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Welcome to Commercial Law 1A (CLA1503).

We suggest that you approach your study of this module by first getting an overview of the module. An overview will enable you to identify what you will need to have mastered by the end of the semester to complete the module successfully, and also how the different prescribed sections and study units (chapters) form part of the syllabus for this module. All references to "chapters" refer to the prescribed textbook.

OVERVIEW

In section A, you are introduced to the South African legal system in study unit 1 (chapter 1) and the science of law in study unit 2 (chapter 2 of the textbook). In section B, you are introduced to the general principles of the law of contract. These general principles form the major part of this module. The general principles of the law of contract are important as they form the basis for other chapters and modules in commercial law. Please note that a contract is a source of obligations, as are a delict and unjustified enrichment, as discussed in study unit 2 (chapter 2). The law of contract is therefore a subdivision of the law of obligations, which, in turn, is a subdivision of patrimonial law, which forms part of private law, as opposed to public law.

Study unit 3 (chapters 3, 4, 5, 6 and 7) gives you a brief introduction to the law of contract and introduces you to the five basic requirements for the conclusion of a valid contract, namely consensus, acting capacity, possibility of performance (both legally and physically), and formalities. With regard to formalities, it is important to note that although formalities are included here, only a limited number of contracts require formalities to render them valid. Study unit 3 also gives you a brief introduction to cession, which is a way in which personal rights can be transferred from one legal subject to another (chapter 12, paragraph 12.2).

It is also important to note what the consequences are if the basic requirements for the conclusion of a valid contract have not been met. Such a contract could nevertheless be valid, valid but unenforceable, void or voidable. In study unit 4 (chapter 8), you are introduced to the different terms that contracts may contain, their meanings, uses and
consequences. In study unit 5 (chapter 10), you are introduced to the various forms of breach of contract that may occur, and in study unit 6 (chapter 11), to the remedies available for each type of breach of contract.

Then we would also like to draw your attention to the paragraphs in each study unit. Please note that in study unit 3 (chapter 4 of the textbook), for example, there are at least three aspects regarding the meaning of consensus that should be distinguished (the intention to be contractually bound, a common intention, and making the intention known). Similarly, in study unit 3 (chapter 5 of the textbook), there are six factors that can influence a legal subject’s capacity to act. Study these separately as they appear under each paragraph, but also as part of the bigger picture.

You will also be studying various topics relating to commercial law. In Section C you will study a number of specific contracts, namely the contract of sale in study unit 7 (chapter 13), the contract of lease in study unit 8 (chapter 14) and the contract of insurance in study unit 9 (chapter 15). These are all variations on the general principles of the law of contract, which you studied in study units 1–6.

In Section D, other aspects of importance for the business world are introduced. At first glance the topics may seem unrelated, but most relate to the law of contract to a lesser or greater extent. This section includes study unit 10 (chapter 20), which discusses the law of agency; study unit 11 (chapter 21) discusses the different forms of business enterprises (excluding companies) and explains how contracts are concluded on behalf of such enterprises; study unit 12 (chapter 23) discusses forms of security and explains how various forms of security can be obtained; and study unit 13 (chapters 24 and 29 of the textbook) discuss the Consumer Protection Act and also introduce to you the Financial Intelligence Act.

The outcome of this module is threefold:

- The study units that deal with the South African legal system and science of law provide you with a general overview of the law and enable you to relate the different sections of the law to one another.
- The study units that deal with the general principles of the law of contract should enable you to identify, analyse and solve basic legal problems relating to the law of contract. You ought to be able to give advice on how contracts arise, what the effect of a particular clause in a contract is, what the implications of breach of contract are, and how contracts are transferred.
- The study units that deal with various types of contracts and those important aspects of commercial law are primarily to enable you to identify different types of contracts and to distinguish between them. You must also know what the rights and duties of the parties to the different contracts are and be able to apply the principles to practical situations.

**PREScribed STUDY MATERIAL**

In conjunction with this study guide, the **PREScribed TEXTBOOK** for the module is Havenga, M et al (eds) *General Principles of Commercial Law* 7th ed (2010).
THE STRUCTURE OF EACH STUDY UNIT

Each study unit is based on a chapter of the prescribed textbook. At the beginning of each study unit, the outcomes for that particular study unit are set out. Once you have worked through a study unit carefully and methodically, you should have mastered these outcomes. Each study unit is divided into different subheadings, which correspond to the headings used in the prescribed textbook.

Under each heading, you will find comments on various aspects of the study material that relate to the subject discussed under this heading. The length of the comments varies in relation to the degree of difficulty of the subject concerned. These comments do not attempt to replace or summarise the textbook; usually they simply provide an explanation or additional notes to help you understand the material in the textbook. As such, they form part of the material for the examination.

Most of the study units contain activities and feedback. The activities are based on the study material. In order to complete each activity, you are expected to understand the work to which it relates. The answers provided are not necessarily complete and may simply refer to relevant paragraphs of your textbook.

HOW TO USE THIS STUDY GUIDE

The aim of this study guide is to steer you through the prescribed textbook. You need to make your own summaries of the course material in both the textbook and this study guide. For this study guide to make sense to you, you must have a copy of the prescribed textbook.

We suggest that you set about your studies in the following way: begin each study unit by reading attentively through the relevant chapter of the textbook. Then you should take the headings, one by one, and both read and study the contents in the textbook, together with any comments that you might find under the same heading in the study guide. Please note that, to a large extent, the comments in this study guide supplement the study material in the textbook. For this reason, this study guide and the textbook should be studied together.

When you have mastered the material under a specific heading, you should try and do the activities, if any are included. Try to do these without looking at the answers. The activities form an important component of the study material and we want to encourage you to do them. These activities also provide practical exercises to help you to achieve the outcomes mentioned. Once you have done the activities, you should compare your answers with the answers in the study guide. Hopefully the activities will indicate any problems you might be experiencing with the study material. By doing the activities carefully, you will be able to monitor your progress through the study material.

Some of the activities are similar to the questions you will encounter in the examination. Therefore, if you are able to do the activities, you will have achieved some of the outcomes set at the beginning of the study unit. Remember, however, that in the examination you will not have access to your textbook and study guide. By that stage, you should be in a position to answer the questions without the assistance of those resources.
Introduction
In this study unit you are introduced to the history and sources of South African law, the courts in South Africa and their officers, the doctrine of *stare decisis*, the interpretation of statutes, and court judgments. The aim of this study unit is to provide a broad outline of the South African legal environment in which the state, its subjects and the business world function.

Please note that three legal systems contributed to the historical development and origins of the South African law, and that six sources some authoritative and others merely persuasive can be consulted to find the South African law on a particular point. You are introduced to five types of courts, their jurisdiction and officers. Three aspects are important regarding the doctrine of *stare decisis*. How statutes are interpreted is discussed in four subdivisions, and we explain four aspects relating to Court Judgments.

Once you have completed this study unit, you should be able to understand the different origins and sources of South African law, the South African court structure, which officers work in the different courts, how the doctrine of *stare decisis* works, how statutes are interpreted, and the most important aspects of typical judgments.

Prescribed study material: textbook chapter 1
INTRODUCTION

In section A you learn about the South African legal system. Since this is intended as background information, it is described very generally. We use diagrams to explain the relevant matters so that you can form an overview of how these various aspects relate to one another.

The following diagram forms the basis of the first two study units. You will note that we add more details about a specific aspect as we deal with that aspect.

![Diagram of South African Legal System]

1. **A brief history of the Law**  
   *(Textbook par 1.1)*

A short historical overview is important in order to establish where South African law comes from. Current South African law is a unique mixture of legal systems, firmly rooted in Roman law, Roman-Dutch law and English law.

The following diagram indicates the origin of South African law:

![Diagram of historical timeline]

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**Activity**

Which ONE of the following statements is **CORRECT**?

1. The Roman emperor Justinian was the author of the *Corpus Iuris Civilis*.
2. Roman law was in force in the Netherlands before 1652.
3. Roman-Dutch law was introduced in the Cape in 1652.
4. The English legal system was adopted in the Cape when the Cape was ceded to England in 1814.

**Feedback**

3 is **CORRECT.** Roman-Dutch law was indeed adopted by the Cape Colony when Jan van Riebeeck established a settlement there in 1652.

1 is **INCORRECT.** Roman law was codified in the *Corpus Iuris Civilis* during the reign of Emperor Justinian, but Justinian was not the author of the codification.

2 is **INCORRECT.** Roman law as a legal system was never in force in the Netherlands, but over many centuries, Dutch customary law was influenced by Roman law to such an extent that the system became known as the Roman-Dutch legal system.

4 is **INCORRECT.** English law was never adopted as a system to replace Roman-Dutch law in the Cape, but after the Cape was occupied by England in 1806, and formally ceded to England in 1814, the legal system in force at the time at the Cape was influenced by English law.

2 **Sources of the Law**

*(Textbook par 1.2)*

It is important to distinguish between the origins of our law (where our law comes from) and the sources of our law (where the law can be found). The sources where we find South African law are shown in the following diagram:

![Diagram of Sources of Law]

When you study judgments of the courts (par 1.2.3 of the textbook) as a source of law, please also refer to paragraph 1.4 of the textbook (the doctrine of *stare decisis*) and 1.6 (court judgments).

3 **The courts in the Republic**

*(Textbook par 1.3)*

The following diagram shows the different courts in South Africa:
Jurisdiction means the capacity to hear a case and pass a valid judgment. The jurisdiction of a High Court is unlimited in the sense that such a court may hear any type of criminal or civil case. It is, however, limited in the sense that a High Court exercises its jurisdiction within a specified area. A High Court may hear constitutional matters, except those matters which, in terms of the Constitution, may be heard only by the Constitutional Court.

Please note under paragraph 1.3.3 of the textbook that the High Courts are no longer the only courts with jurisdiction to hear divorce matters. Please also note under paragraph 1.3.6 of the textbook that magistrates exercise their jurisdiction within certain magisterial districts.

Regional Courts have jurisdiction over the geographical area of several magisterial districts. In terms of the Jurisdiction of Regional Courts Amendment Act 31 of 2008, certain of these regional courts now have jurisdiction to hear divorce matters.

4 The doctrine of Stare Decisis (Textbook par 1.4)

As is clear from the textbook, the hierarchy of the courts determines how the stare decisis doctrine is applied. The following diagram represents the application of this doctrine.

STARE DECISIS IN ACTION:

Meaning of symbols:

↑ = bound by decisions of courts higher in hierarchy
⇔ = bound by own decisions

Constitutional Court: bound by own decisions ⇔
Supreme Court of Appeal: bound by decisions of Constitutional Court ↑
bound by its own decisions ⇔

Each High Court:
Full bench: bound by decisions of Constitutional Court ↑
bound by decisions of Supreme Court of Appeal ↑
bound by its own decisions ⇔

Bench of two judges: bound by decisions of Constitutional Court ↑

bound by decisions of Supreme Court of Appeal ⬆️
bound by decisions of full bench ⬆️
bound by its own decisions ↔️

Single judge:
bound by decisions of Constitutional Court ⬆️
bound by decisions of Supreme Court of Appeal ⬆️
bound by decisions of full bench ⬆️
bound by decisions of bench of two judges ⬆️
bound by its own decisions ↔️

Decisions of other
High Courts:
High Courts not bound by decisions, but decisions have persuasive authority.

Magistrates’ Courts:
bound by decisions of High Courts in their area ⬆️,
decisions of High Courts in other areas have persuasive authority.

A decision is delivered by the magistrate’s court in Bronkhorstspruit. An appeal is lodged with the High Court in Pretoria, and the case will be heard by a bench of two judges. There are conflicting judgments on the matter by several courts. By the decision of which ONE of the following courts will the High Court in Pretoria be bound?

1  a decision by a single judge of the High Court in Pretoria
2  a decision by a full bench of the High Court in Pietermaritzburg
3  a decision by a bench of three judges of the Supreme Court of Appeal
4  a decision by a bench of two judges of the High Court in Cape Town

Feedback

3 is CORRECT. The High Court in Pretoria will be bound by the decision of the Supreme Court of Appeal, as this court is higher than the High Court in the hierarchy of the courts. This is regardless of how many judges took the decision in the Supreme Court of Appeal.

1 is INCORRECT. In this case the High Court in Pretoria will be bound by the decision of the Supreme Court of Appeal, as this court is higher than the High Court in the hierarchy of the courts. But in the absence of a decision on the matter by the Supreme Court of Appeal, a bench of two judges will not be bound by an earlier decision of a single judge in its area of jurisdiction, but such earlier decision by a single judge will have persuasive power.

2 is INCORRECT. In this case the High Court in Pretoria will be bound by the decision of the Supreme Court of Appeal, as this court is higher than the High Court in the hierarchy of the courts. But in the absence of a decision on the matter by the Supreme Court of Appeal, a High Court of one area of jurisdiction is not bound by the decisions of another High Court in another area of jurisdiction, although such earlier decision by a High Court in another area of jurisdiction will have persuasive power.
4 is INCORRECT. In this case the High Court in Pretoria will be bound by the decision of the Supreme Court of Appeal, as this court is higher than the High Court in the hierarchy of the courts. But in the absence of a decision on the matter by the Supreme Court of Appeal, a High Court of one area of jurisdiction is not bound by the decisions of another High Court in another area of jurisdiction, although such earlier decision by another High Court will have persuasive power.

5 Explanatory notes

Advocate: An LLB graduate who has been admitted as an advocate of the High Court. When an advocate practises as such, he or she is usually also a member of a Bar. There is a Bar for each of the High Courts. In order to become a member of a Bar, a candidate must complete a pupillage and pass the Bar examination. An advocate may appear in any court, except the small claims court. Advocates do not deal directly with the public, but are instructed by attorneys on behalf of their clients. Unlike attorneys, advocates are involved primarily in litigation and legal opinion work. A person may not be an advocate and an attorney at the same time.

Appeal: Taking a decision of a lower court to a higher court. The person bringing the appeal hopes to persuade the higher court to change the decision of the lower court. The person who takes the matter to a higher court is called the appellant, regardless of whether this party was the applicant or the respondent in the first case, or whether this person was the plaintiff or the defendant in the first case (see “Defendant” and “Plaintiff” below).

Attorney: An LLB graduate who has passed the board examination of the law society, completed articles of clerkship, and has been admitted as such by the court. Attorneys may appear in the lower and High Courts. Attorneys deal directly with members of the public who need legal advice or representation, and they may refer their clients to advocates. Apart from litigation, attorneys also give assistance in all kinds of legal matters, such as the drawing up of contracts and wills.

Clerk of the court: The official who receives and issues legal documents and pleadings in civil actions in the magistrate’s court (see ‘Registrar’ below).

Codified: Recorded in one comprehensive piece of legislation. The Corpus juris Civilis is a codification of the Roman law, which was compiled during the reign of Emperor Justinian in the sixth century. South African law is not codified.

Common law: The term is used in both a wide and a narrow sense. In the wide sense, it is used to indicate law that is not contained in legislation, namely the Roman-Dutch law as influenced by English law. In the narrow sense, it is used specifically to refer to the works of the old authorities.

Constitutional Court: The highest court in South Africa for constitutional matters.

Defendant: The person who is sued by the plaintiff in a civil action. In certain types of cases, the defendant is called the respondent.

Government Gazette: The state’s official newspaper in which all Acts, proclamations and other information that needs to be brought to the public’s notice is published. The Government Gazette is published by the Government Printer.

Judge: A court officer who hears and decides cases in the superior courts.
Judgment: The decision of a judge or magistrate or other judicial officer in a case.

Jurisdiction: A court has two kinds of jurisdiction: jurisdiction regarding the type of matter (e.g., a magistrate’s court may not decide on the validity of a will) and jurisdiction in a particular geographical area (e.g., the jurisdiction of the magistrate’s court of Potchefstroom is limited to cases arising in the district of Potchefstroom; it may not hear cases that arose in Bloemfontein, for example).

Magistrate: The court officer who hears and decides cases in the magistrate’s court. Regional magistrates hear matters in Regional Courts.

Minority judgment: The judgment of a judge or judges who disagrees/disagree with the judgment of the majority of judges who hear a case.

Obiter dictum: A remark in passing which was unnecessary for the decision of the case and is, therefore, not binding in subsequent court cases.

Plaintiff: The person bringing an action in a civil case. In certain types of cases, the plaintiff is called the applicant.

Quasi: A prefix that means “similar to”, “resembling”.

Ratio decidendi: The underlying reason for the court’s ruling.

Registrar: The official who receives and issues legal documents or pleadings in a superior court.

Statute law: The law created by the passing of an Act by Parliament or a provincial legislature.

Supreme Court of Appeal: The highest court in the country, except for matters that fall within the jurisdiction of the Constitutional Court. Parties cannot take their cases directly to the Supreme Court of Appeal, because this court hears only appeals against the decisions of the High Courts.
Introduction to the Science of Law

Once you have mastered this study unit, you should be able to distinguish between law in the objective sense and subjective rights, as well as between Public and Private Law; you should also be able to make an objective classification of the law. Moreover, you should be able to distinguish between the four different categories of subjective rights. In addition, you should have a basic knowledge of all the different aspects of Private Law, that is, the law of persons, family law, law of personality and patrimonial law.

Patrimonial Law deals with different aspects of a person’s assets and liabilities, measurable in monetary terms, and includes the law of property, the law of succession, intellectual property law and the law of obligations. Obligations arise from three causes, namely delict, unjustified enrichment and contract. The law of delict, the requirements for a delict and the remedies, as well as the law pertaining to unjustified enrichment and the remedies, are discussed in this study unit. Contracts, the third source of obligations, are dealt with in detail in chapters 3–12 of the textbook.

Prescribed study material: textbook chapter 2

1 The term “Law”
   (Textbook par 2.1)

1.1 The meaning of “law”

“The law” refers to a system of rules that applies in a community and which is binding on people. But not all rules that apply in a community are legal rules. People also abide by other sets of rules, for example social and religious rules. Legal rules are characterised by the fact that they can be enforced by the state.

If a person does not follow the rules, he or she may, for example, be imprisoned or made to pay compensation to another person. Traditionally, the main division in law is the one between Public law and Private law. Public law is concerned with the distribution and exercise of power by the state and the legal relations between the state
and the individual. Private law, on the other hand, is concerned with the legal relationships between individuals. The following diagram shows a traditional classification of the law:

### 1.2 The meaning of “a right”
A right is any right that a legal subject has in respect of a legal object and which is protected by law. The law recognises two categories of legal subjects, namely natural and juristic persons.

The law also recognises four categories of subjective rights that legal subjects may possess, namely real rights, intellectual property rights, personality rights and personal rights.
2 Private Law
(Textbook par 2.2)

2.1 The law of persons
Legal subjects can be bearers of subjective rights. In the case of natural persons as legal
subjects, the law of persons determines
- who is a legal subject
- how a person becomes, or ceases to be, a legal subject
- the various classes (categories) of legal subjects
- the legal position (status) of each of these classes of legal subjects

Please note the difference between legal capacity and acting capacity, which is discussed
in study unit 5 (chapter 5), and which is one of the requirements for the conclusion of a
valid contract.

2.2 Family law
Family law comprises two subdivisions:
- the law of husband and wife
- the law of parent and child

More information regarding the law of husband and wife is provided in study unit 5
(chapter 5), where the effect of marriage on a person’s acting capacity is discussed.

2.3 Law of personality
The law of personality is concerned with the protection of the physical and psychological
integrity of legal subjects. Note that natural persons, as legal subjects, have subjective
rights to aspects of the personality called personality rights. The law of personality defines
what these rights are.

2.4 Patrimonial law
The following diagram shows the different subdivisions of patrimonial law:

![Diagram of Patrimonial Law]

2.4.1 The law of property
The subjective right that a legal subject has towards a material object is called a real right.
Real rights can be comprehensive or limited.
The classification and acquisition of real rights can be shown as follows:

- **Real Rights**
  - Comprehensive
  - Limited
    - Servitudes
    - Mortage
    - Pledge
      - Praedial
      - Personal
      - Immovable things
      - Movable things
  - How is the real right acquired?
    - Registration
    - Registration
    - Registration
    - Delivery
  - Original Methods
    - Occupation
    - Prescription
  - Derivative Methods
    - Movable
    - Immovable
    - How is the real right acquired?
      - Seizure of thing belonging to no one and intention
      - Possession openly as if owner uninterrupted for 30 years
      - Delivery
      - Registration

### Activity

Which **ONE** of the following statements regarding the acquisition of ownership is **CORRECT**?

1. John will acquire ownership of the farm Bloemhof, which he has bought from his neighbour, Gavin, when the farm is registered in his name at the Deeds Office.
2. Sizo cannot acquire ownership of the rabbits he sees in the veld, even if he succeeded in catching them.
3. Freda will become owner of the car that her sister, Brenda, intends giving her for her birthday, as soon as Brenda collects the car from the dealer.
4. Solly can never become the owner of land adjacent to his plot, which he fenced in accidentally when he bought the plot 40 years ago and subsequently cultivated.

### Feedback

1 is **CORRECT**. In the case of immovable property such as a farm, ownership will be acquired by the new owner only on registration of the property in his or her name at the deeds office.
2 is INCORRECT. One original method of acquiring ownership is by occupation of something that belongs to no one. The rabbits do not belong to anyone, and if Sizo succeeds in catching them, he will become their owner by taking possession of them.

3 is INCORRECT. In the case of movables, ownership is acquired on delivery of the thing (in addition to other requirements, which are not relevant in the case of a donation) to the new owner. Only when Brenda delivers the car to Freda will Freda become the owner, not when Brenda promises it to her or collects the car from the dealer.

4 is INCORRECT. The second original method of acquiring ownership is by prescription, in the case of something that belongs, or belonged, to someone else. By prescription, Solly can become the owner of the land that he accidentally fenced in, if he occupied the land openly, as if he were the owner, for longer than 30 years. As the land belonged to someone else (his neighbour), the method is prescription and not occupation.

2.4.2 The law of succession

The law of succession deals with the rights of legal subjects to the property of a deceased person.

2.4.3 The law of intellectual property

Note that legal subjects may have subjective rights to intellectual property, called intellectual property rights. What these rights are and how they are protected is governed by intellectual property law in general, and by copyright law, patent law and trademark law, in particular, depending on the particular class of immaterial object. (This topic is discussed in detail in chapter 18 of the textbook, but is not prescribed for the module CLA1501.)

2.4.4 The law of obligations

The last subdivision of patrimonial law is the law of obligations. A legal subject may have a subjective right to performance by another also which is known as a personal right.

Such personal rights arise from obligations, and obligations arise from:

- contracts
- delicts
- various other causes, for example unjustified enrichment

In this section (section A) we deal only with the law of delict and unjustified enrichment. The contract, the third source of obligations, and the general principles of the law of contract are discussed in greater detail in section B.

2.4.4.1 Introduction to the law of delict

If you refer back to the division of objective law into the two main divisions, namely Public and Private law (see par 1.1 above), you will find criminal law as a subdivision of public law. Criminal law deals with behaviour that is prohibited by the State as crimes and punishable in the interests of the state and its subjects.
However, certain acts that are prohibited as crimes can also constitute delicts for which the innocent party may claim damages, among other things, if the requirements for a delict have been met (as opposed to punishment of the prohibited behaviour in the case of crimes). The law of delict stipulates what is required for an act that causes damage to qualify as a delict and what remedies are available to the party who suffers the damage.

The elements of a delict are the following:

(a) a voluntary human act
(b) unlawfulness
(c) fault (either intent or negligence)
(d) causation
(e) damage or impairment of personality

Grounds of justification are special circumstances that convert an otherwise unlawful act into a lawful act.

The following grounds of justification are usually distinguished:

(i) necessity
(ii) self-defence
(iii) consent: consent to injury
      consent to the risk of injury
(iv) statutory authority
(v) provocation

The remedies in the case of delict are an interdict and payment of damages for three kinds of proven loss: for patrimonial loss (economic loss or loss that can be assessed in terms of money), the actio legis Aquilae is used to recover patrimonial damage; for recovering sentimental damage, the actio iniuriarum is used; and the action for pain and suffering is used to obtain compensation for injury to the personality, for example emotional shock.

Note the difference between damage and damages: The first is the noun used for what the innocent party suffers; the second is the compensation that the wrongdoer pays to the party that suffered the harm/loss.

Activity

Maria has a heart problem. She is very attached to her nephew, Boswell, whom she has raised. David is jealous of the relationship between Maria and Boswell and decides to do something to hurt Maria. Knowing that she has a heart problem, he visits her one evening and tells her that Boswell has been involved in a burglary, caught red-handed by the police and fatally wounded in a wild shooting incident. As a result of the shock, Maria suffers a heart attack. This causes her considerable medical expenses.

Which ONE of the following statements is CORRECT?

1. David did not commit a delict, as the element of a voluntary human act is absent.
2. David committed a delict, as the elements of a voluntary human act, unlawfulness, fault, causation and damage are present.
3. David did not commit a delict, as the element of unlawfulness is absent: David had a ground of justification in that he acted in response to provocation by Maria.

4. David committed a delict, although he did not cause Maria’s heart attack.

Feedback

2 is CORRECT. David did commit a delict. There was a wilful act, in the form of the words he spoke; wrongfulness, as his conduct was in conflict with the community’s sense of reasonableness; there was fault in that he acted intentionally by foreseeing the consequences and reconciling himself to them; there was causation in that his wrongful behaviour caused Maria’s heart attack and the patrimonial damage ensuing from her subsequent medical expenses; and she suffered damage in the form of medical expenses and shock.

1 is INCORRECT. David did commit a delict. The element of a voluntary human act is present, as the things he said comply with the requirement of human conduct and he was in control of his behaviour.

3 is INCORRECT. David did commit a delict. The element of unlawfulness is present, as his conduct was in conflict with the community’s sense of reasonableness, and he had no ground of justification. Provocation requires an immediate reasonable retaliatory response. Maria’s relationship with Boswell does not constitute provocation, and David’s response was, in any event, not a reasonable response.

4 is INCORRECT. If all the elements of a delict are not present, a delict has not been committed. David did commit a delict as the element of causation is present in that his intentional, wrongful behaviour caused Maria’s heart attack and her subsequent patrimonial damage in the form of medical expenses.

Note: Patrimonial damage in the form of medical expenses is claimed with the actio legis Aquiliae. Compensation for shock is recovered with the action for pain and suffering.

2.4.4.2 Introduction to the law of unjustified enrichment

Remember that personal rights originate from obligations, and obligations, in turn, arise from delict, contract and unjustified enrichment. The object of the subjective right known as a personal right is performance. The right to performance thus arises from a contract, a delict and unjustified enrichment. The performance that is the object of the right in the case of unjustified enrichment is the payment of an amount equal to the amount by which one person has been enriched to the detriment of another person this is known as restitution.

The South African law does not recognise a general enrichment action, and an action based on unjustified enrichment can be instituted only in certain specific instances. The obligation imposed upon the enriched person takes one of two forms, namely

(a) restitution
(b) payment of a sum of money
3 Explanatory notes

**Immovable things**: Two types of property are usually distinguished, namely movable and immovable. Immovable things or immovable property is property that cannot be physically moved, such as land, houses, flats and other buildings.

**Negligence**: This is a form of fault where the wrongdoer did not direct his or her will in order to achieve a particular result (which is called intent), but acted differently from what a reasonable person in the same circumstances would have acted, for example by not realising what harm could result from his or her actions, or by not caring about possible consequences.
General Principles of the Law of Contract
Scheme 1: Requirements for the formation of a valid contract

**REQUIREMENTS FOR THE FORMATION OF A VALID CONTRACT**

1. Consensus between the contracting parties
2. Legal capacity to act
3. Jurisdictional possibility of the agreement
4. Physical possibility of performance
5. Observation of any formalities prescribed for the contract

**CONSENSUS BETWEEN THE PARTIES**
Definition: Consensus between the parties is serious, common, communicated intention by both parties to create binding legal rights and duties; this intention is made known (chapter 4 of the textbook).

**LEGAL CAPACITY**
- Age
- Marriage
- Mental deficiency
- Influence of alcohol and drugs
- Prodigals
- Insolvency

**LEGAL POSSIBILITY**
- Contracts contrary to statute law

**PHYSICAL POSSIBILITY**
- Contracts contrary to common law

**FORMALITIES**
- General rule: No formalities are required.
  - Exceptions:
    1. Formalities required by law
    2. Formalities required by the contracting parties

**FACTORS INFLUENCING CONSENSUS**
- Mistake
- Misrepresentation
- Duress
- Undue influence

Consequences of unlawful contracts
- Ex turpi causa non oritur actio rule
- Per delictum rule
Requirements for the conclusion of a valid contract and transfer of personal rights

This study unit consists of three subdivisions. In the first of these your attention is drawn to the distinction between contracts and other agreements. In the second, the five basic requirements for the conclusion of a valid contract are discussed (namely consensus, acting capacity, possibility of performance (both legally and physically), and formalities). The third subdivision contains a description of the way in which personal rights are transferred (cession). When you have studied this chapter you should therefore be able to distinguish between contracts and other agreements, and to know, analyse and apply the requirements for the creation of a valid contract (these requirements are discussed in greater detail in chapters 4–7).

Prescribed study material: textbook chapter 3, 4, 5, 6, 7 and 12

1 The contract as a source of obligations
(Textbook par 3.1)

By definition, a contract is an agreement between two or more people. Obviously you cannot agree with yourself, so there must be more than one party to a contract. (However, see par 3.1.3 of the textbook.) In fact, there may be several persons: for example, fifteen friends may decide to go into business to make a profit, and they form a partnership that creates legal rights and duties for all the partners.

Not all agreements are contracts. A social appointment or engagement is an agreement, but not a contract. Take the example of a hostess who engages a professional caterer to provide food for a party to which ten guests have been invited. If five of the guests fail to attend the party, the hostess has no right to sue any of them for breach of contract.

But if the caterer fails to supply the food and drink, or supplies unsatisfactory food and drink, the hostess has a right to sue the caterer for breach of contract. Therefore, what
makes the distinction between a contract and other agreements is the requirement that there must be intention on the part of the contracting parties to be legally bound, that is, to create one or more obligations. The concept of an “obligation” is wider than the concept of a “contract”. An obligation is a bond or tie between two persons, which creates rights and duties. An obligation may arise from a contract, but also from a delict and from unjustified enrichment, as discussed in study unit 2. Obligations create rights and duties.

A right is an advantage that entitles the holder of the right to demand that another person do something, or refrain from doing something (an example of an obligation to refrain from doing something is the restraint of trade agreement, as discussed in chapter 6.2.1.3(e) of the textbook) or pay a sum of money. In contrast, a duty is a responsibility imposed by law that obliges or binds a person to performance (ie to do something or to refrain from doing something or to pay a sum of money). So the two most important aspects of a contract are the parties’ intention (aim) to create legal obligations, and the legal results (rights and duties) that follow.

---

**Activity**

Victor and Yvette arrange to go to the theatre together. In vain, Victor waits for Yvette who, in the meantime, has decided to go ice-skating with Sonya and Liezel. Victor is upset and wishes to know whether he may take legal action against Yvette. What do you think?

---

**Feedback**

Victor and Yvette’s arrangement was a purely social engagement and not a contract. They had no intention of creating a legal obligation. All that Victor has at his disposal is a social sanction (eg to end their friendship).

---

2 Requirements for the formation of a valid contract
(Textbook par 3.2)

Please note that there are at least four requirements for the formation of any valid contract. A fifth requirement, namely formalities, is set in exceptional cases only. We expect you to memorise these requirements. They are discussed in greater detail in chapters 4 to 7 of the textbook. The following are the requirements for the conclusion of a valid contract:

1. **Consensus**: This comes from the Latin word meaning “unanimity”, or “agreement to the same thing”.
2. **Capacity to act**: This is the ability in law to perform the act of entering into (concluding the contract).
3. **Juridical possibility**: The agreement must be juridically possible – in other words, legally possible. So, for example, an agreement to rob a bank is not juridically possible, because it is against the law.
4. **Physical executability**: The rights and duties must be physically executable.
5. **Formalities**: If any formalities are prescribed, they must be observed.
These requirements are discussed in detail below:

**THE FIRST REQUIREMENT: CONSENSUS**

The first requirement for the conclusion of a valid contract is that there must be consensus between the parties. But whichever requirement is discussed, remember that non-compliance does not necessarily render the contract void: it could still be valid, voidable or valid but unenforceable – or another legal remedy could be available. Note the consequences of each specific instance of non-compliance.

