STUDY UNIT 21

TERMS WHICH QUALIFY AN OBLIGATION

ALTERNATIVE, FACULTATIVE & GENERIC OBLIGATIONS

* Alternative obligation

Is an obligation in terms of which the debtor is bound to deliver one of several specific things. E.g., A has to deliver one of 3 horses: Amadayus, Medoly man & Casper. Unless otherwise agreed by the parties, the debtor is entitled to choose a particular horse he wishes to deliver as performance.

* Faculative Obligation

There is only one performance, but the debtor can choose to deliver something else instead of what has been agreed upon. E.g., the debtor was to deliver Brave Moment, but he chooses to deliver Casper. Creditor can only claim Brave Moment, but debtor can deliver Casper if he wishes.

* Generic Obligation

Performance is described according to its genus, nature or characteristics. For example, 1600 VV, 100 bags of A-grade mealies. In the absence of an agreement, the debtor has a choice with regard to individualisation. Performance fixed by such individualisation.
Relevance of Divisible Obligations

- Factors to determine whether a performance is divisible:
  1. Intentions of the parties
  2. Nature of the performance

A performance may not be divisible, e.g., delivery of a horse or a house. A performance may be divisible, e.g., delivering 10 bags of wheat in equal instalments.

Relevance of divisibility

Whether a performance is divisible or indivisible plays a particular part in the event of initial or supervening impossibility of performance, breach of contract & its remedies. It also plays a role in partially unlawful contracts. However, an agreement must be divisible, e.g., two unlawful parties are rejected and lawful parties are upheld.

Time Clauses

Certain future event

A time clause is a term that qualifies an obligation with reference to a certain future event. Although it is uncertain when it will occur, e.g., when John dies.

Suspensive & resolutive time clauses

Resolutive - is only of effect until a time agreed upon, e.g., "I employ you for one month only."

Suspensive - is a stage at which an obligation becomes due, is postponed until an agreed time, e.g., "You sell me your car today, but we agree that you will deliver the car only in a month's time."
Suspensive time clause has effect in meantime an obligation arises which can be ceded or novated or form basis for suretyship as regards of which breach of contract can be committed by repudiation or prevention of performance.

A term is always a stipulation in a contract a det content of contract. A condition is a condition precedent to sometimes a term. A term may be a condition, warranty, exemption clause, time clause.

**DEFINITION OF A CONDITION**

A condition is a term which qualifies contractual obligations in such a manner as to make that operation and consequences of it dependent on occurrence or non-occurrence of an uncertain future event.

**DIFFERENT CLASSIFICATIONS OF CONDITIONS**

(i) Positive & negative conditions.

(ii) Casual, potestative & mixed conditions.

Casual + Potestative

A offers B R2000 if B marries C.

Casual

A offer B R2000 if B travels to Cape Town by bicycle.

Potestative

Liability can arise from failure (misstep) inherent of a contract as well as breach of contract.
Suspensive & Resolutive Conditions:

A suspensive condition suspends full operation of obligations and makes them dependant on an uncertain future event. E.g., I sell my house to you on condition you obtain a loan from a bank/building society. A claim arises but it cannot be enforced until condition has been fulfilled. Until B obtains a loan, I cannot claim purchase price; he cannot claim transfer of house.

So Resolutive condition:

makes I continued existence of operation or obligation dependent on an uncertain future event. E.g., A sells his car to B on condition if he does not pay me within 30 days. Here I car & price may be claimed immediately but are terminated if payment not made after 30 days.

How conditions are fulfilled:

1. A positive condition is fulfilled when an event concerned occurs.
2. A negative condition occurs if an event concerned no longer occurs.
3. Fictitious fulfilment occurs when a party to a conditional agreement intentionally prevents fulfillment of condition.

A suspensive condition is deemed to be fulfilled if obligation becomes unconditional & binding.

