On constitutive formalities, estoppel and breaking the rules

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1. Introduction

This article focuses on the general rule in South African law that a successful reliance on estoppel should not result in the enforcement of an agreement prohibited by law. [1] More particularly,

it considers the application of the rule in the context of formally defective sales of land and suretyships, where section 2(1) of the Alienation of Land Act 68 of 1981 and section 6 of General Law Amendment Act 50 of 1956 respectively prescribe nullity in the event of formal non-compliance. [2] The contention is that the blanket exclusion of estoppel here should be reconsidered.

As we shall see, certain civilian and common-law jurisdictions recognise that there are circumstances which justify the award of a remedy which gives effect to a party's reliance or expectation interest, even where formal requirements dictate that the contract is void or unenforceable due to non-compliance. For example, English courts have considered the applicability of estoppel and German courts may award a remedy based on paragraph 242 of the *Bürgerliches Gesetzbuch* ("*BGB*"), or in terms of the doctrine of *culpa in contrahendo.* These alternative approaches are discussed below, in order to determine whether they are in any sense useful and usable within the South African context.

At this point, the reader may be forgiven for wondering what the topic has to do with Gerhard Lubbe, to whom this special edition of the *Stellenbosch Law Review* is dedicated. This article ultimately argues that sometimes it would be in the public interest to allow estoppel to operate so that, indirectly, effect is given to a formally invalid agreement. This is based on Lubbe's proposition that public policy, and indeed private law in general, is based on competing

values or principles which must be weighed against each other in order to reach a fair outcome in a particular situation. [3] Thus, he has stated that

> "*'n [b]eskouing van die privaatreg toon onomwonde dat die outonomiebeginsel nie die enigste tersake beginsel is nie. Ons reg erken meerdere, kompeterende beginsels en beleidsfaktore wat benewens die outonomiebeginsel fungeer as determinante van regsreëls en -instellings. Alhoewel meerdere relevante oorwegings in 'n bepaalde geval op dieselfde regsgevolg mag dui, sal dit dikwels gebeur dat hulle in botsing staan met mekaar en uiteenlopende regsgevolge voorskryf … Botsende of kompeterende beginsels moet relativerend in ag geneem word by die daarstel van regsreëls en -instellings. Regters moet gewigte toeken aan mededingende beginsels en oorwegings en reëls en begrippe ontwikkel wat uitdrukking gee aan hierdie waarde-ordening*." [4]

Although this view was expressed as a prelude to explaining why fault may sometimes be required for a successful reliance on the defence, it is broad enough also to suggest an approach to dealing with the other requirements for the operation of estoppel, [5] including the rule that estoppel should not succeed where this would be contrary to public policy. Accordingly, the next section of this article will examine the competing policy considerations underlying constitutive formalities, before proceeding to a discussion of the ways in which different legal systems provide judges with the means to navigate between these competing considerations.

2. The functions and dysfunctions [6] of form

The notion that formalities fulfil certain functions is not novel. [7] They may promote certainty, in that compliance with the relevant provisions forces parties to reduce their agreement to writing, with the document serving as evidence of that agreement. The reduction of the agreement to writing can also draw a party's attention to the fact that he may be assuming a potentially onerous obligation and that he should exercise caution before doing so. Finally, writing can signal the end of the negotiation phase, and serve as a means to distinguish between enforceable and unenforceable transactions. Lon Fuller referred to these advantages as the evidentiary, cautionary and channelling functions of formal requirements. [8]

The fact that formalities fulfil these functions can make them a useful tool to prevent fraudulent claims in transactions like the sale of land and suretyships

where this concern is prevalent. In *Wilken v Kohler* this overarching fraud-prevention purpose was held to be in the public interest:

> "Buyers and sellers of land form no class by themselves; nor do they suffer from any disability or weakness requiring protection. The object of the Legislature could not have been specially to favour so indeterminate a body. 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 the 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 … I am satisfied that the provision was adopted not for the advantage of any particular class of persons, but on grounds of public policy." [10]

The formal requirements prescribed for suretyships have the same aim, and are also in the public interest. [11]

The advantages of formalities illustrate why it is permissible to limit contractual freedom in a legal system where the point of departure is that contractual liability is based on the will of the parties. [12] As Lubbe has noted, the value of contractual autonomy – which underlies the notion of contractual freedom – is only one of several norms or values in any legal system. [13] In the context of statutory formalities, it is outweighed by the need for legal certainty and the consideration that in order to prevent the possibility of fraud, only those expressions of will which adopt a particular form will be regarded as valid. [14]

However, it is also true that formalities have certain disadvantages; these "dysfunctions" have not gone unnoticed within the South African context. For example, complying with formal requirements requires skill and technical knowledge which most laypersons do not have, forcing them to resort to legal assistance. [15] In addition, the regular disputes regarding whether there has been sufficient compliance with formal requirements shows that formalities can increase, rather than decrease, litigation. [16] To my mind however, the most damning criticism of formal requirements is that they create the risk of becoming "a refuge for contract-breakers" [17] by permitting a party to rely on a technical defence of formal non-compliance to escape an otherwise validly concluded contract. [18] This abuse of formalities, whether self- or statutorily-

imposed, is variously described as a type of fraud, [19] unconscionable [20] or con-trary to good faith. [21]

South African courts vacillate between strict insistence on compliance with formal requirements, and an approach which acknowledges that

formalism can lead to inequitable results. For example, when it comes to determining with what degree of precision parties must record the terms of their agreement, it has been held that meticulous accuracy in the recordal is not required, in spite of the fact that this is probably the best way to give effect to the evidentiary function. [22] This more lenient approach has been adopted in order to prevent the relevant legislation being used as an instrument of fraud. [23]

However, when it comes to granting remedies to a party to a formally invalid agreement, South African courts have followed a strict interpretation of the consequence of invalidity for non-compliance. The general position is that in the absence of full performance, [24] a party is limited to an enrichment remedy to reclaim his performance and is not awarded what he bargained for, in spite of the fact that the other party may have led him to believe that he would abide by the formally defective agreement. Such a restrictive approach does not take into account the possibility that statutory formalities are being abused and that the party raising the defence of non-compliance may have acted unconscionably. Other legal systems afford more explicit recognition to the criticism that formalities can be used as an instrument of fraud and tailor their remedies accordingly. For this reason, what follows does not commence with an exposition of current South African law – the strictness of its approach to remedies in the context of statutory formalities becomes clearer once the more liberal English and German approaches have been illustrated.

3. Paragraph 242 *BGB* and the doctrine of *culpa in contrahendo* in German law

As in South Africa, non-compliance with formalities prescribed for suretyships and sales of land results in invalidity in German law. [25] It nevertheless appears that there is some recognition that circumstances may exist which would render it inequitable for a party to rely on a formal defect to escape the consequences of an agreement which was seriously intended. In these situations, there are two possible remedies available to the other party, the bases of which are found in paragraph 242 *BGB* (which stipulates that a party has a duty to act in good faith) and in the doctrine of *culpa in contrahendo* respectively.

