CHAPTER 8

TERM IN CONTRACT = PROVISION WHICH IMPOSES, ON CONTRACTING PARTY, 1 MORE CONTRACTUAL OBLIGATIONS TO ACT IN SPECIFIC MANNER / REFRAIN FROM PERFORMING SPECIFIC ACT / QUALIFIES CONTRACTUAL OBLIGATIONS

THUS DEFINES CONTRACTUAL OBLIGATIONS TO WHICH PARTIES BIND THEMSELVES & WHICH ENFORCE AGAINST EACH OTHER / STIPULATES TIME WHEN / CIRCUMSTANCES IN WHICH OBLIGATIONS BECOME ENFORCEABLE / ARE TERMINATED

TERM

MUST BE DISTINGUISHED FROM STATEMENTS IN RESPECT OF CONTRACT MEAD WITH NO INTENTION THAT SHOULD HAVE LEGAL CONSEQUENCES

SALES TALK / PUFFING NOT CONSTITUTE TERM OF CONTRACT

TERMS - STATEMENTS MADE SERIOUSLY WITH INTENTION ENFORCEABLE IN LAW
DIFFERENT WAYS OF INCORPORATING TERMS INTO CONTRACT

- EXPRESSLY
- IMPICATION
- TACITLY
EXPRESS TERMS

- Articulated if expressed in so may words, whether in writing/orally
- Consumer contract may not contain unfair, unjust/unreasonable T&C's
- Consumer Contract contains term/condition may affect consumer's rights/could not reasonably be expected - supplier must draw consumer's attention to such term/condition
- Usually when including/excluding term to contract
- Consumer Protection Act 68 of 2008 provisions
- Declarations of intent
TACIT TERMS

- TACIT TERM INFERRED BY COURT FROM EXPRESS TERMS & SURROUNDING CIRCUMSTANCES - CAN INCLUDE CUSTOMARY TERMS
- NOT EXPRESSED IN WORDS, BASED ON PARTY'S TRUE INTENTION / INTENTION AS IMPUTED BY LAW
- IMPUTED TACIT TERM ONLY READ INTO CONTRACT IF BOTH PARTIES OVERLOOKED / FAILED TO ANTICIPATE EVENT IN QUESTION
- TACIT TERM READ INTO CONTRACT ONLY IF REASONABLE & NECESSARY IN BUSINESS SENSE FOR PROPER FUNCTIONING OF CONTRACT
- BASED ON ASSUMED INTENT IN RESPECT OF ANY SITUATION NOT BARGAINED FOR
IMPLIED TERMS

TERMS WHICH ARE IMPLIED BY LAW = NATURALIA OF PARTICULAR TYPE OF CONTRACT

TERMS CAN BE IMPLIED BY TRADE USAGE IF UNIVERSAL & WELL-KNOWN THAT PARTY’S KNOWLEDGE & INTENTION BE BOUND BY IT CAN BE PRESUMED

TRADE USAGE: LONG-ESTABLISHED REASONABLE, UNIFORMLY OBSERVED & CERTAIN

TRADE USAGE = HYBRID TYPE OF TERM - CAN BE INFERRED BY COURTS AS TACIT TERM WHERE TRADE USAGE KNOWN TO BOTH PARTIES / IMPLIED TERM IF 1 PARTY CANNOT PROVE OTHER PARTY KNEW

CONTRACT CLASSIFIED AS PARTICULAR TYPE - LAW IMPUTES CERTAIN CONSEQUENCES TO CONTRACT

CAN BE INCORPORATED IN CONTRACT BY OPERATION OF LAW

NOT EXPRESSED IN WORDS
TERMS
CLASSIFICATION
FOR GUIDELINES
FOR ANALYSIS OF
DIFFERENT TYPES
OF CONTRACTS

ESSENTIALIA

INCIDENTALIA

NATURALIA
RESSENTIALIA

THOSE TERMS WHICH ARE ESSENTIAL FOR CLASSIFICATION OF CONTRACT BELONGING TO PARTICULAR CLASS / CATEGORY OF CONTRACT

EXAMPLE: 2 ESSENTIALIA

CONTRACT OF SALE:

(1) SELLER BINDS HIMSELF TO DELIVER SOMETHING TO BUYER

(2) BUYER BINDS HIMSELF TO PAY SUM OF MONEY IN EXCHANGE FOR ASSET

IF BUYER = BOUND NOT TO PAY PRICE, BUT DELIVER OBJECT IN EXCHANGE FOR ASSET - NO CONTRACT OF SALE - ESSENTIALIA FOR CONTRACT OF SALE = MISSING

