Study Unit 20

1 CONTENTS & INTERPRETATION OF AGREEMENT

Essentialia - are positive provisions of law. The law regards as essential to place a contract in a certain category, e.g., sale, lease, insurance.

Naturalia - are positive provisions of law. The law says this or that rule applies to a specific contract. These provisions may be changed by parties unless the law contains a provision to the contrary, e.g., seller's duty to give undisturbed possession to purchaser of a thing sold.

Incidentalia -

The law makes no positive provision. Special arrangements made by parties to agreement. E.g.: it is essentialia of a contract that there should be a thing to be sold, e.g., a bag of potatoes. Naturalia of a contract is that potatoes must be edible (unless parties have excluded such a warranty). However, it is incidentalia of a contract that parties potatoes must be fetched from Jeeburg Station on Friday. This is an arrangement the parties have agreed to.

Terms & Conditions

Terms serve to determine contents of a contract. Conditions are terms which make enforceability or consequences of a contract dependent on occurrence or non-occurrence of an uncertain future event.
Condition usually means condition precedent to a true condition on which my continued existence or operation of a contract depends. Term always means a stipulation in a contract.

I agree to buy X's house. If I get married at the end of 1 month and if he effects certain repairs to my house after 1 sale.

A stipulation of marriage is a condition precedent. If marriage takes place I condition is fulfilled and then contract becomes fully operative and X has to do repairs to my house (Term) in a contract.

A condition precedent determines whether or not a contract will take full effect.

Explain why a contract can be concluded without words.

Contracts inferred from conduct.

I creation of contracts are inferred from conduct of the parties. Where I make my will known by nodding my head, gesturing with my hand or performing under a contract. Eg I want to buy a newspaper from a newspaper vendor. I hand him 1 money & he hands me 1 newspaper. No words are said but both parties. Yet there's no doubt about our will of 1 party.
Ticket cases: 3 fold test

With regard to so-called ticket cases our law follows English decision which lays down a 3 fold test to determine whether a person who receives a ticket is bound by terms of a ticket. It must first be asked whether a person receiving a ticket knew there was writing or printing on it and finally if he knew if it was referred to terms of a contract. If both questions can be answered affirmatively then terms on ticket form part of contract. If answered in negative a further question is posed: Did party issuing ticket take steps which were reasonably necessary to bring reference to notice of other party. If he did then terms form part of contract. If not other party is not bound by it.

Express terms - based on intentions of parties. In writing or orally or by conduct.

Implied terms - if not express, it is implied.

Two kinds

* Terms implied by law (naturalia) is a legal rule read into contract as one of its naturalia e.g. 1 law reads into every contract of sale an implied warranty against latent defects.

* Tacit terms (terms implied from facts) - terms pertaining to circumstances of contract. Terms implied from factual circumstances.
Hypothetical bystander test
is adopted from English law & our courts use it
to determine whether a tacit term can be implied
in a contract.

According to Reigak v union
A term can only be implied if it is necessary in a
business sense to give efficacy to a contract.
If at time a contract was being negotiated
someone had said to both parties “what will happen
in this case” They would have both replied so & so
will happen “We did not trouble to mention it.
It is so clear. It is too clear.

When courts infer a tacit term
courts infer the existence of a tacit term from facts
of each case, facts include: business efficacy
of a contract; what reasonable parties would have
agreed upon in particular circumstances, &
express terms of a contract. Tacit terms are based
on objective rather than subjective terms
intention of both parties. Tacit terms are based
on intentions of both parties. Tacit terms
must comply with express terms of contract.

DISTINCTION BETWEEN EXPRESS & TACIT TERMS

Lies in mode of proof. Express terms proved by
direct evidence & tacit term by circumstantial
evidence. In interpreting express terms &
implying terms both based on intentions of both
parties. Express terms: what parties intended when
they expressed themselves about a matter. Implied terms
what parties intended without saying anything whatever
about a matter.
Distinction between Tacit & Terms. Implied by law:
Tacit terms are based on 1 objective intentions of parties & terms implied by law are legal rules which are read into 1 contract as 1 naturalia. Terms implied by law, not based on 1 intentions of parties.

Distinction between a tacit guarantee or bull was fertile & a term implied by law to contracts of sale (guarantee against latent defects).

SCHOLTZ'S CASE

MINISTER VAN LAND BOU TEGNIE TE DIIENSTE U SCHOLTZ.

Facts:
S a breeder of stud bulls sold one bull to 1 Minister for breeding purposes. (1 bull subsequently turned out to be infertile). Thereupon M. claimed cancellation of 1 sale & a refund of 1 purchase price paid. M. relied on a "tacit consensual warranty" that 1 bull was fertile. Which M. breached by delivering an infertile bull. Claim was made more than a year after 1 sale had taken place. On behalf of S it was alleged 1 purchaser who wishes to cancel a contract of sale on 1 grounds of a latent defect can only do so by 1 actio redditoria (which prescribes one year from 1 date of sale) and M. did not prescribe. M.'s claim had prescribed. The AP rejected this argument & held 1 parties could incorporate a consensual warranty in there contract, breach of which would constitute ordinary breach of contract.
Court further held that S&M had incorporated such a warranty in their contract. An action based on breach of contract has a prescription period of 2 years. Court held that M's claim had not prescribed.

Note: Case provides an excellent example of a distinction between naturalia & tacit incidentia of a contract. Distinction between a consequence attached to a contract by the operation of law ex lege & a term not attached by law but tacitly cleft by the parties.

Van Den Berg v Tenner

T sold half share in his farm and 49% of the shares in Jacer Brickwork, of which he was the only share holder to VDB for R50,000, of which VDB paid R10,000. VDB then wanted to withdraw from the sale. T then sold the farm to Mobil Earth-Moving Services & Jacer Brickwork to V, N, & W. VDB & T then cancelled their 1st contract & entered into a 2nd one which stated that VDB will be refunded his R10,000 when I sold or payment in terms of M & J's new goes through. When I sale consequently failed, VDB claimed immediate payment of his R10,000. He alleged that it was a tacit term of the 2nd contract that should I sale fail he will be paid immediately to him. I argued that since I sale in terms of 2nd contract was a suspensive condition & failure of 1 sale meant non-fulfillment of 1 condition, extinguished I debt obligation.
to pay $10,000. Judgement was given in favour of VDB since the appellate division held that
if payment was to be made, it was from a fund from which payment had to be made and that payment was to be made did not constitute
a suspensive condition. A tacit term did not constitute part of a contract.
For a tacit term to exist, it was necessary for a party to have actually intended it term.