A remedy in terms of paragraph 242 *BGB* for non-compliance with formalities is provided only in exceptional circumstances, and on a case-by-case basis. [26] A particularly illustrative case is colloquially known as *Edelmann II.* The plaintiff had bought a plot of land from the defendant in terms of a written agreement which was not notarised, but which bore the signature of the defendant's managing director (who had also been the plaintiff's employer at an earlier time). When the plaintiff requested that the written agreement be notarially authenticated, the managing director responded that it was his "'habit to honour his obligations no matter whether they were made orally, in writing, or were in notarial form.'" [28] When the plaintiff continued to insist that the agreement should comply with the formal requirements, the managing director replied by stating that he had signed on behalf of the defendant company, and that the contract was as good as a notarial act. [29]

According to the court, the previous employment relationship between the plaintiff and the managing director meant that the latter "was in his eyes endowed with special authority" [30] which made it virtually impossible for him to insist that the agreement should be notarially authenticated. Furthermore,

> "the defendant announced in such an emphatic manner his intention to perform the contract, which was invalid in form, by pledging his status and reputation and by referring to his business practice that he cannot resile free from contract without offending against good faith. Reliance subsequently on the formal invalidity of the contract, constitutes an [inadmissible] exercise of his right, irrespective of the fact that the plaintiff was not in error as to the formal requirements." [31]

The court enforced the formally invalid contract, because the failure to do so would have led to a "totally unbearable" (*schlechthin untragbar*) result. [32]

Thus, before granting a remedy in terms of paragraph 242 *BGB*, a court will weigh up the following factors: knowledge on the part of the defendant that the contract was formally defective; the lack of such knowledge at the time of contracting on the part of the plaintiff (although *Edelmann II* indicates that this is not decisive); detrimental reliance by the plaintiff; and the adequacy of relief provided by enrichment remedies or in terms of the doctrine of *culpa in contrahendo*. [33] The latter remedies are regarded as inadequate when they are incapable of alleviating a "totally unbearable" situation. Such a situation arises in primarily two types of cases: where the (economic) existence of the innocent party would "be destroyed or substantially endangered" by not giving effect to the contract, [34] or where the guilty party has displayed a particularly serious

breach of good faith by relying on the formal defect (which is usually found to exist where that party prevents the other from complying with a formal requirement and thereafter invokes the defect). [35] If the plaintiff is successful in proving these requirements, specific performance will be awarded. [36]

In terms of the *culpa in contrahendo* doctrine, parties incur a duty of care towards each other during the negotiation phase. In the case of non-compliance with statutory formalities, relief is granted where one party knew or should have known of the formal requirement, while the other did not and was also not under a duty to inquire further. [37] The relief granted in terms of this doctrine does not consist of specific performance but of reliance damages, because the former would amount to "'performance of the contract and not the giving of damages … and thus amount to a setting aside of the … formal provision". [38] However, at least in one case, damages were measured according to what the party would have received had the contract been validly concluded. [39] In effect, the remedy indirectly enforced the invalid contract.

The remedies available in German law share a common element: the notion that in certain circumstances it would be unfair to allow a party to rely on formal defectiveness where the other party has reasonably acted on the assumption that the contract is valid and enforceable. The need to do particular justice on the facts outweighs the policy considerations informing statutory formalities, with the result that the contractual expectation is directly (or indirectly) enforced. In such a case, the outcome of strict insistence on formal requirements would be "'unconscionable' or it would be 'inequitable' to allow the other party to go back on his promise". [40]

Estoppel is the subject of the following section. It will become apparent that the same equitable considerations which underlie the remedies discussed thus far, also inform the English courts' approach to the use of estoppel in the context of formalities. In South African law, estoppel in this context is more problematic.

4. Estoppel in English and South African law

4.1 Introduction

Estoppel operates to prevent one party (the representor) from denying the truth of a representation made by him where the other party (the representee)

has acted on that representation to his detriment or, at least, where the latter can prove that he would suffer prejudice if the truth of the representation were denied. [41] In South African law, a successful defence of estoppel must therefore show that there has been a representation by the representor; detriment on the part of the representee; and a causal relationship between the representation and the detriment. [42] As mentioned at the beginning of this article, it is also stated as a general rule that a successful reliance on the defence should not result in the enforcement of an agreement which is prohibited by law. This includes agreements which are invalid because they are illegal, *ultra vires* or formally defective. [43] As Steyn CJ put it in *Trust Bank van Afrika Bpk v Eksteen*: [44]

> "*Dit is 'n erkende beginsel van ons reg dat wat by direkte optrede in stryd met 'n wetlike voorskrif van nul en gener waarde sou wees, nie deur indirekte optrede geldig gemaak kan word nie. So ' n voorskrif wat teen 'n bepaalde transaksie gerig is, tref ook enige optrede wat die voorskrif sou verydel*." [45]

English law also recognises, as a point of departure, the general rule that estoppel may not be used to circumvent the provisions of a statute. [46] From a South African perspective, therefore, it is somewhat surprising to discover that English courts are willing to consider the operation of estoppel even where the agreement does not comply with statutory formalities. The next section will examine this approach, before considering whether there are any exceptions to the rule in South African law.

4.2 Estoppel and statutory formalities in English law

In English law, the application of estoppel in the context of formal non-compliance may be ascribed to the judicial awareness that there are statutes which, "though declaring transactions to be unenforceable or void, are nevertheless not essentially prohibitory and so do not preclude estoppels". [47] This requires an examination of the statutory provision, its purpose and the social policy behind it, before deciding whether estoppel will be successful. [48]

Such an examination occurred in *Actionstrength Ltd v International Glass Engineering IN.GL.EN. SpA* ("*Actionstrength*"). [49] Actionstrength, a sub-contractor, had not been paid by the general contractor and threatened the owner of the site (St-Gobain) with rescission of the contract and withdrawal of its labour. A representative of the owner promised Actionstrength that if St-Gobain could not persuade the general contractor to meet its obligations, it would itself pay the appellant. Relying on this promise, Actionstrength continued to provide labour. The general contractor failed to pay and then St-Gobain also refused to pay.

Because the contract between Actionstrength and St-Gobain was a contract of guarantee (a suretyship in South African law), it was unenforceable because it had not been reduced to writing as required by section 4 of the Statute of Frauds 1677 (the "Statute of Frauds"). In determining whether Actionstrength could successfully estop St-Gobain from relying on the defence of formal non-compliance, Lord Hoffmann stated that

> "[t]he terms of the statute … show that Parliament, although obviously conscious that it would allow some people to break their promises, thought that this injustice was outweighed by the need to protect people from being held liable on the basis of oral utterances which were ill-considered, ambiguous or completely fictitious." [50]

However, these policy concerns were insufficient in themselves to prevent estoppel from being applicable. The purpose of the Statute of Frauds is not to protect particularly vulnerable classes of people, whose weaknesses may be exploited in the absence of some kind of statutory protection. [51] Allowing estoppel to succeed in the latter case would render that protective purpose nugatory. By contrast, the provisions of the Statute of Frauds are intended to prevent the imposition of liability based on "oral utterances" which were never made, or were ill-considered. These policy considerations do not justify the automatic exclusion of estoppel. This is an important point, because it emphasises that statutory formalities can be imposed for different reasons, not all of which dictate that estoppel should be unsuccessful as a matter of course.

The real reason why estoppel was unsuccessful in *Actionstrength* was because no representation, beyond the oral agreement concluded with St-Gobain, had been made to induce or encourage Actionstrength to believe that it was the recipient of an effective guarantee. It was not enough that the creditor acted on the assurance given by the purported guarantor, since this is the case with every guarantee. [52] To admit an estoppel on this representation alone would, in effect, amount to repealing the Statute. [53] While Lord Hoffman declined to consider whether estoppel could ever succeed in the context of formally defective guarantees, three judges did suggest that it might, where

there was an "extra ingredient" such as a representation that the guarantor would honour the agreement despite the absence of writing, or that it was not a contract of guarantee, or that the agreement would be confirmed in writing. [54] In other words, the representation must consist of something more than the mere conclusion of an oral guarantee. Because this "extra ingredient" was not present on the facts of this case, Actionstrength could not recover the £1.3 million due to it.