MAY BE CONTRACT OF EXCHANGE

ESSENTIALIA OF CONTRACT SERVE TO IDENTIFY PARTICULAR CONTACT AS BELONGING TO PARTICULAR CLASS / CATEGORY OF CONTRACT

IDENTIFICATION IMPORTANT AS CATEGORY OF CONTRACT DETERMINES NATURALIA OF PARTICULAR CONTRACT
NATURALIA

TERMS WHICH LAW ATTACHES TO EVERY CONTRACT OF PARTICULAR CLASS

OPERATION OF NATURALIA MAY BE EXCLUDED BY AGREEMENT BETWEEN PARTIES

SOME CASES LAW PROHIBITS / LIMITS RIGHT OF PARTIES TO EXCL WARRANTY AGAINST LATENT DEFECTS

NATURALIA OF MANY CONTRACTS KNOWN TO SA LAW BASED ON IDEAS ORIGINATING IN ROMAN LAW, ADAPTED BY OUR COURS, LEGISLATION & TRADE USAGE

HELPS DETERMINE RIGHTS & DUTIES OF CONTRACTING PARTIES & EFFECTS & CONSEQUENCES OF CONTRACTS

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TERMS WHICH LAW ATTACHES TO EVERY CONTRACT OF PARTICULAR CLASS
Once parties agreed upon essentialia of particular type of contract, such contract has been concluded in bare outlines.

Examples: allowance of certain time for paying money due / for payment thereof in installments.

Naturalia may fulfil further details, but if contracting parties have special requirements, additional terms may be inserted.

These additional terms = incidentalia.
**CONDITION**

**CONDITION** = PARTICULAR KIND OF TERM & DOES NOT INCL ALL TERMS GENERALLY FOUND IN CONTRACTS

**CONDITION** DESCRIBED AS CONTRACTUAL TERM WHICH Renderer operation (COMING INTO EFFECT / TERMINATION OF CONTRACTUAL OBLIGATIONS) & CONSEQUENCES OF CONTRACT DEPENDENT ON OCCURENCE / NON-OCCURENCE OF SPECIFIED UNCERTAIN FUTURE EVENT

**CONDITION MUST REFER TO FUTURE EVENT**

**CONDITION MUST BE SPECIFIED**

**EVENT MUST BE UNCERTAIN (UNCERTAIN WHETHER EVENT WILL OCCUR)**

**EVENT MUST BE SPECIFIED**

**CONDITIONS CLASSIFIED INTO VARIOUS CATEGORIES**

**CATEGORIES: POSITIVE & NEGATIVE, VOUTARY, INCIDENTAL & MIXED, ETC**
2 CLASSIFICATIONS OF CONDITIONS

SUSPENSIVE CONDITION

RESOLUTIVE CONDITION
SUSPENSIVE CONDITION

Contractual term which suspends operation of contractual obligations into contract until condition has been fulfilled.

Upon conclusion of agreement containing suspensive condition, valid contract arises & binding contractual relationship exits from which parties cannot resile.

Although conditional rights & duties exist, although conditional, rights & duties can be ceded, are transferable upon death & are acknowledged in event of insolvency.

Creditor can protect conditional right by means of interdict.

Contractual rights & duties come into operation & become enforceable only when condition is fulfilled.

Example: Offerer makes offer to lease offeree's car subject to condition that offerer obtains salary increase within certain period of time.

If offeree accepts offer, contractual relationship comes into existence - only comes into existence if condition is fulfilled.

If dissolved, neither party has obligation towards the other.

Contract = terminated.
RESOLUTIVE CONDITION

WHERE CONTRACT CREATE CONTINUOUS OBLIGATIONS & NOT SINGLE PERFORMANCE, COMPLETE RESTITUTION DOES NOT OCCUR UPON FULFILMENT OF RESOLUTIVE CONDITION

IF PARTIES HAE ALREADY PERFORMED PRIOR TO FULFILMENT OF CONDITION & CONTRACT = DISSOLVED AFTER PERFORMANCE HAS BEEN RENDERED, EACH PARTY USUALLY HAS TO RETURN WHATEVER RECEIVED ITAL CONTRACT

