COMMERCIAL LAW - CLA1503

CHAPTER 1 THE SOUTH AFRICAN LEGAL SYSTEM

HISTORY OF THE LAW

- SA law is not codified (recorded in one comprehensive piece of legislation)
- Drawn from various other sources
- Principle sources are statutes and decided cases
- Roman law and Roman-Dutch law are also recognized sources of the law
- Roman-Dutch law: brought to SA by Van Riebeeck
- English law exerted influence on Roman-Dutch law

Roman Law

- 753bc – 568ad
- Most of population living on farms
- Rome developed into vast empire and law adapted to highly sophisticated legal system
- From 291ad attempts made to codify Roman law and led to codification known as Corpus Iuris Civilis in the sixth century. This work is the primary authoritative source on which SA courts draw when reverting to Roman law to solve a legal problem.

Roman-Dutch Law

- Roman empire fell in 476ad but former Roman citizens still treated according to Roman law
- Church exerted great influence during this period

English law

- 1910 was a milestone for development of SA law – establishment of union parliament, establishment of appellate division
- Privy council abolished in 1950

SOURCES OF THE LAW

- Some sources are authoritative and others are persuasive
- Courts are bound by authoritative
- Persuasive authority may lead a court to apply or interpret a legal rule in a particular way

Statute law or legislation

General

- Dutch legislation 1652 – 1806 applies only if it has been ratified and accepted by SA law. Dutch law after 1806 doesn’t apply here
- Lease of immovable property (1658) still applies here
- English statutes never applied here unless especially promulgated by British parliament to apply to SA
The constitution

- Most important south of law in SA – Constitution of the Republic of South Africa 1996
- If parliament were to pass a law that offended against the provisions of constitution it would be invalid
- New and existing law inconsistent with constitution can be declared invalid by superior court
- Bill of rights is chapter 2 of constitution
- Bill of rights applies to all law and binds all 3 branches of government and all organs of state. State is required to respect, protect, promote and fulfil these rights
- First generation rights: equality, human dignity, life, freedoms of person (religion, expression, movement, trade)
- Second generation rights: housing, healthcare, food, water, social security, education
- Rights can be limited in special circumstances

Customary law

- Does not consist of written laws, but develops from habits of community and carried down from generation to generation
- Also called trade usages
- Requirements to be met before customary rule recognized as legal rule:
  - Must be reasonable
  - Must have existed for a long time
  - Must be recognized and observed by community
  - Contents of rule must be certain and clear
- Also plays an important role in business and commercial world. It is alleged that if a trade usage exists within certain trade or business then parties are contracted and bound to it

Judgments of the courts

- Judgements of Dutch courts before 1652, judgments of Cape Council of Justice before 1827, judgments of the courts of four provinces before 1910, and judgments of SA courts after 1910 form part of important authoritative source of law known as case law
- Superior courts are Constitutional court, Supreme court of Appeal and High court
- Lower courts are courts lower in status than high court and are required to keep record of their proceedings. They can only adjudicate on specific matters and specific persons. Examples are magistrates court, small claims court, courts of black chiefs and headman

The old authorities

- Known as common law
- Corpus iuris civilis – Ancient Roman law applying in SA courts

Foreign law

- If nothing can be found in one or more of the above sources judges will turn to the law of other modern countries for guidance. This has a persuasive authority only.
• Foreign law as a source of law has been recognised in the Constitution. In interpreting
the Bill of Rights a court of law must consider international law and may consider foreign
law.

Textbooks and law journals

• May be used as persuasive influence

THE COURTS IN THE REPUBLIC

The Constitutional court

• Highest court in all matters
• Consists of the Chief Justice of SA, the Deputy Chief Justice and nine other judges
• In JHB
• Any matter must be heard by at least 8 judges

The Supreme court of Appeal

• Has jurisdiction to hear appeals on matters within the jurisdiction of this court
• President of the Supreme court of Appeal, the Deputy President of the Supreme Court of
Appeal and as many judges as necessary in accordance with prescribed criteria
• In Bloemfontein

The High Court

• There is only one High Court in SA with the following divisions:
  o Eastern Cape Division, with its seat in Grahamstown
  o Eastern Cape Local Division, with its seat in Bhisho
  o Eastern Cape Local Division, with its seat in Mthatha
  o Eastern Cape Local Division, with its seat in PE
  o Free State Division, with its seat in Bloemfontein
  o Gauteng Division, with its seat in Pretoria
  o Gauteng Local Division, with its seat in JHB
  o Gauteng Division, with its seat in Pretoria – functioning as Limpopo division with
    its seat in Polokwane
  o Gauteng Division, with its seat in Pretoria – functioning as Limpopo local division
    with its seat in Thohoyandou
  o Gauteng Division, with its seat in Pretoria – functioning as Mpumalanga divison
    with its seat in Nelspruit
  o KZN Division, with its seat in PMB
  o KZN Local Division, with its seat in Durban
  o Northern Cape Division, with its seat in Kimberley
  o North West Division, with its seat in Mafikeng
  o Western Cape Division, with its seat in Cape Town
• Each division consists of Judge President and one or more Deputy Judge Presidents.
  Each division consists of as many judges as necessary in accordance with prescribed
  criteria and approved by president
• Only court that has jurisdiction on: divorce proceedings, status of person’s mental capacity, applications for sequestration of person’s estate, liquidation of a company, validity of interpretation of a will

Other courts of importance in SA context

• The Supreme court (appeal court) and High court of Zimbabwe with seats in Harare
• The Supreme court (appeal court) and High court of Namibia with seats in Windhoek

Officers of superior courts

• A registrar is appointed in each of the superior courts
  o Responsible for smooth functioning of court
  o Issue of process – summons, warrants etc
  o Enrolment of cases
  o Issuing of orders of court
  o Maintenance of records
• A number of sheriffs are appointed in each of divisions
  o Serve process
  o Execute judgments and orders of court
• In some divisions there is a Masters office presided over by a Master
  o Administrative and quasi-judicial function
  o Deceased and insolvent estates
  o Liquidation and judicial management of companies
  o Affairs of persons under legal disability

• Legal practitioners –
• Advocates
  o Appear in Constitutional court, Supreme court of appeal, high court
• Attorneys
  o Practise in magistrates court
  o Assist in non-litigious matters
    ▪ Draw up contracts and wills
  o Can be a notary
    ▪ Draw up and attest antenuptial contracts and other notarial deeds
  o Can be a conveyance
    ▪ Entitled to prepare deeds of transfer of immoveable property, certificates of title, mortgage bonds etc

Magistrates’ courts
• May not hear any of the matters which fall exclusively within jurisdiction of superior courts

Small claims courts
• Resolve minor conflicts in affordable simple manner without legal representation of parties
• Amount up to R15 000
• Can not be taken to small claims court:
  o Divorces
Matters concerning a will
○ Malicious prosecution
○ Wrongful imprisonment
○ Breach of promise to marry

- Not allowed legal representation but advice can be obtained from paralegals
- No appeal can be filed against judgment of small claims court
- May be referred to High court for review on the following grounds:
  ○ Absence of jurisdiction by the court
  ○ Bias, malice or corruption on part of commissioner
  ○ Gross irregularity pertaining to the proceedings

THE DOCTRINE OF STARE DECISIS

Introduction
- Function of judge is to state, interpret and apply existing law but not make new law
- Judge-made law: effect of a judicial decision which gives a new interpretation to statutory provision, which abstracts, extends or adapts a common law principle, is in many cases to create law
- It remains task of judge to merely apply a law
- Principle of the common law can be abrogated by disuse if it is no longer in accordance with modern views and a judge may decide that the principle no longer applies

Application of the doctrine
- Stare decisis – the decision stands
- A court is bound by its own decisions unless and until they are overruled by a superior court. Circumstances may arise which would render it possible for a court to override its own legal opinion. This is where a previous decision is clearly shown to be wrong.
- Courts are bound by earlier decisions simply because they laid down the rule of stare decisis in earlier cases and adopted it in subsequent judgments
- Stare decisis applies to SA law but in appropriate cases it is possible to depart from the decision of an earlier or even of a superior court

The doctrine of stare decisis and the hierarchy of courts
- Every court is bound by the decisions of the superior court within its area of jurisdiction, unless the decision of the superior court is based on so obvious an error, such as failure to take into account a statutory provision, that there can hardly be any difference of opinion on the matter
- Every court is bound by the decision of a court of concurrent status within its own area of jurisdiction, unless it is convinced that the earlier decision was incorrect, even though the matter may permit a difference of opinion. A departure from an earlier decision takes place only on very good grounds
- One division of the High court is not bound to follow the decisions of other divisions of the high court since they belong to different areas of jurisdiction. Nevertheless, a court will not depart from the decision of another division of the high court without good reason
- Magistrates courts are bound by the judgments of the Constitutional court, Supreme Court of Appeal and High Court. If the judgments of the divisions of the high courts are
conflicting, the magistrates court will follow the decision of the division of the High court in whose jurisdiction they fall.

COURT JUDGMENTS

Ratio decidendi

- The reason for the decision
- The parties to the case are bound by the decision, if entirely different parties involved in a similar set of facts come before the court, the court will as a general rule follow the previous decision
- First determine the material facts on which the judge based the decision. The ratio decidendi is the conclusion reached by the judge based on material facts and excluding the immaterial ones

Obiter dictum

- Any statement falling outside of ratio decidendi – incidental remark
- Any remark which is irrelevant to the immediate settling of the dispute (a by the way)
- It is not binding but can have a persuasive authority
- Once such a obiter dictum is actually applied by a later court it becomes the ratio decidendi of the later decision and thus becomes binding

Distinguishing

- A judge distinguishes one case from another by deciding that the ratio decidendi of a previous decision is not binding on the case before him and therefore does not apply. This may be done in various ways.
  - The court may be of the opinion that the principle was formulated too broadly
  - That the consequences are unacceptable
  - That the earlier court didn’t take sufficient account of a fact
  - There may be extra facts or less facts thus the cases differ

Typical aspects of a judgment

- Example:
  NATIONAL SORGHUM BREWERIES LTD v CORPCAPITAL BANK LTD
  2006 (6) SA 208
  SCA

Applicant/claimant: National Sorghum Breweries Ltd
V – versus/against
Defendant/respondent: Corpcapital Bank Ltd
2006 (6): case reported in sixth part of 2006
SA: case reported in SA law reports
208: page number case was reported
SCA: Supreme court of appeal
CHAPTER 2 INTRODUCTION TO THE SCIENCE OF LAW

THE TERM “LAW”

- System of roles which apply in a community
- Right is any right which a legal subject has regarding a specific legal object and which is protected by law

The meaning of law

- Most important division is between public and private law, although there is an overlap between the two
- Public law: legal rules controlling relationships between state and citizens
- Private law: legal rules controlling relationships between citizens dealing with each other
- Public law subdivisions: international law, constitutional law, administrative law, criminal law, law of procedure
- Private law subdivisions: law of persons, family law, law of personality, patrimonial law
- Commercial or mercantile law: legal rules which although of a divergent origin and nature, nevertheless have in common that they arose from the customs of merchants or which relate to business activity
- Classified under commercial law: contracts of sale, lease and credit agreements, negotiable instruments, insolvency, companies, partnerships, close corporations, agency, security, insurance, contracts of transportation, labour law, intellectual property, competition law, consumer law, tax law

The meaning of right

- A right is any right which a legal subject has regarding a specific legal object and which is protected by law. Such a legally protected right is referred to as a subjected right. Legal objects and subjective rights are determined by objective law

Legal subjects

- Human being or entity subject to law
- Every legal subject has legal capacity, that is the capacity to be the bearer of rights and duties
- All legal subjects are called persons (not the same as human being)
- Two categories: natural persons and juristic persons

Natural persons

- Human being – including new born baby to adult, thus all human beings have rights and duties

Juristic persons

- Recognised as holders of rights and powers and subject to duties
- Examples: company, university, municipality, the state
• Has perpetual succession – although the individuals who comprise the juristic person may die, the juristic person continues to exist
• The member of a company, or shareholder, has no ownership or other real right in the property of the company. They merely have a personal right to claim a share of the profits of the company if a dividend is declared, or the claim a share of the surplus assets of the company if it is liquidated
• If a company caused loss unlawfully, the company (not the shareholders) have the action for redress against the person who caused the loss
• The company is liable for the company’s debts and the shareholders cannot be sued for them

Legal object
• Entity which can be the object of a legal subjects claim to a right
• Examples: property, intellectual property, aspects of personality and performances

Subjective right
• Relationship between a legal subject and a legal object or that between a legal subject and other legal subjects
• All rights can in some way be linked to a legal object
• Categories of juridical rights classified according to the particular legal object:
  o A real right is a right which a legal subject has to property eg book.
    Classified as follows:
    • Ownership
    • Servitudes
      o Praedial servitudes:
        They confer n the holder, in his capacity, as owner of an adjacent property, a limited right to the property of another eg grazing
      o Personal servitudes:
        They confer on a person in his personal capacity, the right of use and enjoyment of property of which another is the owner eg usufruct
        Usufruct: A Civil Law term referring to the right of one individual to use and enjoy the property of another, provided its substance is neither impaired nor altered
    • Mortgage or pledge – they confer on their holder (creditor) the right of security in respect of the property
    • Intellectual property rights – eg works of art
    • Personality rights – relating to personality eg physical integrity or reputation of a person
    • Personal rights – conduct or performance – giving something, doing something, refraining from doing something

PRIVATE LAW

Law of persons
• Regulates the conception, existence, termination of natural person as legal subject
• **Law of person determines**
  o Who are legal subjects
  o How one becomes or ceases to be a legal subject
  o The various classes of legal subjects
  o What the legal position (status) of each of the various classes of legal subject are

• A human being and its legal capacity come into existence at birth
• Rights of unborn child are protected provided that the child is subsequently born alive
• Legal capacity of person terminated by death
• Law protects the body as well as the deceased’s former assets
• Status is accorded to every legal subject: aggregate of rights and duties attached to person as one of a specific class (e.g., minor vs. adult)
• Legal condition: position enjoyed by person in eyes of the law, determines the extent of the rights and duties a legal subject may have
• Status is conferred by law. Status cannot be changed of his own accord apart from exceptional cases (e.g., marriage)
• Status can take various forms in public and private law
• Numerous factors determine status of legal subject such as age, sex, marital status, and sanity. Law of persons is concerned specifically with influence exerted by these factors on status of legal subject

**Family law**

• Part of private law dealing with requirements for conclusion of valid marriage, legal consequences of marriage, grounds on which marriage can be dissolved, legal relationship between parents and children
• Two subdivisions: law of husband and wife, law of parent and child

**Law of personality**

• Rights in respect of physical being, their dignity, and their reputation
• Each person has the undisturbed enjoyment of his personality property within limits laid down by the legal order and under certain conditions compels anyone who has infringed this right to pay a sum of money as compensation
• Important right is right of privacy: entitled to live private life and if another intrudes on his domestic sphere without permission or displays a photo of the person the right to privacy is infringed. This is subject to limitations (e.g., a politician cannot complain if he is caricatured in a cartoon)

**Patrimonial law**

• Consists of all rights and duties which may be valued in money – sum of his assets and liabilities

**Law of property**

• Relationships of persons towards material objects.
• Controlled by means of granting and recognition of rights over property. Extent of legal power depends on the kind of real right held by that person. Different kinds of real rights confer different powers on their holders.
The real right of ownership: use property, enjoy it, destroy it, sell it, etc
Right of pledge: gives the holder of the right only the right to possess the property (which still belongs to the pledger) as security for his claim against the pledger.
More than one real right can subsist in the same property
Right of ownership extremely important in law of property

Right of ownership

Complete power over property, but not unlimited or absolute control
Restricted by public law and rights of others eg sanitary regulations, building regulations, statutory provisions (division of land), traffic rules etc
Ownership always restricted in interested of community
May also be restricted by a neighbour’s right to ownership eg may not excavate the land in such a way that a neighbour’s land subsides or caves in

Servitudes

A right of servitude is a limited real right over the property of another, which confers on the holder of the right specific powers to use the property in a particular way

Praedial servitudes

Examples: drive or walk over plot of neighbour, fetch water from plot, graze cattle
The owner of piece of land has certain powers to adjacent land belonging to another
Servient tenement: owner who permits the servitude
Dominant tenement: makes use of the servitude
Each subsequent owners of each land makes use/allows use of the servitude
If the owner of dominant tenement suffers a loss he may claim damages from servient tenement
Acquiring tenement: register of a servitude at deeds office against title deeds of the properties. Owners of property agree on the servitude and comes into being on registration
Can be obtained though prescription: has openly as though he is entitled to exercised for an uninterrupted period of 30 years the rights and powers which a person with a servitude is entitled to

Personal servitudes

Example - usufruct
Can be referred to as a life interest
May take fruits and produce of property but not destroy or alter property
Usufructuary is attached to specific person and cannot be sold
May be granted for a period of time but not longer than lifetime of holder
Can be registered in terms of testamentary disposition eg Thabo (farmer) may provide in his will that his wife has a life interest in the farm during her lifetime and that the children shall receive the ownership of the farm. Thus she enjoys the farms yield during her lifetime and the children obtain right of ownership after her death
Law of succession