Once you have studied this requirement, you should know what the term “consensus” means and be able to explain the requirements for a valid offer and acceptance; you should be familiar with the special rules regarding this requirement and be able to indicate where and when contracts are formed;

you should also be familiar with the nature of mistake, misrepresentation, duress and undue influence, as factors that could influence consensus, as well as the legal consequences that the existence of these factors can have for the contracting parties.

Prescribed study material: textbook chapter 4

1. **The concept of consensus**
   (Textbook par 4.1)

1.1 **Consensus as the basis for contractual commitment**

The basis of consensus is a common intention to be contractually bound, an intention which the respective contracting parties make known to one another.

1.2 **The intention to be contractually bound**

The parties must intend to create a legal obligation. This intention to create a legal obligation is absent if the parties are not serious about their contract, but enter into it as a joke, for example. Similarly, this intent is absent if a lecturer pretends, say, to sell one of her students a book as a way of explaining the rights and duties of the respective parties to a contract of sale. So when Jill, in explaining the duty of the seller to deliver the thing sold, hands over her book to Peter as a way of showing him her obligation to deliver it, neither she nor he intends to be contractually bound, and so no contract has arisen. And parties would again lack the intention to create a legal obligation if they agree to perform the impossible: for example, if Sheila says that she will pay Jim R1 million if he flies to Mars, she lacks the intention to create a legal obligation.

1.3 **Common intention**

The parties to the proposed contract must have the same intention. This shared intention would be absent if, for example, one party intends to buy the house in question and the other party intends to let that house to him or her under a lease contract. In these circumstances, the parties are negotiating at cross-purposes and disagreement (not agreement) results. Agreement would arise here if both parties intended to be bound by either a lease of the house or, alternatively, a sale and purchase of the house.
1.4 Making the intention known

An intention is a subjective attitude. Unless communicated, expressed or manifested, it remains only a thought. It must be transmitted from one person’s mind to another person’s mind.

The intention can be declared in some way or another. One way is a declaration in writing. The written terms in terms of which a party is willing to contract may be detailed and expressed formally. An example would be a joint-venture contract between multinational companies in which the scale of the proposed business and the money involved necessitate that the terms of the contract be set out in detail. Building contracts are often exceptionally detailed, too, and so they are written down. A second way in which a party’s intention can be made known is through spoken words. Because the words are spoken, the contract that results is known as an oral agreement.

Words are not necessarily essential to the formation of a contract. Intention can also be made known through people’s conduct. For example, a customer enters a shop, chooses twelve apples and puts them down on the shop counter. The shopkeeper rings up the total price on the till. The customer sees this total and takes enough money out of a purse to pay the price. The customer hands over the money, picks up the twelve apples, and walks out of the shop. No words have passed the lips of either the customer or the shopkeeper. Yet a contract of sale has been concluded between the two parties, and then performed. By going up to the counter with the apples that he or she wished to buy, the customer implicitly offered to buy them. The shopkeeper accepted this offer to purchase by ringing up the price on the till. In these circumstances, intention was declared through conduct.

2 Offer and acceptance

(Textbook par 4.2)

2.1 The concepts of offer and acceptance

Contracts are usually concluded through the process of offer and acceptance. The person making the offer (the offeror) proposes terms to the other party (the offeree) for the offeree’s acceptance.

By accepting the offer, the offeree agrees, in words or by conduct, and finally and without reservation, to the offeror’s proposed terms. An example of an express offer would be the following: “I offer to sell you this car in front of us for R10 000.” And an express acceptance of that offer would be the following: “I agree to buy it.”
### 2.2 Requirements for the offer and acceptance

<table>
<thead>
<tr>
<th>OFFER</th>
<th>ACCEPTANCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Undertaking made with the intention – that the offeror will be legally bound</td>
<td>(a) Undertaking that the offeree will be legally bound</td>
</tr>
<tr>
<td>(b) Complete</td>
<td>(b) Unconditional</td>
</tr>
<tr>
<td>(c) Clear and certain</td>
<td>(c) Clear and certain</td>
</tr>
</tbody>
</table>
| (d) Usually made in words or by conduct Exceptions:  
  – Legal requirements (eg, sale of land)  
  – If the offeror specifies as a term of the offer that the offer must be accepted in a specified manner | (d) Usually made in words or by conduct Exceptions:  
  – Legal requirements (eg sale of land)  
  – In the way that the offeror specifies |
| (e) Addressed to:  
  – a specific person or persons (eg, Mrs Jones)  
  – unknown persons (eg, all teachers). This class of offerees has several members, but as a restricted group it is not as numerous as the general public  
  – The general public – anyone who is willing to do what the offer requires (eg, in the case of a reward) | (e) Accepted by the following:  
  – Mrs Jones or Mrs Jones’s authorised agent  
  – Any teacher (ie, a member of this restricted group)  
  – Any member of the public who does what the offer requires. Here it is important that the offeree know about the offer.  
  Take the example of a reward: Will offers a reward for information; Jim does not know about Will’s offer, but gives Will the information. No contract arises between Will and Jim, so Wi has no legal duty to pay Jim the reward. |
| (f) Communicated | (f) Communicated |
Regarding requirement (a) above, namely that the offer and the acceptance must contain an undertaking made with the intention to be legally bound, note that by advertising an item for sale, a shopkeeper makes an invitation to do business concerning that article, that is, with a view to attracting offers. The shopkeeper does not make an offer to sell the item. Instead, it is the purchaser who makes the offer to buy the item.

Regarding requirement (c) above, namely that the offer and the acceptance must be clear and certain, one example of an unclear and uncertain offer would be an offer stating, “The lowest price that I will accept for this book is R50.” This offer leaves the offeree guessing what price the seller would accept – R55? R65? R100? We do not know: the terms of the offer are too vague.

2.3 The falling away of the offer

How long does the offer remain open for acceptance? It falls away in the following five circumstances:

(a) **Expiry.** An offer expressly limited to a certain time falls away if not accepted within that time. So, for example, an offer of employment that will remain open for four days may be accepted on the third or the fourth day, but not on the fifth. An offer that contains no time limit will expire within a reasonable time, if it is not accepted before then.

(b) **Revocation.** Here the offeror withdraws, revokes or annuls the offer before acceptance. Note that the offeror does not revoke or annul the contract, because no contract has yet been formed. It is important that the offeror inform the offeree about the withdrawal of the offer, and that he or she does so before the offeree accepts the offer.

**Example:** If Charles offers to sell his car to Bill and later changes his mind and wishes to sell the car to Edward, Charles must inform Bill that he withdraws the offer before the offer is accepted by Bill. If the offeree has already accepted the offer, a contract exists and the offeror’s attempt to withdraw the offer may amount to breach of contract (in the form of repudiation). (See chapter 10.)

(c) **Rejection.** If the offeree rejects an offer, he or she cannot then change his or her mind and try to accept it.

**Example:** Alfred says to Bill, “I offer to sell you this lawn mower for R250.” Bill replies, “No, thank you.” Even if Bill changes his mind immediately after his refusal, Alfred’s offer has fallen away. It is, however, possible for this offer to be superseded by another new offer, which may be accepted.

(d) **Counter-offer.**

**Example:** Anne says to Betty, “I offer to sell you this washing machine for R500.” Betty replies, “I will buy it for R450.” An important term of Anne’s offer is that the price should be R500. Betty does not accept this term and instead proposes a lower price, thus altering a term of Anne’s offer. Anne’s offer falls away. Betty’s counter-offer is now open for Anne to accept or to reject.

(e) **Death** of either party before acceptance.
In which of the following situations could we speak of a valid offer?

1. Vusi is considering selling his motor cycle as soon as he takes delivery of his new car.
2. Ratanama Butchery has the following notice on the shop window: “Half a lamb at R18.99 a kilogram.”
3. An advertisement in the newspaper reads as follows: “Beach cottage at Har-tenbos for exchange. Call Steve at 033 43 5656.”
4. Rupert puts his house on the market because he wishes to move to an old age home. Daphne views the house and sends Rupert a letter in which she informs him that she will purchase it for R250 000. Rupert passes away before he receives the letter.

In none of the instances was a valid offer made.

1. Vusi’s intention has not yet been made known to a potential addressee with the intention of being legally bound.
2. This is simply an advertisement, an invitation to do business. Clients who are interested and inquire about the meat will make offers to buy the meat.
3. All we have here is an intention, in principle, to enter into an exchange contract. An offer must contain complete details of the contract that the offeror has in mind. There are still several essential uncertainties.
4. Daphne’s expression of her intention does not amount to an offer. An offer is valid only if it comes to the notice of the addressee.

2.3.1 The continued existence of the offer: the option

It is possible to entrench the continued existence of the substantive offer by means of an option. By the word “entrench”, we mean the application of an extra safeguard to ensure the continued existence of the offer. The offer cannot be withdrawn while the option exists. This option is a separate contract. The option gives the option-holder the right to choose whether or not to conclude the main contract (which will arise from the substantive offer) with the option-giver. The option-holder’s right is usually limited to a specified time.

(1) Retrenched substantive offer (to sell a horse)

ANDREW → BRIAN

(2) Offer to keep the retrenched substantive offer (1) open for two weeks

ANDREW → BRIAN

If Brian accepts offer (2) but has not yet accepted the retrenched substantive offer (1), an option exists in which Andrew is the option-giver and Brian the option-holder. At this point, the horse has not yet been sold. Now Brian has two weeks in which to decide whether he wishes to accept Andrew’s offer to sell the horse.

During these two weeks, Andrew may not withdraw this (retrenched) substantive offer; neither may Andrew offer, in the meantime, to sell the horse to a third party, Charles.
The option binds Andrew to keep the retrenched offer open in favour of Brian for two weeks. Before the end of those two weeks, Brian may decide to reject Andrew’s substantive offer.

If Brian rejects Andrew’s substantive offer within, say, four days, the option comes to an end, and the substantive offer also comes to an end. Since the option ended before the end of the specified two weeks, Andrew now has the right to offer the horse to Charles or to accept Charles’s offer to buy it.

But if Brian accepts Andrew’s substantive offer within the specified two weeks of the existence of the option and he lets Andrew know that he wishes to buy the horse, the option comes to an end, and the contract of sale is concluded.

**Activity**

Gabriel is transferred from Kuruman to Kimberley and wishes to rent a house from Tracy, but he is uncertain whether his wife, Nancy, who is still living in Kuruman, will be satisfied with the house. Tracy gives Gabriel an option for two weeks to reach a final decision on whether or not he wishes to rent the house.

Discuss the following situations briefly:

1. On the first weekend, Nancy comes to visit, but is not satisfied with the house. Gabriel informs Tracy that he will not be renting the house.
2. Nancy becomes ill and is able to undertake the journey to Kimberley only after three weeks.
3. Nancy is so anxious to see the house that she comes to inspect it the very next day. She likes it and Gabriel informs Tracy of their decision to rent the house.

**Feedback**

1. Both the option and the substantive offer (to rent the house) expire as soon as Gabriel informs Tracy that he is no longer interested in the house.
2. Both the option and the offer to rent expire after the two-week period of the option has lapsed.
3. As the option is exercised, the lease is concluded.

### 2.4 Special rules in regard to offer and acceptance

In the following instances, special rules may apply to the offer and acceptance:

- invitation to make an offer (par 4.2.4.1 and par 4.2.2(a) above)
- offers of reward (par 4.2.2(e) above)
- options (par 4.2.3.2)
- an intention to contract (par 4.2.4.2)
- calling for tenders (par 4.2.4.3)
- auctions (par 4.2.4.4)

Auctions are either public auctions organised for official purposes (eg sales of unclaimed goods; sales in judicial execution of a court order), or else auction sales (sales on the
initiative of private persons). Both kinds of auction are subject to the conditions of auctions published before the sale. Auctions are either subject to reservation or not, and this difference is illustrated in the following table:

<table>
<thead>
<tr>
<th>AUCTIONS SUBJECT TO RESERVATION</th>
<th>AUCTIONS NOT SUBJECT TO RESERVATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>■ Usual: if the conditions of auction expressly provide that goods will be sold subject to reservation; or if conditions are silent on the matter.</td>
<td>■ Exceptional: if the conditions of auction expressly provide that goods will be sold without reserve.</td>
</tr>
<tr>
<td>■ Goods are sold only if the minimum price set before the sale is reached or exceeded. The auctioneer is the agent of the seller and runs the sale on the seller’s behalf. The minimum price is the lowest price at which the seller is willing to sell the goods. A reserve price of R10 000, for example, would mean that a buyer’s bid to purchase the goods for R10 000 would be acceptable, but that a bid for R9 500 would not be acceptable.</td>
<td>■ The terms of sale expressly (orally or in writing) state that the goods are sold without a reserve price. Actually, there is a reserve price here: the goods must be sold for at least one cent (the smallest unit of currency), because if they are sold for nothing, the contract would not be a sale – it would be a gift (donation).</td>
</tr>
<tr>
<td>■ Offerors: interested potential buyers attending the auction, or their duly authorised representatives. These buyers or their agents bid for the goods (make offers to buy them).</td>
<td>■ Offeror: the auctioneer.</td>
</tr>
<tr>
<td>■ Offeree: the auctioneer.</td>
<td>■ Offeree: the buyer or agent who makes the highest bid.</td>
</tr>
<tr>
<td>■ Offer to buy. An interested buyer or his or her agent makes a bid. The auctioneer decides whether or not a contract comes into existence. The auctioneer may accept or reject bids, and need not choose the highest bid. The auctioneer decides whether to accept any bid. If he or she does decide to accept a bid, a contract is formed.</td>
<td>■ Offer to sell to the highest bidder. The auctioneer offers to sell the goods to the highest bidder. So, the person who decides whether or not a contract comes into existence is the buyer (or his agent) with the highest bid. If that buyer or his agent accepts the auctioneer’s offer to sell the goods, a contract is formed.</td>
</tr>
</tbody>
</table>

3 **The moment and place of formation of a contract** (Textbook par 4.3)

A contract arises at the moment when and at the place where consensus is reached. It is important to establish the exact moment of consensus for deciding whether the offer can still be revoked (withdrawn), whether the offer has expired because of the lapse of time, and whether and when the contractual duties become enforceable. Contractual duties are enforceable if one contracting party has the right to compel the other contracting party to perform the latter’s contractual duties.

It is important to establish the exact place of consensus for deciding which court has jurisdiction to hear a claim concerning the contract.
Example: If the contract was concluded in Pretoria, the Pretoria magistrate’s court would, in principle, have jurisdiction regarding the contract because the contract was concluded in the district over which that magistrate’s court exercises authority.

<table>
<thead>
<tr>
<th>3.1 PARTIES IN EACH OTHER’S PRESENCE (HERE AND NOW)</th>
<th>3.2 PARTIES NOT IN EACH OTHER’S PRESENCE (NOT HERE AND NOT NOW)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>General rule – ascertainment theory</strong>&lt;br&gt;Anna makes an offer and Bert accepts it. Anna learns of this acceptance when and where Bert accepts it; then and there the contract comes into existence. Bert’s acceptance comes to Anna’s notice. The justification for the ascertainment theory is that if Anna is to become contractually liable, it is only fair that she should be the first to know whether or not her offer has been accepted by Bert. The ascertainment theory also applies to contracts concluded by telephone. Because of the immediacy of communication between the telephoning parties, they are regarded as being in each other’s presence, even though they may be speaking to each other by satellite link-up from opposite ends of the earth, thousands of kilometres apart.</td>
<td><strong>Exception – dispatch theory</strong> (expedition theory; posting rule)&lt;br&gt;Communication by post or telegraph is not as direct as communication by telephone. For example, Anna in Cape Town posts an offer to Bert in Johannesburg. This offer is governed by the dispatch theory (also called the expedition theory or the posting rule). The dispatch theory is an exception to the general rule (ascertainment theory). In terms of the dispatch theory, the contract is concluded when and where the letter of acceptance is posted. In the above example, the contract is concluded in Johannesburg, when Bert posts his letter accepting Anna’s offer.</td>
</tr>
</tbody>
</table>

The dispatch theory applies if, in the letter containing the offer, the offeror does not specify any particular method of acceptance. By sending the offer by post, the offeror in these circumstances tacitly indicates to the offeree that the latter may, in turn, validly accept the offer by post. The posting rule is not absolute or compulsory: for example, if Anna wished to make sure that she knew about Bert’s acceptance, she would still be free to state, in her letter containing the offer, that if Bert wishes to accept her offer, his letter of acceptance must come to her attention. This term of Anna’s offer would thus exclude the application of the posting rule (the dispatch or expedition theory) and would apply the general rule (the ascertainment theory) to Anna’s offer.

The application of the dispatch theory can also be excluded if the posted acceptance is cancelled by a method of communication quicker than post. So, if Bert has posted his letter accepting Anna’s offer and then changes his mind and decides to reject her offer, he is free to communicate his rejection to Anna by, for example, telephoning her.

The function of the dispatch theory is to protect the offeree. In the case of contracts concluded by electronic media other than the telephone, the particular circumstances of the case will determine which theory will apply, and will, consequently, also determine the time and place of conclusion of the contract. As indicated above, the offeror may regulate the matter in his or her offer.
### Activity

Susan in Klerksdorp makes a written offer by letter to Gerald in Kenton-on-Sea to purchase his beach cottage for R200 000. Gerald accepts her offer by letter, but while the letter is in transit, he receives an offer of R250 000 from Olga. What should Gerald do if he wishes to accept Olga’s offer? Explain with reference to how the different theories work.

### Feedback

The dispatch theory (expedition theory or posting rule) would apply to Gerald’s acceptance of Susan’s offer and the contract between them comes into being as soon as Gerald posts the letter in which he accepts the offer. However, the law permits Gerald to undo the consequences of the dispatch theory (the conclusion of the contract between Gerald and Susan) by refusing her offer by way of a communication medium that is faster than the post. Thus if Gerald can succeed in reaching Susan telephonically or by e-mail and can tell her that he no longer accepts the offer, the ascertainment theory will apply.

### 4 Consensus and defects in will

*(Textbook par 4.4)*

We will now discuss the circumstances that affect consensus and, therefore, the existence of the contract, namely mistake and improperly obtained consensus. If mistake complies with certain requirements, consensus is absent and no valid contract comes into existence. If consensus is obtained by improper means, a valid contract does come into existence, but it is voidable.

#### 4.1 Absence of consensus (mistake)

Mistake is a misunderstanding by one or more of the parties to a contract about some aspect of the proposed contract, for example a fact that is material to the contract or a legal rule. If mistake meets the requirements discussed below, there is no consensus and no contract arises.

If mistake does not meet these requirements, a valid contract arises, even though consensus is absent, and the party who is labouring under a mistake is held to his or her intention, as expressed, which – because of the mistake – is not his or her true intention. This means that although consensus is set as a requirement for a valid contract, there is an exception to the rule, namely where consensus is absent and there is a mistake regarding aspects that the law regards as irrelevant.

**Example:** John takes a white appliance to the cashier, thinking that it is a washing machine, while the cashier knows it is in fact a tumble dryer. If the requirements for mistake are not met, John is kept to his intention, as expressed, by his action, which says: “I offer to buy this washing machine”.

#### 4.1.1 Requirements to be met before mistake will render a contract void

It is important to note that a contracting party who seeks to rely on the ground of mistake to deny the existence of a contract will have to prove all the requirements discussed below, and will have to prove that a contract was therefore not formed. In other words, these requirements are cumulative.
The requirements are that: the mistake must relate to a fact, legal rule or legal principle; the fact, legal rule or legal principle to which the mistake relates must be material; and the mistake must be reasonable.

4.1.1.1 The mistake must relate to a fact, legal rule or principle
Thinking that the appliance we used as an example in paragraph 4.1 above is a washing machine, when it is actually a tumble dryer, will be an example of a mistake of fact.

4.1.1.2 The mistake must concern a material fact, legal rule or principle
“Material” means essential, important, and relevant (to the contract). “Legally material” means essential, important or relevant in the eyes of the law, for legal purposes.

<table>
<thead>
<tr>
<th>MISTAKES REGARDED AS LEGALLY MATERIAL</th>
<th>MISTAKES NOT REGARDED AS LEGALLY MATERIAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Mistake about the identity of the other party: for example, because of a misdialed telephone number, an employer offers a job to someone other than the offeree actually intended.</td>
<td>(a) Mistake about a person’s attributes: for example, his or her full names or his or her character.</td>
</tr>
</tbody>
</table>
| (b) Mistake about the content of the intended contract:  
  – Time of performance: one contracting party thinks that the contract relates to the renting of a bus on 31 May, while the other party thinks it relates to the renting of a bus on 30 June.  
  – Place of performance: one party thinks that the goods will be delivered in Bloemfontein, while the other party thinks that the goods will be delivered in Port Elizabeth.  
  – Method of performance: one party thinks that the goods must be delivered by courier, while the other party thinks that they must be delivered by train. | (b) Mistake about the attributes of the object of performance:  
Here there is no mistake about the performance to be rendered (identity of the subject matter of the contract), but about its attributes, for example whether the bus is green or red, has plastic or cloth seats, etc – unless the attribute has been made a condition of the contract (see chapter 8). |
<table>
<thead>
<tr>
<th>MISTAKES REGARDED AS LEGALLY MATERIAL</th>
<th>MISTAKES NOT REGARDED AS LEGALLY MATERIAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>(c) Mistake about the interpretation the law attaches to the proposed contract: for example the nature of the contract. One party thinks he or she is acquiring ownership by paying a monthly amount, while the law interprets the contract as a lease contract.</td>
<td>(c) Mistake in the motive (the underlying reason) for concluding the contract: In the textbook example of the person who, mistakenly think that his or her bicycle has been stolen and therefore buys a new bicycle from a dealer, the underlying reason for the purchase of the new bicycle is the mistaken belief that the old bicycle has been stolen and should be replaced. The mistake in motive can be caused by the misrepresentation of the other party, or his or her agent, and the contract that results will then be voidable. Suppose that my bicycle has not been stolen, but that the dealer, desperate for business and aware that my bicycle has not been stolen, lies to me that it has been stolen. Because of this lie, I buy a new bicycle. I later find out that my old bicycle has not been stolen. My reason for buying the new bicycle was the dealer’s lie (his or her intentional misrepresentation) that my bicycle had been stolen.</td>
</tr>
</tbody>
</table>

In the example of the appliance, there is no mistake about the identity of the other party (John wishes to buy from the shopkeeper), or the time and place of performance (the appliance will change hands there and then) or the performance (it is a contract of sale). There is, however, a mistake about the object of performance (a washing machine and not a tumble dryer).

If this mistake is also reasonable, the requirements for absence of consensus are met. Mistakes that are not legally material in this example are the following: the name of the shopkeeper (attributes of the other party), whether the appliance is white or cream (attributes of the object), or John’s mistaken belief that his old washing machine has been stolen (mistake in motive).

4.1.1.3 The mistake in fact or law must be reasonable

If the mistake is unreasonable the contract does exist, even though consensus is absent. The reasonableness of the mistake is tested objectively. The standard of reasonableness is the reasonable person. One asks whether the reasonable person in this situation would make the same mistake if he or she were to judge the particular circumstances.

The reasonable person has no fault. He or she is innocent of intention and negligence. So, if a particular contracting party wishes to rely on mistake to deny a contract, then that
contracting party must have no fault in respect of the mistake. The contracting party will fail in the task of showing this lack of fault if he or she was negligent or careless, or paid insufficient attention to the proposed contract.

---

**Activity**

When, in the light of the statement above, do you think mistake in relation to the scenario of the tumble dryer would be unreasonable?

**Feedback**

The mistake would be unreasonable if, for instance, John had not examined the appliance; carelessly failed to notice that, say, there were no pipes leading out of the appliance; or had not read the instruction brochure.

If, however, the party who is relying on mistake can prove that his or her unreasonable mistake can be laid at the door of the other contracting party and blamed on that party, the position is different. In that case, he or she can rely on the guilty party’s misrepresentation, which is one of the improper ways of achieving consensus.

---

### 4.2 Obtaining consensus improperly

In this section we will consider methods of achieving consensus that are disapproved of by the law. Why does the law come to the assistance of victims of these improper methods of obtaining consensus?

- **(1) Misrepresentation:** Contracting parties must not make untrue statements when negotiating contracts. The legal system regards untrue statements as unlawful.
- **(2) Duress:** Contracting parties must not intimidate other contracting parties to bring about contracts. The legal system regards intimidation as unlawful.
- **(3) Undue influence:** Contracting parties must not abuse their power of influence to persuade other parties to conclude contracts. The legal system regards undue influence as unlawful.

#### 4.2.1 Misrepresentation

We will analyse the requirements of all forms of misrepresentation and discuss each rule separately. To misrepresent something to a person in order to persuade him or her to conclude a contract could amount to a delict if it meets the requirements for a delict. This means that you should bear in mind the principles of the law of delict (as discussed in study unit 2) when you are studying this part of the study material.

Misrepresentation can be described as follows:

- A false (untrue)
- statement about an existing fact or state of affairs (including qualities or characteristics)
- made by one party to the proposed contract (Abel)
- to the other party to the proposed contract (Bob)
– before or at the time when the contract is entered into
– with the aim of inducing (influencing) Bob to enter into the contract
– with the result that, on the basis of this statement, the party to whom the statement is made (Bob), concludes a contract which would not have been concluded otherwise, or would still have been concluded, but subject to materially different terms.

Let’s now look at some aspects of misrepresentation:

Regarding requirement (a) in the textbook, misrepresentation may be made by express statement (words – written or spoken) or tacitly by conduct (eg one party shows the other party a sample of the goods). Misrepresentation can also take place by concealment of the facts (by non-disclosure); one party stays quiet when he or she has a duty to speak. Whether or not a duty to speak exists will depend on the particular circumstances of a case.

The textbook gives the example of an applicant for an insurance policy. This applicant has a duty to make certain relevant statements and may not simply remain silent – otherwise his or her failure to mention the relevant facts will constitute misrepresentation. Another example comes from the law of sale. In Cloete v Smithfield Hotel (Pty) Ltd 1955 (2) SA 622 (O), the hotel’s septic tank was on the municipality of Smithfield’s land. The municipality stated that the tank could no longer remain on the municipality’s land. The defendant company sold the hotel to Cloete, but did not inform Cloete that the tank would have to be moved.

Cloete claimed damages for the defendant company’s fraudulent concealment of this important fact that the municipality no longer wanted the tank to be located on municipal land. The court awarded those damages: the defendant company had a duty to tell Cloete about this important change. Giving an honest opinion or estimate does not constitute misrepresentation, but giving a dishonest or reckless opinion may.

Regarding requirement (b) in the textbook, the person who makes the misrepresentation must be

– the contracting party himself or herself or
– the contracting party’s employee acting within the course and scope of the employee’s employment or
– the contracting party’s authorised agent or
– the contracting party’s co-conspirator

Regarding the co-conspirator, when we say that someone is in “collusion” with a contracting party, we mean that the two parties conspire with each other and agree to commit a crime. The crime here would be the crime of fraud (intentional misrepresentation), which is discussed in paragraph 4.4.2.1.1(a) of the textbook.

Example of collusion: James and Ken hate Lionel and agree to deceive him. James owns a mare. They agree to tell Lionel that the mare is in foal. In this way, they aim to persuade Lionel to buy the mare. The mare is in fact not in foal. A few days later, Ken sees Lionel in town and tells him that James’s mare is in foal. Without checking the facts independently himself, Lionel, very keen to buy this mare because he understands her to be in foal, telephones James and offers to buy the mare. James sells the mare to
Lionel, who later finds out that the mare is not in foal. The person who made the misrepresentation was Ken. But since Ken had conspired (colluded) with James to deceive Lionel, Ken’s intentional misrepresentation to Lionel may be laid at James’s door, and so Lionel may rescind the contract.

The feature common to the employee, the agent and the co-conspirator is that they are all linked to the contracting party who is responsible for the misrepresentation. Contrast this set of circumstances with a different set of circumstances in which a misrepresentation is made to one of the contracting parties by an outsider – a person who has no contractual link with the contracting parties.

**Example:** Nick owns a farm. Paul wishes to buy a farm in the district. One day he hears Oscar saying that the water supply on Nick’s farm is good. Without making any further enquiries of his own, Paul offers to buy the farm from Nick. Nick does not know that Paul (mistakenly) thinks that the water supply on the farm is good; nothing is said about this. After the sale, Paul finds out that the water supply on the farm is in fact poor. Oscar is neither an employee, nor an agent, nor a co-conspirator of Nick’s. In this case Paul will not be able to have the contract of sale that he concluded with Nick set aside on the grounds of misrepresentation because Nick made no misrepresentation to Paul.

The misrepresentation must have occurred during the negotiations before the contract was concluded. It must have occurred while the parties were discussing the terms on which each of them would be willing to do a deal with the other. So this requirement would not be met if the misrepresentation had been made long before the negotiations started; nor would this requirement be met if the misrepresentation were made after the contract had already been concluded.

Regarding **requirement (c)** in the textbook, the misrepresentation must be unlawful. An act will be unlawful if it is contrary to the values of the community. An innocent misrepresentation is made without any fault on the part of the person who makes it. You may wonder why the victim of innocent misrepresentation should be granted a contractual remedy when the person making the misrepresentation was innocent, or blameless. The answer is that the fault or innocence of the person making the misrepresentation is a different aspect from the lawfulness or unlawfulness of the conduct (here, the making of a misrepresentation). In general, it is unlawful to mislead another person, whether deliberately, negligently or even innocently.

Regarding **requirement (d)** in the textbook, there must be a chain of causation between the misrepresentation and the contract as it stands. Before this requirement can be met, we must be able to say that if the misrepresentation had not occurred, the contract would not have been concluded on those particular terms. The victim of the misrepresentation would either not have entered into the contract at all, or even if he or she had entered into the contract, he would have done so on terms different from those to which he or she finally agreed.

**Example:** During a drought, the soil on a particular farm looks dry and unsuitable for growing mealies. An interested buyer approaches the farmer and casually asks whether the soil is suitable for mealies. The farmer, anxious to sell the farm, which has never been fertile, tells the potential buyer that the soil is very fertile and has produced good crops. If the buyer then buys the farm because of this misrepresentation by the farmer, we can say that if the farmer had not made the misrepresentation, the potential buyer would not have bought the farm.
Regarding the possibility that, but for the misrepresentation, the deceived party would not have concluded the contract on the same terms, we can vary the facts of the present example as follows: Suppose the interested buyer has already decided to offer the farmer R1 million for the farm. After being assured that the soil is fertile, the interested buyer decides to offer R2 million for the farm. The farmer accepts this offer and a contract results. Here, if the farmer had not made the misrepresentation about the fertility of the soil, the interested buyer would have offered R1 million, instead of the R2 million that he or she did offer.

The importance of the element of causation in requirement (d) in the textbook is also apparent from the last sentence in paragraph 4.4.2.1(d) (of the textbook): a contracting party who knew that the statement was false before he or she entered into the contract is not entitled to argue that the misrepresentation led him or her to conclude the contract.

**Example:** Let’s change the facts of the sale of the arid farm yet again. Suppose the farm is very dry during the drought and the interested buyer who approaches the farmer has himself or herself attended agricultural college and so recognises an arid farm when he or she sees one.

The farmer tells him or her that the soil is very fertile and that it produced good crops in the past. The prospective buyer tells the farmer that he or she will consider whether or not to buy the farm. After the farmer’s misrepresentation, but before the conclusion of the contract, the prospective buyer finds out that the soil of this farm has always been poor and has never produced good crops. Yet for his or her own particular reasons, the buyer decides to go ahead and purchase the farm anyway. After buying the farm, he or she is not entitled to complain that the farmer’s misrepresentation concerning the fertility of the soil led him or her to buy the farm.