Estoppel has also been considered in the context of formally defective sales of land. The particular form of estoppel applied in this context is proprietary estoppel, [55] which is applicable where

> "[t]he owner of the land, A, in some way leads or allows the claimant, B, to believe that he has or can expect some kind of right or interest over A's land (or, more generally, his property). To A's knowledge, B acts to his detriment in that belief. A then refuses B the anticipated right or interest in circumstances that make that refusal unconscionable." [56]

Prior to the promulgation of the Law of Property (Miscellaneous Provisions) Act 1989 (the "Law of Property Act"), a party to a formally defective sale of land could have relied on the doctrine of part performance as codified in English law by section 40(2) of the Law of Property Act of 1925. [57] Where the claimant had partly performed an oral contract required to be evidenced in writing, he could claim specific performance of that contract (or damages *in lieu* thereof) if the defendant had allowed him to alter his position in the belief that the defendant would also perform his part of the agreement. [58] The doctrine represents one of the earliest confrontations with the problem raised earlier in this article, namely that the defence of formal non-compliance can provide a refuge for a party who seeks to deny the existence of an (otherwise valid) oral contract, despite having allowed the other contracting party to act on the assumption that such a contract exists. [59] Due to the uncertainty surrounding its requirements however, [60] the English Law Commission (the "Commission") suggested that non-compliance with formalities prescribed in

terms of the current legislation should result in invalidity, [61] thus effectively precluding the operation of the doctrine in the context of formally defective sales of land. [62] The Commission did acknowledge that there could be instances where the inability to rely on the doctrine might lead to harsh consequences for the plaintiff, but it believed that other equitable remedies, like estoppel, would still be available in cases of potential injustice. [63] Despite this confident assertion, the Law of Property Act does not refer to estoppel; instead, section 2(5) simply states that "nothing in [section 2] affects the creation or operation of resulting, implied or constructive trusts."

This has created uncertainty as to the exact role which estoppel may play in the context of transactions relating to land. Can a claimant succeed with proprietary estoppel alone, or must the facts (also) give rise to a constructive trust before relief is granted? This question was addressed, *inter alia*, in *Yaxley v Gotts* ("*Yaxley*") [64].

Yaxley and Gotts concluded an oral agreement in terms of which the appellant undertook to make certain improvements to, and manage, a block of flats in return for which he would acquire ownership of the ground floor. This agreement was not reduced to writing, although the respondent did indicate that he would do so at a later stage (the "extra ingredient"). Ownership of the ground floor was never transferred. On appeal, the respondent argued that the appellant was not entitled to estop him from relying on the formal invalidity of the oral agreement, but should rather have instituted a claim for restitution of the value of the work and services he had rendered.

However, Robert Walker LJ had

> "no hesitation in agreeing … that the doctrine of estoppel may operate to modify (and sometimes perhaps even to counteract) the effect of section 2 of the [Law of Property (Miscellaneous Provisions)] Act … The circumstances in which section 2 has to be complied with are so various, and the scope of the doctrine of estoppel is so flexible, that any general assertion that section 2 is a 'no-go area' would be unsustainable." [65]

At the same time, the judge stressed the need to take into account the policy considerations underlying the imposition of formalities. [66] As in *Action-strength* where formalities relating to guarantees were considered, the formal requirements imposed on land transactions did not have as their purpose the protection of particularly vulnerable categories of persons:

> "Parliament's requirement that any contract for the disposition of an interest in land must be made in a particular documentary form, and will otherwise be void, does not have such an obviously social aim as statutory provisions relating to contracts by or with moneylenders, infants, or protected tenants. Nevertheless it can be seen as embodying Parliament's conclusion, in the general public interest,

that the need for certainty as to the formation of contracts of this type must in general outweigh the disappointment of those who make informal bargains in ignorance of the statutory requirement. If an estoppel would have the effect of enforcing a void contract and subverting Parliament's purpose it may have to yield to the statutory law which confronts it, except so far as the statute's saving for a constructive trust provides a means of reconciliation of the apparent conflict." [67]

According to Robert Walker LJ, such reconciliation was possible where the facts met the requirements of both proprietary estoppel and a constructive trust, as they did in this case. [68] He noted that where there is an agreement or some understanding between the parties upon which the claimant has acted, then there is in effect no difference between the two remedies. In both cases, "[e]quity enforces [the oral agreement] because it would be unconscionable for the other party to disregard the claimant's rights". [69]

Beldam LJ went further still, by stating that it was possible that estoppel could succeed even where it did not overlap with a constructive trust:

"I cannot see that there is any reason to qualify the plain words of section 2(5). They were included to preserve … equitable remedies. I do not think it inherent in a social policy of simplifying conveyancing by requiring the certainty of a written document that unconscionable conduct or … fraud should be allowed to prevail … [T]he provision that nothing in section 2 of the Act of 1989 is to affect the creation or operation of resulting, implied or constructive trusts effectively excludes from the operation of the section cases in which an interest in land might equally well be claimed by relying on constructive trust or proprietary estoppel." [70]

Although Beldam LJ's judgment created the impression that estoppel would succeed even when the facts did not also give rise to a constructive trust, the matter remained controversial. For example, in *Cobbe v Yeoman's Row Management Ltd* ("*Cobbe*"), [71] Lord Scott made the *obiter* remark that proprietary estoppel could not succeed on its own, because "[e]quity can surely not contradict [a] statute" [72] which provides that an oral agreement for the sale of land is void. Lord Neuberger, writing extra-judicially, has criticised this statement however. He argues that Lord Scott's approach is capable of two interpretations: either proprietary estoppel will never succeed in the context

of a formally defective sale of land or it will succeed only where the parties have made no attempt to conclude a contract and the claimant is relying on an informal statement or indication by the defendant regarding a proprietary right (the argument being that since the parties had not intended to conclude a contract, section 2(1) of the Law of Property Act is not applicable). [73] According to Lord Neuberger, the former interpretation places an unreasonable restriction on the operation of proprietary estoppel; [74] the latter means, rather perversely, that the stronger the claimant's case (for example, because he can prove the existence of an oral agreement) the less likely he is to succeed with a claim (or defence) based on proprietary estoppel. [75] The unpalatable result of either interpretation leads him to conclude that proprietary estoppel should be available, even in the context of a formally invalid contract, where "the claimant, with the conscious encouragement of the defendant, has acted on the belief that there is a valid contract". [76] This conclusion is reflected in cases decided after *Cobbe*, and it now appears to be possible to claim relief based solely on proprietary estoppel. [77]

It seems therefore that an English court will not refuse to entertain estoppel simply because the agreement fails to comply with statutory formalities and is for that reason unenforceable or void. This is not to say that the mere conclusion of a formally defective agreement is sufficient for it to operate. Even where the facts indicate that the defendant's reliance on formal non-compliance is particularly unappealing,

"it is simply not for the courts to go galumphing in, wielding some Denningesque sword of justice, to rescue a miscalculating, improvident or optimistic [claimant] from the commercially unattractive, or even ruthless, actions of a [defendant], which are lawful at common law." [78]

However, it is suggested that where the conclusion of the formally defective agreement is accompanied by the assurance either that the agreement is immediately binding and enforceable or that the defendant will abide by it despite formal non-compliance, estoppel should succeed, provided all the other requirements have been met. In these instances, it would be unconscionable for the defendant to withdraw his assurance and rely on the fact that the agreement does not comply with statutory formalities. [79]

4.3 Estoppel and statutory formalities in South African law

Although South African law will not allow a contracting party to succeed with a defence of estoppel if this would lead to the enforcement of a formally

defective agreement, [80] it does appear to be possible for a third party to rely on the defence against one of the original contracting parties to such an invalid agreement.

