

*THE SOUTH AFRICAN APPROACH TO THE  
RECTIFICATION OF AGREEMENTS SUBJECT  
TO CONSTITUTIVE FORMALITIES:  
ONE STEP TOO MANY?\**

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*This article examines the South African approach to the rectification of agreements subject to constitutive formal requirements. It focuses on the rule that such an agreement must first comply with formalities ex facie the document recording it, before a court may consider whether the traditional requirements for rectification have been met. In particular, the primary justifications for this rule are assessed: first, a void agreement cannot be rectified and, secondly, ex facie compliance promotes the functions of formalities. An analysis of South African case law reveals not only that these assumptions are questionable, but that the rule is inconsistently applied and leads to the drawing of tenuous distinctions. A brief investigation of both civilian and common-law approaches suggests further that the South African method is based on a misconception of the purpose of rectification: it conflates the correction of the document recording the agreement with the enforcement of that agreement once it is corrected. This leads to the conclusion that the requirement of ex facie compliance should be abolished as a preliminary step and that a South African court should rather consider whether awarding a claim for rectification would defeat the objects of formalities in general.*

## I INTRODUCTION

In *Magwaza v Heenan*,<sup>1</sup> the Appellate Division was confronted with the question whether a document recording an agreement subject to constitutive formalities could be rectified,<sup>2</sup> in spite of the fact that the written agreement did not comply with those formalities. After considering divergent opinions in both case law and academic commentary,<sup>3</sup> the court concluded that an agreement subject to constitutive formal requirements must first comply with those requirements ex facie the document recording the transaction before the agreement may be rectified, because there cannot be rectification of a formally invalid agreement.<sup>4</sup> To hold otherwise, would be ‘in theory

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<sup>1</sup> 1979 (2) SA 1019 (A).

<sup>2</sup> Constitutive formalities are those which result in nullity in the event of non-compliance (in this article, ‘formalities’ and ‘statutory formalities’ are used to refer to these types of formal requirements only). Typical examples are formalities prescribed by s 2(1) of the Alienation of Land Act 68 of 1981 and s 6 of the General Law Amendment Act 50 of 1956.

<sup>3</sup> *Magwaza* supra note 1 at 1024G–1028A.

<sup>4</sup> *Ibid* at 1028A–B.

subversive of the [functions of] statutory formalities, and in practice . . . must inevitably prove emasculatory of them'.<sup>5</sup>

The consequence of the *Magwaza* decision is that South African courts must adopt a two-step approach to the rectification of agreements subject to constitutive formal requirements. First, *ex facie* the document, there must be compliance with those formalities.<sup>6</sup> Thereafter, a court must be satisfied that the party seeking rectification has met the traditional requirements of the remedy: he must prove that the parties at least shared a common intention which they intended to express in their written agreement, but which they failed to do by virtue of a mistake.<sup>7</sup>

The ostensible simplicity of this two-step approach does not immediately strike one as deserving of an in-depth analysis and discussion. However, the recent judgment in *Osborne & another v West Dunes Properties 176 (Edms) Bpk & others*<sup>8</sup> suggests otherwise. In that case, a claim for rectification of a deed of alienation was refused for the following two reasons, among others: first, the real agreement (a description used to refer to the agreement once rectified<sup>9</sup>) would be void for vagueness because the actual purchaser could not be identified<sup>10</sup> and, secondly, the written agreement was invalid because it did not identify the purchaser in terms of the real agreement (although it did identify a purchaser).<sup>11</sup>

Because the court applied the two-step approach in the incorrect order, its conclusions are problematic in view of the current approach to rectification of agreements subject to constitutive formalities. These conclusions will be considered in greater detail elsewhere in this article. However, over and above such technical considerations, the *Osborne* judgment raises a fundamental question: if the two-step approach to the rectification of agreements subject to constitutive formalities is self-evident, why does it continue to create difficulties in application, when South African courts have had more than 30 years to iron out any problems caused by the *Magwaza* decision?

It therefore seems appropriate to re-evaluate the necessity for this two-step method where constitutive formalities are concerned. I propose to focus on the two interrelated justifications presented for the first step: *ex facie* compliance with such formalities. The first is the notion that non-compliance renders the agreement void and therefore precludes rectification. The second is the argument that rectification of a non-compliant agreement creates uncertainty and the possibility of perjured claims and is therefore

<sup>5</sup> *Ibid* at 1028B–C.

<sup>6</sup> *Republican Press (Pty) Ltd v Martin Murray Associates CC* 1996 (2) SA 246 (N) at 254E; *Intercontinental Exports (Pty) Ltd v Fowles* [1999] 2 All SA 304 (A) para 10.

<sup>7</sup> See for example *Meyer v Merchants' Trust Ltd* 1942 AD 244 at 253; *Lazarus v Gorfinkel* 1988 (4) SA 123 (C) at 131D; *Humphrys v Laser Transport Holdings Ltd* 1994 (4) SA 388 (C) at 395H.

<sup>8</sup> 2013 (6) SA 105 (WCC).

<sup>9</sup> *Ibid* para 19.

<sup>10</sup> *Ibid* paras 27–30.

<sup>11</sup> *Ibid* para 35.

contrary to the intention underlying the imposition of statutory formalities. In what follows, the cogency of these arguments will be considered, in view of the approach adopted in other legal systems. However, it is necessary to make preliminary remarks regarding certain basic principles informing the treatment of constitutive formal requirements in South African law to place the first step in context. This is the topic of the next part of the article.

## II CONSTITUTIVE FORMALITIES, RECTIFICATION AND THE REQUIREMENT OF EX FACIE COMPLIANCE

Both s 2(1) of the Alienation of Land Act 68 of 1981<sup>12</sup> and s 6 of the General Law Amendment Act 50 of 1956 require that the parties' contract must be in writing in order to be valid.<sup>13</sup> The reason is because sales of land and suretyships are regarded as so commercially important, or as involving obligations of such an onerous nature that formal requirements are imposed in addition to those normally required for the conclusion of a valid contract.<sup>14</sup> These formal requirements ensure that there is proper proof of the existence and content of the agreement (an evidentiary function);<sup>15</sup> they cause parties to pause and think more seriously about the transaction into which they are entering and draw attention to any potentially onerous obligations which may be assumed upon contract conclusion (a cautionary function);<sup>16</sup> and they delineate the transition from negotiation to conclusion of the contract (a channelling function).<sup>17</sup>

The outcome of obliging parties to embody their agreement in a document is to place limitations on the use of extrinsic evidence. First, there is the rule that the terms of a contract that is required by law to be in writing must appear from the document itself: where the recordal is incomplete, it cannot be supplemented by extrinsic evidence.<sup>18</sup> To admit extrinsic evidence in this instance would subvert at least some of the objects of formalities legislation, namely to minimise uncertainty and disputes.

Secondly, if a contract constitutes the exclusive memorial of the agreement, the parol evidence rule also precludes the admission of extrinsic evidence, to the extent that it adds to, varies or contradicts the written provisions (this rule applies irrespective of whether formalities are

<sup>12</sup> Read together with the definition of 'alienation' and 'deed of alienation' in s 1.

<sup>13</sup> R H Christie & G B Bradfield *Christie's The Law of Contract in South Africa* 6 ed (2011) 131; *Legator McKenna Inc v Shea* 2010 (1) SA 35 (SCA) para 18 (land); *Fourlamel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A) at 341G–H (suretyship).

<sup>14</sup> *Wilken v Kohler* 1913 AD 135 at 142; *Fourlamel* supra note 13 at 342H–343B.

<sup>15</sup> See for example Lon L Fuller 'Consideration and form' (1941) 41 *Columbia LR* 799 at 800.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid* at 801.

<sup>18</sup> *Van Wijk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A) at 989; *African Lumber Co (Pvt) Ltd v Katz* 1978 (4) SA 432 (C) at 434H–435A; *Industrial Development Corporation of SA (Pty) Ltd v Silver* 2003 (1) SA 365 (SCA) para 9.

imposed).<sup>19</sup> The rationale for the parol evidence rule is that it is supposed to promote certainty, minimise disputes and restrict the risk of perjury.<sup>20</sup> Where a contract is statutorily required to be reduced to writing, the parol evidence rule therefore tends to be supportive of the functions served by formalities themselves.<sup>21</sup>

It follows that a rule which stipulates that the document is the sole record of the parties' agreement, and related rules which prohibit the admission of extrinsic evidence, can lead to inequitable results where the document does not correctly record the parties' actual agreement. Indeed, one of the primary criticisms directed at formal requirements in general is the fact that they create the opportunity for a party to rely on a technical defence in order to escape an agreement which was seriously intended.<sup>22</sup>

It is for this reason that rectification is a necessary remedy, because it is designed to correct a document which is an inaccurate reflection of the parties' agreement.<sup>23</sup> Although the exact origins of the remedy remain unclear,<sup>24</sup> its underlying rationale is that 'in contracts regard must be had to

<sup>19</sup> *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at 47. Although the parol evidence rule will be referred to as an indivisible concept in this article, there is authority for the fact that the rule itself consists of two independent sub-rules, namely the 'integration rule' (which determines the extent to which extrinsic evidence may be used to prove the terms of the written contract) and the 'interpretation rule' (which determines the extent to which extrinsic evidence is admissible to interpret the meaning of the terms used in that contract) — *Johnston v Leal* 1980 (3) SA 927 (A) at 943A; S W J van der Merwe, L F van Huyssteen, M F B Reinecke & G F Lubbe *Contract: General Principles* 4 ed (2012) 149; Christie & Bradford op cit note 13 at 200–1, 212. However, for current purposes nothing turns on this distinction between the two sub-rules.

<sup>20</sup> See for example *Du Plessis v Nel* 1952 (1) SA 513 (A) at 534C–E, per Van den Heever JA; G F Lubbe & C Murray *Farlam & Hathaway Contract — Cases, Materials and Commentary* 3 ed (1988) 216n2; Van der Merwe et al op cit note 19 at 152–3.

<sup>21</sup> Arthur L Corbin 'The parol evidence rule' (1944) 53 *Yale LJ* 603 at 609.

<sup>22</sup> Lubbe & Murray op cit note 20 at 206n4; A J Kerr *The Principles of The Law of Contract* 6 ed (2002) 146; A D J van Rensburg & S H Treisman *The Practitioner's Guide to the Alienation of Land Act* 2 ed (1984) 23; *Van Wyk* supra note 18 at 989; *Senekal v Home Sites (Pty) Ltd* 1950 (1) SA 139 (W) at 150; *Exdev (Pty) Ltd v Pekudei Investments (Pty) Ltd* 2011 (2) SA 282 (SCA) para 1.

<sup>23</sup> *Intercontinental Exports (Pty) Ltd* supra note 6 para 11.