- When a person dies, he leaves behind a deceased estate, which consists of all his assets and liabilities. The estate is administered by one or more executors under letters of executorship granted by Master. Duty of executor to pay all debts of deceased, and remaining balance to be distributed among heirs/beneficiaries.
- No benefit accrues to the executor
- Only the executor can sue and be sued in regard to the estate matters and he is the legal representative of the deceased
- Heirs and beneficiaries of depend on if there is a valid will. If there is a will then the estate passes according to the rules of the testate succession. If there is no valid will the rules of intestate succession will apply

The law of intellectual property

- Most important rights is copyright, patents, trade marks, goodwill and models (products of a persons mind) – governed by legislation

The law of obligations

- When a personal right comes into existence between legal subjects the bond or legal relationship between the legal subjects is referred to as an obligation
- Most important example is unjustified enrichment
- The legal object in relation to a contract is the performance which must be delivered
- In the case of a delict, it is the payment of compensation, and in the case of unjustified enrichment, the payment of an amount equal to an amount by which one person has been enriched to the detriment of another
- Examples:
  - If two parties conclude a contract, an obligation arises in terms of one party has the right to demand that the other keep his promise and the other party renders a performance
  - If, by committing a delict, Lindiwe causes damages to Vavi (eg drives into her fence), Lindiwe is obliged to pay and Vavi can claim damages
  - Unjustified enrichment: if Thobeka pays Themba R500 believes erroneously that she owes that money, Themba is unjustly enriched and Thobeka can claim the money back

Delict as per Wikipedia:

The South African law of delict engages primarily with "the circumstances in which one person can claim compensation from another for harm that has been suffered." JC Van der Walt and Rob Midgley define a delict "in general terms [...] as a civil wrong," and more narrowly as "wrongful and blameworthy conduct which causes harm to a person." Importantly, however, the civil wrong must be an actionable one, resulting in liability on the part of the wrongdoer or tortfeasor. The delictual inquiry "is in fact a loss-allocation exercise, the principles and rules of which are set out in the law of delict." The classic remedy for a delict is compensation: a claim of damages for the harm caused.
CHAPTER 3 LAW OF CONTRACT INTRODUCTION

THE CONTRACT AS A SOURCE OF OBLIGATIONS

- A contract is an agreement concluded between two or more persons with the serious intention of creating legally enforceable obligations

Obligation

- An obligations is the legal relationship that exists between parties to an agreement when the parties acquire personal rights against each other that entitle them to performance and/or oblige them to perform in terms of that agreement
- The conclusion of a contract is an event giving rise to an obligation

A special type of agreement

- Although a contract is an agreement between two or more parties, not all agreements are contracts and not all agreements create obligations
- Example: social appointments are not contracts
- Difference between contract and agreement is the intention of the parties and the consequences attached to their agreement

Two or more parties

- A person cannot contract with himself unless he acts in a different capacity on each side of the contract

REQUIREMENTS FOR THE FORMATION OF A VALID CONTRACT

- There must be consensus between the parties. Agree on objectives of contract. Referred to as true agreement. Serious intention to create rights and duties that are legally binding. Make intention known to each other.
- Must have capacity to act. Must be legally capable of performing the particular act.
- Must be legally possible. Must be lawful and legal.
- Must be physically possible. Must be objectively possible to receive the rights or perform the duties. Performance must be certain or ascertainable.
- If formalities are prescribed for formation of contract it must be observed.
- A valid contract will arise if all these requirements are satisfied. There may still be an agreement should any of these requirements not be met but it won’t constitute a contract

Freedom to contract

- You are generally free to choose with whom and on what grounds you contract but can be limited in certain circumstances eg unlawful or illegal
- Important statutes for freedom to contract:
  - The Constitution of Republic of SA 1996 (Chapter 2 Bill of Rights)
Prohibiting unfair discrimination on grounds of race, gender, disability, by prohibiting hate speech, harassment and dissemination and publication of info that unfairly discriminates

CONTRACTING ELECTRONICALLY

• Trade that is conducted by using electronic means such as internet or email – electronic commerce transactions – ecommerce
• Simple retail purchases are the most common
• Other examples are banking and insurance transactions
• In SA Electronic Communications and Transactions Act 25 of 2002:
  Transactions which are specifically excluded from the operation are listed under Schedule 1 of the act (wills and alienation of land are excluded)
CHAPTER 4 CONSENSUS

THE CONCEPT OF CONSENSUS

- Consensus (true agreement) basis for every contract
- To check if contract exists, first check for consensus between parties, this is a subjective inquiry, **there must be proof of consensus**
- Consensus can only be reached if
  - Every party has the serious intention to be contractually bound
  - The parties have a common intention (same commitment)
  - Every party declares their intention

The intention to be contractually bound

- Where the parties merely have the intention to reach an understanding, or to make an arrangement based on good faith, their arrangement will only give rise to a gentlemen’s agreement and not to a binding contract
- A statement made jokingly or to highlight the good qualities of the object of an agreement (called puffing) – generally not made with the intention of creating legally enforceable obligations

Common intention

- Must agree on contractual obligations, commitments and to create the same legal relationship
- If Andrew gives Ben money as a deposit and Ben accepts it as a loan then no contract is formed

Making the intention known

- Can be done orally, written or by means of conduct. Look for an offer and acceptance thereof
- If Andrew decides to sell his watch to Ben for R50 and Ben, completely unaware of Andrew’s intention, decides to offer Andrew R50 for the watch, consensus does not exist until they become aware of each other’s intentions

OFFER AND ACCEPTANCE

The concepts of offer and acceptance

- An offer is a declaration made by a person (offeror) in which he indicates and intention to be contractually bound by the mere acceptance of the offer, and in which he sets out the rights and duties he wishes to create. The offeror invites another party or other parties (offeree/s) to consent to the creation of an obligation between them
- An acceptance is a declaration by the offeree through which it is indicated that he agrees to the terms exactly as put in the offer

Requirements for the offer and acceptance

An offer and acceptance will give rise to the formation of a valid contract only if the following requirements are met:
• The offer must be made with the intention that the offeror will be legally bound by the mere acceptance thereof by the offeree – offer exactly as it is no amendments
• The offer must be complete – all terms
• The offer and acceptance must be clear and certain – obligations must be stated, no doubt about the fact of the acceptance
• Normally an offer and an acceptance may be made either expressly (writing or orally) or tacitly by means of conduct (nod of head, movement of hand, handing over of money). In only a few instances must the offer and acceptance be made in a specific manner. Example purchase or exchange or donation of land must be in writing, or if the offer stipulates that it must be accepted in a specific manner must that requirement be met.
• Offer must be address either to a particular person or persons, or in general to an unknown person or persons or to the general public
  If it is addressed to a specific person or persons it can be accepted only by them or someone acting in their capacity
• The offer and acceptance must be communicated

The falling away of the offer

• Once an offer has been made it does not remain open for acceptance indefinitely but lapses:
  o When the offer stipulates the time period, if no time period is specified it lapses after a reasonable time period
  o If before the offer is accepted the offeror revokes the offer
  o If the offeree does not accept the offer but makes a counter offer
  o If either the offeror or oferee dies before the offer is accepted, unless stated in the offer that it can be transferred to the deceased estate

The continued existence of the offer : the option

• Examples contracts of sale or contracts of lease
• Nomsa offers her horse for sale to Jacques and also undertakes to keep that offer open for two weeks. The option arises only when Jacques accepts the second offer. When the option does come into being, Jacques has two weeks in which to decide whether or not he wishes to accept the substantive offer. Moreover, Nomsa may neither offer the horse to someone else nor accept another offer in respect of the horse until this time period has lapsed or until Jacques has rejected the substantive offer. The option is exercised if Jacques accepts the substantive offer within the period and communicates his acceptance to Nomsa. If Jacques exercises his option, the substantive contract comes into being.

Special rules with regard to offer and acceptance

• Various types of statements should be distinguished from true offers
• The following are examples of statements and not offers:
  o An invitation to make an offer
  o Statements of intent
  o Calling for tenders
  o Auctions

An invitation to make an offer
• A request or invite to make an offer or do business is not a true offer
• An advert or display is an invite to do business, if a person buys the product and the retailer accepts then a consensus and contract of sale arises

**Normally an advert on a website is an invitation, depending on wording.**

Statements of intent

• Document in which a party indicates his intention to contract as opposed to offering to actually do so
• This is the basis on which further negotiations to contract are based

Calling for tenders

• When a tender is called for and the advertiser doesn't bind himself to the highest or lowest tender, the call would be no more than a request for offers that he advertiser may choose to accept or decline

Auctions

• Each auction contains rules which are presented beforehand and thus a contract exists between the auctioneer and each bidder to conduct auction according to advertised conditions of the sale
• Auction held subject to reservation: good will be sold only if predetermined price is fetched or exceeded
  Person bidding is the offeror and auctioneer is offeree
• If nothing is mentioned then auction is subject to reservation
• Auction held without reservation: sell to the highest bidder
  Auctioneer is the offeror and person bidding is the offeree

THE MOMENT AND PLACE OF FORMATION OF A CONTRACT

• A contract arises at the moment when and at the place where consensus is reached
• The exact moment is important in order to decide whether offer can be revoked, if it has expired and when contractual duties become enforceable
• Place of formation important to determine court which has jurisdiction for claims

When the offeror and offeree are in each other’s presence

• Easy to determine as happens at the same time and place
• Information or ascertainment theory: contract comes into being when and where the offeror learns of the acceptance of his offer

Where the parties are not in each other’s presence

• The acceptance is not communicated directly but via another medium
• If concluded via telephone they are considered to be in each other’s presence and ascertainment theory applies. Place where contract arises is location of offeror.
• When offer concluded by post: dispatch theory (expedition theory), the contract comes into being at the place and time that letter of acceptance is posted unless otherwise stipulated. This theory protects the offeree. The offeree can undo his letter of acceptance
if he communicates to the offeror in a speedier method before the letter of acceptance arrives at the offeror.

Electronic agreements

- Ascertainment theory applies if method of communication is instantaneous as though they are in each other’s presence
- Choice of theory is influenced by intention of parties, sound business practice and judgment of where the risk should lie
- In terms of email internal email should be instantaneous but otherwise it is impossible to say when the email will be read
- Electronic communications and transactions act 25 of 2002:
  - In the absence of a different agreement between the parties, an agreement concluded electronically is concluded at the time when, and the place where, the acceptance of the offer is received by the offeror. This is called the reception theory and takes precedence over common-law principles.
  - A data message is deemed to be received when the message enters the information system and no need for acknowledgement
  - Message is deemed to be received at usual place of business of receiver, and if there isn’t then their place of residence.
- When contracts are concluded using traditional and electronic methods then the parties should indicate time and place of formation to eliminate uncertainty

CONSENSUS AND DEFECTS IN WILL

- If there is consensus but it was obtained in an improper manner an contract arises but it will be void and voidable contracts hinges on whether or not consensus existed between the contracting parties

Absence of consensus – mistake

- Mistake exists when one or more of the parties to a proposed contract misunderstand a material fact or legal rule relating to the proposed contract. If such a misunderstanding exists there is no consensus and consequently no contract will arise. It may lead to inequitable results where the parties rely on their own material misunderstanding to escape liability.
- It is accepted that despite the lack of consensus the parties will be held to their declarations of intention unless the circumstances are such that the mistake is reasonable. If the mistake is unreasonable it is not excused by the law and the party who has made the mistake will be held to his declaration of intention rather than to his true intention. This rule is an exception to the principle that consensus is the basis for every contract.
- Only mistakes with regard to a material fact, legal rule or principle will lead to the absence of consensus

Requirements to be met before mistake will render a contract void

- A contracting party who wishes to rely on a mistake to render a contact void would have to prove all of the requirements
  - The mistake relates to a fact, legal rule or principle
  - The fact or rule or principle is material
The mistake must relate to a fact, legal rule or principle

- An example is where Tessa pays Elton R2000 in the mistaken belief that she owes him the money.

The mistake must concern a material fact, legal rule or principle

- A mistake is material in the following instances:
  - A misunderstanding in respect of the identity of the person with whom the agreement is reached. Eg Andrew dials the wrong number and offers a job to Bennie who answers. It will not be material if Ronit purchases a car from Douglas thinking that the sales person she is dealing with is Carol.
  - A mistake concerning the content of the intended contract. This relates to the performance that must be rendered, place or method of delivery or performance itself. Eg Shoni is under the impression that she is making an offer to buy the house in CT but Angie thinks she is offering to buy her house in Durban. It will not void the contract if there is a misunderstanding regarding the attributes of the house eg number of bathrooms.
  - A mistake in respect of an interpretation the law attaches to the offer and acceptance. In such an instance one or both parties have a particular perception of the contents of the contract. Mike offers to pay Tshepo a sum of money to live in a unit in an old age home, thinking he acquires ownership of the property whereas the laws interpretation of the contract is such that Mike acquires only occupation for the remainder of his life.

- Mistake may sometimes be caused by a misrepresentation by the other contracting party. Misrepresentation will normally not void an agreement and merely gives rise to the voidability of the contract at the option of the deceived party. However, when the misrepresentation leads to a material mistake it results in the absence of consensus and no contract will arise.

The mistake in fact or law must be reasonable

- If mistake is not excusable error the contract as it appears from the parties declarations of intention, will be enforced despite the fact that this may differ from the party’s real intention. Mistake will be reasonable if the reasonable person in the same situation would make the same mistake if he were to judge the particular circumstances. The test is therefore objective.
- Unreasonable mistake: Jo, who suffers from a hearing problem, is under the impression that Steffi is offering her R1mil for her old bicycle. Steffi is in fact only offering R100. Although no consensus exists with regard to the purchase price, Jo’s error cannot be excused since a reasonable person would not simply assume that he would obtain such a high price for an old bicycle. Jo is bound by declaration of intention when accepting the offer and a valid contract is concluded.
- A person cannot rely on mistake to deny the contract if he was negligent or careless, or paid insufficient attention to the matter, for instance not reading the contract before signing. A person can rely on misrepresentation if the other party has created the mistake.
Improperly obtained consensus

- It sometimes happens that the assent of one party is obtained in an improper way.
- Examples are:
  - Inducing the other party
  - Conclude contract under duress or improper influences

Misrepresentation

- A misrepresentation can be defined as an untrue statement or representation concerning an existing fact or state of affairs which is made by one party to the contract with the aim, and result, of inducing the other party into concluding the contract. The misrepresentation may relate to the qualities or characteristics of the subject of the contract.
- A contract will be voidable as a result of misrepresentation if the following requirements are satisfied:
  - There must be a misrepresentation – untrue statement concerning an existing fact or condition
    Misrepresentation of law will not entitle party to remedy
    Honest statement of opinion is not misrepresentation
    Can be made via statement, conduct, circumstances – message must be conveyed for a misrepresentation
    Concealment of facts (if duty exists to disclose) can be misrepresentation
    Giving opinion or estimate about future profitability of business that turns out to be a mistake is not a misrepresentation
    A dishonest opinion as to future event may be sufficient to found an action for fraudulent misrepresentation in so far as it falsely reflects the state of mind of the party making the representation. In such a case the party who wants to rely on the opinion of the person he is bargaining with must protect himself by having the opinion made in a term of the contract.
    The representation must be false and untrue
    The representation should concern a state of affairs that relates to the past or present
  - The misrepresentation must be made by one contracting party to another contracting party or by someone acting in the service of a contracting party or on his authority or in collusion with him. If such a contracting party is induced to conclude a contract by the false representation made by an outsider, the outsider's statement is not a misrepresentation but a misstatement, which has no effect on the consensus of the contracting parties. Rescission is an obvious remedy where parties to the contract are involved. However where it is an outsider who makes the misrepresentation rescission would affect an innocent contracting party and not the person who made the misrepresentation.
  - The misrepresentation must be unlawful. Normally an act (or omission) would be unlawful if it is contrary to the norm or standard of a specific community's idea of acceptable conduct. The representation must be material. The representation is normally material if it concerns facts which would probably induce somebody to conclude a contract – the importance of misrepresented fact is weighed against the contract as a whole to ensure that the misrepresentation of an unimportant fact does not sink the whole contract.
The misrepresentation must have induced the contract as it stands. This is referred to as requirement of causality. This means that, but for the misrepresentation, the deceived party would either not have concluded the contract at all or would not have concluded it on the same terms. By implication, this requires that the misrepresentation should have been made during negotiations. The person to whom a representation is made is under no obligation to ascertain whether the representation is true or not.

The misrepresentation can be made intentionally, negligently, or innocently. The degree of fault that can be attributed to the misleader determines the availability of a claim for damages.

The effect of misrepresentation

- Misrepresentation does not exclude consensus between the parties and the contract is therefore not void. It does cause the contract to be voidable since it is regarded as improper to obtain consensus in this manner
- The contract is voidable at the choice of the deceived party. If the innocent party chooses to uphold the contract he may claim whatever remedy may be appropriate for the breach of contract. If the innocent party decides to rescind the contract the obligations are terminated and consequences are similar to cancelling a contract.
- Rescission must consist of words or action which gives one party a clear message that the other party intends to rescind the contract. The date of termination is of great importance.
- Whether or not a further remedy of a claim for damages is available to the deceived party depends on the degree of fault associated with a specific type of misrepresentation.