In *Trust Bank van Afrika Bpk v Eksteen* ("*Trust Bank*") [81] the appellant discounted a number of hire-purchase agreements, or what appeared to be such agreements, in terms of the Hire Purchase Act 36 of 1942 (the "Hire Purchase Act"). The parties to these agreements were a partnership, as the seller, and a number of purchasers of motor vehicles. In addition to the discounting agreement, the partners also bound themselves to the appellant bank as sureties for the debts of the purchasers. Some of the hire-purchase agreements were void due to non-compliance with section 7(1) of the relevant legislation, because the purchasers had not paid the prescribed deposits (contrary to what was contained in the written hire-purchase agreements). When some of the debtors defaulted, the appellant instituted a claim against the respondent as surety. The respondent alleged that because the hire-purchase agreements themselves were void, the suretyship agreement was also void.

Nevertheless, the appellant successfully estopped the respondent from relying on the invalidity of the suretyship agreement. The latter had intentionally created the impression that the principal debts were valid, a representation which was not contradicted *ex facie* the documentation. [82] According to Steyn CJ, this representation was sufficient for the defence of estoppel to succeed. Furthermore, to enforce the invalid suretyship agreement did not contravene the objects of section 7(1) of the Hire Purchase Act, one of which was to discourage people from purchasing goods that they could not afford. [83] If estoppel were to be raised by one of the original contracting parties against his counterparty, this protective function would be negated. This was not the case if estoppel was used to maintain the representation that the suretyship was valid:

"Ek kan egter nie aanneem nie dat die wetgewer in art. 7(1) bedoel het om met die geldigheidsvereistes, in 'n geval soos hierdie, 'n niksvermoedende derde te verhinder om estoppel op te werp, en hom sodoende in dieselfde posisie te plaas as iemand wat die doel van die wetgewer wou verydel. Dit wil

my voorkom dat die estoppel waarop die appellant hom beroep, nie in 'n geval van hierdie aard deur genoemde beginsels uitgesluit word nie." [84]

This conclusion of the court finds approval with commentators such as Nienaber. [85]

However, Steyn CJ goes on as follows:

"*[D]at ongeldigheid tussen twee partye 'n beroep op estoppel deur 'n derde uitsluit, is ook nie 'n beginsel wat deur ons regspraktyk bevestig is nie*". [86]

He seems to be suggesting here that also where the third party claims in terms of the original invalid agreement, it may be possible to rely on estoppel (for example, on the facts of *Trust Bank*, if the appellant sued the purchasers in terms of the invalid hire-purchase agreements). [87]

The minority judgment of Hoexter JA goes further. According to him,

"[t]he doctrine of estoppel is an equitable one, developed in the public interest, and it seems to me that whenever a representor relies on a statutory illegality it is the duty of the Court to determine whether it is in the public interest that the representee should be allowed to plead estoppel. The Court will have regard to the mischief of the statute on the one hand and the conduct of the parties and their relationship on the other hand." [88]

Hoexter JA acknowledged that the suretyship between the parties was invalid, but held that it was *dolus* on the part of the respondent to deny the very fact which he had held out to be true to the appellant. [89] As a result, he also held that estoppel should succeed.

Although Hoexter JA's flexible approach is reflected in a few subsequent cases, [90] it has been observed that the decision in *Philmatt (Pty) Ltd v Mosselbank Developments CC* ("*Philmatt*") [91] appears to have foreclosed the possibility that estoppel could ever succeed in the context of constitutive formalities. [92] Here, the respondent offered to sell a number of properties to Wale Street Industrial Finance Limited or its nominee. A written contract of sale was

concluded, and the appellant was subsequently nominated as the buyer. When the appellant tendered payment and demanded transfer of the properties in its name, the respondent alleged that the written agreement between itself and Wale Street was void because it failed to record a suspensive condition. One of the defences raised by the appellant was estoppel.

After confirming the general principle that estoppel cannot be relied upon to enforce a (formally) invalid contract, [93] the court considered the contention that this does not apply when an innocent third party steps into the shoes of one of the original parties and relies on a representation that an agreement is valid. In support of this argument, the appellant cited the statement by Hoexter JA quoted above. The court dismissed the appellant's argument on the following bases. First, the respondent had not represented that a formally valid deed of alienation had been concluded between the original parties. [94] Secondly, none of the other judges in the *Trust Bank* case concurred in Hoexter JA's judgment. [95] Finally, the basis for Hoexter JA's judgment was *dolus* on the part of the respondent in that the respondent had specifically represented to the appellant that the hire-purchase agreements were valid, when in fact they were not. No such unconscionable behaviour was present on the facts of the current case. [96]

It will be noted that the court did not refer to the statement made in the majority decision in *Trust Bank* that seems to have a similar effect to that in Hoexter JA's judgment, albeit not stated as broadly. Furthermore, the court in *Philmatt* did not expressly hold that an innocent third party can never rely on estoppel in the face of formal invalidity, merely that on the facts before it, no representation had been made as to the formal validity of the agreement. I think it is therefore arguable that the possibility remains that a third party may successfully raise the defence to prevent an original party from relying on the formal invalidity of the agreement.

It is perhaps appropriate to summarise the discussion of estoppel to this point. We have seen that English law does not automatically exclude estoppel where an agreement is formally defective. Rather, the focus is on the policy considerations underlying a particular formal requirement, in order to determine whether they also dictate that estoppel should not succeed. Regarding formalities imposed for guarantees and sales of land, the general opinion seems to be that these formal requirements do not aim to protect categories of persons who are vulnerable to exploitation, oppression or overreaching. For that reason, estoppel in this context is not automatically excluded in terms of policy considerations, although the facts may indicate that the (other) requirements of estoppel have not been met. While South African courts have not engaged in this type of policy-based analysis when estoppel has been raised by one of the original contracting parties to a formally defective contract, it did inform the judgment in the *Trust Bank* case, albeit in

the context of an agreement which was void for failure to comply with another type of statutory prescription. The court specifically considered whether a successful plea of estoppel by a third party would contravene the protective purpose of the Hire Purchase Act and held that it would not.

It is therefore unclear why a South African court cannot engage in the same type of analysis where estoppel is raised by one of the original contracting parties, or by a third party against one of the original contracting parties. Instead, it is repeatedly emphasised that formal requirements which are aimed at preventing fraud are imposed in the public interest and, consequently, that estoppel may not be used to uphold a formally invalid agreement. [97] A similar sentiment has been expressed in recent cases dealing with estoppel and *ultra vires* conduct on the part of public authorities. [98] However, in those cases a decision to uphold a defence of estoppel against a public authority which had acted *ultra vires* might indirectly have condoned nepotism or patronage and ultimately have placed a disproportionate and unnecessary burden on taxpayers. [99]

By contrast, it is not self-evident that a decision to uphold a defence of estoppel in the context of a formally invalid contract could have equally broad ramifications for the public interest. It is worth emphasising at this point that the argument is neither that estoppel should succeed simply because a party has acted in bad faith nor one which favours an approach as broad as that adopted in English law, where even an informal statement regarding a proprietary right might be sufficient to found a claim based on proprietary estoppel. Both propositions would undermine legal certainty, a primary policy consideration underlying the law of contract in general and formalities in particular. [100] However, where parties have concluded an otherwise valid agreement, the most likely inference to be drawn from a resort to a defence of formal non-compliance is that a party is seeking to escape the agreement for opportunistic reasons and not due to evidentiary or other concerns. [101] Admittedly, constitutive formalities do permit such behaviour. [102] It is suggested nevertheless that it is not in the public interest to give effect to this purported exercise of the right to resile from a seriously intended agreement, when its conclusion was

accompanied by a representation to the effect that it was binding and on which a party has acted to his detriment. In this context, I would argue that policy considerations like *pacta servanda sunt*, *ubuntu* and the fact that a party is abusing formalities legislation [103] indicate that estoppel should be successful, with the consequence that the formally defective agreement is upheld.