As regards requirement (e) in the textbook, a contract is voidable even though the misrepresentation occurred innocently, without any form of intention or negligence. If, however, there was any intent or negligence present, it gives rise to the possibility that the misrepresentation could meet the requirements for delictual liability, in which case the additional delictual remedy for damages is available to the injured party.

4.2.1.1 **The effect of misrepresentation**

As regards the consequences of misrepresentation, consensus does exist between the parties. Yet consensus is defective in nature. So the contract itself is voidable at the instance of the deceived party because the law protects contracting parties against unlawful conduct such as misrepresentation.

The contract may be set aside by the person who is the victim of the misrepresentation, but not by the person who made the misrepresentation. The deceived party may elect, or choose, whether to rescind or uphold the contract. If the deceived party decides to uphold the contract, it means that as far as he or she is concerned, the contract still stands: the deceived party still regards himself or herself as bound by his or her contractual duties, and regards himself or herself as entitled to expect the misrepresenter to perform his or her contractual duties.
But if the deceived party decides to rescind the contract, he or she demands that the parties be returned to the position they were in before the contract was concluded. This choice between upholding or rescinding the contract is a golden thread running through all three kinds of misrepresentation (intentional, negligent and innocent). The remedy of rescission is a contractual remedy based on the wrongfulness of the deed. Whether or not there may also be a further delictual remedy open to the deceived party depends on whether the misrepresentation was made intentionally or negligently.

(a) Intentional misrepresentation

Intentional misrepresentation is also called fraudulent misrepresentation.

A special aspect of intentional misrepresentation: The statement was made by a misrepresenter who knew that the statement was untrue or who did not honestly believe in the truth of the statement; or who made the statement recklessly, indifferent to whether it was true or false.

Remedies

Contractual remedies: The victim has the choice whether to uphold or to rescind the contract.

AND

Delictual remedies: Damages, whether the victim chooses to uphold or to rescind the contract.

These damages for misrepresentation are delictual: the victim must be placed, as far as money can achieve this, in the position in which he or she would have been if the delict (intentional misrepresentation) had never happened. The law looks back at the position of the victim before the misrepresentation took place. These delictual damages are awarded for the victim’s negative interest. Note that these damages are not contractual damages – they are delictual damages. (The contractual basis of damages does not apply to misrepresentation, but to breach of contract. If the contract has been breached, the damages are awarded for the victim’s positive interest. As far as money can achieve this, the victim of the breach of contract must be placed in the position in which he or she would have been if the contract had been properly performed.)

(b) Negligent misrepresentation

A special aspect of negligent misrepresentation is that the representation was made negligently, with the aim of inducing the contract. Here the misrepresenter does not intend to make a false statement; otherwise he or she would be guilty of making an intentional (fraudulent) misrepresentation. But the misrepresenter does intend to induce the contract.

Here the misrepresenter honestly believes that the statement is true: the belief is genuine, sincere and actually held. But the misrepresenter fails to take the steps that a reasonable person would have taken in the particular circumstances to satisfy himself or herself that the statement is true.
**Remedies**

**Contractual remedies:** The victim has the choice to uphold or to rescind the contract.

AND

**Delictual remedies:** These damages are avoidable, whether the victim chooses to uphold or to rescind the contract. These damages for misrepresentation are claimed in terms of the law of delict: the victim must be placed, as far as money can achieve this, in the financial position in which he or she would have been if the delict (negligent misrepresentation) had never happened (positive interest).

(c) *Innocent misrepresentation*

A special aspect of innocent misrepresentation: The statement is made without intention or negligence on the misrepresenter’s part. It is, however, made with the intent to induce the contract. With regard to the example in paragraph 4.4.2.1.1(c) in the textbook regarding the sale of the painting, note that the contract is between Fikile (the seller) and Willem (the buyer). Also note that nothing is said about whether the art expert is Fikile’s (the seller’s) employee or agent. The art expert is not Fikile’s co-conspirator: there is no agreement to commit a crime.

**Remedies**

**Contractual remedy only:** The victim has the choice whether to uphold or to rescind the contract.

**There are NO delictual remedies:** Because the misrepresenting party’s misstatements were not intentional or negligent, the requirement of fault has not been met and there can be no question of delictual damages.

---

**Activity**

Indicate which type of misrepresentation features in each situation:

1. Erna’s family owns a porcelain jug, which they have always believed came to South Africa from Batavia in 1680. When Erna urgently needed funds for an expensive operation, she decided to sell the jug and told prospective buyers that it was over 300 years old. She did not, however, consult any antique dealer to ascertain whether the jug was actually as old as she maintained. It turned out to be no more than 100 years old, since her grandfather had brought it back with him from Ceylon in 1902.

2. Because he is keen to sell his car, Bradley declares that it is a 1998 model in spite of the fact that he knows it is a 1995 model.

**Feedback**

1. Erna is guilty of negligent misrepresentation. A reasonable person would have had the age and origin of an antique confirmed before making any claims about it.

2. Bradley is guilty of intentional misrepresentation. He is under no illusion as to the true facts, yet makes untrue statements. Intentional misrepresentation could constitute the crime of fraud if requirements for this crime are met, and this could also, as in this case, be the delict of intentional misrepresentation, if the requirements for delict are satisfied.
4.2.2 Duress

Duress (intimidation) can be described as follows:

- Duress is an unlawful threat of harm or injury
- made by one contracting party or someone acting for that party
- and which causes the other contracting party to conclude the contract.

Effect of duress

Because the coerced party does consent to the contract, there is consensus and a contract results. However, because the consensus is obtained in an improper way, the contract is voidable. The party that is coerced to agree to the contract may also claim damages on the grounds of delict, because duress constitutes a delict.

Requirements

(a) There must be actual violence or damage or a threat of violence or damage directed at the life, limb or freedom of the threatened person, or his or her property, which causes a reasonable fear that the threat may be executed.
(b) If duress is caused by a threat, the threat must be imminent (about to occur) or inevitable (so that the victim cannot escape).
(c) The duress must be unlawful, that is, the party exercising it uses it to obtain some benefit he or she would otherwise not have obtained.
(d) A party to the contract or someone acting on his or her behalf must be responsible for the duress.
(e) The duress must cause the victim to conclude the contract. This requirement will not be met if the threat has been removed and the victim freely enters into the contract, or if the victim ratifies the contract (confirms its validity with retrospective effect). This requirement is also met if the party placed under duress concludes the contract or concludes it on particular terms that he or she may not have accepted but for the duress.

An example of duress that convinces a person to conclude a contract on particular terms is the following: a car owner is willing to sell his or her car for R10 000. But a prospective buyer comes up to the seller and, holding a pistol to the latter’s head, says, “If you don’t sell me this car for R1 000, I will kill you.” The seller hands over the car and accepts the R1 000. We may deduce that, but for the buyer’s threat to the seller’s life, the seller would have been willing to sell the car for R10 000, rather than for the R1 000 that the seller actually agreed to receive as the price.

Remedies

Contractual remedies: The victim of the duress has the choice whether to uphold or to rescind the contract.

AND

Delictual remedies: These entail damages, whether the victim chooses to uphold the contract or to rescind it. These damages are delictual in nature: the victim must be placed, as far as money can achieve this, in the position in which he or she would have been if the delict (duress) had never happened. The law looks back at the position of the victim before the duress took place (negative interest).
4.2.3 Undue influence

Undue influence may be described as follows:

- Improper, unfair conduct
- by one contracting party (Abel)
- that persuades the other contracting party (Bob) to conclude the contract
- against the latter’s (Bob’s) free will.

Undue influence differs from duress in that there does not need to be a threat.

Special relationship

Undue influence occurs mainly where there is a special relationship between the parties, such as between a doctor and a patient, an attorney and a client, and a guardian and a minor. But the existence of such a special relationship does not necessarily mean that undue influence has occurred. The existence of this special relationship does not even lead the courts to presume that undue influence has occurred. Nor is a special relationship an essential requirement for undue influence.

In Patel v Grobbelaar 1974 (1) SA 532 (A), the plaintiff owned a farm. For the balance owing on money apparently lent by the first defendant to the plaintiff, the plaintiff registered a second mortgage over the farm. The plaintiff firmly believed that the first defendant had supernatural powers.

As a result of this belief, the plaintiff successfully claimed that he had been unduly influenced by the first defendant to register the second mortgage over the farm. The mortgage was set aside.

If there is a special relationship, we need to look for possible abuse of that relationship. Has the “stronger” or more intelligent party taken advantage of the other’s ignorance, naivety, frailty, stupidity or mental dependence? The abuse of this relationship weakens the independent will of the victim and allows it to be easily influenced by the other party. But for the abuse of the relationship, the contracting party would not have concluded the contract.

Effect of undue influence

The victim of undue influence has exercised his or her will and has entered into a contract. Consensus exists, but it is defective in nature. The contract is therefore voidable.

Requirements for undue influence

(a) The contracting party who allegedly exercised the undue influence must have acquired an influence over the victim.

(b) This contracting party must have used his or her influence to weaken the victim’s ability to resist, so that the victim’s independent will became easily influenced.

(c) The influence must have been used unscrupulously, with a lack of regard for the morality or rightness of the conduct, to persuade the victim to agree to a transaction which the victim would not have concluded of his or her own normal free will, and which was to the victim’s disadvantage.
The example given in the textbook of the elderly farmer who gives his doctor a farm is based on the most important court case regarding undue influence (*Preller v Jordaan 1956 (1) SA 483 (A))*.

**Remedies**

**Contractual remedies:** The victim of the duress has the choice of whether to uphold or rescind the contract. In South African law there has been no recognition of a delictual remedy of damages for undue influence to date.

**AN ADDITIONAL EXPLANATION OF THE DIFFERENCES BETWEEN VOID AND VOIDABLE CONTRACTS**

<table>
<thead>
<tr>
<th>VOID CONTRACTS</th>
<th>VOIDABLE CONTRACTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>■ No contract exists at all. It may help to indicate this fact by putting inverted commas around the word “contract”.</td>
<td>■ The contract does exist. But because consent to the conclusion of the contract was improperly obtained the consensus is flawed, or defective.</td>
</tr>
<tr>
<td>■ The contract does not give either party contractual rights. The contract is a nullity. Neither party has the right to enforce the contract.</td>
<td>■ The party whose consent was improperly obtained may set aside the contract if his or her consent was obtained by misrepresentation, duress or undue influence.</td>
</tr>
<tr>
<td>■ The contract cannot be ratified. It cannot be given validity afterwards, that is, with retrospective effect.</td>
<td>■ Until that party does set the contract aside the contract remains current, with concomitant rights and duties on either side.</td>
</tr>
<tr>
<td>■ Both contracting parties may disregard the contract, as though the contract were never concluded.</td>
<td>■ The party whose consent was improperly obtained has a choice whether he or she will uphold the contract or rescind it. If a party upholds the contract, he or she recognises the continued existence of the contract; if he or she rescinds the contract, he or she does away with the contract.</td>
</tr>
</tbody>
</table>

So the party that exercises the choice must choose one of these courses – he or she may not choose both courses. The alternatives are mutually exclusive: that is, if one is chosen, the other one is automatically lost and can never be chosen again thereafter.

**THE SECOND REQUIREMENT: CAPACITY TO PERFORM JURISTIC ACTS**

Once you have completed this requirement, you should be able to judge whether contracting parties have the capacity to contract or not. You should also know what protection the law gives to persons with limited capacity to perform juristic acts and what
the consequences are if contracts are concluded by persons without the required capacity.

Prescribed study material: textbook chapter 5

1 Introduction
(Textbook par 5.1)
Although all legal subjects (see chapter 2, par 2.2 again) have legal capacity, not all legal subjects have the capacity to perform juristic acts. The differences between legal capacity and capacity to act have been summarised in the following diagram:

<table>
<thead>
<tr>
<th>LEGAL CAPACITY</th>
<th>CAPACITY TO ACT</th>
</tr>
</thead>
</table>
| - The capacity to acquire and bear rights and duties | - The capacity to  
  - perform juristic acts  
  - participate in legal transactions and  
  - conclude valid contracts |
| - All legal subjects have this capacity, namely  
  - natural persons (human beings)  
  - juristic persons (e.g., companies) | - Only natural persons have this capacity.  
Natural persons must act for juristic persons. |
| - Exceptions:  
  - natural persons with no capacity to act  
  - natural persons with limited capacity to act  
  Reason for exclusion or limitation of capacity to act: the law’s view of whether the person can  
  - form and declare his or her will  
  - judge the rights and duties (the consequences) that ensue from his or her acts | - Example of a person with full capacity to act on his or her own: an unmarried major |
2  
Age  
*(Textbook par 5.2)*  
The age of a natural person affects his or her capacity to perform juristic acts.

2.1  
Majority  
A person attains full capacity to perform juristic acts when he or she reaches majority, that is, when he or she turns 18 (comes of age), or by marrying (before turning 18).

---

**Activity**

Discuss the capacity or otherwise to perform juristic acts, of the following persons:

1. Karin, 16 years old and unmarried  
2. Adam, 17 years old, divorced  
3. Jenny, aged 25, unmarried  
4. David, aged 26, certified mentally deficient  
5. Ajax Gardening Services CC, a close corporation

---

**Feedback**

1. Because Karin is under 18, she probably does not have the capacity to perform juristic acts (but see 5.2.2.3(b) of the textbook).
2. Adam obtained capacity to perform juristic acts when he got married, a status that he does not lose upon divorce (5.2.1 of the textbook).
3. Jenny has the capacity to perform juristic acts because she is older than 18 and there are no factors indicating that the position could be different (5.2.1 of the textbook).
4. Whether David has the capacity to perform a juristic act will depend on whether he was mentally deficient at the time of the act (5.4 of the textbook).
5. Although it has legal capacity, a legal entity does not have the capacity to perform juristic acts. Natural persons must act on behalf of legal entities (par 5.1 of the textbook).

2.2  
Minority  
A minor is any natural person who has not yet turned 18 and who is still unmarried. Minors are under the guardianship of their parents or other guardians. Who is the guardian of a minor child? In the case of children born in wedlock, both the parents have guardianship, which they usually exercise independently. In certain circumstances, the law requires both parents’ permission. These circumstances are explained in the textbook (par 5.2.2.2).

On the death of one of the parents, the other parent becomes the minor child’s only guardian. If both parents should die, the court appoints a guardian for the minor. In the case of a child born out of wedlock (a child whose parents are not married), the mother is usually the child’s guardian. The Children’s Act 38 of 2005 provides for the parental rights of unmarried fathers in certain circumstances.
If the court grants the parents of minor children an order of divorce, the court may make any order that it considers to be in the best interests of the children, including an order regarding the guardianship of the minor children. Such an order could, for example, award the guardianship exclusively to one of the parents.

2.2.1 The minor under the age of seven years

Absence of capacity to act: The child under the age of seven has no capacity to act whatsoever. He or she may not contract – even on terms that are to his or her advantage. A guardian must act for the minor. The guardian needs to have capacity to act. The guardian sees to the minor’s maintenance (including food, clothing, shelter, education, health requirements). The guardian may create rights (eg the purchase of a book for the minor) and duties (eg paying for the book) in connection with the separate estate of the minor.

If a minor suffers loss because of a contract that was concluded on his or her behalf by the guardian, the minor may apply to the High Court for restitution (ie an order cancelling the contract and for the return of everything that has been performed in terms of the contract). The minor must apply within one year of reaching majority. The minor must also prove that the loss was already inherent when the contract was concluded.

2.2.2 The minor over the age of seven years

Limited capacity to act: The minor over the age of seven has restricted capacity to act.

General rule

A guardian must assist the minor. How? In one of the following ways:

– by being present and giving assent when the contract is concluded

OR

– by giving permission before the conclusion of the contract

OR

– by ratifying the contract (giving approval retrospectively, that is, after the conclusion of the contract)

Activity

How could a valid contract of purchase have come about if Vicky, aged nine, who has only limited capacity to act, walks into a café on her own and buys herself an ice-cream?

Feedback

Vicky’s parents either gave her their permission in advance to conclude the contract or they ratified (approved retrospectively) the transaction.
**Common-law exception**

If a minor over the age of seven concludes a contract without the assistance of his or her guardian and, in terms of the contract, acquires only rights and no duties, the contract will be valid. Examples of such contracts are the following: donations and contracts that release the minor from debt, where the other party has a duty to perform, but the minor does not.

**Statutory exceptions**

A minor may act without the assistance of his or her guardian in certain instances. These instances are the following: The Children's Act includes a number of provisions regarding the health care of children. In this regard, the Act now makes more detailed provision for children at a lower age to consent to medical treatment or operations. The Act includes provisions regarding HIV tests on children and makes provision for children's rights regarding access to information on various health issues. The Act also provides for children over the age of twelve years to have access to contraceptives in certain circumstances.

If the minor is older than 16, he or she may make deposits at a bank, withdraw from the deposits and cede or burden the investment (the Mutual Banks Act 124 of 1993 and the Banks Act 94 of 1990).

**Example:** The minor may deposit money in a savings account at a bank. This money earns interest. If the minor wishes to buy something and he or she needs the money, he or she may withdraw the money from the savings account, but he or she must still obtain the guardian’s consent to buy the article.

Refer to chapter 5, paragraph 5.2.2.2 of the textbook for more examples of statutory exceptions.

### 2.2.3 Special situations

**a) Contracts for which the guardian’s assistance is insufficient**

Sometimes the consent of the High Court, or some other specified person in addition to the guardian, is needed.

**Example:** The alienation (eg sale, long lease [more than ten years]) or mortgaging of a minor’s **immovable** property.

<table>
<thead>
<tr>
<th>IF THE VALUE IS UNDER R100 000</th>
<th>IF THE VALUE IS OVER R100 000</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Consent required of:</td>
<td>- Consent required of:</td>
</tr>
<tr>
<td>- guardian and</td>
<td>- guardian and</td>
</tr>
<tr>
<td>- <strong>Master</strong> of the High Court</td>
<td>- <strong>Judge</strong> of the High Court</td>
</tr>
</tbody>
</table>

**b) Tacit emancipation**

The guardian allows the minor to lead an economically separate life. The guardian’s consent may be **express**:

**Example:** “I give you permission to run your own bicycle-repair shop.”
Or the guardian’s consent may be **tacit (silent)**:

**Example:** A minor, John, passes matric and wishes to move out of the house and find a job. His parents do not forbid him from doing so. His mother helps him to choose a flat and makes curtains for the windows. His father hires a truck to help him move his furniture from his room at home into the flat. Fortunately, he finds a job. His parents come to his flat-warming party. In this case there is no inattentiveness or indifference on the parents’ part; actually, there is cooperation.

Test for tacit emancipation:
- economic independence

AND
- the guardian’s allowing the minor some contractual freedom

Signs (not conclusive proof) of tacit emancipation:
- the minor’s separate dwelling

AND
- the minor’s carrying on his or her own business (conducting his or her own affairs)
THE EMANCIPATED MINOR’S CAPACITY TO ACT

<table>
<thead>
<tr>
<th>FULL CAPACITY TO ACT</th>
<th>LIMITED CAPACITY TO ACT</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Question of fact.</td>
<td>• Question of fact.</td>
</tr>
<tr>
<td>• Minor has full capacity to act, except to</td>
<td>• Minor has capacity to act, but only in respect of</td>
</tr>
<tr>
<td>      conclude a marriage</td>
<td>      minor’s business (eg photographer)</td>
</tr>
<tr>
<td>      alienate or encumber immovable property</td>
<td>      minor’s occupation (eg student)</td>
</tr>
<tr>
<td>• Guardian consents to the minor’s complete freedom to decide about and pursue his or</td>
<td>• Guardian retains power relating to other areas of the minor’s life.</td>
</tr>
<tr>
<td>      her lifestyle and way of earning a living.</td>
<td></td>
</tr>
</tbody>
</table>

(c) **Contracts that the minor concludes without the necessary assistance, in spite of a limited capacity to act**

What are the consequences if a minor concludes a contract without the assistance of his or her guardian?

We distinguish the following circumstances:

<table>
<thead>
<tr>
<th>SITUATION</th>
<th>CONSEQUENCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>• The contract is ratified</td>
<td>      Contract is valid — both parties are liable to perform</td>
</tr>
<tr>
<td>      by guardian during minority</td>
<td>      Contract is valid — both parties are liable to perform</td>
</tr>
<tr>
<td>      by “minor” once he/she attains majority</td>
<td></td>
</tr>
<tr>
<td>• The contract is not ratified</td>
<td>      Contract is invalid, but has certain consequences. Minor may claim performance without rendering own performance, but needs assistance of guardian to claim performance. This assistance is ratification by implication. Contract thus valid. Minor consequently liable to perform. Other party now has contractual defence that he or she need not perform until minor has performed or offered to perform.</td>
</tr>
<tr>
<td>      The other party has not yet rendered performance</td>
<td></td>
</tr>
<tr>
<td>      The other party has rendered performance</td>
<td>      no contractual liability.</td>
</tr>
<tr>
<td></td>
<td>      Liability on unjustified enrichment:</td>
</tr>
<tr>
<td></td>
<td>      Luxury items: Minor liable for what remains in his or her possession when claim is instituted.</td>
</tr>
<tr>
<td></td>
<td>      Necessities: Guardian is liable.</td>
</tr>
</tbody>
</table>

Note that the defence mentioned above, which one party has when his or her performance is claimed – namely that he or she need not perform until the other party has performed, or offered to perform – is available in all contracts, and not only in the case of “contracts” with minors.
**Activity**

What are the consent requirements, if any, in the following cases?

1. Rachel, aged 6, for a contract for computer lessons  
2. Amanda, 17, for the sale of a farm to the value of R800 000, which she inherited from her grandfather  
3. John, 14, for a contract for the purchase of school books  
4. Francine, 16, for permission to have her leg set after a motor car accident

**Feedback**

1. Because Rachel is under the age of seven, her guardian must conclude the contract on her behalf.  
2. For the disposal of immovable property to the value of more than R100 000, Amanda has to be assisted by her parents; in addition, she has to obtain the consent of a judge or judges of a High Court.  
3. Only one of John’s parents need assist him. In this case, either of the parents may act.  
4. Because Francine is older than 14 years, she may give permission for the medical treatment.

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**Activity**

Margaret is 15 years of age and concludes an agreement in terms of which she undertakes to take care of the children of Ismail and Rashida at R15 per hour. Her guardian refuses to ratify the agreement. After Margaret has received her remuneration from Ismail, she fails to come to work. Instead, she goes to Century City Mall and buys the school books she needs, perfume for her best friend and make-up for herself. Has a contract been concluded? What are Ismail’s remedies?

**Feedback**

Because Margaret has only limited capacity to act and the contract has not been ratified by her parents, the contract is unenforceable. All that Ismail can do is reclaim his own performance on the ground of unjustified enrichment. Ismail can claim the amount for the school books from Margaret’s parents, because these are necessities. The perfume and cosmetics are luxuries and Ismail would be entitled to the value of the part that Margaret has not given away or consumed by the time the claim is made.

\[(d)\] **Fraudulent misrepresentation of majority**

A minor who concludes a contract without the assistance of his or her guardian is **normally** not liable under the contract, as explained above. However, there is one exception: when a minor fraudulently poses as a major and another party concludes a contract with the minor on the strength of the misrepresentation, the minor is bound to the contract as if he or she had indeed been a major.
Example: In reply to a question about her age, Lize, a minor, lies and says she is 18. If her fraudulent behaviour leads Motu to contract with her, Lize is bound by the contract as though she were a major with the capacity to act.

Note that fraudulent misrepresentation is required and not innocent misrepresentation.

3  Marriage
    (Textbook par 5.3)

Our interest in matrimonial law lies mainly in the effect that it has on the acting capacity of natural persons. In the case of some types of marriage, the capacity to act of certain of the spouses is or was limited.

Here we must distinguish the following three possibilities:

3.1 Agreements concluded prior to 1 December 1993, in cases where the husband had marital power

Although marital power has been abolished completely, some contracts may still exist in which the husband’s consent was required, but not obtained. Such contracts may be ratified by the husband, but if they are not, such contracts are unenforceable, and any claim must be based on unjustified enrichment.

3.2 Agreements concluded by a spouse married in community of property

The general rule is that each spouse may act independently of the other. In certain cases, however, a spouse may not take any action at all relating to the joint estate; in other cases, the consent of the other spouse is required in order to conclude contracts affecting the joint estate.

Note that the husband and the wife are subject to the same limitations, in other words, the wife needs the consent of the husband in circumstances in which consent is required, and the husband needs the consent of the wife in circumstances in which consent is required.

The two exceptions to the general rule are the purchase of domestic necessities in cases where the parties live apart but are not divorced, and where the Matrimonial Property Act 88 of 1984 prescribes certain forms of consent by spouses for certain transactions.

Activity

What type of consent is required in the following situations if spouses are married in community of property?

1. You are the cashier at the bank where Nthabiseng wishes to withdraw money from an account which was opened in the name of her husband, Godfrey.
2. You are the estate agent who found a buyer for the house belonging to Nthabiseng and Godfrey.
3. Godfrey gives the couple’s minibus to Frans as a gift.
1. You will have to insist on written consent from Godfrey. It is also possible that the transaction can be ratified.

2. Either Godfrey or Nthabiseng can conclude the contract of sale, but the other one has to give written consent for the transaction, and the consent must be given in advance. The transaction may not be ratified later.

3. It is sufficient for Nthabiseng to know about the donation and not to object. If, however, she only learns about the donation later, she may consent then. Of course, she could also raise objections to the donation, which would mean that Godfrey did not have capacity to enter into the transaction. If Frans had been unaware that Godfrey lacked the necessary consent, and could not reasonably have been aware of this, the transaction may be regarded as having been concluded with the necessary consent.

What is the consequence if a spouse acts without the other spouse’s consent when it is required? Unless the other party knows, or should know, that consent has not been given, the contract is treated as if consent had indeed been given. And if a spouse unreasonably refuses consent, the other spouse may apply to the High Court to dispense with the requirement of consent. And what if a spouse acts in such a way that the estate is placed at risk (e.g. by squandering the assets)? The other spouse can apply to the High Court for a suspension of that spouse’s powers regarding the joint estate.

3.3 Agreements concluded by a spouse married out of community of property

Remember that if parties to a marriage do not make alternative arrangements, they are automatically married in community of property. Also note that if parties to a marriage conclude an antenuptial contract, the accrual system will automatically apply to their marriage, unless they exclude it expressly. Also remember that an antenuptial contract will be binding on the spouses, even if it is not notarially executed and registered in a Deeds Office; however, it will not be binding on others. You should also know what responsibility each spouse has regarding household necessities.

4 Mental deficiency

(Textbook par 5.4)

Here we refer to persons whose mental condition prevents them from understanding the consequences of their conduct. They have no capacity to conclude contracts. If they do conclude “contracts”, those “contracts” are void. No contractual rights or duties result. Everyone is presumed normal until proved mentally deficient. The High Court has jurisdiction to declare someone mentally deficient and to appoint a curator to look after that person’s estate and affairs.

Mental deficiency is a question of fact. The test is the following: Was the person normal or mentally deficient when he or she entered into the contract? Mental illness may come and go: while it is absent, the person (even if declared mentally deficient by the court) has what is called a “lucid moment”. During such a lucid interval, he or she may acquire contractual rights and duties.
Once a person has been declared mentally deficient, the burden of proof shifts. In such a case it must be proved that the person indeed had capacity to act when the contract was concluded, in spite of the declaration, whereas in the case of a person not certified, it must be proved that the person had no capacity to act when the contract was concluded, in spite of the fact that he or she has not been certified as mentally deficient.

5  The influence of alcohol or drugs
(Textbook par 5.5)

Question of fact: When the person concluded the contract, was he or she so drunk or so drugged that he or she

- could not understand the nature and consequences of his or her actions

OR

- could understand the nature and consequences of his or her actions but could not control those actions

If the answer is “yes”, the contract is void. The contracting party had no capacity to act. No contractual rights and duties result. If the answer is “no”, the contract is completely valid. The contracting party, though influenced by alcohol or drugs, could still form his or her independent will.

Burden of proof: Everyone is presumed able to act until proved unable to do so. Therefore the contracting party who alleges that alcohol or drugs prevented a contracting party from forming an independent will must prove this allegation.

6  Prodigals
(Textbook par 5.6)

A prodigal is a person who habitually spends his or her money recklessly and extravagantly. This person has the capacity to act until the High Court actually declares him or her a prodigal and appoints a curator to look after the prodigal’s estate and affairs. After that, the prodigal has limited capacity to act.

General rule: The court forbids the prodigal from performing juristic acts without the curator’s consent. The prodigal must be assisted by the curator.

Exception: The prodigal may conclude contracts by which he or she acquires rights, but not duties, without the curator’s assistance.

Return to full capacity: If the court sets aside the order declaring the person a prodigal, the former prodigal will regain complete capacity to act.

7  Insolvency
(Textbook par 5.7)

Some provisions of the Insolvency Act 24 of 1936 affect the insolvent’s capacity to act after sequestration of his or her estate. The insolvent may not dispose of any of the assets that were in his or her estate at the time of sequestration.
As far as assets acquired by the insolvent after sequestration is concerned, the insolvent may dispose of these only if they are excluded from the insolvent estate by statute or at common law. The insolvent still has capacity to enter into contracts, provided that they do not dispose of the assets of the estate. So, for example, the insolvent may agree to repair someone’s car for remuneration.

### Activity

You have to enter into contracts with the following persons. How would you ensure that the contracts are valid as regards capacity to perform juristic acts?

1. Alison, aged six
2. John, 14 years of age
3. Richard, married in community of property
4. Georgia, who is mentally deficient
5. Billy, who is addicted to cocaine
6. Lucy, who has been declared a prodigal
7. Dale, an unrehabilitated insolvent
8. Jane, married out of community of property

### Feedback

1. Alison has no contractual capacity. Any contracts she concludes personally will be void. Contracts with Alison will be valid only if her guardian enters into them on her behalf.

2. John has limited capacity to act. Here you need to distinguish between two types of contracts: contracts in terms of which John gets rights only and is not required to perform himself will be valid and enforceable, even if John concludes them without assistance. Other contracts will be unenforceable if John personally concludes them, and will be enforceable only if John’s guardian assists him in concluding them.

3. Richard has full capacity to perform juristic acts. In certain circumstances, however, the law places specific limitations on this juristic capacity. You should therefore look at the type of transaction involved. Richard will have no capacity to bind the joint estate for domestic necessities if he and his wife have separate households and he is to blame for their having separate households. Furthermore, he will need his wife’s consent in some or other prescribed form in order to enter into certain transactions relating to their joint estate.

4. Of course, someone who is mentally deficient could experience moments of normality. To ensure that a contract with Georgia is valid, you must make sure that she grasps the nature and consequences of her action when you conclude the contract with her; in other words, that she has the capacity to act. The position is similar where she has been certified mentally deficient by the court. The only difference is that if there should be a dispute about the validity or otherwise of the contract, and she has not been certified to be mentally deficient by the court, Georgia will have to prove that she did not have the capacity to perform juristic acts when she entered into the contract. If, however, she has already been certified mentally deficient, you will have to prove that she
nonetheless had the capacity to act when she concluded the contract. If you are uncertain whether Georgia actually understands the nature and consequences of her action when you want to enter into the contract with her, and a curator has been appointed for her, the curator may act on her behalf.

5 Billy has full capacity to act. Nonetheless, at the time of contracting with him, you will need to make sure that he realises the nature and consequences of his actions and can control his actions. If Billy is unable to comply with these requirements because of a befuddled mind, he has no capacity to perform juristic acts and the contract will be void. If Billy meets the requirements, he has the capacity to act, even though he is under the influence of the drug. In other words, it is a difference in degree.

6 Since Lucy has already been declared a prodigal, she has limited capacity to act. You must distinguish between two types of contracts: contracts in terms of which Lucy obtains rights only and is not required to deliver any performance will be valid, even if she concludes them without assistance. Other contracts will be valid if her curator assists her, and voidable if he or she does not do so.