Exemption Clauses: An exemption clause is a term in which a party limits his present or future liability. An exemption clause against public policy could be void.
"Guarantee" - may relate to past, present or future. A sells his building to B & guarantee's that B can use it as a funeral parlour. An obligation arises & A can not later state that ordinances & regulations prohibits this use as a funeral parlour. He will be guilty of breach of contract for full damages. Because when he made his statement, he stood by the truth of his statement & he will be liable even if his guarantee proves to be groundless.

JURGENS EIENDOMSAGENTE V SHARIE: SUSPENSIVE CONDITION

Share sold his house to Smith through Jurgens eiendomsagente. The purchase price was to be financed as follows: (i) a cash deposit of R1400 to be advanced by Smith's employer after he had approval of transaction, (ii) A R45600 guarantee by a building society, (iii) A R10000 guarantee acceptable to Share. After Smith had sold his house & received the purchase price for it to be furnished by 30th March 1984

The contract further provided that commission was to be paid to Jurgens even if the contract between Smith & Share was cancelled. A cash deposit was paid & a guarantee of R45600 was also furnished. But although Smith sold his house, he failed to furnish the R10000 timeously, whereupon Share refused to continue with the transaction. Jurgens then sued Share for their commission, Share's defence was that furnishing of the R10000 guarantee by Smith was a suspensive condition & because Smith failed to fulfill this condition, he was not liable to pay commission.
Appellate division rejected this argument & held 1 contract contained 3 suspensive conditions i.e. (i) approval of 1 transaction by Smith's employer (ii) obtaining of 1 p456001 from 1 bank/buildings (iii) sale by Smith of his own house. I court held because these 3 conditions had been fulfilled a valid contract of sale arose out. Jurgens was entitled to their commission. I court held that furnishing of 1 R10,000 guarantee was not a condition or part of one, but merely a term imposed a duty upon Smith to furnish 1 R10,000. Once his house had been sold - attached to - was a time clause requiring performance by 30th March 1984.

How does the court distinguish between provisions, terms, & conditions in a contract?

Notes: 1 3rd clause was a condition of 1 sale by Smith of his own house & Smith fulfilled this condition. 1 sale of by Smith of his own house - condition 1 furnishing of 1 R10,000 guarantee - term.

Design & planning service vs trigger provisions: but 1 provisions of a contract which comprise all arrangements embodied in 1 contract & refers to 1 entire context of 1 contract. Terms: which refer only to those arrangements which curate obligations Conditions: refer to arrangements by which obligations are qualified in such a way that their operation & consequences are made to depend on 1 happening or not happening of an uncertain future event.
Supposition

Parties arrange their relationships with reference to an uncertain event in the past or an present position in the present. This situation referred to as a contract subject to a supposition.

Fourie v CDMO Homes & Supposition

CDMO Homes sold a piece of land bordered by a stream to F. The parties agreement was subject to what was called a "condition" there were pumping rights on the land. Neither party knew if rights existed or not. When F found out there were no rights he stopped paying his instalments and CDMO sued him for further instalments. F counter sued CDMO for the refund of the instalments he had already paid. Judgment on appeal went in favour of F. The court held that parties contracted subject to a supposition and since the supposition turned out to be false, the contract was void ab initio. had it turned out to be true, it would have been valid and binding ab initio.

A condition always relates to an occurrence or nonoccurrence of an uncertain future event, it can never relate to a past or present state of affairs.
was a condition in contract of sale in actual fact a suspensive condition.

In this case the parties agreement was subject to what was called "condition" that there was pumping rights on land, however A & D held 1 condition qualifies obligations which makes the operation dependant on an uncertain future event & a condition can never relate to a past or position in present. A & D held 1 parties contracted subject to a supposition (definition: Jurgen's) a condition can never relate to a past or present state of affairs, it only refers to a future event.