Accepting the general proposition that it is sometimes in the public interest to allow a defence of estoppel to succeed in spite of the existence of a formally invalid contract, does not imply that the mere conclusion of such an invalid contract constitutes a sufficient basis for a successful defence. As indicated in *Edelmann II*, *Actionstrength* and *Yaxley*, and as suggested in the *Trust Bank* and *Philmatt* cases, there must be a representation made by the estoppel-denier to the estoppel-raiser (whether one of the contracting parties or a third party) that the agreement is valid or, perhaps, that he will abide by the agreement in spite of the fact that it does not comply with formal requirements. Where a third party relies on the defence, it is suggested further that it should not be possible to discern, whether from the document itself or from surrounding circumstances, that the agreement upon which he relies is formally defective. For example, in *Trust Bank* the agreement appeared to be valid *ex facie* the document and it would have been unreasonable to expect the appellant to question every principal debtor as to the validity of his hire-purchase agreement.

Whether knowledge of possible formal invalidity on the part of an original contracting party should preclude a defence of estoppel is a more complex issue. However, *Edelmann II* and the minority judgment of Hoexter JA in *Trust Bank* both suggest that in such a case, a court should consider the relationship between the relevant parties and determine the extent to which the estoppel-raiser was in a position to insist that the formal requirements should be met.

Such an analysis might have yielded an alternative solution in *Mouton v Hanekom*. [104] The respondent had been suffering financial difficulties and in return for a loan from the appellant, agreed that his (the respondent's) farm would be transferred into the appellant's name. This agreement was reduced to writing. The parties also agreed that upon repayment of the loan and transfer costs, the appellant would re-transfer the farm to the respondent. Although the parties were informed by their legal advisor that this agreement should be incorporated in the written agreement, they deliberately excluded it. While the respondent succeeded with a claim for rectification, the facts of the case arguably do not support the award of such a remedy. [105] However, they

do indicate that the respondent had little or no commercial experience while the appellant, his nephew, was a successful businessman; [106] that the appellant insisted that he would only assist the respondent with a loan if the latter sold his farm to him; [107] that the respondent was reluctant to do so and only agreed to the sale when the appellant promised that he could buy back the land for the same price plus transfer costs; [108] and finally, that when informed that the *pactum de retrovendendo* should be reduced to writing, the appellant stated that this was unnecessary because the parties were kin and he would keep his word. [109] It is suggested that even though the respondent was aware that

the agreement should have been in writing, the fact that he was at a commercial disadvantage and closely related to the appellant meant that he was not in a position to insist that the formal requirements should be met. The appellant on the other hand exploited the relative weakness of the respondent, in addition to indicating that he would honour the bargain. Against this background, I think that this case provides a particularly good example of a situation in which estoppel should succeed, notwithstanding the respondent's knowledge that the *pactum de retrovendendo* should have been reduced to writing.

5. Conclusion

This article has investigated the fairly restrictive South African approach to remedies in the context of formally defective contracts in comparison with the more flexible approach adopted by English and German courts. We have seen that courts in the latter jurisdictions acknowledge that there are instances where an individual's expectation or reliance interest should be protected, despite the fact that he is party to an agreement that does not comply with statutory formalities. The remedies awarded in terms of the doctrine of *culpa in contrahendo* and paragraph 242 *BGB* in German law, and the use of estoppel in English law, reflect the judicial recognition that a party who relies on formal non-compliance is behaving unconscionably if he had previously led the other party to believe that he would abide by the agreement. It is the retraction of this assurance which entitles the innocent party to relief.

By contrast, the current South African approach does not appear to be inclined to take into account equitable considerations when determining the appropriate remedy in instances of formal invalidity. Instead, it is held that a mechanism like estoppel can never succeed when it would have the indirect effect of enforcing a formally defective contract, because such a consequence would undermine the policy considerations underlying constitutive formal-ities. Not only is this attitude inconsistent with the willingness of South African courts to balance different policy considerations in other areas of the

law, [110] but it also fails to take into account the view that estoppel is flexible enough that a distinction may be drawn between various situations insofar as its requirements are concerned. [111]

There appears to be no reason why it should not be possible for a South African court to distinguish between different policy considerations in the context of formally invalid agreements. Some formal requirements are imposed for protective purposes, which suggest that a successful reliance on estoppel would render that protective purpose nugatory. Others, like those prescribed for suretyships and sales of land, are not aimed at addressing the vulnerabilities of particular classes of contracting parties, but are imposed for more general purposes, like the prevention of fraud, perjury and unnecessary litigation. While the latter policy considerations are in the public interest, I believe that it is equally in the public interest that a formal requirement should not be used to promote the type of unconscionable behaviour inherent in relying on a mere technical defence to escape contractual liability.

The merit of the German and English approaches in this regard is twofold: they support the type of policy analysis already discussed, and they clarify the considerations to be taken into account when determining whether a court should enforce a formally defective agreement. Neither approach advocates judicial "galumphing" (Denningesque or otherwise); rather, they reflect an attempt to maintain a balance between the need for legal certainty on the one hand and the need to reach an equitable decision in a particular instance on the other. A reassessment of the South African approach would allow our law to develop and mature in line with its civilian and common-law counterparts and avoid the harshness inherent in the current position.

Summary

This article examines the rule that estoppel should not succeed when it would lead to the indirect enforcement of an agreement prohibited by law. A comparative perspective reveals that the South African approach to this rule in the context of agreements subject to constitutive formalities is quite restrictive and fails to take into account the possibility that a party is relying on formal non-compliance to escape an agreement that was seriously intended. By contrast, an examination of the English and German approaches to remedies in the event of formal invalidity suggests that it is possible to navigate the tension between giving effect to the policy considerations underlying formal requirements on the hand and the need to do justice on the other. Neither approach suggests remedial intervention simply in the interests of fairness; rather, both approaches consider the purpose of a particular statutory formality and the prior conduct of the party who now seeks to rely on formal non-compliance to determine whether a remedy (which might result in the enforcement of a party's expectation or reliance interest) should be granted. It is in the light of these comparative lessons, that it is argued that the South African approach to the use of estoppel in this context should be reconsidered.

1 See eg *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) SA 1 (SCA) para 13; *Nyandeni Local Municipality v Hlazo* 2010 (4) SA 261 (ECM) para 49; JC Sonnekus *Rabie and Sonnekus The Law of Estoppel* 3 ed (2012) 291; PJ Visser & JM Potgieter *Estoppel: Cases and Materials* (1994) 307; S van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract: General Principles* 4 ed (2012) 29.

