1906.

145 *Supra* fn 69.

146 71 of 1969; Lötze and Nagel 2010 *De Jure* 169.

147 1913 TPD 506 (hereafter the *Potchefstroom Dairies* case).

148 1953 2 SA 314 (W).

149 1968 3 SA 195 (A).

150 1982 1 SA 7 (A).

151 *Supra* fn 9 paras 5–8.

152 *Supra* fn 149 511.

153 A forerunner of s 2(1) of the Act.

154 *Supra* fn 149 512–513.

155 2007 2 SA 172 (SCA).

- (a) Although this judgment is technically correct, formalism and comprehensiveness are often lost in the heat of business transactions¹⁵⁶ and the table is therefore laid for disputes.
- (b) A partner's authority (by implication of law) to act without written authority is a matter of legal policy, as is the case in all other instances where operation of law is applicable.¹⁵⁷ As both trusts and partnerships are not legal persons, and both their legal operation are orchestrated by an *inter partes* agreement, the Supreme Court of Appeal was in an excellent position in the *Thorpe* case to extend this legal policy (ie of acting without written authority) to trustees, as is the case with partners.
- (c) There is no substantive explanation why the reasoning in the *Potchefstroom Dairies* case cannot *mutatis mutandis* be applied to trusts and trustees. A company (previously) did not need written authority to conclude a deed of alienation for land, as long as it had implied authority to do so.¹⁵⁸ Clearly, in the latter instance, no distinction was made between the decision-making process (implied authority) and subsequent signing of the deed of alienation as a functionary of the company. This pragmatic approach was unfortunately rejected in *Thorpe* as far as trusts are concerned.
- (d) The comparison drawn between executors and trustees in *Thorpe* was unfortunate. The function of an executor is distinguishable from that of a trustee. Executors are appointed for a limited time and for a limited scope. This is not so in the case of trustees. The requirement for executors to act jointly, or with the written authority of co-executors, is therefore practically feasible. Thus, executors do not serve as a good analogy for trustees to act jointly or with the written authority of a co-trustee when signing a deed of alienation for land.¹⁵⁹ The function and appointment of trustees are more in line with tutors and curators and they are a far better analogy why trustees, as tutors and curators, do not have to act jointly or with the written authority of co-trustees when signing a deed of alienation for land.
- (e) Trusts are for certain purposes, such as for the registration of land in the name of a trust or as a consumer, deemed a separate *persona*.¹⁶⁰

Lewis JA in the present case, however, distinguished between a functionary and an agent of a legal entity.¹⁶¹ A person authorised by law or by the internal rules of a juristic entity, is a "functionary". An "agent", on the other hand, is a person authorised by expression of will by the legal entity and is sometimes referred to as an "outside agent". The Supreme Court of Appeal held that there is no difference in principle between a "functionary" of a company and a "functionary" of a

156 *Van der Merwe v DSSM Boerdery BK* 1991 2 SA 320 (T); *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 1 SA 669 (W).

157 *Botha v Carapax Shadeparts (Pty) Ltd* 1992 1 SA 202 (A); *Townsend v Farman* 1900 2 Ch 698.

158 See s 69(1)(a) of the repealed Companies Act; *Roodia Beleggings (Flora) (Edms) Bpk v Marais* 1979 4 SA 488 (T); *Icodev (Pty) Ltd v Viljoen* 1985 3 SA 824 (T).

159 *Contra Tabethe v Mtetwa* 1978 1 SA 80 (D).

160 See s 2 of Act 9 of 2003 where the definition of "person" was extended in the Deeds Registries Act 47 of 1937 to include a trust and s 1 of the Consumer Protection Act where a "juristic person" is defined to include a body corporate, partnership, association or trust as defined in the Trust Property Control Act 57 of 1988.

161 *Supra* fn 9 para 11.

close corporation in so far as it concerns the signing of a contract for the sale of land.¹⁶² A member of a close corporation, authorised as such to sign, is in the same position as a functionary of a company authorised to sign and such member, who by law represents a close corporation, need not have written authority.¹⁶³

Although commonly accepted that any agent of a company, whether or not a functionary of it, was empowered by the now repealed section 69 of the Companies Act,¹⁶⁴ to bind the company to a deed of alienation without written authority, Lewis JA expressed her concern whether section 69 was intended to apply to a person who is not a functionary of a company and who is not authorised to act in terms of the company's articles of association or a resolution taken by the company.¹⁶⁵

There is no provision equivalent to section 69 in the Close Corporations Act. Nevertheless, section 54 of the latter Act provides that any member of a close corporation shall, in relation to third parties who are dealing with the close corporation, be regarded as an agent of the close corporation; and any act of a member shall bind the close corporation, unless such member has no power to act for the corporation and the person with whom such member deals has, or ought reasonably to have, knowledge of the fact that the member has no authority to act.