<sup>24</sup> One view is that that the remedy is English in origin and that it was received in South African law as a necessary exception to the English parol evidence rule (see for example *Saayman v Le Grange* (1879) 9 Buch 10 at 12 (per De Villiers CJ) and 13 (per Dwyer J); *Meyer* supra note 7 at 253, per De Wet CJ; *Venter v Liebenberg* 1954 (3) SA 333 (T) at 338C; *Brits v Van Heerden* 2001 (3) SA 257 (C) at 266D–E, 278F; *Von Ziegler v Superior Furniture Manufacturers (Pty) Ltd* 1962 (3) SA 399 (T) at 410A–C; H J Liebenberg 'Die begrip "mutual error" by rektifikasie van kontrakte' (1994) 15 *Obiter* 137; D T Zeffertt & A Paizes *Parol Evidence with Particular Reference to Contract* (1986) 10). Another view is that rectification has civilian roots and is based on the *exceptio doli* (*Weinerlein v Goch Buildings Ltd* 1925 AD 282 at 292–3 (per Wessels JA) and 296–7 (per Kotze JA); *Neuhoff v York Timbers Ltd* 1981 (4) SA 666 (T) at 673E; *Mouton v Hanekom* 1959 (3) SA 35 (A) at 40A–B; *Van Aswegen v Fourie* 1964 (3) SA 94 (O) at 98A; *Otto v Heymans* 1971 (4) SA 148 (T) at 156A–B). A third view is that the

the truth of the matter rather than to what has been written, and the mistake must yield to the truth'.<sup>25</sup> However, the equitable operation of rectification is limited in the context of agreements subject to constitutive formalities, precisely because South African courts assume that the recordal itself constitutes the sole embodiment of the parties' intentions and further, they assume that this conclusion promotes the functions of formalities.

### III THE FIRST JUSTIFICATION: (FORMAL) VALIDITY AS A PREREQUISITE TO RECTIFICATION

#### (a) Introduction

The following two examples illustrate the theoretical basis for the requirement that an agreement must appear to be formally valid before it can be rectified. In the first example, the document records a sale of land. Ex facie the document, the description of the land is so deficient that it cannot be identified with reasonable certainty. On the face of it, the document therefore appears to record a void agreement because it lacks a sufficient description of one of the essential terms required to be in writing by the Alienation of Land Act.<sup>26</sup> In the second example, a document records the sale of shares. The document contains a term which amounts to the giving of financial assistance for the purchase of the shares, in contravention of the relevant company legislation.<sup>27</sup> Ex facie the document, this sale also appears to be void. However, in a claim for rectification, a court will rectify the document in the second example but not the first.

The reason for these different outcomes is explained in *Spiller v Lawrence*:<sup>28</sup>

'The two situations are fundamentally different. In the [second example], when the question of validity relates to the substance of the transaction and not its form, nullity is an illusion produced by a document testifying falsely to what was agreed. In the [first example], . . . the cause of nullity is indeed to be found in the transaction's form. When it is said to consist of a failure to observe the law's requirement that the agreement be reflected by a document with particular characteristics the document itself is necessarily decisive of the issue whether the stipulation has been met; for it has been only if this emerges from

remedy is neither an exception to the parol evidence rule, nor based on the *exceptio doli*, but is simply a reflection of the general rule that a contract is binding because of the parties' consensus or a reasonable reliance on consensus (*Van der Merwe et al op cit* note 19 at 153–4; *Strydom v Coach Motors (Edms) Bpk* 1975 (4) SA 838 (T) at 840E–F).

<sup>25</sup> *Benjamin v Gurewitz* 1973 (1) SA 418 (A) at 426C–D, per van Blerk JA. See also *Weinerlein* supra note 24 at 289, per De Villiers JA.

<sup>26</sup> South African courts do not require meticulous accuracy in the recordal of the terms of an agreement subject to formal requirements. It is sufficient if the content of a term is objectively ascertainable — *Van Wyk* supra note 18 at 989; *Clements v Simpson* 1971 (3) SA 1 (A) at 7F.

<sup>27</sup> This example is taken from the facts of *Spiller v Lawrence* 1976 (1) SA 307 (N).

<sup>28</sup> Supra note 27.

the document. Appearance and reality therefore coincide. Nullity, when the document shows it, is no illusion.<sup>29</sup>

Therefore, when a court is asked to rectify a document for which statutory formalities are not prescribed, a distinction can be drawn between the document recording the agreement and the underlying agreement itself. Provided the underlying agreement is valid,

‘it follows inevitably that at the heart of the matter lies, not a void transaction, but a valid transaction incorrectly documented [and] the particular effect of the mistake in the document is wrongly to give the impression of nullity.’<sup>30</sup>

However, in the case of an agreement subject to formalities, there is no distinction between the underlying agreement and the document, because the prescribed formalities are constitutive in nature: the document and the obligation come into existence simultaneously. The document no longer serves simply as the evidence of the agreement; it *is* the agreement.<sup>31</sup> When such a document does not comply with formalities, no obligation is created and consequently there is nothing to rectify<sup>32</sup> — hence the necessity for the first step.

South African courts consistently require *ex facie* compliance with constitutive formalities as a prerequisite to a successful claim for rectification. One would expect uniformity in the courts’ approach to such an apparently self-evident requirement, but a careful study of case law on the point reveals that uniformity here is itself an illusion. It will also become apparent that there are in fact two dimensions to the question whether the document appears to record a valid transaction. The first is whether a court adopts a strict or lenient approach to formal validity. The second is whether the notion of *ex facie* compliance relates to formal validity only or also to substantive validity. The following analysis of these aspects does not purport to be exhaustive; the cases which are examined have been chosen simply because they best illustrate the points I wish to make.<sup>33</sup>

<sup>29</sup> *Ibid* at 312B–D.

<sup>30</sup> *Ibid* at 311D.

<sup>31</sup> Van der Merwe et al *op cit* note 19 at 157.

<sup>32</sup> This point is confirmed in *Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd* 2001 (4) SA 1315 (SCA) para 26, where Nienaber JA states that ‘where compliance with the statutory formalities is a prerequisite for the actual formation of an agreement, a failure to comply means that nothing is constituted and consequently there is by definition nothing that can be rectified’.

<sup>33</sup> A more detailed discussion is available in Franziska Elizabeth Myburgh *Statutory Formalities in South African Law* (unpublished LLD thesis, Stellenbosch University, 2013) 157–78. The dissertation is available electronically at <http://hdl.handle.net/10019.1/80135>.

(b) *The two dimensions of the validity requirement*

(i) *A strict versus a lenient approach to formal validity*

*Republican Press (Pty) Ltd v Martin Murray Associates CC*<sup>34</sup> and *Intercontinental Exports (Pty) Ltd v Fowles*<sup>35</sup> are discussed here as representative of a strict and a lenient approach to formal validity respectively.

In *Republican Press* the plaintiff sought to rectify a deed of suretyship in which the name 'Republican Press (Pty) Ltd' was erroneously inserted as both the principal debtor and the creditor. It was common cause that the parties had agreed on the identities of all the relevant parties, prior to reducing their agreement to writing.<sup>36</sup> Counsel for the plaintiff argued that there was *ex facie* compliance with the relevant formalities (albeit two of the three parties identified shared the same name)<sup>37</sup> or, alternatively, if there was doubt about whether the document complied with the relevant formalities, then the prevailing judicial trend was to interpret the document in such a manner as to render it formally valid, in order to proceed with rectification.<sup>38</sup>

With regard to the first argument, it was suggested that there was nothing on the face of the document to indicate that it was formally invalid; this was not a situation where the name of one of the parties had been completely omitted, for example. In support of this argument, an analogy was drawn with the situation where two of the parties to the suretyship were apparently identified as the same natural person, but were in fact father and son. In such a case, the document could not be presumed to be formally invalid.<sup>39</sup> Hurt J, writing for the majority, responded to this argument by indicating that first, in a situation such as that, rectification would be unnecessary. If formal invalidity were pleaded, it could be met with the replication that the two parties were in fact related to each other.<sup>40</sup> Secondly, extrinsic evidence would be admissible to identify these parties as father and son. According to the judge, such evidence would always be admissible in cases of doubt as to whether there were in fact three parties identified in the document.<sup>41</sup>

However, because the court was confronted with a document which identified two of the three parties as 'Republican Press (Pty) Ltd', and because there cannot be two companies with the same name, there could be no doubt that the document was referring to the same party as both principal debtor and creditor, and was for that reason formally invalid.<sup>42</sup>

Furthermore, the court disagreed with the contention that in cases of doubt as to whether a document was formally valid, it would adopt an

<sup>34</sup> *Republican Press (Pty) Ltd* supra note 6.

<sup>35</sup> *Intercontinental Exports (Pty) Ltd* supra note 6.

<sup>36</sup> *Republican Press (Pty) Ltd* supra note 6 at 256G–H.

<sup>37</sup> *Ibid* at 251C.

<sup>38</sup> *Ibid* at 251I.

<sup>39</sup> *Ibid* at 251B–D.

<sup>40</sup> *Ibid* at 251E–F.

<sup>41</sup> *Ibid* at 251F–G.

<sup>42</sup> *Ibid* at 251G–H.

interpretation which favoured validity above invalidity. According to the court, there were no cases where such a statement had been explicitly made.<sup>43</sup> The decision in *Magwaza* was also, it said, a clear indication that the policy considerations underlying the imposition of formalities took precedence over the equitable considerations underlying the remedy of rectification, in spite of the fact that formalities may not be the best way to promote these policy considerations and that ex facie compliance with statutory formalities as a prerequisite to rectification could also lead to anomalous results.<sup>44</sup> Finally, where there seemed to be an implication that a benign approach should be adopted in determining whether there had been compliance with formalities, as in *Litecor Voltex (Natal) (Pty) Ltd v Jason*,<sup>45</sup> this was either wrong or at best confusing.<sup>46</sup>

In closing, Hurt J made the following remark:

‘[A] strict approach to the test of whether the document ostensibly complies with the statute is [not], in practice, all that unfair to the parties. The creditor is invariably the party who stipulates for a suretyship undertaking as a condition for the giving, or prolonging, of terms of credit. He is the party who benefits from the undertaking by having an extra debtor, or debtors, against whom he can proceed in the event of default by the principal debtor. It is little enough to ask of him to ensure that, when the undertaking is executed, it has the correct names in the correct places and, as I understand the purport of the decisions of the Appellate Division, a creditor who omits this simple step may find that he has . . . to “dree his weird”.’<sup>47</sup>

Although apparently an obiter remark, this justification for a strict approach confuses the first step — formal validity — with the requirements of the second step, namely the elements to be proved in order to succeed with a claim for rectification. More specifically, it appears as if the judge was resurrecting, perhaps indirectly, the notion that the party seeking rectification must prove that the mistake is reasonable.<sup>48</sup> There is no reason for such a

<sup>43</sup> Ibid at 251I–252A.

<sup>44</sup> Ibid at 253A–D, 255B–E.

<sup>45</sup> 1988 (2) SA 78 (D).