2 The decision to focus only upon sales of land and suretyships is deliberate. Determining whether estoppel should succeed in the context of constitutive formalities depends, *inter alia*, upon the purpose of a particular formal requirement (see 4 below). It is beyond the scope of this article to consider this issue in relation to all the different types of agreements subject to formalities which result in nullity in the event of formal non-compliance. The hope is that the limited focus of this discussion might nevertheless suggest a general approach to the use of estoppel in this area of the law.

3 See eg GF Lubbe "*Bona Fides*, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontraktereg" (1990) 1 *Stell LR* 7 16 and GF Lubbe "Estoppel, Vertrouensbeskerming en die Struktuur van die Suid-Afrikaanse Privaatreg" (1991) *TSAR* 1 14.

4 Lubbe (1991) *TSAR* 14 (footnotes omitted).

5 18, where the possibility of a broader application of these ideas was raised, but not addressed.

6 This label is used by J Perillo "The Statute of Frauds in the Light of the Functions and Dysfunctions of Form" (1973-1974) 43 *Fordham LR* 39 to describe the disadvantages of formalities.

7 See eg Grotius *De Jure Belli ac Pacis Libri Tres II* tr F W Kelsey (1925) 331-332; J Austin "Fragments – On Contracts" in R Cambell (ed) *Lectures on Jurisprudence or the Philosophy of Positive Law II* 5 ed (1911) 907; R Von Jhering *L'Esprit du Droit Romain dans les Diverses Phases de Son Développement III* 2 ed tr O de Meulenaere (1877) 177-183. An English translation of the original German version, *Geist des römischen Recht auf den verschiedenen Stufen seiner Entwicklung* (1865) can be found in AT von Mehren & JR Gordley *The Civil Law System: An Introduction to the Comparative Study of Law* 2 ed (1977) 898-900.

8 L Fuller "Consideration and Form" (1941) 41 *Colum LR* 799 800-801.

9 1913 AD 135.

10 142. A similar sentiment is expressed in the majority judgment of Solomon J (149).

11 See eg *Fourlamel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A) 343A; *Oceanair (Natal) (Pty) Ltd v Sher* 1980 (1) SA 317 (D) 326B; *Intercontinental Exports (Pty) Ltd v Fowles* [1999] 2 All SA 304 (A) para 9.

12 *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) 995H-996A.

13 See text to n 3 above.

14 Fuller (1941) *Colum LR* 808 and 813-814. See also D Kennedy "From the Will Theory to the Principle of Private Autonomy: Lon Fuller's 'Consideration and Form'" (2000) 100 *Colum LR* 94 131.

15 N Grové *Die Formaliteitsvereiste by Borgstelling* LLM thesis University of Pretoria (1984) 6; G Glover *Kerr's Law of Sale and Lease* 4 ed (2014) 112.

16 GF Lubbe & CM Murray *Farlam & Hathaway Contract - Cases, Materials and Commentary* 3 ed (1988) 206 n 4; RH Christie & GB Bradfield *Christie's The Law of Contract in South Africa* 6 ed (2011) 115; ADJ van Rensburg & SH Treisman *The Practioner's Guide to the Alienation of Land Act* 2 ed (1984) 23; *Exdev (Pty) Ltd v Pekudei Investments (Pty) Ltd* 2011 (2) SA 282 (SCA) para 1.

17 Lubbe & Murray *Contract* 206 n 4.

18 Lubbe & Murray *Contract* 206 n 4; Van Rensburg & Treisman *Guide to the Alienation of Land Act* 23; Glover *Sale and Lease* 112; *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A) 989; *Senekal v Home Sites (Pty) Ltd* 1950 (1) SA 139 (W) 150; *Exdev (Pty) Ltd v Pekudei Investments (Pty) Ltd* 2011 (2) SA 282 (SCA) para 1.

19 See eg *Phillips v Miller (2)* 1976 (4) SA 88 (W) 93D-E; *Weinerlein v Goch Buildings Ltd* 1925 AD 282 294 per Kotzé JA.

20 See eg *Weinerlein v Goch Buildings Ltd* 1925 AD 282 292-293 per Wessels JA; JS McLennan "The Demise of the Non-Variation Clause in Contract?" (2001) 118 *SALJ* 574 580.

21 See eg *Magwaza v Heenan* 1979 (2) SA 1019 (A) 1029E; D Hutchison "Non-Variation Clauses in Contract: Any Escape from the *Shifren* Straitjacket?" (2001) 118 *SALJ* 720 721.

22 *Estate du Toit v Coronation Syndicate Ltd* 1929 AD 219 224.

23 See eg *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A) 989.

24 See FE Myburgh *Statutory Formalities in South African Law* LLD thesis Stellenbosch University (2013) 297-309 for a discussion of this topic and the relevant authorities.

25 See § 311b *BGB* (sales of land) and § 766 *BGB* (suretyships), read together with § 125 *BGB*.

26 AT von Mehren "Formal Requirements" in AT von Mehren (ed) *International Encyclopedia of Com-parative Law VII* (1998) 129; R Kanzleiter "§ 311b" in W Krüger (ed) *Münchener Kommentar zum Bürgerlichen Gesetzbuch 2 Allgemeiner Teil: §§ 241-432* 6 ed (2012) para 72.

27 BGHZ 48, 396 (21-06-1967). The case is discussed and quoted in B Markesinis, H Unberath & A Johnston *The German Law of Contract: A Comparative Treatise* 2 ed (2006) 85-86 and a translation of the case by K Lipstein can be found in the same source, 593-594.

28 Markesinis et al *German Law of Contract* 85.

29 85.

30 593 (tr K Lipstein).

31 594.

32 594.

33 Von Mehren "Formal Requirements" in *Int Enc Comp L VII* 129-131.

34 R Zimmermann & DA Verse "Case 4: Formalities I (Germany)" in R Zimmermann & S Whittaker (eds) *Good Faith in European Contract Law* (2000) 258 259. Kanzleiter "§ 311b" in *Münchener Kommentar* para 72.

35 Zimmermann & Verse "Case 4" in *Good Faith in European Contract Law* 259. See also R Zimmermann & DA Verse "Case 5: Formalities II (Germany)" in R Zimmermann & S Whittaker (eds) *Good Faith in European Contract Law* (2000) 281; S Lorenz & W Vogelsang "Case 11: A Contract for the Sale of a House Which Fails for Lack of Formality (Germany)" in J Cartwright & M Hesselink (eds) *Precontractual Liability in European Private Law* (2008) 311 318.

36 See also BGH *NJW* 1972, 1189 in Markesinis et al *German Law of Contract* 595-597 (tr I Snook).

37 Von Mehren "Formal Requirements" in *Int Enc Comp L VII* 131; Lorenz & Vogelsang "Case 11" in *Precontractual Liability* 319; Kanzleiter "§ 311b" in *Münchener Kommentar* para 73. See also RGZ 117, 121 (21-05-1927) in Markesinis et al *German Law of Contract* 591-593 (tr K Lipstein), although the plaintiff was not successful on the facts.

38 BGH *NJW* 1965, 812, 814; BGH *ZIP* 1988, 89, 90 cited in Von Mehren "Formal Requirements" in *Int Enc Comp L VII* 132.

39 BGH *NJW* 1965, 814.

40 Markesinis et al *German Law of Contract* 86.

41 Sonnekus *The Law of Estoppel* 2.

42 Fault, in the form of negligence, may also be a requirement in certain cases. See Sonnekus *The Law of Estoppel* 241 *ff* and Lubbe (1991) *TSAR* 1.

