Department of Mercantile Law

**COMMERCIAL LAW 1C**

Only study guide for CLA1503

University of South Africa, Pretoria
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Welcome to Commercial Law 1C (CLA1503).

Commercial Law 1C (CLA1503) is a semester module. We suggest that you approach your study of this module by first getting an overview of it. An overview will enable you to identify what you will need to have mastered by the end of the semester to complete this module successfully, and also how the different prescribed sections and study units (chapters in the prescribed textbook) form part of the syllabus for this module.

OVERVIEW

In section A, you are introduced to the South African legal system in study unit 1 (chapter 1 of the textbook) and to the science of law in study unit 2 (chapter 2 of the textbook).

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

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

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

You will also be studying various topics relating to commercial law. In section C you will study a number of specific contracts, namely the contract of sale in study unit 7 (chapter 13 of the textbook), the contract of lease in study unit 8 (chapter 14 of the textbook) and the contract of insurance in study unit 9 (chapter 15 of the textbook).
INTRODUCTION

These are all variations on the general principles of the law of contract, which you studied in study units 1–6.

In section D, other important aspects for the business world are introduced. At first glance the topics may seem unrelated, but most relate to the law of contract to a lesser or greater extent. This section includes study unit 10 (chapter 20 of the textbook), which discusses the law of agency; study unit 11 (chapter 21 of the textbook) discusses the different forms of business enterprises (excluding companies) and explains how contracts are concluded on behalf of such enterprises; study unit 12 (chapter 23 of the textbook) discusses forms of security and explains how various forms of security can be obtained; and study unit 13 (chapters 24 and 30 of the textbook) discusses the Consumer Protection Act and also introduces to you the Financial Intelligence Act.

Lastly, and most importantly, in judgments delivered by, *inter alia*, the Constitutional Court there is a trend towards the Africanisation of South African law and the upholding of the principles of *ubuntu*, as well as the promotion of good faith and fairness in contracts.

The African concept of *ubuntu* is subtle and can be described as a set of values expressed through compassion, human dignity, group solidarity, conformity, respect, justice, good faith, fairness to others and other similar virtues. *Ubuntu* finds expression in the Zulu saying “*umuntu ngumuntu ngabantu*”, which means that a person is a person through other people.

This concept was given explicit application in our jurisprudence for the first time in *S v Makwanyane* 1995 (6) BCLR 665 (CC). Madala J noted that *ubuntu* advocates social justice and fairness.

In *AfriForum and Another v Malema and Others* (20968/2010) [2011] ZAEQC 2; 2011 (6) SA 240 (EqC); [2011] 4 All SA 293 (EqC); 2011 (12) BCLR 1289 (EqC) (12 September 2011) Lamont J remarked as follows:

“*Ubuntu* is recognised as being an important source of law within the context of strained or broken relationships amongst individuals or communities and as an aid for providing remedies, which contribute towards more mutually acceptable remedies for the parties in such cases. *Ubuntu* is a concept which *inter alia* dictates a shift from (legal) confrontation to mediation and conciliation.”

It is important, for example, to realise that some of the concepts used in the law of contract are similar to traditional concepts of *ubuntu* typically found in traditional African societies. Throughout this study guide we will indicate how *ubuntu* fits in with commercial law under the heading “*Africanisation and Commercial Law*”.

**LEARNING OUTCOMES**

The outcome of this module is threefold:

- The study units that deal with the South African legal system and science of law provide you with a general overview of the law and enable you to relate the different sections of the law to one another.
- The study units that deal with the general principles of the law of contract should enable you to identify, analyse and solve basic legal problems relating to the law of contract. You should be able to give advice on how contracts arise, the effect
of a particular clause in a contract, the implications of breach of contract and how contracts are transferred.

- The study units that deal with various types of contracts and those important aspects of commercial law are primarily to enable you to identify different types of contracts and to distinguish between them. You should also be able to identify the rights and duties of the parties to the different contracts and apply the principles to practical situations.

PRESCRIBED STUDY MATERIAL


THE STRUCTURE OF EACH STUDY UNIT

Each study unit is based on a chapter of the textbook. At the beginning of each study unit, the outcomes for that particular study unit are set out. Once you have worked through a study unit thoroughly and methodically, you should be able to demonstrate your achievement of the stated outcomes.

Each study unit is divided into different subheadings that correspond with the headings used in the textbook. Under each heading you will find comments on various aspects of the study material that relates to the subject discussed under that particular heading. The length of the comments varies in relation to the degree of difficulty of the subject concerned. These comments do not replace or summarise the textbook; usually they simply provide an explanation or additional notes to help you understand the material in the textbook. As such, they form part of the material for assessment purposes.

The study units contain a number of activities and feedback. The activities are based on the study material. The activities are very important and will give you an understanding of the study material. Please ensure that you do the activities on your own before you look at the feedback that has been provided. In order to complete each activity, you are expected to understand the work to which it relates. The answers provided are not necessarily complete and may simply refer you to relevant paragraphs in the textbook. Therefore, you must use the feedback to determine whether you have understood and completed the activities correctly. At the end of each study unit, you are given self-assessment activities which you need to do by yourself in order to test your understanding of the whole study unit.

HOW TO USE THIS STUDY GUIDE

The aim of this study guide is to guide and steer you through the textbook. You need to make your own summaries of the textbook and the study guide. You should therefore use this study guide in conjunction with the textbook for this study guide to make sense to you.

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

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

Some of the activities are similar to the questions you will encounter in the assessment. Therefore, if you are able to do the activities, you will have achieved some of the outcomes set at the beginning of the study unit. Remember, however, that in the examination you will not have access to your textbook and study guide. By that stage you should be in a position to answer the questions without the assistance of these learning tools.
SECTION A

INTRODUCTION
LEARNING OUTCOMES

After you have worked through this study unit, you should be able to:

• distinguish between the origins and the sources of South African law
• identify the various courts in South Africa, as well as their functions, jurisdiction and officers
• explain the operation and effect of the doctrine of *stare decisis*
• apply the various theoretical rules and methods used to interpret statutes
• describe the contents and typical aspects of a court judgment
• differentiate between the *ratio decidendi* and an *obiter dictum*

Prescribed study material: chapter 1 of the textbook

OVERVIEW

In this study unit you are introduced to the history and the sources of South African law, the courts in South Africa and their officers, the doctrine of *stare decisis*, the interpretation of statutes, and court judgments. The aim of this study unit is to provide you with a broad outline of the South African legal environment in which the state, its subjects and the business world function.

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

INTRODUCTION

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

The following diagram forms the basis of the first two study units. You will note that we add more details about a specific aspect as we deal with that aspect.
ACTIVITY 1.1

Now that you have studied the South African legal system, please proceed to answer the multiple-choice question below. You are expected to motivate your answer and to explain why the other three options are incorrect before you can look at the feedback.

Which ONE of the following legal systems is the basis of the South African legal system?

1. Dutch customary law
2. Roman law
3. English law
4. Roman-Dutch law

FEEDBACK

4 is CORRECT. The works of the Roman-Dutch jurists, the statutes of Holland and the collections of old Dutch opinions and court decisions form the basis of the South African legal system. Enrichment actions were accepted and adopted in Roman-Dutch law, on which South African law is based.

1 is INCORRECT. Roman law was received in the Netherlands and became mixed with the existing Dutch customary law, to form Roman-Dutch law. Roman-Dutch law is the basis of the South African law, and not pure Dutch law.

2 is INCORRECT. Roman law was received in the Netherlands and became mixed with the existing Dutch customary law, to form Roman-Dutch law. Roman-Dutch law is the basis of the South African law, and not pure Roman law.

3 is INCORRECT. Although certain aspects of English law were incorporated into the existing Roman-Dutch law, the basis of the South-African legal system remained the Roman-Dutch law.

If you are still uncertain about the correct option, please study the relevant section in the textbook.

1 A BRIEF HISTORY OF THE LAW

(Textbook par 1.1)

A short historical overview is important in order to establish where South African law comes from. The history of the South African legal system goes far back to the
SECTION A: INTRODUCTION

Romans. Current South African law is a unique mixture of legal systems, firmly rooted in Roman law, Roman-Dutch law and English law.

The following diagram indicates the origin of South African law:

2 SOURCES OF THE LAW
(Textbook par 1.2)

You must study par 1.2 of the textbook to gain a better understanding of the sources of South African law. It is important to distinguish between the origins of our law (where our law comes from) and the sources of our law (where the law can be found). The sources of South African law are shown in the following diagram:

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

ACTIVITY 1.2

Distinguish between authoritative and persuasive sources.

FEEDBACK

Authoritative sources are binding to the courts of law whereas persuasive sources may influence the courts to interpret or apply a legal rule in a particular way.

Refer to par 1.2 of the textbook.
THE COURTS IN THE REPUBLIC

(Textbook par 1.3)

The following diagram shows the different courts in South Africa:

Jurisdiction means the capacity to hear a case and to pass a valid judgment. The jurisdiction of a division of the High Court is unlimited in the sense that such a court may hear any type of criminal or civil case. It is, however, limited in the sense that a division of the High Court exercises its jurisdiction within a specified area. A division of the High Court may hear constitutional matters, except those matters which, in terms of the Constitution, may be heard by the Constitutional Court only. For example, a division of the High Court may decide whether any fundamental right entrenched in the Constitution has been violated.

Please note under par 1.3.3 of the textbook that the High Court is no longer the only court with jurisdiction to hear divorce matters. Regional courts have jurisdiction over the geographical area of several magisterial districts. In terms of the Jurisdiction of Regional Courts Amendment Act 31 of 2008, certain of these regional courts now have jurisdiction to hear divorce matters. Please also note under par 1.3.6 of the textbook that magistrates exercise their jurisdiction within certain magisterial districts.

ACTIVITY 1.3

Identify and briefly describe the most important superior courts.

FEEDBACK

As you are aware by now, the courts in the Republic of South Africa are divided into superior and lower courts. The most important superior courts are the Constitutional Court, the Supreme Court of Appeal and the High Court.

Refer to par 1.3 of the textbook for a brief description of the superior courts.

ACTIVITY 1.4

Identify and discuss the roles of the officers of the superior courts.

FEEDBACK

Officers of the superior courts include
SECTION A: INTRODUCTION

- registrars
- sheriffs
- in some divisions of the High Court, a Master's office that is presided over by a Master
- legal practitioners (advocates and attorneys)

You should study par 1.3.5 of the textbook in order to familiarise yourself with the roles of the above-mentioned officers of the superior courts.

4 THE DOCTRINE OF STARE DECISIS

(Textbook par 1.4)

As is clear from par 1.4 of the textbook, the hierarchy of the courts determines how the *stare decisis* doctrine is applied. The following diagram represents the application of this doctrine.

**STARE DECISIS IN ACTION:**

Meaning of symbols:

\[\uparrow\] bound by decisions of courts higher in hierarchy

\[\leftrightarrow\] bound by own decisions

**Constitutional Court:** bound by own decisions \[\leftrightarrow\]

**Supreme Court of Appeal:** bound by decisions of Constitutional Court \[\uparrow\]

bound by its own decisions \[\leftrightarrow\]

**Each High Court:**

- Full bench: bound by decisions of Constitutional Court \[\uparrow\]
  bound by decisions of Supreme Court of Appeal \[\uparrow\]
  bound by its own decisions \[\leftrightarrow\]

- Bench of two judges: bound by decisions of Constitutional Court \[\uparrow\]
  bound by decisions of Supreme Court of Appeal \[\uparrow\]
  bound by decisions of full bench \[\uparrow\]
  bound by its own decisions \[\leftrightarrow\]

- Single judge: bound by decisions of Constitutional Court \[\uparrow\]
  bound by decisions of Supreme Court of Appeal \[\uparrow\]
  bound by decisions of full bench \[\uparrow\]
  bound by decisions of bench of two judges \[\uparrow\]
  bound by its own decisions \[\leftrightarrow\]

**Decisions of other divisions of the High Court**

- divisions of the High Court not bound by decisions, but decisions have persuasive authority

**Magistrates' courts:** bound by decisions of divisions of the High Court in their area \[\uparrow\], decisions of divisions of High Courts in other areas have persuasive authority
ACTIVITY 1.5

Below is a scenario that is designed to test whether you can apply your knowledge of the doctrine of *stare decisis* to a given set of facts. You are required to motivate your answer and to explain why the other three options are incorrect before you can look at the feedback.

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

Which ONE of the following courts’ decisions will the division of the High Court in Pretoria be bound to follow?

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

FEEDBACK

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

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

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

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

5 INTERPRETATION OF STATUTES
(Textbook par 1.5)

It sometimes becomes necessary for a court to determine what precise meaning must be given to a word or a phrase in an Act. The diagram that follows illustrates the process that a court follows to ascertain this meaning.

The court pronounces on the purpose and interpretation of the statute.

6 COURT JUDGMENTS
(Textbook par 1.6)

The contents and typical aspects of a court judgment are explained in par 1.6 of the textbook. There you will find a copy of a court case, National Sorghum Breweries Ltd v Corpcapital Bank Ltd 2006 (6) SA 208 (SCA). All specific references in this section will be to that case. Although The South African Law Reports (abbreviated as SALR) are the official law reports of South Africa, there are other law reports as well, such as The South African Criminal Law Reports (SACLR).

Even if a previous decision is said to have a binding authority, only certain parts of the judgment are important. The reader of a judgment must distinguish between two kinds of pronouncements by the court: those that relate to the reason for the decision (in Latin, the ratio decidendi) and those that are merely incidental remarks (in Latin, obiter dicta or, in the singular, an obiter dictum). The court will, however, not necessarily state expressly that a certain remark is its ratio decidendi: the reader must draw his or her own conclusion from the judgment. The ratio decidendi is the reason for the decision the court reached on the basis of the facts before it. The doctrine of stare decisis provides that only the ratio decidendi is binding on other courts in the hierarchy.

An obiter dictum is a statement made by the court, which is not part of the ratio decidendi. The court may, for example, refer to an alternative argument, or it may state what the position would have been had the facts been different. Although an obiter dictum is not binding, it may have persuasive authority, particularly if it was expressed by the Supreme Court of Appeal.

Now we want you to understand the obiter dicta and ratio decidendi. In National Sorghum Breweries Ltd v Corpcapital Bank Ltd, the ratio is that a creditor is free to cede its rights, and a non-variation clause in a contract does not restrict this power. Anything else that was said about lease or sale agreements in the judgment is obiter – those are statements that are not binding in terms of the doctrine of stare decisis. You can think about of other examples of obiter dicta and ratio decidendi.
7 SELF-ASSESSMENT ACTIVITIES

1. Distinguish between authoritative sources and persuasive sources of South African law.

2. A group of fishermen normally set their lines on a beach where no boats were permanently stationed. The fishermen did so with a view to catching a shoal of fish seen moving along the coast. No other fishermen were entitled to set lines within any reasonable distance in front of the lines already set.

Identify the case to which the above applies and outline the requirements that must be met before a customary rule will be recognised as a legal rule.

3. Mention the requirements that must be met before this customary rule (practice) can be recognised as a legal rule.

4. Name the divisions of the courts in the Republic and draw a distinction between different courts in the country.

5. Explain the operation and effect of the doctrine of stare decisis.

6. Distinguish between ratio decidendi and obiter dictum.

7. Name different aspects of a court judgment.

8 EXPLANATORY NOTES

Advocate: An LLB graduate who has been admitted and enrolled as an advocate of the High Court. When an advocate practises as such, he or she is usually also a member of a Bar. There is a Bar for each of the various divisions of the High Court. In order to become a member of a Bar, a candidate must complete a pupillage and pass the Bar examination. An advocate may appear in any court, except the small claims court. In terms of section 34(2)(a)(ii) of the Legal Practice Act 28 of 2014 an advocate may now render legal services in expectation of a fee upon receipt of a request directly from a member of the public, provided that he or she is in possession of a prescribed certificate and a trust account.

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

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

Cede: To transfer, assign or hand over one’s right to claim something to another person.

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

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

Common law: This term is used in both a wide and a narrow sense. In the wide sense it is used to indicate law that is not contained in legislation and in the narrow sense it is used specifically to refer to the works of the old authorities.

Constitutional Court: The highest court in South Africa for constitutional matters.
Defendant: The person who is sued by the plaintiff in a civil action. In certain types of cases, the defendant is called the respondent.

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

**Judge:** A court officer who hears and decides cases in the superior courts.

**Judgment:** The decision of a judge, a magistrate or other judicial officer in a case.

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

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

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

**Non-variation clause:** A clause that states that no amendment to, or variation of the contract, will be legally valid or binding unless it is reduced to writing and signed by all the parties.

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

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

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

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

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

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

**Supreme Court of Appeal:** A court of appeal for the High Court and its various divisions. Its appeal jurisdiction is unlimited, with the exception of matters that fall within the exclusive jurisdiction of the Constitutional Court. Parties cannot take their cases directly to the Supreme Court of Appeal, because this court hears only appeals against decisions of the High Court.

**AFRICANISATION AND COMMERCIAL LAW**

In traditional African societies people applied customary law to govern their relations in both private and public spheres. In circumstances where the African concept of *ubuntu* is practised, a lot of weight is attached to values such as human dignity, group solidarity, conformity, respect, justice, good faith, fairness and other similar virtues. In case of a dispute between traditional community members, community members normally defer to institutions such as the *kgiro* (loosely translated as a traditional court) to resolve the matter. Traditional courts invoke the spirit of *ubuntu* when disputes are heard. Fairness, justice, group solidarity and a sense of community are emphasised by the various roleplayers, including the chief and tribal headmen. Each dispute is adjudicated upon on its own merits and although customary law is unwritten, the principle of *stare decisis* is adhered to by the traditional courts. Section 211(3) of the Constitution, 1996 provides that the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law. The concept of *ubuntu* was given explicit application in our jurisprudence for the first time in *S v Makwanyane* 1995 (6) BCLR 665 (CC), where Madala J noted that *ubuntu* advocates social justice and fairness.
LEARNING OUTCOMES

After you have worked through this study unit, you should be able to:

- define the term “law”
- differentiate between different divisions and subdivisions of law
- describe patrimonial law
- define the term “right” and give categories of rights
- describe a legal subject
- distinguish between two categories of legal subjects/persons
- define the term “delict”
- name and describe the grounds of justification
- discuss unjustified enrichment

Prescribed study material: chapter 2 of the textbook

OVERVIEW

In this study unit you are introduced to the meaning of “law”, the meaning of “right”, public law, as well as private law and its subdivisions, which include patrimonial law.

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

1 THE TERM “LAW”

**(Textbook par 2.1)**

1.1 The meaning of “law”

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

If a person does not follow the rules, he or she may, for example, be imprisoned or made to pay compensation to another person who has suffered loss because of what
the guilty person has done or failed to do. Traditionally, the main division in law is between **public law** and **private law**. The division between public law and private law is, however, not absolute and a certain amount of overlap normally occurs. Public law is concerned with the distribution and exercise of power by the state and the legal relations between the state and the individual, whereas private law is concerned with the legal relationships between individuals. The following diagram shows a traditional classification of the law:

![Classification of Law Diagram](image)

1.2 **The meaning of “a right”**

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

![Legal Subjects Diagram](image)

A **legally** protected right is referred to as a **subjective** right. The law recognises four categories of subjective rights that legal subjects may possess, namely, **real rights**, **intellectual property rights**, **personality rights** and **personal rights**. The following diagram shows what these rights are about:
ACTIVITY 2.1

Read the scenario below and answer the question that follows.

Kau is a famous inventor of new environmentally friendly trucks. He stands in his ultramodern workshop, admiring the revolutionary new electrically powered truck that he designed for the company, Big Trucks, which still owes him R5 000 000.

The above paragraph refers to four legal objects (a legal object is one of the four categories of subjective rights). Indicate the correct option.

The R5 000 000 owed to Kau is an example of ...

1. a real right.
2. a personality right.
3. a personal right.
4. an intellectual property right.

FEEDBACK

3 is CORRECT. Personal rights are rights in terms of which some type of conduct, referred to as performance, can be demanded from a person. Personal rights may come about through a contract, a delict or unjustified enrichment. Performance can entail giving something, doing something or refraining from doing something. Kau has a personal right to the R5 000 000 Big Trucks still owes him for the invention they bought from him, probably in terms of a contract of sale.

1 is INCORRECT. A real right is a right that a legal subject has over property such as a book, a pencil or a farm. Kau has a real right over his workshop, if it is registered in his name.

2 is INCORRECT. Personality rights are rights relating to aspects of a person’s personality, for example, a person’s physical integrity or reputation. Kau’s well-earned reputation as a famous inventor of trucks is the object of a personality right.

4 is INCORRECT. Intellectual property rights are rights to intellectual property. Examples of rights relating to intellectual property are an artist’s right to the works of art he or she has created, a writer’s right to his or her literary works, an inventor’s right to his or her inventions, such as Kau’s right to his invention, and a designer’s right to his or her designs.
2 PRIVATE LAW
(Textbook par 2.2)

2.1 Patrimonial law
Patrimonial law involves the relations between persons as regards their patrimony. A person’s patrimony consists of all his or her rights and duties that may be valued in money; it is therefore the sum of his or her assets and liabilities.

The following diagram shows the different subdivisions of patrimonial law:

![Diagram of Patrimonial Law]

2.1.1 The law of property
The subjective right that a legal subject has towards a material object is called a real right. Real rights can be comprehensive or limited.

The classification and acquisition of real rights can be shown as follows:

![Diagram of Real Rights]

ACTIVITY 2.2
Read the scenario below and answer the question that follows.

Bruce provided in his will that ownership of his farm, Big Bull, near Mafikeng, would, on his death, pass to his son Kobus and that his widow, Mary, would have the right
to stay on the farm and use it as long as she lived. During his lifetime Bruce used the property for dairy farming, growing wheat crops and cultivating vegetables.

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

1. Mary’s right is an example of a type of personal servitude called a usufruct.
2. The farm, Big Bull, is called the dominant tenement.
3. Mary may replace the wheat fields with a dirt-track racing course for which a need exists in Mafikeng and which would require less work from her than cultivating wheat.
4. Kobus is entitled to the dairy products and vegetables produced on the farm.

**FEEDBACK**

1 is **CORRECT**. A usufruct is a personal servitude and attaches to the holder personally, whereas a praedial servitude attaches to the owner of property in that person's capacity as the owner of that property.

2 is **INCORRECT**. Whether a property is dominant or servient is only relevant in the case of praedial servitudes, where two properties are involved. Mary has a personal servitude called a usufruct.

3 is **INCORRECT**, because a usufructuary may not alter the substance of the property. This means that Mary should maintain the farm as a farm and not as another kind of enterprise, for example, a sports facility.

4 is **INCORRECT**, because in the case of usufruct it is not the owner of the property who has the right to the fruit and produce of the property, but the usufructuary. The rights of the usufructuary not only include the right to use and enjoy the property itself, but also the right to the fruit of the property. Mary, and not Kobus, is therefore entitled to the produce of the farm.

**ACTIVITY 2.3**

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

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

**FEEDBACK**

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

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

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

2.1.2 The law of obligations

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

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

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

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

2.1.2.1 Introduction to the law of delict

If you refer back to the subdivisions of public law (see par 2.1.1 of the textbook), you will find criminal law. Criminal law deals with behaviour that the State prohibits as crime and that is punishable in the interests of the state and its subjects.

However, certain acts that are prohibited as crimes can also constitute delicts for which the innocent party may claim damages, among other things, if the requirements for a delict have been met (as opposed to punishment of the prohibited behaviour in the case of crimes). The law of delict stipulates what is required for an act to qualify as a delict and what remedies are available to the party who suffers the damage.

The elements or requirements of a delict are the following:

(a) a voluntary human act
(b) unlawfulness
(c) fault (either intent or negligence)
(d) causation
(e) damage to or impairment of personality
Grounds of justification are special circumstances that turn an otherwise unlawful act into a lawful act.

The following grounds of justification are usually distinguished:

i. necessity
ii. self-defence
iii. consent: consent to injury
iv. statutory authority
v. provocation

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

Note the difference between damage and damages: “damage” refers to the loss or harm the innocent party has suffered, while “damages” refers to the compensation that the wrongdoer pays to the party that suffered the harm/loss.

ACTIVITY 2.4

Read the scenario below and answer the question that follows.

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

Which ONE of the following statements is CORRECT?

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

FEEDBACK

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

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

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

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

Note: Compensation for patrimonial damage in the form of medical expenses is recovered by means of the *actio legis Aquiliae*. Compensation for shock is recovered by means of the *action for pain and suffering*.

2.1.2.2 Introduction to the law of unjustified enrichment

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

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

(a) restitution
(b) payment of a sum of money

3 SELF-ASSESSMENT ACTIVITIES

1. What does the term “law” mean?
2. Describe a legal object.
3. Describe a subjective right.
4. Draw a distinction between a legal subject and a juristic person.
5. Name different classes of subjective rights.
6. Draw a distinction between different ways in which ownership can be acquired.
7. Draw a distinction between praedial servitudes and personal servitudes.
8. Draw a distinction between ownership and possession.
9. Define a “delict”.
10. Name and describe the grounds of justification.
11. What remedies does the law grant to a person who has suffered damage or non-patrimonial prejudice?

12. Name and describe the two forms that an obligation imposed upon the enriched person can take.

4 EXPLANATORY NOTES

Delict: Any unlawful culpable act whereby a person (the wrongdoer) causes the other party (the prejudiced person) damage or an injury to personality, and whereby the prejudiced person is granted a right to damages or compensation, depending on the circumstances.

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

Juristic person: An entity that is recognised as a legal subject, for example, a company, a university, the state, and so on. Juristic persons have rights and are subject to duties.

Law: A system of rules that apply in a community.

Legal object: Any entity that can be the object of a legal subject’s claim to a right.

Legal subject: A human being or entity subject to the law.

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

Negotiorum gestio: Negotiorum gestio arises when one person voluntarily, and without the permission or knowledge of another person, manages the affairs of the latter.

Patrimonial law: The law that regulates the relationship between persons as regards their patrimony. A person’s patrimony consists of all his or her rights and duties that may be valued in money (that is, the sum of a person’s assets and liabilities).

Restitution: The act of restoring something that has been taken away, lost or surrendered to the rightful owner.

Right: Any right that a legal subject has regarding a specific legal object and which is protected by law.

Unjustified enrichment: Unjustified enrichment takes place when there is no valid legal ground for the person who has obtained the benefit to have done so and it was done at the expense of the other.