Intentional misrepresentation

- If a false statement of a material fact is made with the intention of inducing a contract, and that statement is made either in the awareness that it is false, or recklessly (carelessly), without regard to the truth or falseness of the statement
- The party is aware that he is misleading the other person
- The innocent party may claim damages from the guilty party irrespective of his choice of upholding or rescinding the contract
- The innocent party must be placed in the same position as though the misrepresentation had not happened
- A claim for damages is a claim for delict and not in contract

Negligent misrepresentation

- False statement of a material fact which is made negligently and with the aim of inducing a contract
- Negligence will be assumed if person making the statement he believes to be true without taking steps that a reasonable person would take to verify it
- Claim is based on delictual principles
- May claim damages from the guilty party irrespective of his choice to uphold or rescind the contract

Innocent misrepresentation
• Is a false statement made with the intention of inducing a contract but the party who makes the statement is neither fraudulent or negligent
• The party making the statement has taken every step reasonable that could have been expected of him to verify the details eg verify painting as genuine
• Innocent party retains his choice of upholding or rescinding the contract

Duress

• An unlawful threat of harm or injury, made by a party to the contract or by someone acting on his behalf that causes the other party to conclude a contract. It is not necessary for the threat to be in the form of expressed words or actions. It can be implied, tacit, or by conduct and may also be by subtle forms of intimidation
• Such a person concludes the contract rather than undergo the threatened action.
• If the person physically forces the hand of the innocent party to sign a written contract the contract will be void ab initio
• Since the consensus is obtained improperly the contract is voidable
• The threatened party has the choice of either upholding or rescinding the contract
• Irrespective of whether the innocent party decides to uphold or rescind the agreement, damages may be claimed from the guilty party, the innocent party must be in the same position had the duress not occurred
• The following requirements must be satisfied before a contract will be voidable based on duress:
  o There must be actual physical violence or a reasonable fear of violence or damage. The test is objective. The fear must be the kind that would overwhelm the resistance of a reasonable person in the same position. A threat is directed at the life or limb or freedom of the threatened person or his immediate family, or at the unlawful damage of his property. A threat of economic damage or ruin may constitute duress and allow the avoidance of contract in certain circumstances. Such cases are likely to be rare for it is not unlawful in general to cause economic harm or ruin to another in a competitive economy. Hard bargaining is not the equivalent of duress and is not unlawful even where there is an imbalance of power.
  o The threat must be of an imminent or inevitable evil. Could the person have averted the threat other than by agreeing to the contract? The time that passes from when the threat is made to when the contract is concluded can play an important role in determining the threat.
  o The threat of harm or violence must be unlawful. If a contracting party uses a threat to obtain a more beneficial performance than one he is reasonably entitled to this would comply with the requirement of unlawfulness
  o The duress must be exercised by one contracting party against the other contracting party
  o The threat must cause the threatened person to conclude the contract
• It must be the threatened person’s fear of the impending harm that persuades him to conclude the contract or to conclude it on particular terms. A person who despite the threat concludes the contract for some other reason cannot complain of duress.

Undue influence
• Any improper or unfair conduct by one of the contracting parties by means of which the other contracting party is persuaded to conclude a contract with the former, contrary to their independent will. The influence must weaken the other party's power of resistance.

• A court will be more readily disposed to find that undue influence has been exercised where there is a special relationship between parties. E.g., doctor and patient, attorney and client, guardian and minor. It is relatively easy for the stronger party to abuse the situation. This may take place through the abuse of the other party's ignorance, lack of experience, physical frailty, intellectual weakness or mental dependence on the stronger party.

• If a party is persuaded into concluding the contract his will is directed at the contents of the contract and the contract does come into existence. The party's assent to the contract has been obtained improperly so that his independent will was not exercised.

• The victim may choose to uphold or rescind the contract and/or claim damages based on negative interest (placed in same position as before).

• The elements of undue influence are the following:
  o The party who has allegedly exercised the undue influence must have acquired an influence over the victim.
  o The party must have used his influence to weaken the victim's ability to resist so that the victim's will became susceptible.
  o The influence must have been used unscrupulously to persuade the victim to consent to a transaction the victim would not have entered into of his normal free will and which was to the victim's disadvantage.

CHAPTER 5 CAPACITY TO PERFORM JURISTIC ACTS

INTRODUCTION

• A further requirement for the validity of a contract is that the parties must have capacity to perform juristic acts.

• Capacity to act must be distinguished from legal capacity and civil or criminal liability.
• Capacity to act: capacity to perform juristic acts, to participate in legal dealings and to conclude valid contracts. Only natural persons are capable of having the capacity to act. Juristic persons can never be capable to performing juristic acts. A contract on behalf of a juristic person must be concluded by a natural person.

• Not all natural persons have the capacity to act. In certain circumstances a person can be incapable of performing juristic acts or his capacity can be limited. The existence, or limit on, a specific persons contractual capacity is determined by the law’s view on that person’s ability to form and declare a will and that person's ability to judge the rights and duties that will flow from his acts.

• An individual who has capacity to act may lose the capacity completely or his capacity may be limited due to the following factors:
  o Age
  o Marriage
  o Mental deficiency
  o Influence of alcohol or drugs
  o Prodigals
  o Insolvency

AGE
• This is determined by his level of intellectual and emotional development
• Children’s Act 38 of 2005 age bands:
  o Nought to 7 years
  o 7 to 18 years
  o 18 years and older
  o (traditional age of majority is 21 years before amendment)

Majority
• 18 years old unless mental deficiency
• A minor obtains full capacity to act upon marriage unless minor’s capacity is flawed for a reason other than age (even if marriage is dissolved before age of majority)

Minority
• Under 18
• No or limited capacity

Minor under the age of 7 years old
• No capacity to act and cannot conclude a contract
• Cannot accept offer of donation

Minor over the age of 7 years old
• Can perform juristic acts with assistance of guardian
• Parent or guardian to safeguard child’s property and interests
• Parents have equal rights of guardianship of children born in marriage
• Need consent of all persons of guardianship of child for:
  o Child’s marriage
- Application for passport
- Depart the republic
- Alienation or encumbrance of any immovable property of child
- unless a competent court order otherwise

- Guardian’s assistance can be by being present at concluding contract, or prior authorization or subsequent ratification. The effect of the guardian’s assistance is that the contract becomes enforceable both by and against the minor. The guardian doesn’t acquire personal liabilities or rights under the contract.

- If a contract concluded on behalf of the minor is to the minor’s detriment, he may, within one year after reaching majority, apply to the High Court for the cancellation of the contract and restitution of everything that has been performed in terms thereof. The minor has to prove that the contract was to his detriment at the time of conclusion.

- A minor or child with limited capacity to act may however conclude contracts without assistance if they are exclusively to his benefit, namely, contracts in terms of which right but no duties are acquired. A minor may for example, accept a donation and may conclude an agreement which releases him from a debt but does not impose a duty on his to render counter-performance

- There are several statutory exceptions to the general rule that a minor is contractually liable only if he concludes the contract with the required assistance:
  - A female minor, irrespective of age, may consent to the termination of pregnancy without consent of parents
  - 17 years old to obtain learners licence
  - 7 years old to withdraw money deposited into his account (Post Office Act)
  - 16 years old to make a valid will
  - 16 years old to deposit or withdraw from bank, or cede or burden the investment

- A child below the minimum age for a valid marriage namely 15 years for girls and 18 years for boys, may in terms of the Children’s Act not be given out to marriage or an engagement by their parents or guardians. A child above this minimum may not be given out to marriage or engagement without the child’s consent. Children under these minimum ages may, in exceptional circumstances, get married but only when the Minister of Home Affairs has given consent to such a marriage

- If a parent dies, the surviving parent will be the minor child’s guardian. If both parents die, the court will appoint another person with the capacity to act as guardian.

- If the child is born out of wedlock the mother will normally be the guardian

- If a minor wants to get married, or to apply for a passport if he is younger than 18 years, or if any immovable property or right to immovable property belonging to the minor needs to be sold or encumbered the consent of both parents must be obtained

- Court granting parents’ divorce will place child exclusively with one parent if in child’s best interest. Any person having an interest in the care of a child may apply to the High Court for guardianship of the child

- Child of 12 years old is able to consent to own medical treatment or operations on them if they have sufficient maturity and mental capacity to understand the benefits, risks, social and other implications

- Child can be tested for HIV if in best interest of child and consent is given. If the child is 12 years older with sufficient maturity to understand they can consent, if not then the parent to consent. A caregiver (parent/guardian/foster parent/head of youth care centre or shelter) can consent to the test. Child and caregivers to be counseled before the test
- 12 years old to have access to contraceptives in certain circumstances

Special situations

Contracts for which the guardian’s assistance is insufficient

- The guardians and the master of the high court must consent to the alienation or mortgaging of immovable property belonging to the minor if the value of the property is less than R100 000. If the value is more than R100 000 the guardians and the judge of the high court must consent. (not applicable to acquiring property)

Tacit emancipation

- This is where the guardian allows the minor to lead an economically independent existence. Guardian must consent to emancipation.
- Emancipation may be evident via separate living space or an own business.
- Emancipation can provide capacity to act but does not terminate minority. Guardian’s permission is still required for certain transactions.

Contracts which the minor concludes without the necessary assistance in spite of a limited capacity to act

- The contract is not necessarily void and without effect
- If a minor concludes a contract without the necessary assistance or ratification of the guardian, it is not enforceable against the minor, not even after the minor has obtained majority. The minor does not incur liabilities towards the other party but the other party incurs liabilities towards the minor. Eg. A minor sells his bicycle for R400 to a major, minor entitled to claim payment but not obliged to deliver the bicycle. If minor wishes to proceed against major for nonpayment need assistance of guardian. This then means that the minor is obliged to stick to his side of the contract.
- The position of the major who has already performed in terms of a contract with a minor is less favourable. The major may well find that the minor either refuses to render performance of the obligations in terms of the contract, or reclaims the performance if he has already performed. In neither case will the major have any contractual remedy at his disposal. The major’s only redress is to institute a claim against the minor only in so far as the unjustified enrichment has continued to exist up to the moment of the minor’s being sued. This means that in the above example the minor is liable for the return of only so much of the money as remains in his possession when the action is instituted. There are three possibilities in this regard:
  - If the minor recklessly squandered the full amount he cannot be sued as there is nothing left
  - If the minor bought a luxury item he is obliged to surrender the item or its value
  - If the minor used the money to provide necessities or essentials for which the guardian normally would have to pay the minor or guardian will be liable to repay that part of the money which brought about a saving of the expenditure.

Fraudulent misrepresentation of majority
If a minor, by any form of conduct, poses as a major in a fraudulent manner and thereby induces a third party to contract with him the minor should be held liable on the contract as though he were a major and had the capacity to act.

MARRIAGE

Marriage has certain patrimonial consequences which relate to the chosen marital regime. Marital regime refers to marriages in and out of community of property.

In order to determine whether a specific spouse has capacity to act in a given situation, a distinction must be drawn between:

- Agreements concluded prior to 1 December 1993 where the husband had marital power
- Certain agreements concluded by a spouse married in community of property
- Agreements concluded by a spouse married out of community of property

**Agreements concluded prior to 1 December 1993**

- A married woman could be subject to the marital power of her husband. Under the old regime it was possible to exclude the marital power in the case of marriages out of community of property, in which event the wife had full capacity to act.
- The effect of marital power was that a married woman who was subject to the power had the limited capacity to act. If the husband possessed the marital power, he had the capacity to control and administer the joint estate or his wife’s separate estate.
- Without her husband’s consent the married woman who was subject to her husband’s marital power could not conclude contracts which imposed liabilities or duties on the common estate, or jointly and severally on her or her husband’s separate estates.
- In 1984 marital power was abolished in respect of marriages concluded on or after 1 November 1984.
- If the necessary steps were not taken the marital power would still have applied to marriages in community of property under the old regime, as well as to marriages out of community of property where the marital power was not specifically excluded.
- However a further amendment abolished the last vestiges of marital power with effect from 1 December 1993. Now, notwithstanding when and how a couple is married, marital power has been completely abolished.

**Agreements concluded by a spouse married in community of property**

- Spouses are married in community of property unless they agree to the contrary.
- The most important consequences are the following:
  - The separate assets and liabilities of the husband and wife are consolidated so that there is only one common estate. This is dissolved by divorce or death of one of the parties. Under exceptional cases it is possible for a spouse to retain specific separate property eg it was bequeathed in terms of a will to a spouse with the express condition that it is to be excluded from the joint estate.
  - The joint estate acquires the profits and bears the losses which arise during the marriage. Any contractual rights or duties are shared equally by the spouses.
- After the abolition of the husband’s marital power (italics above), each spouse has full capacity to act with regard to the joint estate. Thus each spouse is free to manage the joint estate, dispose of assets and incur debts without the consent of the other spouse.
Where a debt is recoverable from the joint estate, the spouse who incurred the debt or both spouses jointly may be sued. Where a debt has been incurred for the necessities for the joint household, the spouses may be sued jointly or separately.

Where the spouses have separated, the common law addresses the problem by determining which spouse’s misconduct led to the separation.

The general rule that each spouse has full capacity to bind the joint estate is qualified with regard to certain assets and certain transactions which involve the joint estate. In these instances each spouse has to obtain the other spouse’s consent to the qualified transaction unless the intended transaction is carried out by a spouse in the ordinary course of his profession or trade, in which case the requirement will be waived in certain circumstances.

Written consent is required if immovable property or investments are alienated or otherwise burdened. For certain transactions the written consent must be attested by two competent witnesses.

Consent can be obtained verbally or tacitly where movable assets of the common household are alienated or otherwise burdened, or where an asset is donated to the prejudice of the other spouse’s interest in the joint estate.

Consent can be given in way of ratification, except where a spouse bind himself as surety or alienates or otherwise burdens the immovable property forming part of the joint estate, or where consent is required for the registration of a deed in the Deeds Registry.

When a spouse concludes a transaction with another person in contravention of these provisions, and that other person does not know and cannot reasonably have known this, the particular transaction is deemed to have been concluded with the required consent.

If the spouse whose consent is required withholds it unreasonably, or if, in any other case, there is good reason to dispense with consent, the high court may, on application, permit the transaction without the required consent.

The court may on application by a spouse indefinitely suspend any powers which the other spouse may exercise in terms of the act. The court will do so only if it is convinced that it would be necessary for the protection of the applicant spouse’s share of the common estate to do so.

Agreements concluded by a spouse married out of community of property

- Parties to a marriage may agree in an antenuptial contract that their marriage will be out of community of property. Such an antenuptial contract must be concluded prior to the marriage. It will only be binding on outsiders if it is also notarially executed and registered in a deeds office within a specified time after such notarial execution.

- The parties to an antenuptial contract stipulate that their intended marriage will be out of community of property and without community of profit or loss. Each spouse then retains his separate estate and each one has full capacity to act only in respect of his own estate. Each spouse will be liable only for the debts incurred by that spouse in respect of his own estate, except for household necessities.

- Spouses are obliged to make pro rata contributions in accordance with each one’s financial means in respect of necessities of the common household.

- Spouses are jointly and severally liable to third parties for all debts incurred by either spouse for necessities for the common household.

- Every marriage out of community of property concluded after 1 December 1984 is subject to the accrual system unless expressly excluded by the antenuptial contract.
MENTAL DEFICIENCY

- If a person’s mental condition is such that he is not able to understand or appreciate the nature or consequences of his conduct at a level which is sufficient to enable him to manage a particular affair and make rational decisions, it stands to reason that such a person cannot form the necessary will to conclude a contract. Such a person is completely contractually incapable.
- If a person concludes a contract, the contract is void and without consequence and no rights or duties are created by it. This also applies to agreements in terms of which the mentally deficient person acquires rights without incurring obligations.
- When a court on application by an interested party, has certified a person as mentally deficient a curator is appointed to administer such a person’s estate and to manage his affairs. Neither the certification as mentally deficient nor the appointment of a curator has any effect on the mentally deficient person’s capacity to act.
- The test is solely a factual one and the question is whether the person was normal or mentally deficient at the moment of concluding the contract. If a mentally deficient person concludes an agreement after having been declared mentally deficient, he can nevertheless be held liable if the contract was concluded during a moment of normality.
- The certification as mentally deficient or the appointment of a curator does have the influence, however, on the burden of proof, since it creates a presumption that the person no longer has the capacity to act. Therefore before certification or appointment there is a presumption of normality and of capacity to act and thereafter there is a presumption of contractual incapacity. The person who avers the opposite must prove it.

INFLUENCE OF ALCOHOL OR DRUGS

- A person who is in such a state of intoxication caused by alcohol or drugs that he does not appreciate the nature and consequences of his actions, or who is unable to control the actions, is incapable of forming a will. Legally therefore such a person is incapable of performing juristic acts.
- If a person is able to form a will in spite of the influence he will have the capacity to act despite the fact that his judgment may be affected to some extent.
- It is therefore a question of fact whether at the moment of concluding an agreement; a person has the capacity to act. Since there is a presumption that every person has capacity to act, a party who alleges incapacity either in him or another must prove it.