The Supreme Court of Appeal held that section 54 simply confers authority on a member to act for a close corporation and expresses no more than the usual rules relating to ostensible authority similar to the common law right of a partner to bind the partnership.¹⁶⁶ As it was previously assumed that section 69 regulates the question of written authority for purposes of section 2(1) of the Act, section 54 does not address this aspect. The remaining question therefore to be answered *in casu* was whether the *Potchefstroom Dairies* principle applies to an agent of a close corporation who is not a member.

The Supreme Court of Appeal held that where there is no implication of authority by law (*contra* functionaries of a juristic entity who obtain authority through its articles of association or membership) written authority, as required for an agent under section 2(1) of the Act, is necessary.¹⁶⁷ The reason is that authority in the latter instance is conferred by the expression of will and not, as in the instance of a functionary, by operation of law. Lewis JA therefore held that:

“Authority arising by implication of law in this context is that conferred by statute, by the rules of the juristic entity or by the common law in relation to partners. An express authorisation is one given to an agent by a principal who can act for him or herself. In the case of a close corporation the logical principle should in my view prevail: a member who is given authority by statute to bind it needs no written authority. But if a member authorises an agent to enter into a contract for the sale of land on behalf of the close corporation he or she must do so in writing.”¹⁶⁸

To motivate her viewpoint Lewis JA held that a close corporation is intended to be a simple entity, akin to a partnership, but with limited liability and the

162 *Ibid.*

163 Para 17.

164 *Supra* fn 131.

165 *Supra* fn 9 para 14. The position under the new Companies Act is discussed in 7 below.

166 Para 17.

167 Paras 19–22.

168 Para 22.

complex requirements of company law are not intended to apply to close corporations.¹⁶⁹ Thus, it is partnership principles, rather than company-law principles, that should govern the relationship between members. Therefore, a member, like a partner, need not have written authority to enter into a deed of alienation of land. But where a partner or a member authorises an “outside agent” to conclude a deed of alienation of land, written authority, as contemplated in section 2(1) of the Act, is required.

Since there will be no uncertainty on a functionary’s authority in the above scenario, the Supreme Court of Appeal held that this deduction will not defeat the object of section 2(1) of the Act to ensure certainty.¹⁷⁰ This certainty is, however, absent where the authority arises from the expression of will (“express authorisation”) and such authority must therefore be in writing to curtail any uncertainty as to its source.

By this decision the Supreme Court of Appeal overruled *Lombaard v Dropprop CC*¹⁷¹ where it was held that section 54 of the Close Corporations Act is not wide enough to exempt close corporations or its members, when acting as agents on behalf of a close corporation, from compliance with the provisions of section 2(1) of the Act.¹⁷²

6 INFLUENCE OF THE CONSUMER PROTECTION ACT AND COMPANIES ACT ON FORMALITIES

Though section 50(1) of the Consumer Protection Act does not require agreements in general to be in writing, it nevertheless stipulates that the Minister of Trade and Industry may prescribe categories of agreements to be in writing. Alas, the Act does not provide any consequence for non-compliance. If a contract is in writing as required by the Consumer Protection Act or voluntarily, but not signed by the parties thereto, the contract is enforceable despite the fact that it has not been signed. This provision is clearly in conflict with sections 2(1) and 28(1) of the Act. Section 28(1) unambiguously stipulates that if a deed of alienation is not in writing *and* signed by the parties thereto or by their agents acting on their written authority, it will be regarded as null and void.

To solve the above conflict the provisions of section 2(9) of the Consumer Protection Act should be implemented. This section instructs that if there is any inconsistency with any other Act and the Consumer Protection Act, the provisions of both Acts apply concurrently to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening any of the Acts. If this is not possible, the provision that extends the greater protection for the consumer (purchaser) prevails. Needless to say, if the provisions of section 50(1) of the Consumer Protection Act should become applicable to transactions or agreements concerning land, uncertainty will prevail and the impact of sections 2(1) and 28(1) of the Act will be lost.