5 AFRICANISATION AND COMMERCIAL LAW

The law, be it formal (e.g. common law and statutory law) or informal (e.g. customary law and practices), is aimed at protecting people and their property, and regulating relationships between people and between people and the state. Thus, the law is not only there to maintain order within society, but also to make sure that people and their belongings receive protection and that those who suffer loss or are prejudiced because of the wrongful acts of others are compensated. It is only fair that the owners of property receive protection from the law (e.g. a lawful owner of property may not be unlawfully deprived of or evicted from the property) and that those who have
SECTION A: INTRODUCTION

suffered any form of loss or damage due to the fault of others receive some form of compensation. This ties in with the concept of ubuntu, which is more in favour of restorative justice – which concerns repairing the harm – than retributive justice – which concerns punishing the offender.
SECTION B

General Principles of the Law of Contract
SECTION B: GENERAL PRINCIPLES OF THE LAW OF CONTRACT

Scheme 1: Requirements for the formation of a valid contract

REQUIREMENTS FOR THE FORMATION OF A VALID CONTRACT

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

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

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

LEGAL POSSIBILITY
Contracts contrary to statute law
Contracts contrary to common law

PHYSICAL POSSIBILITY

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

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

Consequences of unlawful contracts
Ex turpi causa non oritur actio rule
Par delictum rule
LEARNING OUTCOMES

The outcomes of this study unit are divided into the following six categories:

After you have worked through the introduction to the law of contracts, you should be able to:

- describe a contract
- distinguish between contracts and other agreements
- list five basic requirements for the conclusion of a valid contract

After you have worked through the requirement of “consensus”, you should be able to:

- explain what is meant by the concept of “consensus”
- explain the basis for contractual commitment
- describe the requirements for a valid offer and acceptance
- explain consensus and defects in will
- describe the special rules regarding a valid offer and acceptance
- indicate where (place) and when (moment) contracts are formed/concluded
- explain what “mistake”, “misrepresentation”, “duress” and “undue influence” entail
- explain how the existence of mistake, misrepresentation, duress and undue influence can influence/affect consensus

After you have worked through the requirement of “capacity to perform a juristic act”, you should be able to:

- distinguish between legal capacity and capacity to act
- describe the factors that can influence a natural person’s capacity to act
- describe the different age bands according to which a person’s capacity to act is determined
- determine whether certain contracting parties have the capacity to perform juristic acts
- explain what protection the law gives to persons with limited capacity to perform juristic acts
- describe the consequences in cases where contracts are concluded by persons without the required capacity

After you have worked through the requirement of “the agreement must be possible”, you should be able to:

- determine which contracts and performances are illegal, unenforceable or impossible
- describe the consequences of such contracts
- name remedies that are available in the various circumstances
SECTIONS B: GENERAL PRINCIPLES OF THE LAW OF CONTRACT

• give reasons why agreements that purport to be contracts could be contrary to the common law
• identify contracts that are contrary to the common law and contracts that are contrary to statutory law

After you have worked through the requirement of “formality”, you should be able to:

• identify the contracts for which formalities are required
• discuss the consequences of non-compliance with the formalities
• explain the effect of the formalities on contracts concluded electronically

After you have worked through the “transfer of personal rights”, you should be able to:

• describe the concept of “cession”
• distinguish among the cedent and the cessionary

OVERVIEW

This study unit consists of three subdivisions. In the first of these your attention is drawn to the distinction between contracts and other agreements. In the second, the five basic requirements for the conclusion of a valid contract are discussed (namely consensus, acting capacity, possibility of performance (both legally and physically), and formalities). The third subdivision contains a description of the way in which personal rights are transferred (cession).

Prescribed study material: chapters 3, 4, 5, 6, 7 and 12 of the textbook.

1 THE CONTRACT AS A SOURCE OF OBLIGATIONS
(Textbook par 3.1)

Before one can speak of obligations, a valid contract must have been concluded. In other words, a valid contract must exist before obligations may arise or come into existence.

What is a contract?

Can you think of any examples of contracts you entered into in the past?

A contract is an agreement between two or more persons. This agreement is entered into with the intention to create legal obligations. If the agreement does not create a legal obligation that is enforceable, then that agreement is not a contract. This means that not all agreements are contracts; however, all contracts are agreements. Therefore, the main difference between contracts and other agreements is the requirement that there must be intention to create legal obligations.

Let us take the example of a hostess who engages a professional caterer to provide food for a party to which ten guests have been invited. If five of the guests fail to attend the party, the hostess has no right to sue any of them for breach of contract. Why? Because this is a social appointment and there was no intention to create legal obligations.
However, the situation becomes different if the caterer fails to supply the food and drink as requested by the hostess. In this instance, the hostess has a right to sue the caterer for breach of contract. Why? Because the parties in question intended to create legally enforceable obligations.

An obligation may arise from a contract or a delict, or from unjustified enrichment. The two most important aspects of a contract are the parties’ intention (aim) to create legal obligations and the legal results (rights and duties) that flow from such intention.

Therefore, a holder of a right is entitled to performance, and any person who has to render that performance has a duty towards the holder of a right.

ACTIVITY 3.1

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

FEEDBACK

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

2 REQUIREMENTS FOR THE FORMATION OF A VALID CONTRACT

(Textbook par 3.2)

An agreement must comply with the basic requirements for the conclusion of a valid contract in order for such agreement to be regarded as valid. There are four requirements for the conclusion of a valid contract as listed in par 3.2(a)–(d) of the textbook. The fifth requirement, namely, formalities (in par 3.2(e) of the textbook) is not always required in order for a contract to be valid (see par 7.2 of the textbook). However, formalities may be prescribed by the law for a contract to be valid (see par 7.3.1 of the textbook). Further, parties to a contract may also prescribe formalities with which to comply in order for the contract to be valid (see par 7.3.2 of the textbook).

The following are the requirements for the conclusion of a valid contract:

(a) Consensus: This comes from the Latin word meaning “unanimity”, or “agreement to the same thing”.
(b) Capacity to act: This is the ability in law to perform the act of entering into (concluding) the contract.
(c) Juridical possibility: The agreement must be juridically possible – in other words, legally possible. So, for example, an agreement to rob a bank is not juridically possible, because it is against the law.
(d) Physical executability: The rights and duties must be physically executable.
(e) Formalities. If any formalities are prescribed, they must be observed.
THE BASIC REQUIREMENTS FOR THE CONCLUSION OF A VALID CONTRACT

THE FIRST REQUIREMENT: CONSENSUS

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

Prescribed study material: chapter 4 of the textbook

1 The concept of consensus

(Textbook par 4.1)

1.1 Consensus as the basis for contractual commitment

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

1.2 The intention to be contractually bound

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

ACTIVITY 3.2

You are now required to test your understanding of the above concepts. Below is a case study that you must analyse. Thereafter, you must choose the correct option and motivate why you think the other options are incorrect.

Kamo, a 40-year-old bachelor, has finally decided to get married. He requests his closest friend, Matome, to be his best man. Matome gladly agrees. However, Matome does a disappearing act on the day of the wedding. Matome, who is a
bachelor at 45, apparently confided in one of their mutual friends that he was
ashamed to be the best man because he did not even have a girlfriend.

Which ONE of the following statements is CORRECT?

1. A contract arises between Kamo and Matome, as consensus exists.
2. No contract arises, as Kamo and Matome have no intention to be legally
   bound.
3. A contract arises, as a common intention exists and every party has made
   it known to the other party.
4. No contract arises, as nothing was put in writing.

FEEDBACK

2 is CORRECT. The essence of the element of consensus is that all of the parties
must have the serious intention to be contractually bound, which means that they
must intend to create legal rights and obligations. If Kamo and Matome agree that
Matome should be Kamo’s best man, they have no intention that their agreement
should create legal obligations (rights and duties).

1 is INCORRECT. Although consensus is the basis of every contract, the parties
themselves must intend to be contractually bound by their agreement.

3 is INCORRECT. Although consensus is the basis of every contract, the parties
themselves must intend to be contractually bound by their agreement.

4 is INCORRECT. Generally, a contract does not need to be in writing to be binding
on the parties.

1.3 Common intention

The parties to the proposed contract must have the same intention. This shared
intention is absent if, for example, one party intends to buy a specific house and
the other party intends to let that house to him or her under a contract of lease. In
these circumstances, the parties are negotiating at cross-purposes and, as a result,
no contract is formed. A contract would arise here if both parties intended to be
bound by either a lease of the house or, a sale and purchase of the house.

1.4 Making the intention known

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

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

Words are not necessarily essential to the formation of a contract. Intention can also be made known through people's conduct. For example; a customer enters a shop, chooses 12 apples and puts them down on the shop counter. The shopkeeper rings up the total price on the till. The customer sees this total and takes enough money out of her purse to pay the amount in question. The customer hands over the money, picks up the 12 apples and walks out of the shop. No words have passed the lips of either the customer or the shopkeeper, yet a contract of sale was concluded between the two parties, and then performed. By going up to the counter with the apples that she wished to buy, the customer implicitly offered to buy them. The shopkeeper accepted this offer to purchase by ringing up the price on the till. In these circumstances, intention was declared through conduct.

2  Offer and acceptance
(Textbook par 4.2)

2.1  The concepts of offer and acceptance

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

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

2.2  Requirements for the Offer and Acceptance

<table>
<thead>
<tr>
<th>OFFER</th>
<th>ACCEPTANCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Undertaking made with the intention that the offeror will be legally bound</td>
<td>(a) Undertaking that the offeree will be legally bound</td>
</tr>
<tr>
<td>(b) Complete</td>
<td>(b) Unconditional</td>
</tr>
<tr>
<td>(c) Clear and certain</td>
<td>(c) Clear and certain</td>
</tr>
<tr>
<td>(d) Usually made in words or by conduct</td>
<td>(d) Usually made in words or by conduct</td>
</tr>
<tr>
<td>Exceptions:</td>
<td>Exceptions:</td>
</tr>
<tr>
<td>– legal requirements (e.g. sale of land)</td>
<td>– legal requirements (e.g. sale of land)</td>
</tr>
<tr>
<td>– if the offeror specifies as a term of the offer that the offer must be accepted in a specified manner</td>
<td>– in the way that the offeror specifies</td>
</tr>
</tbody>
</table>
Regarding requirement (a) above, namely that the offer and the acceptance must contain an undertaking made with the intention to be legally bound, note that by advertising an item for sale, a shopkeeper makes an invitation to do business concerning that item with a view to attracting offers. Thus, the shopkeeper does not make an offer to sell the item. Instead, it is the purchaser who makes the offer to buy the item.

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

### 2.3 The falling away of the offer

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

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

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

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

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

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

(d) **Counter-offer**

**Example:** Anne says to Betty, “I offer to sell you this washing machine for R500.” Betty replies, “I will buy it for R450.” An important term of Anne’s offer is that the price should be R500. Betty does not accept this term and instead proposes a lower price, thus altering a term of Anne’s offer. Anne’s offer falls away because Betty has made a counter-offer to her. Betty’s counter-offer is now open for Anne to accept or to reject. If Anne rejects Betty’s counter-offer, Betty cannot fall back on Anne’s original offer, as it would no longer be open for acceptance.

(e) **Death** of either party before the offer is accepted.

### ACTIVITY 3.3

In which of the following situations could we speak of a valid offer?

1. Vusi is considering selling his motor cycle as soon as he takes delivery of his new car.
2. Ratanama Butchery has the following notice on the shop window: “Half a lamb at R18,99 a kilogram.”
3. An advertisement in the newspaper reads as follows: “Beach cottage at Hartenbos for exchange. Call Steve at 033 435 656.”
4. Rupert puts his house on the market because he wishes to move to an old-age home. Daphne views the house and sends Rupert a letter in which she informs him that she will purchase it for R250 000. Rupert passes away before he receives the letter.
5. The police say they will pay a reward of R100 000 to anyone who can provide them with information relating to the killing of a top football star.

### FEEDBACK

1. Vusi's intention has not yet been made known to a potential addressee with the intention of being legally bound.
2. The notice is simply an advertisement, that is, an invitation to do business. Clients who are interested and inquire about the meat will make offers to buy the meat.
3. All we have here is an intention, in principle, to enter into an exchange contract. An offer must contain complete details of the contract that the offeror has in mind. There are still several essential uncertainties.
4. Daphne’s expression of her intention does not amount to an offer. An offer is valid only if it comes to the notice of the addressee.
5. One of the requirements for offer and acceptance is that the offer must be addressed to a particular person or persons, or in general to an unknown person or persons. The reward offered by the police is an example of an offer addressed to unknown persons. Thus, it constitutes a valid offer.
2.3.1 The continued existence of the offer: The option

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

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

ANDREW → BRIAN

(2) Offer to keep the entrenched substantive offer (I) open for two weeks

ANDREW → BRIAN

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

During these two weeks, Andrew may not withdraw this (entrenched) substantive offer; neither may Andrew offer, in the meantime, to sell the horse to a third party, Charles.

The option binds Andrew to keep the entrenched offer open in favour of Brian for two weeks. Before the end of those two weeks, Brian may decide to reject Andrew’s substantive offer.

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

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

ACTIVITY 3.4

Read the scenario below and discuss the subsequent situations.

Morongwa is transferred from Kuruman to Kimberley and wishes to rent a house from Tracy, but she is uncertain whether her husband, Mpho, who is still living in Kuruman, will be satisfied with the house. Tracy gives Morongwa an option for two weeks to reach a final decision on whether or not she wishes to rent the house.

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

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

2.4 Special rules in regard to offer and acceptance

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

(a) invitation to make an offer (par 4.2.4.1 and par 4.2.2(a) of the textbook)
(b) offers of reward (par 4.2.2(e) of the textbook)
(c) options (par 4.2.3.2 of the textbook)
(d) an intention to contract (par 4.2.4.2 of the textbook)
(e) calling for tenders (par 4.2.4.3 of the textbook)
(f) auctions (par 4.2.4.4 of the textbook)

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

<table>
<thead>
<tr>
<th>AUCTIONS SUBJECT TO RESERVATION</th>
<th>AUCTIONS NOT SUBJECT TO RESERVATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Usual: if the conditions of auction expressly provide that goods will be sold subject to reservation, or if conditions are silent on the matter.</td>
<td>• Exceptional: if the conditions of auction expressly provide that goods will be sold without reserve.</td>
</tr>
<tr>
<td>• Goods are sold only if the minimum price set before the sale is reached or exceeded. The auctioneer is the agent of the seller and runs the sale on the seller’s behalf. The minimum price is the lowest price at which the seller is willing to sell the goods. A reserve price of R10 000, for example, would mean that a buyer’s bid to purchase the goods for R10 000 would be acceptable, but that a bid for R9 500 would not be acceptable.</td>
<td>• The terms of sale expressly (orally or in writing) state that the goods are sold without a reserve price. Actually, there is a reserve price here: the goods must be sold for at least one cent (the smallest unit of currency), because if they are sold for nothing, the contract would not be a sale – it would be a gift (donation).</td>
</tr>
<tr>
<td>• Offerors: interested potential buyers attending the auction, or their duly authorised representatives. These buyers or their agents bid for the goods (make offers to buy them).</td>
<td>• Offeror: the auctioneer.</td>
</tr>
</tbody>
</table>
AUDITIONS SUBJECT TO RESERVATION

• Offeree: the auctioneer.

• Offer to buy. An interested buyer or his or her agent makes a bid. The auctioneer decides whether or not a contract comes into existence. The auctioneer may accept or reject bids, and need not choose the highest bid. The auctioneer decides whether to accept any bid. If he or she does decide to accept a bid, a contract is formed.

AUDITIONS NOT SUBJECT TO RESERVATION

• Offeree: the buyer or agent who makes the highest bid.

• Offer to sell to the highest bidder. The auctioneer offers to sell the goods to the highest bidder. So, the person who decides whether or not a contract comes into existence is the buyer (or his or her agent) with the highest bid. If that buyer or his or her agent accepts the auctioneer’s offer to sell the goods, a contract is formed.

ACTIVITY 3.5

Tom, a tobacconist, has placed a placard outside his shop advertising the sale of a special brand of tobacco at a very low price. John, a chain smoker, sees the low price and goes in to buy a kilogramme of tobacco at R100 as displayed on the placard. Tom refuses to sell it to John at that price and asks him to leave. John contends that Tom must give him the kilogramme of tobacco because he has accepted a valid offer from him.

Which ONE of the following statements is CORRECT?

1. John accepted Tom’s offer with the intention of being legally bound on the basis of the placard.
2. Tom made an offer to John with the intention that he would be legally bound by the mere acceptance of the offer by John.
3. The placard outside Tom’s shop constitutes an invitation to John to make an offer.
4. By offering Tom the R100, John made it clear that he unconditionally accepted Tom’s offer.

FEEDBACK

3 is CORRECT. The general rule is that an advertisement or display in itself does not constitute an offer, but is an invitation to do business. If John reacts to Tom’s invitation, he makes Tom an offer to buy the advertised or displayed item. If Tom accepts John’s offer, consensus is reached and a contract of sale arises.

1 is INCORRECT. Tom did not make John an offer, but only invited John or the public to do business. When a member of the public reacts to a price-marked article, he or she makes the dealer an offer to buy the displayed item.

2 is INCORRECT. Tom did not make John an offer. John is the one who made Tom an offer to buy his tobacco for R100. It is one of the requirements of offer and acceptance that the offer must be made with the intention that the offeror (John) will be legally bound by the mere acceptance of the offer by the offeree (Tom).
3. The moment and place of formation of a contract

(Textbook par 4.3)

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

It is important to establish the exact **place** of consensus for deciding which court has jurisdiction to hear a claim concerning the contract.

**Example:** If the contract was concluded in Pretoria, the Pretoria magistrate’s court would, in principle, have jurisdiction regarding the contract because the contract was concluded in the district over which that magistrate’s court exercises authority.

<table>
<thead>
<tr>
<th>3.1 PARTIES IN EACH OTHER’S PRESENCE (HERE AND NOW)</th>
<th>3.2 PARTIES NOT IN EACH OTHER’S PRESENCE (NOT HERE AND NOT NOW)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>General rule – ascertainment theory:</strong> Anna makes an offer and Bert accepts it. Anna learns of this acceptance of the offer at the moment when and at the place where Bert accepts it; the contract comes into existence then and there. Bert’s acceptance of the offer comes to Anna’s notice. The justification for the ascertainment theory is that if Anna is to become contractually liable, it is only fair that she should be the first to know whether or not her offer has been accepted by Bert. The <strong>ascertainment theory</strong> also applies to contracts concluded by <strong>telephone</strong>. Because of the immediacy of communication between the parties communicating over the telephone, they are regarded as being in each other’s presence, even though they may be speaking to each other by satellite linkup from opposite ends of the earth, thousands of kilometres apart.</td>
<td><strong>Exception – dispatch theory (expedition theory; posting rule):</strong> Communication by post or telegraph is not as direct as communication by telephone. For example: Anna in Cape Town posts an offer to Bert in Johannesburg. This offer is governed by the dispatch theory (also called the expedition theory or the posting rule). The <strong>dispatch theory</strong> is an exception to the general rule (ascertainment theory). In terms of the dispatch theory, the contract is concluded at the moment when and at the place where the letter of acceptance is <strong>posted</strong>. In the above example, the contract is concluded in Johannesburg when Bert posts his letter accepting Anna’s offer.</td>
</tr>
</tbody>
</table>
The dispatch theory applies if, in the letter containing the offer, the offeror does not specify any particular method of acceptance. By sending the offer by post, the offeror in these circumstances tacitly indicates to the offeree that the latter may, in turn, validly accept the offer by post. The posting rule is not absolute or compulsory: for example, if Anna wished to make sure that she knew about Bert’s acceptance of the offer, she would still be free to state, in her letter containing the offer, that if Bert wishes to accept her offer, his letter of acceptance must come to her attention. This term of Anna’s offer would thus exclude the application of the posting rule (the dispatch or expedition theory) and would apply the general rule (the ascertainment theory) to Anna’s offer.

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

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

The Electronic Communications and Transactions Act 25 of 2002 (ECT Act) regulates contracts concluded by electronic means where the parties failed to, or chose not to, regulate contract formation specifically. The ECT Act provides that, in the absence of a different agreement between the parties, an agreement concluded electronically is concluded at the time when and at the place where the acceptance of the offer is received by the offeror. This is the “reception theory” and it takes precedence over the common-law principles.

When parties conclude contracts using both traditional and electronic methods of communication, it is advisable for them to expressly indicate the time and place of formation to eliminate uncertainty.

**ACTIVITY 3.6**

Susan in Klerksdorp makes a written offer by letter to Gerald in Kenton-on-Sea to purchase his beach cottage for R1.5 million. Gerald accepts her offer by letter, but while the letter is in transit, he receives an offer of R2 million from Olga. What should Gerald do if he wishes to accept Olga’s offer? Explain with reference to how the different theories work.

**FEEDBACK**

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

4 Consensus and defects in will
(Textbook par 4.4)

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

4.1 Absence of consensus (mistake)

Mistake is a misunderstanding by one or more of the parties to a contract about some aspect/s of the proposed contract, for example, a fact that is material to the contract or a legal rule. If mistake meets the requirements discussed below, there is no consensus and no contract arises. If mistake does not meet the requirements, a valid contract arises even though consensus is absent and the party who is labouring under a mistake is held to his or her intention, as expressed, which – because of the mistake – is not his or her true intention. Therefore, although consensus is set as a requirement for a valid contract, there is an exception to the rule, namely, if consensus is absent and there is a mistake regarding aspects that the law regards as irrelevant.

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

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

A contracting party who seeks to rely on the ground of mistake to deny the existence of a contract will have to prove all the requirements discussed below and will have to prove that a contract was therefore not formed. In other words, these requirements are cumulative.

The requirements are that the mistake must relate to a fact or a legal rule or principle, the fact, legal rule or legal principle to which the mistake relates must be material, and the mistake must be reasonable.

4.1.1.1 The mistake must relate to a fact, legal rule or principle

The scenario in par 4.1 above where John thinks that the appliance is a washing machine when it is actually a tumble dryer is an example of a mistake of fact.
4.1.1.2 The mistake must concern a material fact, legal rule or principle

“Material” means essential, important and relevant (to the contract). “Legally material” means essential, important or relevant in the eyes of the law for legal purposes.

<table>
<thead>
<tr>
<th>MISTAKES REGARDED AS LEGALLY MATERIAL</th>
<th>MISTAKES NOT REGARDED AS LEGALLY MATERIAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Mistake about the identity of the other party: for example, because of a misdialled telephone number, an employer offers a job to someone other than the offeree actually intended.</td>
<td>(a) Mistake about a person’s attributes: for example, his or her full names or his or her character.</td>
</tr>
<tr>
<td>(b) Mistake about the content of the intended contract:</td>
<td>(b) Mistake about the attributes of the object of performance:</td>
</tr>
<tr>
<td>- Time of performance: for example, one contracting party thinks that the contract relates to the renting of a bus on 31 May, while the other party thinks it relates to the renting of a bus on 30 June.</td>
<td>Here there is no mistake about the performance to be rendered (i.e. the identity of the subject matter of the contract), but about its attributes, for example, whether the bus is green or red, has plastic or cloth seats, and so on, unless the attribute has been made a condition of the contract (see chapter 8 of the textbook and study unit 4 below).</td>
</tr>
<tr>
<td>- Place of performance: for example, one party thinks that the goods will be delivered in Bloemfontein, while the other party thinks that the goods will be delivered in Port Elizabeth.</td>
<td></td>
</tr>
<tr>
<td>- Method of performance: for example, one party thinks that the goods must be delivered by courier, while the other party thinks that they must be delivered by train.</td>
<td></td>
</tr>
<tr>
<td>- Performance to be rendered: for example, one party thinks it is renting a bus, while the other party thinks it is leasing a truck.</td>
<td></td>
</tr>
</tbody>
</table>
### MISTAKES REGARDED AS LEGALLY MATERIAL

<table>
<thead>
<tr>
<th>Mistake about the interpretation the law attaches to the proposed contract:</th>
</tr>
</thead>
<tbody>
<tr>
<td>for example, the nature of the contract. One party thinks he or she is acquiring ownership by paying a monthly amount, while the law interprets the contract as a contract of lease.</td>
</tr>
</tbody>
</table>

### MISTAKES NOT REGARDED AS LEGALLY MATERIAL

<table>
<thead>
<tr>
<th>Mistake in the motive (the underlying reason) for concluding the contract:</th>
</tr>
</thead>
<tbody>
<tr>
<td>The example given in the textbook is of the person who mistakenly thinks that his bicycle has been stolen and therefore buys a new bicycle from a dealer. The underlying reason for the purchase of the new bicycle is the mistaken belief that the old bicycle has been stolen and should be replaced. The mistake in motive can be caused by the misrepresentation of the other party, or his agent, and the contract that results will then be voidable. Suppose that my bicycle has not been stolen, but that the dealer, desperate for business and aware that my bicycle has not been stolen, lies to me that it has been stolen. Because of this lie, I buy a new bicycle. I later find out that my old bicycle has not been stolen. My reason for buying the new bicycle was the dealer’s lie (his or her intentional misrepresentation) that my bicycle had been stolen.</td>
</tr>
</tbody>
</table>

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

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

#### 4.1.1.3 The mistake in fact or law must be reasonable

If the mistake is unreasonable the contract does exist even though consensus is absent. The reasonableness of the mistake is tested objectively. The standard of reasonableness is the reasonable person. One asks whether the reasonable person in this situation would make the same mistake if he or she were to judge the particular circumstances.
The reasonable person has no fault. He or she is innocent of intention and negligence. So, if a particular contracting party wishes to rely on mistake to deny a contract, then that contracting party must have no fault in respect of the mistake. The contracting party will fail in the task of showing this lack of fault if he or she was negligent or careless, or paid insufficient attention to the proposed contract.

**ACTIVITY 3.7**

In light of the quotation in the above example, when do you think mistake in relation to the scenario of the tumble dryer would be unreasonable?

**FEEDBACK**

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

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

**ACTIVITY 3.8**

In which **ONE** of the following situations does consensus **NOT** exist?

1. Ben tells Tim that he is selling a 2015 Toyota Etios car and Tim is interested in buying the car. However, the car is, in fact, a 2013 model.
2. Moshe wishes to sell a desktop computer to a certain Johan Dube. However, Moshe is not sure whether the prospective purchaser that he is speaking to over the telephone is Johan Dube or John Dupe.
3. Martin persuades Anna, at gun point, to sell him her luxury 2005 Mercedes Benz S Class for R1 000, although it is worth R250 000.
4. Dr Mary Matheys convinces her patient, Dan, who is very ill, to sell his luxury sports car to her at a cheap price shortly before he undergoes TB treatment.

**FEEDBACK**

2 is **CORRECT**. A mistake that is material can exclude consensus. In this case there is a misapprehension in respect of the identity of the other contracting party, and no consensus is reached.

1 is **INCORRECT**. This is a case of misrepresentation, which does not exclude consensus.

3 is **INCORRECT**. In this case there is also consensus, although it was obtained by duress.

4 is **INCORRECT**. In this case there is consensus, although it was obtained by undue influence.
4.2 Obtaining consensus improperly

In this section we will consider methods of achieving consensus that are disapproved of by the law. These are circumstances where the assent of one party is obtained in an improper way. Why does the law come to the assistance of victims of these improper methods of obtaining consensus?

1. **Misrepresentation**: Contracting parties must not make untrue statements when negotiating contracts. The legal system regards untrue statements as unlawful.

2. **Duress**: Contracting parties must not intimidate other contracting parties to conclude contracts. The legal system regards intimidation as unlawful.

3. **Undue influence**: Contracting parties must not abuse their power of influence to persuade other parties to conclude contracts. The legal system regards undue influence as unlawful.

4.2.1 Misrepresentation

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

Misrepresentation can be described as follows:

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

Let’s now look at certain aspects of misrepresentation:

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

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

Cloete claimed damages for the defendant company’s fraudulent concealment of this important fact that the municipality no longer wanted the tank to be located on municipal land. The court awarded damages: the defendant company had a duty to tell Cloete about this important change.

Giving an honest opinion or estimate, even if the opinion turns out to be mistaken, does not constitute a misrepresentation, but giving a dishonest or reckless opinion may constitute a misrepresentation. The other person will not have any remedy against the person who gives an opinion, unless in delict where it can be proven that the opinion was given negligently.