EXAMPLE: PARTY 1 LETS FARM FROM PARTY 2. PARTIES AGREE THAT CONTRACT WILL DISSOLVE IF PARTY 1 MARRIES

CONTRACT COMES INTO OPERATION WHEN CONCLUDED & IS UNDONE BY FULFILMENT OF CONDITION

IF CONDITION = FULFILLED, CONTRACT = DISSOLVED & CONTRACTUAL RIGHTS & DUTIES CEASE TO EXIT

& CONTRACTUAL RIGHTS & DUTIES BECOME OPERATIVE & ARE IMMEDIATELY ENFORCEABLE

IF AGREEMENT CONTAINS RESOLUTIVE CONDITION, BINDING CONTRACT COMES INTO EXISTENCE IMMEDIATELY UPON CONCLUSION OF CONTRACT

& CONTRACTUAL TERM WHICH RENDERS CONTINUED EXISTENCE OF CONTRACT DEPENDENT ON OCCURRENCE (/NON-OCCURRENCE) OF SPECIFIED UNCERTAIN FUTURE EVENT

EXAMPLE: PARTY 1 LETS FARM FROM PARTY 2 UNTIL TRANSFERRED TO OTHER CITY. WHEN TRANSFERRED, PERSON 2 DOES NOT NEED TO REPAY RENT

IF PARTIES HAE ALREADY PERFORMED PRIOR TO FULFILMENT OF CONDITION & CONTRACT = DISSOLVED AFTER PERFORMANCE HAS BEEN RENDERED, EACH PARTY USUALLY HAS TO RETURN WHATEVER RECEIVED ITAL CONTRACT

EXAMPLE: PERSON 1 RENTS FROM PERSON 2 UNTIL TRANSFERRED TO OTHER CITY. WHEN TRANSFERRED, PERSON 2 DOES NOT NEED TO REPAY RENT
TIME CLAUSE

TIME CLAUSE MUST BE DISTINGUISED FROM CONDITION

BROUGHT INTO OPERATION BY REACHING OF CERTAIN & DETERMINED / ASCERTAINABLE TIME WHICH AGREED UPON

DETERMINES SPECIFIC TIME / PERIOD CONTRACT BECOME OPERATIVE / DISSOLVE

MOMENT MUST BE SPECIFIED

CERTAIN TO TAKE PLACE

EXACTLY WHEN - CERTAIN / ASCERTAINABLE

(1) SUSPENSIVE

(2) RESOLUTIVE
SUSPENSIVE TIME CLAUSE

- Contract subject to suspensive time clause if duty to perform postponed until determined / ascertainable moment arrived
- Contract comes into being when concluded
- Parties bound by obligation
- Obligations into operation & enforceable only when moment arrives
- Enforceability of rights & duties postponed
- Rendering of performances into contract - postponed until moment arrived / period lapsed
- Contract comes into being when concluded
- Parties bound by obligation
- Obligations into operation & enforceable only when moment arrives
- Enforceability of rights & duties postponed
- Rendering of performances into contract - postponed until moment arrived / period lapsed
OBLIGATIONS FROM CONTRACT HAVE EFFECT ONLY UNTIL ARRIVAL OF CERTAIN MOMENT / EXPIRY OF CERTAIN PERIOD

WHEN MOMENT ARRIVES OBLIGATIONS - EXTINGUISED

RESOLUTIVE TIME CLAUSE

CONTRACT COMES INTO BEING @ CONCLUSION

OBLIGATIONS - IMMEDIATELY OPERATIVE

PERFORMANCE - IMMEDIATELY INFORCEABLE
SUPPOSITION

RENDERS EXISTENCE OF CONTRACT DEPENDENT ON EVENT WHICH HAS TAKEN PLACE IN PAST / STATE OF AFFAIRS WHICH EXISTED/EXISTS @ TIME OF CONCLUDING CONTRACT

WHEN UNCERTAIN WHETHER SPECIFIC SITUATION EXISTS/EXISTED

ONLY WISH TO CONTRACT IF FACT EXISTS / EXISTED

OBLIGATIONS COME INTO BEING ONLY IF SUPPOSITION EXISTS / EXISTED

SUPPOSITION = NOT CONDITION - DOES NOT RELATE TO HAPPENING OF UNCERTAIN FUTURE EVENT

SUPPOSITION = MOTIVE FOR CONCLUDING CONTRACT - MAY BECOME TERM

NO EFFECT / CONTRACTUAL OBLIGATIONS IF NOT
WARRANTY

CONTRACTUAL TERM WHEREBY CONTRACTING PARTY ACCEPTS ABSOLUTE RESPONSIBILITY FOR PROPER PERFORMANCE RELATING TO ABSENCE OF DEFECTS IN WARRANTOR PRODUCT / SERVICE