7 Because rehabilitation is a process that begins only after sequestration, you may assume that Dale’s estate has been sequestrated. Once again you will need to distinguish between different types of transactions, in this case, three types. With reference to the disposal of assets in the insolvent estate, Dale has no capacity to act and his curator has to act on his behalf. In relation to other contracts that could have a detrimental effect on Dale’s estate, he has limited capacity to act and needs the assistance of his curator. Without the necessary assistance, the contract is unenforceable. As far as other contracts are concerned, namely those that do not affect his estate, Dale has the capacity to act.

8 Jane has full capacity to perform juristic acts and you may freely conclude a contract with her. It would, however, be advisable to make sure that Jane is really married out of community of property.

THE THIRD AND FOURTH REQUIREMENTS: THE AGREEMENT MUST BE PHYSICALLY AND LEGALLY POSSIBLE

Once you have studied these two requirements, you should be able to determine which contracts and performances are illegal, unenforceable or impossible; what the consequences of such contracts are and what remedies are; available in the circumstances.

Prescribed study material: textbook chapter 6

Most of this chapter in the textbook is reasonably straightforward and must be studied.
1 Legal possibility

A performance is legally impossible if it is in conflict with the common law or statutory law. In terms of the common law, a contract may be legally impossible if it cannot be legally executed or if it is contrary to good morals or public policy. Contracts could be contrary to public policy because they abuse or thwart the course of justice, amount to offences or delicts, jeopardise the safety of the state, restrict people’s freedom to participate in legal or commercial intercourse or constitute gambling.

(a) Agreements restraining a person’s freedom to participate in legal intercourse
(Textbook par 6.2.1.3(d))

Activity

Indicate whether the following agreements would be valid or not and give reasons for your answers.

1 While their father is still alive, two brothers, Onego and Aresha, agree that, on the death of their father, Onego will forgo his inheritance so that it will pass to Aresha.
2 Onego and his father agree that the father will leave nothing to Onego so that Aresha will inherit everything.

Feedback

1 This agreement is invalid. During the father’s lifetime, Onego may not agree to forgo his inheritance one day. It is contrary to public interest to allow persons to restrict their right to participate in legal intercourse if the restriction infringes the person’s freedom excessively.
2 This agreement is also invalid. The law does not permit the father to restrict his freedom to decide who will receive legacies and bequests.

As an exception, the law does allow engaged couples to include a clause in their antenuptial contract to the effect that the one spouse makes the other spouse his or her heir. This exception enables the first-dying spouse to provide for the maintenance of the surviving spouse.

(b) Agreements restraining a person’s freedom to participate in trade
(Textbook par 6.2.1.3(e))

Not all contracts that restrict a person’s right to take part in trade will be contrary to public policy and result in these contracts being null and void. You need to be able to determine when such contracts are indeed invalid.

See the example in the textbook concerning the sale of a hairdressing business. Other examples are the following:

1 Ali and Ben are partners in a veterinary practice. Ali is afraid that if Ben were to leave their partnership, nearly all the customers would take their sick animals to Ben. He therefore persuades Ben to promise that if he (Ben) were to leave the partnership, he would not practise as a veterinary surgeon in Cape Town for one year.
(2) Cas Ltd, anxious to protect its trade secrets and keep its important clients, requires its employee, Don, to agree to a restraint that will prevent him from doing the same work in a specified geographical area (South Africa) for a specified time (ten years).

Here the principle of freedom to work and trade is in conflict with the principle that contracting parties must uphold their contracts. The second principle (contractual commitment) is generally preferred, and contracts in restraint of trade are regarded as valid and enforceable.

For this reason, Ben and Don would have to prove that the restraints on their freedom to practise and work are contrary to public policy. The court may take into consideration whether the restraint is reasonable to both parties at the time of its taking effect (i.e., when Ben and Don leave their present places of work and Dr Ali and Cas Ltd seek to enforce the restraints). Ben’s restraint is limited: he could start practising immediately somewhere else (even near Cape Town) or, if he wishes to continue practising in Cape Town, he need wait only a year.

Thus, because the restraint on his freedom to trade is reasonable and consequently not contrary to public policy, it is valid. However, Don’s restraint is too long and extensive, and therefore unreasonable. The restraint against Don is therefore contrary to public policy and unenforceable. The courts have the discretion to alter the period or the area of the constraint in order to bring the contract within the sphere of reasonableness.

(c) Gambling contracts

(Textbook par 6.2.1.3(f))

The purpose of a contract is so that the parties thereto perform in terms of the contract. Problems arise when a party does not perform as he or she has undertaken to do. In the case of a valid contract, the law provides certain remedies for breach of the contract, and a party wishing to enforce his or her rights in terms of the contract can institute action in a court of law against the party in breach. (See chapters 10 and 11 on breach of contract and the remedies the law provides.) In some cases the law recognises the contract as valid, but does not afford the usual remedies for breach of contract. It is then that we speak of valid, but unenforceable contracts.

A typical example of this is the common-law wagering contract. (Revision: You have now learnt about invalid contracts, valid but voidable contracts, valid and enforceable contracts, as well as valid but unenforceable contracts. Can you give examples of each of these contracts? It might be worth attempting to do this without paging back to the relevant chapters in the textbook. See how much you can remember.)

In terms of the common law, wagering contracts are valid but unenforceable. In contrast, gambling contracts were illegal and therefore invalid. In addition to the common law, there are now two statutes regulating gambling contracts, which serve as examples of how public policy changes with time. Both these Acts make provision for certain gambling debts to be enforceable. Gambling contracts and debts not covered by the Acts are still regulated by the common law.
1.1 Consequences of illegality

Most unlawful contracts are **void**. Contracts that conflict with statutory law are **void** if the law determines that such contracts will be invalid. If the law does not determine what the result of such contracts will be, you need to try and ascertain what the legislator’s intention was, that is, whether the contract is valid or invalid, and whether the parties are committing an offence.

No contractual rights or duties can arise from a void contract. In the case of unlawful contracts, this fact is expressed by the rule that no action arises from a shameful cause (ex turpi causa non oritur actio). What is more, the parties may not turn to the law on unjustified enrichment in order to obtain performance.

This is established by the **par delictum** rule, which has the effect that the person in possession of the performance is in a stronger position. However, in the past, the courts sometimes relaxed the **par delictum** rule when it was in the public interest to do so, for example when the contract was in contravention of a statutory prohibition and the contravention was of a technical nature.

Contracts related to the unlawful “contract” may also be void if they have the following consequences:

- if the related contract indirectly enforces the unlawful “contract”

  **OR**

- if not, if it is close enough to the unlawful “contract” to help, promote or encourage it

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**Activity**

Tom pays Gwelo R50 000 to burn down the Pretoria city hall. However, Gwelo has second thoughts and refuses to perform as agreed. Is Tom legally entitled to enforce Gwelo’s performance or, alternatively, to demand the return of the R50 000?

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**Feedback**

The contract between Tom and Gwelo is invalid. It conflicts with common law because it would amount to committing an offence. In terms of the ex turpi causa rule, Tom cannot demand Gwelo’s performance, but neither can he demand the return of his own performance of R50 000, because where parties are equally guilty of an illicit contract, the **par delictum** rule applies and it stipulates that, in a situation like this, the person in possession is in the stronger position. It is improbable that, under these conditions, the **par delictum** rule will be relaxed by a court.
2  Possibility and certainty of performance
   (Textbook par 6.3)

2.1  Objective possibility to perform

You should note that impossibility of performance is relevant in three different stages of a contract, namely at the conclusion thereof (which applies here), where breach of contract in the form of prevention of performance occurs (see par 10.6 of the textbook), or where rights are terminated by the supervening impossibility of performance (see par 12.8 of the textbook). You should make a point of distinguishing between these three situations.

It is only objective physical impossibility of performance that prevents the conclusion of a contract. If the performance is not objectively or absolutely impossible, the contract is valid. In chapter 8 we look at terms that may be included in contracts, such as a condition, which could be relevant here. Note the difference between divisibility in character and divisibility in law. A performance that is divisible in character will not necessarily be divisible in law; that would depend on the subject matter itself and the intention of the parties. A set of chairs is an example of a performance that is physically divisible, but which may not be divisible in a particular contract.

Activity

Lerato sells a dining room suite consisting of a table, six chairs and a sideboard to Estelle. The suite actually belongs to Alex, Lerato’s previous husband. Answer the following questions and give reasons for each of your answers:

1  Is the contract between Lerato and Estelle valid in light of the fact that Lerato does not own the suite?

2  Suppose that, on returning home, Lerato finds that her father has burned the suite to spite Alex, even before Lerato concluded the contract with Estelle. What is the status of the contract now?

3  Suppose that Lerato arrives home after her father has only thrown three of the chairs onto the fire. Will the contract between Lerato and Estelle be valid or not?

Feedback

1  The contract is not invalid because it is simply subjectively impossible to perform. Objectively, it is still physically possible to perform because Lerato can always buy the suite from Alex in order to meet her contractual obligations. Failing that, she commits breach of contract.

2  In this case, performance would be objectively physically impossible and the contract would be void.

3  The dining room suite is physically divisible into the sideboard, the table and the chairs. This does not, however, necessarily mean that the law views the dining room suite as a divisible performance. If the law does view the performance as divisible, a valid contract comes into being, and the performance is that part of the divisible performance that is still possible. If the law does not view the performance as divisible, the contract is null and void. So, it is necessary to determine whether the dining room suite is a legally divisible performance. One
way of determining whether the performance is divisible is to see how the price is expressed. If the price of the suite is R5 500, the performance might not be divisible, but if the price is set at R1 000 for the table, R1 500 for the sideboard and R500 for each of the chairs, the performance might be viewed as divisible.

2.2 Determined and ascertainable performance

The requirement that performance must be physically possible includes the requirement that the performance must be determined or ascertainable. If performance is neither determined nor ascertainable, the contract is invalid due to vagueness because then performance is impossible. A contract will be valid if the performance is determined or ascertainable: either of the two would suffice.

In view of the last statement, you should note the difference between a facultative obligation (which is a specific type of determined performance) and an alternative obligation (which is a type of ascertainable performance). In the case of the facultative obligation, if the determined performance becomes impossible, the debtor is relieved of his or her obligation. In the case of the alternative obligation, the obligation to deliver continues if one of the alternatives becomes impossible, provided the other alternatives still exist. This means that the personal right is not terminated. The performance that arises from a generic obligation and the personal right to it also continues because it is accepted that the genus continues to exist. (The termination of contracts is discussed in chapter 12 of the textbook.)

THE FIFTH REQUIREMENT: FORMALITIES

Once you have studied this requirement, you should be able to identify the contracts for which formalities are required, thereby ensuring that any contracts that you encounter are valid. You should also know what the consequences are of non-compliance with the formality requirements, as well as the effect of this formality on contracts concluded electronically.

Prescribed study material: textbook chapter 7

1 Introduction
   (Textbook par 7.1)

The final requirement that we take into consideration when determining whether a valid contract has come into existence is whether compliance with any formalities is prescribed for the formation of a contract (see the requirements for the formation of a valid contract in study unit 3).

The word “formalities” refers to the external, visible form that the agreement must take in order to be a valid, enforceable contract. Formalities may be required either by law or by the parties themselves. Usually these formalities entail that the parties must write down their agreement and sign it. If no formalities are expressly required by the law or the parties, the contract arises once the parties with the capacity to act reach consensus on rights and obligations that are physically and legally possible.
2 The general rule: no formalities required
(Textbook par 7.2)

As a general rule, no formalities are needed for the formation of a valid contract.

Contracts may be entered into
- through spoken words (orally)
- through written words
- through conduct (tacitly) only

Most contracts are formed orally or by conduct. Think of shopping at a supermarket. In the example concerning a lease given in the textbook, Anna’s formal letter or informal note would be a written offer, and her oral offer to Bob may be, “Hello, I’d like to hire this car from you for R2 000 a month.”

Bob could accept in a formal letter or an informal note (written words), or, if he is a man of few words, he could merely nod his head or hand over the car keys to Anna (conduct). Some aspects of the contract may be agreed to orally or through conduct, and some may be agreed to in writing. For example, Bob could hand Anna a note about who is to be responsible for maintaining which parts of the car, and then hand Anna the keys of the car.

3 Contracts where formalities are required
(Textbook par 7.3)

There are some exceptions to the general rule that no formalities are required. These are discussed below.

3.1 Formalities required by law

<table>
<thead>
<tr>
<th>TYPE OF CONTRACT</th>
<th>PRESCRIBED BY</th>
<th>FORMALITIES REQUIRED</th>
<th>CONSEQUENCE OF NON-COMPLIANCE</th>
</tr>
</thead>
</table>
| Alienation of land               | Alienation of Land Act 68 of 1981                   | Contained in a contract of alienation  
Signed by parties or their agents  
Agents must have written authority | Invalid, but deemed to be valid if both parties have fully performed and transfer to the new owner has occurred |
| (sale, exchange, donation)       |                                                    |                                                                                        |                                                                      |
| Suretyship                       | General Law Amendment Act 50 of 1956                | In writing  
Signed by or on behalf of surety (surety may orally authorise agent to sign on his or her behalf) | Invalid                                                                 |
<p>| | | | |
|                                  |                                                    |                                                                                        |                                                                      |</p>
<table>
<thead>
<tr>
<th>TYPE OF CONTRACT</th>
<th>PRESCRIBED BY</th>
<th>FORMALITIES REQUIRED</th>
<th>CONSEQUENCE OF NON-COMPLIANCE</th>
</tr>
</thead>
</table>
| Contracts of donation in which performance is due in future | General Law Amendment Act 50 of 1956 | - Contained in a written document  
- Signed by donor or someone on his or her behalf  
- Donor must give written authorisation to the person to sign on his or her behalf  
- Authority must be granted in presence of two witnesses | Invalid |
| Antenuptial contracts | Deeds Registries Act 47 of 1937 | - Must be registered | Invalid against third parties, but valid between parties to contract |

### 3.2 Formalities required by the parties

Two situations need to be clearly distinguished here:

- Firstly, the parties may have a clear, common intention that the contract between them should be in writing in order to be valid. The parties require writing as a formality. Therefore, until the contract is written down, there will be no binding contract.
- Secondly, it could be the parties’ intention that the oral contract be valid but that they are putting it in writing to facilitate proof of the oral contract.

Which of these two possibilities actually reflects the intention of the parties needs to be ascertained from the contract itself?

### 3.3 Writing and signing of electronic transactions

The Electronic Communications and Transactions Act 25 of 2002 (ECT Act) provides that electronic messages are recognised as writing if the document or information is accessible for future use, except in respect of transactions concluded under the following Acts:

- the execution, retention and presentation of a will or codicil in terms of the Wills Act 7 of 1953
- an agreement for alienation of immovable property in terms of the Alienation of Land Act 68 of 1981
- an agreement for a long-term lease of immovable property in terms of the Alienation of Land Act 68 of 1981
- the execution of a bill of exchange in terms of the Bills of Exchange Act 34 of 1964

The ECT Act also provides that in certain circumstances an electronic signature may legally fulfil the same function as a traditional handwritten signature.
 activity

Which of the following contracts are valid with regard to the formalities required by law for these types of contracts?

1. Retha purchases a kitten orally from Thami. They arrange that she will collect the kitten in two weeks' time, when it is mature enough to leave its mother.
2. Sam undertakes verbally to stand surety for the study loan of his son, Pieter.
3. Britney and Justin enter into a written antenuptial contract, but the attorney neglects to register the contract at a deeds registry.
4. Lemmy pays cash for his father’s house when his father emigrates. Although their agreement is verbal, they succeed in having the transfer of the property registered in Lemmy’s name at the deeds office.
5. John, who has relocated to England, leases his house to Jack via the internet for a period of 21 years.

Feedback

1. The deed of sale between Retha and Thami is valid. There are no requirements for the sale of movable things.
2. This contract is invalid. Contracts of surety are valid only if they comply with the required formalities. It must be in writing and signed by Sam or someone on his behalf. Sam cannot be held liable for his son’s student loan on the basis of this agreement.
3. The antenuptial contract is valid between Britney and Justin, but is not binding on third parties.
4. Since the property has been transferred to Lemmy and both parties have fully performed their obligations, the contract is regarded as valid, even though it does not meet the validity requirements for the alienation of immovable property.
5. The lease agreement between John and Jack is invalid. In terms of the ECT Act, an agreement in terms of which an immovable property is leased in excess of 20 years cannot be concluded electronically.

TRANSFER AND TERMINATION OF PERSONAL RIGHTS

1. Introduction
   (Textbook par 12.1)

This study unit deals with the transfer of personal rights by way of cession and also with the various ways in which personal rights can be terminated. Here you are introduced to cession, the only way in which personal rights can be transferred. The aim of this discussion is to enable you to identify the legal principles relating to the transfer of personal rights. It is important for you to understand the practical implications of transferring personal rights, as well as how to apply the principles in practice.

Transfer of personal rights
2  Cession  
(Textbook par 12.2)

Personal rights may be transferred in only one way, namely by way of cession. Since the rights that result from a contract are personal rights, they must be ceded in order to affect their valid transfer. The transfer of a right by agreement is known as cession.

If a debtor owes a debt (eg R500) to a creditor, the creditor may cede his or her personal right (his or her entitlement to payment of the R500) to another party (eg because the creditor owes this party the same amount). In respect of the obligation between the creditor and the third party, the creditor is known as the cedent and the other party as the cessionary. The obligation between the debtor and the creditor is not terminated by the cession.

Schematically, cession can be illustrated as follows:

The cession does not create any new obligations, since the debtor’s obligation is still to pay his or her original debt. However, payment must now be made to the cessionary, and not to the cedent.

Rights may normally be ceded freely. Cession of a particular right may, however, be prohibited, as this scheme indicates:
A debtor may not be prejudiced by cession. This is the reason why a right may be ceded only in its entirety, unless the debtor agrees to splitting. However, the debtor’s loss of his or her right to setoff (discussed later in chapter 12 of the textbook) is not regarded as prejudice.

The following is an example of the circumstances in which a debtor will lose his or her right to setoff: Henry owes Ron R500, which is payable immediately. Ron, however, owes Henry R200, but this is only payable at the end of the month. These two debts can be set off against each other; in other words, Henry can deduct the amount Ron owes him from the amount he pays Ron (R500 minus R200 = R300). However, if Ron cedes his right to payment of the R500 to Mervyn, Henry loses the advantage of setoff which he had before. He will have to pay Mervyn the R500 immediately and will be entitled to the R200 from Ron only at the end of the month. This is not considered to be prejudice, unless the cedent and the cessionary acted in bad faith to deprive the debtor of this right. In such a case, the debtor can use the defence that he would have had against the cedent, namely that he, the debtor, had a counterclaim against the cessionary.

2.1 The consequences of cession

Several consequences arise from the valid cession of a personal right:

(a) The right forms part of the patrimony of the cessionary, not of the cedent.
(b) The cessionary alone has the right to collect the debt.
(c) Once ceded, the right may not be ceded to another person by the cedent, but may be ceded by the cessionary.
(d) The debtor can no longer perform validly against the cedent.
(e) The claim is transmitted to the cessionary in its entirety, together with all benefits and privileges.
(f) The cessionary also receives the right with all disadvantages attached to it.

Activity

At a golf day Chuck wins a free holiday of three days at Sun City which is sponsored by Sun International. Chuck is not interested in the prize and cedes the right to it to Natalie. Who is the debtor, who is the cedent and who is the cessionary in this set of facts?
The debtor is Sun International, the cedent is Chuck and the cessionary is Natalie.

3 Explanatory notes

Cedent: The person who transfers a personal right to another.

Cession: The transfer of a personal right from one party to another.

Cessionary: The person to whom a personal right is transferred.
Terms of the Contract

Now that you are familiar with the five basic requirements for the conclusion of a valid contract, we introduce you to the terms a contract may contain. The chapter starts off by explaining what the word “term” means, and indicates three ways in which terms can be included in a contract. You are then introduced to the three types into which these terms are divided: the essentialia (the essential elements a contract must contain in order for it to be a contract of a particular kind, for example a contract of sale), the naturalia (the natural consequences of such a contract if these have not been excluded from the contract expressly) and the incidentalia (the incidental matters for which the parties wish to provide, such as time of performance, for example). Then ten types of terms are discussed. You will immediately realise that these terms could be used to alter the naturalia, but are most often used as incidentalia. In the case of conditions and time clauses, please note the difference between “suspensive” and “resolutive”.

When you have studied this study unit you should be familiar with the variety of terms that can be included in contracts, and the advantages and consequences of including these in contracts. This will enable you to utilise these terms to your advantage in the contracts which you might possibly encounter.

Prescribed study material: textbook chapter 8


I Introduction: the term
(Textbook par 8.1)

It is important to distinguish between terms of a contract and statements made about the contract, which do not form part of it.

<table>
<thead>
<tr>
<th>TERMS OF A CONTRACT</th>
<th>STATEMENTS MADE ABOUT THE CONTRACT</th>
</tr>
</thead>
<tbody>
<tr>
<td>A term is a provision in a contract. It obliges a party to act in a specific manner, or not to perform a specific act. It may also qualify (limit) the contractual obligations. It has legal consequences that may be claimed and enforced.</td>
<td>If the statements about the contract are misrepresentations, they do have legal consequences (see chapter 4). But if the statements are merely sales talk intended to attract customers (eg the item or product is presented as the best, the cheapest, the prettiest or the funniest), they do not have legal consequences.</td>
</tr>
</tbody>
</table>

There are three ways in which a term can be made part of a contract:

(a) *Express terms*

These are terms that are expressed in words, whether written or spoken. These words must express the essential terms that are relevant to and characterise a particular kind of contract (eg a contract of sale: an agreement to buy and sell). In the case of specific contracts, the essential terms must be expressed.

The Consumer Protection Act 68 of 2008 contains provisions that state that a consumer contract may not contain unfair, unjust or unreasonable terms and provisions. The Act also requires that if a consumer contract contains a term or provision that may affect the consumer’s rights, or which could not reasonably be expected in that type of contract, the supplier must draw the consumer’s attention to such term or provision.

(b) *Tacit terms*

These are terms that are not expressed, but that are based on the parties’ true intention, or on the intention as imputed by the law. Such a term is imported into a contract if it is reasonable and necessary for achieving the contract’s desired commercial effect.

The test for such an importation is the following: If someone were to ask the parties, “What would happen in such and such a case?”, and both contracting parties’ answers were essentially the same as that of the alleged tacit term, the term would be imported into the contract.

**Example:** A breeder of stud cattle acquires a stud bull for breeding purposes. In due course it becomes evident that the bull is infertile. The purchaser brings a claim against the seller on the grounds of the bull’s infertility. The court finds that although there is no explicit term in the agreement that the bull must be fertile, there is a tacit term to this effect.
(c) **Implied terms**

These are terms not expressed in words, but incorporated into the contract by operation of the law or trade usage. Implied terms that are included in contracts of a specific type are known as the *naturalia* of that type of contract.

Note that trade usages can be incorporated into a contract as either tacit or implied terms. If both parties are aware of a particular trade usage, the term will be part of the contract as a tacit term. If one party cannot prove that the other was aware of the trade usage, the trade usage could become an implicit term of the contract. For a trade usage to be implied as a term of a contract, it will need to meet the requirements of being long established, reasonable, uniformly observed and certain. If these requirements are met, it can be presumed that the other party knew of the other party may be presumed to have known about its existence and intended to be bound by it. (See also par 1.2.2 in chapter 1 of the textbook.)

2 **Essentialia, Naturalia and Incidentalia**

(Textbook par 8.2)

<table>
<thead>
<tr>
<th>ESSENTIALIA</th>
<th>NATURALIA</th>
<th>INCIDENTALIA</th>
</tr>
</thead>
<tbody>
<tr>
<td>These essential terms identify the contract as being a certain kind of contract, for example a contract of sale.</td>
<td>These terms are automatically incorporated into the contract as implied terms, unless they are excluded by the parties to the particular contract. A warranty against latent defects is implied in all contracts of sale which are regulated by the Consumer Protection Act. In terms of the Act, parties may only exclude the warranty against latent defects, by a voetstoots clause, if certain requirements have been complied with.</td>
<td>These special terms serve two purposes: they allow the parties to add special provisions not provided for by the essentialia and naturalia, and they allow parties to exclude or alter the naturalia to suit their particular needs.</td>
</tr>
<tr>
<td>Once the essentialia identify the particular contract as being a certain type of contract, then the relevant naturalia for that contract follow unless excluded by the parties.</td>
<td>Example: In the contract of sale, the warranty against latent defects forms part of the contract unless expressly excluded.</td>
<td>Example: a clause that specifies that the goods bought must be delivered by train.</td>
</tr>
</tbody>
</table>

3 **The condition**

(Textbook par 8.3)

**Example:** Andy and Bill agree that Andy will buy Bill’s car on condition that Andy’s sister gives him the money to pay the price.
This is a valid condition. It makes the purchase dependent on the occurrence of a future event (the sister’s giving Andy the money to pay the purchase price). The event is specified. The event is also uncertain (no one knows whether Andy’s sister will actually give him the money), and the event has yet to happen (it is a future event).

3.1 The suspensive condition

The above example of the purchase of a car contains a suspensive condition. The contract of sale already exists: neither Andy nor Bill may withdraw from it. But the operation of the contract is suspended until the condition has been fulfilled: until then, neither Andy nor Bill may enforce the contract by demanding delivery or payment. If Andy’s sister gives Andy the money to pay the price, the condition will be fulfilled. Then the contract will become enforceable. However, if Andy’s sister does not give him the money to pay the price, the condition will stay unfulfilled. Consequently, the contract will not become enforceable and will come to an end.

3.2 The resolutive condition

Example: Carl agrees to let his house to David indefinitely, on a monthly basis, on condition that if Carl ever needs it, it must be returned to him.

The contract of lease of the house exists, is effective and can be enforced. If Carl refuses to allow David to take occupation, David may demand occupation or the payment of damages. It is uncertain whether Carl will ever need the house. If he does, the lease will end. David will then have to vacate the house so that Carl can take occupation again: in this way David will return what he has received under the contract. But since David, as a tenant, has a continuous duty to pay the rent, he will not get back the rent that he has paid for the completed period.

Activity

Dudu agrees with his wife, Tandeka, that he will buy her a car on condition that she obtains a BCom degree. Is this condition suspensive or resolutive?

Feedback

This is a suspensive condition. There is a valid contract, but its operation is suspended until Tandeka obtains the BCom degree.

4 The time clause

(Textbook par 8.4)

The difference between a condition and a time clause is the following: a condition depends on an uncertain future event, whereas a time clause depends on a certain future event, although the specific time at which the event will occur may be uncertain. (For example, although it is certain that Bertie will die, it is uncertain precisely when this will happen.)
Example: On 1 June 2012, Eddy sells his car to Fatima. They agree that delivery and payment will occur on 1 August 2013.

This time clause specifies the time when delivery of the respective performances must take place. According to general human experience, it is certain that 1 August 2013 will arrive.

4.1 The suspensive time clause

The above sale of the car contains a suspensive time clause. The contract exists: neither Eddy nor Fatima may withdraw from it. But Eddy must deliver the car to Fatima, and Fatima must pay for it, only when the time (1 August 2013) comes. Until then, both parties’ obligations are unenforceable.

4.2 The resolutive time clause

Example: Gugu agrees to work for Hassan for three years.

This is a contract of employment, subject to a resolutive time clause. The contract exists: each party may render and claim performance. At the end of three years, the resolutive time clause brings the contract to an end.

Activity

Tucker and Abraham agree that Tucker will pay Abraham R1 000 a month until the day that either Tucker or Abraham dies. What type of term is this?

Feedback

This is a resolutive time clause. The contract comes into being immediately and Tucker is liable to Abraham. The contract comes to an end with the death of either of the two, that is, it is terminated when a certain future event takes place.

Activity

Themba is a collector of old books. He is missing one volume of a valuable set. At an exhibition he comes across one volume, but is unsure whether it is the volume he needs to complete his set. How would you advise him to formulate the contract of sale?

Feedback

Themba should make the purchase subject to the supposition that this is the specific volume that is still missing from his set. In this way he can insert his reason for purchasing the book in the contract. If it turns out that the specific book is not the volume he is seeking, the supposition has not been met and the contract of sale does not come into being. If it is the volume concerned, the obligations stemming from the contract arise.
The warranty
(Textbook par 8.6)

Example: Lindi lets a house to Kara. The terms include a warranty that the fence will be high enough so that no dogs will be able to leap over the fence. (Kara is a breeder of champion cats.) As the landlord, Lindi has a duty to deliver and maintain the house in a condition fit for the purpose of the lease. Kara has a right to the performance of this common-law duty. But by giving the warranty, Lindi has assumed an additional obligation, namely to make sure that the fence is high enough so that no dogs will leap over the fence. She must therefore take appropriate steps to make the fence high enough. If dogs do leap over the fence, Lindi will be in breach of contract.

The modus
(Textbook par 8.7)

Example: Modise gives Nola a car, subject to the modus that Nola must give up smoking within two months. This is an example of a contract subject to a modus to refrain from doing something (stop smoking within two months). Nola may claim delivery of the car now, before having stopped smoking. But if, after two months, she has not stopped smoking, she will be in breach of contract and Modise will then be contractually entitled to repossess the car.

The example in the textbook of Nelson and Podile is an example of a burden to do something, and the example of the father and son is an example of a burden to perform against a third party.

The cancellation clause
(Textbook par 8.8)

Example: Olly and Pete incorporate into their lease a clause that if (for whatever reason) Pete is late in paying his rent, Olly will be entitled to cancel the contract. This is a cancellation clause that makes the punctual payment of rent a matter of particular importance as far as this contract is concerned.

Pete has paid his rent punctually every month for ten years. Then the following month, he pays his rent one day late. (He forgot to pay it because he had to arrange his father’s funeral.) Olly would be entitled to cancel the lease summarily without warning Pete of his intention to do so. In such a case, Pete would fail to persuade the court that the breach was so trivial and so understandable that it should be ignored and that it would not be a ground for cancelling the contract if it had not been for the cancellation clause.

The fact remains that the contract does contain such a clause, and Pete has breached its provisions. (See par 11.3.1 of the textbook regarding cancellation in general.)
8 The penalty clause
(Textbook par 8.9)

Example: In Maiden v David Jones (Pty) Ltd 1969 (1) SA 59 (D), Maiden worked for David Co as a property salesman on a commission basis. As part of an enforceable restraint clause, Maiden promised that if he were to breach the restraint, he would pay David Co liquidated damages of R200 a month for each month that he was in breach. Maiden later sued David Co for commission due. David Co retaliated by claiming R1 200 (R200 × 6) because Maiden had breached the restraint for six months.

The clause about liquidated damages was a penalty clause and had been included to deter Maiden from breaching the restraint. It fell within the scope of section 1 of the Conventional Penalties Act 15 of 1962. It entitled David Co to claim the damages simply because Maiden had breached the provisions. It established the extent of the penalty before Maiden breached the restraint; David Co did not need to prove its damages.

Maiden tried to persuade the court to exercise its discretion and reduce the penalty to what it considered reasonable, but he failed: the court was not convinced that the liquidated damages claimed by David Co were disproportionate to the prejudice that David Co had suffered as a result of Maiden’s breach of contract.

Activity

Nelson is a racing driver. His next race is on 28 March. He is paid R10 000 for each race in which he participates. He and George agree that George will replace the engine of his car and that the work will be completed on 26 March. In terms of a penalty clause in the contract, George will have to pay Nelson R500 for every day that the work is late. George breaches the contract and only delivers the car on 3 April. This prevents Nelson from participating in the race and, consequently, he loses R10 000. Advise Nelson about whether he may claim damages to the value of R10 000 from George.

Feedback

Sometimes a contract contains a clause that offers the creditor the choice of claiming damages in the case of breach of contract or of relying on the agreed penalty clause. It is not indicated whether this contract contains such a clause. If the contract does contain such a clause, Nelson could demand damages, in this case the R10 000. If, however, there is no such clause in the contract, Nelson would be restricted to the terms of the penalty clause: he would be able to claim only R500 for each day that George is late, in other words, R500 × 7 days = R3 500. The Conventional Penalties Act 15 of 1962 prevents Nelson from claiming both.