Regarding requirement (b) in the textbook, the person who makes the misrepresentation must be
- the contracting party him- or herself or
- the contracting party’s employee acting within the course and scope of the employee’s employment or
- the contracting party’s authorised agent or
- the contracting party’s co-conspirator

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

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

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

**Example**: Nick owns a farm. Paul wishes to buy a farm in the district. One day he hears Oscar saying that the water supply on Nick’s farm is good. Without making any further enquiries of his own, Paul offers to buy the farm from Nick. Nick does not know that Paul (mistakenly) thinks that the water supply on the farm is good; nothing is said about this issue. After the sale, Paul finds out that the water supply on the farm is, in fact, poor. Oscar is neither an employee, nor an agent, nor a co-conspirator of Nick’s. In this case Paul will not be able to have the contract of sale that he concluded with Nick set aside on the grounds of misrepresentation because Nick did not make a misrepresentation to Paul.
The misrepresentation must have occurred during the negotiations before the contract was concluded. It must have occurred while the parties were discussing the terms on which each of them would be willing to do a deal with the other. So this requirement would not be met if the misrepresentation had been made long before the negotiations started; nor would this requirement be met if the misrepresentation were made after the contract had already been concluded.

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

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

Example: During a drought, the soil on a particular farm looks dry and unsuitable for growing mealies. An interested buyer approaches the farmer and casually asks whether the soil is suitable for mealies. The farmer, anxious to sell the farm, which has never been fertile, tells the potential buyer that the soil is very fertile and has produced good crops. If the buyer then buys the farm because of this misrepresentation by the farmer, we can say that if the farmer had not made the misrepresentation, the potential buyer would not have bought the farm.

Regarding the possibility that, but for the misrepresentation, the deceived party would not have concluded the contract on the same terms, we can vary the facts of the present example as follows: Suppose the interested buyer has already decided to offer the farmer R1 million for the farm. After being assured that the soil is fertile, the interested buyer decides to offer R2 million for the farm. The farmer accepts this offer and a contract is concluded. Here, if the farmer had not made the misrepresentation about the fertility of the soil, the interested buyer would have offered R1 million instead of the R2 million that he or she offered.

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

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

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

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

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

The contract may be set aside by the person who is the victim of the misrepresentation
but not by the person who made the misrepresentation. The deceived party may
choose to rescind or to uphold the contract. If the deceived party decides to uphold
the contract, it means that as far as he or she is concerned, the contract still stands:
the deceived party still regards him- or herself as bound by his or her contractual
duties, and regards him- or herself as entitled to expect the party who made the
misrepresentation to perform his or her contractual duties.

But if the deceived party decides to rescind the contract, he or she demands that the
parties be returned to the position they were in before the contract was concluded.
This choice between upholding or rescinding the contract is a golden thread running
through all three kinds of misrepresentation (intentional, negligent and innocent).
The remedy of rescission is a contractual remedy based on the wrongfulness of
the deed. Whether or not there may also be a further delictual remedy open to the
deceived party depends on whether the misrepresentation was made intentionally
or negligently.

(a) Intentional misrepresentation
Intentional misrepresentation is also called fraudulent misrepresentation.

The following is a special aspect of intentional misrepresentation: The statement
was made by a party who knew that the statement was untrue, or who did not honestly
believe in the truth of the statement, or who made the statement recklessly, without
regard to whether it was true or false.

Remedies

Contractual remedies: The victim may choose to uphold or to rescind the contract.

AND

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

**b) Negligent misrepresentation**

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

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

**Remedies**

**Contractual remedies:** The victim may choose to uphold or to rescind the contract.

AND

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

**c) Innocent misrepresentation**

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

**Remedies**

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

**There are NO delictual remedies:** Because the misrepresenting party’s misstatements were not intentional or negligent, the requirement of fault has not been met and there can be no question of delictual damages.
ACTIVITY 3.9

Read the following scenarios and indicate the type of misrepresentation that features in each of them:

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

2. Because he is keen to sell his car, Bradley declares that it is a 2010 model, in spite of the fact that he knows it is a 2006 model.

FEEDBACK

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

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

4.2.2 Duress

Duress (intimidation) can be described as follows:

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

Effect of duress

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

Requirements

(a) There must be actual physical violence or damage, or a threat of violence or damage directed at the life, limb or freedom of the threatened person, or his or her property, which causes a reasonable fear that the threat may be executed.

(b) If duress is caused by a threat, the threat must be imminent (about to occur) or inevitable (so that the victim cannot escape).

(c) The duress must be unlawful, that is, the party exercising it uses it to obtain some benefit he or she would otherwise not have obtained.

(d) A party to the contract or someone acting on his or her behalf must be responsible for the duress.

(e) The duress must cause the victim to conclude the contract. This requirement will not be met if the threat has been removed and the victim freely enters
into the contract, or if the victim ratifies the contract (confirms its validity with retrospective effect). This requirement is also met if the party placed under duress concludes the contract or concludes it on particular terms that he or she may not have accepted but for the duress.

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

Remedies

Contractual remedies: The victim of the duress may choose to uphold or to rescind the contract.

AND

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

ACTIVITY 3.10

Roy holds a firearm to Tito's head and threatens to kill him should he refuse to sell his car to him (Roy). Tito agrees to sell the car to Roy and the two parties sign a contract of sale.

Which ONE of the following statements is CORRECT?

1. There is no consensus between Roy and Tito.
2. A valid contract was not concluded between Roy and Tito because of the absence of consensus.
3. The contract is void as a result of duress.
4. The contract is voidable because Tito signed it under duress.

FEEDBACK

4 is CORRECT. Even if a contract is concluded as a result of duress, consensus exists. But the party who entered into the contract because of the duress may rescind the contract. Such a contract is voidable, and not void.

1 is INCORRECT. Even if a contract is concluded as a result of duress, consensus exists. But the party who entered into the contract because of the duress may rescind the contract.

2 is INCORRECT. Even if a contract is concluded as a result of duress, consensus exists. A valid contract comes into existence. However, such a contract is voidable at the instance of the prejudiced (innocent) party.
3 is INCORRECT. A contract concluded under duress is voidable at the instance of the prejudiced (innocent) party, and not void.

4.2.3 Undue influence

Undue influence may be described as follows:

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

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

Special relationship

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

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

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

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

Effect of undue influence

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

Requirements for undue influence

(a) The contracting party who allegedly exercised the undue influence must have acquired an influence over the victim.
(b) This contracting party must have used his or her influence to weaken the victim's ability to resist, so that the victim's independent will became easily influenced.
(c) The influence must have been used unscrupulously, with a lack of regard for the morality or rightness of the conduct, to persuade the victim to agree to a transaction the victim would not have concluded of his or her own normal free will and which was to the victim's disadvantage.

The example given in the textbook of the elderly farmer who gives his doctor a farm is based on the most important court case regarding undue influence (Preller v Jordaan 1956 (1) SA 483 (A)).

Remedies

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

ACTIVITY 3.11

In which ONE of the following situations does undue influence occur?

1. Donald wants to buy a hair dryer for his wife. He takes a small box from the shelf and pays for it, thinking that it is a hair dryer, while the cashier knows that it is actually a steam iron.
2. Molefi wishes to buy Jan's farm. He asks Jan about the water supply to the farm and Jan assures him that it is good. Molefi buys the farm and later finds out that the water supply to the farm is, in fact, poor.
3. Ralph finds an uncut diamond in his backyard. He doesn't know what it is and what it is worth. Sello, Ralph's attorney, goes to Ralph and promises him a loaf of bread in exchange for the diamond. Ralph agrees because Sello tells him that it is just a worthless stone.
4. Pat wants to sell his television set for R1 500. Teddy comes up to him and, holding a gun to his head, says, “If you don't sell me this television set for R200, I will kill you.” Pat takes the R200 and hands over the television set to Teddy.

FEEDBACK

3 is CORRECT. This is an example of a situation where one contracting party by his or her conduct improperly or unfairly persuades the other contracting party to conclude a contract with the former, contrary to the latter's independent will. Sello used Ralph's ignorance or lack of knowledge to his advantage. It was Ralph's ignorance or lack of knowledge coupled with the incorrect information from Sello that caused Ralph to exchange an uncut diamond for a loaf of bread. Ralph's assent to the contract was obtained improperly so that his independent will was not exercised. The elements of undue influence are present in this situation, seeing that Sello acquired influence over Ralph, Sello's influence weakened Ralph's ability to resist and, lastly, Sello used his influence unscrupulously to persuade Ralph to consent to a transaction Ralph would not have entered into of his normal free will and which was to Ralph's disadvantage. Note that although a contract induced by misrepresentation is generally voidable at the instance of the deceived party, in this example the contract is probably void as it is contrary to statutory law, which prohibits the trading in uncut diamonds.
1 is INCORRECT. This is an example of a 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. In this instance, Donald wanted to buy a hair dryer and not the steam iron. There was therefore a mistake about a material fact. However, the cashier is not to blame as he or she did not know that Donald wanted to buy a hair dryer and not a steam iron.

2 is INCORRECT. This situation is an example of a misrepresentation. A misrepresentation is an untrue statement or representation concerning an existing fact or state of affairs that is made by one party to a contract, thereby inducing the other party into concluding the contract. The other party’s assent is obtained in an improper manner. Jan gave Molefi incorrect information, knowing that it was incorrect. The statement that the water supply on the farm was good was not true and Jan knew that. This is a misrepresentation because if Molefi had known that the water supply was poor he probably would not have bought the farm.

4 is INCORRECT. This situation is an example of duress. Duress is an unlawful threat of harm or injury, made by a party to the contract or by someone acting on his or her behalf, that causes the other party to conclude a contract. Pat did not sell his TV set to Teddy for R200 of his own free will. He was threatened with a gun to sell at that price and he was afraid he would lose his life if he sold it at the price he actually wanted.

AN ADDITIONAL EXPLANATION OF THE DIFFERENCES BETWEEN VOID AND VOIDABLE CONTRACTS

<table>
<thead>
<tr>
<th>VOID CONTRACTS</th>
<th>VOIDABLE CONTRACTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>• No contract exists at all. It may help to indicate this fact by putting inverted commas around the word ‘contract’.</td>
<td>• The contract does exist, but because consent to the conclusion of the contract was improperly obtained, the consensus is flawed or defective.</td>
</tr>
<tr>
<td>• The contract does not give either party contractual rights. The contract is a nullity. Neither party has the right to enforce the contract.</td>
<td>• The party whose consent was improperly obtained may set aside the contract if his or her consent was obtained by misrepresentation, duress or undue influence.</td>
</tr>
<tr>
<td>• The contract cannot be ratified. It cannot be given validity afterwards, that is, with retrospective effect.</td>
<td>• Until that party does set the contract aside, the contract remains current, with concomitant rights and duties on either side.</td>
</tr>
</tbody>
</table>
VOID CONTRACTS

- Both contracting parties may disregard the contract as though the contract were never concluded.

VOIDABLE CONTRACTS

- The party whose consent was improperly obtained has a choice between upholding the contract or rescinding it. If a party upholds the contract, he or she recognises the continued existence of the contract; if he or she rescinds the contract, he or she does away with the contract.
- So the party that exercises the choice must choose one of these courses – he or she may not choose both courses. The alternatives are mutually exclusive, that is, if one is chosen, the other one is automatically lost and can never be chosen again thereafter.

5 Self-assessment activities

1. Briefly describe the requirements that must be fulfilled for consensus to be reached between the parties to a contract.
2. Lido wants to sell his BMW 320i to Lara for R150 000. But Lido does not, in any way, express his intention to Lara. At the same time, Lara wants to buy the BMW 320i from Lido for R150 000. Similarly, Lara fails to express her intention to Lido.
   Has a valid contract come into existence between the parties?
3. Describe the requirements for the offer and acceptance.
4. Draw a distinction between an offer and an invitation to make an offer.
5. Name circumstances under which an offer will lapse or fall away.
6. Describe an option in the context of offer and acceptance.
7. Various types of statements should be distinguished from true offers. Think of examples of statements that are not offers.
8. Draw a distinction between the information (ascertainment) theory and the dispatch (expedition/posting rule) theory.
10. Discuss the requirements for mistake, misrepresentation, duress and undue influence.
THE SECOND REQUIREMENT: CAPACITY TO PERFORM JURISTIC ACTS

Prescribed study material: chapter 5 of the textbook

1 Introduction

(Textbook par 5.1)

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

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

2 Age

(Textbook par 5.2)

The age of a natural person affects his or her capacity to perform juristic acts.

2.1 Majority

A person attains full capacity to perform juristic acts when he or she reaches the age of majority, that is, when he or she turns 18 (comes of age), or by marrying (before turning 18).
ACTIVITY 3.12

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

1. Karin, 16 years old and unmarried
2. Adam, 17 years old and divorced
3. Jenny, aged 25 and unmarried
4. David, aged 26 and certified mentally deficient
5. Ajax Gardening Services CC, a close corporation
6. Sello, married in community of property
7. Duiker, 16 years old and left behind by parents who emigrated to Russia because he had his own job and flat

FEEDBACK

1. Because Karin is under 18, she probably does not have the capacity to perform juristic acts (but see par 5.2.2.3(b) of the textbook).
2. Adam obtained capacity to perform juristic acts when he got married, a status that he does not lose upon divorce (par 5.2.1 of the textbook).
3. Jenny has the capacity to perform juristic acts because she is older than 18 and there are no factors indicating that the position could be different (par 5.2.1 of the textbook).
4. Whether David has the capacity to perform a juristic act will depend on whether he is mentally deficient at the time of the act (par 5.4 of the textbook).
5. Although it has legal capacity, a legal entity does not have the capacity to perform juristic acts. Natural persons must act on behalf of legal entities (par 5.1 of the textbook).
6. The general rule is that each spouse in a marriage in community of property has full capacity to bind the joint estate. However, this rule is qualified with regard to certain assets of the joint estate and certain transactions which involve the joint estate. In these instances Sello has to obtain his wife's consent to the qualified transactions unless he carries out the transactions in the ordinary course of his profession or trade, in which case the requirement will be waived in certain circumstances (par 5.3.2 of the textbook).
7. Duiker has full capacity to perform juristic acts. He is clearly emancipated since he lives separately from his parents and is economically independent. His parents consciously left him behind when they emigrated to Russia, not out of neglect, but because of a conscious decision on their part that it would be best for him (par 5.2.2.3(b) of the textbook).

ACTIVITY 3.13

Which ONE of the following statements is CORRECT?

1. In line with the common law, the Children's Act 38 of 2005 provides that a person becomes a major when he or she reaches the age of 21 years.
2. A minor may obtain full capacity to act upon marriage.
3. A married minor loses the capacity to act if he or she should divorce before reaching the age of majority.
4. A person will only have full capacity to act when he or reaches the age of majority.
FEEDBACK

2 is **CORRECT**. Upon marriage a minor obtains full capacity to act as if he or she were 18 years old, unless the minor’s capacity is flawed for reasons other than his or her age.

1 is **INCORRECT**. In terms of the Children’s Act a minor becomes a major when he or she reaches the age of 18 years (which is the age of majority).

3 is **INCORRECT**. A married minor retains the capacity to act acquired upon marriage even if the marriage is dissolved by divorce before he or she reaches the age of majority.

4 is **INCORRECT**. A person may obtain full capacity to act upon marriage or emancipation in certain instances. Refer to par 5.2.2.3(b) of the textbook.

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2.2 Minority

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

On the death of one of the parents, the other parent becomes the minor child’s only guardian. If both parents should die, the court appoints a guardian for the minor. In the case of a child born out of wedlock (a child whose parents are not married), the mother is usually the child’s guardian. The Children’s Act 38 of 2005 provides for the parental rights of unmarried fathers in certain circumstances.

If the court grants the parents of minor children an order of divorce, the court may make any order that it considers to be in the best interests of the children, including an order regarding the guardianship of the minor children. Such an order could, for example, award guardianship exclusively to one of the parents.

2.2.1 *The minor under the age of seven years*

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

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

2.2.2 The minor over the age of seven years

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

General rule

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

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

OR

– by giving permission before the conclusion of a contract

OR

– by ratifying a contract (giving approval retrospectively, i.e. after the conclusion of the contract)

ACTIVITY 3.14

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

FEEDBACK

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

Common-law exception

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

Statutory exceptions

A minor may act without the assistance of his or her guardian in certain instances. Those instances are the following: The Children’s Act has a number of provisions regarding the health care of children. In this regard, the Children’s Act now makes more detailed provision for children at a lower age to consent to medical treatment or operations. The Children’s Act includes provisions regarding HIV tests on children and makes provision for children’s rights regarding access to information on various health issues. The Children’s Act also provides for children over the age of 12 years to have access to contraceptives in certain circumstances.

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

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

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

2.2.3 Special situations

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

Sometimes the consent of the High Court, or some other specified person, must be obtained in addition to the assistance of the guardian.

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

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

(b) Tacit emancipation

The guardian allows the minor to lead an economically separate life. The guardian’s consent may be given expressly.

Example: “I give you permission to run your own bicycle-repair shop.”

The guardian’s consent may also be given tacitly (silently).

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

Test for tacit emancipation:

– economic independence

AND

– the guardian allows the minor some contractual freedom

Signs (not conclusive proof) of tacit emancipation:

– the minor has a separate dwelling

AND

– the minor carries on his or her own business (conducts his or her own affairs)
THE EMANCIPATED MINOR'S CAPACITY TO ACT

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

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

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

We distinguish the following circumstances:

<table>
<thead>
<tr>
<th>SITUATION</th>
<th>CONSEQUENCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>• The contract is ratified</td>
<td>- The contract is valid – both parties are liable to perform.</td>
</tr>
<tr>
<td>- by the guardian during minority</td>
<td>- The contract is valid – both parties are liable to perform.</td>
</tr>
<tr>
<td>- by the &quot;minor&quot; once he or she</td>
<td></td>
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<tr>
<td>attains majority</td>
<td></td>
</tr>
<tr>
<td>• The contract is not ratified</td>
<td>- The contract is invalid, but has certain consequences. The minor may claim performance without rendering performance, but needs the assistance of the guardian to claim performance. This assistance is ratification by implication. The contract is thus valid. The minor is consequently liable to perform. The other party now has the contractual defence that he or she need not perform until the minor has performed or offered to perform.</td>
</tr>
<tr>
<td>- The other party has not yet</td>
<td>- There is no contractual liability.</td>
</tr>
<tr>
<td>rendered performance.</td>
<td>Liability on unjustified enrichment:</td>
</tr>
<tr>
<td></td>
<td>Luxury items: The minor is liable for what remains in his or her possession when a claim is instituted.</td>
</tr>
<tr>
<td></td>
<td>Necessities: The guardian is liable.</td>
</tr>
</tbody>
</table>
Note that the above-mentioned defence that one party has when his or her performance is claimed, namely, that he or she need not perform until the other party has performed or offered to perform is available in all contracts and not only in the case of “contracts” with minors.

ACTIVITY 3.15

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

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

FEEDBACK

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

ACTIVITY 3.16

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

FEEDBACK

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

A minor who concludes a contract without the assistance of his or her guardian is **normally** not liable under the contract, as explained above. However, there is one exception: when a minor fraudulently poses as a major and another party concludes a contract with the minor on the strength of the misrepresentation, the minor is bound to the contract as if he or she were indeed a major.

**Example:** In reply to a question about her age, Lize, a minor, lies and says she is 18. If her fraudulent behaviour leads Motu to contract with her, Lize is bound by the contract as though she were a major with the capacity to act.

Note that fraudulent misrepresentation is required and not innocent misrepresentation.

3 Marriage

_(Textbook par 5.3)_

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

Here we must distinguish the following three possibilities:

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

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

3.2 Agreements concluded by a spouse married in community of property

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

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

The two exceptions to the general rule are the purchase of domestic necessities in cases where the parties live apart but are not divorced, and where the Matrimonial Property Act 88 of 1984 prescribes certain forms of consent by spouses for certain transactions.
ACTIVITY 3.17

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

1. You are the cashier at the bank where Nthabiseng wishes to withdraw money from an account that was opened in the name of her husband, Godfrey.
2. You are the estate agent who found a buyer for the house belonging to Nthabiseng and Godfrey.
3. Godfrey gives the couple’s minibus to Frans as a gift.

FEEDBACK

1. You will have to insist on written consent from Godfrey. It is also possible that the transaction can be ratified by Godfrey.
2. Either Godfrey or Nthabiseng can conclude the contract of sale, but the other one has to give written consent for the transaction and the consent must be given in advance. The transaction may not be ratified by either of them later.
3. It is sufficient for Nthabiseng to know about the donation and to not object to it. If, however, she only learns about the donation later, she may consent then. Of course, she could also raise objections to the donation, which would mean that Godfrey did not have capacity to enter into the transaction. If Frans had been unaware that Godfrey lacked the necessary consent, and could not reasonably have been aware of this, the transaction may be regarded as having been concluded with the necessary consent.

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

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

Remember that if parties to a marriage do not state otherwise, they are automatically married in community of property. Also note that if parties to a marriage conclude an antenuptial contract, the accrual system will automatically apply to their marriage, unless they exclude it expressly. Moreover, an antenuptial contract will be binding on the spouses, even if it is not notarially executed and registered at a deeds office; however, it will not be binding on third parties. You should also know what responsibilities each spouse has regarding household necessities.

4 Mental deficiency

(Textbook par 5.4)

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

Mental deficiency is a question of fact. The test is as follows: Was the person normal or mentally deficient when he or she entered into the contract? Mental illness may come and go: while it is absent, the person (even if declared mentally deficient by the court) has what is called a “lucid moment”. During such a lucid interval, he or she may acquire contractual rights and duties.

Once a person has been declared mentally deficient, the burden of proof shifts. In such a case it must be proved that the person indeed had the capacity to act when the contract was concluded, in spite of the declaration, whereas in the case of a person who has not been declared mentally deficient, it must be proved that the person had no capacity to act when the contract was concluded, in spite of the fact that he or she has not been certified as mentally deficient.

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

Question of fact: When the person concluded the contract, was he or she so drunk or so drugged that he or she
– could not understand the nature and consequences of his or her actions?
OR
– could understand the nature and consequences of his or her actions but could not control those actions?

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

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

6 Prodigals
(Textbook par 5.6)

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

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

Exception: The prodigal may conclude contracts by which he or she acquires rights, but not duties, without the curator's assistance.
Return to full capacity: If the court sets aside the order declaring the person a prodigal, the former prodigal will regain complete capacity to act.

7 Insolvency
(Textbook par 5.7)

Certain provisions of the Insolvency Act 24 of 1936 affect an insolvent’s capacity to act after his or her estate has been sequestrated. The insolvent may not dispose of any of the assets that were in his or her estate at the time of sequestration.

As far as assets acquired by the insolvent after sequestration are concerned, the insolvent may dispose of these only if they are excluded from the insolvent estate by statute or at common law. The insolvent still has capacity to enter into contracts, provided that they do not dispose of the assets of the estate. The insolvent may, for example, agree to repair someone’s car for remuneration.

ACTIVITY 3.18

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

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

FEEDBACK

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

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

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

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

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

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

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

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

8 Self-assessment activities

1. Aaron is a mentally deficient, married man. Does his mental deficiency have an influence on his legal capacity?
2. Mention the factors that can influence a natural person’s capacity to act.
3. Describe the different age bands according to which a person’s capacity to act is determined.
4. Does a minor lose his or her capacity to act once a marriage to which he or she is a party is dissolved by divorce? Explain.
5. Advise Mr Tau whether he can consent, as part of his cultural practices, to Mr Bundu marrying his 17-year-old daughter, Buhle, without her consent.
6. Explain whether Mary, a 13-year-old girl, can undergo an HIV test without her guardian’s consent.
7. Can Matu, a 40-year-old businessman who is virtually unconscious after having consumed 12 glasses of whisky, conclude a contract for the sale of his farm?
8. Does Mabel, who has been declared a prodigal by the court, have capacity to act?
9. Briefly describe the contracts for which a guardian's assistance is insufficient.
10. Tapiwa, a minor of 17 years, has just completed a printing course and decides to launch a business that prints business cards as well as birthday and wedding invitations. His father, an estate agent, finds business premises for him in the local shopping centre. His mother buys a computer, a printer-cum-photocopier and furniture for the business. As a minor, Tapiwa requests you to advise him on the concept of tacit emancipation.

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

Prescribed study material: chapter 6 of the textbook

1 Legal possibility

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

(a) Agreements restraining a person's freedom to participate in legal intercourse

(Textbook par 6.2.1.3(d))

ACTIVITY 3.19

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

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

FEEDBACK

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

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

(b) Agreements restraining a person’s freedom to participate in trade

(Textbook par 6.2.1.3(e))

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

See the example in the textbook concerning the sale of a hair salon. Other examples are the following:

1. Ali and Ben are partners in a veterinary practice. Ali is afraid that if Ben were to leave their partnership, nearly all the customers would take their sick animals to Ben. He therefore persuades Ben to promise that if he (Ben) were to leave the partnership, he would not practise as a veterinary surgeon in Cape Town for one year.

2. Cas Ltd, anxious to protect its trade secrets and to keep its important clients, requires its employee, Don, to agree to a restraint that will prevent him from doing the same work in a specified geographical area (South Africa) for a specified time (ten years).

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

For this reason, Ben and Don would have to prove that the restraints on their freedom to practise and work are contrary to public policy. The court may take into consideration whether the restraint is reasonable to both parties at the time it takes effect (i.e. when Ben and Don leave their present places of work and Ali and Cas Ltd seek to enforce the restraints). Ben’s restraint is limited: he could start practising immediately somewhere else (even near Cape Town) or, if he wishes to continue practising in Cape Town, he need wait only a year. Thus, because the restraint on his freedom to trade is reasonable and consequently not contrary to public policy, it is valid. However, Don’s restraint is too long and extensive, and therefore unreasonable. The restraint against Don is therefore contrary to public policy and unenforceable. The courts have the discretion to alter the period or the area of the restraint in order to bring the contract within the sphere of reasonableness.

(c) Gambling contracts

(Textbook par 6.2.1.3(f))

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

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

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

1.1 Consequences of illegality

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

No contractual rights or duties can arise from a void contract. In the case of unlawful contracts, this fact is expressed by the rule that no action arises from a shameful cause (ex turpi causa non oritur actio). Moreover, the parties may not turn to the law on unjustified enrichment in order to obtain performance. This is established by the par delictum rule, which has the effect that the person in possession of the performance is in a stronger position. However, in the past, the courts sometimes relaxed the par delictum rule when it was in the public interest to do so, for example, when the contract was in contravention of a statutory prohibition and the contravention was of a technical nature.

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

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

OR

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

ACTIVITY 3.20

Read the following scenario and answer the question that follows.

Winnie works at the local traffic department. Winnie sells driver’s licences to the public illegally. Nigel reaches an agreement with Winnie to pay her R500 in cash for a driver’s licence. Nigel pays the money but Winnie refuses to deliver the driver’s licence to Nigel.
Which **ONE** of the following statements is **CORRECT**?

1. Nigel can claim delivery of the driver's licence from Winnie on the basis of the contract that arose between them.
2. Nigel can reclaim the amount paid to Winnie on the ground of unjustified enrichment.
3. The contract between Winnie and Nigel is void due to legal impossibility.
4. Options (2) and (3) above are both correct.

**FEEDBACK**

3 is **CORRECT**. The contract between Winnie and Nigel is unlawful and therefore void owing to legal impossibility.

1 is **INCORRECT**. No party may institute an action against another to claim performance on the basis of an unlawful contract. This rule is expressed in the maxim *ex turpi causa non oritur actio* (no action arises from a shameful cause). Even if one of the parties has already rendered performance in terms of the unlawful contract, the court will not recognise the contract. Nigel will therefore not be able to claim delivery of the driver's licence from Winnie on the basis of the contract which arose between them.