**Wells v SA Alumenite Co.**

**EXEMPTION CLAUSE**

**WHAT WAS EXEMPTION CLAUSE IN THIS CASE?**

SA Alumenite Co sued Wells for a lighting plant he had bought from the company. Wells argued he was induced to buy the lighting plant by a misrepresentation made by the Co's representative. He in turn claimed recission of contract. However in turn Wells had signed an order form exempting the Co from liability made any representations made by its representatives.

It was held in the absence of an allegation the Co made a fraudulent misrep, Wells defence could not succeed.

 Liability for fraudulent misrep cannot be excluded by agreement

 Liability for negligent, innocent misrep can be excluded.
STUDY UNIT 23 - BREACH OF CONTRACT

5 forms of breach of contract
- Mora Debitoris
- Mora Creditoris
- Malperformance
- Repudiation
- Positive or Prevention of performance

4 ways in which debtor can breach a contract
(i) Mora Debitoris
(ii) Repudiation
(iii) Positive Malperformance
(iv) Prevention of performance.

4 ways in which creditor can breach a contract
(i) Mora Creditoris
(ii) Repudiation
(iii) Prevention of performance

Define breach of contract.
Breach of contract can be defined as a culpable interference by one of the contracting parties with the rights of the other contracting party.

Explain breach of contract.
Parties may have miscalculated as regards their expectations or arrangements in that debtor is not able to render or deliver performance & creditor is not able to accept performance. Such malperformance occurs which can be negative, e.g. debtor fails to perform timeously or positive
defective performance is rendered. A contract can be breached in several ways. E.g. a debtor can fail to pay his telephone account; a creditor can fail to open his gates to allow a pool company inside to repair his pool. I can kill a horse after selling it to prevent you from becoming a true owner.

STUDY UNIT 24 - MORA DEBITORIS

What Mora Debitoris means?

Any obligation must have a time limit. Otherwise it will be valueless. Where a debtor neglects or fails to perform timeously, where performance remains possible in spite of his failure to perform, he is guilty of breach of contract called Mora Debitoris. He is in mora.

Mora Debitoris relates to the time of performance alone and not the nature of performance.

For Mora Debitoris to arise -
1. Debt must be due and enforceable
2. Time for performance must have arrived
3. Obligation must not be subject to an unfulfilled suspensive condition.
4. Debt must not have become prescribed.
5. Not be necessary for creditor must perform something prior for debtor to perform.
When Mora Debitoris Occurs

Delay in performance if a date for performance is fixed and that day arrives.

Time for performance can be set in 2 ways:

1. It may be agreed upon in contract either expressly or tacitly that when the date arrives, the debtor will automatically fall into Mora known as Mora ex re.

When no date/time has been set for performance in a contract, a creditor must set a time by making a demand, interpellation on the debtor to perform at a set time. When this time arrives, and debtor fails to perform, he will be in Mora ex persona.

Forms of Mora Debitoris: Mora ex re & Mora ex Persona

Mora Ex Re

This occurs if a date is fixed for performance and the debtor fails to perform on or before the specified day. He is then automatically in Mora. The debtor is only in Mora ex re if it was the intention of the parties that he should perform on or before a specified day.

Mora Ex persona

Where no time has been fixed for performance, the debtor must perform within a reasonable time after the conclusion of the contract. If he fails to perform...
he will not automatically be in mora
where a contract is silent about a date for performance & I debtor fails to perform within a reasonable time I creditor must make a demand interpellation on I debtor to perform on a specified time.

Nel v. Cloete

Facts of case

Cloek sold a house to Nel. Nel paid the deposit & I balance was to be paid against transfer. Cloete kept on delaying transfer because he discovered that I title deed was missing. Nel then sent a demand (notice) to Cloete on the 12 August 1969, that the transfer was to take place before or on the 12 August 1969. 2 months had passed & still no transfer had taken place. Nel informed Cloek that he was cancelling I contract because I transfer did not take place. He claimed a refund of I deposit paid.