9 The forfeiture clause
(Textbook par 8.10)

Example: A clause in a contract of sale of land could read as follows: “Should the purchaser fail to comply with the terms and conditions of this agreement and remain in
default for a period of seven days after despatch per registered post of written notice requiring such default to be remedied, the seller shall be entitled to cancel this agreement at once and to retain, as a genuine pre-estimate of damages, the moneys paid to date by the purchaser after deduction of estate agent’s commission payable in terms of clause 12 of this agreement."

This forfeiture clause entitles the seller to cancel and keep the moneys paid by the buyer. So the buyer who breaches the sale will lose his or her right to claim restitution of these moneys. In terms of section 4 of the Conventional Penalties Act 15 of 1962, this Act is also applicable to forfeiture clauses (remember that a forfeiture clause is a species of penalty clause). Therefore, as in the case of other penalty clauses, the court may be asked to exercise its discretion to reduce the penalty. (See par 11.3.7 of the textbook regarding the consequences of cancellation in general.)
Breach of Contract

Although the objective of a validly concluded contract is that the contractual obligations be fulfilled by due and proper performance, this might not happen and the contract may be breached by one of the parties. The law recognises five forms of breach of contract: default by the debtor; default by the creditor; positive malperformance; repudiation; and prevention of performance. Note that not all forms of breach of contract can be committed by both the debtor and the creditor. The requirements for each form are important, as well as the consequences of that type of breach. Prevention of performance is a form of breach of contract, whereas initial impossibility of performance prevents a contract from being concluded validly.

The aim of this study unit is to enable you to determine which actions amount to breach of contract, whether breach of contract has occurred, and if so, in what form and what the consequences are, because this determines the remedies available to the prejudiced party, as discussed in chapter 11 of the textbook.

Prescribed study material: textbook chapter 10

1 Introduction
   (Textbook par 10.1)

All contracts are intended to be performed properly and on time. Most contracts are performed in this way, but some are not, for example if the terms of the contract are broken because of the conduct of one of the parties. This is called breach of contract. The table below indicates the different forms of breach of contract and which party may be responsible for a particular kind of breach of contract.
<table>
<thead>
<tr>
<th>TYPE OF BREACH</th>
<th>CAN BE COMMITTED BY DEBTOR</th>
<th>CAN BE COMMITTED BY CREDITOR</th>
</tr>
</thead>
<tbody>
<tr>
<td>Default of the debtor</td>
<td>✓</td>
<td>X</td>
</tr>
<tr>
<td>Default of the creditor</td>
<td>X</td>
<td>✓</td>
</tr>
<tr>
<td>Positive malperformance</td>
<td>✓</td>
<td>X</td>
</tr>
<tr>
<td>Repudiation</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Prevention of performance</td>
<td>✓</td>
<td>✓</td>
</tr>
</tbody>
</table>

In reciprocal contracts (for example a contract of sale), both parties are simultaneously obliged to perform and are entitled to performance, that is, both parties are simultaneously debtor and creditor, but in respect of different performances (as the table below indicates).

**Example:**

**RIGHTS AND DUTIES (OBLIGATIONS) IN A CONTRACT OF SALE**

<table>
<thead>
<tr>
<th>DUTY</th>
<th>RESTS ON</th>
<th>THEREFORE CALLED</th>
<th>RIGHT</th>
<th>HELD BY</th>
<th>THEREFORE CALLED</th>
</tr>
</thead>
<tbody>
<tr>
<td>To pay purchase price</td>
<td>The purchaser</td>
<td>The debtor</td>
<td>To receive the purchase price</td>
<td>The seller</td>
<td>The creditor</td>
</tr>
<tr>
<td>To transfer the merch</td>
<td>The seller</td>
<td>The debtor</td>
<td>To receive the merch</td>
<td>The purchaser</td>
<td>The creditor</td>
</tr>
<tr>
<td>To preserve the merch until delivery</td>
<td>The seller</td>
<td>The debtor</td>
<td>To receive the merch in same condition</td>
<td>The purchaser</td>
<td>The creditor</td>
</tr>
<tr>
<td>To protect the buyer against eviction</td>
<td>The seller</td>
<td>The debtor</td>
<td>Not to be evicted</td>
<td>The purchaser</td>
<td>The creditor</td>
</tr>
<tr>
<td>To deliver the merch free from latent defects</td>
<td>The seller</td>
<td>The debtor</td>
<td>To receive the merch free from latent defects</td>
<td>The purchaser</td>
<td>The creditor</td>
</tr>
</tbody>
</table>
As the table shows, the same transaction between the parties (for example a sale) may create several different rights and duties. In the context of breach of contract, it is always important to start by ascertaining which performance obligation gave rise to a “problem”, and then to decide whether it is the debtor or the creditor in respect of that performance who is responsible for the fault (breach of contract).

2 DEFAULT OF THE DEBTOR
(Textbook par 10.2)

Default by the debtor is committed by the debtor when he or she fails to perform on time and the delay is due to his or her fault.

2.1 Requirements

Two requirements must be met for default of the debtor to occur. The one is that performance must be late and the other is that the delay must be due to the debtor’s fault.

(a) Performance must be late

Please note the following:

This form of breach of contract has to do with the time of performance only, and not with any of the other aspects of the contract (for example the quality of performance). It occurs when performance does not take place at the time agreed upon in the contract.

Note that the debtor is automatically in mora if he or she does not perform by the date or time specified. This is called mora ex re. If, however, the contract does not specify a particular date or time for performance, the debtor will have to be placed in mora by a letter of demand that permits a reasonable time for performance. Only when performance does not occur by this date – as stated in the letter of demand – has the debtor defaulted. This is known as mora ex persona.

The reasonableness of the time depends on the contract and the circumstances: the court takes factors such as the following into consideration:

– the parties’ intention
– the nature of the performance due
– the accompanying difficulties and delays, as actually contemplated by the parties at the conclusion of the contract or which would have been contemplated by a reasonable person at the time
– the necessary assumption that the debtor is expected to act promptly, appropriately and carefully; in this regard the court also takes into consideration the parties’ commercial and other interests
– the period specified in the demand for performance; also the period that has already elapsed, because the debtor cannot sit back and do nothing and then assume that when his or her performance is demanded, he or she will still be given the full period that is reasonable for performance

It is advisable, though not essential, for purposes of certainty and proof, to put the demand in writing. It is also important to understand that performance can be late only if
it is claimable: performance subject to a suspensive condition or time clause is not claimable. For example, if Thabo has agreed to buy Mary a car when she gets her BCom degree, his performance is not claimable until she obtains the degree.

(b) The delay must be due to the debtor’s fault

Unless the debtor has given a warranty that performance will occur at a certain time, he or she does not commit mora debitoris if the delay is caused by factors beyond his or her control, for which he or she is not intentionally or negligently responsible. If the delay in the debtor’s performance is caused by the creditor, we are dealing with mora creditoris.

2.2 The consequences of the debtor’s default

The creditor is entitled to the remedies that the law grants to an innocent party in the case of breach of contract (see chapter 11 of the textbook). In a contract of sale, the fact that the debtor is in mora will influence the passing of the risk (see chapter 13 of the textbook). If performance becomes impossible after the debtor has fallen in mora, the consequences are the following: although supervening impossibility of performance usually releases the debtor from his or her duty to perform (as you will see in chapter 12 of the textbook), this does not happen if the debtor was already in mora when impossibility of performance occurs.

This is still mora debitoris, and the debtor’s duty to perform is not extinguished, and since he or she is no longer able to perform, he or she will be liable for damages (one of the remedies for breach of contract discussed in chapter 11 of the textbook).

3 Default of the creditor

(Textbook par 10.3)

Default of the creditor entails the creditor’s failure, through his or her own fault and without lawful excuse, to cooperate in receiving the debtor’s due and valid performance. The creditor’s default presupposes a bilateral juristic act, that is, one requiring the creditor’s cooperation if the debtor is to perform his or her own obligations.

Example: Thembi, a dressmaker, cannot fulfil her obligations properly (making the final adjustments to the dress) unless Ellen (the creditor) cooperates (by turning up for a fitting session).

3.1 Requirements

Four requirements must be met before default of the creditor can occur:

(a) The debtor’s performance must be dischargeable. This means that the performance must be due in terms of a valid and existing contract, which it is legally and physically possible to perform. A performance is not dischargeable if a suspensive condition has not been fulfilled.

Example of a suspensive condition not yet fulfilled: Roger sells his business to Paul, on condition that Paul obtains a trading licence. Roger’s (the debtor’s) performance (the transfer of the business) is not dischargeable until Paul has obtained the licence.
(fulfilment of the suspensive condition). Performance is furthermore not dischargeable unless the time for performance, as agreed to in the contract, has arrived.

**Example:** Mary orders snacks from Sylvia for her cocktail party scheduled for Saturday. Until Saturday, this performance by Sylvia is not dischargeable. If Sylvia delivers on Thursday, Mary’s refusal to accept the snacks cannot constitute *mora creditoris*, because the performance is not yet dischargeable.

(b) The debtor must tender performance and the performance he or she tenders must be proper performance.

**Example:** the dressmaker must ask the client to come for a final fitting. If the dressmaker does not try to reach the client, then neither the client nor the dressmaker is guilty of default by the creditor.

(c) The creditor must delay performance by not co-operating, and performance must still be possible at a later stage.

**Example** of delay when later performance is possible: The client does not come for the dress fitting, but a later fitting will still enable the dressmaker to perform her obligation, even though it will be later than agreed. Default of the creditor takes place. Pay special attention in this regard to the difference between *mora ex re* and *mora ex persona*

**Examples** of delays when later performance is impossible:

1. After the conclusion of an employment contract, Shaun tenders his services to his employer, Barney. Barney delays in making use of these services. Shaun’s performance for the period of delay is no longer possible. Barney has thus prevented performance for the period in question.

2. Sylvia undertakes to deliver the snacks to Mary before five o’clock on Saturday. Mary is not at home to receive the snacks. Sylvia is informed that Mary has gone overseas for two weeks. Time for performance is an integral part of the performance. Sylvia cannot perform later, because the snacks will have been spoilt. Mary has made it impossible for Sylvia to perform in terms of the contract. Mary’s action amounts to prevention of performance and not default of the creditor.

(d) The default must be due to the fault of the creditor.

**Example:** Ellen, who concluded a contract to have a dress made, deliberately avoids the dressmaker for two weeks. This amounts to default by the creditor (if the other requirements are met).

Without acting negligently in any way, Ellen is run over by a car and hospitalised for two weeks. This delay is not due to any fault of Ellen’s and there is no default of the creditor. (See par 10.6 of the textbook.)

### 3.2 The consequences of the creditor’s default

(a) The debtor’s duty of care is diminished if the creditor is in default. The debtor is liable only for intentional loss (for example, after the client fails to arrive for the fitting, the dressmaker decides that she loathes the material that the client bought
for the outfit, so she burns it) or gross negligence (for example, Ali sells Brian a
business and the shop in which it is located; Brian is late in taking occupation; Ali
leaves the shop unstaffed and unguarded; the stock is stolen and the premises are
vandalised: Ali is grossly negligent in failing to look after the shop and stock
properly).

(b) In the case of reciprocal agreements, the debtor remains liable to render his or her
performance, albeit later than originally intended, and is entitled to the creditor’s
counter-performance.

Example: Elias and Fred agree that Elias will build a wall on Fred’s property on
11 May. Fred commits default of the creditor by failing to acquire the bricks in
time. Elias may not use Fred’s default to escape his obligation to build the wall,
and Elias remains entitled to payment by Fred.

(c) If the debtor’s performance becomes impossible while the creditor is in default, the
debtor is set free from performing his or her obligations. But the creditor must still
perform his or her obligations. The supervening impossibility of the debtor’s
performance must not result from the debtor’s intention or gross negligence.

Example: Under a contract of letting and hiring of work, a potter has finished a
specialy decorated pot for a client, who is late in coming to fetch it, as arranged
previously. Lightning strikes the potter’s home and, in the ensuing fire, the pot is
destroyed. The potter is set free from his or her obligation to deliver the pot. But
the creditor must still pay the potter for making the pot.

(d) If the debtor is already in default, his or her default is ended by the creditor’s
subsequent default. It is not possible for both the debtor and the creditor to be in
default at the same time in respect of the same performance.

Example: Gary sells a car to Herman. They agree that Gary must deliver the car
on 16 August. Gary does not perform on 16 August, so he is in mora (in default).
When Gary tries to deliver the car on 18 August, Herman is late for their
appointment and Gary cannot deliver the car. Gary and Herman cannot both be in
default at the same time in respect of the same obligation. Herman’s default (mora
creditoris) on 18 August purges (wipes out) Gary’s default. From 18 August, only
Herman is in default.

Take note of the following two points:

Although the earlier mora debitoris is cancelled by the later mora creditoris, any liability for
damages caused during the time of the debtor’s mora is not extinguished. Even though
Herman’s own default (by not being available to accept the car when Gary eventually
attempted to deliver it) extinguishes Gary’s default (of late delivery), the damages
Herman may have suffered as a result of Gary’s default are not extinguished and
Herman may still claim them from Gary.

In the case of different obligations, mora debitoris and mora creditoris can exist at the
same time. If Herman had to pay when Gary delivered the car, there would have been
two obligations: Gary’s obligation to deliver the car and Herman’s obligation to pay the
purchase price. If Herman was not available to accept delivery of the car, he would have
been guilty of default by the creditor in respect of Gary’s obligation to deliver, and also
guilty of default by the debtor in respect of his own obligation to pay the purchase price.
4 Positive malperformance
(Textbook par 10.4)

Positive malperformance is committed when the debtor tenders defective or improper performance.

Example: Billy, a building contractor, uses floor tiles of an inferior quality, contrary to the clear specifications about this in the building contract.

Positive malperformance is also committed when the debtor does something that, in terms of the contract, he or she may not do.

Example: Zandile buys Barbara’s business. They agree that, for six months, Barbara will not start a similar business within a radius of 25 kilometres. After two months, Barbara starts an identical business across the road from Zandile’s.

5 Repudiation
(Textbook par 10.5)

“Repudiation” means that either in words communicated to the other party or through conduct, the debtor or the creditor shows that he or she does not intend to perform his or her contractual obligations. A party may repudiate the whole contract or only some of his or her obligations or part of the contract.

A party repudiates the whole contract by

- denying the existence of the contract
  
  Example: “We did not agree to form a partnership to sell hotdogs as you allege; those discussions between us last month were only negotiations; there was no serious offer and acceptance: I am not your partner in a hotdog business.”

- trying, without a valid reason, to withdraw from the contract

  Example: Ulrich decides to rescind the contract because of undue influence; his view that there was undue influence later proves to be incorrect: so his attempt at rescinding the contract is not justified and amounts to repudiation of the contract.

- giving notice that he or she cannot perform any longer

  Example: “Unfortunately, I do not have the equipment to build your block of flats as agreed, and I have no way of acquiring the equipment.”

- giving notice that he or she refuses to perform any longer

  Example: “I am no longer prepared to work for you; find someone else to type your work; I quit.”

- indicating that he or she will not perform

  Example: “I know that I promised last week to make your hat by next month, but I’ve got so much work that I won’t be able to get around to making your hat until the end of the year.”

A party’s repudiation of only some of his or her obligations or a part of the contract could lead to repudiation of the whole contract.
Example: Arnold works hard when he is at work, but refuses to come to work at the agreed time, which he says is far too early for him.

The test for repudiation is the following: Has the alleged repudiator behaved in a way that would lead a reasonable person to conclude that the repudiator does not intend to perform his or her contractual obligations?

Mere failure by the debtor to perform is not repudiation; so, for example, the debtor’s forgetting that he or she is contractually bound to perform is not repudiation of the contract.

6 Prevention of performance
(Textbook par 10.6)

6.1 Prevention of performance by the debtor

Here the debtor prevents his or her own performance: through his or her own fault (either intentionally or negligently), the debtor makes his or her own performance impossible. Nevertheless, the debtor’s obligation to perform continues.

Example: “A sells something to B and then disables himself from fulfilling the contract by selling and delivering the thing to C, who will not part with it at any price” (Wille’s Principles of South African Law (1991) 514). A’s obligation to perform continues. Because A cannot now deliver the thing to B, A is liable to B for damages.

6.2 Prevention of performance by the creditor

The following table indicates the differences between the creditor’s prevention of performance and the creditor’s default.

<table>
<thead>
<tr>
<th>PREVENTION OF PERFORMANCE BY THE CREDITOR</th>
<th>DEFAULT OF THE CREDITOR</th>
</tr>
</thead>
<tbody>
<tr>
<td>■ The creditor makes it permanently impossible for the debtor to perform.</td>
<td>■ The creditor delays the debtor’s performance, but does not make it impossible for the debtor to perform.</td>
</tr>
<tr>
<td>■ The debtor can never perform.</td>
<td>■ The creditor can still perform.</td>
</tr>
</tbody>
</table>

Example: Ezak arrives to repair John’s stove; since having asked Ezak to repair the stove, John has intentionally destroyed it. It is John’s fault that Ezak cannot repair the stove. So Ezak is regarded as having performed his obligation to repair the stove.

Ezek may still demand payment from John, but must deduct from his claim any expenses that Ezak has saved through his no longer having to perform (for example the purchase of parts).

Example: Thomas sells lan a painting. They agree that Thomas must deliver it on 31 July by packing it for Ian to collect at Thomas’s house on that day. Thomas duly packs the painting, but Ian forgets to collect it on 31 July. On 1 August, Ian is in default.
On 3 February, the management of Thutong University concluded a contract with Roy Building Contractors in terms of which Roy Building Contractors undertook to build two hostels, each consisting of 250 single rooms, 100 double rooms, a sitting room, a dining room and a kitchen. The contract stipulated that the building would be complete on 15 December. They also agreed as follows:

(a) If the hostels have not been completed by 15 December, Roy Building Contractors will be liable for an amount of R10 000 per day after 15 December.
(b) Ten per cent of the contract price will be held back until Smith, Thutong’s architect, issues a final certificate.

What form of breach of contract, if any, has been committed in each of the following situations?

1. Roy Building Contractors only completes the work on 5 January of the following year. The delay is caused by serious floods resulting from an unseasonable cyclone in September.
2. Roy Building Contractors only completes the work on 10 January of the following year. The delay is caused by a week-long strike by Roy Building Contractors’ employees over the bonuses they received from Roy Building Contractors in that same year.
3. On 6 January, Smith issues a final certificate, but owing to a cash flow problem, Thutong University does not pay the outstanding balance on the contract price.
4. In order to make a higher profit, Roy Building Contractors uses floor tiles of a poorer quality than was specified in the contract.
5. Roy Building Contractors only commences construction on 20 March of the following year, and not on 1 March as agreed. The delay is caused by Thutong University’s failure to provide the approved building plans to Roy Building Contractors on 15 February, as agreed. The plans are only supplied to Roy Building Contractors on 25 February.
6. On 20 February, Thutong University informs Roy Building Contractors that the university is “cancelling” the contract because it wishes to erect laboratories on the site instead of hostels.

Feedback

1. There is no breach of contract here. The delay is not due to the fault of a contracting party. However, there is temporary impossibility of performance. (See par 12.8.3. of the textbook)
2. Here there is breach of contract in the form of *mora debitoris*. The delay is due to the actions of Roy Building Contractors.
3. This is breach of contract in the form of *mora debitoris*. Thutong University defaults by failing to meet its obligation in time.
4. In this instance, Roy Building Contractors commits positive malperformance. They act contrary to the terms of the contract.
5. This is a case of *mora creditoris*. The creditor prevents the timely performance of the debtor by withholding its cooperation.
6 Thutong University is guilty of repudiation here, since it is clear that the university does not intend to honour the obligations stipulated in the contract. The university is attempting to withdraw from the contract without justification.
The law provides three remedies to the innocent party when a contract has been breached. They are execution of the contract, cancellation of the contract and damages. **Note** that claiming damages is not an alternative remedy, but is available in both the case of execution and cancellation. **Note**, also, that when a contract is cancelled, it is terminated, whereas if an order is given for execution, proper performance is still required for the contract to come to an end. **Note** the rules for cancellation for each specific type of breach of contract and the consequences. The requirements for the remedy of claiming damages are most important.

This study unit will enable you to determine the appropriate remedy or remedies for each particular type of breach of contract you encounter in practice.

**Prescribed study material: textbook chapter 11**

1 Introduction
   (Textbook par 11.1)

Where there is a contract between parties, the one party’s breach of contract entitles the other party (the victim or the aggrieved or innocent party) to a contractual remedy or remedies. These remedies are the legal means provided for protecting the innocent party’s contractual rights. The innocent party may sue the party who is in breach of contract and may enforce these remedies with the assistance of the court and the court’s officials, who carry out the orders of the court.

The following diagram shows the different remedies for breach of contract:
In general, the remedy of execution (specific performance) may be claimed in respect of all contracts. It is the "primary" remedy for breach of contract since it is aimed at accomplishing the execution of the contract.

In contrast, cancellation is a "supplementary" remedy since it is aimed at ending the contract. The remedy of cancellation may be used only if there is a right to cancellation. This means that the innocent party may cancel only if breach occurs, if the contract contains a cancellation clause, if such a right was later stipulated, or if it can be proved that the breach of contract is material.

The innocent party must choose either to continue the contract or to end it; he or she may not do both. The innocent party may claim the remedies in the alternative: this is done by claiming, for example

- specific performance of the other party’s contractual obligations

  OR

- failing which, cancellation of the contract

The above claim means that the innocent party now exercises his or her choice to continue with the contract and claims an order for specific performance. However, if the court, for whatever reason, does not give the order for specific performance, the claimant then applies for an order for cancellation of the contract. The contract continues until

- either the court refuses the order for specific performance and grants an order for cancellation

  OR

- the claimant, having been awarded an order for specific performance, later finds that the defendant cannot or will not render the performance, and cancels the contract
Note that in this sequence of events, the claimant does not enforce specific performance and cancellation of the contract at the same time. The remedy of damages is an additional remedy at the disposal of the innocent party, regardless of whether the innocent party claims specific performance (execution) of the contract or insists on cancellation. The remedy of damages may also be claimed on its own.

Example: Ally sells her car to Buti, but then she refuses to deliver the car. Buti needs transport, so in the meantime, he makes use of taxis. After a week, Ally decides to fulfil her contractual obligations and delivers the car to Buti. Buti still wants the car and no longer needs to claim specific performance because, after all, Ally is tendering performance. Nor does Buti wish to cancel the contract. But Buti can claim the taxi expenses he incurred as a result of Ally’s breach of contract.

2 Execution of the contract
(Textbook par 11.2)

Purpose: To achieve the same result as the parties intended to achieve when they entered into the contract, or, if that result cannot be achieved, then a result as close as possible to the one originally intended.

2.1 Orders for specific performance

Generally speaking, every party to a binding agreement who is ready to carry out his or her own obligation in terms of the agreement has the right to demand from the other party, as far as it is possible, a performance of his or her undertaking in terms of the contract.

Exception 1: Where the debtor’s estate has been sequestrated, specific performance will not be granted because it could prejudice the insolvent’s other creditors.

Example: Vusi owns a house worth R1 million. It is a valuable asset in Vusi’s estate. When he concludes an agreement of partnership with Manu, Vusi promises to contribute the house to the partnership for use as the partnership’s business premises. However, before the house has been transferred to the partnership, Vusi is declared insolvent. The duty of Vusi’s trustee is to take control of Vusi’s assets and enforce claims against Vusi’s debtors so as to amass as large a sum of money as possible from which to pay Vusi’s creditors. The house is due to be transferred to one of Vusi’s creditors, namely the partnership. However, if the partnership were allowed to take transfer of the house, Vusi’s trustee would be left with a much smaller amount from which to pay Vusi’s other creditors. In this way, the partnership would have an unfair advantage over Vusi’s other creditors. Instead, the house falls into Vusi’s insolvent estate and will be sold for the highest price possible, so that the proceeds of the sale may go towards increasing the sum of money available for distribution among Vusi’s creditors, in terms of the law of insolvency.

Exception 2: If, objectively speaking, the debtor cannot carry out his or her contractual obligation, an order for specific performance will not be granted because that would imply that the law expects the impossible of the debtor.
Example: Callie sells his unique painting to Donna. Before delivery, it is destroyed. The court will not order Callie to deliver the painting to Donna.

In all other cases, the court exercises its discretion whether to grant or refuse an order for specific performance. It thus seeks to uphold legal and public policy and to prevent unfairness. So it will refuse an order for specific performance if this remedy would have an unreasonably harsh effect on the defendant and would be unfair in the circumstances. It will, for example, refuse the order if the cost of fulfillment of the contract to the party who has breached the contract would be out of all proportion to the corresponding benefit to the claimant, and if the claimant could be equally well compensated by an award of damages.

An example of this, given by the judge in ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd 1981 (4) SA 1 (A) 5, is the following: “[A] leased building is to be pulled down at or shortly after the expiration of the lease and the cost to the lessee of reinstatement would be considerable. The cost of, for example, replastering, painting, etc would be out of proportion to the benefit to the lessor owner, which would in the case postulated be nil or, at most, negligible. (In the above passage, the word “reinstatement” means “returning the let property to the condition in which it was received at the conclusion of the lease, fair wear and tear excepted, so that the tenant (lessee) can then return the reinstated property to the landlord (lessor”).

There is no rule in our law that says that specific performance will be denied in the case of an obligation to render personal services. The situation will be judged according to the same principles applicable to any other performance, namely whether ordering specific performance will be equitable to the debtor. The court may order specific performance of one or some of the obligations undertaken by the debtor, while refusing to do so in respect of other obligations or terms.

2.2 Orders for reduced performance

The principle of reciprocity:

Most commercial contracts create rights and duties for both parties. When the one party undertakes certain obligations in return for the other party’s undertaking other obligations, the principle of reciprocity applies to the agreement. This principle requires that if the claimant wishes to demand performance from the other party, he or she must either have performed or offered his or her performance to the defendant. The defendant from whom performance is claimed consequently has a defence against such claim, until the claimant has rendered or tendered performance, and the defendant may withhold his or her own performance in the meantime.

The defense of exceptio non adimpleti contractus:

This defense may be raised in the case of an unfulfilled contract if

- both parties must perform at the same time

Example: In a cash sale, the seller must usually deliver or transfer the thing sold at the same time that the buyer must pay the price

OR

- the claimant must perform before the party raising the defence.
Example: In general, a landlord must perform before he or she may demand rent. If the landlord tries to claim payment of the rent before performing his or her obligation to deliver the premises to the tenant, or without undertaking to do so, the tenant may raise the _exceptio non adimpleti contractus_. The contracting parties may change the general rule by agreement: thus the landlord and a tenant may agree that the rent be paid at the beginning of the period of lease.

The defence of _exceptio non adimpleti contractus_ cannot be raised if

- the contract is one to which the principle of reciprocity does not apply

  OR

- the claimant is not upholding the contract, but terminating it (the claimant cancels the contract and claims damages instead of upholding it) and claiming damages

  OR

- the claimant has performed or offered to perform

  OR

- the claimant need not perform

Example: In a contract of donation, the donor cannot raise the _exceptio non adimpleti contractus_ against the donee’s claim for performance because the donee need not perform.

The defence may be raised where the claimant has not rendered or tendered performance, or where the claimant has indeed rendered performance, but this performance is defective. What happens if the party who rendered defective performance claims performance from the other contracting party (the defendant), who, while using the defective performance, raises the defence of _exceptio non adimpleti contractus_ and refuses to render his or her own performance? Here the claimant is the creditor in respect of the performance he or she is now claiming from the debtor, but which is being withheld by the debtor on the basis of the _exceptio non adimpleti contractus_.

Example: Andrew, a building contractor, built a house that does not meet the agreed specifications and now seeks payment from the owner, Simon, for the work done. The construction work is almost complete and Simon is already occupying the house. Andrew, the claimant, will have to persuade the court to exercise its discretion in Andrew’s favour, to relax the _exceptio non adimpleti contractus_ defence, and to order Simon to render a reduced performance of his own (up to now withheld). As Andrew’s performance is incomplete or defective, Simon cannot fairly be ordered to make a full counter-performance.

To succeed in claiming a reduced performance, the plaintiff creditor must prove

(a) that the defendant is using the defective performance

  Example: The defendant is living in the half-completed dwelling,

  AND

(b) that in the circumstances it would be fair for the court to exercise its discretion in favour of granting the order
Note: Such circumstances were absent in Stemmet v Ackermann 1916 CPD 536. Stemmet agreed to dig for water where Ackerman showed him and to channel the water to a dam. Stemmet was to be paid ten pounds per inch of water, and after that, proportionally for every inch or part of an inch. Stemmet delivered less than one inch of water. The court held that the parties had intended that no payment be made before Stemmet had produced an inch of water. Ackerman had received no benefit and Stemmet was not entitled to any payment. In other words, the court found that in the circumstances it would not be fair and equitable for it to exercise its discretion to relax the exceptio non adimpleti contractus defence and, therefore, upheld it. The result was that Ackerman was entitled to use the defence that he did not have to perform (pay the money) as Stemmet had not performed (delivered water).

AND

(c) what the reduced contract price must be, that is, what the cost would be of rectifying his or her own performance, so as to establish by how much the contract price must be reduced

The court therefore does the following calculation:
The reduced contract price = the full contract price minus the cost of finishing or improving the performance to the standard required in the contract.

REQUIREMENTS FOR THE USE OF THE EXCEPTIO NON ADIMPLETI CONTRACTUS

<table>
<thead>
<tr>
<th>REQUIREMENT</th>
<th>EXPLANATION</th>
<th>EXAMPLE</th>
</tr>
</thead>
<tbody>
<tr>
<td>The principle of reciprocity must apply to the contract.</td>
<td>One party undertakes certain obligations in return for the other party’s undertaking certain other obligations.</td>
<td>Sam undertakes to deliver a car to Tom in return for Tom’s undertaking to pay the purchase price of R1 000.</td>
</tr>
<tr>
<td>Both parties must be obliged to perform at the same time.</td>
<td>Delivery of the thing sold must take place at the same time as the buyer pays the purchase price.</td>
<td>A cash sale: Sam must deliver the car at the same time as Tom pays the amount of R1 000.</td>
</tr>
<tr>
<td>One party must be obliged to perform before the other party is obliged to perform.</td>
<td>The party who claims performance from the other party must be obliged to render his or her own performance before the other party needs to render his or her performance; and he or she must have rendered his or her performance or have tendered his or her performance.</td>
<td>Xolile must finish the garden shed he has undertaken to erect for Tshepo before he can claim the contract price.</td>
</tr>
<tr>
<td>REQUIREMENT</td>
<td>EXPLANATION</td>
<td>EXAMPLE</td>
</tr>
<tr>
<td>-----------------------------------------------------------------------------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>■ The party who raises the defence must continue with the contract.</td>
<td>The party against whom breach of contract has been committed cannot use the defense unless he or she decides to claim execution of the contract.</td>
<td>Xolile finishes the garden shed and claims payment from Tshelo, who refuses to pay the contract price, maintaining that the garden shed is defective.</td>
</tr>
<tr>
<td></td>
<td>The defence is not available if such a party chooses to cancel the contract.</td>
<td>Tshelo can use the defence of exceptio non adimpleti contractus only if he decides to uphold the contract; if he decides to cancel the contract (and sue Xolile for damages), the defence is not available.</td>
</tr>
</tbody>
</table>

**WHAT THE PLAINTIFF MUST PROVE WHEN HE OR SHE CLAIMS REDUCED PERFORMANCE**

| (a) That the defendant is using the defective performance                     | Tshelo is using the defective garden shed that Xolile has erected.                                                                                                                                              |
| (b) That it would be fair in the circumstances for the court to exercise its discretion to relax the defense. |                                                                                                                                                                                                               |
| (c) What the reduced contract price should be                                | It will cost Tshelo R500 to rectify the garden shed.                                                                                                                                                        |

2.3 **Prohibitory interdicts**

One contracting party can apply for a prohibitory interdict

- to prevent the other contracting party from doing what he or she is not entitled to do in terms of the contract, or prevent him or her from continuing to do so

  **OR**

- to prevent the other contracting party from doing what he or she is threatening to do and which he or she is not entitled to do in terms of the contract

Examples of situations in which interdicts are sought include the following:

- **Double sales**
  
  **Example**: Nic sells the same thing first to Sam and then to Tom. The thing has not been delivered to Sam or to Tom. The rule that the person who is first in time has the stronger right means that Sam may apply for an interdict preventing Nic from transferring the thing to Tom, and may claim specific performance, thus leaving Tom to claim damages from Nic.
- Restraints of trade

**Example:** Harry has agreed not to compete against Dick in Pretoria for a year after their contract ends. The contract ends and Harry immediately opens a rival business. Dick may apply for an interdict enforcing the negative obligation not to compete against Dick in Pretoria for a year after their contract has ended. Here the interdict preventing Harry from continuing the rival business amounts to the specific performance of the negative obligation. Harry is entitled to do business that does not compete with Dick’s. If interdicted from competing with Harry, Dick, Harry must obey the court’s interdict, otherwise he will be in contempt of court and may be liable to punishment.