<sup>46</sup> *Republican Press (Pty) Ltd* supra note 6 at 253E–254I. *Litecor Voltex (Natal) (Pty) Ltd* supra note 45 is discussed in part III(b)(ii) below.

<sup>47</sup> *Republican Press (Pty) Ltd* supra note 6 at 255E–G.

<sup>48</sup> See for example cases like *Van der Byl v Van der Byl & Co* 1899 16 SC 338 at 349, per De Villiers CJ; *Quinn v Goldschmidt* 1910 EDL 158 at 164; *Patel v Le Clus (Pty) Ltd* 1946 TPD 30 at 34; *Bushby v Guardian Assurance Co* 1915 WLD 65 at 71 and the statement by Kerr op cit note 22 at 157–9:

‘[T]he line of distinction [to determine which errors will be corrected] lies between, on the one hand, cases in which parties give the problem [of the recordal of an essential term] the consideration it requires and take care over the recording of their agreement but overlook an error of commission or omission; and, on the other hand, cases in which they give the problem little consideration or make no serious attempt to complete their contract in writing. . . . What is fatal is language so obscure, or an omission of such a nature, that when the parties look at the document(s) before signing they should realise that the requirements of the statute in question have not been fulfilled.’ (Footnotes omitted.)

requirement, because both parties know what the true agreement is. Reasonableness in the context of dissensus and mistake is imposed in order to protect the party who relies on the agreement as it appears to be; in the context of rectification, both parties are usually aware of the fact that the ostensible agreement does not reflect their actual agreement and neither party therefore needs the additional protection that the mistake should be reasonable.<sup>49</sup>

A second, more lenient approach to the first step is found in *Intercontinental Exports*. The suretyship identified the principal debtor as ‘Mr Frank Fowles’ while the surety was described as ‘Frank Turner Fowles’.<sup>50</sup> The court decided that although the names reflected as principal debtor and surety were similar, they were not identical and, ex facie the document, did not necessarily refer to the same person. Even if the two names had been identical, it did not follow as a matter of course that they referred to the same person.<sup>51</sup> The suretyship was therefore capable of being construed ex facie the document as reflecting a creditor, principal debtor and surety and was held to comply with the statutory formalities.

The reason why *Republican Press* is characterised as adopting a strict approach while *Intercontinental Exports* is regarded as more lenient is not because the reasoning differs greatly: both set out to determine objectively whether there has been compliance with statutory formalities.<sup>52</sup> The differences lie elsewhere.

First, *Intercontinental Exports* recognises that formalities can be an ‘unnecessary stumbling-block’<sup>53</sup> to rectification and that a court should thus adopt an interpretation consistent with validity where this is reasonably possible. This seems to be a tempering of the approach adopted in *Republican Press*, where there was an outright rejection of the argument that in cases of doubt, a court should adopt an interpretation which favours formal validity rather than invalidity.

Secondly, the leniency of the approach is reflected in the role it ascribes to extrinsic evidence in determining formal validity. In *Republican Press*, Hurt J’s full response to the argument that identification of two of the three parties to

More recent cases have indicated that a reasonable mistake is not a requirement, including *Humphrys* supra note 7 at 399A–I; *Offit Enterprises (Pty) Ltd v Knysna Development Co (Pty) Ltd* 1987 (4) SA 24 (C) at 28F–G; *Van Aswegen* supra note 25 at 102B–C. See also B R Bamford ‘Rectification in contract’ (1963) 80 SALJ 528 at 533–4.

<sup>49</sup> J C de Wet & A H van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg vol 1* 5 ed (1992) 29–30.

<sup>50</sup> *Intercontinental Exports (Pty) Ltd* supra note 6 para 15.

<sup>51</sup> *Ibid* para 17.

<sup>52</sup> See N J Grové ‘*Republican Press (Pty) Ltd v Martin Murray Associates CC and Others*’ 1996 DJ 401 at 404; Rochelle le Roux ‘A creditor left to “dree his weird”’ (1996) 4 JBL 157 at 158.

<sup>53</sup> *Intercontinental Exports (Pty) Ltd* supra note 6 para 11.

a suretyship as the same natural person does not in itself render the agreement formally invalid was as follows:

‘It seems to me that there are two conclusive answers to this proposition. The first is that if there are indeed two parties to the suretyship undertaking who have identical names, there will be no need for a rectification of the document and those parties would presumably be cited, and separately identified, in any proceedings in which the document and the question of its enforceability may come before the Court. If it were pleaded, in such a case, that the document was invalid for non-compliance with s 6 [of the General Law Amendment Act], that plea could be disposed of by a replication to the effect that the identical names referred to two different juristic *personae*. The second is that evidence would be admissible for the limited purpose of identification of the parties to the undertaking, provided always that the evidence does not encroach into the prohibited territory demarcated by the parol evidence rule. . . . It seems to me that such evidence would be admissible *ante omnia* in any situation where there is doubt as to whether the document refers to three separate parties to the contract of suretyship.’<sup>54</sup>

With the last statement in the quotation, the judge appears to imply that extrinsic evidence would always be admissible as a matter of course in order to determine whether an agreement was formally invalid. For example, if the suretyship identified both the debtor and surety as natural person ‘X’, extrinsic evidence would be admissible to determine whether ‘X’ the debtor and ‘X’ the surety were two different persons (in which case the suretyship would be formally valid) or one and the same person (in which case the agreement would be formally invalid).

The court in *Intercontinental Exports* reacted to Hurt J’s exposition as follows:

‘With regard to the first answer, it seems to proceed from the premise that the suretyship undertaking is formally valid. With regard to the second, the envisaged evidence would be admissible not to establish the document’s formal validity, but to give effect to an otherwise valid suretyship. It would, for example, permit extrinsic evidence to be led to identify the actual creditor, principal debtor or surety, as the case may be, from among a group of such named in the written document. . . . To that extent the quoted passage is not inconsistent with the views expressed above. If by the last sentence is meant that evidence could be led to show, contrary to what appears *ex facie* the document, that a suretyship undertaking lacks formal validity (eg to show that two of the parties are the same) I would respectfully disagree.’<sup>55</sup>

In other words, the court draws a distinction between the use of extrinsic evidence to apply the terms of a formally valid agreement to the facts and the use of extrinsic evidence to prove that an agreement is formally invalid, in spite of the appearance of validity *ex facie* the document. To use the example given above: extrinsic evidence is permitted to show that debtor ‘X’ and surety ‘X’ are in fact father and son. This admission of extrinsic evidence

<sup>54</sup> *Republican Press (Pty) Ltd* supra note 6 at 251D–G.

<sup>55</sup> *Intercontinental Exports (Pty) Ltd* supra note 6 para 20.

proceeds from the prior conclusion that the agreement is formally valid, which in turn is based on the fact that the two parties are natural persons: a reasonable interpretation in favour of formal validity assumes that the identified parties are in fact two different people. By contrast, extrinsic evidence would not be admissible if it were tendered for the purpose of showing that contrary to this assumption, debtor 'X' and surety 'X' are in fact one and the same person in reality and that the agreement is therefore formally invalid, since such evidence would contradict the formal validity that appears *ex facie* the document.<sup>56</sup>

It is in this way that *Intercontinental Exports* again represents a lenient approach: it confines itself to determining formal validity by examining the document alone. If, on the face of it, it appears to comply with statutory requirements, then a court must conclude that the agreement is formally valid, irrespective of whether there may be extrinsic evidence to prove the contrary. This approach to the determination of formal validity has been confirmed in subsequent Supreme Court of Appeal decisions<sup>57</sup> and it applies not only where the parties have made a mistake in recording one of the essentialia of their agreement,<sup>58</sup> but also in cases where the parties have mistakenly omitted a material, albeit non-essential, term.<sup>59</sup> Provided that the omission of the material term is not apparent from the recordal, a court will conclude that the agreement is formally valid in the latter type of cases and proceed to consider whether the (other) requirements for rectification have been met.<sup>60</sup>

<sup>56</sup> It should be pointed out that this statement is confined to extrinsic evidence tendered for the purpose of proving formal invalidity and which contradicts what appears to be a formally valid agreement. It is a different matter if evidence was tendered to prove that debtor 'X' and surety 'X' are the same person because there was no agreement upon the principal debtor for whom the surety accepted liability. This evidence would show that there was a lack of consensus on one of the basic elements of a suretyship, which is always admissible (see for example *Johnston* supra note 19 at 945G–E).

<sup>57</sup> *Inventive Labour Structuring (Pty) Ltd v Corfe* 2006 (3) SA 107 (SCA) paras 7–8, 12; *Swanepoel v Nameng* 2010 (3) SA 124 (SCA) para 16; *Van Oudtshoorn v Investec Bank Ltd* [2011] ZASCA 205 para 37.

<sup>58</sup> Those terms which indicate that an agreement belongs to a particular class of contract (Van der Merwe et al op cit note 19 at 245).

<sup>59</sup> For the purposes of this article, material terms are understood to amount to the incidentalialia of the agreement: those terms which supplement the essentialia and naturalia (terms which are incorporated automatically due to the fact that the agreement falls within a particular class of contract: Van der Merwe et al op cit note 19 at 246) or which vary the naturalia of the agreement. See for example *Just Names Properties 11 CC v Fourie* 2007 (3) SA 1 (W) para 33 (this aspect of the judgment was not discussed on appeal in *Just Names Properties 11 CC v Fourie* 2008 (1) SA 343 (SCA)); Tjakie Naudé 'The law of purchase and sale' 2007 *Annual Survey* 1039 at 1048–9; Van der Merwe et al op cit note 19 at 146n135, 247; Lubbe & Murray op cit note 20 at 199n4; Van Rensburg & Treisman op cit note 22 at 51–2.

<sup>60</sup> See for example *Standard Bank of SA Ltd v Cohen* (1) 1993 (3) SA 846 (SE) at 853B–D; *Brits* supra note 24 at 270I–271B.

In the light of this discussion, the approach in *Osborne* was incorrect. There, the deed of alienation described the purchaser as ‘P J Osborne (Pty) Ltd’, but rectification was sought so that the corrected description would identify the purchaser as a registered shelf company, to be bought in the future, after which its name would be changed and inserted into the written agreement.<sup>61</sup>

After concluding that the underlying agreement (or to use the court’s terminology, the ‘real’ agreement) was void for vagueness, the court held further that the written agreement was formally defective:

‘Section 2(1) of Act 68 of 1981 requires that the agreement be signed by “the parties thereto”. Upon a proper interpretation of this provision it obviously refers to the true parties to the agreement. It would be absurd to construe it as relating to the formal parties because there is no legal bond between them. It is therefore essential that the true parties be identified in the written agreement. In the present case the formal agreement of sale purports to record an agreement between second plaintiff as purchaser and first defendant as seller. According to the allegations supporting plaintiffs’ claim for rectification, however, no such agreement exists. The legal bond, in terms of plaintiffs’ version, exists between first defendant and the shelf company. The formal agreement thus fails to identify the purchaser in terms of the true agreement of sale. . . . As the formal document does not identify the true purchaser it is invalid and therefore not capable of rectification.’<sup>62</sup>

By considering the validity of the underlying agreement prior to examining that of the written agreement, the court appears to revert to the approach adopted in *Republican Press* to the extent that extrinsic evidence (the contents of the real agreement) was relied upon to determine the validity of the written agreement, an approach which was expressly rejected in *Intercontinental Exports*.