2 is **INCORRECT**. The relief of unjustified enrichment is usually not allowed in respect of unlawful contracts as a result of the existence of a legal rule known as the *par delictum* rule. According to this rule, when there is equal guilt the possessor is in the stronger position. Winnie is in possession of the sum of money agreed upon and since Winnie and Nigel are equally guilty, Winnie is in the stronger position. Therefore, Nigel cannot claim the purchase price from her.

4 is **INCORRECT**. Although option (3) is **CORRECT**, option (2) is **INCORRECT**. Option (3) is **CORRECT** because the contract between Winnie and Nigel is unlawful and therefore void owing to legal impossibility. Option (2) is **INCORRECT** because the relief of unjustified enrichment is usually not allowed in respect of unlawful contracts as a result of the existence of a legal rule known as the *par delictum* rule. According to this rule, when there is equal guilt the possessor is in the stronger position. Winnie is in possession of the sum of money agreed upon and since Winnie and Nigel are equally guilty, Winnie is in the stronger position. Therefore, Nigel cannot claim the purchase price from her.

2  **Possibility and certainty of performance**

*(Textbook par 6.3)*

**2.1 Objective possibility to perform**

You should note that impossibility of performance is relevant in three different stages of a contract, namely, at the conclusion thereof (which applies here), where breach of contract in the form of prevention of performance occurs (see par 10.6 of the textbook), or where rights are terminated by the supervening impossibility of performance (see par 12.8 of the textbook). You should make a point of distinguishing between these three situations.
It is only objective physical impossibility of performance that prevents the conclusion of a contract. If the performance is not objectively or absolutely impossible, the contract is valid. In study unit 4 we look at terms that may be included in contracts, such as a condition, which could be relevant here. Note the difference between divisibility in character and divisibility in law. A performance that is divisible in character will not necessarily be divisible in law: that would depend on the subject matter itself and the intention of the parties. A set of chairs is an example of a performance that is physically divisible, but which may not be divisible in a particular contract.

**ACTIVITY 3.21**

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

1. Is the contract between Lerato and Estelle valid in light of the fact that Lerato does not own the suite?
2. Suppose that, on returning home, Lerato finds that her father has burnt the suite to spite Alex, even before Lerato concluded the contract with Estelle. What is the status of the contract now?
3. Suppose that Lerato arrives home after her father has only thrown three of the chairs onto the fire. Will the contract between Lerato and Estelle be valid or not?

**FEEDBACK**

1. The contract is not invalid because it is simply subjectively impossible to perform. Objectively, it is still physically possible to perform because Lerato can always buy the suite from Alex in order to meet her contractual obligations. Failing that, she commits breach of contract.
2. In this case, performance would be objectively physically impossible and the contract would be void.
3. The dining room suite is physically divisible into the sideboard, the table and the chairs. This does not, however, necessarily mean that the law views the dining room suite as a divisible performance. If the law does view the performance as divisible, a valid contract comes into being, and the performance is that part of the divisible performance that is still possible. If the law does not view the performance as divisible, the contract is null and void. So, it is necessary to determine whether the dining room suite is a legally divisible performance. One way of determining whether the performance is divisible is to see how the price is expressed. If the price of the suite is R5 500, the performance might not be divisible, but if the price is set at R1 000 for the table, R1 500 for the sideboard and R500 for each of the chairs, the performance might be viewed as divisible.

**2.2 Determined and ascertainable performance**

The requirement that performance must be physically possible includes the requirement that the performance must be determined or ascertainable. If performance is neither determined nor ascertainable, the contract is invalid due to vagueness because in
SECTION B: GENERAL PRINCIPLES OF THE LAW OF CONTRACT

that case performance is impossible. A contract will be valid if the performance is determined or ascertainable: either of the two would suffice.

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

3 Self-assessment activities

1. Molefe and Lebogang are engaged. They include a clause in their antenuptial contract to the effect that Molefe makes Lebogang his heir.
2. Discuss whether this contact is legally possible or not in terms of common law.
3. What do we mean when we say that the contract is contrary to statutory law?
4. Tom pays Gwelo R50 000 to burn down the Pretoria city hall. However, Gwelo has second thoughts and refuses to perform as agreed. Is Tom legally entitled to enforce Gwelo’s performance or, alternatively, to demand the return of the R50 000?
5. Sifiso undertakes to deliver his Rally mountain bike to Motha. The contract further provides that Sifiso may, at his sole discretion, deliver another mountain bike of similar quality.
6. What kind of obligation is applicable in this scenario?
7. Draw a distinction between an alternative and a generic obligation.
8. Explain what objective possibility of performance means.
9. When is a contract or performance determined and ascertainable?

THE FIFTH REQUIREMENT: FORMALITIES

Prescribed study material: chapter 7 of the textbook

1 Introduction

(Textbook par 7.1)

The final requirement that we take into consideration when determining whether a valid contract has come into existence is whether compliance with any formalities is prescribed for the formation of a contract. (See the requirements for the formation of a valid contract in study unit 3 and chapter 3–7 of the textbook.)

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

(Textbook par 7.2)

As a general rule, no formalities are needed for the formation of a valid contract. Contracts may be entered into

- through spoken words (orally)
- through written words
- through conduct (tacitly) only

Most contracts are formed orally or by conduct. Parties are normally free to choose the way in which they wish to create a contract, i.e. in writing, orally or tacitly. Think of shopping at a supermarket. In the example concerning a lease given in the textbook, Anna's formal letter or informal note would be a written offer, and her oral offer to Bob may be, “Hello, I’d like to hire this car from you for R2 000 a month.”

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

3 Contracts where formalities are required

(Textbook par 7.3)

There are a number of exceptions to the general rule that no formalities are required. These are discussed below.

3.1 Formalities required by law

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

### 3.2 Formalities required by the parties

No formalities are required in common law, but the legislature laid down certain requirements that must be satisfied when concluding certain types of contracts.

Two situations need to be clearly distinguished here:

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

Which of these two possibilities actually reflects the intention of the parties needs to be ascertained from the contract itself.
ACTIVITY 3.22

Which ONE of the options provided below completes the following sentence CORRECTLY?

Compliance with formalities is a requirement for the validity of ...

1. all contracts.
2. all written contracts.
3. only those contracts where legislation prescribes formalities.
4. only those contracts where the formalities are prescribed by legislation or the contracting parties.

FEEDBACK

4 is CORRECT. Where formalities are prescribed by either legislation or the parties to a contract, they have to be complied with in order for the contract to be valid.

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

2 is INCORRECT. The fact that a contract is in writing does not mean that formalities are prescribed by the law or the parties as a requirement for its validity.

3 is INCORRECT. Where formalities are prescribed by legislation, these have to be complied with in order for the contract to be valid. However, if formalities are prescribed by the parties to a contract, these formalities also have to be complied with in order for the contract to be valid. Both legislation and the parties to the contract can therefore prescribe formalities, and not only legislation.

3.3 Writing and signing of electronic transactions

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

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

The ECT Act also provides that, in certain circumstances, an electronic signature may legally fulfil the same function as a traditional handwritten signature.
ACTIVITY 3.23

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

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

FEEDBACK

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

4 Self-assessment activities

1. Peter is very excited. He has just heard that he has won a new car. He phones Mpho and tells him the good news. Peter offers to give his old car to Mpho, who gladly accepts the offer. They agree that Peter will deliver the old car to Mpho once he has received his new car.
2. Discuss the legal status of the agreement between Peter and Mpho.
3. Describe the formalities for contracts of donation in terms of which performance is due in the future.
5. A contract of suretyship is valid even if it is concluded orally. Is this statement true or false?
6. More agreements are concluded electronically than previously. The Electronic Communications and Transactions Act 25 of 2002 provides that data messages (electronic messages) are recognised as writing if the document is accessible for future use, except in respect of specific transactions concluded under specific Acts.

Discuss whether or not electronic messages can be recognised as writing under the National Credit Act 34 of 2005.
**TRANSFER AND TERMINATION OF PERSONAL RIGHTS**

Prescribed study material: chapter 12 of the textbook

### 1 Cession

(Textbook par 12.2)

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

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

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

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

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

2  The consequences of cession

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

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

ACTIVITY 3.24
At a golf day Chuck wins a free holiday of three days at Sun City which is sponsored by Sun International. Chuck is not interested in the prize and cedes the right to it to Natalie. Who is the debtor, who is the cedent and who is the cessionary in this set of facts?

FEEDBACK
The debtor is Sun International, the cedent is Chuck and the cessionary is Natalie.

3  Self-assessment activities
1. Describe cession.
2. Distinguish between cessionary and cedent.
3. List the consequences of cession.
4 Explanatory notes

4.1 Introduction to law of contract

Duty: A responsibility imposed by law that obliges or binds a person to render performance (i.e. to do something or to refrain from doing something).

Obligation: A legal relationship that creates rights and duties.

Right: An advantage that entitles the holder of the right to demand that another person do something or refrain from doing something (an example of an obligation to refrain from doing something is a restraint of trade agreement, as discussed in chapter 6.2.1.3(e) of the textbook), or pay a sum of money.

4.2 Consensus

Acceptance: A declaration by the offeree through which it is indicated that he or she agrees to the terms of the offer exactly as put in the offer.

Auction: A public sale where the price is neither set nor arrived at by negotiation, but is discovered through the process of competitive and open bidding. If the auction is held subject to reservation, the goods will be sold only if a predetermined price is fetched or exceeded. On the other hand, an auction is held without reservation if the conditions of sale state that the goods will be sold to the highest bidder.

Consensus: The agreement between contracting parties or the (common) intention of the contracting parties to be contractually bound (which is the primary basis of every contract). All the parties to the contract must be aware of one another’s intention.

Dispatch (expedition) theory: A contract comes into being at the place where and at the time when the letter of acceptance is posted, unless the parties agree otherwise.

Duress: An unlawful threat of harm or injury, made by a party to a contract or by someone acting on his or her behalf, which causes the other party to conclude a contract.

Electronic agreements: Contracts that are concluded, for example, by facsimile (fax), SMS, e-mail or via the internet.

Entrench: The application of an extra safeguard to ensure the continued existence of an offer.

Information (ascertainment) theory: A contract comes into being at the time when the acceptance is communicated and at the place where the parties happen to be at that moment.

Misrepresentation: An untrue statement or representation concerning an existing fact or state of affairs that is made by one party to the contract with the aim of inducing the other party into concluding the contract.

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.

Offer: A declaration made by the offeror in which he or she indicates an intention to be contractually bound by the mere acceptance of the offer, and in which he or she sets out the rights and duties he or she wishes to create.

Option: An offeror may bind him- or herself by an agreement with the offeree not to revoke the offer, in which case the offer remains open for a specified period. Such an irrevocable offer (together with the agreement that makes it irrevocable) is known as an option.
Reception theory: In the absence of a different agreement between the parties, an agreement concluded electronically is concluded at the time when and at the place where the acceptance of the offer is received by the offeror.

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 the latter’s independent will.

Void: “Void”, in relation to a contract, means not valid or legally binding, or of no legal effect.

Voidable: “Voidable”, in relation to a contract, means valid and binding but may be annulled or rendered unenforceable for a number of legal reasons by a party to the transaction who is legitimately exercising his or her power to avoid the contractual obligations.

4.3 Capacity to perform juristic acts

Capacity to act: The capacity to perform juristic acts, to participate in legal transactions and to conclude valid contracts.

Insolvent: A debtor whose estate is under sequestration, including a debtor who is unable to meet his or her debts or obligations before the sequestration of his or her estate.

Legal capacity: The capacity or competence to acquire and to bear rights and duties.

Major: Any natural person who has reached the age of 18 years or who is married.

Mental deficiency: The condition where a person is not able to understand or appreciate the nature or consequences of his or her conduct at a level which is sufficient to enable him or her to manage a particular affair and to make rational decisions.

Minor: Any natural person who has not yet reached the age of 18 years and who is still unmarried.

Prodigal: A person who habitually squanders his or her money recklessly and extravagantly.

Tacit emancipation: This occurs where the guardian allows the minor to lead an economically separate and independent life. The guardian’s consent may be given expressly or tacitly.

4.4 The agreement must be possible

Ex turpi causa non oritur actio: No action arises from a shameful cause/immoral consideration.

Freedom of testation: The power of a person to choose how to have his or her properties distributed upon his or her death.

Genus: The number of beings or objects which agree in certain general properties, common to them all.

Inheritance: The practice of passing on property, titles, debts, rights and obligations upon the death of an individual.

Par delictum rule: When the parties to an unlawful contract are equally at fault, neither can obtain affirmative relief from the court and whoever possesses whatever is in dispute may continue to do so in the absence of a superior claim.

Void: “Void”, in relation to a contract, means not valid or legally binding, or of no legal effect.

Voidable: “Voidable”, in relation to a contract, means valid and binding but may be annulled or rendered unenforceable for a number of legal reasons by a party
to the transaction who is legitimately exercising his or her power to avoid the contractual obligations.

4.5 Formalities

**Advanced electronic signature**: A signature that results from a process which has been accredited by the authority provided for in terms of the Electronic Communications and Transactions Act 25 of 2002. The authority referred to is the Department of Communication.

**Electronic signature**: Anything from the typing of a name at the end of a document and a scanned hand-written signature to the use of complex identification technology, as long as it is intended to be a signature.

**Formalities**: Those requirements (stipulated either by the law or by the contracting parties themselves) relating to the outward, visible form in which the agreement must be cast to create a valid contract.

4.6 Transfer and termination of personal rights

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

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

**Cessionary**: The person to whom a personal right is transferred.

5 Africanisation and commercial law

The general principles of the law of contract are interrelated with the African concept of *ubuntu*, which advocates social justice and fairness. Most principles in the law of contract are aimed at ensuring fairness and reasonableness in the interest of justice.
LEARNING OUTCOMES

After you have worked through this study unit, you should be able to:

- explain what is meant by a “term” in a contract
- explain the different ways of incorporating terms into a contract
- draw a distinction between the *essentialia*, the *naturalia* and the *incidentalia* of a contract
- differentiate between condition, time clause, supposition, warranty and modus as terms of a contract
- differentiate between a cancellation clause, a penalty clause, and a forfeiture clause
- apply these terms in contracts

Prescribed study material: chapter 8 of the textbook

OVERVIEW

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

1 INTRODUCTION: THE TERM

(Textbook par 8.1)

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

A term is a provision in a contract. It obliges a party to act in a specific manner, or not to perform a specific act. It may also qualify (limit) the contractual obligations. It has legal consequences that may be claimed and enforced.

STATEMENTS MADE ABOUT THE CONTRACT

If the statements about the contract are misrepresentations, they do have legal consequences (see chapter 4). But if the statements are merely sales talk intended to attract customers (e.g. the item or product is presented as the best, the cheapest, the prettiest or the funniest), they do not have legal consequences.

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

(a) **Express terms**

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

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

(b) **Tacit terms**

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

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

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

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

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

**ACTIVITY 4.1**

Discuss the correctness or incorrectness of the following statement: In a contract of sale, a guarantee against latent defects is included in the contract by operation of law.

**FEEDBACK**

The statement is correct. The guarantee against latent defects forms part of every contract of sale, unless the parties specifically alter or exclude it.
ESSENTIALIA, NATURALIA AND INCIDENTALIA

(Textbook par 8.2)

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

ACTIVITY 4.2

Draw a distinction between essentialia, naturalia and incidentalia as terms of a contract.

FEEDBACK

1. Essentialia are terms that are essential for the classification of a contract as belonging to a particular class or category of contract.
2. Naturalia are terms that the law attaches to every contract of a particular class.
3. Incidentalia are additional terms that are included in a contract by the parties.

3 THE CONDITION

(Textbook par 8.3)

A condition can be described as a contractual term that renders the operation and consequences of the contract dependent on the occurrence, or non-occurrence, of a specified uncertain future event.
Example: Andy and Bill agree that Andy will buy Bill’s car on condition that Andy’s sister gives him the money to pay the price.

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

3.1 The suspensive condition

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

3.2 The resolutive condition

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

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

ACTIVITY 4.3

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

FEEDBACK

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

4 THE TIME CLAUSE

(Textbook par 8.4)

The difference between a condition and a time clause is the following: a condition depends on an uncertain future event, whereas a time clause depends on a certain future event, although the specific time at which the event will occur may be
uncertain. (For example, although it is certain that Bertie will die, it is uncertain precisely when it will happen.)

**Example:** On 1 June, Eddy sells his car to Fatima. They agree that delivery and payment will occur on 1 August.

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

4.1 **The suspensive time clause**

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

4.2 **The resolutive time clause**

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

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

**ACTIVITY 4.4**

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

**FEEDBACK**

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

5 **THE WARRANTY**

(Textbook par 8.6)

**Example:** Lindi leases her house to Kara. The terms include a warranty that the fence will be high enough so that no dogs will be able to leap over the fence. As the landlord, Lindi has a duty to deliver and to maintain the house in a condition fit for the purpose of the lease. Kara has a right to the performance of this common-law duty. But by giving the warranty, Lindi has assumed an **additional** obligation, namely, to make sure that the fence is high enough so that no dogs will be able to leap over the fence. She must therefore take appropriate steps to make the fence high enough. If dogs do leap over the fence, Lindi will be in breach of contract.
SECTION B: GENERAL PRINCIPLES OF THE LAW OF CONTRACT

6 THE MODUS

(Textbook par 8.7)

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

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

7 THE CANCELLATION CLAUSE

(Textbook par 8.8)

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

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

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

8 THE PENALTY CLAUSE

(Textbook par 8.9)

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

The clause about liquidated damages was a penalty clause and had been included to deter Maiden from breaching the restraint. It fell within the scope of section 1 of the Conventional Penalties Act 15 of 1962. It entitled David Co to claim the damages simply because Maiden had breached the provisions. It established the extent of the penalty before Maiden breached the restraint; David Co did not need to prove its damages.
Maiden tried to persuade the court to exercise its discretion and to reduce the penalty to what it considered reasonable, but he failed: the court was not convinced that the liquidated damages claimed by David Co were disproportionate to the prejudice that David Co had suffered as a result of Maiden’s breach of contract.

ACTIVITY 4.5

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

FEEDBACK

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

THE FORFEITURE CLAUSE

(Textbook par 8.10)

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

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

1. Name three ways in which a term can be made part of a contract.
2. Can the incidentalia of a contract be used to exclude the naturalia of the contract?
3. Indicate whether the following terms are conditions or not:
   3.1 I will give you my bicycle if you pass Commercial Law at the end of the year.
   3.2 Transfer of ownership of the house will take place if the bank approves your loan in the next three days.
   3.3 I will wash your car for a week if it is true that the Lions beat Western Province in the rugby match last Saturday.
4. What is a time clause?
5. Describe a modus as a term of a contract.
6. Draw a distinction between a penalty clause and a forfeiture clause.

11 EXPLANATORY NOTES

**Condition:** A term that makes an obligation subject to an uncertain future event.

**Express:** “Express” means an articulated declaration of intent.

**Implied:** “Implied” means not expressed in words, incorporated by operation of law.

**Tacit:** “Tacit” means not expressed in words, but based on the parties’ true intention, or their intention as imputed by the law.

**Term:** A provision that imposes, on a contracting party, one or more contractual obligations to act or not to act in a specific manner, or which qualifies contractual obligations.

12 AFRICANISATION AND COMMERCIAL LAW

The parties to a contract are free to include any term or clause in a contract as long as the term or clause is not unlawful, illegal, unfair or unreasonable. The Consumer Protection Act 68 of 2008 contains a provision that a consumer contract may not contain unfair, unjust or unreasonable terms and conditions. If a consumer contract contains a term or condition that may affect the consumer’s rights, or that could not reasonably be expected in that type of contract, the supplier must draw the consumer’s attention to such term or condition. In this way the Act aims to protect consumers against unscrupulous suppliers.
LEARNING OUTCOMES
After you have worked through this study unit, you should be able to:

• distinguish between the different types of breach of contract
• name and describe the requirements for both *mora debitoris* and *mora creditoris*
• describe the consequences of each form of breach of contract
• draw a distinction between prevention of performance by the debtor and the creditor

Prescribed study material: chapter 10 textbook

OVERVIEW
Although the objective of a validly concluded contract is that the contractual obligations be fulfilled by due and proper performance, this might not happen and the contract may be breached by one of the parties. The law recognises five forms of breach of contract: default by the debtor, default by the creditor, positive malperformance, repudiation and prevention of performance. Note that not all forms of breach of contract can be committed by both the debtor and the creditor. The requirements for each form are important as well as the consequences of that type of breach. Prevention of performance is a form of breach of contract, whereas initial impossibility of performance prevents a contract from being concluded validly. Supervening impossibility of performance, discussed in chapter 12 of the textbook, results in the contract being terminated. This distinction is important.

INTRODUCTION
(Textbook par 10.1)
All contracts are intended to be performed properly and on time. Most contracts are performed in this way, but some are not, for example, if the terms of the contract are broken because of the conduct of one of the parties. This is called breach of contract. The table below indicates the different forms of breach of contract and which party may be responsible for a particular kind of breach of contract.

<table>
<thead>
<tr>
<th>TYPE OF BREACH</th>
<th>CAN BE COMMITTED BY DEBTOR</th>
<th>CAN BE COMMITTED BY CREDITOR</th>
</tr>
</thead>
<tbody>
<tr>
<td>Default of the debtor</td>
<td>✓</td>
<td>×</td>
</tr>
<tr>
<td>Default of the creditor</td>
<td>×</td>
<td>✓</td>
</tr>
<tr>
<td>Positive malperformance</td>
<td>✓</td>
<td>×</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>TYPE OF BREACH</th>
<th>CAN BE COMMITED BY DEBTOR</th>
<th>CAN BE COMMITED BY CREDITOR</th>
</tr>
</thead>
<tbody>
<tr>
<td>Repudiation</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Prevention of</td>
<td>✓</td>
<td>✓</td>
</tr>
</tbody>
</table>

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

Example:

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

<table>
<thead>
<tr>
<th>DUTY</th>
<th>RESTS ON</th>
<th>THEREFORE CALLED</th>
<th>RIGHT</th>
<th>HELD BY</th>
<th>THEREFORE CALLED</th>
</tr>
</thead>
<tbody>
<tr>
<td>To pay purchase price</td>
<td>The purchaser</td>
<td>The debtor</td>
<td>To receive the purchase</td>
<td>The seller</td>
<td>The creditor</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>price</td>
<td></td>
<td></td>
</tr>
<tr>
<td>To transfer the merx</td>
<td>The seller</td>
<td>The debtor</td>
<td>To receive the merx</td>
<td>The purchaser</td>
<td>The creditor</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>To preserve the merx</td>
<td>The seller</td>
<td>The debtor</td>
<td>To receive the merx in</td>
<td>The purchaser</td>
<td>The creditor</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>same condition</td>
<td></td>
<td></td>
</tr>
<tr>
<td>To protect the buyer</td>
<td>The seller</td>
<td>The debtor</td>
<td>Not to be evicted</td>
<td>The purchaser</td>
<td>The creditor</td>
</tr>
<tr>
<td>against eviction</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>To deliver the merx free</td>
<td>The seller</td>
<td>The debtor</td>
<td>To receive the merx free</td>
<td>The purchaser</td>
<td>The creditor</td>
</tr>
<tr>
<td>from latent defects</td>
<td></td>
<td></td>
<td>from latent defects</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

As the table shows, the same transaction between the parties (for example, a sale) may create several (different) rights and duties. In the context of breach of contract, it is always important to start by ascertaining which performance obligation gave rise to a “problem” and then to decide whether it is the debtor or the creditor in respect of that performance who is responsible for the fault (breach of contract).

**ACTIVITY 5.1**

Themba and Kwena conclude a contract of sale for the property 25 Meerhof Gardens, which belongs to Kwena. Their contract stipulates that Themba must pay an amount of R50 000 as deposit on the purchase price within two days of Kwena’s acceptance of the offer. The money must be paid into Kwena’s bank account, and
Kwena must provide Themba with the name of his bank, the account number and the branch code. Four days after Kwena has accepted Themba's offer, Kwena still has not provided the required information to Themba.

Which ONE of the following statements is CORRECT?

1. Themba has committed breach of contract in the form of *mora debitoris*, as he has not paid the deposit.
2. Kwena has committed breach of contract in the form of *mora creditoris*, as he has neglected to give his co-operation to enable Themba to fulfil his obligation with regard to the deposit.
3. As Themba spent the R50 000 before he received the necessary information from Kwena, supervening impossibility of performance has occurred, and their contract is terminated.
4. Kwena is entitled to cancel the contract if he has given Themba notice of intention to cancel the contract and a reasonable time to comply with his obligation to pay the deposit.

FEEDBACK

2 is CORRECT. In respect of the obligation to pay the deposit, Themba is the debtor and Kwena the creditor. *Mora creditoris* occurs when the creditor's co-operation is required for the debtor to be able to perform. In this set of facts it is the lack of co-operation from the creditor, Kwena, which prevents the debtor, Themba, from performing his obligation to pay the deposit. Kwena has therefore committed *mora creditoris*.

1 is INCORRECT. *Mora debitoris* occurs if the debtor does not perform at the agreed time, and the delay is due to the debtor's fault. In respect of the obligation to pay the deposit, Themba is the debtor and Kwena the creditor. In this set of facts the delay is caused by the creditor, Kwena, causing the debtor's (Themba's) performance to be delayed. Themba has not committed *mora debitoris*, but Kwena has committed *mora creditoris*.

3 is INCORRECT. Supervening impossibility of performance occurs when performance becomes impossible due to an external factor beyond the control of the parties. In this case Themba's inability to pay the deposit is not the result of any external force. Furthermore, Themba's inability to pay is not objectively impossible, and Themba is still liable to pay the deposit.

4 is INCORRECT. The remedy of cancellation of the contract is available only to the innocent party. In this set of facts Themba is the innocent party as he did not commit breach of contract. It is Kwena who is guilty of breach of contract in the form of *mora creditoris*, and because he is not the innocent party, he cannot cancel the contract or give Themba notice of his intention of doing so.

2 DEFAULT OF THE DEBTOR

(Textbook par 10.2)

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

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

(a) Performance must be delayed

Please note the following:

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

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

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

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

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

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

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

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

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

ACTIVITY 5.2

Which **ONE** of the options below will **COMPLETE** the following sentence **CORRECTLY**?

A debtor commits breach of contract in the form of default ( _mora debitoris_ ) if he or she …

1. has tendered defective or improper performance.
2. has rendered performance impossible.
3. has delayed performance.
4. has indicated that performance will not take place as arranged.

FEEDBACK

3 is **CORRECT**. One of the requirements for default by the debtor is that the performance must be delayed by the debtor.

1 is **INCORRECT**. The tendering of defective or improper performance is not a requirement for default by the debtor. Where the debtor tenders defective or improper performance, the form of breach of contract is positive malperformance.

2 is **INCORRECT**. Rendering performance impossible is not a requirement for default by the debtor. Where the debtor renders the performance impossible, the form of breach of contract is prevention of performance.

4 is **INCORRECT**. The indication that performance will not take place as arranged is not a requirement for default by the debtor. Where the debtor indicates that performance will not take place as arranged, the form of breach of contract is repudiation.

3 DEFAULT OF THE CREDITOR

(Textbook par 10.3)

When a creditor, through his or her own fault and without lawful excuse, fails to cooperate in receiving the debtor’s due and valid performance, he or she is in default.
The creditor’s default presupposes a bilateral juristic act, that is, where the creditor’s co-operation is required to enable the debtor to perform his or her own obligations.