PRODIGALS

- If as a result of a person’s propensity to squander his own money in an irresponsible and extravagant manner, a person is incapable of managing his own affairs competently, the high court may, on application by an interested party declare such a person a prodigal. A curator will then be appointed to manage their affairs on their behalf.
- Only when the court declares a person a prodigal and appoints a curator will that person be forbidden to perform juristic acts without the consent of the curator.
- Only agreements which are solely to the person’s advantage, and which do not render him liable for the discharge of obligations, may be concluded without the assistance of the curator.
- Because a prodigal has the ability to reach consensus, his unassisted contracts are voidable and not void and can therefore be ratified by the curator.
• The limitation on a prodigal’s capacity to act is terminated when the order is set aside by the court

INSOLVENCY

• A person’s capacity to act is not influenced merely by insolvency. However if a person’s estate is sequestrated, a person’s capacity to act will be influenced by certain provisions of the Insolvency Act 24 of 1936
• The sequestration of a person’s estate causes the insolvent estate to vest in the Master and then in the trustee as soon as one is appointed. It is the trustee’s duty to liquidate the estate for distribution among creditors.
• After sequestration the insolvent loses the capacity to act with regard to the assets of the insolvent estate. Any agreement attempting to dispose of such assets would be invalid. This limitation has no effect on assets which are excluded from the insolvent’s estate
• The insolvent may also not conclude agreements which may probably have a detrimental effect on the insolvent estate, without the permission of the trustee. In such instances the insolvent’s capacity is limited. The contract would not automatically be void as it can be ratified by the trustee, but it is voidable at the option of the trustee.
• His capacity to contract will generally not be influenced by the sequestration. The insolvent’s capacity to act will only be influenced to the extent provided for in the Insolvent Act. The insolvent may, for instance, accept any position as employee without the permission of the trustee. The insolvent may, however, not be employed to do business as a general dealer or manufacturer, or have an interest in such a business without the consent of the trustee

CHAPTER 6 THE AGREEMENT MUST BE POSSIBLE

INTRODUCTION

• The requirement that the agreement must be possible comprises two elements, namely legal and physical possibility of execution
LEGAL POSSIBILITY

- Legal possibility requires that the agreement, as well as the rights and duties that are created, must be permitted by the law to constitute a contract. A contract will be unlawful and illegal when its conclusion, or the reason or object of its existence, or rights and duties agreed upon, is/are forbidden by common or statutory law.

Contracts contrary to the common law

- An agreement can be contrary to the common law because it is legally impossible to execute, or because it is against good morals, or against public policy.
- The constitution is generally a reliable indicator of good moral values.
- Where a contractual term violates the constitution, the contract is contrary to public policy and is unenforceable.

Contracts which cannot be legally executed

- It can be said that a contract cannot be legally executed if the rights and duties in terms of the contract cannot be performed in accordance with general legal policies.
- Eg it is impossible to buy and sell something which is not capable of being privately owned eg the sea or moon.

Agreements that are contrary to good morals

- An agreement will be contrary to the good morals of the community if the contract itself, its purpose or the rights and duties agreed upon are contrary to the community’s perception of what is proper and decent.
- Eg contracts which are aimed at providing illicit sexual services.
- The convictions of the community with regard to good moral values differ from one community to another and also change within any particular community with the passage of time.

Agreements that are contrary to public policy

- A contract will be contrary to public policy if the contract itself, its effect or the purpose of its conclusion is harmful to the interests of the public at large. A contract is generally not contrary to public policy merely because its terms offend an individual’s sense of propriety and fairness – it should be unconscionable, immoral or illegal.
- The supreme court of appeal has stipulated that when deciding whether to invalidate a contract on the ground of public policy, the courts have to take into account the founding values of the constitution.
- Harm should be substantially incontestable. Although the concept of public interest refers to the interest of society as a whole, it must be remembered that a society’s interest may in certain circumstances, be served by upholding the interest of a section of the society or even individual interests.
- Public policy also adapts to changing convictions with the passage of time.
- Examples
  - Agreements involving the administration of justice
  - Agreements involving crimes and delicts
  - Agreements affecting the safety of the state.
- Agreements restraining a person’s freedom to participate in legal transactions
- Agreements restraining a person’s freedom to participate in trade
- Gambling contracts

Agreements involving the administration of justice

- Eg someone does not report another person’s crime to the police
- Eg bribing public officials

Agreements involving crimes and delicts

- Eg defraud a creditor or insurance company

Agreements affecting the safety of the state

- An agreement with a person or subject of enemy state eg selling military supplies

Agreements restraining a person’s freedom to participate in legal transactions

- A person is not permitted to undertake that he will refuse to accept an inheritance upon the future death of the testator. Nor may a person be deprived of the freedom of testation by an agreement stipulating that his possessions will be bequeathed in a certain manner. Such agreements in respect of legacies must be distinguished from valid donations between the living.
  Testation: the act or power of disposing of property by testament or will
- Antenuptial contracts are exception. Here parties may agree to the appointment of the other spouse as heir thereby actually providing for maintenance of the survivor

Agreements restraining a person’s freedom to participate in trade

- It often happens that the purchaser of a business enterprise or of a professional practice insists on including in the contract of sale an undertaking by the seller that, for a specified period and/or within a specified geographical area, the seller will not practice his profession or carry on a business in competition with the purchaser
- The second kind of contract in restraint of trade commonly relates to the protection of trade secrets and commercial contracts
- These contracts bring two principles of public policy into conflict. On the one hand it is in the public interest that everyone should be able to participate freely in commerce. On the other hand it is in the public interest that contracts must be executed
- If the limitation on a person’s freedom to trade is lawful in terms of proven common-law principles, it will not transgress the provisions of the constitution and the agreement will be upheld
- One of the factors which the court will take into consideration when determining whether the agreement is contrary to public policy is whether the restraint is reasonable to both parties. The reasonableness of the restraint may hinge on the nature of the restraint (what it prevents), the geographical size of the area in the restraint, the length of time
- The court’s determination can even be influenced by factors which were not present in the minds of the parties when they entered into the agreement
- The court will not allow general or specialized skills and knowledge which belong to an employee to be excluded from the labour market
Contracts in restraint of trade are valid and enforceable. The law permits the restraint if parties freely conclude an agreement to this effect. The court will refuse to enforce the contract only if the circumstances of the case show that enforcement would be contrary to public policy.

Gambling contracts

- A feature of a gambling contract is that one party undertakes to render performance to another if some uncertain future event, which is dependent on chance or luck occurs.
- Lotteries act 57 of 1997 and national gambling act 7 of 2004
  - Gambling and lottery debts incurred in the course of lawful, regulated or licensed gambling or lottery activities are valid and enforceable in the court of law.
- Gambling or gaming debts resulting from unlawful, unregulated agreements remain subject to the common law. These contracts are mostly valid.
- Since such contracts are contrary to public policy, the law will not assist in their enforcement as they are generally regarded as encouraging prodigality and wastefulness. Such a gambling contract is not enforceable in court.
- A gambling contract leads to a natural obligation between the contracting parties, implying that even though the law will not enforce the obligation arising from such a contract, it will still recognise its existence.

Contracts contrary to statutory law

- The courts will hold an agreement to be void if to allow it would defeat the purposes of the legislation.
- A contract contravenes statutory law only if it contemplates a contravention of a prohibition – if the contractual terms as such contravene a prohibition.
- There is no contravention of a prohibition if the agreement is merely concluded. Eg the law forbids the unauthorized trading in liquor without a licence for longer than one month. If a contract of sale is concluded between the owner of a licenced liquor store who wishes to sell his store to a purchaser who, at this stage, does not have a licence, but who has applied for one, the agreement is valid. If the purchaser doesn’t obtain the licence in time and contravenes the prohibition it will not affect the validity of the agreement.
- Sale of weapons and ammunition or of unpolished diamonds by and to someone who does not hold the prescribed licence is prohibited.
- A contract infringing any of the constitutional rights entrenched in the bill of rights may be illegal and unenforceable if it does not satisfy the requirements of the limitation clause – the limitation should be reasonable and justifiable in an open and democratic society.

Consequences of illegality

- An unlawful or illegal contract is, with a few exceptions, void under the common law. None of the parties acquire any enforceable rights and duties from the contract. Certain illegal agreements are not invalidated by their illegality but are merely unenforceable.
- The effect of statutory illegality has to be determined with reference to the wording of the statute. Statutory illegality will void a proposed contract if the legislature makes its intention plain by enacting that an agreement in contravention of a prohibition will be null and void. Such express provisions are not always present and sometimes difficult to determine the effect of the contravention of the agreement.
• When an agreement is void owing to illegality, no party may institute an action against the other to claim a promised performance on the grounds of the unlawful agreement. This rule is expressed in the maxim known as ex turpi causa non oritur action – no action arises from a shameful cause.

• A party who has suffered a loss as result of the contract is not able to rely on the contract to claim damages eg piet sold joe unpolished diamonds, joe paid but piet didn’t deliver, joe cannot take action against piet.

• The unlawfulness of a contact may also affect transactions connected to the contract. Eg kylie and don conclude an agreement to provide illicit sexual activities, they borrow money from dudu for construction – indirect enforcement of an unenforceable contract is never permitted. In this example the construction contract is not an attempt to enforce the first contract as it is separate. The second principle is that a connected contract which helps or encourages the performance of the unlawful contract may also be condemned, depending on whether in the courts view the connected contract is casually connected to the unlawful contract or whether the connection is too remote to have any bearing upon the unlawful act. It has also been held that a tainted act may not be unenforced at the instance of the wrongdoers, but it may be voidable at the instance of the innocent party (dudu).

POSSIBILITY AND CERTAINTY OF PERFORMANCE

• A further requirement for the creation of a contract is that the performance of rights and duties flowing from the agreement must be objectively possible at the time of the conclusion of the contract. Furthermore, as it would be impossible to perform something which has not been determined and is not determinable, it is also required that the performance should be certain or ascertainable.

Objective possibility to perform

• Performance will be impossible if at the moment of concluding the contract it is absolutely impossible to render the performance (the cow sold has already died). No valid contract arises.

• Objective or absolute impossibility implies that it must be totally impossible for anybody to perform in terms of the contract.

• If the performance is just inconvenient or difficult the performance is also not objectively impossible.

• If the parties fail to perform it will amount to breach of contract.

• Impossibility of performance at the conclusion of the contract must be distinguished from performance which is possible at the moment of conclusion but which subsequently becomes impossible, and also from performance which is rendered impossible by the debtor after concluding the contract.

Divisibility of performance

• When determining whether a performance is possible it is the divisibility or indivisibility of the performance. If an indivisible performance is objectively impossible no valid contract arises. If only part of a divisible performance is objectively impossible, a valid contract will arise in respect of the separate part which can still be performed.
Whether a performance is divisible or indivisible depends on the nature of the performance and the intention of the parties. The performance will be indivisible in character if it can be rendered in only one manner, in its entirety (where a person undertakes to deliver a vehicle or house). A performance is divisible in character if it is physically possible to render the performance in separate units (two horses) and if it is the parties’ intention that the performance should be regarded as divisible. If a contract is divisible in the physical sense, there is only one contract even though performance is divisible.

Divisibility is a legal concept. The law cannot convert a physically indivisible performance into a divisible one. The law can do that opposite namely regard a physically divisible performance as indivisible. (set of encyclopedias instead of only one book)

The fact that two contracts are made at the same time and recorded in one document does not mean they should be reduced to one contract.

It has been held that to determine the intention of the parties one should ask whether the contracting parties would have concluded separate contracts in respect of each part of the performance.

Determined and ascertainable performance

- It is impossible to perform under an agreement where the nature of the performance is unclear and ambiguous.
- Whether or not a performance is determined, ascertainable or uncertain may depend on a contracting party’s right, under the contract, to choose or identify a specific performance. The contracting party’s right to choose or identify a specific performance is a contractual obligation based upon the exercise of a choice or formula. Because the manner in which the choice or identification is to be exercised may differ from contact to contract the law has identified various types of obligations which are based on a right of choice.
- The law distinguishes between a facultative obligation, which results in a determined performance and an alternative and generic obligations where the exercise of the selection results in an ascertainable performance.

The determined performance

- Performance will be determined if the parties expressly mention the performance in their agreement eg the identity and purchase price of horse are specified.
- In the case of some simple obligations the debtor is authorized to perform a different specific performance if he chooses. This type of obligation is known as facultative obligation. Eg obligate a debtor (art dealer) to deliver a painting – the “potato eaters” – but may allow the dealer if he chooses to deliver another painting of the same value. In the facultative obligation the performance is determined from the beginning and the creditor is not entitled to claim a different performance – the creditor may only claim “potato eaters” from the art dealer. Performance remains determined and only the debtor may exercise another choice. If performance becomes impossible without any fault on the debtor’s part, the debtor will be relieved of the obligation.

The ascertainable performance

- The performance will be ascertainable if, at the time of concluding the contract, the parties agree on a criterion or a formula to identify the performance or if they agree that a specific person will determine the performance.
• Obligations are ascertainable where the identification of the performance depends upon the exercise of a choice or the application of a formula. Alternative and generic obligations are examples of such instances

The alternative obligation

• Known as performance of choice
• The alternative obligation exists where a party may select the performance which is due from two or more different alternatives, for example either of two horses, or one horse from a specified three. The objects from which the selection may be made, and the quantity that must be set aside, must be established at the time of concluding the contract
• Unless otherwise agreed upon, the debtor has the right of selection. When he has exercised his choice, the performance is no longer determinable, but is indeed determined. The choice is irreversible and the debtor is bound to deliver the chosen performance. Contrary to the position with a facultative obligation, where impossibility of performing the stipulated performance relieves the debtor his obligations, the impossibility of performing one of many alternatives will not relieve the debtor from his obligation, as he will have to choose between the remaining options, which would then be the only options

The generic obligation

• The performance is determined by describing a kind (genus) of commodity in terms of number or measure
• This involves the selection of performance from a specific genus. For a valid determination of the performance the contract must contain an indication of the following:
  o The kind of commodity from which the selection must be made
  o The method of selection (according to number, mass or measure)
  o The party who must make the selection. If there is no agreement about the person who may select, the right of selection resides with the debtor
• By separation of performance, the generic obligation is converted into a simple obligation. The performance is no longer ascertainable, but indeed determined. The individualized object(s) must be delivered
• Subject to the assumption that things of a particular kind do exist, a party to a generic obligation can never rely on impossibility of performance since the kind cannot be extinguished

CHAPTER 7 FORMALITIES

INTRODUCTION

• Final factor to determine if valid contract is if there is compliance with any formalities for that type of contract
• It is outward, visible form in which contract is cast
• Can be stipulated by law or contracting parties
• If there is no provision that certain formalities must be complied with, a contract will arise when parties who have the capacity to act reach consensus on obligations that are physically and legally possible

THE GENERAL RULE: NO FORMALITIES REQUIRED
• Usually no formalities, informal contracts binding and concluded without formalities
• Can be in writing, orally or tacitly
• Certain aspects can be writing while other part orally etc

CONTRACTS WHERE FORMALITIES ARE REQUIRED

Formalities required by law

• To prevent fraud and reduce evidential problems

Contracts for the alienation of land

• Contract of alienation signed by the parties to contract or by agents acting on written instructions
• Land act 68 of 1981
• Alienation of land in contravention with the act will be deemed valid if both parties have performed fully and the land has been transferred to the new owner
• Act provides for special enrichment rules in case of invalidity due to noncompliance

Contracts of suretyship

• General law amendment act 50 of 1956
• A contract of surety is valid in writing and signed by or on behalf of surety

Contracts of donation in terms of which performance is due in the future

• General law amendment act 50 of 1956
• Written document signed either by donor or by someone acting on his written authority
• Authority to be granted in presence of two witnesses

Consumer contracts

• Consumer protection act 68 of 2008
• Written record of each transaction falling within act to be given to consumer
• Record to contain supplier full name/registered business name, vat reg nr
• Franchise agreement to be in writing and signed by or on behalf of the franchisee and in plain and understandable language
• If a consumer doesn’t sign a contract it doesn’t make it invalid
• National credit act 34 of 2005 – does not prescribe writing as requirement for validity of credit agreement. From provisions of act it is clear that a credit agreement has to be in writing and signed by the parties. Agreement must be in the prescribed form and form can be determined by credit provider if there is no prescribed form. Copy to be provided to the consumer in printed or electronic format. Although non compliance with the requirement that it be in writing will constitute a criminal offence by credit provider the credit agreement is still valid.
• Deeds registries act 47 of 1937 – antenuptial contract to be registered in manner and within time mentioned in act. If not the contract is of no force and effect against any person who is not a party to it (will be valid between spouses but not against third parties)

Formalities required by the parties
• Parties sometimes negotiate their contents of contract orally and agree that the final agreement will be in writing
• If parties state that writing is a requirement for the contract the contract will only come into force when placed in writing, if the contract is put into writing as a means of proof only the contract is binding at oral agreement stage

Writing and signing of electronic transactions

• Electronic communications and transactions act 25 of 2002 – data messages are recognised as writing if the document or info is accessible for future use, except in respect of transactions concluded under the following acts:
  o Alienation of immovable property – alienation of land act 68 of 1981
  o Long term lease of immovable property in excess of 20 years – alienation of land act 68 of 1981
  o Execution, retention and prescription of a will or codicil – wills act 7 of 1953
    ▪ Codicil: a supplement to a will, containing an addition, explanation, modification, etc., of something in the will
  o Execution of bill of exchange – bills of exchange act 34 of 1964
• An electronic signature can fulfill the same function in some circumstances. Electronic signature can be anything from typing of a name at the end of a document, a scanned handwritten signature or the use of a complex id tech as long as the intention is to be a signature
• Where a signature is required by law only the use of an advanced electronic signature will comply – this means that the person signing will be identified and verified to ensure that nothing has been altered
• Where a signature is not required by law other methods may be used
• The parties to an electronic transaction may either stipulate a specific type of electronic signature or use an appropriate method which identifies the person and indicates his approval of the info communicated

CHAPTER 8 TERMS OF THE CONTRACT

INTRODUCTION: THE TERM

• A term in a contract is a provision which imposes, on a contracting party, one or more contractual obligations to act in a specific manner or to refrain from performing a specific act, or which qualifies the contractual obligations
• There are different ways of incorporating terms into a contract, namely expressly, tacitly or by implication

Express terms

• A term is articulated if it is expressed in so many words, whether in writing or orally
• A consumer contract may not contain unfair, unjust or unreasonable terms and conditions
• The consumer protection act provides that if a consumer contract contains a term or condition which 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 condition

Tacit terms
• Based on the parties’ true but unexpressed intention
• An imputed tacit term is only read into a contract if both the parties overlooked or failed to anticipate an even in question – it is based on their assumed intent in respect of a given situation they had not bargained for
• A tacit term is inferred by the court from the express terms and surrounding circumstances, which can include the recognition of terms customarily included or observed in a specific trade and which were known to both parties (trade usages)
• A tacit term is read into a contract only if it is reasonable and if it is necessary in a business sense for the proper functioning of the contract.
• The test to determine whether a tacit term forms part of the contract is to determine what the parties would have answered if, at the time of concluding the contract, someone were to have asked them what the position in respect of a specific situation or problem would be. If both parties were to answer that the position is as expounded in the alleged tacit term, the court would read the tacit term into the contract.