Secondly, the statement that since ‘the formal document does not identify the true purchaser it is invalid and therefore not capable of rectification’ is peculiar — by definition, a party seeks rectification of a written agreement precisely because it does not accurately record the real or underlying

<sup>61</sup> *Osborne* supra note 8 para 7. The complete, corrected description would read as follows:

‘Die koper word verteenwoordig deur Pieter Jacobus Osborne. ’n Geregistreerde rakmaatskappy sal vir die doel van die koop as koper aangekoop [sic] waarna ’n gepaste beskikbare naamsverandering en reservering tot die Registrateur van Maatskappye gerig sal word. Sodanige maatskappy se naam wat goedgekeur word deur die Registrateur van Maatskappye, sal daarna op hierdie kontrak aangebring word teenoor die parawe van Le Roux en Osborne.’ (‘The purchaser is represented by Pieter Jacobus Osborne. A registered shelf company will be purchased for the purpose of the sale as purchaser after which an appropriate available name change and reservation will be directed towards the Registrar of Companies. Such company name which is approved by the Registrar of Companies, will thereafter be inserted in this agreement against the initials of Le Roux and Osborne.’)

<sup>62</sup> *Ibid* paras 35–6.

agreement. In other words, the focus should not have been on the discrepancy between the purchaser's recorded identity and its actual identity for the purpose of determining whether rectification would be permitted, but rather on whether the written agreement complied with the prescribed formal requirements *ex facie* the document. On the facts, the written agreement did in fact so comply, because a purchaser was indeed identified.

However, *Osborne* does suggest that the current approach is unnecessarily complicated and a potential source of confusion, particularly in view of the process followed in other legal systems to determine whether an agreement subject to constitutive formalities should be rectified. This comparative material will be examined later in this article.

(ii) *Formal versus substantive validity*

Whether a court adopts a strict or lenient approach to the determination of formal validity and *ex facie* compliance with statutory formalities, it is a separate question whether such a court would rectify the document if the agreement it embodies is substantively, as opposed to formally, invalid. Formal validity relates to defects in the form of the transaction. Substantive invalidity relates to the failure to comply with other requirements for contractual validity, like legality, possibility and certainty of performance.<sup>63</sup> As will become apparent below, South African courts limit the ambit of the first step so that only formal invalidity precludes the rectification of an agreement subject to formalities. Ostensible substantive invalidity is therefore not an obstacle to a claim for rectification.

The origin of the distinction between these different 'types' of invalidity is attributed to *Spiller*,<sup>64</sup> although there the court was concerned with distinguishing between the rectification of agreements which are not subject to constitutive formalities and those which are. Didcott J was required to consider whether a written agreement for the sale of shares, which included a term that amounted to the giving of financial assistance, could be rectified in spite of the fact that the document, on its face, appeared to record an invalid transaction. In concluding that it could, the judge stated that in the case of agreements not subject to constitutive formalities, 'nullity is an illusion produced by a document testifying falsely to what was agreed'.<sup>65</sup> In such a case, a court may consider the parties' actual agreement and, where this is valid, rectify the document accordingly. However, in the case of agreements which are required to comply with formalities, 'the cause of nullity is indeed to be found in the transaction's form . . . [and] the document itself is necessarily decisive of the issue whether the [formal requirements have] been met'.<sup>66</sup> Where formalities are constitutive, a court may not consider the

<sup>63</sup> Van der Merwe et al op cit note 19 at 157–8.

<sup>64</sup> *Spiller* supra note 27. See *Litecor Voltex (Natal) (Pty) Ltd* supra note 45 at 82Gff; *Headerman (Vryburg) (Pty) Ltd v Ping Bai* 1997 (3) SA 1004 (SCA) at 1010D–H; Van der Merwe et al op cit note 19 at 157n223.

<sup>65</sup> *Spiller* supra note 27 at 312B.

<sup>66</sup> *Ibid* at 312C–D.

parties' actual, underlying agreement, but is confined to determining whether the document itself reflects a valid agreement. In other words, where formalities are prescribed upon pain of nullity for non-compliance, '[a]pppearance and reality coincide'.<sup>67</sup>

Although the distinction in *Spiller* focused on the difference between the rectification of agreements not subject to formalities and the rectification of those which are, this distinction has also been used to limit the ambit of the first step in the rectification of agreements subject to formalities. The relevance of the distinction is as follows: where an agreement subject to formalities is formally invalid it may not be rectified, in spite of the fact that the parties may have a valid underlying agreement. However, if an agreement complies with the relevant statutory formalities, but appears to be void for some other reason, then a court may consider the parties' underlying agreement in order to determine whether the apparently (substantively) invalid written agreement may be rectified.

An example of this is found in *Litecor Voltex (Natal) (Pty) Ltd v Jason*<sup>68</sup> where, ex facie the suretyship agreement, it seemed that the defendant had acted on behalf of the debtor company. Throughout the document the defendant was referred to only as a representative of the debtor company.<sup>69</sup> According to the court, his unqualified signature as surety did not change the fact that he had signed in his representative capacity,<sup>70</sup> with the effect that the principal debtor was standing surety for its own debt. On one view of the facts and in the light of decisions like *Magwaza* and *Spiller*, the document should not have been capable of rectification because it did not comply with statutory formalities. However, the very opposite was held to be the case by Didcott J, the same judge who delivered judgment in the *Spiller* case.

He held that the document he was being asked to rectify did not fall within the ambit of the rule that '[one] cannot by rectification invest a document which is on the face of it null and void with legal force'.<sup>71</sup> According to Didcott J, the difference between the document he was being asked to rectify and those before courts in which the rule was upheld, like *Dowdle's Estate v Dowdle*,<sup>72</sup> *Kourie v Bean*<sup>73</sup> and *Magwaza*, was that in the latter cases the descriptions of the land sold were too uncertain to constitute sufficient records of one of the essential terms of a contract of sale of land.<sup>74</sup> The rule laid down in these cases could not be said to apply to all contracts which were required to be in writing and which appeared to be void ex facie the document, but only to those which were void because they failed to comply

<sup>67</sup> Ibid at 312D.

<sup>68</sup> *Litecor Voltex (Natal) (Pty) Ltd* supra note 45.

<sup>69</sup> Ibid at 79G.

<sup>70</sup> Ibid.

<sup>71</sup> *Dowdle's Estate v Dowdle* 1947 (3) SA 340 (T) at 354.

<sup>72</sup> Ibid.

<sup>73</sup> 1949 (2) SA 567 (T).

<sup>74</sup> *Litecor Voltex (Natal) (Pty) Ltd* supra note 45 at 82C–D.

with the relevant formal requirements.<sup>75</sup> The judge held further that the distinction drawn for the purposes of rectification in the *Spiller* case — between agreements which are not subject to formalities and those which are — was only relevant when a court was faced with a claim for rectification of a document which failed to meet formal requirements.<sup>76</sup> According to Didcott J, the document that he was being asked to rectify

‘met all the formal requirements for a suretyship. [But it] showed a fault of another sort. And it showed that wrongly. The actual agreement, the agreement intended all along, had none. Rectification was thus in order.’<sup>77</sup>

It is difficult to determine the true import of the *Litecor Voltex* decision. According to the court’s own interpretation of the deed of suretyship, the surety had not signed in his personal capacity, but as representative of the debtor company. Therefore, it would appear that the document was *formally* invalid, since it failed to identify three distinct parties as creditor, debtor and surety.<sup>78</sup> On this interpretation, no distinction should have been drawn between the documents in *Magwaza*, *Dowdle* and *Kourie* on the one hand, and the document in *Litecor Voltex* on the other, because they all failed to identify an essential term of the agreement.

However, *Litecor Voltex* has also been interpreted as an example of a case where the document is formally valid, but appears to be substantively invalid.<sup>79</sup> Even though the surety signed the document in his representative capacity, three separate names appeared *ex facie* the document. Such an interpretation would explain Didcott J’s statement that the document ‘met all the formal requirements for a suretyship’ despite the fact that the surety had signed in the incorrect capacity. Such an interpretation would also explain how Didcott J found support for his reasoning in the *Spiller* case. According to the judge,

<sup>75</sup> Ibid at 82E–F.

<sup>76</sup> Ibid at 83C–D.

<sup>77</sup> Ibid at 83D–E.

<sup>78</sup> See also Van der Merwe et al op cit note 19 at 158n226; *Republican Press (Pty) Ltd* supra note 6 at 254A–D, where Hurt J was of the opinion that on one interpretation at least, the document in *Litecor Voltex (Natal) (Pty) Ltd* supra note 45 was formally invalid.

<sup>79</sup> Lubbe & Murray op cit note 20 at 235n4:

‘[*Litecor Voltex*] extends the reasoning in [*Spiller*] to contracts governed by statutory formalities. A mistake in the expression of the parties creating the impression of [substantive] invalidity may be rectified provided that the document on the face of it complies with the statutory requirements.’

See also *Nuform Formwork and Scaffolding (Pty) Ltd v Natscaff CC* [2002] 4 All SA 575 (D) at 581; *Republican Press (Pty) Ltd* supra note 6 at 254H; *Headerman (Vryburg) (Pty) Ltd* supra note 64 at 1010G.

‘[t]he distinction drawn [in *Spiller*] for the purposes of rectification between contracts governed by formal requirements and the rest free from such mattered . . . only when those on which they called did not duly answer them.’<sup>80</sup>

This is a somewhat ingenious argument. The *Spiller* case was not concerned with the rectification of an agreement subject to formalities, but sought rather to indicate why a written agreement not subject to formalities but which appeared to be void could be rectified, whereas an agreement for which writing is constitutive could not be so rectified. In the former, the writing is not constitutive and a distinction can be drawn between the written record of the agreement and the agreement itself. Such a distinction cannot be drawn in cases where formalities are prescribed upon pain of nullity. However, in *Litecor Voltex* Didcott J applies this reasoning to agreements subject to formalities by distinguishing between instances where such an agreement does not comply with formal requirements (and therefore cannot be rectified) and an agreement which does comply but appears to be invalid for some other reason (in which case a court may consider the parties’ underlying agreement). In other words, the judge assumed that in the event of formal invalidity, the document is the sole embodiment of the parties’ agreement and no distinction can be drawn between the recordal and that agreement. However, when the document recording the agreement complies with the relevant formal requirements but appears to be substantively invalid, then such a distinction can be drawn between the document and the underlying agreement.