43 Sonnekus *The Law of Estoppel* 291 *ff*. For the application of the rule in the context of agreements subject to statutory formalities, see eg *Oceanair (Natal) (Pty) Ltd v Sher* 1980 (1) SA 317 (D); *Fuls v Leslie Chrome (Pty) Ltd* 1962 (4) SA 784 (W); *Philmatt (Pty) Ltd v Mosselbank Developments CC* 1996 (2) SA 15 (A).

44 1964 (3) SA 402 (A).

45 *Trust Bank van Afrika Bpk v Eksteen* 1964 (3) SA 402 (A) 411H. See also *H N R Properties CC v Standard Bank of SA Ltd* 2004 (4) SA 471 (SCA) para 21.

46 *Kok Hoong v Leong Chong Kweng Mines Ltd* [1964] AC 993 1015 per Viscount Radcliffe; E Cooke (ed) "Estoppel" in H Halvey (ed) *Halsbury's Laws of England XLVII* 5 ed (2014) 241 249. In fact, the principle seems to have been incorporated in South African law partly on the basis that it was also applicable in English law. In *Merriman v Williams* (1880) F 135 173-174, De Villiers CJ stated that:
"[n]either by the English, nor, I presume, by the Scotch law would the doctrine of estoppel apply so as to prevent a defendant from denying that the acts which are supposed to operate as an estoppel are contrary to or inconsistent with the provisions of the law."

47 *Kok Hoong v Leong Chong Kweng Mines Ltd* [1964] AC 993 1015 per Viscount Radcliffe. More than one type of estoppel is recognised in common-law jurisdictions, hence the reference to "estoppels".

48 *Kok Hoong v Leong Chong Kweng Mines Ltd* [1964] AC 993 1015; *Yaxley v Gotts* [2000] Ch 162 182 and 191; *Shah v Shah* [2002] QB 35 44; E Cooke *The Modern Law of Estoppel* (2000) 136.

49 [2003] UKHL 17. An Australian perspective of this case is provided by A Robertson "The Statute of Frauds, Equitable Estoppel and the Need for 'Something More'" (2003) 19 *JCL* 173.

50 *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA* [2003] UKHL 17 para 20.

51 See *Actionstrength Ltd v International Glass Engineering IN.GL.EN. SpA* [2003] UKHL 17 para 49 in which Lord Walker of Gestingthorpe refers to persons dealing with moneylenders or certain kinds of tenants as typical classes of vulnerable people worthy of protection. See also Cooke *Estoppel* 143.

52 *Actionstrength Ltd v International Glass Engineering IN.GL.EN. SpA* [2003] UKHL 17 para 25.

53 Para 26.

54 Para 9 per Lord Bingham, para 35 per Lord Clyde, and para 50 per Lord Walker.

55 Unlike the other forms of estoppel, proprietary estoppel can be a cause of action in English law (see Cooke *Estoppel* 127 *ff*). Although it has been said that estoppel cannot be used in this way in South African law (see eg Sonnekus *The Law of Estoppel* 348 *ff*), this rule was criticised as formalistic by Harms DP in *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC* 2011 (2) SA 508 (SCA) para 31.

56 Cooke "Estoppel" in *Halsbury's Laws of England XLVII* 249.

57 S Whittaker "Form" in HG Beale (ed) *Chitty on Contracts 1: General Principles* 30 ed (2008) 379 399.

58 Although the doctrine constitutes a type of estoppel (*Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA* [2003] UKHL 17 para 22 per Lord Hoffmann; H Burn & J Cartwright *Cheshire and Burn's Modern Law of Real Property* 18 ed (2011) 973), it differs from proprietary estoppel in that the latter does not require proof of an agreement (a representation by the defendant is sufficient) and provides for greater remedial flexibility. See C Davis "Estoppel: An Adequate Substitute for Part Performance?" (1993) 13 *OJLS* 99 101 *ff* for a comprehensive discussion of the differences between these two mechanisms.

59 See eg *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA* [2003] UKHL 17 paras 2-3 per Lord Bingham; English Law Commission *Working Paper No 92: Formalities for Contracts for Sale etc of Land* (1985) para 2.4. The Statute of Frauds was promulgated in 1677; the earliest authority on the doctrine of part performance is *Butcher v Stapely* 23 ER 524 (1685).

60 This may be ascribed to *Steadman v Steadman* [1976] AC 536, a decision which rendered it unclear which acts were sufficient for the doctrine to be applicable and whether these acts must go to prove a contract relating to land or simply point to the existence of *a* contract. See English Law Commission *Formalities for Contracts for Sale etc of Land (Law Com No 164)* (1987) para 1.9.

61 *Formalities for Contracts for Sale etc of Land (Law Com No 164)* (1987) para 4.13. This recommendation is reflected in s 2(1) of the Law of Property (Miscellaneous Provisions) Act of 1989.

62 The doctrine of part performance can only be applied, as a matter of logic, where a valid oral agreement is recognised separately from the recorded agreement. It cannot apply where formalities are thought to be constitutive, since there cannot be performance of a non-existent contract. For this reason, the doctrine has also been held not to be applicable in the South African context – see *Jolly v Herman's Executors* 1903 TS 515 522-523; *Wilken v Kohler* 1913 AD 135 143-144.

63 *Formalities for Contracts for Sale etc of Land (Law Com No 164)* (1987) paras 5.4-5.5.

64 [2000] Ch 162.

65 174.

66 174-175.

67 175.

68 Briefly, and quite generally, a constructive trust arises when "the legal holder of property cannot in conscience deny the other party's beneficial interest, typically because of the circumstances in which he has acquired it or because of what he has said and done in relation to the property on which the other party has acted so as to make it unconscionable to deny the latter's expectation of an interest in the property."
J Cartwright *Formation and Variation of Contracts: The Agreement, Formalities, Consideration and Promissory Estoppel* (2014) 168. Because the vehicle of a constructive trust has been specifically rejected in South African law (see *Kerbyn 178 (Pty) Ltd v Van den Heever and Others NNO* 2000 (4) SA 804 (W) 817 D-F; E Cameron "Constructive Trusts in South African Law: The Legacy Refused" (1999) 3 *Edin LR* 341), it is not discussed in detail in the main text.

69 *Yaxley v Gotts* [2000] Ch 162 180.

70 193.

71 [2008] 1 WLR 1752.

72 *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752 para 29. Neuberger LJ also assumed that proprietary estoppel would not succeed if the facts did not also give rise to a constructive trust in *Kinane v Mackie-Conteh* 2005 WL 62273, although he subsequently changed his mind, as he himself acknowledges in "The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity" (2009) 68 *CLJ* 537 546 and as is evident in the main text. Discussion (and criticism) of the notion that proprietary estoppel must overlap with a constructive trust before it can succeed in the context of formally defective sales of land can be found in B McFarlane "Proprietary Estoppel and Failed Contractual Negotiations" (2005) *Conv and Prop Law* 501; G Owen & O Rees "Section 2(5) of the Law of Property (Miscellaneous Provisions) Act of 1989: A Misconceived Approach?" (2011) *Conv and Prop Law* 495; Burn & Cartwright *Modern Law of Real Property* 973-978.

73 Neuberger (2009) *CLJ* 545-546.

74 546.

75 546.

76 546.

77 See eg *Thorner v Major* [2009] UKHL 18; *Whittaker v Kinnear* 2011 WL 2039893; S Whittaker "Form" in HG Beale (ed) *Chitty on Contracts 1: General Principles* 31 ed (2012) 445 478-479; M Dixon *Modern Land Law* 8 ed (2012) 373.