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

3.1 Requirements

There are four requirements that must be met before default of the creditor can occur:

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

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

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

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

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

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

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

Examples of delays when later performance is impossible:

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

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

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

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

3.2 The consequences of the creditor’s default

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

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

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

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

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

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

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

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

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

**ACTIVITY 5.3**

Phoswa and Mothiba conclude a contract of sale for property 30 in Mamelodi Gardens, which belongs to Mothiba. Their contract stipulates that Phoswa must pay an amount of R50 000 as deposit on the purchase price within two days of Mothiba’s acceptance of the offer. The money must be paid into Mothiba’s bank account and Mothiba must provide Phoswa with the name of his bank, the account number and the branch code the following day. Five days after Mothiba has accepted Phoswa’s offer, Mothiba has still not given Phoswa the information as agreed.

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

1. Phoswa has committed breach of contract in the form of *mora debitoris*, as he has not paid the deposit.
2. Mothiba has committed breach of contract in the form of *mora creditoris*, as he has neglected to give his co-operation to enable Phoswa to fulfil his obligation with regard to the deposit.
3. As Phoswa spent the R50 000 before he received the necessary information from Mothiba, supervening impossibility of performance has occurred, and their contract is terminated.
4. Mothiba is entitled to cancel the contract if he has given Phoswa notice of intention to cancel the contract and a reasonable time to comply with his obligation to pay the deposit.

**FEEDBACK**

2 is the **CORRECT** option. In respect of the obligation to pay the deposit, Phoswa is the debtor and Mothiba the creditor. *Mora creditoris* occurs when the creditor fails to give his co-operation to enable the debtor to perform. In this instance it is the lack of co-operation from the creditor, Mothiba, which prevents the debtor, Phoswa, from performing his obligation. Mothiba has therefore committed *mora creditoris*.

Option 1 is **INCORRECT**. *Mora debitoris* occurs if the debtor does not perform at the agreed time, and the delay is due to the debtor’s fault. In respect of the obligation to pay the deposit, Phoswa is the debtor and Mothiba the creditor. In
this set of facts the delay is caused by the creditor, Mothiba, causing the debtor’s (Phoswa’s) performance to be delayed. Phoswa has not committed *mora debitoris*, but Mothiba has committed *mora creditoris*.

Option 3 is INCORRECT. Supervening impossibility of performance occurs when performance becomes impossible due to an external factor beyond the control of the parties. In this case, Phoswa’s inability to pay the deposit is not the result of an external force. Furthermore, Phoswa’s inability to pay is not objectively impossible, and Phoswa is still liable to pay the deposit.

Option 4 is INCORRECT. The remedy of cancellation of the contract is available only to the innocent party. In this set of facts, Phoswa is the innocent party as he did not commit breach of contract. It is Mothiba who is guilty of breach of contract in the form of *mora creditoris*, and as he is not the innocent party, he cannot cancel the contract or give Phoswa notice of his intention of doing so.

4 **POSITIVE MALPERFORMANCE**
(Textbook par 10.4)

This form of breach of contract occurs when a debtor commits an act that is contrary to the terms of the contract. There are two situations that can be distinguished with regard to positive malperformance:

(a) The debtor tenders defective or improper performance:

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

(b) The debtor does something that, in terms of the contract, he or she may not do:

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

5 **REPUDIATION**
(Textbook par 10.5)

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

A party repudiates the whole contract by

- denying the existence of the contract

   **Example:** “We did not agree to form a partnership to sell hotdogs as you allege; those discussions between us last month were only negotiations; there was no serious offer and acceptance: I am not your partner in a hotdog business.”
• trying, without a valid reason, to withdraw from the contract

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

• giving notice that he or she cannot perform any longer

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

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

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

• indicating that he or she will not perform

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

A party's repudiation of only some of his or her obligations or a part of the contract could lead to repudiation of the whole contract.

**Example:** Arnold works hard when he is at work, but refuses to come to work at the agreed time, which he says is far too early for him.

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

Mere failure by the debtor to perform is not repudiation; so, for example, if the debtor forgets that he or she is contractually bound to perform, he or she has not repudiated the contract.

### 6 PREVENTION OF PERFORMANCE

(Textbook par 10.6)

#### 6.1 Prevention of performance by the debtor

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

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

#### 6.2 Prevention of performance by the creditor

The following table indicates the differences between the creditor's prevention of performance and the creditor’s default:
STUDY UNIT 5: BREACH OF CONTRACT

PREVENTION OF PERFORMANCE BY THE CREDITOR

- The creditor makes it permanently impossible for the debtor to perform.
- The debtor can never perform.

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

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

DEFAULT OF THE CREDITOR

- The creditor delays the debtor’s performance, but does not make it impossible for the debtor to perform.
- The debtor can still perform.

**Example:** Thomas sells Ian a painting. They agree that Thomas must deliver it on 31 July by packing it for Ian to collect at Thomas’s house on that day. Thomas duly packs the painting, but Ian forgets to collect it on 31 July. On 1 August, Ian is in default.

ACTIVITY 5.4

Read the case study and answer the questions that follow.

On 3 February, the management of Thutong University concludes a contract with Roy Building Contractors in terms of which Roy Building Contractors undertakes to build two hostels, each consisting of 250 single rooms, 100 double rooms, a sitting room, a dining room and a kitchen. The contract stipulates that construction will commence on 1 March and the building will be completed by 15 December. They also agree as follows:

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

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

1. Roy Building Contractors only completes the work on 5 January of the following year. The delay is caused by serious floods resulting from an unseasonable cyclone in September.
2. Roy Building Contractors only completes the work on 10 January of the following year. The delay is caused by a week-long strike by Roy Building Contractors’ employees over the bonuses they received from Roy Building Contractors in that same year.
3. On 6 January, Smith issues a final certificate, but owing to a cash flow problem, Thutong University does not pay the outstanding balance on the contract price.
4. In order to make a higher profit, Roy Building Contractors uses floor tiles of a poorer quality than was specified in the contract.

5. Roy Building Contractors only commences construction on 20 March of the following year and not on 1 March as agreed. The delay is caused by Thutong University’s failure to provide the approved building plans to Roy Building Contractors on 15 February as agreed. The plans are only supplied to Roy Building Contractors on 25 February.

6. On 20 February, Thutong University informs Roy Building Contractors that the university is “cancelling” the contract because it wishes to erect laboratories on the site instead of hostels.

FEEDBACK

1. In this instance there is no breach of contract. The delay is not due to the fault of a contracting party. However, there is temporary impossibility of performance. (See par 12.8.3. of the textbook.)

2. This is breach of contract in the form of mora debitoris. The delay is due to the actions of Roy Building Contractors.

3. This is breach of contract in the form of mora debitoris. Thutong University defaults by failing to meet its obligation in time.

4. In this instance, Roy Building Contractors commits positive malperformance by acting contrary to the terms of the contract.

5. This is a case of mora creditoris. The creditor prevents the timely performance of the debtor by withholding his or her co-operation.

6. Here Thutong University is guilty of repudiation, since it is clear that the university does not intend to honour the obligations stipulated in the contract. The university is attempting to withdraw from the contract without justification.

SELF-ASSESSMENT ACTIVITIES

1. Name different forms of breach of contract.
2. Draw a distinction between mora debitoris and mora creditoris.
3. Describe repudiation as a form of breach of contract.
4. Draw a distinction between positive malperformance and prevention of performance.
5. What are the requirements that should be met before the debtor can be placed in mora?
6. What are the requirements that should be met before a creditor can be placed in mora?

EXPLANATORY NOTES

Breach of contract: When one of the parties to the contract fails to perform in terms of the contract (with or without valid reasons).

Creditor: The party who is owed performance or the party who must receive performance (from another party, namely, the debtor) in terms of the contract.

Debtor: The party who has the duty to perform (to another party, namely, the creditor) in terms of the contract.

Mora: A fault or breach committed by a party to the contract.
9 AFRICANISATION AND COMMERCIAL LAW

Parties enter into a contract with the intention of being legally bound by contractual rights and duties that are created by the type of contract they are concluding. Therefore, it is only fair for both parties to perform as agreed. Any other performance that is not what the parties have agreed upon, or failure to perform at all will be contrary to the obligations created by the contract, leading to what is called breach of contract. The law recognises different forms of breach of contract to bring certainty to the law of contract and to protect parties who have serious intentions to be bound by the terms of the contract they have concluded.
LEARNING OUTCOMES

After you have worked through this study unit, you should be able to:

- identify various remedies for breach of contract
- determine the appropriate remedy or remedies for each type of breach of contract

Prescribed study material: chapter 11 of textbook

OVERVIEW

The law provides for three remedies, namely, execution of the contract, cancellation of the contract and damages to protect the innocent party when a contract has been breached. It is important to note that claiming damages is not an alternative remedy, but is available in both the case of execution and cancellation of the contract. You should note the requirements for the remedy of claiming damages. Note also that when a contract is cancelled, it is terminated – whereas if an order for execution is given, proper performance is still required for the contract to come to an end.

1 INTRODUCTION
(Textbook par 11.1)

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

The following diagram shows the different remedies for breach of contract:
In general, the remedy of **execution** (specific performance) may be claimed in respect of all contracts. It is the **“primary” remedy** for breach of contract since it is aimed at accomplishing the same result as was intended originally by the contracting parties.

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

The innocent party must choose either to continue with the contract (i.e. execution of the contract) or to end it (i.e. cancellation of the contract). He or she may not do both. Further, the innocent party may claim the remedies in the alternative, which is done by claiming, for example

- specific performance of the other party’s contractual obligations

**OR/IN THE ALTERNATIVE**

- failing which, cancellation of the contract

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

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

**OR**

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

ACTIVITY 6.1

Ally sells her car to Buti, but then refuses to deliver the car on the agreed date. Since Buti needs transport, he, in the meantime, decides to use taxis. After a week, Ally decides to fulfil her contractual obligations and delivers the car to Buti. Buti accepts delivery of the car because he still wants the car. As a result, he no longer needs to claim specific performance because, after all, Ally has tendered performance. Further, Buti does not wish to cancel the contract. Advise Buti on the appropriate remedy in this instance.

FEEDBACK

Ally decided to perform in terms of the contract; therefore, it is not necessary for Buti to claim for specific performance. Further, since Buti is in need of the car, it is not appropriate to cancel the contract. However, Buti can claim the taxi expenses he incurred as a result of Ally's breach of contract by failing to deliver the car on the agreed date.

EXECUTION OF THE CONTRACT

(Textbook par 11.2)

The primary purpose of the remedy of execution of the contract is to achieve the same result as the parties intended to achieve when they entered into the contract, or, if that result cannot be achieved, a result as close as possible to the one originally intended. Appropriate orders for execution of the contract are an order for specific performance, an order for reduced performance and a prohibitory interdict.

2.1 Orders for specific performance

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

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

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

**Exception 2:** If, objectively speaking, the debtor cannot carry out his or her contractual obligation, an order for specific performance will not be granted because that would imply that the law expects the impossible of the debtor.

**Example:** Callie sells his unique painting to Donna. Before delivery, it is destroyed. The court will not order Callie to deliver the painting to Donna.

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

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

**ACTIVITY 6.2**

Which **ONE** of the following is an order for execution of the contract?

1. an order for specific performance
2. default of the debtor
3. cancellation of the contract
4. an order for increased performance

**FEEDBACK**

1 is **CORRECT.** An order for specific performance is an order for execution of the contract. It is a court order that orders a contracting party to render the performance he or she has undertaken to render. It therefore attempts to achieve the result that was intended by the parties originally.

2 is **INCORRECT.** Default of the debtor is a form of breach of contract. It happens when the debtor does not perform on time and the delay is due to the debtor's fault.

3 is **INCORRECT.** Cancellation of the contract is NOT an order for execution of the contract. The remedy of execution of the contract attempts to achieve the same result as was intended originally by the parties, or a result that is as close to that as possible, while in the case of cancellation of the contract the consequence is
that the parties do not accomplish that which they originally agreed upon because the contract comes to an end.

4 is INCORRECT, because an order for increased performance is not an order for execution of the contract. In certain circumstances the court will order a contracting party to render a reduced performance and not an increased one. This can happen if the other party has rendered performance, but his or her performance is defective or incomplete.

2.2 Orders for reduced performance

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

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

- both parties must perform at the same time

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

  OR

- the claimant must perform before the party raising the defence

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

The defence of exceptio non adimpleti contractus cannot be raised if

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

  OR

- the claimant does not uphold the contract, but terminates it and claims damages (the claimant cancels the contract and claims damages instead of upholding it)

  OR

- the claimant has performed or offered to perform

  OR

- the claimant need not perform
Example: In a contract of donation, the donor cannot raise the *exceptio non adimpleti contractus* against the donee's claim for performance because the donee need not perform.

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

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

To succeed with a claim for reduced performance, the plaintiff creditor must prove

(a) that the defendant is using the defective performance
   Example: The defendant is living in the half-completed dwelling.
   AND

(b) that in the circumstances it would be fair for the court to exercise its discretion in favour of granting the order
   AND

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

The court therefore does the following calculation:

The reduced contract price = the full contract price minus the cost of finishing or improving the performance to the standard required in the contract.

**REQUIREMENTS FOR THE USE OF THE *EXCEPTIO NON ADIMPLETI CONTRACTUS***

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

| (a) That the defendant uses the defective performance | Tshepo uses the defective garden shed that Xolile has erected. |
| (b) That it would be fair in the circumstances for the court to exercise its discretion to relax the defense. | |
| (c) What the reduced contract price should be | It will cost Tshepo R500 to rectify the garden shed. |
ACTIVITY 6.3

Floodwaters Local Council contracts with Bessy for the construction of a bridge for R5 million. The bridge must have four lanes: two for vehicle traffic, one for pedestrians and one for trains. When finished, the bridge has only two lanes for vehicle traffic. The local council finds out that it will cost another R3 million to add the lanes for pedestrians and trains. The local council refuses to pay Bessy any money.

Which ONE of the following statements is CORRECT?

1. Bessy may use the *exceptio non adimpleti contractus* to institute action for payment.
2. The *exceptio non adimpleti contractus* does not apply to this case, because the contract is not reciprocal.
3. The local council will have to pay Bessy the agreed R5 million if it decides to use the defective bridge.
4. The local council could raise the *exceptio non adimpleti contractus* when Bessy claims payment.

FEEDBACK

4 is CORRECT. The defence *exceptio non adimpleti contractus* is available to the local council if Bessy claims payment, since Bessy has not rendered complete performance.

1 is INCORRECT. The *exceptio non adimpleti contractus* is a defence, and therefore can never be used to institute action.

2 is INCORRECT. The contract in this instance is reciprocal, because the local council has to pay a specified amount and, in turn, is entitled to construction of the bridge. Bessy, in turn, must construct the bridge and will then be entitled to payment. Both parties thus incur both rights and obligations.

3 is INCORRECT. The local council will not necessarily have to pay the full contract price if it decides to use the defective performance, since the party who has suffered damages as a result of the other party’s breach of contract (in this instance, positive malperformance) is also entitled to damages as a remedy.

2.3 Prohibitory interdicts

One contracting party can apply for a prohibitory interdict to prevent the other contracting party from doing what he or she is not entitled to do in terms of the contract, or to prevent him or her from continuing to do so, or to prevent the other contracting party from doing what he or she is threatening to do and which he or she is not entitled to do in terms of the contract.

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

– double sales

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

– restraint of trade agreements

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

### 3 CANCELLATION OF THE CONTRACT

*(Textbook par 11.3)*

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

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

**OR**

– if the breach of contract is material (where the contract does not have a cancellation clause)

#### 3.1 The act of cancellation

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

#### 3.2 The consequences of cancellation

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

Further, note the difference in the parties’ obligations in the case of a divisible contract and in the case of an indivisible contract. The sale of a lamp is an example of an indivisible contract and the lease of a house is an example of a divisible contract, which continues from one period of the lease to the next period (say, from month to month). If restitution is possible in an indivisible contract, it takes place. Thus, the seller repays the price, and the buyer returns the thing sold. By contrast, if a continuing contract such as a lease is cancelled, the tenant restores the property let (e.g. the house), but the landlord is not obliged to repay all the tenant’s payments dating from the conclusion of the lease. The landlord need return only the rent for the period for which the tenant has not been afforded the use and occupation of the premises let.

4 DAMAGES
(Textbook par 11.4)

Generally, a contract is entered into with the intention to have obligations fulfilled. The innocent party’s patrimony should not be allowed to be diminished by the defendant’s breach of contract. Therefore, the innocent party is entitled to claim damages in order to place him or her in the position he or she would have been in had the contract been carried out.

4.1 Patrimonial loss

It should be noted that breach of contract does not necessarily cause the innocent party to suffer loss. After cancellation of the contract, the innocent party may, for example, conclude a contract on better terms than the cancelled contract and actually even save money.

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

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

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

AND

– the plaintiff’s actual financial position

ACTIVITY 6.4

Barry sells his car to Clay for R60 000. He then refuses to deliver it. Car prices rise. Clay cannot buy the same make of car for less than R65 000, and buys one from Amos. Clay would have paid R60 000 if Barry had delivered the car; instead, Clay had to pay R5 000 more (R65 000) because Barry repudiated the sale. Advise Clay of the appropriate remedy against Barry.
FEEDBACK

Clay may claim damages from Barry for repudiation, Since Clay is worse off by R5 000, this sum represents the damages that he may claim from Barry. In addition, if the injured/innocent party (Clay in this instance) could have made a profit out of the contract, the lost profit may also be claimed. However, in this instance Clay wouldn’t have made any profit.

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

5 SELF-ASSESSMENT ACTIVITIES

1. Name the contractual remedies that are available to an innocent party in the case of breach of contract.
2. Name three possible orders the court can give with regard to the remedy of execution of the contract.
3. Under which circumstances will the court refuse an order for specific performance?
4. What is the defence called the exceptio non adimpleti contractus all about?
5. What factors must the plaintiff prove for the court to grant him or her an order for reduced performance?
6. Describe a prohibitory interdict.
7. Why is cancellation of a contract an abnormal remedy for breach of contract?
8. Under which circumstances will the creditor have the remedy of cancellation of the contract in the event of mora debitoris?
9. Under which circumstances will the innocent party have the remedy of cancellation of the contract in the event of mora creditoris?
10. Describe the consequences of cancellation of a contract.
11. Explain damages as a remedy for breach of contract.

6 EXPLANATORY NOTES

Execution of the contract: A remedy for breach of contract that is intended to achieve the same result as was intended originally by the parties to a contract.

Order for specific performance: A court order that orders a contracting party to render performance he or she has undertaken to render.

Damages: The sum of money that is awarded to compensate someone who has suffered a loss or injury.

7. AFRICANISATION AND COMMERCIAL LAW

The concept of ubuntu has been described as a concept that advocates fairness and reasonableness in the administration of justice. This concept plays a major role, in that principles that emanate from this concept are applied by the courts in resolving disputes relating to the law of contract. These principles are encapsulated in the remedies for breach of contract, which aim to put the party who has suffered loss or damage in the position in which he or she would have been had the breach of contract not occurred.
SECTION C

Specific contracts
LEARNING OUTCOMES
After you have worked through this study unit, you should be able to:

- explain the two essential elements (essentialia) of the contract of sale
- discuss the rights and duties of the purchaser and the seller
- explain the different forms of delivery in case of movable and immovable property
- discuss the importance of the passing of the risk
- discuss the statutory protection of purchasers

Prescribed study material: chapter 13 of the textbook.

OVERVIEW
In this study unit you are introduced to the first specific contract prescribed for this module, namely the contract of sale. In the beginning of the study unit, two essentialia of the contract of sale are explained (see also chapter 8 of the textbook), followed by a discussion of the rights and duties of the purchaser and the seller. Since a contract creates obligations (see chapter 2 of the textbook), you will realise that the rights of one party constitute the duties of the other party. The purchaser has four common law rights (which become the duties of the seller), and a variety of remedies are at the purchaser’s disposal to enforce these rights against the seller.

The purpose of a contract of sale is the transfer of property from one party to another. Note the requirements for transferring ownership and in particular the forms of delivery in the case of movable or immovable property (discussed in chapter 2 of the textbook). Ownership is only transferred when delivery has taken place, but an interesting characteristic of the contract of sale is that the risk of loss or damage to the object could pass to the purchaser even before delivery has taken place. The rules in this regard are most significant. The last section of this chapter discusses the influence of the legislation on the contract of sale and on the sale of either immovable or movable property.

Prescribed study material: chapter 13 of the textbook

INTRODUCTION
(Textbook par 13.1)

In chapters 3 to 12 of the textbook, the basic general rules that apply to all forms of contracts are discussed. You will find it helpful to go through the contents of these chapters again before you attempt to study this chapter.

The introduction to chapter 13 contains the definition of a contract of sale. This definition includes the essential elements (essentialia) of a contract of sale. Essentialia
are those terms which are essential for the classification of a contract as belonging to a particular class or category of contract. It is important to know what these *essentialia* are (these are in addition to meeting the requirements for the conclusion of a valid contract, as discussed in chapters 3 to 8 of the textbook).

1.1 The object of the sale (*merx*)

*Merx* is the Latin word for the object of the sale. It is important to remember that, for a contract of sale to be valid, the object of the sale must either be definite or ascertainable.

1.2 The purchase price

The purchase price must be agreed upon and also either be definite or ascertainable. It is important to note that a purchase price can be determined by a method without reference to the parties themselves. The parties may agree that a specific third person will determine the purchase price.

The price must be an amount payable in money; if not, it might amount to a contract of exchange and not a contract of sale.

**ACTIVITY 7.1**

Richard wants to buy 50 bags of corn from Tiger Mills.

Which ONE of the following will NOT qualify as an acceptable purchase price? Substantiate your answer.

1. 150 loaves of bread
2. R4 000
3. an amount determined by Seipati, a financial adviser
4. R50 per bag.

**FEEDBACK**

1 is the **CORRECT** option, because 150 loaves of bread will not qualify as an acceptable purchase price. In a contract of sale, the purchase price must be an amount of money. If Richard delivers 150 loaves to Tiger Mills in exchange for the 50 bags of corn, it will be a contract of exchange and not a contract of sale.

2 is an **INCORRECT** option because R4 000 qualifies as an acceptable purchase price. The parties to a contract of sale may agree on an amount for the purchase price. Tiger Mills may therefore agree to deliver the 50 bags of corn to Richard against payment of R4 000.

3 is an **INCORRECT** option because an amount specified by a third person qualifies as an acceptable purchase price. The parties to a contract of sale may agree that a specified third person will determine the price. Tiger Mills may therefore agree to deliver the 50 bags of corn to Richard against payment of a price to be determined by Seipati, a financial adviser.
4 is an INCORRECT option because R25 per bag of flour qualifies as an acceptable purchase price. The parties to a contract of sale may stipulate a price per unit. Richard may agree to buy the 50 bags of corn from Tiger Mills for R25 per bag.

2 THE RIGHTS AND DUTIES OF THE PURCHASER AND THE SELLER

(Textbook par 13.2)

The classification of a contract as a contract of sale has important practical legal consequences. As discussed above, the object of the sale and the purchase price are consequences that cannot be excluded by the parties. Our common law provides a legal framework for contracts of sale and if parties do not make arrangements to exclude these natural consequences (naturalia), these consequences will apply to contracts of sale. It is important to take note of the common-law position as applied to contracts of sale.

2.1 The common-law rights of the purchaser

(Textbook par 13.2.1)

2.1.1 The purchaser is entitled to delivery of the merx

The purchaser is entitled to delivery of the merx. This does not necessarily demand of the seller to physically offload the merx on the purchaser's doorstep. The seller is, however, obliged to make the merx available to the purchaser and confer upon the purchaser free and undisturbed possession of the merx. Delivery of the merx can take place in different forms, depending on the nature of the object which is sold. The different forms of delivery are discussed under the heading “Transfer of Ownership” in paragraph 13.3 of the textbook.

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

One of the duties of the seller is to preserve the merx until it is delivered to the purchaser. Should the merx be damaged or destroyed while the seller is in default (mora), the seller bears the risk. Should the purchaser fail to take delivery of the merx, that is, if the purchaser is in default (mora), the seller will only be liable for gross negligence or intent.

Whenever a merx is accidentally damaged before delivery takes place, the situation is governed by a different set of principles. In such a case it is important to establish who bears the risk. If the contract is perfecta, the risk has passed from the seller to the purchaser, which means that the purchaser will have to bear the risk of damage to the merx. If the contract is not yet perfecta, the seller still bears the risk. If it has become objectively impossible for the seller to perform before the contract becomes perfecta, the principles of supervening impossibility of performance will apply. The passing of the risk when a contract of sale becomes perfecta is discussed under the heading “The Passing of the Risk” in paragraph 13.4 of the textbook.
2.1.3 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 of the merx to the purchaser. The seller merely undertakes that the purchaser will not be disturbed in his or her 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.

This common-law right of the purchaser is best described by means of a scenario.

Scenario 1:

Peter has a nice-looking car which you are interested in buying. Peter bought this car from John for an amount of R100 000. Peter agrees to sell this car to you for the amount of R120 000. You pay this amount in cash and take delivery of the car. You and Peter are unaware of the fact that John had stolen the car from Brian. Two months later, you receive a phone call from Brian. He claims the car, since it is still his rightful property. Brian, who is the rightful owner of the car, may institute proceedings against you to claim back the car. He will do so by issuing summons against you in either a magistrate’s court or a High Court, making use of the action known as the rei vindicatio. For a further discussion on the position when the seller is not the owner, see paragraph 13.3.4 of the textbook.

You will now have to inform Peter of these events and ask him to assist you in defending Brian’s claim against you. You can use the actio empti to enforce your rights against Peter. For a discussion on the actio empti, see paragraph 13.2.1.5 of the textbook. If Peter is not willing to cooperate, you should vigorously defend this claim against you. Do you think you will succeed in your defence? It is important to take note that Brian is the rightful owner and that Peter has now breached the warranty against eviction.

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

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

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

This common-law right of the purchaser can also be explained by means of a scenario.

Scenario 2:

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

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

If, however, the car is completely useless, you would institute action against the seller by making use of the actio redhibitoria. With this action you cancel the contract and claim back the purchase price.

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

(a) the defect was material
(b) the defect was present when the contract was concluded
(c) the defect was latent
(d) the purchaser was unaware of the defect at the time of conclusion of the contract

The above-mentioned aedilitian actions can also be applied in circumstances other than the breach of the implied warranty against latent defects. It is important to take note that the aedilitian actions are aimed at restitution or restoration and thus cannot be used to claim damages.

If the above contract was concluded on an “as is” (voetstoots) basis, the purchaser will have no recourse against the seller. This is so because the warranty against latent defects may be excluded by the parties. There is, however, an exception to this “as is” clause; if it can be proved that Thomas had been aware of the defect and that he intentionally concealed it. In such an instance, the purchaser can make use of the actio redhibitoria or the actio quanti minoris. In addition, the purchaser will most probably succeed in proving intentional misrepresentation, entitling the purchaser to claim damages with the actio empti.

2.1.5 The actio empti

The actio empti is another powerful remedy which the purchaser can use to enforce his or her rights against the seller and to claim damages.

The purchaser may rely on the actio empti in the following instances:

(a) defective performance
(b) misrepresentation
(c) manufacturer’s liability
(d) breach of the warranty against eviction

ACTIVITY 7.2

William sells a Yamaha motorboat to Kelvin for R250 000. William assures Kelvin that the motorboat has an excellent service record and low mileage. A month later, the motorboat has a fuel blockage in one of its engines due to a sub-standard
filter. Kelvin is unhappy about the repair costs of the fuel blockage and wants to claim the repair costs from William.