Implied terms
• Not expressed in words
• When a contract has been classified as a particular type of contract, the law implies certain consequences of the contract
• Terms which are thus implied by law are usually referred to as the naturalia of that particular type of contract
• Terms can also be implied by trade usage if it is so universal and well-known that a party’s knowledge and intention is bound by it can be presumed

ESSENTIALIA, NATURALIA AND INCIDENTALIA

• For the purpose of providing a guideline for the analysis of different types of contracts
  Essentialia
  • Terms which are essential for the classification of a contract as belonging to a particular class or category of contract. Eg two essentialia of a contract of sale are that the seller binds himself to deliver something to the buyer, and the buyer binds himself to pay a sum of money in exchange for the asset
  • Such identification is important as the category of the contract determines the naturalia of a particular contract

  Naturalia
  • Terms which the law attaches to every contract of a particular class
  • Helps to determine the rights and duties of contracting parties and the effects and consequences of their contracts
  • May be excluded by agreement between the parties
• In some instances the law prohibits or limits the right of parties to exclude the warranty against latent defects

Incidentalia

• Special requirements or additional terms to be inserted
• Eg allowances of a certain time for payment of money or for the paying thereof in installments

THE CONDITION

• In common parlance the word condition is often used as term
• A condition is a particular kind of term and does not include all the terms generally found in contracts
• A contractual term which renders the operation (coming into effect or termination of the contractual obligations) and the consequences of the contract dependent on the occurrence or non-occurrence of a specific uncertain future event eg loan approval
• The purchase is subject to a condition and the contract becomes operative only if the condition is fulfilled.
• Since only future events can be uncertain the condition refers to a future event
• Conditions can be classified into various categories – suspensive, resolutive

Suspensive condition

• A contractual term which suspends the operation of the contractual obligations in terms of the contract until the condition has been fulfilled
• Upon conclusion of an agreement containing a suspensive condition a valid contract arises and a binding contractual relationship exists from which the parties cannot withdraw
• Although there is an existing binding contractual relationship, the operation of contractual rights and duties are suspended until the condition has been fulfilled
• They can be ceded, transferred upon death, acknowledged in event of insolvency
• Creditor can be protected by interdict
• If the specified uncertain future even does not take place the condition is not fulfilled and the contractual obligations do not become operative but are terminated

The resolutive condition

• The contractual rights and duties become enforceable on conclusion of the contract and are dissolved when the condition is fulfilled
• Eg alan lets his farm to bill. The parties agree that their contract will be dissolved if alan marries. The contractual obligations become operative when the contract is concluded but when alan marries the fulfillment of the contract causes the contract to be dissolved and terminated
• If parties have already performed prior to the fulfillment of the condition, and the contract is therefore dissolved after performance has been rendered, each party usually has to return whatever he received in terms of the contract
• However complete restitution of performance subsequent to the fulfillment of the resolutive condition is not required in all types of contract eg don’t claim rent back

THE TIME CLAUSE
• Brought into operation by the reaching of a certain and determined or ascertainable time which has been agreed upon
• Determines a specific time when or the period within which the contract will either become operative or be dissolved
• Must be certain (e.g., 25 Dec 2017) or ascertainable/determinable (death of insurance policy holder)
• Time clauses can be suspensive or resolutive

Suspensive time clause

• Duty to perform is postponed until a determined or ascertainable moment has arrived
• Contract comes into being when it is concluded and parties bound to obligations
• Rendering of performance is postponed until moment has arrived (time) or the specific period ends
• Enforceability of rights and duties postponed until determined/ascertainable moment arrives (e.g., death)

The resolutive time clause

• Obligations will have effect only until the arrival of a certain moment or until expiry of a certain period of time
• Contract comes into being which it is concluded and obligations immediately operative and enforceable
• Obligations extinguished when moment arrives
• Eg lease of house – time – end at the end of lease, rent stops, move out

THE SUPPOSITION

• Term which renders the existence of the contract dependent on an event which has taken place in the past, or on a state of affairs which existed or exists at the time of concluding the contract. Contracting parties will include a supposition when they are uncertain whether a specific situation exists or existed, and they only wish to contract if it, in fact, exists or existed. If a contract rests on a supposition, contractual obligations come into being only if what is supposed indeed exists or existed
• Eg only purchase the property if it has a sea view – based on existing state

THE WARRANTY

• Contracting party accepts absolute responsibility for proper performance relating to the absence of defects in the warrantor’s product or service, or to the possibility that the warrantor is able to render the performance, or to the quality and standard of the warrantor’s product or service
• Eg Koos guarantees that the fridge he is selling to Burt will not fade within 3 years and if it does he is in breach of contract
• Certain warranties can be operational by law – form part of certain contracts unless expressly excluded by contracting parties e.g., latent defects and eviction in contracts of sale
• Innocent party will be able to make use of legal remedies available for breach of contract

THE MODUS
• Burdens a contracting party’s right to the performance made to him in terms of the contract. Can be to perform towards a third party, or to do something, or to refrain from doing something. It will always relate to something that has to happen in the future.
• Can claim the property immediately (sale or donation) but if the modus is not executed (e.g., convert to nursery school) it is breach of contract.

THE CANCELLATION CLAUSE

• Can cancel the contract if the other party is in breach of contract.
• If the other party is in breach of contract, it is unnecessary to send a letter of demand or a notice warning the other party of the intended cancellation of the contract.

THE PENALTY CLAUSE

General

• Breach of contract – certain remedies – claim execution of contract, cancel contract, and/or claim damages.
• These remedies can be insufficient to the parties thus they include a penalty clause as further penalty of breaching.
• Usually a payment of sum of money.
• Can also consist of delivering something or rendering another performance.
• Conventional penalties act 15 of 1962:
  o Penalty clause enforceable subject to courts discretion.
  o Amount which court considers reasonable in the circumstances.
  o Court can act of its own initiative for the amount or based on proof provided by debtor stating that the amount is exorbitant.
• Benefits of clause:
  o Recoverable merely on ground of breach of contract by debtor.
  o Extent of penalty clause is predetermined.
• No need for creditor to prove damages.
• Creditor can either claim damages or the penalty, not both.
• If the contract does not stipulate that the creditor has a choice between penalties or damages then penalty is the only option.

The national credit act and penalty clauses

• Three types of contract or scenario:
  o Those contracts which are governed by the NCA 34 of 2005 and conventional penalties act
    ▪ These two acts can be in conflict.
    ▪ NCA will take precedence in a conflict.
  o Those contracts which are governed by the conventional penalties act only.
  o Those contracts which are governed neither by the NCA nor the conventional penalties act
    ▪ Clause will be determined by common law.

THE FORFEITURE CLAUSE
• A person who is entitled to cancel or rescind a contract in certain specified circumstances will normally be entitled to restitution as well
• Entitles party who cancels contract to claim the return of everything he has already performed in the contract
• In certain circumstances one or both of them can lose the right to restitution
• Party in breach can forfeit all performances already rendered in contract
• Subject to reduction at discretion of court

THE ROUWGELD CLAUSE (ROUWKOOP CLAUSE)

• Not connected to breach of contract
• Not subject to Conventional Penalties Act
• Payment out of the contract (buyout)
• Mpho sells his house to Nonzi and the contract contains a rouwkoop clause which provides that, should Nonzi withdraw from the contract, Mpho may retain, as rouwkoop money the R5000 deposit Nonzi paid when concluding the contract. As soon as Nonzi withdraws from the contract the rouwkoop clauses comes into operation and she forfeits the amount of the deposit. Clause entitles Nonzi to cancel the contract. No further consequences, adverse to Nonzi, flow from her dissolving the contract. Because she acts in terms of the contract her withdrawal does not amount to breach of contract. Mpho can claim neither specific performance nor damages

THE ENTRENCHMENT CLAUSE

• Agreement may be altered only by means of a written amendment

CHAPTER 10 BREACH OF CONTRACT

INTRODUCTION

• Forms of breach of contract:
  o Default by the debtor
  o Default by the creditor
  o Positive malperformance
  o Repudiation
  o Prevention of performance
• Debtor is the one who must perform the obligation and creditor is entitled to the obligation
• If the contract has performance for both parties each will be debtor and creditor

DEFAULT OF THE DEBTOR

• Also referred to as mora debitoris
• In mora – in default
There are two requirements that have to be met
  o Performance must be delayed
  o It is obvious that the performance must already be claimable, or there can be no question of late performance
    ▪ Specific date or time: if fail to perform automatically default – date and time must be specified in contract
      Called mora ex re
    ▪ No exact date: define a reasonable time for debtor to perform – in default if fail to perform by that date
      Called mora ex persona
      Date needs to be demanded
  
If legal justification for delay debtor will not be in breach eg bad fortune or circumstances beyond his control, but if the debtor provided a guarantee for service then it will be a breach

Consequences of debtor’s default

  Remedies for breach of contract
  If debtor is in default he cannot claim impossibility of performance to be relieved from obligations

DEFAULT OF THE CREDITOR

  Also called mora creditoris
  Creditor causes debtor’s performance to be delayed
  This is when the creditor’s co-operation is necessary for the debtor to perform

Requirements

  The performance must be dischargeable. The performance owing to the creditor must be dischargeable in terms of an existing and valid obligation and must be physically and legally capable of being discharged. Performance will not be discharged until it is time for the performance if, by the relevant time clause, the parties intend that performance should not occur before a particular date
  
The debtor must tender performance. The debtor must offer proper performance as specified in the contract and must call upon the creditor to co-operate. If the tendered performance is defective, the creditor may refuse to accept it. The creditor’s refusal will not constitute breach of contract
  
The creditor must fail to give his co-operation and thereby delay performance. If an exact date has been set for the creditor’s co-operation, the creditor will automatically be in default if he does not co-operate on that day. If no specified date for performance or co-operation has been agreed upon, the debtor has to call upon the creditor to co-operate and fix a date for such co-operation. The creditor will be in mora ex persona if he does not co-operate on that date determined in the demand. As in the case of more debitoris the performance should merely be delayed and it must still be possible for the debtor to perform at a later stage. If at the time which performance should take place is an integral part of the performance, the creditors failure to accept performance at the agreed time will, if the other requirements are present, amount to prevention of performance by the creditor.

Consequences of creditor’s default
• The debtor's duty of care is diminished and only responsible for intentional and gross negligence loss
• In the case of reciprocal agreements, the debtor remains entitled to performance entitled to him and debtor remains liable to perform as well
• Should performance become impossible (other than through intention or gross negligence of the debtor), while the creditor is in mora, the debtor is released from the obligation to perform. However, the creditor remains liable for the counter performance. Eg creditor in terms of building contract in mora in respect of taking delivery of the completed building and the building is destroyed by an earthquake, the creditor remains liable for contract price
• If the debtor is in mora, it is removed by the subsequent default of the creditor as cant have two forms of breach of contract alongside each other. Creditor can still claim damages from debtor from first breach. Possible for both to breach at the same time eg delivery when person not available to accept goods

POSITIVE MALPERFORMANCE

• Debtor commits act contrary to terms of contract
• Eg debtor tenders defective or improper performance
• Eg debtor does something he may not do in terms of the agreement

REPUDIATION

• Any behavior by a party to a contract indicating he may not honour the obligations under the contract
• Innocent party entitled to remedies of breach of contract
• Innocent party can wait for party to commit another form of breach or default before acting
• Test is an objective one in which the conduct of the repudiating party is assessed against the background info available to innocent party
• Examples of repudiation
  o Party tries to withdraw without justification
  o Party gives notice that he cannot or will not perform
  o Party offers inadequate or defective performance as proper performance

PREVENTION OF PERFORMANCE

Prevention of performance by the debtor

• He renders his own performance impossible
• Debtor not released from obligations
• He must pay damages as he can no longer perform

Prevention of performance by the creditor

• Creditor renders debtor's performance impossible and can never be rendered eg creditor has car accident before debtor able to service car
• Debtor becomes discharged from obligations
• Debtor still entitled to creditors performance, but the debtor must bring into account any expenses which have been saved by the reason of the debtor no longer being obliged to
CHAPTER 11 REMEDIES FOR BREACH OF CONTRACT

INTRODUCTION

- Legal remedies at the disposal of the innocent party are execution of the contract, cancellation of the contract and damages
- Availability of remedies is determined by nature and seriousness of breach and terms of contract

EXECUTION OF THE CONTRACT

- Most obvious remedy
- Three possible orders:
  - An order for specific performance
  - An order for reduced performance
  - A prohibitory interdict

Orders for specific performance

- Render performance contracted to
- Not applicable when estate sequestrated
- Not applicable is performance is now impossible
• Grounds on which the court will refuse an order is where an order would affect the defendant unreasonably harshly, where the order would comprise an injustice or would be inequitable under the circumstances
• Court can order one or some of the obligations and refuse other terms and obligations within contract

Orders for reduced performance

• If performance is defective or incomplete
• Exception non adimpti contractus – one claims against the other but the other party needs to render his performance while the first party withholds performance till the other performs
  o The exception – the defence that the plaintiff (party claiming performance) has not fulfilled his part of contract – is available only where performance by both parties must occur simultaneously, or where the plaintiff must perform before the defendant. It is not available to the defendant where the plaintiff has cancelled the contract because of the defendant’s breach of contract and where the plaintiff is claiming damages instead of performance. It’s also not available where the plaintiff does not have to perform (eg donation)
• Where fairness requires it court can order defendant to render reduced counter-performance even when plaintiff provided defective or incomplete performance
• Court will grant plaintiff order for reduced performance if he proved the following:
  o Defendant is using the defective performance
  o Circumstances are such that it would be equitable for the court to exercise its discretion in favour of the granting of such an order
  o What the reduced contract price should be, that is, the contract price less the amount required to bring the performance up to the required standard

Prohibitory interdicts

• Should a party do something he may not do in terms of the contract or threaten to act in this manner, the other party may apply for an interdict to end or prevent such conduct

CANCELLATION OF THE CONTRACT

• Abnormal remedy
• If there is a cancellation clause it will state circumstances it is available for
• If there is no cancellation clause the innocent party is entitled to cancel contract only if breach is serious

Cancellation and default of the debtor

• Specific date for performance (mora ex re) and tacit term that timely performance is essential
  o Date and time is essential part of the contract
  o Eg goods subject to price fluctuations
• Notice of intention to cancel
  o The creditor’s notice of intention to cancel must allow the debtor a reasonable time within which to perform and must state clearly that the creditor will lay claim to a right of cancellation if the debtor fails to perform by stipulated date. If no date for performance is stipulated and where the creditor, therefore, first has to demand
performance from the debtor in order to place him in mora ex persona it is permissible for the creditor to combine the demand with a notice or intention to cancel, thereby not only fixing a date for performance but also acquiring a right of cancellation. Where the debtor is already in mora ex re, but time is not of the essence to the contract, the demand is only used to acquire a right of cancellation

- **Cancellation clause**
  - If parties have agreed that the creditor can cancel the contract in the event of the debtor’s default, the creditor will be able to cancel the contract even if the default is not a material breach of contract

**Cancellation and default of the creditor**

The innocent party will be entitled to cancel the contract for mora creditoris under the same circumstances as those for mora debitoris, namely:

- **Specific date for performance (mora ex re) and tacit term that timely performance is essential**
  - Essential that creditor co-operates to allow timely performance by the debtor
- **Notice of intention to cancel**
  - The debtor notifies the creditor that he will cancel the contract if the creditor does not co-operate to receive the debtor’s performance
- **Cancellation clause**
  - If the parties have agreed that the debtor can cancel the contract in the event of the creditor’s default, the debtor will be able to cancel the contract even if the default is not a material breach

**Cancellation and defective performance (positive malperformance)**

- **Material breach of contract**
  - Where the defect is of such a serious nature that the creditor cannot reasonably be expected to abide by the contract, the creditor may cancel the contract.
- **Cancellation clause**
  - If parties agreed on clause the creditor will be able to cancel the contract in the agreed circumstances

**Cancellation and repudiation of the contract**

- **Material repudiation**
  - The innocent party remains entitled to rather seek order for execution of contract
- **Cancellation clause**
  - If agreed on cancellation clause innocent party able to cancel

**Cancellation and prevention of performance**

- **Prevention of performance by the debtor entitles the creditor to cancellation, since execution of the contract is no longer possible. However, if the creditor has prevented the performance of the debtor, the debtor is regarded as having performed and can either insist on performance by the creditor or claim cancellation**

The act of cancellation
• Choose between cancelling and enforcing contract
• Right of cancellation must be exercised within reasonable time after innocent party has become aware of other party’s breach
• If not exercised within reasonable time innocent party must explain why
• Can give guilty party opportunity to rectify defective performance
• Notice of cancellation can be oral or written and clear and unequivocal
• Can be notified via third party acting independently
• A threat to cancel is not a cancellation
• Must comply with cancellation clause requirements as per contract

The consequences of cancellation

• Termination of obligations
• If neither has performed both are relieved of performance
• If one has performed the performance to be returned
• If restitution has become impossible the party who is cancelling the contract is relieved of his duty to return the performance which has been received, as long as the impossibility is not due to his fault. If restitution is partially possible, the party has to return what is left

Restitution: reparation made by giving an equivalent or compensation for loss, damage, or injury caused; indemnification
• If it is impossible for the guilty party to return the innocent party’s performance, the innocent party need also not return the guilty party’s performance
• Where a contract involving continuing obligations is cancelled, the rights that have accrued prior to cancellation are not affected

DAMAGES

• Where one party suffers a loss due to the other party
• Innocent party placed into position he would have been in if contract had been carried out
• Can claim damages whether he has cancelled contract or claimed execution

Patrimonial loss

• Breach does not constitute a loss to the other party in all cases
• Breach must have adversely affected the estate of innocent party
• Two financial positions:
  o The position the plaintiff would have been in if the contract had been carried out and breach of contract had not occurred
  o The plaintiff’s actual financial positions
  o The difference (first exceed the second) constitutes the plaintiff’s loss
• Positive interest: claim profit
• Negative interest: claim for unlawful conduct eg duress

Casual connection between breach of contract and loss

• Loss is caused by breach of contract
• If loss caused by other factors other than breach, those factors will still be included in claim
Eg. Thandi negligently writes cheque as R10 in a way it can be altered, person going to the bank has altered the cheque to R1000, bank doesn’t see the alteration and pays out the R1000, Thandi claims R990 from the bank for loss

Foreseeable loss

The test for determining whether damages flow naturally from the breach is whether, having regard to the subject matter and terms of the contract, the harm that was suffered can be said to have been reasonably foreseeable as a realistic possibility eg buy a watch and it works for a while and then stops and when it stops you miss the train to an important meeting that could generate a lot of money, can’t blame the person who sold you the watch

The duty to mitigate damages

The defendant will not be held liable for loss arising after breach of contract which the injured party could have limited by exercising reasonable care

The proof of loss and the calculation of damages

When the contract is a contract of sale the damage is difference between contract price and market value of commodity at time and place performance should have occurred
Failure to discharge a money debt – interest is awarded as damages calculated from due date of payment
Defective execution of work – cost of repair, or amount costs for someone else to do the work is the damages

CHAPTER 12 TRANSFER AND TERMINATION OF PERSONAL RIGHTS

INTRODUCTION
Can be terminated in various ways but only transferred by one way namely cession

CESSION

Person transferring right is called cendent
Person to whom right is transferred is called cessionary
An agreement by which a personal right is transferred to another creditor
The debtor merely performs to new creditor
Parties to contract or law can prohibit ceding
Right can only be ceded in its entirety, not part of it
Does not have to be documented formally

The consequences of a cession

The right now forms part of the patrimony of the cessionary and not that of the cedent
The cessionary alone has the right to collect the debt
The cedent can only cede his claim to one person, after that the cessionary is the one who can further cede it
If debtor pays original debtor without knowledge of the ceding he is released from obligation
The claim is transmitted to the cessionary in its entirety together with all benefits and privileges such as interest.
Cessionary receives the disadvantages as well e.g. claim of duress.

**DISCHARGE**

- Performance of the obligation undertaken is called discharge (fulfillment) and is the natural way in which a contractual relationship is terminated.
- Can be bilateral or unilateral juristic act:
  - Bilateral: debtor requires creditor’s co-operation for fulfillment
  - Unilateral: debtor doesn’t require co-operation
- Bilateral contract is discharged in full only when both parties have complied with their obligations.
- Performance can be undertaken by third party other than debtor.
- Performance can be tendered to a third party other than the creditor, if agreed by parties.
- If a lump sum payment is made for a few debts and debtor does not specify for which debts these rules apply:
  - Interest is paid before capital
  - Due debts are paid before debts which have not fallen due
  - Onerous debts (secured by bond) have preference over non-onerous debts
  - Old debts have preference over new debts
  - If rules are not conclusive then payment is proportionately allocated between debts.

**RESCISSION AND CANCELLATION**

- Rescission: withdrawing from a contract due to reasons other than breach.
- Cancellation: withdrawal from contract due to breach.
- In case of voidable contracts innocent party has the choice between enforcing or rescission.
- Cancellations is a remedy for breach at choice of innocent party.

**AGREEMENT**

- Can have clause in contract that parties can agree to cancel the contract.
- Usually for contracts with continuous obligations and unspecified duration.
- Agreements that parties could enter into for purpose of termination are release, novation and settlement.

**Release**

- Also called waiver.
- Can be concluded expressly or tacitly.
- Must have consensus.
- The creditor releases the debtor from his obligation and if often accompanied by intention to donate on part of creditor or an exchange between debtor and creditor.

**Novation**
• Agreement between debtor and creditor where old obligation is terminated and new one created in its place
• The effect of novation is to extinguish the original debt and therefore to extinguish accessory obligations such as suretyship, to extinguish security, to bring the running of interest to an end, and to purge default.
• If the novation is void, the old agreement remains valid

Delegation
• This is where a new party is introduced, either the debtor or creditor is replaced
• New obligations with the replaced person and the one leaving the contract’s obligations are extinguished

Settlement (transaction)
• Also called compromise
• Where parties settle a dispute between them about an actual or supposed obligation
• This is where there is a dispute regarding the debt eg amount
• New agreement made in compromise of the old agreement
• If the debtor does not perform according to the terms of the settlement, the creditor may fall back on the original debt (if it does exist), only where it was a term of the settlement that the creditor would have this right

MERGER (confusio)
• One person becomes debtor and creditor of the same obligation
• Debt is thus extinguished
• Eg lesee buys the leased property, or debtor and creditor conclude marriage in community of property

SET-OFF
Set off is the extinguishing of debts owed reciprocally by two parties.

Requirements:
• The debts must be similar in nature eg money or goods
• The debts must be liquidated. Exact monetary value is certain and ascertained.
• The debts must be claimable. Cannot be set off against debt not yet claimable. Unconditional debt cannot be set off against conditional debt
• The debts must be between the same persons. Eg cannot be personal versus executor of estate

IMPOSSIBILITY OF PERFORMANCE SUPERVENING AFTER CONCLUSION OF THE CONTRACT
• This is when after concluding the contract performance becomes objectively impossible
• Must not be due to fault of a party and must be beyond their control
• At the time of conclusion of contract performance was possible thus a contract came into being. When supervening impossibility of performance arises the contract is terminated
• It is important to establish at which stage the performance become impossible and if it was due to fault of parties

Consequences

• Extinguishes obligations
• Where the debtor has accepted the risk of supervening impossibility, the obligation is note terminated

Objective and subjective impossibility of performance

• Subjective impossibility: specific debtor’s inability to perform does not relive him of liability eg it is expensive, or difficult
• Objective: not the fault of the debtor, terminates obligation and counter obligation

Temporary and partial impossibility of performance

• Partially impossible: debtor is released only proportionately and counter performance reduced proportionately
• If indivisible performance becomes partially impossible it will have same consequence as total impossibility unless creditor prepared to accept partial performance. The counter performance is reduced in proportion to the reduced value of the accepted performance
• The same principle applies where performance becomes temporarily impossible, because this too is a case of partial impossibility. If example, an employee contracts for one year and due to illness is unable to work for two months of that year, the employees performance is temporarily impossible. The obligation is not terminated by illness. If the illness is such a long duration that the employer cannot reasonably be expected to remain in uncertainty any longer the contract may be terminated

PRESCRIPTION

Nature of prescription

• Acquisitive prescription: acquiring rights
• Extinctive prescription: released from obligations
• Date starts when debt is due
• Where the debtor willfully prevents the creditor from gaining knowledge of the existence of the debtor, prescription will not begin to run until the creditor becomes aware of the existence of the debt. This rule does not apply to debts arising from agreement
• A debt is not deemed claimable until the creditor has knowledge of the identity of the debtor as well as the facts resulting in the debt
• The prescription act 68 of 1969 provides that prescription can be delayed for the following reasons:
  o The debtor is outside of the republic
  o The debtor and creditor are married to each other
  o The creditor is a minor, insane, a person under curatorship, or prevented by superior force from interrupting the running the prescription
  o The creditor and debtor are partners and the debt arose from the partnership
  o The creditor is a juristic person and the debtor is a member of the governing body of such juristic person
A circumstance which delays the completion of prescription will have the effect of suspending the running of prescription provided that the circumstances has ceased to exist less than a year before the due date for completion of prescription.

Interruption of prescription is by acknowledgement of liability and service of process: The running of prescription shall be deemed to not have been interrupted if the creditor does not successfully prosecute his claim under the process in question to final judgment, or if the creditor does prosecute his claim but abandons the judgment or the judgment is set aside. The supreme court of appeal recently confirmed that an interruption or delay in running the prescription in favour of a principle debtor interrupts or delays the running of prescription in favour of the surety.

Prescription periods

- Thirty years:
  - Debt secured by mortage bond
  - A judgment debt (surety)
  - A debt for tax or levy under law
  - Debt owed to state
    - Profit, royalty, right to minerals or substances

- Fifteen years:
  - Debt owed to state
    - Advance or loan of money, sale or lease of land by state to debtor (unless longer period applies)

- Six years:
  - Debt from bill of exchange, negotiable instrument, or notarial contract (unless longer period applies)

- Save where an act of parliament provides otherwise, three years in respect of any other debt

**SEQUESTRATION AND SUBSEQUENT REHABILITATION**

- When a debtor is unable to pay one or more of his debts creditor can apply to high court for sequestration of debtor
- After sequestration the debtor’s property is transferred to trustee, who sells the property and divides proceeds among creditors
- A sequestration order does not terminate contracts concluded by the insolvent prior to the insolvency. Some contracts are terminated eg a contract of mandate comes to an end when the estate of the mandator is sequestrated. It a contract has not been terminated by sequestration, any remaining obligations of the insolvent will be extinguished when the sequestration is later terminated by rehabilitation, unless the obligation arose from fraude on the part of the insolvent.
CHAPTER 13 THE CONTRACT OF SALE

INTRODUCTION

- For contracts to be classified as specified or named it must contain certain additional characteristics or requirements
- A contract of sale can be defined as a contract in which one party (seller) undertakes to deliver the merx to another party (buyer) and the buyer, in exchange for this, agrees to pay the seller a certain sum of money (purchase price)
- Essentialia of contract of sale
  - Consensus of purchase price
  - Consensus of thing sold

The object of the sale (merx)

- Must be definite or ascertainable
- Definite: mentioned by name eg the horse Morning Star
- Ascertainable: number, weight or measure mentioned with the type of thing
- Must be lawful eg not drugs
- Must form part of someone’s patrimony
- Can include claims, servitudes, patents

The purchase price

- Must be definite or ascertainable
- Must agree on amount or have method to determine the unit price
- Even when object doesn’t contain price tag in shop it is still agreed upon if purchased
- Price must be in money
- Price must be fair, reasonable and just

THE RIGHTS AND DUTIES OF THE PURCHASER AND THE SELLER

The classification of a contract as a contract of sale has important practical legal consequences:

- It determines legal consequences that cannot be excluded by the parties namely payment of purchase price and delivery of merx
- It determines the legal position of the parties in respect of certain matters that were not arranged by them.

The common law rights of the purchaser

- The purchaser is entitled to delivery of the merx
  - Does not mean physically delivering, means made available
- The purchaser is entitled to preservation of the merx during delivery
  - Duty of the seller is to preserve the merx until it is delivered to the purchaser. If the merx is damaged or destroyed owing to negligence or intentional conduct of the seller, he will be liable. Should the purchaser fail to take delivery of the merx the sell will only be liable for gross negligence or intent.
    If the merx is damaged or destroyed while the seller is in mora the seller bears the risk, except for misfortunes, which in any case would have affected the merx, even if he had delivered on time
- The purchaser is entitled to be protected by the seller against eviction
  - In our law it is not an automatic consequence of a contract of sale that the seller has to transfer ownership in the merx to the purchaser. The seller merely undertakes that the purchaser will not be disturbed in his enjoyment and possession of the merx by another person with a better title to the merx than that of the purchaser. This undertaking is implied by our law in every contract of sale. However, as a general rule nothing prevents the parties from excluding this consequence.
    The undertaking so implied by our common law is known as the seller’s warranty against eviction. It entails that where the purchaser is disturbed in his possession and enjoyment of the merx by someone claiming legal title to it, it is the seller’s duty to come to the purchaser’s assistance after being notified by the purchaser. Should the seller fail to do so, the purchaser must nonetheless put up a proper and competent defence against the third party’s claim.
    If the purchaser has notified the seller, but the seller fails to intercede, and the third party succeeds with the claim despite the fact that the purchaser has vigorously resisted it, the seller will be deemed to have breached the warranty against eviction.
    Should the purchaser fail to put up a proper and competent defence, and it turns out that the third party’s claim was contestable, the purchaser loses his right to recourse against the seller.
If the purchaser has surrendered to the third party’s claim, he will still have a right to recourse against the seller if it can be proved that the third party’s claim was incontestable. The purchaser can decide either to enforce the contract and claim damages or to cancel the contract and claim the return of the purchase price and damages.

- The purchaser is entitled to a merx free from latent defects
  - An implied warranty against latent defects is read into every contract of sale unless it has been excluded by parties. This warranty entitles the purchaser to certain legal remedies, should the merx contain a latent defect. This seller is liable for latent defects even when he was unaware of the defect and did not act in bad faith.