It should also be kept in mind that if a deed of alienation is signed by an agent, such agent will most probably qualify as an “intermediary”. In this instance section 27(3) of the Consumer Protection Act stipulates that an “intermediary” must

169 Para 25.

170 Para 26.

171 *Supra* fn 2.

172 Para 55.

disclose the information prescribed by the Minister of Trade and Industry to any person whom he or she represents regarding the sale or supply of any property. This information includes the disclosure of his or her personal details, the exact service to be rendered, the fee, commission or costs to which he or she is entitled, the code of conduct applicable, if he or she has been convicted of any offence involving dishonesty and if he or she was placed under sequestration or still is an unrehabilitated insolvent.

Section 69 of the Companies Act previously provided that written authority was not required if an agent acted on behalf of a company.¹⁷³ Section 66(1) of the new Companies Act gives the board of directors the authority to bind the company. It follows that a resolution of the board is required in this regard with exceptions where a director had implied authority or where the company is estopped from claiming lack of authority. It thus appears that written authority will be required in terms of section 2(1) of the Act where companies are involved in the sale of land. However, it is an open question whether the so-called *Potchefstroom Dairies* principle¹⁷⁴ will still be relevant.

8 CONCLUSION

It is clear that section 2(1)¹⁷⁵ of the Act is a disappointment as the legislature's aim with this provision, that is, to prevent litigation, perjury and fraud, is far from successful. On the contrary, it seems that section 2(1) of the Act actually provokes litigation which is often unnecessary and sometimes even causes unwanted hardship. It is our submission that after commencement of the Consumer Protection Act, sellers are in a prejudiced position that will encourage, and not reduce, litigation.

Reading between the lines of many of the decisions dealing with section 2(1) of the Act it becomes clear that this section is often abused by unscrupulous sellers who regret having sold the property and then try to rescind the contract for non-compliance with the technical formality requirements of the Act. The same holds true for purchasers looking for a loop-hole to escape from their contractual obligations. Therefore, this piece of legislation urgently needs revision, bearing in mind its original aims.

Central to this type of statutory provision, is public policy. It is a moot point that public policy is a changing concept. What the public policy was almost a century ago in 1913 when *Wilken* was decided is not necessarily the same today. The question therefore is whether the same arguments previously advanced for the need to have this legislation in the current format still hold true today.

To conceptualise the flexible contents of "public policy" the following remarks of Ngcobo J in *Barkhuizen v Napier*¹⁷⁶ offer some guidance:

"Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it. Indeed, the foundation provisions

173 See 5 above.

174 *Ibid.*

175 Read together with s 28.

176 2007 5 SA 323 (CC).

of our Constitution make it plain: our Constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law.”¹⁷⁷

Moseneke DCJ (in his minority judgment) went even further in asserting the importance of the public-policy threshold and held as follows:

“Public policy cannot be determined at the behest of the idiosyncrasies of individual contracting parties. If it were so, the determination of public policy would be held ransom by the infinite variations to be found in any set of contracting parties. In effect, on the subjective approach that the majority judgment favours, identical stipulations could be good or bad in a manner that renders whimsical the reasonableness standard of public policy.”¹⁷⁸

Thus, “public policy” in this instance is under pressure in so far as section 2(1) of the Act is not within the value parameters set for this type of legislation today. Is there, for example, still a need to protect those who cannot protect themselves in this regard?

An important factor to be considered is that most of the contracts in relation to land come into existence through estate agents or lawyers who are generally not laymen in this regard and are in a position to provide guidance to their clients. For this reason, *inter alia*, the following possible scenarios to amend section 2(1) read with section 28 are briefly suggested: No formalities or less strict formalities (for example, only in writing) are required; formalities are required and non-compliance will render the agreement voidable; provided that the aggrieved party is able to prove prejudice; notarial execution is required; a statutory rectification window-period can be created along the lines of a “cooling off” provision; or a combination of the aforementioned.

An in-depth investigation of this problem is inevitable and it is recommended that the South African Law (Reform) Commission be tasked with re-evaluation of the legal position.

177 *Supra* fn 176 paras 28–30.

178 Paras 98–104.