This approach is of course inconsistent with the theory underlying the imposition of the first step in the rectification of agreements subject to formalities. The document constitutes the embodiment of the parties’ agreement and it is surely the document which must be considered to determine whether the agreement complies with both formal and substantive requirements. If the document is the sole manifestation of the parties’ agreement and bearing in mind the rule that a void agreement cannot be rectified, then both substantive and formal invalidity should preclude rectification. As Van der Merwe and others have pointed out,

‘[i]n a case governed by statutory formalities it is arguable that the legal act is fully identified with its documentary manifestation. As a matter of logic, it might therefore be contended that the proper analysis is, in the words of Didcott J in the *Spiller* case, that “appearance and reality coincide. . . . Nullity, when the document shows it, is no illusion”, and that rectification ought to be excluded.’<sup>81</sup>

Nevertheless, the effect of the *Litecor Voltex* decision is to limit the ambit of the first step so that it only precludes the rectification of a document which does not appear to be formally valid; in the case of (mere) substantive

<sup>80</sup> *Litecor Voltex (Natal) (Pty) Ltd* supra note 45 at 83C–D. To clarify: the distinction is only important where contracts subject to formalities do not comply with those formalities.

<sup>81</sup> Van der Merwe et al op cit note 19 at 158.

invalidity *ex facie* the document, it seems that a court is entitled to have regard to the parties' 'actual' agreement.

This limitation of the ambit of first step is also apparent in cases where there is no doubt whatsoever that statutory formalities have been properly complied with, but where the document appears to reflect a substantively invalid agreement. For example, in *Headerman (Vryburg) (Pty) Ltd v Ping Bai*<sup>82</sup> the court ordered rectification of a deed of alienation which complied with statutory formalities but which, *ex facie* the document, appeared to relate to the sale of erven in an unproclaimed township. Such a sale was prohibited by certain ordinances and the failure to heed this prohibition rendered the sale void.<sup>83</sup> However, as in *Litecor Voltex*, the Supreme Court of Appeal interpreted the *Spiller* distinction as prohibiting the rectification of agreements subject to formalities only in cases where the document fails to identify an essential term and is therefore formally invalid.<sup>84</sup> Where, as here, the document indicated compliance with statutory formalities but had the appearance of substantive invalidity, the court was entitled to consider the parties' underlying agreement (which was not invalid) and to rectify the document accordingly, by inserting the correct description of the land sold.<sup>85</sup>

Both the lenient approach to formal invalidity and the judicial tendency to rectify agreements subject to formalities where they appear to be substantively invalid only, represent attempts to navigate the tension between giving effect to the policy considerations underlying statutory formalities on the one hand, and the need to do justice on the other.<sup>86</sup> However, the question arises whether such judicial navigation, which often results in drawing tenuous distinctions, could not have been avoided altogether in the absence of the first step.

(c) *Is the validity requirement necessary?*

It would appear that not all courts subscribe to the rule that constitutive formalities preclude consideration of any underlying agreement or prior intention independent of the document for the purposes of determining *ex facie* compliance. At least in *Osborne* and *Litecor Voltex*, as well as in those cases where substantive invalidity was clear *ex facie* the document, the court

<sup>82</sup> *Headerman (Vryburg) (Pty) Ltd* supra note 64.

<sup>83</sup> *Ibid* at 1010B.

<sup>84</sup> *Ibid* at 1010D–H.

<sup>85</sup> Van der Merwe et al op cit note 19 at 158 cite *Engelbrecht v Nel* 1991 (2) SA 549 (W) as an example of a judgment where the apparent substantive invalidity *ex facie* the document precluded its rectification, thus contradicting *Headerman (Vryburg) (Pty) Ltd* supra note 64. However, it is suggested that the authors overlooked the prevailing judicial tendency which characterises the requirement that the terms of an agreement subject to formalities should be reasonably ascertainable as a formal, rather than substantive, requirement (see *Engelbrecht* *ibid* at 552C–D; *Hartland Implemente (Edms) Bpk v Enal Eiendom* 2002 (3) SA 653 (NC) at 667G–I). Upon such an interpretation, the agreement in *Engelbrecht* was therefore formally, and not substantively, invalid.

<sup>86</sup> *Intercontinental Exports (Pty) Ltd* supra note 6 para 11; *Papenfus v Steyn* 1969 (1) SA 92 (T) at 98D–E.

recognised the separate existence of such an underlying agreement. Although I shall also evaluate the approaches discussed above and their implications for the policy concerns informing the imposition of the first step, certain preliminary points of criticism of the position that a document which does not comply with statutory formalities cannot be rectified, will be considered here.

First, it is unclear whether the authority cited in *Magwaza* actually supports the conclusion that an agreement which is subject to constitutive formalities cannot be rectified if it does not first comply with those formalities. The court relied on a statement in *Dowdle*,<sup>87</sup> which in turn appeared to be relying on the following portion of De Villiers JA's judgment in *Weinerlein v Goch Buildings Ltd*:<sup>88</sup>

'By putting the agreement in writing and signing it the parties have complied with the provisions of s 30 [of Transvaal Proclamation 8 of 1902]. So far, therefore, as that section is concerned, the agreement stands. . . . We were pressed with the decision of the Transvaal Supreme Court in the case of *Jolly v Herman's Executors* 1903 TS 515 in which it was laid down that there is no *vinculum juris* between the parties to a mineral contract as long as the contract has not been notarially executed and duly registered in accordance with the Volksraad Besluit. It was urged that *Jolly's* case gives a person a right to reseal as long as the provisions of the Volksraad Besluit have not been complied with and that the plaintiffs have a similar right in the present case. . . . But there is nothing inconsistent in this view of s 30 with the decision in *Jolly's* case. No doubt s 30 gives either party the right to refuse to complete the agreement before it has been put into writing and signed, but there is nothing in the section to compel the same conclusion where the agreement has been reduced to writing and signed. The two cases differ *toto caelo*. In the one case there is no contract between the parties, who are free to go on with the contract or not as they please. In the other there is a concluded contract between them, *contractus absolutus et perfectus est*. (C 4.21.17; C 4.38.15; Faber C 4.16.14; Perezius C 21.10.)'<sup>89</sup>

Botha J expressed doubt in *Vogel NO v Volkersz*<sup>90</sup> whether De Villiers JA's judgment supported the general proposition that non-compliance with statutory formalities rendered a written agreement incapable of rectification. As the judge pointed out, the court in *Weinerlein* was confronted with the question whether rectification of a written agreement for the sale of land, which complied with the relevant formalities but which failed to describe the merx accurately, would be contrary to the relevant statutory formalities. It

<sup>87</sup> *Magwaza* supra note 1 at 1025A.

<sup>88</sup> *Weinerlein* supra note 24. In *Dowdle's Estate* supra note 71 at 354, Dowling AJ does not indicate which judgment in the *Weinerlein* case implies that non-compliance with statutory formalities precludes rectification. However, in *Vogel NO v Volkersz* 1977 (1) SA 537 (T) at 557A–B, Botha J indicates that it is that part of De Villiers JA's judgment quoted in the main text above. This portion of De Villiers JA's judgment is also cited in *Magwaza* supra note 1 at 1025E–H.

<sup>89</sup> *Weinerlein* supra note 24 at 290, per De Villiers JA.

<sup>90</sup> *Vogel NO* supra note 88 at 557A.

was not asked to consider what the case would be if the agreement did not comply with statutory formalities.<sup>91</sup>

Malan goes even further and argues that De Villiers JA's judgment could be interpreted to mean that the mere reduction of an agreement subject to constitutive formalities to a signed document is sufficient for a court to consider its rectification.<sup>92</sup> According to him,<sup>93</sup> the quoted portion of the judgment should be understood in the light of the argument made by counsel for the plaintiffs to the effect that the absence of a valid, antecedent contract between the parties precluded rectification of the document in order to reflect the parties' actual agreement. This was because

'[t]o seek to bind the plaintiffs to such a contract . . . it is not a sufficient compliance with the section to show that there is a writing signed by both parties, unless each term of the antecedent verbal agreement has been embodied in the writing. In the absence of such a term in the instrument the plaintiff cannot be said to have agreed to that term because he has not agreed to it in writing.'<sup>94</sup>

According to Malan, De Villiers JA's response indicates that all that is required is that there must be an instrument which can be rectified; the fact that it reflects a void contract is neither here nor there.<sup>95</sup> Furthermore, the purpose of drawing the distinction with *Jolly* was simply to indicate that in that case, the basic formal requirements of notarial execution and registration had not been complied with, and as a result there was nothing to rectify.<sup>96</sup> Malan argues that where writing only is prescribed, and the parties have complied with this requirement, there is something to rectify, albeit not a fully enforceable and valid contract.<sup>97</sup>

Such an interpretation of De Villiers JA's judgment appears to resonate in the judgment of Wessels JA, where he states that

'[a]ll therefore, that sec. 30 says in effect is that the Courts will not recognise any contract of sale as a legal act unless it is in writing, but once the contract is in writing the Court will not allow it to be used as an engine of fraud to extort from an adversary what the claimant knows that he never was entitled to and in order to prevent this it will cause the written contract . . . to be rectified'.<sup>98</sup>

Furthermore, Malan's interpretation would appear to be more in line with the equitable origins of the remedy of rectification. All three judgments in the *Weinerlein* case emphasise the fact that to allow a party to rely on a written document which does not accurately reflect the parties' intention is to allow

<sup>91</sup> Ibid at 557A–C.

<sup>92</sup> J F Malan *Aspekte van Rektifikasie in die Suid-Afrikaanse Kontrakereg* (unpublished LLD thesis, University of Pretoria, 1987) 258–9.

<sup>93</sup> Ibid at 259.

<sup>94</sup> *Weinerlein* supra note 24 at 289–90.

<sup>95</sup> Malan op cit note 92 at 259.

<sup>96</sup> Ibid at 259.

<sup>97</sup> Ibid at 260.

<sup>98</sup> *Weinerlein* supra note 24 at 293.

that party to perpetrate a type of fraud.<sup>99</sup> The imposition of the first step, contrary to this fraud-prevention purpose of rectification (and, incidentally, of formalities), allows a party to rely on the formal invalidity of the document, in spite of the fact that the parties may have orally agreed on all the particulars of their agreement. This does not seem to be consistent with the equitable nature of the remedy of rectification emphasised in the *Weinerlein* case.

Despite the possible merits of Malan's argument, it does display some weaknesses. For example he, like Dowling AJ in the *Dowdle* case, appears to lose sight of the fact that the court had not been asked to consider whether the rectification of an agreement which did not comply with constitutive formalities would be possible. Furthermore, it is arguable that the relaxation of the prior concluded contract requirement has nothing to do with whether a formally invalid agreement can be rectified, but rather with what must be proved in order to succeed with a claim for rectification.<sup>100</sup> Nevertheless, Malan's interpretation of De Villiers JA's judgment presents an apparent solution to the problems which have arisen with the requirement that a document must first comply with formalities before it can be rectified.