A purchaser who wishes to institute a claim because of latent defects in the merx must prove that:

- There is or was a material defect in the merx. This renders it completely useless or less useful than the purpose for which it was bought
- The defect was present when the contract of sale was concluded
- The defect was latent. Defects are regarded as latent if the purchaser could not have readily noticed it during a reasonable inspection of the merx at the time of the sale
- The purchaser was unaware of the defect at the time of conclusion of the contract

The remedies for breach of the implied warranty against latent defects

- The actio redhibitoria
  - If the latent defect is so material that had he known about the defect, the purchaser would never have brought the article, or if the defect renders the article useless the purchaser may claim the following:
    - Return of the purchase price
    - Interest
    - Repayment of all expenses incurred regarding the receipt and preservation of the merx
    - Reimbursement for improvements effected by him to the merx
  - The purchaser must return the merx with all that has accrued to it
  - If the merx is destroyed as a result of the defect or for some or other reason through no fault of the purchaser, the inability to return the merx will not prevent the purchaser from enforcing this remedy
  - In the case of a serious defect, the purchaser is not forced to use this remedy and may use actio quanti minoris

- The actio quanti minoris
  - If the defect is not so material that the purchaser would have refused to buy the article if he had known about the defect, or if the defect does not render the article completely useless, but there is still a defect, the purchaser will have to be satisfied with keeping the merx and claiming a reduction of the purchase price. The reduction is calculated by deducting the value of the defective merx from the purchase price

- Further availability of aedilitian actions (remedy)
These two remedies can be used in the following circumstances in exceptional circumstances:
  o When a contractual warranty against latent defects is breached
  o When a contractual warranty which warrants certain good characteristics in the merx is breached
  o Where the seller intentionally conceals defects in the merx
  o Where during negotiations the seller makes a material statement about characteristics of the merx which do not exist

As is sales
- Warranty can be excluded by parties
- If seller knew about defect and conceals it purchaser will have case for negligent misrepresentation

The action empti
- This is a remedy purchaser uses to enforce rights against seller in the following circumstances:
  o Defective performance
  o Misrepresentation
  o Manufacturers liability
  o Breach of the warranty against eviction

The common-law rights of the seller
- Payment of purchase price

THE TRANSFER OF OWNERSHIP

Four requirements:
- The transferor must deliver the thing to the transferee
- Both parties must have the intention that ownership should pass from the transferor to the transferee
- The transferor must be in the position to transfer ownership
- In the case of contracts of sale, the purchase price must be paid or security given for its payment or credit must have been granted. If it is a cash sale, ownership will pass only once the purchase price is paid or security given. In the case of a credit sale, ownership will pass upon delivery

Delivery forms
- Actual delivery: physical handing over of thing
- Symbolic delivery: eg keys, not the actual thing but way of accessing it
- Delivery with the long hand: pointing out and made available eg cattle
- Delivery with the short hand: purchaser already in possession of the thing
- Constitutum possessorium: seller retains possession on behalf of purchaser
THE PASSING OF RISK

- Contract of sale risk that the risk of accidental damage to, or the loss of the thing, as well as the right to benefit or profit passes from the seller to the purchaser as soon as the contract is perfecta: even before purchaser becomes owner.
- This can be excluded by contract by agreeing on another risk arrangement
- The contract is perfecta as soon as the requirements are met:
  - The merc must be definite or identified
  - The purchase price must be ascertained or ascertainable through simple calculation
  - If the contract contains a suspensive condition it must already have been fulfilled
- If something happens to merc before delivery, purchaser still pays purchase price even without receiving object

STATUTORY PROTECTION OF PURCHASERS

- Important terms of contract put in writing

The alienation of land act 68 of 1981

- If seller becomes insolvent the money has to be refunded (in case of purchasing stands)
- When purchasing in installments purchaser has right to claim transfer of land in his name after 50% is paid
- Purchaser has right to revoke an offer to purchase land or to terminate a deed of alienation of land – requirements:
  - The purchaser or prospective purchaser must be a natural person
  - The purchase price must not exceed R250 000
  - The land involved must be used or intended to be used mainly for residential purposes, not agricultural
- If requirements are present and doesn’t fall into one of the exceptions the purchaser may terminate or revoke offer within 5 business days after signing it. Must be delivered to seller a signed notice.
- Any amounts paid by purchaser must be refunded within 10 days of delivery of notice
- Not available in the following instances:
  - Where the land is purchased at a publically advertised auction
  - Where the seller and purchaser have previously entered into deed of alienation of the same land on substantially the same terms
  - Where the purchaser or prospective purchaser has reserved the right to nominate or appoint another person to take over his rights and obligations
  - Where the purchaser is exercising an option which was open for at least 5 days

Consequences of void or terminated deeds of alienation

- Purchaser may recover from seller
  - Interest at prescribed rate on any payment made
  - Reasonable compensation for necessary expenditure incurred for preservation or improvement of property
  - Reasonable compensation for any improvement effected by him with consent of seller, if the market value was enhanced by improvement
- Seller may recover from purchaser
Reasonable compensation for occupation, use and enjoyment of land
Compensation for any damage caused

The national credit act 34 of 2005

Applicable to instalment agreements in terms of movable property sold to consumer meeting the following criteria:

- Whole or part of price is deferred and payable by instalments
- Possession and use of property is transferred to consumer
- Ownership of property is reserved and passes when agreement is fully complied with, or ownership passes immediately subject to the right of the credit provider to repossess the goods should the consumer fail to satisfy his financial obligations under agreement
- Interest, fees, other charges are payable to credit provider in respect of the agreement or deferred amount

ADDITIONAL SECTION TO BE STUDIED

CHAPTER 16 CREDIT AGREEMENTS

THE NATIONAL CREDIT ACT 34 OF 2005

General

- Essential elements of credit agreement
  - Deferral of repayment or prepayment
  - Fee, charge or interest imposed on repayment or discount given for prepayment
- Section 4 of the act provides that the act applies to every credit agreement between parties who deal at arm’s length which is made within or has effect within SA

Credit agreement

- Credit agreement:
  - A credit facility
  - A credit transaction
  - A credit guarantee (eg surety)
  - Combination of the above
- Not a credit agreement:
  - Insurance policy
  - Contract for lease of immovable property
  - Transaction between stokvel and members
- Credit facility: credit card
- Credit transaction:
  - Pawn transaction
  - Discount transaction – discount is pay by date or higher amount if later
- Development credit agreement:
  - Education loan or money provided for development of a small business, low income housing or any purpose prescribed by minister designed to promote the socio-economic development of persons who are historically disadvantaged; low
income persons and communities, and remote or low-density populations and communities

- public interest credit agreement:
  - Minister declares that credit agreements entered into in specified circumstances for specified purposes or during specified period. Eg for national disaster or public interest

Dealing at arm’s length

- Does not include loans between family members, shareholders, partners, friends on informal basis

Circumstances under which the act will not apply

- Dealing closer than arms length (mentioned above)
- Loans to state, organ or state or juristic person with asset value or turnover equals or exceeds R1 million at time agreement was entered into. For the purpose of the act a partnership is a juristic person
- Where the credit provider is SAR
- A large agreement in terms of which the consumer is a juristic person whose asset value or annual turnover is at the time of the agreement below the threshold value of R1 million
- When the credit provider is situated outside of republic

CHAPTER 14 THE CONTRACT OF LEASE

INTRODUCTION

- Three forms of contract of lease
  - Letting and hiring of movable or immovable thing
  - Letting and hiring of services
  - Letting and hiring of work to be done

THE ESSENTIAL ELEMENTS OF A CONTRACT OF LEASE

- Undertaking by lessor to give lessee use and enjoyment of something
- Agreement between lessor and lessee that the lessee’s right to use is temporary
- Undertaking to pay rent

The use and enjoyment of a thing

- Can be the full use or partial letting eg a room

Temporary use and enjoyment

- Can be indefinite
- Can be terminated by either party on due notice eg month to month
The rent

- Must be specified amount of money
- Agriculture can be payable related to produce
- Rent must be reasonable

FORMATION OF A CONTRACT OF LEASE

- Ordinary rules of contract apply
- A long lease of agricultural land is prohibited unless consented by minister in writing
- A long lease must be registered against title deed of land let to be valid for more than ten years against creditor and onerous successors of lessor, unless the creditor or successor knew of the lease when he became creditor or successor
- Long lease:
  - Not less than ten years
  - Natural life of lessee
  - Lease indefinitely renewable
  - Renewable for periods together amount to not less than ten years

THE RIGHTS AND DUTIES OF THE LESSOR AND LESSEE

- If lessor or lessee does not fulfill obligations can rely on natural remedies of breach of contract
- If breach is of material form, he may elect to abide by contract, sue for specific performance, claim damages, or regard contract as cancelled and sue for damages
- If breach is non-material he may claim damages

The duties of the lessor

The duty to deliver the leased object to the lessee

- Able to enter into undisturbed occupation of it

The duty to maintain the object of the lease in a proper condition

- Delivered in condition reasonably fit for purpose of lease and maintained in such state
- Excludes faults by lessee
- If object so defective when tendered to lessee the lessee can cancel the contract without giving lessor opportunity to remedy it
- If object in serious state of disrepair during lease he may elect to cancel contract only after giving lessor reasonable time to repair, lessee remains liable for rent until vacating property, can claim a reduction in rent is repairs is serious
- Lessor liable for damages alleged to have been suffered by lessee only if he was aware of defects or if a person with expert knowledge ought to be aware of them

The duty to ensure the lessee’s undisturbed use and enjoyment

- The lessee may not dispute the lessor’s title or right to let the property. The actual owner of the property is naturally not bound by the lease unless he has consented to it
• Must ensure that lessee not disturbed by someone with a legal right to the property during the lease time
• A lessor who unlawfully disturbs the lessee in use or enjoyment of object of lease is guilty of breach of contract. Does not include repairs or inspections
• Lessee must inform lessor of threatened eviction by third party, if fail to inform lessor then must put up strong defence against eviction

The duties of the lessee

The lessee’s duty to pay the rent

• Rent to be paid in money or share of fruits or proceeds from property
• Must be paid in SA currency
• A lessor who cancels the contract may claim rent up to the time of cancellation

The lessee’s duty of proper use and care of the object of the lease

• Main only be used for purpose agreed upon
• Must be maintained in good condition

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

• Must be returned in condition received, except for reasonable wear and tear
• If property was destroyed or stolen, the lessee must show that the destruction or theft cannot be attributed to his fault
• Lessor is entitled to insure (insurance) the property

The rights of the lessor

Non-payment of rent

• Can have a cancellation clause
• The lessor’s tact hypothec for unpaid rent
  o The lessor makes attachment (court order to seize) of goods, or obtaining interdict preventing lessee of disposing of goods or removing from property. Tenant can obtain order to prevent this.
  o Goods of a third party can be seized from property if goods of lessee insufficient to cover the arrears
  o If a special notarial bond has been registered over movable property before the hypothec has been perfected the hypothec does not apply to property which is in the possession of a person other than the mortgagee, or to which an instalment sale transaction relates
  o Hypothec terminates on payment of arrear rent and lessor to return goods
• Automatic rent interdict and attachment order under the magistrates court act
  o Obtained when a summons claiming rent is issued
  o The landlord must allege that the premises are situated within jurisdiction of court, rent not exceeding the jurisdiction of the court is due and in arrear, that such rent has been demanded in writing for at least 7 days, and if not that the lessor believes
that the tenant is about to remove the movable property upon the premises in order to avoid the payment of rent

Misuse of the object of the lease
- If misuse is material he may cancel the contract and has a claim for damages for any loss suffered as result of breach, if misuse if not material the claim is restricted to action for damages.

Failure to return the property
- If property returned in improper condition can claim specific performance for repairs or damages if loss suffered
- If lessee remains on property new lease is created based on old lease and is for indefinite period and can be terminated unilaterally upon reasonable notice

The rights of the lessee

Failure to deliver
- Lessee may regard contract as cancelled and sue for damages, or claim specific performance and damages. Amount for damages is determined in accordance with law.
- If the object is defective the lessee may waive rights and accept it

Failure to maintain property
- As above

Breach of warranty against interference
- May claim damages, or cancel contract and claim damages if material interference
- May obtain interdict against the person
- If property is destroyed by event as “act of god” or “accidental occurrence” lease is terminated

Subletting
- May sublet unless lease prohibits it
- May not sublet in rural without lessor’s consent
- If sublet without permission lessor can cancel the lease even without a cancellation clause present

Cession
- A lessee may cede his right to a third party like any other creditor, unless the contract of lease prohibits or restricts this right. In the case of a rural tenement, the cession may only take place with the prior written consent of the lessor.
- The effect of a cession is that the cessionary becomes the creditor of the original lessor and that the lessee ceases to be his creditor. The lessee remains the lessor’s debtor, since only the rights, and not the duties, of the lessee are ceded
- As in the case of subletting, the matter is governed by express agreement between parties that the lessee will not be able to cede his rights without the consent of the lessor. A
cession in contravention of such an express agreement is void. If there is not express agreement, it seems accepted law that the lessee may sublet without the lessor’s consent (except rural land)

Assignment

- A creditor transfers his rights by cession. The duties of a debtor are transferred by delegation.
- If there is to be a complete substitution of one lessee for another it must be effected by a combination cession and delegation, or by a delegation of rights and duties. This is termed assignment.
- The assignee becomes the debtor and the creditor of the lessor, while the agreement between the lessor and original lessee comes to an end. Since an agreement always involves a delegation, it cannot take place without the consent of the debtor.

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

- Lease remains in force on death of lessor, except by operation of statutory provisions the new owner not bound by lease
- If a lessor of immovable property sells the property the purchaser is bound by the lease – only applies to sold, exchange or donated
- The maxim huur gaat voor koop qualifications:
  - Certain leases of immovable property shall not be binding on a creditor or successor under onerous title of the lessor for longer than ten years, unless lease is registered against title deed of the property, or unless the creditor or successor had knowledge of such a contract of lease
  - The position of the lessees for less than ten years is not governed by legislation. These lessees are protected by the maxim only if they are in occupation of the property let, or if the successor or creditor of the lessor had notice of the existence of the lease at the time when he entered into the contract or acquired the real right in the property, or if the successor or creditor acquired the real right in the property gratuitously. Knowledge will be ascribed to the purchaser where the lessee occupied the premises or property at the time when such passing of ownership. These principles also apply in respect of the first 10 years of the term of long lease which has not been registered against the title deed

TERMINATION OF A LEASE

- Termination by effluxion of time
  - When period ends or event occurs
- Termination by notice
  - Reasonable notice given
  - Indefinite time lease
  - Notice of termination to be issued
- Termination by extinction of the lessor’s title
  - If unable to provide undisturbed use any longer
  - If they intended the termination in such a case
- Termination by death
  - If contract provides this as a reason
• If will provides this as a reason
• Termination by insolvency
• The lessee’s right to compensation for improvements
  o A lessee of rural land may remove annexures constituting luxurious or useful improvements before the lease terminates provided the property will not be left in a worse condition than it was received
  o A lessee in terms of urban land is entitled to remove useful or luxurious improvements before termination of the lease, provided they can be removed without leaving the property in a worse position than it was received. The lessor can elect to keep the improvements and pay the lessee the value that they would have on separation. The lessee is not entitled to remove the improvements but has a claim for expenses. The lessee is entitled to compensation for useful improvements that are not removable, but usually not in respect of luxurious improvements

**STATUTORY PROTECTION OF TENANTS**

• **Constitutional rights:**
  o Right to access adequate housing
  o State take reasonable measures to realization of that right
  o No one may be evicted from their home or have their home demolished without a court order. No legislation may permit arbitrary evictions
• **Rental housing act 50 of 1999**
  o Lease to include the following:
    ▪ Name of tenant and landlord and addresses
    ▪ Description of dwelling of lease
    ▪ Amount of rent
    ▪ Frequency of rental payments
    ▪ Amount of deposit
    ▪ The lease period and notice period
    ▪ Obligation of landlord and tenant
    ▪ Any other charges
    ▪ List of house rules and defects attached as annexures
CHAPTER 15 THE CONTRACT OF INSURANCE

HISTORY AND SOURCES OF THE LAW OF INSURANCE

- Originated with maritime insurance
- Governed by Roman-Dutch law
- Subject to certain conditions the Consumer Protection Act 68 of 2008 does not apply to contracts of insurance

THE NATURE AND BASIS OF THE CONTRACT OF INSURANCE

Indemnity insurance

- Insurer undertakes to make good the damage which the insured suffered through the occurrence of the event insured against
- Eg property and liability insurance

Non-indemnity insurance (capital insurance)

- The insurer undertakes to pay the insured or the beneficiary a fixed sum of money if the event insured against takes place
- Causes non-patrimonial harm and abstract need for satisfaction
- Life and personal accident insurance
ESSENTIALIA OF THE INSURANCE CONTRACT

The following must be present

- An undertaking by the insured to pay a premium
- An undertaking by the insurer to compensate the insured for either a patrimonial or non-patrimonial loss
- A term that makes the insurer’s obligation dependent on the occurrence of a particular uncertain future event (risk)
- An insurable interest

The premium

- In form of money but can be something else
- Payment of premium is needed for policy to take effect (suspensive condition)

An undertaking by the insurer to compensate the insured

Determine the amount payable (non-indemnity insurance)

- Predetermined amount

Determine the amount payable (indemnity insurance)

- Exact amount of payment is determined after occurrence of the event insured against, by determining extent of damage
- Insured must be placed in same position before occurrence of the event, not better position
- A maximum value of cover is stipulated

Value and unvalued policies

- Agree on concluding contract the value of risked objects, need only prove the loss of the object and not the value of the object – valued policy

The insurer’s right to repair

- Insurer reserves the right to repair the object instead of compensation
- Must be repaired within reasonable time

The insurer’s right of subrogation

- A right of recourse for an insurer who has indemnified its insured
- The insurer takes the place of the insured and is allowed to institute an action in the name of the insured
- The parties to the lawsuit have the same rights and defences as they would have had, had the claim not been subrogated
- Subrogation does not affect the rights and duties of either the plaintiff or the defendant
- Where the insured has a claim against a third party who has caused the damage to the risk-object, the insured may not recover compensation from both his own insurer and the third party
• Once the insurer has compensated the insured, the insurer has the right of subrogation – the insurer may enforce the insured’s claim against the third party in the name of the insured
• The insurer does not have the right of subrogation unless the insurer has been fully compensated for his loss

Insuring with several insurers

• May insure the same risk object with as many insurers as you wish
• Only recover the full amount of the loss and no more
• Must decide whether to claim total from one insurer or pro rata from separate insurers

Over and under insurance

• In case of indemnity insurance cant claim more than total value of loss
• Average clause: insured is covered for average and suffers the loss of the difference
• If you are eg covered for 6/10 of the value of object you can claim 6/10 of the loss suffered

Excess clauses

• Common in motor vehicle and liability insurance
• Must bear specific portion of loss by insured

The risk

Agreement to insure against a particular risk

• The uncertain event insured against is the risk
• Description of risk must include:
  o The object insured
  o The hazard insured against
  o Circumstances affecting the risk
• Risk and its circumstances may be refined by time and place eg driven by unlicenced driver
• Vague or ambiguous terms are interpreted in favour of insured

The difference between insurance contracts and wagering contracts

• A wagering contract is unenforceable in court
• In wagering contracts, the parties choose an arbitrary event on the occurrence of which one party wins and the other looses. In insurance the interest is in the non-occurrence of the event.
• An insurance contract does not itself create the risk of loss
• The intention with which the parties conclude an insurance contract can be of the greatest importance in distinguishing it from a wagering contract. The purpose of an insurance contract is to protect a person’s estate while that of a wager is to increase the estate

THE DUTY OF GOOD FAITH

• The right of the insurer to receive correct and complete info about material facts relating to the risk
• Duty on insured to provide the info known as ex lege

Misrepresentations

• A positive act consisting of a pre-contractual statement of fact made by the prospective insured to the insurer. Statement is incorrect and contract still concluded.
• Statement can be made orally or in writing
• Opinion not included
• Voidable at the instance of the insurer, insurer may uphold or rescind contract

Non-disclosures

• Insured to disclose all material facts before conclusion of contract
• This is an omission
• Contract will be voidable at instance of insurer
• If contract requires specific fact to be disclosed it must be, irrespective if it is material or not

Warranties

• A strict contractual term by which the insured undertakes that certain representations are accurate or true
• In case of breach the insurer may rescind the contract and avoid all liability for losses suffered for breach
• The insurer can only rely on a misrepresentation or non-disclosure, whether warranted or not, if it was of such a nature as to be likely to have materially affected the assessment of the risk, if the representation is immaterial the insurer can no longer rely on it to avoid liability under the contract

PARTIES TO THE CONTRACT

• Insured
• Insurer
• Insurance broker or agent
  • Insurance broker – middle man between client and insurance company, not tied to one insurance company
  • Insurance agent – primary agents of the insurance company
  • Not regulated by FAIS

STATUTORY PROTECTION OF INSURED

• A creditor who requires a debtor to make such an insurance policy available must give the debtor prior written notification that he has a free choice:
  • Whether he wishes to enter into a new policy or make available an existing policy
  • If a new policy is to be entered into, as to the insurer with whom the policy is to be entered into and the person who is to act as the intermediary
  • If an existing policy is made available, as to the person who is to act as intermediary
  • Whether or not the value of the policy benefits made available shall exceed the value of the interest of the creditor
Unless the person whose policy is to be made available to the creditor confirms in writing that he received prior notification to the right to a free choice and that the right was accordingly exercised, the security provided under such circumstances will be void and the creditor will have no claim to it.