Cloek raised the defence that Nels demand was without legal effect it was premature and an unreasonably short period of time for him to perform.

Court a quo held I demand was not premature but 2 month was unreasonably a short period for him to apply to I deeds office for a duplicate deed.
A.D. confirmed that demand was not premature and period of time was not unreasonable.

Note: this case provides authoritative answers on when a debtor is in mora debitoris.

1. General rule is that when no time has been expressly or tacitly agreed upon for performance, the debtor must perform within a reasonable time after conclusion of contract if he fails to perform. He is not yet in mora. He will must be placed in mora by a demand interpellation stating a date for performance. If he then fails to perform before or on specified time, he will be in mora ex personae.

2. Where a time for performance is agreed upon and if a debtor fails to perform on or before specified time, he automatically & immediately is in mora ex re.

3. If period allowed for in demand is unreasonable then period demand is invalid & without legal effect.

Goldstein & Wolff v Maison Blanc

Facts
Maison Blanc had ordered dresses from Goldstein & Wolff. 1 dresses were to be delivered on Jan/Febuary 1945. Goldstein & Wolff delivered 1 dresses on 1 April 1945 & Maison Blanc refused delivery and contended payment of 1 purchase price & it was
entitled to cancel the contract since a dak was stipulated for performance & Goldstein & Wolff were already in mora ex re. Time was of the essence to the contract since Maison Blanc required dressers in good time for the winter season. Maison Blanc's contention was upheld by 1st Cape Provincial Division.

NOTE
The Court found that the contract had fixed a date for performance that is Jan/Feb 1945. Performance had to take place on or before 28 February, & when performance did not take place Goldstein & Wolff were automatically in mora ex re on 1 March 1945.

I Court also deduced from the surrounding circumstances that the parties had tacitly agreed that time would be of essence to the contract & in the respondent would have a right to cancellation if performance did not take place simultaneously.

Mora ex re with a tact lex commissoria
Remedies of 1 creditor in Mora Debitoris

- Performance by debtor may be enforced
- Creditor may cancel 1 agreement
- Damages: Creditor may claim damages for any loss suffered
- Damages may be claimed together with specific performance & cancellation

A contract may be cancelled on 1 ground of Mora Debitoris when time is of essence & time is of 1 essence in the circumstances.

1) When 1 contract contains a cancellation clause or lex commissoria, a creditor may rescile from 1 agreement if he stipulated a right to rescile. He may rescile immediately if debtor fails to perform timelssly.

2) Tacit cancellation clause, where it is clear from 1 circumstances 1 parties intended time to be of 1 essence of 1 contract. A contract is a tacit lex commissoria. If nature of 1 agreement is such 1 failure to perform timely would justify cancellation of 1 contract. Goldstein & Wolff v Maison Blanc.

3) Notice of rescission
   Time can be made of essence by giving 1 debtor notice of rescission. Reasonable period of time must be given in which to perform like demand.
Sweet v Ragerguhara & Others

Facts

Sweet bought immovable property from Ragerguhara & Others. In terms of a contract, vacant occupation of the property was to be given on 1 Jan 1977. This was not done as 2 people were living on the property on 12 Jan 1977. Sweet notified the sellers that he was cancelling the contract. They said he was not entitled to do so. Sweet then sent a notice of rescission in which he gave the sellers 30 days to give him vacant occupation. They failed to do so. Sweet asked the court for a declaratory order that the contract had been validly cancelled.

The court held that a notice of rescission was not relevant because a notice of rescission is used to rescind a contract in case of mora debitoris. This was not a case of mora debitoris but positive malperformance. Occupation had been given, but it was timeous performance, however, it was not vacant occupation & defective performance. How defective is the perf. to justify cancellation is postponed for further evidence.

Note:
Study Unit 25 - Mora Creditors

Define Mora Creditors

Where cooperation of 1 creditor is necessary for fulfillment of 1 obligation of 1 debtor, where creditor fails to cooperate timeously, the performance remains possible.