In addition to the possibly suspect origins of the first step, its imposition has also led to the development of the rather tenuous distinction between formal and substantive invalidity in an attempt to avoid it. It is unclear why the apparent formal invalidity of a document recording an agreement subject to formalities should preclude rectification, whereas substantive invalidity apparent *ex facie* the document would not. Such a distinction is illogical. If the effect of constitutive formal requirements is to equate the document with the parties' agreement, then any kind of invalidity *ex facie* the recordal should preclude rectification on the basis that no obligation has been created and as a consequence, that there is nothing to rectify.

In any event, the requirement of apparent formal validity as a prerequisite to rectification appears to be based on a logical error about the nature of the remedy. Statements to the effect that '[one] cannot, by rectification, invest a document which, on the face of it, is null and void, with legal force'<sup>101</sup> and that '[being] a nullity, [an agreement subject to formalities cannot] be rectified so as to become a valid contract'<sup>102</sup> presuppose that rectification, in itself, constitutes transformation and/or enforcement of a nullity. This is incorrect: rectification simply corrects the document.<sup>103</sup> As we shall see, this

<sup>99</sup> *Ibid* at 288–9 (per De Villiers JA), 292–3 (per Wessels JA) and 294 (per Kotze JA).

<sup>100</sup> See note 119 below.

<sup>101</sup> *Dowdle's Estate* *supra* note 71 at 354.

<sup>102</sup> *Kourie* *supra* note 73 at 572.

<sup>103</sup> *Boundary Financing Ltd v Protea Property Holdings (Pty) Ltd* 2009 (3) SA 447 (SCA) para 13; *Bester NO v Schmidt Bou Ontwikkelings CC* 2013 (1) SA 125 (SCA) paras 10–12; Kerr *op cit* note 22 at 156. This point relates to a similar one made by De Wet & Van Wyk *op cit* note 49 at 323n55, who remark that the approach of the courts amounts to a conceptual confusion: rectification does not change the contract, but rather the document that is an inaccurate reflection of that contract. Louise Tager

distinction between correction and enforcement is recognised in other legal systems. It has also been recognised by local courts, albeit not in the context of the rectification of agreements subject to constitutive formalities — in *Spiller*, for example, it was noted that rectification relates to and concerns the document, but that does not mean that the remedy is focused on the enforcement of the agreement it reflects.<sup>104</sup> In other words, a distinction can be made between the correction of the document, which is the purpose of rectification, and the enforcement of the recorded agreement once corrected. This distinction between correction and enforcement was confirmed by the Supreme Court of Appeal in *Akasia Road Surfacing (Pty) Ltd v Shoredits Holdings Ltd*.<sup>105</sup> The court permitted the rectification of a written agreement despite the possibility (and the court considered it no more than a mere possibility) that the correction might render the written agreement too vague to be enforced. According to the court, provided the parties' common intention is clear, it is irrelevant that the rectification of the document may have the effect that there are no longer any enforceable rights and obligations.<sup>106</sup> In view of this conclusion, and taking into account that the written agreement was formally valid in *Osborne*, the claim for rectification should have succeeded in spite of the fact that the written agreement, once corrected, would have been void for failure to identify the actual purchaser with reasonable certainty and therefore incapable of being enforced.<sup>107</sup>

'Rectification of invalid contracts' (1977) 94 *SALJ* 8 at 11 submits that even though the document and the obligation are said to come into existence at the same time, they can be separated conceptually and therefore should be treated separately in a claim for rectification. According to these writers, rectification should be permitted even where the document on the face of it does not comply with formalities.

<sup>104</sup> *Spiller* supra note 27 at 313A–D. See also Tager op cit note 103 at 11; *Lazamus* supra note 7.

<sup>105</sup> 2002 (3) SA 346 (SCA).

<sup>106</sup> *Akasia Road Surfacing (Pty) Ltd* supra note 105 paras 14, 16. In this regard the court did not refer to opinions to the contrary which indicated that when rectification would be pointless, for example when the parties' prior agreement or intention is inchoate, a court will not rectify a document. See *Spiller* supra note 27 at 308G; Bamford op cit note 48 at 534; Kerr op cit note 22 at 152.

<sup>107</sup> This is in spite of the fact that an additional reason for the refusal to award rectification in *Osborne* supra note 8 paras 38–40 was the absence of the actual purchaser's signature. This conclusion is not supported. First, the court allowed evidence of the underlying agreement to determine the formal validity of the written agreement (para 38) and secondly, if the written agreement had been rectified, the signature requirement would have been fulfilled by virtue of the fact that the actual purchaser's representative had signed on its behalf (supra note 61). The real or underlying agreement was therefore not invalid because the true purchaser had not signed, but simply because the identity of true purchaser was not reasonably ascertainable. In other words, the facts before the court were not similar to those described by Phillip Maurice Wulfsohn *Formalities in Respect of Contracts of Sale of Land Act* (1980) 222 (cited in *Osborne* supra note 8 para 39) who deals with the signatures of natural, and not juristic, persons.

*(d) A comparative perspective on the correction of written agreements*

Civilian and common-law courts are also required to determine the extent to which compliance with formal requirements should outweigh the need to give effect to what the parties actually agreed upon or intended. It is therefore appropriate to consider how they would deal with this challenge.

*(i) A civilian approach to the correction of errors in agreements subject to statutory formalities*

German law does not recognise a rule similar to the parol evidence rule.<sup>108</sup> However, it does recognise a presumption in favour of the completeness and accuracy of a document, which is even stronger in the case of agreements which must be reduced to writing.<sup>109</sup> As in South Africa, sales of land<sup>110</sup> and suretyships<sup>111</sup> are typical examples of agreements subject to constitutive formalities in German law. Nevertheless, this jurisdiction also allows these and other written agreements to be brought into line with the parties' actual intentions when, by virtue of a mistake, the former do not constitute an accurate recordal of the parties' consensus.

A German court will use one of two methods to correct a written agreement. The first is to approach the problem as a type of mistake in expression, and to solve it according to the old Roman maxim *falsa demonstratio non nocet*: a false description does not vitiate the contract. The maxim allows the court to consider the parties' actual agreement, which then prevails over the words used in the contract. It is relied upon in cases which would be labelled as rectification for a common or unilateral mistake respectively in both English and South African law. Thus, where the contract describes the land to be sold as parcels 31 and 32 but the parties actually intended that parcel 33 should also be sold,<sup>112</sup> the parties' common intention would take precedence over the incomplete description in the contract. Similarly, the *falsa demonstratio* principle would also be applicable where the written agreement indicates that parcels 31, 32 and 33 are sold, but the seller only intended to sell parcels 31 and 32 and the purchaser concluded the agreement knowing of this intention. In such a case, effect will be given to the mistaken party's intention and the written agreement will be corrected.<sup>113</sup>

The *falsa demonstratio* principle as applied in German law presupposes that there is in fact an inaccurate or insufficient description of a term in the contract. However, it also appears that when an essential term of the agreement subject to constitutive formalities is omitted from the contract, a German court will use the *Andeutungstheorie* ('theory of indication') to

<sup>108</sup> Stefan Vogenauer 'Interpretation of contracts: Concluding comparative observations' in Andrew Burrows & Edwin Peel (eds) *Contract Terms* (2007) 135.

<sup>109</sup> *Ibid* at 138.

<sup>110</sup> § 311b BGB.

<sup>111</sup> § 766 BGB.

<sup>112</sup> BGHZ 87, 150 (25-03-1983) at 152-5.

<sup>113</sup> BGH *NJW-RR* 1993, 373 (translated in Vogenauer *op cit* note 108 at 142).

determine whether there is some 'indication' of or allusion to this omitted term in the contract itself.<sup>114</sup> If there is such an allusion, the court will permit evidence of external circumstances to discover whether the parties had in fact agreed upon the omitted term.<sup>115</sup> As a second step, the court will then determine whether the contract is formally valid in light of these external circumstances. The justification underlying this approach is that evidentiary certainty is trumped by the belief of the parties that they have concluded a valid agreement.<sup>116</sup>

Thus, the German approach is to characterise situations where the document does not accurately represent the parties' intention as a matter of interpretation or construction. In principle, all extrinsic evidence is admissible in order to determine whether a written agreement is valid and what it means.<sup>117</sup> In common-law jurisdictions, as in South Africa, this particular problem cannot be dealt with in the same way, precisely because of the existence of the parol evidence rule. However, an examination of the way in which rectification proceeds in these common-law jurisdictions also indicates that a court will first rectify an agreement before determining its formal validity.

(ii) *The common-law approach to the correction of errors in agreements subject to statutory formalities*

Unlike South African courts, common-law courts do not hesitate to rectify an agreement subject to formalities, even when the documented recordal fails to comply with them. This was not always the position: until the authoritative decision in *Joscelyne v Nissen*,<sup>118</sup> it was unclear whether a document recording an agreement subject to statutory formalities could be rectified to give effect to a prior oral agreement or common intention or whether the fact that these did not constitute a valid contract precluded such a claim.<sup>119</sup>

<sup>114</sup> Vogenauer op cit note 108 at 138–9.

<sup>115</sup> See for example Rainer Kanzleiter '§ 311b' in Wolfgang Krüger (ed) *Münchener Kommentar zum Bürgerlichen Gesetzbuch Schuldrecht 2 Allgemeiner Teil: §§ 241–432* 5 ed (2007) note 64.

<sup>116</sup> Ibid.

<sup>117</sup> Vogenauer op cit note 108 at 135; Birke Häcker 'Mistakes in the execution of documents: Recent cases on rectification and related doctrines' (2008) 19 *King's LJ* 293 at 306–7.

<sup>118</sup> [1970] 2 QB 86.

<sup>119</sup> If South African law did indeed receive the remedy of rectification from English law (as a corrective to the parol evidence rule), then the South African courts preceded their English counterparts in the relaxation of at least one of its requirements. In *Weinerlein* supra note 24 at 285 per De Villiers JA, it was held that a party need not prove the existence of a prior, validly concluded contract in order to succeed with a claim for rectification of a subsequent recordal — proof of a prior agreement was sufficient. This requirement was further relaxed in *Meyer* supra note 7 at 253 so that proof of a prior common intention (rather than an agreement or contract) would suffice. The distinction between a prior agreement and a common intention is discussed in Myburgh op cit note 33 at 197–224.