The insured must be informed about the decision on his claim in writing, within 10 days of an insurer taking the decision. Where the claim is rejected or disputed, the written notification to the insured must inform him of the reasons for the decision; the insured’s right to make representation to the insurer in respect of the decision within a period of 90 days.

In the event where there is no time limitation for the institution of legal action, inform of the prescription period that applies.

If the insured makes representations to the relevant insurer, that insurer will have 45 days from receipt of representation to notify the insured of its decision.

The insurer is prohibited from allowing the insured to sign any blank or partially completed form in connection with an insurance transaction where another person will be required, permitted or allowed to fill in other detail required, or conclude any such transaction where any such signing is providing of detail have occurred.

CHAPTER 20 THE LAW OF AGENCY

INTRODUCTION

Is an agreement in terms of which one party undertakes to perform a task or commission on behalf of another.

The contract is known as contract of mandate and is governed by the law of contract in general and by the rules applicable to contracts of mandate in particular.

Agency also occurs where one person (agent) concludes a juristic act on behalf of another (principal). A juristic act is an act which creates, alters, or extinguishes a legal relationship through expression of will of one or more persons. Used in this sense, agency combines the principles of mandate and representation.

CONTRACT OF MANDATE

A contract of mandate arises when one party (mandator) concludes a contract with another (mandatary), in terms of which the mandatary undertakes to person a mandate (commission or task) for the mandatory.

The mandatary may only perform juristic acts in the name of the mandatory if authorized to represent him.

The mandate may entail the performance of a single act, or be a general mandate to conduct all the affairs of the mandatory. It may also be a mandate to conduct all business of a specific nature.

Duties of the mandatory...
• The duty to compensate the mandatory for expenses
• The duty to pay the mandatary the agreed remuneration

Duties of the mandatary

• The duty to carry out the mandate
• The duty not to exceed the terms of the mandate
• The duty to perform the mandate personally
• The duty to act with care and skill
• The duty to act in good faith
• The duty to render accounts
• The duty to account

Termination of mandate

• Death of mandator or mandatary
• Sequestration of estate of the mandator or mandatary
• Insanity of the mandator or mandatary
• Revocation by the mandator
• Renunciation by the mandatary

AGENCY

• Person can have someone represent him for concluding transaction
• Juristic person needs a natural person to conclude a contract
• Anyone with capacity to act juristically can appoint an agent
• Agent can be distinguished as for, on behalf of, pp or qq

Authority

• Authority to perform can be express or implied
• If no authority existed can be rectified by ratification or stopped

Authorization

• Can be done informally but at times a written power of attorney is required

Other sources of authority

• Can be implied by law eg curator or guardian over minor
• Authorization to directors to act on behalf of company
• A member of cc be agent for the corporation
• Contractual relationship between partners

Delegation of authority

• Agent may have authority to delegate to sub-agent
• May be given expressly or tacitly
• Important consideration in determination is whether the act requires a particular skill or can be performed by any person
Termination of authority

- Can be given for only the specific act thus ends when concluded or unable to conclude
- Can be given for specific time period
- Can be given for specific relationship so ends when relationship ends
- When principle or agent dies
- When the status of the principle changes and restricts his capacity to perform juristic acts eg insane, sequestration
- Principle may revoke authority – may be liable for claim for damages for breach of contract
- Agent renounces authority – in absence of good cause agent can be liable for damages for breach of contract

Estoppel

- If principle culpably created false impression that another person has authority and the agent acts on that authority it will be taken as authority was given
- Requirements:
  - Principle must have represented to third party that the agent had authority to contract on his behalf
  - Representation of authority must be attributed to principle or someone for whose conduct he is responsible
  - Although representation did not intend to mislead, it must have been of such a nature that it could reasonably have been expected to mislead the third party
  - Third party must have acted on the strength of the representation to his detriment – failure to confirm authority
- Court will consider circumstances of third party and principle in terms of a reasonable person’s beliefs
- A company may be estopped from denying the authority of an individual who purported to act on its behalf

Ratification

- If a person purports to act on behalf of another without authority to do so, the principle is not liable. But if the principle ratifies the particular transaction concluded by the agent the principle becomes liable
- Ratification can be express or tacit
- Person who ratifies must have knowledge of the juristic act
- Person who ratifies doesn’t need consent of third party or person who concluded the transaction
- Requirements for legal effect:
  - Principle must be in existence when agent purported to act on its behalf
  - Agent must have made it clear that he was acting as representative when agreement was entered into with third party
  - Principle must be named or ascertainable and both must have the capacity to ratify the unauthorized transaction
- Must take place within reasonable time after the act
- Illegal act cannot be ratified
• Third party entitled to undo act before ratification or refuse ratification is it hasn’t occurred within reasonable time

Duties of the agent

• The duty to follow instructions
  o Follow parameters of agreement
• The duty to exercise care and diligence
• The duty of good faith
  o Secret profits
    ▪ All profits are acquired for principal
  o Conflicts of interest
    ▪ Agent to disclose any conflicts
  o Disclosure of confidential information
    ▪ Agent to not disclose any confidential information even after termination
  o Delegation of authority
    ▪ Delegation allowed if principal allowed it
• The duty to account properly

The duties of the principal

• Payment of remuneration
• Reimbursement
  o Must be reimbursed for expenses
  o Not reimbursed for negligence, default or breach of duty
• Indemnity
  o Agent indemnified for loss or liability incurred in execution of mandate

Personal liability of the agent or purported agent

• No legal relationship between third party or agent unless they agree on one
• Identity of principle need not be disclosed by agent
• In certain cases agent can incur personal liability
• If agent doesn’t disclose to third party that he is representing someone else he can incur personal liability to third party
• An agent who contracts of behalf of principal without authority, or who exceeds his authority, can be liable on basis of implied warranty of authority. If principal doesn’t ratify the unauthorized conduct, the agent is liable, not on the contract, but on the basis of the guarantee that he had required authority. If the agent acted fraudulently or negligently, the third party may claim damages for delictual action

The doctrine of undisclosed principal

• The situation may arise that, by a contract of mandate, an agent is authorized and intends to contract on behalf of his principal, but fails to disclose his representative capacity to the third party. No contract is then formed between the principal and third party. However, in terms of the doctrine of the undisclosed principal, the principal is entitled, once the representative has reached agreement with the third party, to step into the agents shoes as the real party to the contract. The third party may hold the principal liable.
This is contrary to the principles of contract and agency
In instances where the doctrine applies, the undisclosed principal may elect to claim the performance promised to the agent. If the principal doesn’t make this claim, the third party is liable to agent. If the third party performs to agent before the principal intervenes, the third party is discharged and performance to principal cannot be enforced
On discovery of the facts the third party can hold either the principal or agent liable
Does not apply where the third party is obliged to perform to more than one creditor
Does not apply where contract precludes it (agent not representative), or where the third party wanted the contract to be concluded with agent specifically

CHAPTER 21 FORMS OF BUSINESS ENTERPRISE

INTRODUCTION

No longer able to form or incorporate CC’s
Available forms of enterprise:
  - Sole proprietorship
  - A partnership
  - A company
  - A business trust
  - A co-operative

THE SOLE PROPRIETORSHIP

Single owner
Acquire all profits and risks
No favourable tax implications

THE PARTNERSHIP

Definition and legal nature of a partnership
Two or more persons
Not a separate legal entity
Partnership can sue and be sued

Basic requirements
• Must comply with requirements for valid contract
• No limitation of number of partners
• Legal entities may be parties to partnership agreement
• No formal requirements
• Each partners must contribute, object of making profit to be divided

A contribution by each partner

• Must contribute or undertake to contribute
• May be capital, knowledge, services or skill
• Must be of commercial value
• Must be made unconditionally (assumes risk of partnership)

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

• Net profit to be shared among partners
• Free to regulate proportions of sharing profit, no one may be entirely excluded
• May agree that one or some will bear a net loss

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

• Can be formed for continuation or specific objective
• Formed for common interest

The natural consequences of a partnership agreement

Mutual mandate

• Each partner can perform individually
• Unless third party aware of partner’s lack of authority, partnership will be bound by contract concluded, even if partner has a restricted capacity

The proportion in which net profit is shared

• If no provisions in contract, the net profit is divided in same ratio as the respective contributions
• If impossible to value contributions properly then divided equally among partners

The obligation to share in the net loss

• General rule all partners share the loss
• Can be excluded by agreement but at least one partner to carry the loss

The proportion which the net loss is shared

• In absence of provision, losses are shared in same proportion as net profits
• Partnership agreement should contain arrangement

The proportion in which the assets are divided upon dissolution

• If not determined by contract, then in same ratio as profits
• If no agreement on profits, then in terms of contributions
• If not able to do that, then equally
The proportion in which partners are co-owners of the assets of the partnership

- Partners are co-owners of assets

The rights and duties of the partners

- Fiduciary duties:
  - A partner must comply with his duties in terms of partnership agreement
  - Partner must advance the partnership interests unselfishly
  - All info relating to partnership to be disclosed to all co-partners
- Partners entitled to claim delivery of contribution by partner
- Partners to keep proper accounts and entitled to accounting records
- Unless otherwise agreed upon, each partner entitled to participate in management of the partnership and to perform management functions

The termination or dissolution of a partnership

- Partnership estate is liquidated, creditors paid out and surplus divided
- No formalities required
- Wide publicity is encouraged to inform public of termination

Grounds for dissolution

- Termination agreement may be express or tacit
- Duration of partnership may be determined in partnership agreement
- A partnership may terminate on the occurrence of an event specified in the partnership agreement
- Any change in membership terminates a partnership
- Retirement or death of a partner
- Due to events beyond it’s control making it unable to continue
- Sequestration of a private estate of a partner
- Personal circumstances eg illness, mentally incapable, enemy of war
- Court order
- Enemy of war residing in enemy territory
- Court order from breach of fiduciary relationship between partners
- Unilateral act of partner, notice is given, renounced by law eg misconduct

Consequences of dissolution

- Partners still owe fiduciary duties to one another
- Partnership agreement and mutual mandate is terminated
- Rights and duties to third parties remain valid
- Partners jointly and severally liable for ligations

Liquidation of partnership

- Entails realization of assets, payment of debts, distribution of remaining assets or liabilities among partners
- Agreement may contain provisions regarding liquidation procedure
- Partners may conduct liquidation themselves or appoint liquidator
COMPANY LAW

Specified as read only section pg 327 – 333, summary not made

CLOSE CORPORATION

Introduction
- Small less complicated enterprise
- Legal person separate from members
- Indefinite continued existence
- No new close corporations may be registered – Companies Act 71 of 2008

Formation and membership of a close corporation
- Registration of founding statement by Registrar of Close Corporations, separate from Memorandum of Incorporation
- Ends with CC
- Only natural persons as members
- No more than 10 members
- Consent of member or members holding at least 75% of interest required for certain matters
- Members owe fiduciary duties to corporation
- Members not liable for debts of corporation except where specified in Act
- Member’s to be held personally liable for carrying on business of corporation recklessly, fraudulently, or with gross negligence

Capital of the enterprise
- To consist of money, property or services rendered at formation
- Known as members interest and expressed in percentage
- Any payment may be made to members by reason of membership provided that
  - Assets exceed liabilities after such payment
  - Corp is able to pay debts as they become due in ordinary course of business
  - Such payment will not render corp unable to pay its debts as they become due in the ordinary course of business

Representation of a CC
- Act allows for conclusion of pre-incorporation contracts
- CC has capacity and powers of natural person of full capacity in so far as juristic person can have
- Every member is an agent

Conversions
- Act provides for conversion of CC to company after act came into operation

THE BUSINESS TRUST

Introduction
Public business trusts invite the public to invest money in the trust, in exchange they become members but not involved in management

Definition

A business trust is a trust where the trustees do not merely protect and manage the trust assets, but use the assets for carrying on a business for profit in order to benefit the trust beneficiary or beneficiaries, or to further the aims of the trust. The private business trust is a trust with a specific aim, to run a business with the object of making a profit in order to benefit the trust beneficiary or beneficiaries

Requirements

Not created by statute but from ordinary trust
Must comply with normal requirements for trust
Requirements:
- The founder of the trust must have the serious intention of creating a trust
- The founder must express his intention in such a manner that a binding obligation is created
- The trust assets and trust beneficiaries must be readily ascertainable
- The trust object must be defined with reasonable certainty
- The object of the trust must be lawful

Specific aspects

Business trust not a separate legal person
The trust document provides trustees with authority to represent trust in contracts
If there are two or more trustees they shall act jointly
No restriction on duration of trust
No restriction on number of persons who may be beneficiaries
Debts are paid from trust estate
Beneficiaries cannot be held liable for trust debts
Income tax and estate duty benefits
Trust itself doesn’t incur tax liability
Legal and natural persons may be parties
Little control over acts of trustees

THE CO-OPERATIVE

Introduction

Voluntary association from law of partnership
Self-help, self-reliance, self-responsibility, democracy, equality, social responsibility
Create employment, income, black based empowerment, eradicate poverty
Variety: housing, worker, social, agricultural, burial society, financial services, and others

Definition

Autonomous association of persons united voluntarily to meet their common economic and social needs and aspirations through a jointly owned and democratically controlled enterprise
• Each member has only one vote
• Members provide capital
• At least five percent of surplus set aside in reserve fund
• Provide education and training to members and employees
• Restriction must not constitute unfair discrimination

Registration

• Meeting of interested persons held
• Adopt a constitution and elect directors
• Application made to Registrar of at least five people
• No restriction on maximum number of members
• Must have words co-operative or co-op in name
• Must have ltd as last word of name, unless unlimited liability
• Certificate of registration is issued
• Legal person
• Consists of black persons, youth, disabled persons, persons in rural area then support from Dep of Trade and Industry
• Must maintain an office in the republic and keep its records there
• Hold annual general meeting and appoint auditor

Capital of the enterprise

• Entrance fees, membership fees, subscriptions, shares, loans or member funds
• Repayment of shares can be deferred for max of two years after effective date of notice of withdrawal
• Withdrawal of member does not terminate his liability
• Constitution may provide for establishment of member funds in which members may be credited for any purpose permitted in terms of constitution except writing off of losses
• May provide loans or security dependent on their ability to pay their debts
• Must set up reserve fund

Representation

• The co-op may within a month after registration ratify pre-incorporated contract at general meeting
• Co-op may do things necessary to carry out objectives subject to limitations of constitution and the Act or other law
• Highest decision making structure is general meeting of members
• Managed by board of directors
• Board may be elected for max of four years

Conversion and winding up

• May be wound up voluntarily by special resolution of at least 75% of members
• Court may order winding up if co-op unable to pay debts
• Minister may order winding up if believed that co-op registered fraudulently, if period it was intended for has expired, if it hasn’t transacted for two years, not operating in accordance with constitution or act