3 Cancellation of the contract
   *(Textbook par 11.3)*

The contract is ended by cancellation. Since parties should, in principle, uphold their contracts, cancellation may be used only

- if the parties have agreed to the remedy of cancellation (by including a cancellation clause in the contract)

   OR

- if the breach of contract is material

3.1 Cancellation and default of the debtor
   *(Textbook par 11.3.1)*

3.2 Cancellation and default of the creditor
   *(Textbook par 11.3.2)*

3.3 Cancellation and defective performance (positive malperformance)
   *(Textbook par 11.3.3)*

3.4 Cancellation and repudiation of the contract
   *(Textbook par 11.3.4)*

3.5 Cancellation and prevention of performance
   *(Textbook par 11.3.5)*

3.6 The act of cancellation

Please note that a contracting party who has the right to cancel cannot be forced to do so. Furthermore, the right to cancel must be exercised within a reasonable time. The innocent party exercises the right of cancellation by notifying the other party of the cancellation. The notice can be in any form (oral or written), as long as it is clear and unequivocal. It is sufficient if the innocent party’s decision to cancel, or the conduct that indicates this choice, is reported to the guilty party by a third person acting independently. A mere threat to cancel is not yet a notice of cancellation.
3.7 The consequences of cancellation

As regards cancellation, the basic rule is that what has been performed must be returned. However, if it is impossible to return a performance, the duty to return it is influenced by the party’s role in the cancellation of the contract: If the innocent party, that is, the one who cancelled the contract because of the other’s breach of contract, cannot return the performance received, he or she is relieved of the duty to return the performance, unless the impossibility is due to his or her own fault; nevertheless, the party who committed the breach of contract still has to return the performance he or she received.

If the party whose breach of contract caused the cancellation cannot return the performance that he or she received, the innocent party need not return.

4 Damages
(Textbook par 11.4)

4.1 Patrimonial loss

Breach of contract does not necessarily cause the innocent party to suffer loss. After cancellation of the contract, the innocent party may, for instance, conclude a contract on better terms than the cancelled contract, and may actually even save money.

The law of contract provides a legal remedy called “contractual” damages. Contractual damages may be claimed for patrimonial loss only. Compensation for non-patrimonial loss or damage, such as hurt feelings, disappointment and irritation, cannot be claimed on the basis of contract, but could possibly be claimed on the basis of delict, which was discussed in chapter 2 of the textbook.

How are damages calculated? The following two financial positions are compared:

- the financial position in which the plaintiff would have been had proper performance of the contract taken place

AND

- the plaintiff’s actual financial position

Example: Barry sells his car to Clay for R60 000. He then refuses to deliver it. Car prices rise. Clay cannot buy the same make of car for less than R65 000 and buys one from Amos. Clay would have paid R60 000 if Barry had delivered the car; instead, Clay had to pay R5 000 more (R65 000) because Barry repudiated the sale. So Clay is worse off by R5 000 – the sum of damages that he may claim from Barry. If the injured party could have made a profit out of the contract, the lost profit may also be claimed.

Example: Clay wants to use the car he bought from Barry as a taxi and Barry knows this. Damages will then not only include the higher price of R5 000 explained above, but also the loss of profit Clay would have made with the taxi if this could be quantified.
Activity

What remedy or remedies is/are available to the innocent party in situations (2) to (6) in the last activity in study unit 10?

Feedback

1. Since there has been no breach of contract, Roy Building Contractors are not liable for any damage suffered.

2. Roy Building Contractors is the debtor regarding the construction of the buildings. In principle, the remedies that are available to the creditor (Thutong University) for the default of the debtor (mora debitoris) are execution of the contract or cancellation of the contract and damages. It is unlikely that Thutong University would want to cancel the contract. Besides, cancellation is only available if the time of performance is material, which is not the case here, or if the contract contains a cancellation clause, or if the creditor sends a notice of intention to cancel to the debtor, which is inappropriate here, since the hostels have been completed in the interim. The remedy of execution of contract would have been available, but performance has been tendered in the meantime, therefore claiming damages is the appropriate remedy. In terms of the Conventional Penalties Act 15 of 1962, however, a party forfeits the right to claim damages if a contract provides for payment of a penalty amount, unless the contract provides for the possibility of a party exercising a choice between the two. Thutong University may claim R50 000 from Roy Building Contractors (5 days’ delay x R10 000 a day), unless the contract stipulates that Thutong University has the option of claiming damages instead of the penalty amount.

3. In relation to the payment of the contracted amount, Thutong University is the debtor. Although, in principle, cancellation or execution and damages are available to Roy Building Contractors (the creditor), the appropriate remedy here is execution of the contract and, indeed, an order for specific performance. Together with this, Roy Building Contractors may claim damages which, in case of default to pay a sum of money, takes the form of interest, calculated from the date on which the debt became payable. Here the debt fell due on the date on which Smith issued his final certificate.

4. In principle, the remedies that are available for positive malperformance are execution of the contract or cancellation of the contract and damages. In this case, cancellation is not available because there is no material breach of contract. Thutong University may demand execution of the contract, namely that Roy Building Contractors replace the inferior tiles with those specified, and damages for loss of rental from the hostels for the period during which the work is done.

5. As regards the provision of the approved architectural plans, Thutong University is the debtor and Roy Building Contractors the creditor. In case of mora creditoris, cancellation or execution and damages are available in principle. The appropriate remedies in this case are execution of the performance and damages.

Roy Building Contractors would not be able to use the default of Thutong University as a reason for not fulfilling its obligations.

6. Thutong University commits breach of contract in the form of repudiation. On the ground of this repudiation of a material obligation, Roy Building Contractors is entitled to cancellation. However, Roy Building Contractors is also entitled to insist
on execution of the contract. Given the facts, Roy Building Contractors will probably accept the repudiation, cancel the contract and claim damages (for proved damage).
Specific Contracts
The Contract of Sale

The first specific contract to which you are introduced is the contract of sale. Firstly the two essentialia (discussed in chapter 8 of the textbook) of the contract of sale are explained, followed by a discussion of the rights and duties of the purchaser and the seller. As a contract creates obligations (see chapter 2 of the textbook), you will realise that the rights of one party constitute the duties of the other party. The purchaser has four common law rights (which become the duties of the seller), and a variety of remedies are at the purchaser’s disposal to enforce these rights against the seller. One right is listed for the seller, namely the right to be paid. Conversely, the duty of the purchaser is to pay the purchase price.

The purpose of a contract of sale is the transfer of property from one party to another. Note the requirements for transferring ownership, and in particular the forms of delivery in the case of movable or immovable property (discussed in chapter 2 of the textbook). Ownership is only transferred when delivery has taken place, but an interesting characteristic of the contract of sale is that the risk of loss or damage to the object could pass to the purchaser even before delivery has taken place. The rules in this regard are most significant. The last section of this chapter discusses the influence of the legislation on the contract of sale, on the sale of either immovable or movable property. At the end of this study unit you should know the essentialia of the contract of sale and you should be able to assess the value of, and appreciate, the individual rights and duties of both purchaser and seller. You should therefore know your rights as a potential purchaser or seller, and be able to enforce them with the remedies at your disposal. You should further be in a position to recognise different forms of delivery as well as the rules pertaining to the passing of risk. You should have sufficient knowledge to advise purchasers and sellers regarding their common law rights and the legislation applicable to the contract of sale.

Prescribed study material: chapter 13 of the textbook
1 Introduction

(Textbook, par 13.1)
In chapters 3–12 of the textbook the basic general rules that apply to all forms of contracts were discussed. You studied these chapters in the module CLA1501. You will find it helpful to go through the contents of these chapters again before you attempt to study this chapter.

The introduction to chapter 13 contains the definition of a contract of sale. This definition includes the essential elements (essentialia) of a contract of sale. It is important to know what these essentialia are (these are in addition to meeting the requirements for the conclusion of a valid contract discussed in chapters 3–8 of the textbook).

1.1 The object of sale (merx)

“Merx” is the Latin word for “a thing which is sold”. It is important to remember that for a valid contract of sale the merx must be either definite or at least ascertainable.

1.2 The purchase price

The purchase price must also be either definite or ascertainable. The price must be an amount payable in money.

2 The rights and duties of the purchaser and the seller

(Textbook, par 13.2)

2.1 The common-law rights of the purchaser

2.1.1 The purchaser is entitled to delivery of the merx

The purchaser is entitled to delivery of the merx. This legal consequence cannot be excluded by the parties. Delivery can take place in different forms, depending on the nature of the thing which is sold. Refer to paragraph 13.3 of the textbook; there you will find a discussion of the different forms of delivery.

2.1.2 The purchaser is entitled to preservation of the merx pending delivery

The seller will be liable to the purchaser if the merx is damaged as a result of negligence or intentional conduct on his or her part before delivery takes place. Make sure that you understand the effect of mora (discussed in chapter 10 of the textbook), on the part of the purchaser and the seller respectively, on this duty.

Whenever a thing is accidentally damaged before delivery takes place, the situation is governed by a different set of principles. In such a case it is important to establish who bears the risk. If the contract is perfecta the risk has passed from the seller to the purchaser, which means that the purchaser will have to bear the risk of damage to the merx. See paragraph 13.4 of the textbook, in which the perfecta principle is discussed. If the contract is not yet perfecta the seller still bears the risk. If it has become objectively impossible for the seller to perform before the contract becomes perfecta, the principles of supervening impossibility of performance will apply (see paragraph 6.3.1 of the textbook).
2.1.3 The purchaser is entitled to be protected by the seller against eviction

This common-law right of the purchaser is best described by means of an example:

Peter has a nice-looking car which you are interested in buying. Peter bought this car from John for an amount of R100 000. Peter agrees to sell this car to you for the amount of R120 000. You pay this amount in cash and take delivery of the car. You and Peter are unaware of the fact that John stole the car from Brian. Two months later you receive a phone call from Brian. He claims the car, since it is still his rightful property.

Brian, who is the rightful owner of the car, may institute proceedings against you to claim back the car. He will do so by issuing summons against you in either a magistrate’s court or a High Court, making use of the action known as the “rei vindicatio” (see paragraph 13.3.4 of the textbook).

You will now have to inform Peter of these events and ask him to assist you in defending Brian’s claim against you. If Peter is not willing to cooperate, you should vigorously defend this claim against you. However, you will not succeed in your defence because Brian is the rightful owner. Peter has now breached the warranty against eviction.

As a result of this serious breach of contract you now have the right to cancel the contract and recover from Peter the R120 000 which you paid him. If you have suffered a loss, you may also claim damages (e.g. the costs pertaining to a roadworthy test). It is noteworthy that Peter will also have a similar claim, based on his warranty against eviction, against John, who sold the car to him.

2.1.4 The purchaser is entitled to a merx free from latent defects

This common-law right of the purchaser can also be explained by means of an example:

You would like to buy a car. You contact Thomas, who has advertised a car in the classified section of the newspaper and make an appointment to test-drive the car. At Thomas’s house you inspect the car thoroughly by checking the paint-work, the tyres, the suspension, the exhaust, the interior and the engine. You also take the car out on the road and are satisfied with its performance. There and then you buy the car, pay the purchase price and take delivery of the car. On your way home the car breaks down. The emergency services tow the car to the nearest garage and there it is established that one of the pistons (pistons are very important parts of the car’s engine) is broken. It is also discovered that this piston must have been broken before, because it has been welded.

And now? What you should do is to determine whether the car is now less useful to you, or whether it is completely useless. If you decide that the car is less useful, but worth keeping, you may institute action against the seller by means of the actio quanti minoris. (With this action you retain possession, but claim a reduction in price which corresponds to the reduced use.) If, however, the car is completely useless, you would institute action against the seller by making use of the actio redhibitoria. (With this action you cancel the contract and claim back the purchase price.)

Irrespective of which action you institute you will have to prove that:

- the defect was material
- the defect was present when the contract was concluded
- the defect was latent
- you were unaware of the defect at the time of conclusion of the contract

If the above contract was concluded on an “as is” (voetstoots) basis you will have no recourse against the seller – unless you can prove that Thomas was aware of the defect and that he intentionally concealed this. In this event you may (and should) not make use of the actio redhibitoria or the actio quanti minoris, but instead institute action against Thomas with the actio empti (see paragraph 13.2.1.5 of the textbook) or on the ground of intentional misrepresentation. [Regarding an action based on misrepresentation, see paragraph 4.4.2.1.1(a) of the textbook.]

### 2.1.5 The actio empti

The actio empti is another powerful remedy which the purchaser can use, depending on circumstances, to enforce his or her rights against the seller. (Study paragraph 13.2.1.5 of the textbook for more on this.)

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**Activity**

Glad Hair manufactures and supplies Perfect Hair Gel. Sam’s Salon, one of Glad Hair’s long-time customers, has been using Perfect Hair Gel for years. Because of the quality of Perfect Hair Gel, Sam’s Salon has been able to attract many clients. In June 2011 Sam’s Salon renews its order with Glad Hair, which order is executed promptly. However, all the clients who use Perfect Hair Gel from the new stock lose their hair. As a result, Sam’s Salon loses many of its valued clients.

Advise Sam’s Salon on the following:

1. Is there a latent defect in the *merx* (i.e. Perfect Hair Gel)? Substantiate your answer.
2. Supposing Sam’s Salon can prove that there was a latent defect in the batch of Perfect Hair Gel sold and delivered to the purchaser in June 2011. What remedy or remedies, if any, would be available to Sam’s Salon?

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**Feedback**

1. Yes, there is a latent defect. The defect was already present when the contract was concluded, was material, was latent (i.e. could not be detected by a reasonable inspection) and Sam’s Salon was unaware of it.
2. As the defect is so material as to render the *merx* useless, the actio redhibitoria is available to Sam’s Salon (see paragraph 13.2.1.4.1 of the textbook). However, as the seller (Glad Hair) is also the manufacturer and Sam’s Salon has suffered consequential damages, it would be more prudent to institute the actio empti (see paragraph 13.2.1.5 of the textbook).
2.2 The common-law rights of the seller
The seller is entitled to payment of the agreed purchase price. This legal consequence cannot be excluded by the parties. However, where and when payment is to be effected, is a matter that must be negotiated by the parties.

3 The transfer of ownership
(Textbook, par 13.3)
Transfer of ownership is the main goal of the conclusion of a contract of sale.

Activity
On 16 May Charlie sells his computer to David for R5 000. They agree that David will immediately take delivery of the computer, but that he will only pay the purchase price on 30 May (when his salary is paid into his account). On 25 May, David sells and delivers the computer to Ursula for R6 000 cash. Ursula is not aware of the contract between David and Charlie. On 30 May Charlie claims payment from David, who refuses to pay the R5 000.

Can Charlie claim the computer from Ursula with the rei vindicatio? Who is the owner of the computer?

Feedback
No, Charlie will not be able to claim the computer from Ursula, as she is now the owner thereof. On the facts given, the contract of sale between Charlie and David is clearly a credit sale. Therefore, ownership was transferred to David when delivery took place. David, as the owner of the computer, concluded a cash sale with Ursula who paid cash and simultaneously took delivery of the computer. Therefore ownership was transferred to Ursula. Charlie will only be in a position to enforce his personal right to claim specific performance (the payment to him of the R5 000) from David. (See paragraph 13.3 of the textbook.)

4 The passing of the risk
(Textbook, par 13.4)
This is one of the important sections of the work relating to contracts of sale. If a question states that a certain merx was accidentally damaged after the conclusion of the contract, but before delivery of the merx, the first thing you should do is to determine who bears the risk of damage to the merx. In order to determine this, you will need to establish whether the contract is perfecta or not. If the contract is perfecta the risk passes from the seller to the purchaser and the purchaser will have to bear the loss.

Activity
On 15 February Duane buys Nikita’s car on condition that it passes a roadworthy test on or before 24 February. If the car passes the test, it will be delivered to Duane on 25 February. They also agree that the purchase price of R200 000 will be paid in cash (i.e. when delivery takes place on
25 February). The car passes the roadworthy test on 19 February. On 21 February Nikita phones Duane to inform him that the car was stolen the night before. She insists that despite the theft, Duane still owes her the purchase price.

What are the legal consequences in the following instances?

1. It is established that the car was stolen in Nikita’s driveway while she was opening her garage door. She had left the key in the ignition and the engine running.
2. The car was stolen out of Nikita’s locked garage.

Feedback

1. From the facts it should be clear that Nikita acted negligently. As the loss was the result of her negligent action, Duane need not pay the purchase price even though the contract was already perfecta. Duane was entitled to the preservation of the merx. The risk for damage or loss resulting from the seller’s intentional or negligent conduct remained with Nikita. (See paragraph 13.2.1.2 of the textbook.)
2. Where the loss did not result from Nikita’s intentional or negligent conduct, it is material to establish whether the contract was perfecta when the loss occurred. The merx and the purchase price had been determined, and the suspensive condition (that the car should pass a roadworthy test on or before 24 February) had been fulfilled. Therefore, the contract was perfecta and Duane will have to pay the R200 000 purchase price, despite the fact that the car was stolen.

Comment: How can a purchaser protect himself or herself against possible detrimental effects of bearing the risk? One option is to take out insurance cover on the merx and to make sure that the insurance cover is effective from the date of purchase. The other option is to agree with the seller that the risk will remain with the seller, even though the contract is perfecta, until delivery takes place.

5 Statutory protection of purchasers
(Textbook, par 13.5)

5.1 National Credit Act 34 of 2005

The Act applies in respect of transactions in terms of which movable property or services are sold to a purchaser against payment of the price in instalments over a period in the future. The following features must be present:

- The whole or part of the price is paid in instalments.
- Possession and use of the property is transferred to the consumer.
- Ownership of the property is reserved and passes only when the agreement is fully complied with, subject to the right of the credit provider to repossess the goods should the consumer fail to satisfy all his or her financial obligations in terms of the agreement.
- Interest, fees or other charges are payable to the credit provider in respect of the agreement or deferred amount.
5.1.1 General
(Textbook, par 16.3.1)

5.1.2 Application of the Act

The Act regulates different types of credit agreements.

5.1.2.1 Credit agreement

“Credit agreement” is defined in section 8 of the Act. Refer to 16.3.2.1 of the textbook to see what will and what will not qualify as a credit agreement for the purposes of the Act. You must also be able to draw a distinction between a credit facility, a credit transaction and a credit guarantee.

5.1.2.2 Dealing at arm’s length

The following arrangements are deemed to be dealing at closer than arm’s length and, therefore, fall outside the ambit of the Act: loans between family members, shareholders, partners and friends on an informal basis.

5.1.3 Circumstances under which the Act will not apply
(Textbook, par 16.3.3)
The second specific contract prescribed for this module is the contract of lease, which is often encountered in the commercial sphere. Firstly, the three essentialia of a contract of lease are discussed, followed by the basic rule that no formalities are required for the conclusion of a valid contract of lease, except some statutory exceptions.

The rights and duties of the lessee and lessor are discussed comprehensively. You will notice immediately that the three duties of the lessee (paragraph 14.4.2 of the textbook) correspond to the three rights of the lessor (paragraph 14.4.3 of the textbook). The remedies at the disposal of the lessor in case of breach of a duty by the lessee are discussed under the rights of the lessor. Likewise, the three duties of the lessor (paragraph 14.4.1 of the textbook) correspond to the first three rights of the lessee (paragraph 14.4.4 of the textbook), and four more rights, to which the lessee is entitled are listed (refer to chapter 12 of the textbook for explanations of cession and assignment).

In the next two paragraphs (14.5.1–14.5.6) the six ways in which a contract of lease could be terminated are discussed, as well as how such a contract can be renewed.

On completion of this study unit, you must know the general characteristics of a contract of lease, you must be able to, distinguish, and understand, the rights and duties of the lessee and lessor; you must be familiar with the remedies at the disposal of the innocent party in case of non-compliance; and you must know how a contract of lease can be terminated or extended and what legislative protection is provided for lessees and occupiers of different kinds of property.

Prescribed study material: textbook, chapter 14
1 Introduction
(Textbook, par 14.1)
A “contract of lease” is a reciprocal contract. This means that both parties (the lessor and the lessee) have rights and duties (ie legal obligations) in terms of the contract. The contract of lease is also referred to as a “rental agreement” or “contract of letting and hiring”.

This study unit (and chapter 14) is only concerned with the letting and hiring of a thing (ie an object), in contrast to the letting and hiring of services (ie in a modern context, the contract of employment – see chapter 17) or the letting and hiring of work to be done (ie the construction contract). Furthermore, it is important to note that chapter 14 of the textbook is primarily concerned with letting and hiring of immovable property. However, the essentialia as well as the common-law rights and duties of the lessor and lessee apply equally to the letting and hiring of moveables (eg motor vehicles or videos).

2 The essentialia of a contract of lease
(Textbook, par 14.2)

2.1 The use and enjoyment of a thing
The contract of lease may pertain to a lease object in its totality (eg a farm, or a car), or it may pertain to only a part of the object of the lease (eg two rooms in a ten-roomed house).

2.2 Temporary use and enjoyment
In a contract of lease the lessor makes only the temporary use and enjoyment of the object of lease available to the lessee.

2.3 The rent
The amount of rent to be paid by the lessee must be certain and must sound in money. There is only one exception, namely where the rent in respect of a lease of agricultural land (eg a farm) may consist of an agreed proportion of the produce (see the example given in par 14.2.3 of the textbook).

3 The formation of a contract of lease
(Textbook, par 14.3)
Although in terms of the common law no formalities are required for the conclusion of a valid contract of lease, there are certain Acts of Parliament that may require that a lease agreement be reduced to writing.
4  The rights and duties of the lessor and the lessee  
(Textbook, par 14.4)

4.1  The duties of the lessor

The lessor has the following three duties, which are discussed in paragraphs 14.4.1.1–14.4.1.3 of the textbook:

- The lessor must deliver the thing let to the lessee
- The lessor must maintain the thing let in a proper condition
- The lessor must ensure the lessee’s undisturbed use and enjoyment

4.1.1  The duty to deliver the thing let to the lessee

The lessor must put the use and occupation of the object leased at the disposal of the lessee in such a manner that the lessee is able to enter into undisturbed occupation of it.

For example: Joy leases Pat’s house. They agree that Joy will move into the house on 1 July. It is Pat’s responsibility to put the house at Joy’s disposal on 1 July. Pat must also allow Joy to take control and occupation of the house without any disturbance either from Pat or from any other person during the period of lease.

4.1.2  The duty to maintain the thing let in a proper condition

The object of the lease must not only be delivered in a condition which is reasonably fit for the purpose for which it is being leased – it must also be maintained in that state, allowing for normal wear and tear.

Example:

Benny approaches Agnes about letting her store. The store is in good condition and everything that Benny will need is there. If the agreement between Benny and Agnes is that Benny will commence business in that store on a particular date, Agnes may not begin to neglect the store. Agnes must continue to maintain the store in the condition in which she was obliged to deliver it – that is, in the state in which Benny last saw it. If the store is so defective (owing to Agnes’s negligence) that Benny cannot reasonably be expected to accept it, he may elect to cancel the contract.
4.1.3 The duty to ensure the lessee’s undisturbed use and enjoyment

The lessor must warrant that no one has the right in law to disturb the lessee’s use and enjoyment of the property. He or she must ensure that the lessee’s use and enjoyment is not disturbed during the period of lease. The disturbance of the lessee may be caused by the lessor personally – for example, if the lessor enters the leased premises at will and without a valid reason. In this instance, a valid reason may be if the lessor enters the leased premises to effect reasonably necessary repairs. The disturbance may also be caused by a third party, for example, where a third party claims to have a superior title over the leased object.

Lastly, disturbance may occur as a result of the operation of natural forces over which the parties have no control – for example, the house leased is destroyed by flood waters. In this last instance, the lessor is not guilty of breach of contract because flooding is generally something over which the lessor has no control.

Activity

Kathleen rents a shop from David who is the owner of a small shopping complex. After a severe thunder storm, the roof of the building starts leaking, causing damage to Kathleen’s stock. Kathleen complains to David, who responds by stating that, as the lessee, Kathleen has a common law duty to maintain the leased premises in a proper state.

Kathleen is unhappy with David’s response and wants to cancel the lease. Advise her on the legal position.

Feedback

Kathleen, as the lessee, merely has a duty of proper use and care of the thing leased (ie the shop). David, as the lessor, has a common law duty to maintain the lease object in a proper condition so that it is reasonably fit for the purpose for which it is being used. Through his malperformance David is breaching the contract of lease. However, Kathleen may only cancel the contract if she can prove that David’s malperformance (see paragraph 10.4 and paragraph 11.3.3 of the textbook) is material or if their contract contains a cancellation clause. The parties to a contract may agree that the lessee will undertake to keep the property in repair. Such an agreement must be clear and unambiguous. If Kathleen and David reached an agreement in this regard, this common law duty will fall on Kathleen.

4.2 The duties of the lessee

The lessee has the following three duties, which are discussed in paragraphs 14.4.2.1–14.4.2.3 of the textbook:
4.2.1 The lessee’s duty to pay the rent

The payment of rent is an essential element of a contract of lease. Therefore, it may not
be excluded – even by agreement between the parties. The parties to the contract of
lease may, however, agree to alter the common-law rules in respect of, for example, the
time of payment. Note that if the parties do not explicitly reach agreement on the time
of payment, rent is deemed to be payable only at the end of the term of the lease.

Also note that the acceptance by the lessor of a late payment of rent does not
necessarily mean that the lessor has waived the right to insist on prompt payment of
future amounts of rent.

4.2.2 The lessee’s duty of proper use and care of the thing let

The thing let may not be used improperly or unreasonably. It must be maintained in a
good condition and may be used only for the purpose for which it has been leased.

Example: If Roger leases a house from Tsepo in a residential area, one of Roger’s
obligations is to keep the house neat and clean and he will not, without Tsepo’s
permission, be able to use the premises (house) to conduct his panel-beating
business.

4.2.3 The lessee’s duty to return the property undamaged on termination of
the lease

The lessee is under an obligation to repair any damage to the property caused by either
himself or herself or by anyone for whose actions he or she is responsible.

Activity

Tukishi leases an apple orchard to Eddie for a period of three years. After two years have elapsed Eddie uproots all the apple trees and
starts growing tomatoes. Tukishi only learns the truth after Eddie's first tomato crop has been harvested. Tukishi is furious. Eddie maintains that tomatoes are a much better option than apples.

Advise Tukishi with reference to the rights and duties of the lessor and lessee.

Feedback

Eddie is breaching the contract of lease. Firstly, he is breaching the lessee’s duty of proper use and care of the lease object. Secondly, it will not be possible for Eddie to return the lease object (an apple orchard) to Tukishi at the end of the lease period in the condition in which it was received, over and above reasonable wear and tear. Tukishi will be able to make use of the normal remedies available in respect of breach of contract. The serious nature of the breach suggests that Tukishi will cancel the lease and also claim damages.

4.3 The rights of the lessor

4.3.1 Non-payment of rent

Note that the parties need to agree specifically on the inclusion a forfeiture clause. Although this agreement can be made orally, it is better practice to include such a clause in a written contract of lease. This right should similarly be expressly waived in a written contract of lease in order to remove any possible uncertainty as to whether the landlord has waived his or her rights under the forfeiture clause.

4.3.1.1 The lessor’s tacit hypothec for unpaid rent

The lessor of immovable property (eg a house or a flat) acquires a hypothec over all movables situated on the property as soon as the lessee falls into arrears with his or her rent. The hypothec serves as security in respect of such rent. The lessor may rely on the hypothec only when, and for as long as, the rent is in arrears. However, it is of no force and effect until the lessor attaches the goods in respect of which the hypothec is operative. Note the effect of the Insolvency Act 26 of 1936 and the Security by Means of Movable Property Act 57 of 1993 on the operation of the hypothec.

The Rental Housing Act 50 of 1999 provides that a lessee has a right not to have his or her possessions or goods seized. Only the Rental Housing Tribunal or a court can give effect to the landlord’s hypothec for unpaid rent.

4.3.1.2 Automatic rent interdict and attachment order under the Magistrates’ Courts Act

4.3.2 Misuse of the object of the lease

The lessor has the right to ensure that the lessee does not make improper use of the property that is the object of the lease. The lessor’s contractual remedy on infringement of this right will depend on whether the misuse of the property was material or immaterial.
4.3.3 Failure to return the property

The lessor has the right to the return of the undamaged property when the lease is terminated. Here again, the normal contractual remedies are at the disposal of the lessor. It is important to distinguish the different circumstances that would determine which would be the appropriate remedies to use.

4.4 The rights of the lessee

The rights of the lessee are discussed in paragraphs 14.4.4.1–14.4.4.7 of the textbook.

4.4.1 Failure to deliver

It is the lessee’s right that the leased object be delivered. Failure by the lessor to deliver amounts to a material breach of contract, which entitles the lessee to certain remedies. Make sure that you know these remedies, and also which remedies are available to the lessee in cases where the property has been delivered, but where the property is not in a proper state of repair. Note again the distinction between circumstances where the breach is material and circumstances where it is immaterial.

4.4.2 Failure to maintain the property

It is the lessee’s right that the property be properly maintained. The lessee is entitled to the same remedies as those discussed in 4.4.1 above. See the example in the textbook.

4.4.3 Breach of warranty against interference

The lessee has the right to undisturbed use and enjoyment of the thing leased. Three possible situations should be distinguished, each governed by different rules and remedies. In cases where it is impossible for any of the parties to perform owing to supervening impossibility of performance the relationship is terminated. Because performance becomes objectively impossible (ie impossible for any person), the law does not attach any consequences to the breach. Parties do not have control over vis major (eg if a house is destroyed in a flood) or casus fortuitus (eg if the state expropriates a farm), and will therefore not be subjected to the normal contractual remedies.

4.4.4 Subletting

Except if the contract of lease prohibits it, a lessee is entitled to sublet (re-let) anything that has been let, without the lessor’s consent (except a rural tenement), provided the sublease is not to a person to whom the original lessor could reasonably object.

4.4.5 Cession

Unless the contract prohibits or restricts the right, a lessee may cede his or her rights to a third party. But in the case of a rural tenement prior written consent of the lessor is required for cession to take place.
4.4.6 Assignment

Assignment cannot take place without the consent of the creditor, since it always involves a delegation. (Read more about delegation in chapter 12.)

4.4.7 The lessee’s relationship with successors of the lessor: the maxim “huur gaat voor koop”

In simple terms, the maxim “huur gaat voor koop” can be translated as “hire takes precedence over sale”.

Study the discussion of this maxim in paragraph 14.4.4.7 of the textbook.