Advise Kelvin on the following:

1. On which ground should Kelvin rely in order to succeed with the *actio empti* against William?
2. What can Kelvin claim with the *actio empti*?
3. Is there a latent defect in the motorboat? Substantiate your answer.
4. Suppose there is a latent defect in the motorboat, what remedy or remedies, if any, would be available to Kelvin?

**FEEDBACK**

1. Defective performance (see paragraph 13.2.1.5 (a) of the textbook).
2. Kelvin can claim damages based on his positive interest. Note that damages based on positive interest demands that the purchaser be placed in a position as if the contract was concluded successfully without the object having had any defects. If the motorboat was seriously defective, Kelvin could have claimed cancellation (see paragraph 13.2.1.5 (a) of the textbook).
3. Yes, there is a latent defect. The sub-standard filter which resulted in the fuel blockage was already present when the contract was concluded (see paragraph 13.2.1.4 of the textbook).
4. If the motorboat is less useful, but worth keeping, Kelvin may institute action against William by means of the *actio quanti minoris*. With this action you retain possession, but claim a reduction in the purchase price which corresponds to the reduced use. Kelvin can also claim damages with the *actio empti* as seen at (1) above (see paragraphs 13.2.1.4.2 and 13.2.1.5 (a) of the textbook).

#### 2.2 The common-law rights of the seller

The seller is entitled to payment of the agreed purchase price. This is the most important obligation of the purchaser and cannot be excluded by the parties. However, where and when payment is to be effected, is a matter that must be negotiated by the parties.

#### 3 THE TRANSFER OF OWNERSHIP

(Textbook par 13.3)

Transfer of ownership is the primary goal of the conclusion of a contract of sale; however, it is not an automatic consequence of the execution of the contract of sale. The transfer of ownership is regulated by the law of property. Four requirements must be complied with for transfer of ownership to take place. You must study these requirements thoroughly (study paragraphs 12.3(a–d) of the textbook). Also take note that the parties must have the intention that ownership be transferred by the delivery of the *merx*. **The seller must be the owner of the merx. If the seller is not the owner of the merx, the purchaser will not become the owner of the merx. This is so because one cannot transfer more rights than one has.** Transfer of ownership can only take place if the purchase price has been paid or if the purchaser has given security for the payment of the *merx*. 
SECTION C: SPECIFIC CONTRACTS

3.1 Delivery

Movable property has to be delivered to the transferee. The following are different forms of delivery:

1. actual delivery
2. symbolic delivery
3. delivery with the long hand
4. delivery with the short hand
5. constitutum possessorium

ACTIVITY 7.3

1. Edith sells her car to Nomagugu. They agree that Edith will rent the car from Nomagugu for a further period of 12 months. What form of delivery has taken place?

2. On 15 January, Zenzo sells his Xbox 360 to Kwena for R2 500. They agree that Kwena will immediately take delivery of the Xbox 360, but that Kwena will only pay the purchase price on 31 January when his salary is paid into his account. On 25 January, Kwena sells and delivers the Xbox 360 to Themba for R2 000 cash. Themba is not aware of the contract between Zenzo and Kwena. On 30 January, Zenzo claims payment from Kwena, who refuses to pay the R2 500. Can Zenzo claim the Xbox 360 from Themba with the rei vindicatio? Who is the owner of the Xbox 360?

FEEDBACK

1. Constitutum possessorium is a form of delivery where the seller (Edith) retains possession of the merx on behalf of the purchaser (Nomagugu) for a period of time (see paragraph 13.3.1.5 of the textbook).

2. No, Zenzo will not be able to claim the Xbox 360 from Themba, as he is now the owner thereof. On the facts given, the contract of sale between Zenzo and Kwena is clearly a credit sale. Therefore, ownership was transferred to Kwena when delivery took place. Kwena, as the owner of the Xbox 360, concluded a cash sale with Themba who paid cash and simultaneously took delivery of the Xbox 360. Therefore, ownership was transferred to Themba. Zenzo will only be in a position to enforce his personal right to claim specific performance (the payment to him of the R2 500) from Kwena (see paragraph 13.3.5 of the textbook).

3.2 Registration

Immovable property is transferred by way of registration in a Deeds Office.

4 THE PASSING OF THE RISK

(Textbook par 13.4)

This is one of the most important sections of the work relating to contracts of sale. If performance accidentally becomes impossible after the conclusion of the contract of sale, in other words, neither the seller nor the purchaser is in default, the
general rule is that both parties are released from their respective obligations. The most important question that you must be able to answer is: when does the passing of the risk from the seller to the purchaser take place, especially when the object of sale is damaged or lost? The passing of the risk takes place once the contract is *perfecta*. If the contract is *perfecta*, the risk passes from the seller to the purchaser and the purchaser will have to bear the loss. You must study the requirements for when a contract of sale becomes *perfecta* in order to ascertain if the passing of the risk transpired.

**ACTIVITY 7.4**

On 15 March, Khanyile buys Oscar’s truck on condition that it passes a roadworthiness test on or before 25 March. If the truck passes the test, it will be delivered to Khanyile on 26 March. The parties also agree that the purchase price of R300 000 will be paid in cash when delivery takes place on 26 March. The truck passes the roadworthiness test on 20 March. On 21 March Oscar phones Khanyile to inform him that the truck was stolen the night before. Oscar insists that, despite the theft, Khanyile still owes him the purchase price.

What are the legal consequences in the following instances?

1. It is established that the truck was stolen in Oscar’s driveway while he was opening his garage door. He had left the key in the ignition and the engine running.
2. The truck was stolen out of Oscar’s locked garage.

**FEEDBACK**

1. From the facts it should be clear that Oscar acted negligently. As the loss was the result of his negligent action, Khanyile need not pay the purchase price even though the contract was already *perfecta*. Khanyile was entitled to the preservation of the *merx*. The risk for damage or loss resulted from Oscar’s (seller) intentional or negligent conduct (see paragraph 13.2.1.2 of the textbook).
2. Where the loss did not result from Oscar’s intentional or negligent conduct, it is material to establish whether the contract was *perfecta* when the loss occurred. The *merx* and the purchase price had been determined, and the suspensive condition (that the truck should pass a roadworthiness test on or before 25 March) had been fulfilled. Therefore, the contract was *perfecta* and Khanyile will have to pay the R300 000 purchase price, despite the fact that the truck was stolen.

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

5 STATUTORY PROTECTION OF PURCHASERS
(Textbook par 13.5)

5.1 The National Credit Act 34 of 2005
This National Credit Act applies in respect of transactions in terms of which movable property or services are sold to a purchaser against payment of the price in instalments over a specified period. The following features must be present:

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

5.1.1 General
(Textbook par 16.3.1)

5.1.2 Application of the Act
The Act regulates different types of credit agreements.

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

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

5.1.3 Circumstances under which the Act will not apply
(Textbook par 16.3.3)

6 SELF-ASSESSMENT ACTIVITIES

1. Name the essential elements (essentialia) of the contract of sale.
2. For a valid contract of sale, both the object of sale and the purchase price must be definite or ascertainable. Explain what “definite” or “ascertainable” entails and provide practical examples to substantiate your answer.
3. List and discuss the common-law rights of the purchaser.
4. Explain the *actio redhibitoria* and indicate what the purchaser can claim with this action.
5. Explain the *actio quanti minoris* and indicate what the purchaser can claim with this action.
6. Discuss the differences between the *actio redhibitoria* and the *actio quanti minoris*.
7. Explain the *actio empti* as a remedy which the purchaser can use to enforce his or her rights against the seller.
8. List and discuss the common-law rights of the seller.
9. List the different forms of delivery and give a description and example of each of these forms.
10. Explain the importance of the passing of the risk.
11. What does it mean to say a contract is *perfecta*?
12. Give a brief description of the legislation aimed at the protection of purchasers with emphasis on its purpose.

7 EXPLANATORY NOTES

**Latent defect**: A defect that could not be detected through reasonable inspection.

**Merc**: refers to the object of the sale

**Registration**: refers to the transfer of ownership over immovable property by registration in the Deeds Office.

**Vendor**: The seller of a thing.

**Voetstoots**: also known as ‘as is’ – refers to a situation whereby the object of the sale is sold as it is.

8 AFRICANISATION AND THE CONTRACT OF SALE

*Ubuntu* is recognised as being an important principle of law within the context of the contract of sale, especially to promote commercial transactions which reflect the principles of fairness and good faith. The Consumer Protection Act 68 of 2008 (CPA) explicitly recognises and incorporates the principles of *ubuntu* into the regulation of commercial transactions. The CPA promotes an economic environment that supports and strengthens a culture of consumer rights and responsibilities, business innovation and enhanced performance. Importantly, the CPA promotes consumer participation in decision-making processes concerning the interests of consumers – seller and purchasers – to eventually enter into contracts that reflect the principles of fairness, reasonableness and good faith. Fairness is a noticeable consequence of *ubuntu* in the sphere of the law of contract. Furthermore, the Consumer Protection Act promotes the spirit of *ubuntu* by protecting consumers – sellers and purchasers – against any deceptive, misleading, unfair or fraudulent conduct in trade practices. In essence, all consumers (purchasers) have a right to fair and honest dealing.

The application of the principle of *ubuntu* in the law of contract was also emphasised by the Constitutional Court in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC), where it was held that: “[c]ontracting parties certainly need to relate to each other in good faith” and in accordance with the values of *ubuntu*. 

LEARNING OUTCOMES

After you have worked through this study unit, you should be able to:

• explain the two essential elements (essentialia) of the contract of lease
• discuss the formation of a contract of lease
• discuss the rights and duties of the lessor and the lessee
• discuss the termination of a lease

Prescribed study material: chapter 14 of the textbook

OVERVIEW

In this study unit you are introduced to the second specific contract prescribed for this module, namely the contract of lease. Firstly, the three essentialia of a contract of lease are discussed, followed by the basic rule that no formalities are required for the conclusion of a valid contract of lease, except some statutory exceptions.

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

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

1 INTRODUCTION

(Textbook par 14.1)

This study unit deals with the letting and hiring of immovable property, including a building or a part of it. It also deals with what is described as a contract of landlord (lessor) and tenant (lessee). Take note that, in this study unit, the concepts landlord (lessor) and tenant (lessee) are used interchangeably. However, the essential elements (essentialia) as well as the common-law rights and duties of the lessor and lessee apply equally to the letting and hiring of movable property, for example, motor vehicles. A contract of lease is a reciprocal contract in terms of which the lessor (landlord) undertakes to make temporarily available to the lessee (tenant) the use and enjoyment
of the object of the lease in return for the payment of a sum of money, or a share in the fruits of the object of the lease.

2 THE ESSENTIAL ELEMENTS OF A CONTRACT OF LEASE

(Textbook par 14.2)

The essential elements of a contract of lease are the following:

(a) an undertaking by the lessor to give the lessee the use and enjoyment of the object of the lease
(b) an agreement between the lessor and lessee that the use and enjoyment of the object of the lease will be temporary
(c) an undertaking to pay rent

2.1 The use and enjoyment of a thing (property)

In theory, any corporeal thing, movable or immovable, can be an object of lease. It is important to take note that it is not an essential requirement that a contract of lease must confer the full use and enjoyment of the object of lease. Partial lease is permissible. For example, a room in a house may be let. The parties must agree on the particular object that is to be the subject matter of the lease. The object, or part of it, must be identified or identifiable.

2.2 Temporary use and enjoyment

A contract that confers permanent use and enjoyment of the object of lease will not be considered a contract of lease. However, it is not a requirement that the contract of lease be entered into for a definite period; the period of lease may be expressed or indefinite. For example, a student lets a flat near Unisa until the completion of his qualification. This will be regarded as a valid contract of lease although it is uncertain when the student will complete his qualification.

2.3 The rent

The lessee must undertake to pay rent that consists of a specified sum of money. There is an exception to this rule, namely where the rent payable in respect of a lease of agricultural land, for example, a farm, may consist of an agreed upon proportion of the produce of the farm.

ACTIVITY 8.1

Rafia and Mpfari agree orally that Rafia will lease her cornfields to Mpfari, on condition that Mpfari will annually give ten percent of the corn produced by her to Rafia, as rent.

Did Rafia and Mpfari conclude a valid contract of lease?
FEEDBACK

Rain and Mpfari agreed on the object of lease (cornfields) and also agreed that Mpfari will, on an annual basis, give Raina ten percent of the corn produced by her. The rent payable in respect of a lease of agricultural land, for example, a farm, may consist of an agreed upon proportion of the produce of the farm. If Raina and Mpfari agreed that the lease of the cornfields will be permanent, the contract of lease will be invalid. A contract of lease must contain an expressed, definite or indefinite period of lease to be valid (see paragraphs 14.2.1–14.2.3 of the textbook).

3 THE FORMATION OF A CONTRACT OF LEASE

(Textbook par 14.3)

Generally, no formalities are required for a valid contract of lease to come into existence. There are statutory exceptions to this general rule. For example, the Formalities in Respect of Lease of Land Act 18 of 1969 provides that a long lease (more than ten years) must be registered against the title deed of the land for the lease to be valid. Also, the Rental Housing Act 50 of 1999 provides that a landlord must reduce a lease agreement into writing, if requested to do so by the tenant.

4 THE RIGHTS AND DUTIES OF THE LESSOR AND THE LESSEE

(Textbook par 14.4)

Generally, contracts of lease are embodied in standard-form contracts. Lessors and lessees are not allowed to exclude any of the essential elements of a contract of lease. Parties to a contract of lease may, however, exclude some of the consequences ensuing from the common law.

4.1 The duties of the lessor

The duties of the lessor can be schematically illustrated:

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

DUTIES OF THE LESSOR
4.1.1 The duty to deliver the leased object to the lessee

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

The duty to deliver the leased object to the lessee can be explained by means of a scenario.

Scenario 1:
Nonhlanhla leases a cluster house from Buyiswa. They agree that Nonhlanhla will move into the cluster house on 1 July. It is Buyiswa’s responsibility to put the cluster house at Nonhlanhla’s disposal on 1 July. Buyiswa must also allow Nonhlanhla to take control and occupation of the house during the period of lease without any disturbance either from Buyiswa or from any other person. Before Nonhlanhla obtains actual possession of the cluster house, she only has a personal right against Buyiswa. It is only after Nonhlanhla has been given possession of the cluster house by Buyiswa that Nonhlanhla’s possession can be protected.

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

The object of the lease must not only be delivered in a condition which is reasonably fit for the purpose for which it is being leased – it must also be maintained in that state. The lessor must, however, allow for normal wear and tear and, excluding the repairs caused by the lessee, continue to maintain the object of lease in the condition it was delivered.

If the object of the lease falls into a serious state of disrepair during the term of the lease that it will be unreasonable to expect the lessee to continue with the lease, the lessee may elect to cancel the contract, but the lessor must be granted a reasonable time period to repair the defect. It is important to note that the lessee remains liable for the rent until the object of lease is vacated. Should the lessee elect to retain or remain in possession of the object of lease, he or she may not refuse to pay the rent, but may claim a reduction in the rent proportional to its diminished use and enjoyment.

The duty to maintain the object of lease in a proper condition can be explained by means of a scenario.

Scenario 2:
Nomagugu rents a house from Moseki for R7 500 per month. The roof of the house has been damaged by a hail storm which causes water leakage whenever it rains. Furthermore, roof tiles have been damaged to the extent that certain parts of the house are not covered and grants easy access to burglars. Nomagugu is now obliged to sleep at her mother’s house because of the water leakage when it rains, but most importantly to secure her personal safety. Despite several demands by Nomagugu to Moseki to repair the defective roof, he is adamant that the defect is not material and that he is therefore not obliged to repair the roof. Nomagugu now has the following options: firstly, she may elect to cancel the contract of lease, but remains liable for the rent until the house is vacated. Secondly, Nomagugu may elect to remain in occupation of the house, but may claim a reduction in the rent proportional to its diminished use and enjoyment. Alternatively, Nomagugu may effect the repairs herself.
SECTION C: SPECIFIC CONTRACTS

and recover the cost from Moseki or deduct it from the rent. She may also apply for a court order to demand specific performance from Moseki to effect the repairs.

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

The lessor must warrant that no one with a legal right to the object of lease disturbs the lessee’s use and enjoyment of the object of lease. The disturbance of the lessee may be caused by the lessor himself or herself, or by third parties, or by operation of natural forces over which the parties have no control. The lessor’s liability depends on the person or event that disturbed the lessee’s use and enjoyment in the particular circumstances. A lessor will be guilty of breach of contract if the use and enjoyment was unlawfully disturbed.

The duty to ensure the lessee’s undisturbed use and enjoyment of the leased object can be further explained by means of a scenario.

Scenario 3:

Boaz rents a flat from Kwena for R5 500 per month for a period of 12 months. Shabier, the owner of the flat, demands that Boaz vacate the flat within 7 days. In this instance, Boaz must inform Kwena about the threatened eviction to enable Kwena to assist him in his defence as part of the lessor’s duty to warrant against eviction. Should Kwena fail to assist Boaz in his defence, Boaz must still put up a strong defence. What will the legal position be if Shabier is the true owner of the flat and Kwena rented the flat without Shabier’s knowledge? Boaz will be entitled to a reduction of rent pro rata to the diminished use and enjoyment.

4.2 The duties of the lessee

The duties of the lessee can be schematically illustrated:

4.2.1 The lessee’s duty to pay the rent

The payment of rent is an essential element of a contract of lease. Therefore, it may not be excluded; even by agreement between the parties. The parties to the contract of lease may, however, agree to alter the common-law rules in respect of, for example, the time of payment. Note that if the parties do not explicitly reach an agreement on the time of payment, rent is deemed to be payable only at the end of
the term of the lease. The acceptance by the lessor of a late payment of rent does not necessarily mean that the lessor has waived the right to insist on prompt payment of future amounts of rent. Rent is payable in money, unless the parties have agreed that it will consist of a share in the fruits or proceeds of the leased property. It is important to note that a lessee will not be in default if the lessor causes his or her inability to pay the rent on time. Also study the ways in which a lessee will commit breach of the duty to pay rent.

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

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

The lessee’s duty of proper use and care of the object of lease can be further explained by means of a scenario.

Scenario 4:
Jessica leases a house from Tumi for residential purposes. Jessica's obligations demand that she keeps the house neat and clean and also maintain it in a good condition. Without Tumi’s permission, Jessica will not be able to use the premises to conduct her hair salon business.

ACTIVITY 8.2

Lesego rents a shop from Makabongwe, who is the owner of a small shopping centre. After a severe hail storm, the roof of the building starts leaking, causing damage to Lesego's stock. Lesego complains to Makabongwe, who responds by stating that, as the lessee, Lesego has a common-law duty to maintain the leased premises in a proper state. Lesego is unhappy with Makabongwe’s response and wants to cancel the lease agreement.

Advise Lesego on the legal position regarding the lessee's duty of proper use and care of the thing let.

FEEDBACK

Lesego, as the lessee, merely has a duty of proper use and care of the thing leased. Makabongwe, as the lessor, has a common-law duty to maintain the lease object in a proper condition so that it is reasonably fit for the purpose for which it is being used. Through his malperformance, Makabongwe is breaching the contract of lease. However, Lesego may only cancel the contract if she can prove that Makabongwe's malperformance (breach) is material. In instances where the breach is not material, Lesego may claim damages, which will amount to a proportionate deduction of the rent (see paragraphs 14.4.4.1–14.4.4.2 of the textbook). The parties to a contract of lease may agree that the lessee will undertake to keep the property in repair. Such an agreement must be clear and unambiguous. If Lesego and Makabongwe reached an agreement in this regard, this common-law duty will fall on Lesego (see paragraph 14.4.2.2 of the textbook).
4.2.3 The lessee’s duty to return the property undamaged on termination of the lease

Upon termination of the lease agreement, the lessee must return the leased object, or evacuate the property. The leased property must be returned in the condition in which it was received, except for deterioration as a result of reasonable wear and tear.

ACTIVITY 8.3

Gael leases a strawberry orchard to Gill for a period of five years. After two years of the lease agreement has lapsed, Gill uproots the strawberry orchard and starts growing potatoes. Gael only discovers the state of affairs after Gill’s first potato crop has been harvested. Gael is hysterical. Gill maintains that potatoes are a much better option than strawberries.

Advise Gael on her legal position with reference to the rights and duties of the lessor and lessee.

FEEDBACK

Gill is breaching the contract of lease. Firstly, Gill is breaching the lessee’s duty of proper use and care of the lease object. Secondly, it will not be possible for Gill to return the lease object, namely a strawberry orchard, to Gael at the end of the lease period in the condition in which it was received, over and above reasonable wear and tear. Gael will be able to make use of the normal remedies available in respect of breach of contract. The material nature of the breach suggests that Gael will cancel the lease and also claim damages (see paragraphs 14.4.2.2–14.4.2.3 and 14.4.4.1–14.4.4.2 of the textbook).

4.3 The rights of the lessor

4.3.1 Non-payment of rent

The lessor has the right to receive the rent agreed upon in the contract of lease. Contracts of lease of immovable property regularly contain a cancellation clause. The payment of rent is normally a sub-clause in the cancellation clause of a contract of lease, in which the parties agree that the lessor (landlord) will be entitled to cancel the lease if the lessee (tenant) defaults on the payment of rent. This right can, however, be expressly waived in a written contract of lease in order to remove any possible uncertainty as to whether the lessor (landlord) has waived his or her rights under the cancellation clause. The lessor (landlord) has certain remedies to protect his or her right to receive the rent agreed upon.

4.3.1.1 The lessor’s tacit hypothec for unpaid rent

The lessor of immovable property (for example, a house) acquires a hypothec over all movables situated on the property as soon as the lessee falls into arrears with his or her rent. The hypothec serves as security in respect of such rent. The lessor may rely on the hypothec only when, and for as long as, the rent is in arrears. However, it is of no force and effect until the lessor attaches the goods in respect of which the hypothec is operative. The lessor may also obtain an interdict preventing the
lessor who is in arrears from disposing of movable property. In terms of section 4(3)(c) of the Rental Housing Act 50 of 1999, a lessee has a right not to have his or her possessions or goods seized. Only the Rental Housing Tribunal or a court can give effect to the landlord's hypothec for unpaid rent.

Take note of the position of third parties' movable property brought onto the leased premises. Movable property belonging to a third party is covered by the landlord's (lessor) tacit hypothec, provided such movables were brought onto the leased property with the owner's consent for the use of the lessee. The movable property of a third party will be subject to a landlord's (lessor) tacit hypothec in instances where a third party has failed to give the landlord (lessor) notice of his or her ownership, and the landlord is unaware of the fact that the movables belong to a third party.


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

The Magistrates' Courts Act 32 of 1944 provides the lessor with two more remedies, should the lessee fall into arrears with the rent. Firstly, an automatic rent interdict may be obtained and would also prevent any person having knowledge of such an interdict from removing movables that may serve as security for the unpaid rent. The second remedy which the Act provides for is the issuing, on application, of an attachment order. Note specifically which facts the lessor needs to allege in his affidavit when making an application for an attachment order.

### ACTIVITY 8.4

Sarah rents a house from Chris for R5 500. The rent is due on the first day of every month. Sarah is two months in arrears with her rent. Sarah, nevertheless, buys a new television set from Game Stores to be paid off in instalments over 12 months.

Will Chris be able to obtain a tacit hypothec over the new television set for Sarah's unpaid rent?

### FEEDBACK

The ambit of the lessor's tacit hypothec has, to some extent, been curtailed by the National Credit Act 34 of 2005. A lessor's tacit hypothec does not apply to property to which an instalment-sale transaction relates, unless the hypothec has been perfected (see paragraph 14.4.3.1.1 of the textbook).

### 4.3.2 Misuse of the object of the lease

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

The lessor has the right to the return of the undamaged property when the lease is terminated. Here again, the normal contractual remedies are at the disposal of the lessor. The lessor may either claim specific performance for an order to return the property, or damages if the lessor has suffered damages. It is important to distinguish the different circumstances that would determine which would be the appropriate remedy to use.

4.4 **The rights of the lessee**

The rights of the lessee are mainly determined by the duties of the lessor and the lessee. However, certain aspects of the lessee’s rights are not obvious from these duties.

4.4.1 **Failure to deliver**

It is the lessee’s right that the leased object is delivered by the lessor. Failure by the lessor to deliver the leased object amounts to a material breach of contract. The lessee may regard the contract as cancelled and sue for damages, or may claim specific performance and damages. Take note of the remedies available to the lessee in cases where the leased property has been delivered, but where the property is not in a proper state of repair. In this instance, the remedy at the disposal of the lessee will depend on whether the breach of contract is material or immaterial.

4.4.2 **Failure to maintain the property**

It is the lessee's right that the leased property be properly maintained. The lessee is entitled to the same remedies as those discussed under heading “4.4.1 Failure to deliver” above, namely: the lessee may regard the contract as cancelled and sue for damages, or may claim specific performance and damages.

Take note of the position where there is a need to repair the leased property. In this instance, the remedy at the disposal of the lessee will depend on the substantiality of the inconvenience caused by the lessor.

4.4.3 **Breach of warranty against interference**

The lessee has the right to undisturbed use and enjoyment of the object of the lease. Where a lessor or third party interferes with this right, the lessee may rely on the ordinary rights in respect of breach of contract. It is important to take note of situations in which it becomes impossible for the lessee to exercise the right to undisturbed use and enjoyment of the object of the lease without the interference of the lessor or a third party, because performance becomes objectively impossible.

In instances where interference is caused by an act of God (*vis major*) where, for example, a house is flooded by rain, or an accidental occurrence (*casus fortuitus*) where, for example, the state expropriates the object of lease, the lessee has a right to reduction of rent. If the object of lease is destroyed by the mentioned events, the position is governed by the rules of supervening impossibility of performance which terminates the relationship between the lessee and lessor.
4.4.4 Subletting

Unless the contract of lease prohibits it, a lessee is entitled to sublet (re-let) anything that has been let, without the lessor’s consent (except a rural tenement), provided that the proposed sub-lessee is not a person to whom the original lessor could reasonably object. Take note that sublet in contravention of an expressed agreement that requires the consent of the original lessor is void.

If a property is sublet, a contract arises between the original lessee and the sub-lessee.

4.4.5 Cession

Unless the contract of lease prohibits or restricts it, a lessee may cede his or her rights to a third party. In the case of a rural tenement, prior written consent of the lessor is required for cession to take place. The effect of a cession is that the cessionary becomes the creditor of the original lessor. The lessee remains the lessor’s debtor; this is so because only rights, and not duties, of the lessee are ceded.

4.4.6 Assignment

Under heading “4.4.5 Cession” above, it was stated that the lessee remains the lessor’s debtor; this is so because only rights, and not duties, of the lessee are ceded. The duties of a debtor are transferred by delegation. In order to substitute one lessee for another, it must be effected by a combined cession and delegation, or by a delegation of rights and duties known as an assignment. Assignment cannot take place without the consent of the debtor.

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

In instances where ownership is transferred by operation of statutory provision, for example, if leased land is expropriated by the state, the state will not be bound by any lease agreement pursuant to the expropriation. If the lessor of immovable property sells the property, the general rule will apply, and that is that the purchaser is bound by any lease agreement pursuant to the sale.