The introduction of the ‘prior common intention’ requirement in common-law jurisdictions now allows a court to rectify the document so that it complies with the relevant legislation rather than because it does so. Therefore, even where essential terms have been omitted from the document, these terms may be inserted,<sup>120</sup> provided only that the traditional requirements for rectification have been met.<sup>121</sup>

This phenomenon may be explained on the basis that the relevant legislation usually prescribes different consequences for non-compliance with statutory formalities. For example, s 4 of the English Statute of Frauds, 1677 provides that when a guarantee (a suretyship in the South African sense) does not contain all the terms of the parties’ agreement, that guarantee is merely unenforceable, rather than void. This means that

‘[t]he statute, in fact, only provides that no agreement not in writing and not duly signed shall be sued on: but when the written instrument is rectified there is a writing which satisfies the statute, the jurisdiction of the court to rectify being outside the prohibition of the statute’.<sup>122</sup>

Unenforceability means that English courts do not have to grapple with the apparent legal problem of rectifying a document which simultaneously constitutes the agreement between the parties and appears to be a nullity.<sup>123</sup> It allows a court to recognise that there is an underlying agreement or intention and to rectify a document which does not represent that agreement or intention accurately. Unlike their South African counterparts, furthermore, English courts are not faced with the apparent difficulty of distinguishing between the consequences of non-compliance with statutory formalities and the failure to record an agreement accurately. As the above quotation illustrates, the relevant legislation makes it clear that non-compliance leads to unenforceability; since rectification is aimed at the correction of the

<sup>120</sup> Edwin Peel *Treitel’s The Law of Contract* 13 ed (2011) 191, 348; Caroline N Brown *Corbin on Contracts 4: Statute of Frauds* §§ 12.1–23.11 (1997) § 14.22; American Law Institute *Restatement (Second) of the Law of Contracts* (1981) § 156 (where it is stated that there is no meaningful distinction between errors of commission and those of omission); *United States of America v Motor Trucks Ltd* [1924] AC 196; *Craddock Brothers v Hunt* [1923] 2 Ch 136; *GMAC Commercial Credit Development Limited v Kalvinder Singh Sandhu, Kewal Singh Sandhu* [2004] EWHC 716; *Hughes v Payne* 22 SD 293, 117 NW 363 (1908); *Calhoun v Downs* 211 Cal 766, 297 P 548 (1931); *Whiting v Diver Plumbing & Heating Ltd* [1992] 1 NZLR 560 569; *Jireh Customs Limited v Clode* [2008] NZHC 1665.

<sup>121</sup> In *Swainland Builders Limited v Freehold Properties Limited* [2002] EWCA Civ 560 para 33, the court listed these requirements:

‘(1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified; (2) there was an outward expression of accord; (3) the intention continued at the time of the execution of the instrument sought to be rectified; [and] (4) by mistake the instrument did not reflect that common intention’.

<sup>122</sup> *United States of America* supra note 120 at 200–1, per the Earl of Birkenhead.

<sup>123</sup> Peel op cit note 120 at 193 states that the contract can be *concluded* orally, but it can only be *enforced* if the contract has been reduced to writing.

document and not its enforcement, a court which grants the remedy does not circumvent the prohibition of the relevant statute.<sup>124</sup>

Admittedly, not much can be gained from attempting to compare the consequence of unenforceability with that of nullity.<sup>125</sup> Something which is void is non-existent, and not merely incapable of being enforced.<sup>126</sup>

Nevertheless, there are certain common-law statutes which prescribe invalidity for non-compliance with statutory formalities. The first is s 2(1) of the English Law of Property (Miscellaneous Provisions) Act, 1989. Unlike its South African equivalent however, the Act also makes specific provision for the rectification of a deed in order to make it comply with statutory formalities.<sup>127</sup> The fact that this remedy is statutorily permitted in spite of the fact that the agreement is void may suggest that the legislature was not aware of, or disagreed with, the idea that one cannot rectify a void agreement. This makes a direct comparison between the South African and the English approach on the point somewhat difficult, although if the South African approach was as self-evident as the courts assume it to be, one would have expected some academic or judicial commentary on the apparent change in position adopted by the English legislature.<sup>128</sup>

The California Civil Code is another statute which prescribes invalidity when certain agreements have not been reduced to writing.<sup>129</sup> While the Code also contains a provision relating to the rectification of agreements, it does not explicitly authorise the rectification of a void agreement in order to comply with formalities.<sup>130</sup> It is therefore useful to note how a Californian court would approach this issue.

In *Oatman v Niemeyer*<sup>131</sup> the Supreme Court of California was asked to rectify a deed of sale which failed to describe the property that was the object of the sale. It held as follows:

‘There can, of course, be no question but that the deed was void in law, that is, that it failed wholly as conveyance of property since no property was described.

<sup>124</sup> *GMAC Commercial Credit Development Limited* supra note 120 para 58.

<sup>125</sup> Tager op cit note 103 at 14–15 makes the same observation.

<sup>126</sup> See *Commissioner for Inland Revenue v Insolvent Estate Botha t/a ‘Trio Kulture’* 1990 (2) SA 548 (A) at 565D–F.

<sup>127</sup> Section 2(4).

<sup>128</sup> The change in position refers to the fact that prior to the promulgation of the Act, contracts for the sale of land were governed by the Law of Property Act, 1925 which prescribed unenforceability in the event of non-compliance with statutory formalities. The imposition of nullity was a product of the English Law Commission’s recommendations in *Formalities for Contracts for Sale etc of Land (Law Com No 164)* (1987) paras 1.4–1.9. Despite the fact that non-compliance with statutory formalities now renders an agreement for the sale of land void, the Law Commission confirmed in para 5.6 that rectification would also be available under the new regime, without any comment on the apparent contradiction or inconsistency, at least from a South African perspective, in the notion that a void agreement may be rectified.

<sup>129</sup> § 1624.

<sup>130</sup> § 3399 simply reiterates the general common-law rules relating to rectification.

<sup>131</sup> 207 Cal 424, 278 P 1043 (1929).

But the contention that, for that reason, it cannot be reformed fails to distinguish between a contract which is void for some fundamental reason and an instrument or writing which is void because of mistake in its preparation. If the contract itself is void, as, for example, because it is immoral or because the parties have not agreed on all of its terms and there is, for that reason, no final contract or understanding between them, . . . reformation is impossible, since there is no valid contract to reform. But this is entirely different from a case where there is a valid contract and the parties have endeavored to put it in writing, and have made a mistake in writing down its terms, or have endeavored in accordance with the contract to execute an instrument, such as a deed, for the purpose of carrying it out and, through mistake in the preparation of the instrument, the document fails, either wholly or partially, to accomplish such purpose. The instrument may be void in such a case because of the mistake, but there is still a valid contract; and the contract being valid, equity will reform the instrument to make it what it should be, and would have been except for the mistake. There is no making of a new contract in such a case. There is but the making of a new instrument, either to correctly express the contract or to carry it into effect.<sup>132</sup>

This portion of the judgment is quoted in full as an illustration of a more tenable approach to the problem. First, it indicates that even where formalities are constitutive, a logical distinction can be drawn between the document (instrument) and the underlying agreement or contract. Secondly, it illustrates that rectification of a document which does not comply with formalities does not necessarily lead to the inescapable conclusion that a court is investing a void transaction with validity. In these circumstances, '[t]here is no making of a new contract', but the correction of the document or deed which inaccurately reflects that contract. Finally, it places the correct question in the foreground: is the agreement that the parties concluded (and not necessarily its recordal) valid, or void?

The approach in both common- and civil-law jurisdictions as described above maintains a better balance between the need to promote the functions of statutory formalities and the need to give effect to the parties' true intention. Logically, a document should first be corrected before one can determine whether it complies with the requirements for validity, both formal and substantive, and is therefore enforceable.<sup>133</sup> In German law, all extrinsic evidence is admissible in order to determine the content of a written agreement. If this evidence indicates that there has been a mistake in the recordal of the agreement, the *falsa demonstratio* principle and the *Andeutungstheorie* allow effect to be given to the parties' true intention. Only thereafter does a court determine whether the corrected agreement is (formally) valid or void. This is also the procedure followed in common-law jurisdictions, at least insofar as it relates to rectification: first correct the document and then determine its validity once corrected. Of course, this

<sup>132</sup> *Oatman* supra note 131 at 426–7.

<sup>133</sup> *Brown* op cit note 120 at 234–6. See also *Van der Merwe et al* op cit note 19 at 157.

does not mean that a document will always be rectified when it does not comply with formalities; it simply places the emphasis, correctly it is argued, on the true issue, which is whether the requirements for rectification have been met. Whether the difference in emphasis between the South African approach on the one hand, and the common (and civilian) approach on the other, has any effect on the policy issues underlying the imposition of formalities is considered next.

#### IV THE SECOND JUSTIFICATION: EX FACIE COMPLIANCE AND THE FUNCTIONS OF FORM

The rectification of agreements subject to constitutive formalities involves two conflicting principles.<sup>134</sup> The first, which underlies rectification, is that effect must be given to the true agreement between the parties. The other is that the functions of statutory formalities should not be circumvented. In *Magwaza*, the court opted to give greater weight to the second principle and held that the rectification of an agreement which does not comply with constitutive formalities opens the door to fraud, possible perjury and unnecessary litigation.<sup>135</sup>

As a general rule, South African courts do not consider the policy considerations underlying formal requirements when determining whether an agreement subject to formalities should be rectified, perhaps because there is an assumption that formal validity automatically precludes the subversion of such functions. This is certainly the impression created in *Magwaza*,<sup>136</sup> where the court very briefly mentioned that in order to promote the evidentiary function fulfilled by formalities, effect must be given to the plain wording of the relevant statute. This statement was made without considering the fact that while a document may appear to record a formally valid agreement, a mistake in that recordal renders the document inaccurate evidence of the parties' agreement. A document containing an incorrect description of land, for example, is no better evidence of the parties' agreement than a document which contains no description at all. Furthermore, there appears to be an inherent contradiction in an approach which stipulates the requirement of formal validity as a precondition to rectification in order to prevent uncertainty and disputes and then allows rectification of that document, when the remedy in itself opens the door to uncertainty and disputes.<sup>137</sup> Subsequent decisions, if they mention policy issues at all, have simply proceeded on the same assumption of automatic subversion as justification for the decision that a particular agreement cannot be rectified, without investigating whether the facts really merit such a conclusion.

<sup>134</sup> *Republican Press (Pty) Ltd* supra note 6 at 256A, per Squires J.

<sup>135</sup> *Magwaza* supra note 1 at 1029F. According to Friedman J in *Thathiah v Kahn NO* 1982 3 SA 370 (D) at 375B–C, this is the true ratio of that decision.

<sup>136</sup> *Magwaza* supra note 1 at 1029E–F.

<sup>137</sup> *Vogel NO* supra note 88 at 558F–G.