ADDITIONAL OBLIGATION - PART OF CONTRACT - RESULT OF EXPRESS INCL OF WARRANTY

PURCHASES ENTITLED TO REMEDIES OF ACTIO REDHIBITORIA / ACTIO QUANTI MINORIS

INNOCENT PARTY - LEGAL REMEDIES

CERTAIN WARRANTIES - OPERATION OF LAW

EXAMPLES: LATENT DEFECTS, EVICTION IN CONTRACTS OF SALE

BREACH OF CONTRACTUAL TERM = BREACH OF CONTRACT
CONTRACTUAL TERM - BURDENS CONTRACTING PARTY'S RIGHT TO PERFORMANCE MADE TO HIM INTO CONTRACT

PERFORM TOWARDS 3RD PARTY, DO SOMETHING / REFRAIN FROM DOING SOMETHING

ORDINARY CONTRACTUAL REMEDIES

PARTY 1 CLAIM DELIVERY, IF FAILS TO PERFORM MODUS - BREACH OF CONTRACT

BURDEN ALWAYS RELATE SOMETHING HAPPEN IN FUTURE

CONTRACT ≠ UNCONDITIONAL - CAN ENFORCE PERFORMANCE IMMEDIATELY
CANCELLATION CLAUSE

ENTITLES CONTRACTING PARTY TO CANCEL CONTRACT SUMMARILY IF OTHER PARTY IN BREACH OF CONTRACT

UNNECESSARY TO SEND LETTER OF DEMAND / NOTICE WARNING TO OTHER PARTY
PENALTY CLAUSE

1. Penalty recoverable merely on ground of debtor's breach of contract
2. Extent of penalty = predetermined

Depending on type of breach innocent party can claim execution of contract / cancel contract & claim damages

Usually sum of money

Late completion of work

Calculation of damages in advance

Convention al penalties Act 15 of 1962

Penalty clause enforceable, subject to court's discretion to reduce extent of penalty to reasonable amount

Creditor derives basic benefits:
Penalty Clause Continued...

- No need for creditor to prove damages.
- Act prohibits creditor from claiming damages & stipulated penalty.
- If contract does not give choice of damages / penalty - automatically penalty.
- Can only claim 1 / other.
3 TYPES OF CONTRACT / SCENARIO:

(1) CONTRACTS GOVERNED BY NATIONAL CREDIT ACT 34 OF 2005 & CONVENTIONAL PENALTIES ACT

(2) CONTRACTS GOVERNED BY CONVENTIONAL PENALTIES ACT ONLY

(3) CONTRACTS NEITHER GOVERNED BY NATIONAL CREDIT ACT / CONVENTIONAL PENALTIES ACT

IF ACTS IN CONFLICT, NATIONAL CREDIT ACT - PREVAIL

NATIONAL CREDIT ACT & PENALTY CLAUSES
FORFEITURE CLAUSE

RIGHT TO RESTITUTION ENTITLES PARTY WHO CANCELS / RESCINDS CONTRACT TO CLAIM RETURN OF EVERYTHING ALREADY PERFORMED INTO CONTRACT

FORFEITURE CLAUSES SUBJECT TO REDUCTION @ DISCRETION OF COURT

PARTY IN BREACH FORFEITS PERFORMANCES ALREADY RENDERED

IF CLAUSE INCL 1 / BOTH PARTIES LOSE RIGHT TO RESTITUTION IN CERTAIN CIRCUMSTANCES
ROUWGELD (ROUWKOOPE) CLAUSE

- Penalty clause only connected to breach of contract
- Clause not connected to breach of contract
- Not subject to provisions of conventional penalties act
- Person may withdraw from contract upon payment of certain sum of money
- Refers to amount to be paid for right to dissolve agreement
- If refers to contract of sale - ROUWKOOPE clause
- Cannot claim specific performance / damages
- Deposit to be paid - if cancel - loses deposit
ENTRENCHMENT CLAUSE

PROVIDES THAT AGREEMENT MAY BE ALTERED ONLY BY MEANS OF WRITTEN AMENDMENT

CONTRACT MAY NOT BE VARIED BY ORAL AGREEMENT EVEN IF PARTIES IN COMPLETE AGREEMENT WRT AMENDMENT