In simple terms, the maxim “huur gaat voor koop” can be translated as “hire takes precedence over sale”. The effect of the maxim “huur gaat voor koop” is that the lessee acquires a real right to the property and will only apply if there has been a succession of rights.

Note that the maxim “huur gaat voor koop” is subject to certain qualifications. This mostly entails that the purchaser (successor) of the immovable property had knowledge of the lease agreement. Familiarise yourself with these qualifications.

ACTIVITY 8.5

Millicent is the owner of a chicken farm which she inherited from her father. Millicent does not live on the chicken farm, and in order to maintain the farm and ensure that she receives an income from it, Millicent leases the farm to Siyanda for R10 000 per month for an initial period of three years, renewable by agreement between Millicent and Siyanda. Nine months after the two parties entered into
the lease agreement, Millicent is killed in a hijacking and her son, Moses, inherits the chicken farm from his mother. Moses is keen to take over the chicken farm himself, and comes to you for advice on whether he can terminate the contract of lease which Millicent entered into with Siyanda.

Advise Moses on the legal position regarding the maxim “huur gaat voor koop” in the case where there has been a succession of rights.

FEEDBACK

Compare your answer with the content of paragraph 14.4.4.7 of the textbook. Did you mention the following important factors?

- The lease involves immovable property and therefore the maxim “huur gaat voor koop” applies.
- Moses may not evict Siyanda, as long as Siyanda pays the agreed rent.
- The fact that this is an acquisition of immovable property by means of succession, rather than sale, does not have an impact on the application of the maxim “huur gaat voor koop”.
- Siyanda acquires a real right to the property for the duration of the lease agreement.
- If Moses, as the new owner of the chicken farm, acknowledges the rights of Siyanda, he is bound to the contract of lease and he, therefore, does not have the right to terminate the contract of lease until the termination of the lease.
- Did you mention that the maxim “huur gaat voor koop” is subject to certain qualifications and did you discuss them? The short-term lessees are not governed by legislation. The maxim “huur gaat voor koop” will only apply if the lessee is in occupation of the leased property or if the successor of the lessor had notice (knowledge) of the existence of the lease when he or she acquired the real right, or if the successor of the lessor has acquired his or her real right in the immovable property gratuitously.

5 THE TERMINATION OF A LEASE

(Textbook par 14.5)

A contract of lease is usually terminated by performance, but may be terminated in the following specific ways:

1. termination by effluxion of time
2. termination by notice
3. termination by extinction of the lessor’s title
4. termination by death
5. termination by insolvency

It should be noted that the termination of the lease will effectively also result in the termination of any existing sub-lease. However, depending on the circumstances, the sub-lessee may be in a position to institute action against the sub-lessee on the basis of breach of contract, as the latter has the duty to ensure the sub-lessee’s undisturbed use and enjoyment of the leased object.

Take note of the lessee’s right to compensation for improvements to the leased property. Make sure that you distinguish between the position relating to rural
tenements and other leased properties. Also establish if compensation for useful, luxurious or necessary improvements to leased property can be claimed from the lessor.

6 SELF-ASSESSMENT ACTIVITIES

1. Name the essential elements (essentialia) of the contract of lease.
2. List and explain the duties of the lessee and the lessor.
3. Explain the rights of the lessee and the lessor.
4. Explain the operation of the lessor’s tacit hypothec for unpaid rent.
5. Explain the application of the maxim “huur gaat voor koop” in both “long-term leases” and “short-term leases”.
6. List the various ways in which a contract of lease may be terminated.

7 EXPLANATORY NOTES

Assignment: refers to the substitution of a person with another in a contract.

“Huur gaat voor koop” maxim: literally translated means ‘hire takes precedence over sale’.

Lessees: The person who leases the property from the lessor (tenant).

Lessors: The person who owns the property that is to be leased (landlord).

Lessor’s tacit hypothec: Lessor acquires a hypothec over all movables situated on the property as soon as the lessee falls into arrears with his rent. The hypothec serves as security in respect of such rent.

8 AFRICANISATION AND THE CONTRACT OF LEASE

Ubuntu is an influential principle when considering issues under contract of lease. This is so because the principles of ubuntu – fairness and good faith – forms the Grundnorm of various legislative developments enacted with the objective to promote access to adequate housing by creating platforms to ensure the proper functioning of the rental housing market. The Rental Housing Act 50 of 1999, as amended by the Rental Housing Amendment Act 43 of 2007 and Rental Housing Amendment Act 35 of 2014, promotes section 26(b) of the Constitution of the Republic of South Africa, which compels the state to take reasonable and other measures, within its available resources, to achieve the progressive realisation to the right to have access to adequate housing. Importantly, the Act provides for the establishment of Rental Housing Tribunals to apply the general principles of conflict resolution in order to promote sound relations between lessees and lessors.

The principles of conflict resolution form an integral part of ubuntu, which aims to restore and promote relations between dissident members of society. Any dispute in respect of an “unfair practice” may be referred to a Rental Housing Tribunal. The Extension of Security of Tenure Act 62 of 1997 demands that all facts relevant for an eviction must be considered. This includes the availability of suitable alternative accommodation and to what extent the constitutional rights of any affected person will be violated. Note specifically that this Act clearly promotes the principle of fairness by requiring the court to make orders that are just and equitable. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, like the previous Extension of Security of Tenure Act 62 of 1997, incorporates the principle of fairness by stating that a court should grant an order for eviction only if it is of the opinion that it is just and equitable to do so. Fairness and the duty of good faith are noticeable consequences of ubuntu in the sphere of the law of lease.
Importantly, the Consumer Protection Act 68 of 2008 also promotes the spirit of ubuntu by protecting lessees against unfair practices. It allows a lessee to arbitrarily cancel the lease before the expiry date of the lease agreement, by giving 20 business days’ notice. The lessor is, however, entitled to impose a reasonable cancellation penalty and demand all outstanding amounts owed in terms of the lease. In essence, all lessees and lessors have a right to fair and honest dealing.

The application of the principle of ubuntu in the law of lease was also emphasised by the Constitutional Court in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC), where it was held that: “[c]ontracting parties certainly need to relate to each other in good faith” and in accordance with the values of ubuntu.
STUDY UNIT 9

The Contract of Insurance

LEARNING OUTCOMES

After you have worked through this study unit, you should be able to:

• explain the essential elements (essentialia) of the contract of insurance
• explain the difference between indemnity and non-indemnity insurance
• explain how the amount payable on the occurrence of the insured event is determined
• explain the concept of insurable interest
• explain the duty of good faith between the insurer and the insured

Prescribed study material: chapter 15 of the textbook

OVERVIEW

In this study unit you are introduced to the last specific contract prescribed for this module, namely the contract of insurance. After discussing the history and sources of the insurance contract, we explain the important difference between indemnity and non-indemnity insurance. The essentialia of this type of contract are the undertaking by the insured to pay a premium, the undertaking by the insurer to compensate the insured in the case of loss or damage, the insured risk and an insurable interest. The amount payable by the insurer depends on whether the contract relates to non-indemnity or indemnity insurance, and in the case of the latter certain aspects, addressed in paragraphs 15.3.2.2.1–15.3.2.2.6 of the textbook, are relevant.

1 THE NATURE AND BASIS OF THE CONTRACT OF INSURANCE
(Textbook par 15.2)

The nature and basis of insurance contracts can be schematically illustrated:

A contract of indemnity insurance is a contract intended to compensate the insured for patrimonial loss, while a contract of non-indemnity insurance is a contract intended to compensate the insured for non-patrimonial loss resulting from impairment of an abstract interest.
SECTION C: SPECIFIC CONTRACTS

1.1 Indemnity insurance

In indemnity insurance, the insurer undertakes to make good the damage which the insured may suffer through the occurrence of the event insured against. Examples of indemnity insurance are property insurance and liability insurance.

1.2 Non-indemnity insurance (capital insurance)

In non-indemnity insurance, the insurer undertakes to pay the insured or the beneficiary a fixed sum of money if the event insured against takes place. The occurrence of the event causes non-patrimonial harm and creates an abstract need which requires consolation or satisfaction. Examples of non-indemnity insurance are life insurance and personal accident insurance.

ACTIVITY 9.1

1. Mark buys a new BMW sports car from BMW Motors for R500 000. Mark insures the car for R500 000 with AB Insurance Company.

Advise Mark as to the nature of the insurance contract that he has concluded with AB Insurance Company.

2. Joe's wife, Sarah, dies as a result of a fatal heart attack. Joe subsequently discovers that he is to receive R1 000 000 in terms of an insurance policy which Sarah took out on her own life with XY Insurance Company.

Advise Joe as to the nature of the insurance contract that Sarah concluded on her life with XY Insurance Company.

FEEDBACK

1. Mark, the insured, concluded an indemnity insurance contract with AB Insurance Company (see paragraph 15.2.1 of the textbook).

2. Sarah, the insured, concluded a non-indemnity insurance (life insurance) contract on her own life with XY Insurance Company (see paragraph 15.2.1 of the textbook).

2 ESSENTIALIA OF THE INSURANCE CONTRACT

(Textbook par 15.3)

The essentialia of a contract are those terms which distinguish a particular contract from other types of contracts. The essentialia of an insurance contract may be schematically illustrated:

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

As indicated above, the insured undertakes to make payments, called “premiums”, to the insurer. The “premium” is a consideration given or to be given in return for an undertaking to provide insurance benefits. It is usually given in the form of money. Note that the actual payment of a premium is not a prerequisite for the creation of a valid insurance contract. An undertaking to pay is sufficient. However, the insurer may refuse to make any payment to the insured before a premium has been received.

2.2 An undertaking by the insurer to compensate the insured

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

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

2.2.2 Determination of the amount payable (indemnity insurance)

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

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

Valued and unvalued policies

It can be very difficult to determine the value of an insured object. The insurer and the insured may agree on the value of the insured object at the time of conclusion of the contract. This type of policy is called a “valued policy”. In the case of a valued policy, the insured is not required to prove the amount of his or her loss, but only needs to prove that he or she has suffered a loss.

(Study paragraph 15.3.2.2.1 of the textbook.)

2.2.2.1 The insurer’s right to repair

An insurer usually reserves the right, in an insurance contract, to have the damaged object repaired instead of compensating the insured. Once a claim has been made by the insured, the insurer must elect within a reasonable time whether it wishes to repair the insured object or compensate the insured. If the insurer elects to repair the insured object, the repairs must be completed within a reasonable time.
2.2.2.2 The insurer’s right of subrogation

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

It is important to take note of the following:

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

2.2.2.3 Insuring with several insurers

An insured has the right to insure an object with as many insurance companies as he or she wishes. It is important to note that in the event of loss, the insured may only recover the full amount of the loss and no more. This means that where an insured has over-insured the object with more than one insurance company, he or she must decide whether to recover the total loss from one insurer or a pro rata portion from each of the insurers.

Where an insurer pays more than its pro rata share of the amount claimed, it has a right of recourse against the other insurers for a pro rata contribution towards the compensation paid to the insured. This right of recourse is based on the principle of contribution.

ACTIVITY 9.2

Your car is valued at R250 000. You decide to insure your car with AB Insurers for R250 000 and with XY Insurers for R250 000. Your car is damaged and the repair cost amounts to R250 000. Both insurers decide that they will rather compensate you instead of repairing the car.

What amount of compensation can you claim from AB Insurers and XY Insurers?

FEEDBACK

You will have the right to claim the whole R250 000 from either AB Insurers or XY Insurers. If, for example, AB Insurers pays you the amount of R250 000, it will have the right to claim R125 000 from XY Insurers, which is XY Insurers’ pro rata contribution, and if XY Insurers pays you the amount of R250 000, it will have the right to claim R125 000 from AB Insurers. You would also be able to claim each insurer’s pro rata contribution directly from the insurer – that is, R125 000 from AB Insurers and R125 000 from XY Insurers (see paragraph 15.3.2.2.4 of the textbook).
2.2.2.4 Over and under-insurance

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

ACTIVITY 9.3

You have a car that is worth R20 000. You insure the car for only R10 000 with an insurance company and the contract contains an average clause. The car is damaged and the total repair bill amounts to R5 000.

How much will you be able to claim from your insurance company?

FEEDBACK

The amount is determined by dividing the amount the car is insured for, R10 000, by the real value of the car, R20 000. The answer to this mathematical exercise is one half or fifty percent. This means that the actual amount of damage R5 000 must also be divided by one half to find the amount that the insurer will have to compensate you with. The answer is that you are entitled to recover R2 500 from your insurer. If you are over-insured (for example, if you insure your car, which has a value of R20 000, for an amount of R30 000) and the car is totally destroyed, you will only be entitled to receive the real value, that is R20 000, from your insurance company, except if the policy is a valued policy, in which case you will be able to claim the full amount of R30 000 (see paragraphs 15.3.2.2.1 and 15.3.2.2.5 of the textbook).

2.2.2.5 Excess clauses

It may be agreed in an insurance contract that the insured may only recover a certain proportion of his or her loss. This is called an excess clause. In terms of this type of clause, the insured must bear a certain proportion of the loss himself- or herself, for example the first R2 000 of the loss.

2.3 The risk: Agreement to insure against a particular risk

The uncertain event insured against is known as the risk. The description of the risk in the contract of insurance is important, as the insurer must know the nature of the risk and the insured must know the extent of his or her cover. The description of the risk must include the following: (a) the insured object (a car, a person’s life); (b) the hazard insured against (theft, death); and (c) the circumstances affecting the risk (for example, the limitation of the insurance to theft of a car while it is parked in a specific place).

2.4 Insurable interest

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

2.4.1 **Indemnity insurance**

The insurable interest in indemnity insurance is a financial interest which the insured has in the non-occurrence of the risk. By reason of the financial interest, the insured will suffer damage on occurrence of the event insured against and will be entitled to compel the insurer to honour its obligation. The insurable interest (financial interest) must exist at the moment the loss or damage occurs. It is not necessary for the insurable interest to exist at the moment when the contract is concluded.

2.4.2 **Non-indemnity insurance**

In the case of non-indemnity insurance, the insurable interest differs depending on whose life is insured. Where the insurance is on one’s own life or the life of a spouse then an unlimited interest is presumed. Where the insurance is on the life of another, then the law requires an insurable interest in the form of a financial or pecuniary interest. For example, a creditor has an insurable interest in the life of his or her debtor. The insurable interest must exist at the moment when the contract is concluded. The insured or the beneficiary will be able to claim the amount payable in terms of the insurance contract even if the interest might not exist at the moment the risk occurs.

**ACTIVITY 9.4**

Which ONE of the following options completes the sentence **CORRECTLY**?

- Insurable interest means that …
  1. the insurer must have an interest in the non-occurrence of the uncertain event
  2. the insured must have an interest in the non-occurrence of the uncertain event
  3. the insurer must have a financial interest in the non-occurrence of the uncertain event

**FEEDBACK**

2 is **CORRECT**. The insured is required to have an interest in the non-occurrence of the uncertain event (see paragraphs 15.3.4 and 15.3.4.1 and 15.3.4.2 of the textbook).

1 is **INCORRECT**. The insured, not the insurer, must have an interest in the non-occurrence of the uncertain event.

3 is **INCORRECT**. In indemnity insurance the insured, not the insurer, must at least have a financial interest in the non-occurrence of the uncertain event.

**THE DUTY OF GOOD FAITH**

(Textbook par 15.4)

The contract of insurance is one based on good faith (bona fides) between the insurer and the insured. The duty of good faith relates to the right of the insurer to receive correct and complete information regarding the material facts relating to the risk. The insured is required to discharge this duty when he or she completes a proposal form for insurance. The duty is placed on the insured *ex lege* (by operation of law).
In terms of the duty of good faith, an insured should refrain from providing untrue information and should provide information concerning material facts to the insurer. The non-disclosure of a material fact would amount to a material breach of the contract and would justify the repudiation of the contract by the insurer.

3.1 Misrepresentations

A misrepresentation is a positive act consisting of a pre-contractual statement of fact made by the prospective insured to the insurer, which is incorrect (untrue), and which results in the insurer concluding a contract of insurance with the insured. The statement may be made in writing or orally and must relate to the material facts. An insurance contract which is induced by a misrepresentation of the insured is voidable at the instance of the insurer. The insurer may either elect to rescind the contract or uphold it. Take note of the test for materiality, as set out in paragraph 15.4.1 of the textbook.

3.2 Non-disclosures

A non-disclosure is different to a misrepresentation, because the act which creates the wrong impression is not a positive act but rather an omission. It means that the insured fails to remove a wrong impression by not disclosing a material fact that would have done so. Note that the test to determine the materiality of facts which were not disclosed is the same as that for misrepresentations. This test limits the insurer’s right to repudiate claims involving non-disclosure of facts to those involving material facts and not those involving insignificant inaccuracies or trivial statements in insurance proposals. An insurance contract which is induced by a non-disclosure of the insured is voidable at the instance of the insurer. The insurer may either elect to rescind the contract or uphold it.

3.3 Warranties

A warranty is a contractual term in terms of which the insured undertakes that certain representations are accurate or true. Both the Long-term and Short-term Insurance Acts provide that an insurer can only rely on a breach of warranty to avoid liability in terms of the contract of insurance, if it was of such a nature as to be likely to have materially affected the assessment of the risk. This means that if the representation or non-disclosure which is warranted is not material, the insurer will not be able to avoid liability in terms of the contract of insurance.

4 SELF-ASSESSMENT ACTIVITIES

1. List the essential elements (essentialia) of the contract of insurance.
2. What is a “premium”?
3. Is the payment of a premium a prerequisite for the creation of a valid contract of insurance?
4. Explain how the amount payable on occurrence of the insured event by the insurer is determined in both indemnity and non-indemnity insurance.
5. What is a valued policy?
6. Explain the insurer’s right to repair.
7. Explain the insured’s right of subrogation.
8. What is the difference between over- and under-insurance and what are the consequences thereof?
9. Explain what is meant by excess clauses.
10. What must be included in the description of the risk for the purpose of the insurance contract?
11. What is an insurable interest?
12. What qualifies as an insurable interest for the purpose of both indemnity and non-indemnity insurance?
13. Explain fully the duty of good faith.
14. Discuss fully the consequences of misrepresentation and non-disclosure made by the insured in the insurance contract.
15. What is a warranty?

5 EXPLANATORY NOTES

**Indemnity insurance**: is an insurance contract that compensates for patrimonial loss.

**Non-indemnity insurance**: is an insurance contract that compensates for non-patrimonial loss.

**Premium**: is the amount paid or undertaken to be paid in return for an undertaking to provide insurance.

6 AFRICANISATION AND THE CONTRACT OF INSURANCE

A good example of the application of ubuntu in the insurance context is the case of *Barkhuizen v Napier* 2007 (5) SA 323 (CC). The Constitutional Court had to determine the constitutionality of a time limitation clause in a short-term (indemnity) insurance policy. A time clause prevents an insured from instituting legal action against the insurer, after repudiation of the claim, if the summons is not served on the insurance company within the time limit set out in the clause. The Court held that fairness and justice cannot be separated from public policy which is informed by the concept of ubuntu. It further held that it would be contrary to enforce a time limitation clause that does not afford the person an adequate and fair opportunity to seek judicial redress.

In *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC), the Constitutional Court held that it is necessary to infuse the law of contract with the values of ubuntu. It is thus clear that the contract of insurance is one based on good faith and has to be infused with the values of ubuntu.
SECTION D

Specific Aspects of Commercial Law
LEARNING OUTCOMES
After you have worked through this study unit, you should be able to:

- explain the concept of agency
- explain the concept of representation
- explain the manifestation of authority to act as an agent on behalf of a principal
- explain the legal obligations ensuing from agency or representation
- apply the legal rules ensuing from agency or representation on practical situations

Prescribed study material: chapter 20 of the textbook.

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

1 INTRODUCTION
(Textbook par 20.1)

Note that the term “agency” may be used in different contexts. In one context, it may refer to a mandate which arises from a contract between the mandator and the mandatary, for example, a contract with an estate agent to find a buyer for a house. Reciprocal rights and obligations ensue from a contract of mandate. In another context the term may refer to an agent who concludes juristic acts on behalf of, or as a representative of, the principal, for example, a director of a company.

2 AGENCY
(Textbook par 20.3)

The concept of “agency” arises when one person, the agent, concludes a juristic act for or on behalf of another, who is called the principal, with the result that a legal relationship arises between the principal and a third party. If such a juristic act in a contract entered into between the agent, (on behalf of the principal), and a
third person, the rights and duties which ensue from such a contract accrue to the principal, and not to the agent. This relationship can be schematically illustrated:

```
    The principal
    |
    |
    The agent
    |
    |
    The third party
```

The agent acts on behalf of the principal. A legal relationship is created between the principal and third the party.

### 2.1 Authority

The agent must have authority to conclude juristic acts on behalf of the principal. Authority can be given expressly, or it can by implied by the law or on the facts. The lack of authority may sometimes be cured by ratification, or alternatively by estoppel. Ratification and estoppel are discussed below.

#### 2.1.1 Authorisation

Authorisation of an agent may be given:

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

Generally, no formal requirements are imposed for expressed authorisation, because authorisation is a unilateral act. However, a formal appointment by means of a written power of attorney is required in some cases.

#### 2.1.2 Other sources of authority

In certain instances, the authority is implied by law. In many of these instances, the agent acquires authority by virtue of his or her appointment to a particular office; or as a guardian who has the authority to act on behalf of a minor; or as a curator who has the authority to enter into juristic acts on behalf of a mentally ill person. In the case of a company, it may confer authority on one of its directors in terms of the Memorandum of Incorporation of that company.
2.1.3 **Delegation of authority**

An agent’s authority may include the authority to delegate, that is, to authorise a sub-agent to perform a juristic act on behalf of the principal. Whether the principal intended the agent to have the power to delegate will be a question of fact.

2.1.4 **Termination of authority**

Authority can be terminated in various ways. Authority is terminated when it is revoked by the principal, but lapses automatically upon the death or insolvency of the principal or if the principal loses his or her capacity to act. Authority is also terminated upon the death of the agent or if the agent renounces authority on just grounds. In instances where authority was given for the conclusion of a particular act or for a specific period of time, the authority is terminated when the act has been concluded or when the period expires.

ACTIVITY 10.1

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

In which ONE of the following scenarios will Eckhart still possess authority after event has taken place?

1. Eckhart was authorised to act on behalf of his employer. His employment is terminated on the grounds of misconduct.
2. Natascha authorised Eckhart to use her tuck-shop until the end of 2015 only. The year 2015 has come to an end.
3. Eckhart is the guardian of Tristan, a 12-year-old boy. Tristan celebrates his 13th birthday.
4. The house which Eckhart was authorised to sell is destroyed by fire.

FEEDBACK

3 is CORRECT. A guardian has authority to conclude juristic acts on behalf of a minor. Tristan will still be a minor after celebrating his 13th birthday.

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

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

4 is INCORRECT. If authority is given for the conclusion of a particular juristic act, it lapses when the act can no longer take place. The house which Eckhart was authorised to sell was destroyed by fire and consequently the authority is terminated.

ACTIVITY 10.2

Read the scenario below. State the way in which the agent acquired authority.
Mr Chang opened a shop. The shop did so well that Mr Chang opened another two shops. Mr Chang could no longer manage the shops by himself and engaged Bella to act as his buyer. Bella went to several wholesale stores to purchase goods for the shops. She had been doing this for several months and ordered goods on Mr Chang’s account, which was paid every month. Bella acquired her authority ...

FEEDBACK
The answer is “tacitly”. Give a reason for your answer (see paragraph 20.3.1.1 of the textbook).

2.1.5 Estoppel
If the principal has culpably created the false impression that another person had the authority to conclude certain juristic acts on his or her behalf and the third party then acts to his or her detriment on the strength of that impression, the principal is estopped (prevented) from denying the authorisation. The following are the three requirements for estoppel:

(a) The principal must have represented to the third party that the agent had the authority to contract on his or her behalf.
(b) The representation must have been of such a nature that it could reasonably have been expected to mislead the third party.
(c) The third party must have acted on the strength of the representation to his or her detriment.

Make sure that you study these requirements thoroughly so that you can apply the principle of estoppel on a practical situation.

ACTIVITY 10.3
Can a third party rely on the principle of estoppel if he or she knew that the agent was not authorised?

FEEDBACK
A third party cannot rely on the principle of estoppel if he or she knew that the agent was not authorised by the principal (see paragraph 20.3.1.5 of the textbook).

2.1.6 Ratification
Ratification is the validation by a person of a juristic act concluded on his or her behalf by another person who did not have the authority to do so. Ratification is a unilateral juristic act which can be performed either tacitly or expressly. The effect of ratification is that the parties are treated as though a relationship of principal and agent had already existed at the time when the juristic act was concluded. The “unauthorised” agent, the principal and the third party are therefore placed in the same position they would have been in if the act had originally been carried out.

FEEDBACK

STUDY UNIT 10: THE LAW OF AGENCY
with the necessary authority. In essence, ratification amounts to the validation of an unauthorised juristic act.

2.2 The duties of the agent

An agent or representative is a person who concludes juristic acts with the intention of creating, altering or terminating legal relationships on behalf of the principal. You must study the duties of the agent, and also the contents of these duties thoroughly.

2.2.1 The duty to follow his or her instructions

The agent is bound to act in accordance with the principal’s instructions. Failure to follow the principal’s instructions may afford the principal a right of recourse against the agent.

2.2.2 The duty to exercise care and diligence

The agent must use such care, skill and diligence as is reasonably required for the proper performance of his or her mandate.

2.2.3 The duty of good faith

The agent occupies a position of trust and confidence in relation to the principal. This fiduciary relationship requires the agent to act in the interests of his or her principal. The following four cases can be distinguished in relation to the duty of good faith:

(a) secret profits
(b) conflicts of interest
(c) disclosure of confidential information
(d) delegation of authority

You must study the content of these four cases thoroughly.

2.2.4 The duty to account properly

The agent must at all times be able to account properly for all matters concerning the agency. The agent is therefore obliged to keep proper record of the agency business, and everything belonging to the principal must be handed over upon termination of the agency.

2.3 The duties of the principal

2.3.1 Payment of remuneration

If the principal and the agent have agreed on the payment of remuneration and the agent has performed his mandate with care and diligence, the principal must pay the agent the agreed remuneration. The agent must prove that there was an undertaking to pay.
2.3.2  **Reimbursement**

The principal must reimburse the agent for expenses incurred for the execution of a lawful instruction.

2.3.3  **Indemnity**

The principal also has a duty to indemnify the agent for loss or liability incurred during the execution of his or her authorised instructions.

2.4  **Personal liability of the agent or purported agent**

The agent merely creates a legal relationship between his or her principal and third parties; generally, there is no legal relationship between the agent and the third party. The agent incurs no liability to, nor rights against, the third party, unless the agent has expressly or tacitly agreed to do so. An agent can, however, incur personal liability if he or she neglects to disclose to a third party that he or she is acting on behalf of a principal. Note that the identity of the principal need not be disclosed. Such a principal will be known as an “unnamed principal”. An agent who contracts on behalf of a principal without authority or exceeds the powers of authority can also be liable on the basis of an implied warranty of authority.

2.4.1  **The doctrine of the “undisclosed principal”**

The situation of the “unnamed principal” described above should be distinguished from the one in which there is an “undisclosed principal”. In this case, the agent fails to disclose the existence of the principal to the third party. The agent acts in his or her own name and is thus strictly speaking not acting as an agent, although he or she is acting on the instructions of the principal. No contract is formed between the principal and the third party, but in terms of the doctrine of the “undisclosed principal” the principal is entitled, once the agent has reached an agreement with the third party, to step into the shoes of the agent as the real party to the contract. In order for the doctrine of the undisclosed principal to apply, the agent must be authorised to contract on behalf of the principal, but must fail to disclose his or her representative capacity to the third party.