This point is illustrated by a closer examination of the decisions in *Republican Press* and *Intercontinental Exports*. In the former case, the court justified its strict approach on the following basis: the majority, per Hurt J, emphasised that the *Magwaza* decision amounted to a clear policy statement that the intention of the legislator should prevail over the equitable remedy of rectification.<sup>138</sup> The fact that giving effect to this intention may lead to anomalous results was not, according to the court, sufficient justification for adopting a 'lenient' approach in determining whether a document should be rectified.<sup>139</sup> Although *Intercontinental Exports* represents a less strict approach (by recognising that a document is formally valid when it is reasonably capable of an interpretation consistent with validity) the court nevertheless supported the majority decision in *Republican Press*.<sup>140</sup>

The following comment has been made about these two decisions:

'Chance may determine whether the transcription error in question, in addition to giving the same name to two parties, introduces a slight difference into the name thereby allowing the principle of *Intercontinental Exports* to operate or whether the name is identical so the case falls within *Republican Press (Pty) Ltd*.'<sup>141</sup>

This criticism is convincing when considered in the context of the policy considerations underlying the imposition of formalities.<sup>142</sup> In neither *Republican Press* nor *Intercontinental Exports* did the court consider whether its decision promoted the functions of formalities. From this perspective, the latter decision fails to do so any better than the former. In both cases, the document before the court constituted incorrect and misleading evidence of the true agreement between the parties. In addition, and although this is rarely mentioned in cases dealing with formalities,<sup>143</sup> the cautionary function of formalities had been fulfilled: the document in each case had been reduced to writing, thereby (presumably) giving the respective sureties an opportunity to consider the obligations they were undertaking. When considered in this light, the different decisions (and approaches) in these two cases, while possibly strictly logically correct, do seem arbitrary.

<sup>138</sup> *Republican Press (Pty) Ltd* supra note 6 at 253B.

<sup>139</sup> *Ibid* at 255B–E.

<sup>140</sup> *Intercontinental Exports (Pty) Ltd* supra note 6 para 16.

<sup>141</sup> C F Forsyth & J T Pretorius *Caney's The Law of Suretyship* 5 ed (2002) 71. This opinion is expressed again in the sixth edition (C F Forsyth & J T Pretorius *Caney's The Law of Suretyship* 6 ed (2010) 76n73). See also Minette Nortje 'General principles of contract' 1999 *Annual Survey* 154 at 171; Jopie Pretorius 'Surety issues: A survey of recent cases' (2006) 14 *JBL* 164 at 168.

<sup>142</sup> However it does lose sight of the difference in the facts of the respective cases: companies cannot have the same names (*Republican Press*) while natural persons can and do (*Intercontinental Exports*).

<sup>143</sup> The minority judgment in *Republican Press (Pty) Ltd* supra note 6 proves to be one of the few exceptions. Squires J alluded to the cautionary function of formalities when he said that '[t]he relevant party, in the form of the surety, has addressed himself and his mind to the completion of the document, but erroneously also recorded the creditor's name as that of the principal debtor' (at 259I–260A).

But what of decisions permitting rectification where the document creates the impression of substantive invalidity? Do they, by limiting the ambit and effect of the first step, subvert the functions of formalities by recognising that there is an agreement independent of the document which records it? While possibly contrary to the rule that the document is the sole manifestation of the parties' agreement, it is suggested that these cases appear to promote at least the evidentiary function of formalities, since the document once rectified constitutes accurate evidence of the parties' agreement.

This recognition that an inaccurate recordal constitutes misleading evidence of the parties' true intention, and should be corrected for that reason, appears to underlie the application of the *falsa demonstratio* principle and the *Andeutungstheorie* in German law. In the context of the sale of land, the comment has been made that where there is an inaccurate description of the subject-matter, it is (usually) only the evidentiary function of the document which fails; the function of writing as a means to warn and inform the parties is nevertheless fulfilled.<sup>144</sup> This being the case, the document may be corrected in order to present an accurate record of the parties' agreement. A similar argument appears to underlie the common-law approach. For example, it has been stated that

[t]he theory of reformation is that the instrument already *is* subjectively — i.e., to the parties — what they supposed it to be, and therefore that the statutory requirement of writing is, subjectively at least, satisfied; and that the “reformation” is needed only to make the instrument appear to all the rest of the world as it appeared (and therefore legally was) to the parties when they signed it.<sup>145</sup>

It is therefore arguable that the requirement of formal validity as a prerequisite to the rectification of an agreement subject to constitutive formalities is not only illogical, inconsistently applied and uncertain in its ambit, but also unnecessary from a functional perspective. Cases like *Republican Press* and *Intercontinental Exports* illustrate that the first step does not really promote the functions of formalities any better than a decision like *Litecor Voltex*, which appears to avoid it. In fact, all that these cases really achieve is to ‘demonstrate the irrelevance of apparent formal validity as a litmus test for the rectification of a formal contract.’<sup>146</sup>

A more convincing argument would be that constitutive formalities are undermined when non-compliance with formal requirements reflects the lack of agreement between the parties on a term which is required to be in writing. Rectification in these circumstances would subvert formalities legislation by opening the door to the possibility of fraud and perjury. However, this subversion could be prevented through a proper consider-

<sup>144</sup> See Kanzleiter *op cit* note 115 at note 67. Even where this cautionary function of formalities has failed, the document is nevertheless corrected in order to ensure the parties' reliance on the ‘workability’ of the contract.

<sup>145</sup> James H Chadbourn *Evidence in Trials at Common Law by John Henry Wigmore* 9 (1981) § 2417(3) p 61.

<sup>146</sup> Nortje *op cit* note 141 at 171.

ation and application of the requirements of rectification. Although it falls beyond the scope of this article to discuss these requirements,<sup>147</sup> it is worth mentioning that on the facts of *Magwaza*, there was insufficient evidence that the seller shared the same intention as the purchaser — it would therefore have been impossible to prove the existence of a prior agreement or common intention.<sup>148</sup> A similar flaw characterises the agreement of the parties in the *Dowdle* case.<sup>149</sup>

In both these cases, rectification would have been inappropriate, not because the parties failed to record an essential term of their agreement, but because they had neither agreed upon nor shared a common intention with respect to that essential term. Rectification, if granted, would have resulted in the judicial creation of an agreement for the parties, rather than the correction of an error in its recordal.

## V CONCLUSION

In this article, I have considered the South African two-step approach to the rectification of agreements subject to constitutive statutory formalities. I have focused particularly on the first step, which prescribes *ex facie* compliance with formalities before a court will consider whether the (other) elements of a claim for rectification have been proved. Two interrelated justifications are presented for the first step. First, a void agreement cannot be rectified and secondly, rectification of a formally invalid agreement would be contrary to the policy considerations underlying the imposition of constitutive formal requirements.

With regard to the first justification, most courts adopt a form-for-form's-sake approach. It is submitted that this emphasis on validity *ex facie* the recordal is misplaced, because in addition to being theoretically suspect, the application of the rule by South African courts is anything but consistent. It is one thing to argue that the first step is required despite the fact that this may have anomalous results; it is another thing entirely when the requirement itself is counterproductive and lends itself to the drawing of tenuous distinctions. Further, despite the current lenient approach to the determination of formal validity, a case like *Osborne* suggests that an approach which stipulates formal validity as a prerequisite for rectification is not self-evident. There is something particularly illogical in requiring a written agreement, which is by one or both parties' admission an incorrect record of their true agreement, to be formally correct before it can be substantively corrected.<sup>150</sup>

<sup>147</sup> However, see Myburgh *op cit* note 33 at 197–224 for a detailed discussion.

<sup>148</sup> *Republican Press (Pty) Ltd* *supra* note 6 at 257H–J, per Squires J.

<sup>149</sup> *Dowdle's Estate* *supra* note 71 at 348 read with 355. The same argument is also made in *Republican Press (Pty) Ltd* *supra* note 6 at 258A–D, per Squires J; Tager *op cit* note 103 at 13–14.

<sup>150</sup> J C de Wet & A H van Wyk *De Wet en Yeats Die Suid-Afrikaanse Kontraktereg en Handelsreg* 4 ed (1978) 286n55 (the statement is not repeated in the corresponding passage in the fifth edition *op cit* note 49: see 323n55).

Indeed, the South African approach is characterised by a more fundamental logical flaw and that is that it conflates the purpose of rectification, which is the correction of the document, and the future enforcement of the agreement once corrected.

The second justification for the imposition of *ex facie* compliance with formal requirements, namely that it promotes the functions of formalities, amounts to an undue deference to those functions or policy considerations without acknowledging that such deference may in itself fail to promote these functions or, in fact, convert them to dysfunctions.<sup>151</sup> German courts, for example, recognise that an inaccurate recordal fails to promote the evidentiary function and rectify the agreement before considering whether it is valid. More importantly, a requirement of formal validity before rectification may occur seems to encourage, rather than prevent, fraud. The potential for abuse of the protection offered by statutory formalities exists whenever it is possible for a party to rely on a defence of statutory invalidity despite the fact that there is proof of an underlying agreement or common intention. Common-law courts are aware of this potential for abuse and rectify agreements subject to formalities so that the legislation does not become 'an instrument for enabling sharp practice'.<sup>152</sup> The fact that most common-law legislation prescribes unenforceability rather than nullity for a failure to comply with statutory formalities does not change the fact that the disadvantages of formalities remain the same and that the relevant legislation in each case may be abused by unscrupulous parties. South African courts on the other hand, beyond recognising the possibility that statutory formalities may be abused,<sup>153</sup> seem to find themselves unable to devise a consistent solution to this problem. If the imposition of the first step described in this article turns out to be an obstacle, it is surely incumbent on local courts to re-examine its necessity.

By creating this artificial two-step procedure for the rectification of agreements subject to constitutive statutory formalities, South African courts have promoted an unnecessarily complicated approach to the observance of statutory formalities on the one hand and their role in rectification on the other. Arguably, a better approach would be for the courts to consider themselves faced simply with the question whether a document, irrespective of whether there is *ex facie* compliance with statutory formalities, should be rectified in order to give effect to the parties' underlying agreement or common intention. In answering this question, due weight should be given

<sup>151</sup> This term is used by Joseph M Perillo 'The Staute of Frauds in the light of the functions and dysfunctions of form' (1973–1974) 43 *Fordham LR* 39 to describe the disadvantages of formalities.

<sup>152</sup> *United States of America* supra note 120 at 200; *GMAC Commercial Credit Development Limited* supra note 120 para 53; *Steinbach Credit Union Ltd. v Hildebrandt* 37 Man R (2d) 192 (1985) para 20.

<sup>153</sup> See for example *Magwaza* supra note 1 at 1029E.

to both the functions of formalities and the requirements for rectification throughout the process.<sup>154</sup>

<sup>154</sup> Such an approach would have the added benefit of providing an alternative solution to the problem of blank spaces in documents recording agreements subject to formalities. The current South African approach regards an agreement subject to formalities as void if the document recording it contains blank spaces relating to material terms and the omission cannot be treated as one of the instances where extrinsic evidence is admissible (see for example *Johnston* supra note 19 at 940E–F). An alternative solution, and one which has already been adopted in certain common-law jurisdictions (G M Andrews & R Millett *The Law of Guarantees* 5 ed (2008) 88–92; *Whiting* supra note 120 at 569; *Jireh Customs Limited* supra note 120 at 1665), is to consider whether the document containing such blank spaces can be rectified. If the first step were abolished, courts would be free to determine whether the parties had in fact reached agreement or shared a common intention regarding the content of that blank space, but had simply failed to complete it by virtue of a mistake.