Activity

Tabo is the owner of a farm which he inherited from his father. Tabo does not live on the farm, and in order to maintain the farm and ensure that he receives an income from it, he leases the farm to Jabulani for R1 000 per month for an initial period of two years, renewable by agreement between Tabo and Jabulani. Nine months after the two parties entered into the agreement, Tabo is killed in a motorcar accident and his daughter, Gertrude, inherits the farm from her father. Gertrude is keen to farm the land herself, and comes to you for advice on whether she can terminate the contract of lease which Tabo entered into with Jabulani.

Advise Gertrude.

Feedback

Compare your answers with the information you were given in paragraph 14.4.4.7 of the textbook. Did you mention the following important factors?

- The lease was over immovable property and therefore the maxim ‘huur gaat voor koop’ applies.
- Gertrude may not evict Jabulani, as long as Jabulani pays the agreed rent.
- The fact that this is an acquisition of property by way of succession, rather than sale, does not affect the principle of ‘huur gaat voor koop’.
- The lessee acquires a real right in the property for the duration of a lease. Do you remember the difference between a real and a personal right? (If not, go back to paragraph 2.1.2.3 of chapter 2 of your textbook.)
- If the new owner, Getrude, acknowledges the rights of the lessee Jabulani, she is bound to the contract of lease and she therefore does not have the right to terminate the contract. If the new owner, Getrude, acknowledges the rights of the lessee Jabulani, she is bound to the contract of lease and she therefore does not have the right to terminate the contract.
- Did you mention that the maxim ‘huur gaat voor koop’ is subject to certain qualifications and did you discuss them?
5 The termination of a lease
(Textbook, par 14.5)

A contract of lease may be terminated in various ways – as discussed in the textbook (paragraph 14.5). It should be noted that the termination of the lease will effectively also result in the termination of any existing sublease. However, depending on the circumstances, the sublessee may be in a position to institute action against the sublessor on the basis of breach of contract, as the latter has the duty to ensure the sublessee’s undisturbed use and enjoyment of the leased object.
In this study unit you are introduced to the last specific contract prescribed for this module, the contract of insurance. After discussing the history and sources of the insurance contract, we explain the important difference between indemnity and non-indemnity insurance. The essentialia of this type of contract are the undertaking by the insured to pay a premium, the undertaking by the insurer to compensate the insured in the case of loss or damage, the insured risk and an insurable interest. The amount payable by the insurer depends on whether the contract relates to non-indemnity or indemnity insurance, and in the case of the latter certain aspects, addressed in paragraphs 15.3.2.2.1–15.3.2.2.6 of the textbook, are relevant. As far as the risk is concerned, note the difference between insurance contracts and wagering contracts, which are discussed in detail in chapter 6 of the textbook.

We then discuss the following: three duties of good faith, who the parties to the insurance contract are and what statutory protection the insured enjoys.

After completing this study unit you should be able to determine whether a person has concluded a valid contract of insurance in a given instance, and whether such a contract amounts to indemnity or non-indemnity insurance. You should also be able to say whether a particular risk is covered by the contract and establish whether the insured can claim compensation for the loss suffered. In addition, you must understand what duties of good faith apply, and what the consequences of breaching these duties are. You must also understand the roles of insurance brokers and agents, and what legislative protection insured parties enjoy.

Prescribed study material: textbook, chapter 15

1  History and sources of the law of insurance  
   (Textbook, par 15.1)

The South African law of insurance is primarily governed by Roman-Dutch common law. At present, insurance business (ie the requirements for a company to do insurance business, the types of business that may be carried on, etc) is regulated by the Long-term Insurance Act 52 of 1998, the Short-term Insurance Act 53 of 1998 and the Financial Advisory and Intermediary Services Act 37 of 2002.
2 **The nature and basis of the contract of insurance**  
(Textbook, par 15.2)

![Insurance Contracts Diagram]

**Activity**

1 Sipiwe buys a new car for R50 000. Sipiwe insures the car for R50 000. Advise Sipiwe as to the nature of the insurance contract that he has concluded.

2 Julia’s husband, Bill, dies in a car accident. Julia discovers that she is to receive R100 000 in terms of an insurance policy which Bill took out on his own life. Advise Julia as to the nature of the insurance contract that Bill concluded on his life.

**Feedback**

In (1) Sipiwe, the insured, concluded an indemnity insurance contract. In (2) Bill, the insured, concluded a non-indemnity insurance contract on his own life.

3 **Essentialia of the insurance contract**  
(Textbook, par 15.3)

For the nature of the essentialia and the difference between the essentialia and the naturalia see paragraphs 8.2.1 and 8.2.2 of your prescribed textbook.

The essentialia of an insurance contract may be illustrated diagrammatically as follows:

![Contract of Insurance Diagram]

These essentialia will now be discussed in more detail.
3.1 The premium

As indicated above, the insured undertakes to make payments, called “premiums”, to the insurer. Note that the actual payment of a premium is not a prerequisite for the creation of a valid insurance contract. An **undertaking** to pay is sufficient. However, the insurer may refuse to make any payment to the insured before a premium has been received.

3.2 An undertaking by the insurer to compensate the insured

3.2.1 Determination of the amount payable (non-indemnity insurance)

In the case of non-indemnity insurance, such as life insurance, the insurer and the insured agree upon conclusion of the contract on the amount to be paid out when the event insured against (such as death) takes place. You can find an example of a life-insurance contract in paragraph 15.2.2 of the textbook. In that (particular) example Your Life Insurance Company is the insurer, Brian is the insured and his wife is the beneficiary.

3.2.2 Determination of the amount payable (indemnity insurance)

Since indemnity insurance is nothing other than insurance against damage to or loss of the object insured, the extent of the damage must be determined in order to determine the amount payable by the insurer to the insured.

If the object is only partly damaged the insurer will have to pay the insured an amount equal to the cost of repairing the insured object, or the insurer may choose to repair the damaged object himself or herself. If, however, the object insured is totally destroyed, the insurer will have to compensate the insured for his or her loss, which will be an amount equal to the value of the insured object at the time of the destruction.

3.2.2.1 Valued and unvalued policies

It can be very difficult to determine the value of an insured object. The insurer and the insured may agree on the value of the insured object at the time of conclusion of the contract. This type of policy is called a “valued policy”.

3.2.2.2 The insurer’s right to repair

The insurer normally reserves the right to have the damaged object repaired instead of compensating the insured.

3.2.2.3 The insurer’s right of subrogation

The principle of subrogation is best explained by means of an example: You insure your car against damage with an insurance company. One Sunday afternoon you go for a drive. Another driver negligently ignores a stop sign and bumps into your car. On Monday morning you phone your insurance company and they immediately have your car repaired. The repairs do not cost you a cent. The total repair bill costs your insurance company R10 000. Your insurance company would now like to recover this
cost from the negligent driver. Because the insurance company has made good your damage, they will be able to institute action in your name against the negligent driver in order to recover the repair cost.

It is important to take note of the following:

- The insurer’s right of subrogation rests on contract – in other words, the insurer and the insured contractually agree that the insurer will have a right to institute an action in the insured’s name.
- This right may be exercised only if the insurer has fully compensated the insured for the damage.

3.2.2.4 Insuring with several insurers

You have the right to insure an object with as many insurance companies as you wish.

Activity

Your car is valued at a total amount of R10 000. You insure your car with Shallow Insurers for R10 000 and with Lekker Versekeraars for R10 000. Your car is damaged and the cost of repairs amounts to R10 000. How much can you claim in damages from either Shallow Insurers or Lekker Versekeraars?

Feedback

You will have the right to claim the whole R10 000 from either Shallow Insurers or Lekker Versekeraars. If Shallow Insurers pays you the amount of R10 000, Shallow Insurers will have the right to claim R5 000 from Lekker Versekeraars, which is Lekker Versekeraars’ pro rata contribution to the repair costs. You would also be able to claim each insurer’s pro rata share directly from the insurer, that is R5 000 from Shallow Insurers and R5 000 from Lekker Versekeraars.

3.2.2.5 Over- and underinsurance

The general principle applicable to all indemnity-insurance contracts is that the insured may never recover more than the actual amount of damage he or she has suffered. The following activity will explain overinsurance and underinsurance.

Activity

You have a car that is worth R20 000. You insure the car for only R10 000 with an insurance company and the contract contains an average clause (for information on an average clause, see paragraph 15.3.2.2.5 of the textbook). The car is damaged and the total repair bill amounts to R5 000. How much will you be able to claim from your insurance company?

Feedback

The amount is determined by dividing the amount the car is insured for (ie R10 000) by the real value of the car (ie R20 000). The answer to this mathematical exercise is
one half or fifty percent. This means that the actual amount of damage (ie R5 000) must also be divided by one half to find the amount with which the insurer will have to compensate you. The answer is that you are entitled to recover R2 500 from your insurer.

If you are over-insured (eg if you insure your car, which has a value of R20 000 for an amount of R30 000) and the car is totally destroyed, you will be entitled to receive only the real value, that is R20 000, from your insurance company, except if the policy is a valued policy, in which case you will be able to claim R30 000.

3.2.2.6 Excess clause

Insurance companies protect themselves against the frequent institution of small claims by providing that the insured themselves should bear a certain amount of the loss of each claim. For an example, see paragraph 15.3.2.2.6 of the textbook.

3.3 The risk

3.3.1 Agreement to insure against a particular risk

The main objective when taking out insurance cover is to protect oneself against some unforeseen future event that could result in patrimonial loss. In the case of indemnity insurance, such future events may include theft, accidental damage, floods, fire, etc. In the case of non-indemnity insurance the event insured against is often death.

3.3.2 The difference between insurance contracts and wagering contracts

Insurance contracts and wagering contracts show some remarkable similarities, but they also differ to a large extent. See paragraph 15.3.3.2 of the textbook.

3.4 Insurable interest

The insured must have an interest in the non-occurrence of the event insured against. The nature of this interest and the time at which it must exist differ, depending on whether indemnity or non-indemnity insurance applies.

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**Activity**

Zandile buys Emma’s house for R50 000. The sale of the house is on condition that Zandile obtains a mortgage from the bank. That same day Zandile takes out an insurance contract with Big Boy Insurers to insure the house and applies to the bank for a mortgage. That night the house is destroyed in a fire. Zandile wants to claim R50 000 from Big Boy Insurers. Advise her on whether she has a valid claim. Can Emma claim from the insurers?

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**Feedback**

Clearly Zandile cannot claim from the insurers. The risk of the accidental loss of the property has not yet passed to her since the contract is not perfecta (go back to study
unit 1). Emma still bears the risk for the accidental destruction of the house. It may also be said that Zandile does not have an insurable interest in the property. Emma did not conclude the contract of insurance with Big Boy Insurers and is not the insured in terms of the contract. Consequently she may not claim the sum insured from the insurers either.

4 The duty of good faith
(Textbook, par 15.4)

The contract of insurance is one based on good faith (bona fides) between the insurer and the insured. If the insured incorrectly answers questions contained in an application form for insurance cover, the insurer has the right to cancel the contract. Note that the duty covers both misrepresentations and non-disclosures. You must also be able to distinguish between the different tests which are applied to determine the materiality of facts. A typical example of a misrepresentation would be where the insured answers “No” to the question on the proposal form for life insurance about whether he or she practises a dangerous sport, while in fact he or she regularly participates in bungee-jumping competitions.
Specific Aspects of Commercial Law
The Law of Agency

In this study unit you are introduced to two forms of representation, namely mandate and agency. In both instances a contract is concluded between at least two persons: the person who undertakes to perform a task on behalf of another and the other person on whose behalf the first person undertakes to perform the task. The agent derives his or her authority from a contract of agency, as mentioned previously, and in other ways. The chapter also explains possible delegation of authority, how authority is terminated, estoppels and ratification. The duties of the agent and the principal are discussed, as well as the possible personal liability of the agent, and the doctrine of the undisclosed principal. The difference between the unnamed principal and the undisclosed principal is significant.

After completing this study unit, you should understand how the law of agency operates by relating the information contained herein to real-life demands and practical experiences. You should also know how to apply the principles of agency.

Prescribed study material: textbook, chapter 20

1 Introduction
   (Textbook par 20.1)

The term “agency” may be used in different contexts. In one context, it may refer to a mandate which arises from a contract between the mandator and the mandatary – for example, a contract with an estate agent to find a buyer for a house. In another context, the term may refer to an agent who acts on behalf of, or as a representative of, the principal – for example, a director of a company. In this study unit we discuss the expression “agency” as described in the contexts mentioned above.
2 Agency
(Textbook par 20.3)

The concept of “agency” arises when one person, the agent, concludes a juristic act for or on behalf of another, who is called the principal, with the result that a legal tie arises between the principal and a third party or third parties. If such juristic act is a contract entered into between the agent, on behalf of the principal, and a third person, the rights and obligations which arise from such a contract accrue to the principal, and not to the agent.

![Diagram of agency relationships]

It is important to remember that the consequences of a juristic act concluded by an agent come into operation for the principal, and not for the agent as the representative, provided that the agent had the necessary authority to perform the act on behalf of the principal.

2.1 Authority

The representative must have authority to conclude juristic acts on behalf of the principal. The lack of authority may sometimes be cured by ratification, or alternatively by estoppel in a case in which the person on behalf of whom the act has been concluded is precluded from relying on the fact that the agent did not have the necessary authority. “Ratification” and “estoppel” are discussed below.

2.1.1 Authorisation

Authorisation of an agent may be given:

1. expressly, such as when embodied in a contract of employment.
2. tacitly, when the principal’s conduct and attitude in respect of the agent are such that the only reasonable inference which may be drawn is that he or she wishes the agent to act on his or her behalf.

2.1.2 Other sources of authority

Authority often comes about by operation of law. In this case the agent acquires authority by virtue of his or her office, as when a guardian has authority to act on behalf
of a minor, a curator has authority to enter into juristic acts on behalf of a mentally ill person, or a company confers authority on one of its directors by means of the articles of association.

2.1.3 Delegation of authority

An agent’s authority may include the authority to delegate – that is, to authorise a sub-agent to perform a juristic act for the principal.

2.1.4 Termination of authority

Authority can be terminated in a number of ways. It is terminated if revoked by the principal, but lapses automatically upon the death or insolvency of the principal or if the principal loses his or her capacity to act, or upon the death of the agent. If authority was given for the conclusion of a particular act or for a specific period of time the authority is terminated when the act has been concluded or when the period expires. If the authority was derived from a special relationship it is extinguished as soon as that relationship ceases to exist. Similarly, if the authority is based on a contract the authority lapses when the contract comes to an end.

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**Activity**

The authority of an agent can be terminated in different ways.

In which **ONE** of the following instances would Max still possess authority after the termination has taken place?

1. Max was authorised to act on behalf of his employer. His employment is terminated on the grounds of misconduct.
2. Joy authorised Max to use her tuckshop until the end of 2010 only. The year 2010 has come to an end.
3. Max is the guardian of George, a twelve-year old boy. George celebrates his thirteenth birthday.
4. The house which Max was authorised to sell is destroyed by fire.

**Feedback**

3 is CORRECT. A guardian has authority to conclude juristic acts on behalf of a minor. George will still be a minor after celebrating his thirteenth birthday.

1 is INCORRECT. If authority is derived from a special relationship, it is extinguished as soon as that relationship ceases to exist. The relationship between the employer and employee ceases to exist when the contract of employment is terminated.

2 is INCORRECT. If authority is given for a specified time, it lapses when the time expires.

4 is INCORRECT. If authority is given for the conclusion of a particular juristic act, it lapses when the act can no longer take place. The house which Max was authorised to sell was destroyed by fire and consequently the authority is terminated.
Read the case study below. In the space provided, state the way in which the agent acquired authority:

Mr Tycoon ran a shop. The shop did so well that Mr Tycoon opened another two such shops. He could no longer manage the business by himself and engaged Linda to act as his buyer. She went to several wholesale stores to purchase goods for the shops. She had been doing this for several months and ordered goods on Mr Tycoon’s account, and the account was paid every month. Linda acquired her authority ...

The answer is “tacitly”.

2.1.5 Estoppel

If the principal has culpably created the false impression that another person has the authority to conclude certain juristic acts on his or her behalf and the third party then acts to his or her detriment on the strength of that impression the principal is estopped (or prevented) from denying the authorisation.

The effect of a successful reliance on estoppel is that the person who has been estopped (the principal) is bound to the transaction as though he or she had authorised the other to act. In a decided court case, Quin & Co Ltd sued the Witswatersrand Military Institute for catering services it had rendered in connection with a mess dance. These services had been ordered by one Smith, a steward whom the Institute had appointed to exercise general control of that particular mess and its canteen. The Institute disclaimed any authority on the part of Smith to act on its behalf. The facts were the following: Smith was in charge of that particular mess; the dance in question was one of the annual dances held for members of the mess; Smith had organised similar dances and was also organising this one; previous accounts rendered to the Institute for catering services in connection with such dances had been paid. The court therefore held that it was reasonable for Quin & Co Ltd to have inferred that Smith was acting for the Institute and that he had authority to do so. Since the Institute should reasonably have expected that these facts would mislead Quin & Co Ltd the Institute was estopped from denying that Smith had authority to contract on its behalf. The Institute had held Smith out as its agent and Quin & Co Ltd had reasonably relied on this representation – to its prejudice.

2.1.6 Ratification

“Ratification” is the validation by a person of a juristic act concluded on his or her behalf by another who did not have the authority to do so. Ratification is a unilateral juristic act which can be performed tacitly or expressly. The effect of ratification is that, after ratification, the parties are treated as though a relationship of principal and agent had already existed at the time when the juristic act was entered into. The professed agent, the principal and the third party are placed in the same position they would have been in if the act had originally been carried out with the necessary authority.
In another case, Dreyer’s son bought a blazer from the defendant on Dreyer’s account. Although Dreyer had not expressly authorised the purchase he knew that his son was required to have a school blazer. His son furthermore wore the blazer several times while visiting his parents. Dreyer however ignored the account, which was forwarded to him each month. Dreyer denied liability only when threatened with legal proceedings. The court held Dreyer liable on the grounds that he had tacitly ratified the purchase by acquiescence.

2.2 The duties of the agent

An agent or representative is someone who concludes a juristic act with the intention of creating, altering or terminating legal relationships on behalf of someone else. You must know the following duties of the agent, and also the contents of these duties:

(1) The duty to follow his or her instructions

The agent is obliged to act within the limits of his or her instructions and to carry out the instructions to the best of his or her ability.

(2) The duty to exercise care and diligence

The agent must act in a manner that does not cause his or her principal any loss or else the agent may be liable for breach of duty and negligence.

(3) The duty of good faith

The agent occupies a position of trust and confidence in respect of the principal. This fiduciary relationship requires the agent to act in the interests of his or her principal. This means that the agent may not make any secret profit from matters conducted on behalf of his or her principal, that he or she should not place himself or herself in a position in which his or her interests and those of the principal are in conflict, and that agent may not misuse confidential information obtained through his or her fiduciary relationship with the principal.

In a decision before the court, Palmer had been appointed manager and agent of Transvaal Cold Storage Co Ltd. Without informing the company, he later contracted in his private capacity to land frozen meat from vessels arriving in port, and to store the meat in Transvaal Cold Storage Co Ltd’s storage chambers on behalf of another company, in return for certain remuneration. It was held that Palmer had to account to Transvaal Cold Storage Co Ltd for the profits he had made in this way out of his agency, since he had committed a breach of the duty of the utmost good faith which, as agent, he owed his principal.

(4) The duty to account properly

The agent must at all times be able to account properly for all things concerning the agency. The agent is therefore obliged to keep proper books and to perform his or her work regarding the principal’s affairs in such a manner that the principal could at any time he or she wished obtain a full and accurate statement of accounts from the agent.
Mr Mazwayi, who is the director of Khulani (Pty) Limited, a company dealing with the purchasing of second-hand motor vehicles, is authorised by the company’s articles of association to conclude transactions on behalf of the company. How would you describe his relationship with the company? What are his duties in respect of the company?

In answering the above question, refer to paragraph 20.3.2 of the textbook, that is, the discussion on the duties of the agent.

2.3 The duties of the principal

There can be no representation of a person who does not exist. Consequently, a deceased person or one still to be born cannot be represented, nor can a contract on behalf of a non-existent principal be ratified if the principal comes into existence at a later stage.

The identity of the principal need not necessarily be disclosed at the time when the contract is concluded. If the third party is aware that the agent is acting on behalf of a principal, and he or she does not know the identity of the principal, the principal is known as the unnamed principal.

The principal must reimburse the agent for expenses incurred in the exercise of a lawful instruction. The principal also has a duty to indemnify the agent against losses necessarily incurred in the execution of his or her mandate. The principal is furthermore obliged to compensate the agent for his or her services.

2.4 Personal liability of the agent or purported agent

Study paragraph 20.3.4 of the textbook in this regard.

2.4.1 The doctrine of the undisclosed principal

The situation described above should be distinguished from the one in which there is an undisclosed principal. In this case, the agent fails to disclose the existence of the principal to the third party.

The “agent” here acts in his or her own name and is thus strictly speaking not acting as an agent, although he or she is acting on the instructions of the “principal”.

No contract is formed between the principal and the third party, but in terms of the doctrine of the “undisclosed principal” the principal is entitled to step into the shoes of the agent as the real party to the contract once the representative has reached an agreement with the third party.
Activity

In which **ONE** of the following cases will the agent **NOT** incur personal liability?

1. The agent acts under a false impression, created by the principal, that he or she has authority.
2. The agent acts for an undisclosed principal.
3. The agent specially warrants that he or she has the necessary authority.
4. The agent tacitly warrants that he or she has the required authority.

**Feedback**

1 is **CORRECT**. The agent will **NOT** be personally liable if the principal has culpably created the false impression that the agent has authority to conclude certain juristic acts on behalf of the principal. If the third party then acts to his or her detriment on the strength of that impression, the principal is prohibited by law from denying the authorisation. In this case the principal will be personally liable.

2 is **INCORRECT**. In such circumstances the agent would incur personal liability. Where an agreement is concluded in the agent’s own name with a third party, a legal relationship arises between them and the agent is personally liable unless the agent cedes his or her right in terms of the agreement to the principal. However, according to a doctrine known as the doctrine of the undisclosed principal, the principal could emerge after conclusion of the agreement without relying on cession, and claim that the third party was liable against the principal and not the agent.

3 is **INCORRECT**. In this case the agent would incur personal liability. The agent could always bind himself or herself by way of agreement as against a third party, for example, by specifically warranting that he or she has the necessary authority.

4 is **INCORRECT**. In these circumstances the agent may incur personal liability. An analysis of the circumstances and actions of the parties could indicate clearly that agreement was reached about the furnishing of a guarantee by the representative to the third party, to the effect that he or she had the required authority. That is, the agent tacitly warranted that he had the necessary authority.
In this study unit you are introduced to six forms of business enterprise. They are the sole proprietorship, the partnership, the company, the close corporation, the business trust and the co-operative. The particular characteristics, requirements and attributes of each form are important, as are the following: how it is formed, where the capital comes from, whether it has separate legal entity, what falls within the scope of the enterprise, who is allowed to act on behalf of the enterprise (representation), and its duration and winding up.

After completing this study unit you should be able to compare and distinguish various forms of business enterprise so that you can advise a client on which form of business is the most appropriate in a specific situation. You should also be able to give advice on whether a particular business entity is bound by a contract entered into by someone on behalf of the enterprise.

Prescribed study material: textbook, chapter 21

1 Introduction
   (Textbook par 21.1)

An enterprise can be structured in various ways, each of which has its own advantages and disadvantages. It is therefore important that the prospective entrepreneur should begin by considering which form of enterprise would be best suited to his or her particular business requirements. Risk, tax implications, the amount of capital needed to start the enterprise and the need for the creation of a separate legal entity are only some aspects that must be considered when deciding on an appropriate form of business enterprise.
2 The sole proprietorship (single owner enterprise)  
(Textbook par 21.2)

This form of business venture is, of course, limited in nature. It is therefore unsuitable for an enterprise which has substantial capital requirements, or if it is envisaged that the business will expand so rapidly that the sole proprietor will not be able to manage it alone.

3 The partnership  
(Textbook par 21.3)

3.1 Introduction

The partnership as a business enterprise is possibly one of the oldest commercial institutions known to man. Our law of partnership is based mainly on Roman-Dutch common law. Certain Acts, for example the Business Names Act 27 of 1960, the Companies Act 71 of 2008, the Attorneys Act 53 of 1979 and the Businesses Act 71 of 1991, contain provisions which may apply to partnerships. Note the influence of the works of the French writer Pothier and of English law on our partnership law.

3.2 Definition and legal nature of a partnership

A partnership may be described as a legal relationship that arises from an agreement between two or more persons in terms of which they agree to contribute property and/or labour to a joint enterprise or business with the object of making a profit to be divided among them. Note that a partnership is not a separate legal entity with separate legal personality. There are, however, exceptions to this general rule which allow the partnership to sue or to be sued in the name of the partnership, or to be treated as an estate which is separate from those of its members for the purposes of sequestration.

3.3 The basic requirements (essentialia) of a partnership

The legal relationship of a partnership is created by contract. All the essentials of a valid contract must therefore be present before a partnership will come into being. This is, of course, also a prerequisite for all other contracts. No formal requirements need to be complied with. The contract of partnership may be concluded orally, in writing or tacitly (by the conduct of the parties).

Legal entities may also be parties to a partnership agreement. Therefore, a close corporation may, for example, enter into a partnership agreement with a natural person, or a company, or even another close corporation.

The presence of the essentialia of a partnership, together with the parties’ intention (as signified by their agreement and conduct) to form a partnership will be indicative of the establishment of this form of enterprise. To put it slightly differently: If the parties have the intention of forming a partnership and the essentialia have been complied with, a valid partnership agreement has been concluded.
Therefore:

\[
\text{Contribution} + \text{Joint benefit of parties} = \text{Object of making profit to be divided among partners}
\]

There are three essentialia of a partnership agreement. Each of the essentialia will now be discussed separately.

### 3.3.1 A contribution by each partner

Each partner must contribute something, or must undertake to contribute something to the partnership. This contribution may be property of any description (for example, money, movable or immovable property, corporeal or incorporeal things), as well as services or skills. The nature of the contributions by the different partners may, therefore, differ. One partner may, for example, contribute money, while another partner contributes his or her expertise.

The golden rule is that generally anything may be contributed, provided that it has a commercial value.

**Note** that the contribution should be exposed to the risks of the partnership. The example in the textbook is indicative of how the same person can simultaneously be a partner as well as a creditor of the partnership.

### 3.3.2 The object of making a profit to be divided among the partners

In a partnership the parties must intend to make a profit in which each of the partners expects to share. If the object of the parties is something other than making a profit – for example to found a charitable organisation or a cultural society or a sports club – their association is not a partnership.

No partnership can exist without community of profit. If the parties agree that one or more of them will not be entitled to a share of the profits no partnership comes into being. This requirement is met if a partner has only an expectation of sharing in the profit – for example if the particular partner will share in the profit only when it exceeds a specific amount. The expectation should, however, be realistic.

### 3.3.3 Partnership business to be carried out for the joint benefit of the parties

Whether the partnership is formed for the completion of one project only or for the purpose of establishing an ongoing, long-term business enterprise, it is of absolute importance that each partner benefits from the formation of the partnership.

Schematically illustrated:

![Diagram of partnership essentials](image)
Tristan, Moodley, Soekie and Ramgobin conclude an agreement in terms of which they agree to run a business that repairs small electrical appliances. The object is to make a profit. Tristan will be responsible for managing the business and doing the repairs and Moodley will allow the business to operate rent-free from premises which he owns. Soekie is to be employed as a receptionist in the business at a salary of R1 500 per month and agrees not to draw her salary until the business is making a profit. As soon as the business is making a profit she will receive her salary plus any arrears. Ramgobin is to contribute R5 000 to the business but it is agreed that R2 500 must be repaid to him at the end of the first year for which the business has been operational, irrespective of whether the business is making a profit or not.

Which ONE of the following answers is CORRECT?

1. A valid partnership agreement has not been concluded between Tristan, Moodley, Soekie and Ramgobin because Moodley has not made, or has not agreed to make, a contribution to the business.
2. A valid partnership agreement has not been concluded between Tristan, Moodley, Soekie and Ramgobin because Tristan has not made, or has not agreed to make, a contribution to the business.
3. A valid partnership agreement has not been concluded between Tristan, Moodley, Soekie and Ramgobin because Soekie has not made, or has not agreed to make, a contribution to the business.
4. A valid partnership agreement has not been concluded between Tristan, Moodley, Soekie and Ramgobin because Ramgobin has not made, or has not agreed to make, a contribution to the business.

Feedback

3 is CORRECT. Soekie is to be paid for her services, although payment is deferred. She therefore has not contributed anything unconditionally to the partnership.

1, 2, and 3 are INCORRECT. Moodley, Tristan and Ramgobin have respectively contributed the use of premises, skills and a cash amount to the partnership. Each of these constitutes a valid contribution.

3.4 The natural consequences (naturalia) of a partnership

The natural consequences (naturalia) of a partnership are those consequences which apply by operation of law if there is no provision to the contrary in the partnership contract.

Unlike the essentials (essentialia) of a partnership, the naturalia can be excluded by the partnership contract without affecting the formation or existence of the partnership. A provision excluding certain natural consequences has no effect as far as third parties who have no knowledge of it are concerned, but it is effective between the partners.

3.4.1 Mutual mandate

You will see in paragraph 21.3.4.1 of your textbook that, unless there is an agreement to the contrary, the rule is that each partner, individually and without the collaboration of
the other partners, has the capacity to perform any legal act concerning the administration of the partnership business. Each partner can therefore bind his or her co-partners as principals by performing any act which falls within the sphere of activity of the partnership. (If the sphere of activity of the partnership is the buying of race-horses, the purchase of a Persian cat would fall outside the sphere of activity of the partnership.) If a third party wishes to hold the partnership liable in terms of a contract concluded by a partner it is sufficient for him or her to prove that the contract fell within the sphere of activity of the partnership business.

3.4.2 The proportion in which the net profit is shared

Normally, this is done in proportion to the value of the respective partners’ contributions to the firm. If it is impossible to value the respective contributions properly the profit will be divided equally among the partners.

3.4.3 The obligation to share in the net loss

A partner may validly be excluded from the obligation to share in a net loss without impeding the existence of the partnership. At least one partner must carry the losses of the partnership.

3.4.4 The proportion in which the net loss is shared

Usually a net loss is shared in the same proportion as a net profit.

3.4.5 The proportion in which the assets are divided upon dissolution

See paragraph 21.3.4.5 of your textbook on how, upon dissolution of a partnership, its assets are divided.

3.4.6 The proportion in which the partners are co-owners of the assets of the partnership

Since a partnership is not a legal entity, the assets of the partnership do not belong to the partnership, but to the partners jointly. In the absence of a provision to the contrary the partners are the co-owners of the partnership assets, in the same proportion as that in which the assets are to be divided, upon dissolution. If the ratio of the eventual division is unknown the partners are co-owners in the same ratio as that in which the profits are to be shared.

The division of net profit, net loss and assets upon dissolution as well as co-ownership in the absence of an agreement can be summarised as follows:
| **Division of net profit** | In proportion to the partners’ respective contributions. If impossible to value contributions, profit is divided equally. |
| **Share in net loss** | In the same proportion as a net profit. |
| **Division of assets upon dissolution** | In the same proportion as the profits. If no agreement has been reached regarding the profits, in proportion to the respective contributions. If impossible to value contributions, the assets are divided into equal parts. |
| **Proportion of co-ownership in assets** | In the same proportion as that in which assets are to be divided upon dissolution. If proportion is unknown, partners are co-owners in the same proportion as that in which the profits are to be shared. |

### 3.5 The rights and duties of partners

The *essentia* and the *naturalia* of a partnership form the basis of the various rights and duties of the partners, although some of the rights and duties may expressly have been agreed upon.

The “duty of good faith” is often referred to as the partner’s “fiduciary duty”. The relationship between partners has been described as being very much the same as that between brothers. The partnership, therefore, is a contract in which the utmost good faith must be shown among the partners. Furthermore, all partners must comply with the terms of the partnership agreement.