78 Neuberger (2009) *CLJ* 541.

79 A similar argument is made by M Dixon "Confining and Defining Proprietary Estoppel: The Role of Unconscionability" (2010) 30 *Legal Studies* 408 417 and Cartwright *Formation and Variation of Contracts* 201.

80 The same rule does not apply when a successful defence of estoppel would contravene a prescription imposed by the parties themselves. Eg estoppel could be relied upon, in theory at least, in the event of a failure to comply with a non-variation clause, because such a clause will not protect a party against his own fraud. See the discussion in Hutchison (2001) *SALJ* 731-739 and, more recently, in *Nyandeni Local Municipality v Hlazo* 2010 (4) SA 261 (ECM) paras 41-60. Further see Van der Merwe et al *Contract* 135-138 who suggest that considerations of public policy should be taken into account to determine whether estoppel should succeed in this context. This approach is similar to the one proposed in 4 2 above. Another mechanism which may be available to counter an unconscionable reliance on self-imposed formalities is to categorise a particular requirement as amounting to the prescription of a mode of acceptance, rather than a formal requirement which is intended to be constitutive. In *Roberts v Martin* 2005 (4) SA 163 (C) 169G-H and *Pillay v Shaik* 2009 (4) SA 74 (SCA) para 53, such a characterisation of a signature requirement (which was not complied with by one of the parties) allowed the respective courts to apply the reliance theory and to hold that a valid contract had been concluded on the facts. Admittedly, there is a fine line between self-imposed formalities and prescribed modes of acceptance. This matter is discussed further in C Pretorius "Reliance, Formalities and the Mode of Acceptance of an Offer" (2011) 32 *Obiter* 453.

81 1964 (3) SA 402 (A) 412A-C.

82 409G-H, 412H-413A.

83 409F, 411G.

84 413A-C.

85 PM Nienaber "Iets oor Verdiskontering, Estoppel en Borgtog" (1964) 27 *THRHR* 262 265. Nienaber approves of the court's conclusion on the basis that the enforcement of the agreement between the appellant and respondent was not prohibited by any piece of legislation and would also not promote a prohibited result. He states:

"*Ons het hier wesenlik te doen met die geval van 'n borg wat die indruk geskep het dat dat die hoofvordering geldig is terwyl hy voor sy siel geweet het dat dit nie die geval was nie. In so 'n geval behoort estoppel wel deeglik teen hom te kan geld. Weliswaar is die borg se aanspreeklikheid aksessoor, maar die aksessore karakter is nie so deurdringend dat dit ongeoorloof sou wees om 'n borg op grond van estoppel gebonde te hou aan die skyn waarvoor hy self verantwoordelik is nie, in weerwil van die nietigheid of ongeoorloofdheid van die hoofskuld*." (265, footnotes omitted).Also see Sonnekus *The Law of Estoppel* 304-305.

86 *Trust Bank van Afrika Bpk v Eksteen* 1964 (3) SA 402 (A) 413C.

87 This interpretation is shared by Nienaber (1964) *THRHR* 266; an alternative interpretation is provided by RL Selvan "Discounting, Estoppel and Suretyship – A Divergent View" (1965) 28 *THRHR* 231 234. See the response to the views expressed in this article in PM Nienaber "Nogmaals Verdiskontering en Estoppel" (1966) 29 *THRHR* 51.

88 *Trust Bank van Afrika Bpk v Eksteen* 1964 (3) SA 402 (A) 415H-416A.

89 416B.

90 See eg *Credit Corporation of SA Ltd v Botha* 1968 (4) SA 837 (N) 851I-852A; *Sonday v Surrey Estate Modern Meat Market (Pty) Ltd* 1983 SA 521(C) 522G-523C; *Syfrets Mortgage Nominees Ltd v Cape St Francis Hotels (Pty) Ltd* 1991 (3) SA 276 (SE) 289E-F.

91 1996 (2) SA 15 (A).

92 Van der Merwe et al *Contract* 141 n 99; Sonnekus *The Law of Estoppel* 305 n 94.

93 *Philmatt (Pty) Ltd v Mosselbank Developments CC* 1996 (2) SA 15 (A) 26H-I.

94 27D.

95 27C.

96 27D-E.

97 See eg *Oceanair (Natal) (Pty) Ltd v Sher* 1980 (1) SA 317 (D) 326B-C; *Fuls v Leslie Chrome (Pty) Ltd* 1962 (4) SA 784 (W) 788A-B.

98 See eg *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA) para 11; *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) SA 1 (SCA) para 16.

99 *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA) paras 8-9 and 12; *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) SA 1 (SCA) para 15.

100 See the remarks made in 2 above and the views of the majority in *Brisley v Drotsky* 2002 (4) SA 1 (SCA) and of C Lewis "The Uneven Journey to Uncertainty in Contract" (2013) 76 *THRHR* 80 and M Wallis "Commercial Certainty and Constitutionalism" (17-09-2015) *KovsieScholar* <http://scholar.ufs.ac.za:8080/xmlui/handle/11660/1789> (accessed 13-02-2016).

101 See eg the remarks in Lubbe & Murray *Contract* 206 n 4 and the following representative observation in *Senekal v Home Sites (Pty) Ltd* 1950 (1) SA 139 (W) 150:

"On sudden and unforeseen appreciation of the value of land, the subject-matter of executory contracts of sale, there has been evinced a marked tendency on the part of vendors of such land to seek with a jaundiced eye in the deed of sale for technical points which might justify, under colour of the requirements of sec. 30 [of Proclamation 8 of 1902 (Transvaal)], a repudiation of sales of land duly entered upon in written deeds of sale."

102 On this statutory *locus poenitentiae*, see *Jolly v Herman's Executors* 1903 TS 515 522 and *Magwaza v Heenan* 1979 (2) SA 1019 (A) 1024G-H and 1028F-1029A.

103 AJ Kerr *The Principles of the Law of Contract* 6 ed (2002) 146-147 also suggests that estoppel may be an appropriate mechanism to prevent an unconscionable reliance on formal invalidity. See also the analogous situation in *Nyandeni Local Municipality v Hlazo* 2010 (4) SA 261 (ECM), where the court refused to give effect to a non-variation clause because the party seeking to rely on it was not using it for the legitimate vindication of his rights.

104 1959 (3) SA 35 (A).

105 Despite the subsequent curial explanation that the parties in *Mouton v Hanekom* 1959 (3) SA 35 (A) were mistaken about the effect of their written agreement (see eg *Von Ziegler v Superior Furniture Manufacturers (Pty) Ltd* 1962 (3) SA 399 (T) 411B-C; *Tesven CC v South African Bank of Athens* [1999] 4 All SA 396 (A) paras 17-18), this explanation is not entirely convincing. Not only was the *pactum de retrovendendo* deliberately excluded from the written agreement, but the parties also seemed to do so with full knowledge of the consequences of the omission. Why else would the appellant have indicated that it was unnecessary to reduce the agreement to writing because he would keep his promise to return the land to the respondent, if not in response to information that it would not be binding in its oral form? A similar point is made in Van der Merwe et al *Contract* 156 n 210.

106 *Mouton v Hanekom* 1959 (3) SA 35 (A) 36C-E.

107 36H-37A.

108 37A.

109 38G.

110 As to which, see the discussion in S van der Merwe & G Lubbe "*Bona Fides* and Public Policy in Contract" (1991) 2 *Stell LR* 91 and the sources cited in n 3 above.

111 *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A) 403A per Steyn CJ.