1 creditor is guilty of breach of contract

Failure of 1 creditor to cooperate occurs when 1 creditor fails to accept 1 proper performance tendered by 1 debtor or creditor fails to perform an act necessary to enable 1 debtor to perform.

WHEN MORA CREDITORS OCCURS / CIRCUMSTANCES

1. When 1 debt is capable of fulfillment, when 1 debt is capable of being discharged
2. 1 debtor is ready to perform and tenders proper performance.
3. Creditor Culpably fails to perform an act necessary to enable 1 debtor to perform eg Creditor fails to open storage room where debtor has to deliver goods.
4. Creditor Culpably fails to cooperate eg Jaafer hires a Rolls Royce from Fatimah & agreed that Fatimah will deliver 1 Rolls Royce to Jaafer 1 next day, Fatimah carries 1 next day @ 3 p.m. time but Jaafer is not @ home to receive 1 Rolls Royce.


**Consequences of Mora Creditoris**

1. *Debtors & Creditors in respect of same obligation cannot be in Mora debitoris & Mora creditoris at same time. If a debtor in Mora tenders performance he purges his Mora & incurs no further liability.*

2. *A debtor's duty of care is diminished if creditor is in Mora, he is only responsible for intentional loss & loss occasioned by gross negligence. E.g., Fatimah has to deliver a horse to Jaafar; Jaafar is in Mora. Fatimah's duty of care is diminished, she is only responsible for intentional loss & L.O.B.G.N.*

3. *Supervening impossibility of performance means that performance has become impossible after conclusion of contract, obligation is terminated, creditor carries risk of supervening incap performance after. If he is in Mora.*

4. *Sureties are released; debtor released from his obligation to pay interest, creditor's right of pledge falls away.*

5. *Debtor must be compensated by creditor for any loss incurred by debtor due to delay by creditor in accepting performance. E.g., Jason delivers horse to Harry but Harry refuses to take delivery & is in Mora. He must compensate Jason for cost incurred e.g., transportation costs.*
(6) Consignation—Debtor was able to free himself from debt by buy making payment into court or I proceeds from thing promised or delivering thing itself.

(7) Debtor may rescile from contract by reason of mora creditoris.

(8) Debtor remains entitled to performance.

(9) Debtor should be able to compel creditor to accept performance.

Ranch International Pipelines v. LMG.

Ranch International Pipelines was awarded a building contract by Flour Engineers to erect a pipeline. Ranch entered into a Subcontract with LMG to do part of the work. Ranch brought an urgent application against LMG to vacate the work site and not to enter there again. Ranch's action did not allege a breach of contract by LMG but rested its whole case on an employers absolute right to terminate a building contract at any time and eject contractor even if he is completely innocent. LMG brought a counter application to prevent Ranch from interfering with its work. The court granted it.

I judgement contains an emphatic recognition of a creditors duty to co-operate to enable his debtor to render performance and of mora creditoris as separate form of breach of contract.
Note

Mora Creditor is occurs where cooperation of creditor is necessary for fulfillment of Obligation of debtor. He is guilty of breach of contract, if he fails to co-operate timely, when performance remains possible.

STUDY UNIT 26

POSITIVE MALPERFORMANCE

Positive Malperformance takes place when a contracting party does not comply with terms of contract by either doing something in a manner which does not comply with terms of contract or doing something which he undertook not to do.

2 Forms of Positive Malperformance:
1) Debtor renders faulty or defective performance. He builds a house, but with inferior materials.
2) He does something which he is permitted not to do in terms of agreement.

Legal Remedies

1) He may reject defective performance and claim proper performance.
2) He may reject defective performance and claim damages from other party as compensation.
(3) He may retain defective performance & sue for damages to compensate for loss caused by defect.

(4) He may rescind contract if he reserved himself right to rescind & if breach of contract is so serious he cannot be expected to abide by contract & be satisfied with damages.