Make sure that you have a good understanding of the principles that underlie the rights and duties of the partners as discussed in the textbook, as well as of the two actions by which those partnership rights can be enforced.

### 3.6 The termination or dissolution of a partnership

The dissolution of a partnership has an effect on the relationship between the partners and on the relationship between the partners and third parties. Study these relationships.

#### 3.6.1 Grounds for dissolution

Partnerships can be terminated or dissolved by agreement, by operation of law, or by the unilateral act of one of the partners. See paragraph 21.3.6.1 of the textbook in this regard.
3.6.2 Consequences of dissolution
See paragraph 21.3.6.2 of the textbook.

3.7 Liquidation of the partnership
In practice, partners frequently reach agreement on how and by whom the partnership is to be wound up after dissolution. It is common for them to make specific provision for this when entering into the partnership contract.

Activity

Sibongile, Thobi and Martina enter into a partnership. They each contribute R10 000 towards the starting of the business. They do not put anything down in writing, and in terms of their agreement they will buy old car tyres, sell them to the public and share the profits. One particular day Martina buys a house in order to sell it with the hope that they will make more profit. After hearing what she has done Sibongile suffers a heart attack and dies. Nevertheless, Thobi and Martina agree that they will continue with the partnership.

Which ONE of the following statements is INCORRECT?

1. The death of Sibongile terminates the partnership even though Thobi and Martina want to continue with the business.
2. Martina’s action cannot bind the partnership because the activity does not fall within the sphere of the partnership business.
3. The agreement entered into by the three parties is not a partnership agreement because it is not in writing.

Feedback

3 is INCORRECT. See paragraph 21.3.3 of the textbook.

1 is CORRECT. See paragraph 21.3.6.1 of the textbook.

2 is CORRECT. See paragraph 21.3.4.1 of the textbook.
4 The close corporation
(Textbook par 21.5)

4.1 Introduction
A close corporation also has the advantage of separate legal personality, and is a form of enterprise that is well suited to the needs of a small business undertaking. According to section 13 of the Companies Act 71 of 2008 it is no longer possible to register a new close corporation. However, close corporations registered before the coming into operation of section 13 of the Act will continue to exist for an indefinite period.

4.2 Formation and membership of a close corporation
A close corporation acquires legal personality upon its registration with the Registrar of Close Corporations. The membership of a close corporation is limited to 10 or fewer (natural) persons. Any member is an agent of the corporation with regard to a person who is not a member and who is dealing with the corporation.

The issue is not what business the corporation conducts, but whether or not the person acting on behalf of it is a member. A close corporation has no organs. Its members fulfill both management and control functions in the normal course of events. They also owe fiduciary duties and duties of care and skill to the corporation which are similar to the duties owed by directors to a company. Note that consent in writing of a member or members holding at least 75 percent of members’ interests is required for certain matters, such as a change in the principal business of the close corporation.

4.3 Capital of the enterprise
A close corporation does not issue shares. A person may become a member by acquiring a member’s interest either from an existing member or members, or from their deceased or insolvent estate(s), or pursuant to a contribution made by that person to the corporation.

Note that the Close Corporations Act maintains the capital of the enterprise by protecting the solvency and liquidity of the corporation. This type of regulation is more flexible than the statutory regulation imposed by the Companies Act.

4.4 Representation of a close corporation
If a person who is not a member (an outsider) deals with a corporation, any member of that corporation has the capacity to act as its agent and by doing so bind the corporation. The corporation will, however, not be bound if the outsider knew, or should have known, that the member did not have the power to conclude the transaction.

4.5 Conversions
As indicated above, it will no longer be possible to register a new close corporation. The new Companies Act does, however, provide for the conversions of close corporations which existed at the time when the new Act came into operation into companies.
5 The business trust  
(Textbook par 21.6)

5.1 Introduction
A business trust is any trust used to carry on a business for profit. It is a popular form of 
business enterprise since it does not have to comply with the large number of statutory 
rules which bind companies and close corporations.

5.2 Definition
The private business trust is a trust with a specific goal, namely to run a business with the 
object of making a profit in order to benefit the trust beneficiary or beneficiaries.

5.3 Requirements
Study paragraph 21.6.3 of the textbook. Note that, in addition to the normal 
requirements of a trust, the object of a business trust must be to run a business with the 
purpose of making a profit.

5.4 Specific aspects
Study paragraph 21.6.4 of the textbook in this regard.

Activity

Timothy and Philly want to start a business with the following characteristics, among others:
- It will have the benefit of limited liability.
- Legal and natural persons will be eligible for its membership.
- There will be no tax liability in respect of its income.
- The number of its beneficiaries will not be limited.

Which ONE of the following forms of business enterprise would best suit their interests?

1 partnership  
2 close corporation  
3 business trust  
4 company

Feedback

3 is CORRECT. See paragraph 21.6.4 of the textbook.
1 is INCORRECT. See paragraph 21.3.2 of the textbook.
2 is INCORRECT. See paragraph 21.5.2 of the textbook.
4 is INCORRECT. See paragraph 21.4.1 of the textbook.
6 The co-operative
(Textbook par 21.7)

6.1 Introduction
This type of enterprise developed from the law of partnership. The Co-operatives Act 14 of 2005 governs this form of enterprise. The Act recognises the potential of co-operatives to play a major role in South Africa’s economic and social development. See paragraph 21.7.1 of the textbook for a description of the various types of co-operatives recognised by the Act.

6.2 Definition
The definition of a co-operative includes the broader principles and philosophical reasoning that underpin this type of enterprise. Make sure that you know the definition of a co-operative, because the definition contains the essential elements which provide this form of enterprise with its unique characteristics. Also pay attention to the co-operative principles discussed in the textbook.

6.3 Registration
The procedure for registering a co-operative is discussed in detail in paragraph 21.7.3 of your textbook. Pay attention to the fact that there are primary co-operatives, secondary co-operatives and tertiary co-operatives. Make sure that you are able to distinguish between the process of registering a company and the process of registering a co-operative. Although the processes of registering these two forms of business enterprise may seem similar, it is important to note the differences between these processes. Also ensure that you are aware of the different terminology used when registering a company or a co-operative.

Activity

Complete the table below by filling in the following words:

(a) separate legal entity
(b) not more than ten
(c) business trust
(d) two or more persons

<table>
<thead>
<tr>
<th>Business enterprise</th>
<th>Legal personality</th>
<th>Membership</th>
</tr>
</thead>
<tbody>
<tr>
<td>Close Corporation</td>
<td>a separate legal entity</td>
<td>(1) ..................</td>
</tr>
<tr>
<td>(2) ..................</td>
<td>not a separate legal entity</td>
<td>no restrictions</td>
</tr>
<tr>
<td>Co-operative Society</td>
<td>(3) ..................</td>
<td>no restrictions</td>
</tr>
<tr>
<td>Partnership</td>
<td>not a separate legal entity</td>
<td>(4) ..................</td>
</tr>
</tbody>
</table>
1 See paragraph 21.5.2 of the textbook.
2 See paragraph 21.6.4 of the textbook.
3 See paragraph 21.7.1 of the textbook.
4 See paragraph 21.3.2 of the textbook.
Security provides a way in which a creditor can ensure performance of the debtor’s obligations. We distinguish between personal and real security. In personal security a person takes responsibility for the proper compliance of the obligations of the debtor towards a creditor. This is called suretyship (for example, ABC Bank lends Jack money to finance his studies, and his father stands surety that if Jack does not repay the loan, his father will). In the case of real security, some property of the debtor is given as security to ensure proper compliance of the debtor’s obligations, property that can be used by the creditor as a substitute for the agreed performance. Real security can be given by agreement, or can come about by operation of law. It can be given in the form of movable or immovable property. The law distinguishes the following types of real security: pledge, notarial bonds, mortgage bonds, liens, hypothecs and cession to secure a debt. The requirements for each are important, namely whether it applies to movable or immovable property, and the way in which the form of security arises, either by agreement or by operation of law.

After completing this study unit, you should be able to advise a surety who has entered into a contract of suretyship on the rights and duties involved. You should also be able to advise a creditor on how a debtor’s obligations can be secured by means of real security and when real security will automatically come into being by operation of law.

Prescribed study material: textbook, chapter 23

1 Introduction
   (Textbook par 23.1)

Persons who enter into contracts often seek to ensure performance of the other party’s or parties’ obligations by means of security. The security serves as additional protection for the creditor to ensure that the debtor will comply with his or her obligations under the contract. Security may be obtained in the following ways:

(1) by making available a particular object (asset) to the creditor (real security).
(2) by the fact that a third party binds himself or herself in respect of proper compliance with the debtor’s obligations (personal security).
Schematically, the types of security may be illustrated as follows:

![Security Diagram]

2 The contract of suretyship
(Textbook par 23.2)

The contract of suretyship is a type of personal security. It is given by granting the creditor the right, in case of non-payment of the principal debt, to secure payment by means of a personal right against another party to carry out the stipulated performance.

2.1 Definition

In a contract of suretyship there are two debtors, namely the debtor in the first agreement (the principal debtor) and the debtor in the contract of surety (the surety).

The liability of the surety is additional to the liability of the principal debtor. The creditor acquires a personal right against the surety.

Example: John buys a car from James for R70 000. Albert concludes a contract with James which provides that if John should default on his payment of the R70 000 Albert will be liable to pay that amount. John is therefore the principal debtor, James is the creditor and Albert is the surety. Albert is also the debtor in the contract of surety.
The following diagram illustrates this situation:

![Diagram of Creditor (James), Principal debtor (John), Surety (Albert)]

2.2 Conclusion of the contract of suretyship

The contract of suretyship is concluded by agreement between the creditor and the surety. The principal debtor is not a party to the agreement.

The General Law Amendment Act 50 of 1956 provides that a contract of suretyship must be in writing and must be signed by or on behalf of the surety. Any variation of the terms of a contract of suretyship must also be in writing (see chapter 7 for a discussion of formalities).

The surety may be rendered liable for less than the principal debt, but may not be liable for more than that debt.

2.3 The liability of the surety

A contract of suretyship renders the surety liable to the creditor for payment of the debt of the principal debtor, or for any lesser amount agreed upon.

Since the obligation of the surety is accessory (additional) to the obligation of the principal debtor, the surety may rely on defects in the liability of the principal debtor – for example, duress and misrepresentation – provided that they are not personal defences such as minority.

Credit agreements sometimes fall within the ambit of the National Credit Act 34 of 2005. If a credit agreement is regulated by the National Credit Act, the surety may also rely on the benefits (or defences) the debtor has in terms of the Act.

Example: Lebo owes Greg R20 000. She bought Greg’s car and paid only the R5 000 which Greg wanted as a deposit. Lebo’s uncle Mandla enters into a contract of suretyship with Greg for Lebo’s debt. Mandla later discovers that Lebo never intended to buy Greg’s car. Greg, who wants money to pay his debts, actually threatens that, if Lebo does not buy the car, he will tell her husband about her affair with Glen, who happens to be Lebo’s colleague. In this case, Mandla may refuse to pay Greg the money owed to him by Lebo, because Lebo was forced to buy the car. Lebo’s liability (the principal debtor) has a defect (duress).
Sebake buys a car from Joel for R20 000. Lerato, Sebake’s friend, enters into a contract of suretyship with Joel for an amount of R10 000.

Which **ONE** of the following statements is **CORRECT**?

1. The contract between Joel and Lerato is only valid if it is in writing and signed by or on behalf of Lerato.
2. Lerato has bound herself as a surety for Sebake’s debt, and is therefore liable for the total amount of the outstanding balance.
3. The contract between Joel and Lerato is not binding since Sebake was not a party to it.

**Feedback**

1. is **CORRECT**. The General Law Amendment Act 50 of 1956 requires the contract of suretyship to be in writing and to be signed by or on behalf of the surety.

2. is **INCORRECT**. A surety can be liable for a lesser amount if he or she has bound herself or himself in respect of such lesser amount. In this case Lerato bound herself for only R10 000.

3. is **INCORRECT**. The principal debtor, in this case Sebake, does not have to be a party to the contract of suretyship.

### 2.4 The rights of the surety

The surety has the following six rights, which are discussed in paragraphs 23.2.4.1 to 23.2.4.6 of the textbook.
2.4.1 The benefit of excussion

It permits the surety to compel the creditor to recover as much as possible of the due debt from the principal debtor, before proceeding against him or her (the surety). This defence will be forfeited if the surety fails to raise it at the beginning of the proceedings against him or her.

2.4.2 The benefit of division

In terms of this benefit, if there are several sureties in respect of one and the same obligation and the creditor attempts to recover from a single surety the entire debt which is due, such surety may demand that the creditor divide his or her claim between the available sureties, so that his or her liability may be restricted to his or her proportionate share of the principal debt.

Example: Let us say, Miles, Mark and Sipho are co-sureties in respect of a debt incurred by their friend John, who owes Excellent Loan Institution an amount of R60 000. If Excellent Loan Institution claims the whole amount of R60 000 from Sipho alone, Sipho may demand that Excellent Loan Institution divide that amount among the three of them, which would mean that Excellent Loan Institution would have to claim an amount of R20 000 from each of them.

2.4.3 The benefit of cession of actions

A surety who has rendered performance of the principal obligation is allowed by this benefit to demand the transfer by the creditor of all rights which the latter may enjoy against the principal debtor and the co-sureties, if any, to the surety. A surety who has settled the principal debt will, however, always enjoy a right of recourse against the principal debtor and co-sureties.

Example: Baba enters into a contract of suretyship with Sandle for money owed to Sandle by Thato. If Baba pays that money to Sandle she may demand that Sandle cede his claim against Thato to her (Baba). Instead of paying Sandle, Thato will now pay Baba. In case Baba is not the only surety (let us say there are two more sureties and Baba has paid Sandle that money), she may demand that Sandle cede his claim against the other two sureties to her. Those other two sureties will now have to pay Baba, and not Sandle, if Thato defaults against Baba.

2.4.4 The surety’s right of recourse against the principal debtor

A surety who has discharged his or her obligations to the creditor has a right of recourse against the principal debtor for the amount paid, as well as for any costs reasonably incurred.

This right is excluded if the surety carelessly neglected to raise a defence which was available to the debtor, or if after paying the debt he or she negligently failed to inform the debtor of payment, with the result that the latter also paid the amount to the creditor.
2.4.5 The surety’s right to a contribution from co-sureties

A surety who has discharged the principal debt fully is entitled by the operation of the law to recover a proportionate contribution from each of the solvent co-sureties. This right arises even when the co-sureties undertook liability independently, or in ignorance of each other. However, such surety has no right to such a contribution if he or she negligently failed to raise a defence in rem (a non-personal defence) that was available to the debtor.

2.4.6 The surety’s right to reciprocal counter-performance

If a creditor is contractually bound to render a counter-performance to the principal debtor against performance of the principal obligation by the debtor, the surety becomes entitled to claim the reciprocal counter-performance on discharge of the principal obligation, and to set it off against his or her claim against the principal debtor.

2.5 Discharge of the surety

A contract of suretyship may legally be terminated orally, except if the contract requires cancellation to be in writing. However, any variation of the terms of a contract of suretyship has to be in writing (study paragraph 23.2.5 of the textbook).

Activity

Lindiwe decides to open a bakery. She buys a bread-making machine for R200 000 from Motshene Factory and pays a R20 000 deposit. Bongiwe and Thembi stand surety for the balance of the purchase price. The debt is now due and Motshene Factory wants to claim the whole balance from Bongiwe.

Advise Bongiwe whether Motshene Factory can claim from her alone, and also on her rights as a co-surety with Thembi.

Feedback

Motshene Factory can claim from Bongiwe alone but she may demand that they divide the claim between her and Thembi. If Bongiwe pays the whole balance she is entitled to recover the proportionate contribution from Thembi if she is solvent. See paragraphs 23.2.4.2 and 23.2.4.5 of the textbook.

3 Real security

(Textbook par 23.3)

Real security gives the creditor a limited real right to the object of the security. This right is accessory to the obligation secured by it. This right may be derived from an agreement with the debtor or by operation of law.

If the value of the real security is greater than the amount of the debt secured by it, the surplus which remains after the realisation (conversion into monetary value by sale) of the real security reverts to the debtor or his estate.
3.1 **Pledge**

Pledge is a form of real security which is constituted by agreement between the pledgor, who undertakes to deliver the article, and the pledgee, and the subsequent delivery of the (movable) property in question.

\[
\text{pledgor's agreement} + \text{pledgee's agreement} = \text{pledge}
\]

Although the pledge between the pledgor and the pledgee may be valid even without the delivery of the article, the pledgee has no real security in the absence of delivery of the thing and its retention.

**Note** that the real right is acquired only when the article is delivered and that *constitutum possessorium*, by which the pledgor retains possession of the object, is not a valid form of delivery in the case of a pledge.

If the secured debt is not met, the article given in pledge may be attached and sold in execution. The proceeds of the sale are used to pay the debt. Any surplus that remains is paid to the debtor after recovery of the costs in respect of the sale.

An agreement between the parties to the effect that the article may be sold without intervention by law (ie without attachment and sale in execution) is known as ‘parate ekseksie’. The pledge remains effective for as long as the creditor retains possession of the property.

3.2 **Notarial bonds**

The registration of a notarial bond over the movable property of the debtor is another manner in which a creditor can obtain a preference over the movable goods of the debtor. The Deeds Registries Act 47 of 1937 defines a notarial bond as a bond attested by a notary public, hypothecating movable property generally or specially.

3.3 **Mortgage bonds**

The Deeds Registries Act 47 of 1937 defines a mortgage bond as a bond attested by the Registrar of Deeds specially hypothecating immovable property. A mortgage bond arises by agreement, followed by registration. The agreement which gives rise to a mortgage bond is similar to that which gives rise to a pledge. However, in the case of a pledge the subject matter (ie the object which is pledged) is movable property, whereas in the case of the mortgage bond the subject matter is immovable property. The parties to a mortgage bond are a mortgagor, whose property is mortgaged, and the mortgagee, in whose favour the mortgage bond is registered. In other words, if the mortgagor defaults in terms of his principal debt (eg that part of the payment of a home loan which is due), the mortgagee (the financial institution from which the loan was obtained) is entitled to sell the property over which the bond was registered in execution to recover the outstanding debt.

The mortgage bond must be registered in a competent Deeds Office. Once a mortgage bond has been registered in respect of a particular immovable property the Registrar of
Deeds is precluded from attesting or executing a transfer of that property until the bond is cancelled or until the property has been released from the operation of the bond by the written consent of the mortgagee.

Note that more than one real right may exist in respect of the same immovable property. More than one mortgage bond may therefore be registered over the same property. In practice, it often happens that the owner of a house has registered a first bond in respect of the purchase price and then later obtains a second bond to cover the costs of building alterations, for example, on that property.

The mortgagor remains the owner of the property and remains entitled to its use and enjoyment. A mortgage bond may secure an existing or a future debt, or a combination of the two. A mortgage bond which secures either a future debt or a combination of a future and an existing debt is known as a covering bond.

‘Parate eksekusie’ (see paragraph 3.1 above) is not permitted by law if a mortgage bond has been registered over immovable property. If the debtor (mortgagor) defaults on that part of his or her debt which is due, the mortgagee must obtain a judgment and must be authorised by the court to sell the mortgaged property in execution (this is done by means of a writ of execution). The property is then sold in execution. Special rules however, apply, in respect of the mortgage of South African ships regulated in terms of the Ship Registration Act 58 of 1998 (study paragraph 23.3.3 in your textbook).

3.4 Liens and hypothecs

3.4.1 Liens

A lien is a form of real security which arises by operation of law, and not as a consequence of an agreement between the parties.

A lien is the right to retain the possession of property (a right of retention). The person claiming the lien must therefore be in possession of the property which is the object of the lien. If he or she loses possession he or she automatically loses the lien, which does not revive if he or she later recovers possession of the property. But if physical control of the object of the lien was lost as a result of force, fraud or any other unlawful action, the lien is revived as soon as effective control is recovered. A lien may also be revived after it has been lost, provided that the control was lost in terms of an agreement and regained afterwards in terms of the same agreement.

There are three types of lien, namely:

- Salvage liens
- Improvement liens
- Debtor and creditor liens
Note that salvage liens and improvement liens are known as enrichment liens. This type of lien is enforceable against any person, and not only against a contracting party. Study the example in paragraph 23.3.4.1 of the textbook to make sure that you understand which liens would operate against which parties and under what circumstances. Some liens originate from statutes and cannot be categorised as either enrichment or debtor and creditor liens.

### 3.4.2 Hypothecs

Hypothecs, too, are a form of real security and arise by operation of law, and not as a consequence of an agreement between the parties. Examples of hypothecs are the landlord’s tacit hypothec (which is discussed in paragraph 14.4.3.1.1 of the textbook) and the statutory hypothec which accrues to the seller under an instalment-sales transaction (as described in the National Credit Act 34 of 2005, which is discussed in chapter 16 of the textbook) in respect of the object of a sale upon the purchaser’s insolvency.

**Activity**

Consider the following statements:

- it arises by agreement followed by registration.
- it must be registered by the Registrar of Deeds.
- it is a means of creating real security over immovable property.

Indicate which form of real security mentioned below has the above characteristics:

1. mortgage bond
2. notarial bond
3. pledge
4. lien

**Feedback**

1. is CORRECT. See paragraph 23.3.3 of the textbook.
2. is INCORRECT. See paragraph 23.3.2 of the textbook.
3. is INCORRECT. See paragraph 23.3.1 of the textbook.
4. is INCORRECT. See paragraph 23.3.4.1 of the textbook.

### 3.5 Cession to secure a debt

A cession to secure a debt (cession in securitatem debiti) occurs when the cession of a personal right – for example, a right in respect of shares – is effected as security for a debt.

**Activity**

Vashney has a life insurance policy with Tibane Insurance Company to the value of R100 000. She wants to buy a farm from Letty for R110 000. They agree that Vashney will give Letty her right to claim against the insurance company, in case Vashney fails to pay Letty the required amount.
Which **ONE** of the following statements is **INCORRECT**?

1. Vashney provides security through suretyship.
2. Vashney is called a cedent.
3. Letty is called a cessionary.

**Feedback**

1 is **INCORRECT**. The transfer of a right by agreement is known as cession whereas suretyship is an agreement by means of which one person renders himself or herself liable towards a creditor for the proper compliance of the obligations of a debtor. Cession of a personal right may be effected as security for a debt.

2 is CORRECT. A cedent is a person who transfers the right to another person.

3 is CORRECT. A person to whom the right is transferred is called the cessionary.
The Consumer Protection Act and the Financial Intelligence Centre Act

This study unit deals with the Consumer Protection Act and its purpose and application. Various consumer rights are also discussed. The Consumer Protection Act introduces a single comprehensive legal framework for consumer protection in South Africa. You are also given a brief overview of the objectives of the Financial Intelligence Centre Act (“the FICA”). One of the main objectives of the Act is to act as a deterrent as far as money-laundering is concerned and also to prevent money-laundering.

By the end of this study unit you should be familiar with the purpose and application of both the Consumer Protection Act and the Financial Intelligence Centre Act. You should also be able to identify the respective consumer rights and appreciate their importance, and be in a position to advise a consumer on how his or her rights are protected.

Prescribed study material: textbook, chapters 24 (sect 24.1.3.2.4) and 29

1 Introduction
   (Textbook par 29.1)

This section of the prescribed book contains a brief background to the introduction of the Consumer Protection Act. From this background you will understand that the Act provides a single comprehensive legal framework for consumer protection that never before existed in South Africa.

2 The consumer protection Act 68 of 2008
   (textbook par 29.2)

2.1 Purpose and structure of the Act
   (Textbook par 29.2.1)

The Act promotes and advances the social and economic welfare of consumers in South Africa. Chapter 2 of the Act introduces eight fundamental consumer rights and chapter 3 deals with the protection of those rights. See 29.2.1 of the textbook for the consumer rights, and 29.2.4 of the textbook for the protection of those rights.
2.2 Application of the Act

The Act applies to every transaction for the supply of goods or services or the promotion of goods or services and the goods or services themselves taking place within South Africa. However, the Act does not apply to any transaction exempted from the application of the Act – see 29.2.2 of the textbook for such transactions. Also study the definitions of the following important terms contained in the provision on the application of the Act: transaction, goods, service, supply, supplier, promote, and consumer.

2.3 Fundamental consumer rights in terms of the Act

2.3.1 Right to equality

Section 8 of the Act prohibits any unfair discrimination by the supplier of goods and services against any person on the grounds listed in section 9 of the Constitution of the Republic of South Africa, 1996. Consumers who allege breach of the equality section may institute proceedings before the equality court or file a complaint with the Consumer Commission. (See 29.2.6.1 of the textbook for a discussion on the Consumer Commission.)

2.3.2 Right to privacy

The right to privacy is covered under sections 11 and 12 of the Act, containing restrictions on direct marketing. “Direct marketing” means to, in the ordinary course of business, approach a person, either in person or by post or via electronic communication, for the purpose of promoting or offering to supply goods or services to him or her or requesting a person to make a donation.

2.3.3 Right to choose

This right is about the consumer’s right to make a choice in the following respects:

- **Suppliers**

  Section 13 of the Act prohibits a supplier from requiring the consumer as a condition for entering into a transaction to purchase goods or services from a supplier or a designated third party or enter into an additional agreement for the supply of these goods or services. (This is known as “bundling”.)

- **Fixed-term agreements**

  This matter is regulated by section 14 of the Act, in terms of which fixed-term agreements may not exceed the maximum period prescribed by the minister concerned for the different categories of consumer agreements.

- **Repairs and maintenance services**

  This matter is dealt with under section 15 of the Act. See 29.2.4.3.3 of the textbook for the transactions or consumer agreements to which section 15 applies.

- **Advance reservations, bookings or orders**

  Section 17 of the Act allows consumers to cancel advance reservations, bookings and orders, subject to a reasonable cancellation fee (with certain exceptions).
- **Examination of goods**

In terms of section 18 of the Act, a consumer may not be held liable for loss of or damage to goods displayed by a supplier unless the loss or damage was caused by gross negligence or recklessness, malicious behaviour or criminal conduct by the consumer. This right further gives the consumer the right to select or reject any particular item from the goods displayed or sold from the open stock.

- **Delivery of goods or supply of services**

In terms of section 19 of the Act, every transaction contains an implied condition for the supply of goods and services on the date and at the time and place agreed upon at the supplier’s own cost, and that the goods to be delivered remain at the supplier’s risk until the consumer has accepted their delivery.

- **Return of goods**

In terms of section 20 of the Act, a consumer in certain circumstances has a right to return goods to the supplier within ten business days after delivery. See 29.2.4.3.7 of the prescribed textbook for the circumstances under which a consumer may return goods to the supplier.

- **Unsolicited goods or services**

See 29.2.4.3.8 for the circumstances under which goods or services may be regarded as unsolicited in nature.

### Activity

Which ONE of the following statements with regard to a consumer’s right to choose is CORRECT?

1. The supplier of goods sells his or her goods to a consumer subject to a condition that that consumer makes use of the services of a particular installer.
2. The decision about the duration of a fixed-term contract where a consumer concludes a contract of sale of goods with the supplier is always made by the supplier.
3. The risk of goods bought by a consumer, but not yet delivered, rests with the supplier, as the sale agreement has already been concluded.
4. The consumer has the right to reject any particular item from the goods sold or displayed before he or she concludes the transaction for the supply of those goods.

**Feedback**

3 is CORRECT. In terms of section 19 of the Act, every transaction for the supply of goods and services has an implied condition that the goods to be delivered remain at the supplier’s risk until the consumer has accepted delivery, unless the parties expressly agreed otherwise.

1, 2 and 4 are INCORRECT statements regarding a consumer’s right to choose.

### 2.3.4 Right to disclosure and information

The right to disclosure and information includes the following:

- information in plain and understandable language
- disclosure of the price of goods and services
- product labelling and trade descriptions
- disclosure of reconditioned and gray-market goods
- to receive sales records
- disclosure of intermediaries
- identification of deliverers and installers

See 29.2.4.4 of the textbook for a discussion of these rights.

2.3.5 Right to fair and responsible marketing

The aim of this right is to create fair business practices in respect of advertising and selling. This right regulates the general standard and specific types of marketing. It applies to the following: general standards for the marketing of goods and services, bait marketing, negative-option marketing, direct marketing to consumers, catalogue marketing, trade coupons and similar promotions, customer-loyalty programmes, promotional competitions, alternative work schemes, referral selling and agreements with persons lacking legal capacity. See 29.2.4.5 of the textbook for more information about this right.

2.3.6 Right to fair and honest dealing

The Act protects consumers against unconscionable, unfair, unreasonable, unjust or improper trade practices and deceptive, misleading, unfair or fraudulent conduct and regulates unconscionable conduct; false, misleading or deceptive representations; fraudulent schemes and offers; pyramid schemes and other possibly unreasonable conduct and trade practices. See 29.2.4.6 of the textbook for more information about this right.

2.3.7 Right to fair, just and reasonable terms and conditions

This right provides for measures for guarding against unfair, unreasonable or unjust contract terms are dealt with. For example:

- A supplier must not supply, offer to supply or enter into an agreement to supply goods or services at a price or on terms that are unfair, unreasonable or unjust.
- A supplier is not allowed to market any goods or services, or negotiate or enter into a transaction or agreement for the supply of goods or services in a manner that is unfair, unjust or unreasonable.
- A supplier must not require a consumer or a person to whom goods or services are supplied at the consumer’s direction to waive any rights, assume any obligation or waive any liability of the supplier on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.

A consumer will in terms of the right to fair, just and reasonable terms and conditions have the right to be notified about certain terms and conditions; to receive written consumer agreements; and not to be exposed to transactions, agreements, terms or conditions prohibited by the Act. The Act also gives the court the powers to ensure fair and just conduct, terms and conditions.
2.3.8 Right to fair value, good quality and safety

This right entails a consumer’s right to demand quality service and a right to receive goods that are reasonably suitable for the purposes that they are intended for, are of good quality, in a working condition and free of any defects. The goods must also be usable and durable for a reasonable time to comply with any applicable standards.

The right is also about the implied warranty of quality in terms of section 56 of the Act in every transaction pertaining to the supply of goods to a consumer, a warranty on repaired goods, a warning concerning the fact and nature of risks (where an activity or facility supplied is subject to any risk of an unusual nature or character of which a consumer could not reasonably be expected to be aware), the recovery and safe disposal of designated products or components (e.g. containers for dangerous substances), and safety monitoring and recall (e.g. of defective or hazardous goods).

A producer, importer, distributor or retailer is liable for harm caused to any person by the supply of unsafe goods: product failure, defect or hazard, or inadequate instructions or warnings. This is the case irrespective of whether the harm resulted from any negligence on the part of the aforementioned persons.

Which ONE of the following statements is CORRECT?

1. A supplier may require a consumer to whom goods are supplied to waive any rights that the consumer has in terms of the Consumer Protection Act.
2. As soon as a consumer takes delivery of goods from a supplier the consumer will be liable for any harm caused to any person by the goods.
3. A consumer has a right to receive information in plain and understandable language.

3 is CORRECT. See 29.2.4.4 of the textbook.
1 is INCORRECT. See 29.2.4.7 of the textbook.
2 is INCORRECT. See 29.2.4.8 of the textbook.

2.4 Protection of consumer rights

The Consumer Commission is the body responsible for promoting dispute resolution between consumers and suppliers, and also receives complaints concerning prohibited conducts or offences. The Consumer Commission may issue a compliance notice to any person who fails to comply with the provisions of the Act. The Commission will then take the matter to the National Prosecuting Authority for prosecution, or apply to the consumer tribunal for the imposition of a fine if the person fails to comply with a compliance notice. See 29.2.6 of the textbook.
3 The Financial Intelligence Centre Act ("The FICA")
(Textbook par 24.1.3.2.4)

The main objectives of FICA are to establish a financial-intelligence centre and money-laundering advisory council to assist with the anti-money-laundering effort and to impose specific “Know-Your-Customer” (KYC) standards. See 24.1.3.2.4 for the obligations imposed on financial institutions by FICA.