**ACTIVITY 10.4**

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

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

**FEEDBACK**

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

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

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

4 is INCORRECT. In these circumstances the agent may incur personal liability. An analysis of the circumstances and actions of the parties could indicate clearly that agreement was reached about the furnishing of a guarantee by the agent to the third party, to the effect that he or she had the required authority. That is, the agent tacitly warranted that he had the necessary authority.

3 SELF-ASSESSMENT ACTIVITIES
1. Explain the concept of agency.
2. Explain how an agent can acquire authority to act on behalf of the principal.
3. Discuss the termination of authority.
4. Explain the application of the principle of estoppel in agency.
5. Discuss the duties of the agent and principal.
6. Distinguish between the concept of unnamed principal and the doctrine of the undisclosed principal.
7. Explain whether or not an agent can incur personal liability.

4 EXPLANATORY NOTES
Ab initio: means from the beginning or the time when the particular transaction was concluded.
Agency: refers to an agreement in terms of which one party undertakes to perform a task for commission on behalf of another.
Ratification: is a process of validating a contract concluded by a person not so authorised.

5 AFRICANISATION AND THE LAW OF AGENCY
Ubuntu is recognised as being an important principle of law within the context of agency. The law of agency accords with the principles of ubuntu, because the legal rules governing agency prescribe that contracts of mandate and agency reflect principles of fairness, reasonableness and good faith. The duty to act in good faith is a noticeable distinction of ubuntu and this distinctive forms the basis of the fiduciary relationship between contracting parties. The context of agency further accords with the spirit of ubuntu by protecting parties against any deceptive, misleading, unfair or fraudulent conduct by contracting parties and enhancing fair and honest dealings.
STUDY UNIT 11

Forms of Business Enterprise

LEARNING OUTCOMES

After you have worked through this study unit, you should be able to:

• compare and distinguish between the different forms of business enterprise
• identify characteristics and requirements of the different forms of business enterprise
• explain why a particular form of business will be most suitable in a specific situation
• explain whether a particular business enterprise is bound by a contract entered into by a person on behalf of the business enterprise

Prescribed study material: chapter 21 of the textbook

OVERVIEW

In this study unit you are introduced to five forms of business enterprise, namely the sole proprietorship, the partnership, the company, the close corporation, the business trust and the co-operative. The particular characteristics, requirements and attributes of each form are important, as are the following: how it is formed, where the capital comes from, whether it has separate legal entity, what falls within the scope of the enterprise, who is allowed to act on behalf of the enterprise (representation), and its duration and winding up.

1 INTRODUCTION

(Textbook par 21.1)

An entrepreneur aspiring to launch a business venture has a choice of several forms of business enterprise. The following are forms which an enterprise may take:

• sole proprietor (single-owner enterprise)
• partnership
• company (not prescribed for CLA1503 assessment)
• business trust
• co-operative

Various factors will influence a prospective entrepreneur’s decision to elect a form of business enterprise best suited for his or her particular business concern. Risk, tax implications, the amount of capital needed to start the business enterprise and the need for the creation of a separate legal entity are only some aspects that must be considered when deciding on an appropriate form of business enterprise.
2 THE SOLE PROPRIETORSHIP (SINGLE-OWNER ENTERPRISE)
(Textbook par 21.2)

This form of business enterprise is limited and basic in nature. It is not suitable for an enterprise which will have substantial capital requirements, or if it is envisaged that the business will expand so rapidly that the sole proprietor will not be able to manage it alone. The success of a sole proprietor depends solely on the owner and his/her creditworthiness. A sole proprietor does not have a separate legal personality; consequently, the owner is fully liable for debts and liabilities.

3 THE PARTNERSHIP
(Textbook par 21.3)

3.1 Introduction

The partnership as a business enterprise is possibly one of the oldest commercial institutions known to man. Partnerships are mainly regulated by common-law principles. The works of the French writer Pothier and the English law on partnership law are also persuasive authorities. Various Acts also contain provisions which may apply to partnerships, for example, the Companies Act 71 of 2008, the Attorneys Act 53 of 1979, the Businesses Act 71 of 1991 and the Consumer Protection Act 68 of 2008.

3.2 Definition and legal nature of a partnership

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

3.3 The basic requirements (essentialia) of a partnership

The legal relationship of a partnership is created by a contract. All the essential elements of a valid contract must therefore be present before a partnership will come into existence. No formal requirements need be complied with. A partnership agreement may be concluded orally, in writing or tacitly. However, a written partnership agreement is preferable. The Companies Act 71 of 2008 does not provide for any limitation on the number of partners in any partnership. Legal entities may also be parties to a partnership agreement. Therefore, a close corporation may, for example, enter into a partnership agreement with a natural person, or a company, or even another close corporation.

The presence of the essentialia of a partnership, collectively with the parties’ intention to form a partnership will be sufficient to constitute a partnership. Schematically illustrated:
There are three essentialia of a partnership agreement. Schematically illustrated:

3.3.1 A contribution by each partner

Each partner must contribute something, or must undertake to contribute something to the partnership. This contribution may be property of any description (e.g. money, movable or immovable property, corporeal or incorporeal things), as well as services or skills. The nature of the contributions by the different partners may, therefore, differ. The golden rule is that generally anything may be contributed, provided that it has a commercial value.

Note that the contribution must be made unconditionally. It must therefore be subjected to the risks of the partnership business. A contribution to a partnership made on the condition that it must be repaid to him/her will make the contributor a creditor and not a partner.

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

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

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

Whether the partnership is formed for the completion of one project only or for the purpose of establishing an ongoing, long-term business enterprise, it is of absolute importance that each partner should benefit from the formation of the partnership. This requirement implies that partners should be jointly entitled to the common fund formed by their contributions.

ACTIVITY 11.1

Troy, Martin, Serena and Rory conclude an agreement in terms of which they agree to run a business that repairs small electrical appliances. The object is to make a profit. Troy will be responsible for managing the business and doing the repairs and Martin will allow the business to operate rent-free from premises which he owns. Serena is to be employed as a receptionist in the business at a salary of R7 500 per month and agrees not to draw her salary until the business is making a profit. As soon as the business is making a profit, she will receive her salary plus any unpaid salaries. Rory is to contribute R10 000 to the business, but it is agreed that R5 500 must be repaid to him at the end of the first year for which the business has been operational, irrespective of whether the business is making a profit or not.

Which ONE of the following statements regarding contributions by each partner to the partnership business is CORRECT?

1. A valid partnership agreement has not been concluded between Troy, Martin, Serena and Rory because Martin has not made, or has not agreed to make, a contribution to the partnership business.
2. A valid partnership agreement has not been concluded between Troy, Martin, Serena and Rory because Troy has not made, or has not agreed to make, a contribution to the partnership business.
3. A valid partnership agreement has not been concluded between Troy, Martin, Serena and Rory because Serena has not made, or has not agreed to make, a contribution to the partnership business.
4. A valid partnership agreement has not been concluded between Troy, Martin, Serena and Rory because Rory has not made, or has not agreed to make, a contribution to the partnership business.

FEEDBACK

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

1, 2, and 3 are INCORRECT. Martin, Troy and Rory have respectively contributed the use of premises, skills and a cash amount to the partnership. Each of these constitutes a valid contribution. Note that Rory is both a partner and a creditor of the partnership. (See paragraph 21.3.3.1 of the textbook.)

3.4 The natural consequences (naturalia) of a partnership agreement

The natural consequences (naturalia) of a partnership are those consequences which apply by operation of law if there is no provision to the contrary in the partnership contract. Unlike the essential requirements (essentialia) of a partnership, the naturalia
can be excluded by the partnership contract without affecting the formation or existence of the partnership. A provision excluding certain natural consequences has no effect as far as third parties who have no knowledge of it are concerned, but it is effective between the partners. The most common natural consequences (*naturalia*) of a partnership agreement are the following:

### 3.4.1 Mutual mandate

Unless there is an agreement to the contrary, the rule is that each partner, individually and without the collaboration of the other partners, has the capacity to perform any legal act concerning the administration of the partnership business. **Each partner can therefore bind his or her co-partners as principals by performing any act which falls within the sphere of partnership business.** If a third party wishes to hold the partnership liable in terms of a contract concluded by a partner, it is sufficient for him or her to prove that the contract fell within the sphere of the partnership business.

### 3.4.2 The proportion in which the net profit is shared

Generally, the net profit is shared in proportion to the partners’ respective contributions to the partnership. If it is impossible to value the respective contributions properly, the profit will be divided equally among all the partners.

### 3.4.3 The obligation to share in the net loss

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

### 3.4.4 The proportion in which the net loss is shared

Generally, a net loss is shared in the same proportion as a net profit. The effect of this provision is that the partner who receives the greatest portion of the net profit will also have to absorb the largest portion of the net loss.

### 3.4.5 The proportion in which the assets are divided upon dissolution

If the partnership agreement does not determine the ratio in which assets will be divided upon dissolution of the partnership, partnership assets will be divided in the same ratio as the net profits. If the partners did not agree on the division of the net profits, the partnership assets will be divided in accordance with the partners’ respective contributions. If it is not possible to value the partners’ respective contributions, the partnership assets will be divided equally among all the partners.

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

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

The division of net profit, net loss and assets upon dissolution as well as co-ownership in the absence of an agreement can be summarised as follows:

<table>
<thead>
<tr>
<th>Division of net profit</th>
<th>In proportion to the partners’ respective contributions. If impossible to value contributions, profit is divided equally</th>
</tr>
</thead>
<tbody>
<tr>
<td>Share in net loss</td>
<td>In the same proportion as a net profit</td>
</tr>
<tr>
<td>Division of assets upon dissolution</td>
<td>In the same proportion as the profits If no agreement has been reached regarding the profits, in proportion to the respective contributions If impossible to value contributions, the assets are divided into equal parts</td>
</tr>
<tr>
<td>Proportion of co-ownership in assets</td>
<td>In the same proportion as that in which assets are to be divided upon dissolution If proportion is unknown, partners are co-owners in the same proportion as that in which the profits are to be shared</td>
</tr>
</tbody>
</table>

### 3.5 The rights and duties of partners

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

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

Make sure that you have a thorough understanding of the principles that underlie the rights and duties of the partners.

### ACTIVITY 11.2

Explain the two actions by which partnership rights can be enforced.

### FEEDBACK

The *actio pro socio* is a general partnership action that can be used to enforce specific compliance with the partnership agreement, or to claim dissolution of the partnership. The *actio communi dividundo* is used to effect physical division
of tangible things held in joint ownership by partners. (See paragraph 21.3.5 of the textbook.)

3.6 The termination or dissolution of a partnership

The legal relationship that was created by the partnership agreement changes upon the dissolution of the partnership. The partnership estate is liquidated, creditors are paid and any surplus is divided among partners. No formalities are required for the dissolution of a partnership.

3.6.1 Grounds for dissolution

The grounds for dissolution of a partnership are illustrated schematically:

3.6.2 Consequences of dissolution

Note that, after dissolution of the partnership, the partners still owe fiduciary duties to one another. The rights and obligation of the partnership towards third parties remain valid and binding, but the partners generally become jointly and severally liable for the obligations.

3.7 Liquidation of the partnership

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

ACTIVITY 11.3

Which ONE of the following does NOT occur in the liquidation of a partnership?

1. the realisation of the assets of the partnership
2. the distribution of the assets or liabilities among partners
3. the payment of debts of the partnership
4. the sequestration of partners’ private estates
FEEDBACK

4 is the CORRECT option. The partnership is not a separate legal entity. In certain limited circumstances, however, the law treats the partnership as a separate legal entity, for example, for purposes of liquidation, the partnership's estate is treated as an estate which is separate from those of its partners. Even though the sequestration of the private estate of a partner dissolves the partnership, which does not necessarily mean that the estate of the partnership has to be liquidated. Creditors of a partnership must in principle claim against the partnership estate and private creditors have a claim against the individual estate of the particular partner.

1 is INCORRECT. Liquidation of the partnership entails the realisation of the assets of the partnership.

2 is INCORRECT. Liquidation of the partnership entails the distribution of the remaining assets or liabilities of the partnership among partners.

3 is INCORRECT. Liquidation of the partnership entails the payment of debts of the partnership.

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4 THE CLOSE CORPORATION

(Textbook par 21.5)

4.1 Introduction

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

4.2 Formation and membership of a close corporation

In the past, close corporations acquired legal personality upon the registration of the founding statement with the Registrar of Close Corporations. A founding statement is comparable to a company’s Memorandum of Incorporation. The membership of a close corporation is limited to ten or fewer (natural) persons. Any member is an agent of the corporation with regard to a person who is not a member and who is dealing with the corporation.

The members of the close corporation fulfil both the management and control functions. These members also owe fiduciary duties and duties of care and skill to the close corporation which are similar to the duties owed by directors to a company. Note that written consent of a member or members holding at least 75 percent of members’ interests is required for certain matters, such as a change in the principal business of the close corporation.
4.3 Capital of the enterprise

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

Note that the Close Corporations Act maintains the capital of the enterprise by protecting the solvency and liquidity of the corporation. The payment to members by reason of their membership is subject to certain qualifications. Make sure that you study these qualifications.

ACTIVITY 11.4

The payment to members by reason of their membership is subject to certain qualifications. List these qualifications.

FEEDBACK

(a) The corporation's assets will exceed its liabilities after such payment.
(b) The corporation is able to pay its debts as they become due in the ordinary course of business.
(c) Such payment will not render the corporation unable to pay its debts as they become due in the ordinary course of business.

4.4 Representation of a close corporation

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

4.5 Conversions

As indicated above, it will no longer be possible to register a new close corporation. The new Companies Act 71 of 2008 does, however, provide for the conversions of close corporations into companies which existed at the time when the new Act came into operation.

5 THE BUSINESS TRUST

(Textbook par 21.6)

5.1 Introduction

The business trust is a more recent development in South African commercial law. Public business trusts often invite members of the public to invest money in the trust, thereby acquiring membership of the trust. These members never become involved in the management of the trust business. The Collective Investment Schemes Control
Act 45 of 2002, the Companies Act of 2008 and other statutory provisions apply to trusts that acquire investments from the public.

5.2 Definition
The business trust is a trust with a specific goal, namely to manage the trust assets with the object of making a profit in order to benefit the trust beneficiary or beneficiaries and to further the aims of the trust.

5.3 Requirements
A business trust must comply with the normal requirements for a trust. Study these requirements. Note that, in addition to the normal requirements of a trust, the object of a business trust must be to run a business with the purpose of making a profit.

5.4 Specific aspects
A business trust is not a separate legal person. The trustees act on behalf of the trust. Trustees must act in accordance with the trust deed of the business trust. Although the business trust does not have a separate legal personality, the debts of the trust are normally payable by the trust estate. There is no restriction on the duration of a trust, and also no limitation on the number persons who may be beneficiaries of the trust. Business trusts enjoy the same benefits as companies and close corporations, but are not subject to the strict regulatory framework of these business enterprises. For example, the income tax scales applicable to the income derived from companies and close corporations do not apply to trust income. Legal and natural persons may be parties to a trust.

ACTIVITY 11.5
Thomas and Wilfred want to start a business with the following characteristics, among others:

- This business has the benefit of limited liability.
- Legal and natural persons will be eligible for its membership.
- There will be no tax liability in respect of its income.
- The number of its beneficiaries will not be limited.

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

1. partnership
2. close corporation
3. business trust
4. sole proprietor

FEEDBACK
3 is CORRECT. The business trust has the benefit of limited liability for its beneficiaries; natural and legal persons may be party to it and there is no restriction on the number of beneficiaries.
1 is INCORRECT. Although natural and legal persons may be parties to a partnership, the partners are liable for the debts of the partnership, and membership is limited to twenty, subject to certain exceptions.

2 is INCORRECT. Although members of a close corporation are in principle not liable for the debts of the close corporation, the membership of a close corporation is limited to ten and only natural persons may become members, with certain limited exceptions.

4 is INCORRECT. The sole proprietorship is the most basic form of enterprise and has a single owner. This type of business enterprise will not comply with the characteristics required by Thomas and Wilfred.

6 THE CO-OPERATIVE
(Textbook par 21.7)

6.1 Introduction
This type of enterprise developed from the law of partnership. The Co-operatives Act 14 of 2005 governs this form of enterprise. The Act recognises the potential of co-operatives to play a major role in South Africa’s economic and social development. This form of business enterprise is based on the co-operative values of self-help, self-reliance, self-responsibility, democracy, equality and social responsibility.

6.2 Definition
A co-operative is defined in the Co-operatives Act 14 of 2005 as an autonomous association of persons united voluntarily to meet their common economic and social needs and aspirations through a jointly owned and democratically controlled enterprise organised and operated on co-operative values.

6.3 Registration
Before applying for the registration of a co-operative, a meeting of interested persons must be held to adopt a constitution and elect its first directors. Application is then made by a minimum of five people to the Registrar of Co-operatives to register the co-operative. Pay attention to the fact that there are primary co-operatives, secondary co-operatives and tertiary co-operatives. Make sure that you study further aspects relating to co-operatives in this paragraph.

6.4 Capital of the enterprise
Note the different ways in which capital can be contributed by members of a co-operative. There are important differences between shareholding in a company and in a co-operative. For example, must all the shares issued in co-operatives be of the same class and ranking? Is the position the same for shares in companies? Also make sure that you understand the effect of holding shares in a company compared to that of holding shares in a co-operative, as there are important differences.
special attention to the rules pertaining to the provision of financial assistance by the co-operative as well as the rules regarding the reserve fund that must be set up by each co-operative.

6.5 Representation

A co-operative, like a company, may conclude a pre-incorporation contract. Ensure that you know the rules pertaining to pre-incorporation contracts. The co-operative and any director may only perform acts within its functions. Acts performed outside its functions may render the co-operative or its directors guilty of a criminal offence. As with companies, the co-operative’s highest decision-making body is the general meeting of members and its affairs are managed by a board of directors.

6.6 Conversion and winding-up

It is important to note that a company may, upon application to the registrar, be converted into a co-operative. Make sure you are aware of the different ways in which a co-operative can be wound up. A co-operative may be wound up voluntarily or by court order.

ACTIVITY 11.6

Complete the table below by filling in the following words:

(a) separate legal entity
(b) not more than ten
(c) business trust
(d) two or more persons

<table>
<thead>
<tr>
<th>Business enterprise</th>
<th>Legal personality</th>
<th>Membership</th>
</tr>
</thead>
<tbody>
<tr>
<td>Close corporation</td>
<td>A separate legal entity</td>
<td>1.-------------------------</td>
</tr>
<tr>
<td>2..........................</td>
<td>Not a separate legal entity</td>
<td>No restrictions</td>
</tr>
<tr>
<td>Co-operative society</td>
<td>3..........................</td>
<td>No restrictions</td>
</tr>
<tr>
<td>Partnership</td>
<td>Not a separate legal entity</td>
<td>4..........................</td>
</tr>
</tbody>
</table>

FEEDBACK

1. (b) (See paragraph 21.5.2 of the textbook.)
2. (c) (See paragraph 21.6.4 of the textbook.)
3. (a) (See paragraph 21.7.1 of the textbook.)
4. (d) (See paragraph 21.3.2 of the textbook.)
7 SELF-ASSESSMENT ACTIVITIES
1. Define the sole proprietor.
2. Define a partnership.
3. Explain the basic requirements (*essentialia*) of a partnership.
4. Explain the natural consequences (*naturalia*) of a partnership.
5. Discuss the rights and duties of partners.
6. Explain the dissolution of a partnership.
7. Discuss the formation of a close corporation.
8. Discuss the representative capacity of members of a close corporation.
10. Discuss the requirements of a business trust.
11. Define a co-operative.
12. Explain the registration process of the co-operative.

8 EXPLANATORY NOTES

**Business trust**: It is any trust where the trustees manage the assets of the trust in order to make a profit for the benefit of the beneficiary.

**Co-operative society**: A special type of organisation which acts on behalf of its members.

**Partnership**: is an agreement between two or more persons in terms of which each contributes to a common business for the purpose of making profit for division amongst them.

**Sole proprietorship**: A business that has one owner and this owner acquires all the profits and is responsible for all the losses of the business.

9 AFRICANISATION AND FORMS OF BUSINESS ENTERPRISE

*Ubuntu* is recognised as being an important principle of law within the context of forms of business enterprise, especially to promote the economic and social empowerment of all members of society. *Ubuntu* has aspects of socialism and propagates the redistribution of wealth, which accords with the main objective of various forms of business enterprise in South Africa. Importantly, the duty to act in good faith is also distinctive of *ubuntu* and this distinction forms the basis of the fiduciary relationship between members and third parties in the various forms of business enterprise.
LEARNING OUTCOMES

After you have worked through this study unit, you should be able to:

- explain the ways in which security can be obtained
- define the contract of suretyship
- explain the rights (benefits) of the surety
- discuss the circumstances under which the surety may be discharged
- explain the different forms of real security

Prescribed study material: chapter 23 of the textbook

OVERVIEW

In this study unit you are introduced to two types of security, namely personal and real security. In personal security, a person takes responsibility for the proper compliance with the obligations of the debtor towards a creditor. This is called suretyship. In the case of real security, some property of the debtor is given as security to ensure proper compliance with the debtor’s obligations, property that can be used by the creditor as a substitute for the agreed performance. The law distinguishes the following types of real security: pledge, notarial bonds, mortgage bonds, liens, hypothecs and cession to secure a debt.

1 INTRODUCTION

(Textbook par 23.1)

Persons who enter into contracts often seek to ensure performance of the other party’s obligations by means of security. The security serves as additional protection for the creditor to ensure that the debtor will comply with his or her obligations under the contract. Security may be obtained in the following ways:

The creditor can obtain the right to have the proceeds of property belonging to the debtor applied to ensure proper compliance with the debtor’s obligations to the exclusion of the rights of other creditors. This is known as real security.

The creditor may require a third party to bind him- or herself in respect of proper compliance with the debtor’s obligations. This is known as personal security.

Schematically, the types of security may be illustrated as follows:
2 THE CONTRACT OF SURETYSHIP

(Textbook par 23.2)

The contract of suretyship is a type of personal security. It is given by granting the creditor the right, in case of non-payment of the principal debt, to secure payment by means of a personal right against another party to carry out the stipulated performance.

2.1 Definition

The contract of suretyship is an agreement by means of which one person (the surety) renders himself or herself liable towards a creditor of another person (the debtor) for the proper compliance of the obligations of the debtor. In a contract of suretyship there are two debtors, namely the debtor in the first agreement (the principal debtor) and the debtor in the contract of surety (the surety). The liability of the surety is additional to the liability of the principal debtor. It is an essential characteristic of the contract of suretyship that it is accessory (additional) to the principal obligation between the original debtor and creditor. The creditor acquires a personal right against the surety. The contract of suretyship can be explained by the following scenario:

Scenario 1:

Mark buys a Lexus motor vehicle from Helena for R700 000. Shaun concludes a contract with Helena, which provides that if Mark should default on his payment of the R700 000, Shaun will be liable to pay that amount. Mark is therefore the principal debtor, Helena is the creditor and Shaun is the surety. Shaun is also the debtor in the contract of surety.
The contract of suretyship can be schematically illustrated:

2.2 Conclusion of the contract of suretyship

The contract of suretyship is concluded by agreement between the creditor and the surety. The normal requirements for the conclusion of a valid contract have to be met.

2.3 The liability of the surety

A contract of suretyship renders the surety liable to the creditor for payment of the debt of the principal debtor, or for any lesser amount agreed upon.

Since the obligation of the surety is accessory to the obligation of the principal debtor, the surety may rely on defects in the liability of the principal debtor, for example, duress and misrepresentation, provided that they are not personal defences such as minority.

The surety’s obligation is accessory to the principal debt and as such it only becomes enforceable if the principal debtor defaults in the performance of the principal obligation. If the principal debtor is granted an extension of time, the surety may not be held liable in the meantime. Also note that credit agreements mostly fall within the ambit of the National Credit Act 34 of 2005. If a credit agreement is regulated by the National Credit Act, the surety may also rely on the benefits or defences afforded to the debtor in terms of the Act.

The liability of the surety can be explained by the following scenario.

Scenario 2:

Sue owes Bob R20 000. She bought Bob’s VW Beetle car and only paid the R5 000 which Bob wanted as a deposit. Sue’s uncle Mandla enters into a contract of suretyship with Bob for Sue’s debt. Mandla later discovers that Sue never intended to buy Bob’s car. Bob, who wants money to pay his debts, actually threatens that, if Sue does not buy the car, he will tell her husband about her affair with Sipho, who happens to be Sue’s colleague. In this case, Mandla may refuse to pay Bob the money owed to him by Sue, because she was forced to buy the car. Sue’s liability (the principal debtor) has a defect (duress).
ACTIVITY 12.1

Jacob buys a Toyota Yaris car from Pieter for R40 000. Lerato, Jacob's friend, enters into a contract of suretyship with Pieter for an amount of R10 000.

Which ONE of the following statements regarding the liability of the surety is CORRECT?

1. The contract between Pieter and Lerato is only valid if it is in writing and signed by or on behalf of Lerato.
2. Lerato has bound herself as a surety for Jacob's debt, and is therefore liable for the total amount of the outstanding balance.
3. The contract between Pieter and Lerato is not binding since Jacob was not a party to it.

FEEDBACK

1 is CORRECT. The General Law Amendment Act 50 of 1956 requires a contract of suretyship to be in writing and to be signed by or on behalf of the surety.

2 is INCORRECT. A surety can be liable for a lesser amount if he or she has bound herself or himself in respect of such lesser amount. In this case Lerato binds herself for only R10 000 and will be liable for only that amount.

3 is INCORRECT. Although the General Law Amendment Act 50 of 1956 requires that the principal debtor be identified in the contract, it does not require the principal debtor to be a party to the contract, to be aware of the existence of the contract, or to be a signatory thereto.

2.4 The rights of the surety

The surety has six benefits which are derived from the common law. The surety will enjoy their protection, unless they are specifically excluded. These benefits can be schematically illustrated:

THE RIGHTS OF THE SURETY

- The benefit of division
- The benefit of cession of actions
- The surety’s right of recourse against the principal debtor
- The surety’s right to a contribution from co-sureties
- The surety’s right to reciprocal counter-performance
SECTION D: SPECIFIC ASPECTS OF COMMERCIAL LAW

2.4.1 The benefit of excussion

It permits the surety to compel the creditor to recover as much as possible of the due debt from the principal debtor, before proceeding against him or her (the surety). This defence will be forfeited if the surety fails to raise it at the beginning of the proceedings against him or her. The benefit of excussion is not available to the surety if he or she has renounced it, has bound him- or herself as surety and co-principal debtor or where excussion is not possible.

2.4.2 The benefit of division

In terms of this benefit, if there are several sureties in respect of one and the same obligation and the creditor attempts to recover from a single surety the entire debt which is due, such surety may demand that the creditor divide his or her claim between the available sureties, so that his or her liability may be restricted to his or her proportionate share of the principal debt. The benefit of division is not available to a surety where he or she has renounced it, has bound him- or herself as surety and co-principal debtor or where division is impractical or impossible.

The benefit of division can be explained by the following scenario.

Scenario 3:

Jabu, Michael and James are co-sureties in respect of a debt incurred by their friend Joseph, who owes ABC Loan Institution an amount of R90 000. If ABC Loan Institution claims the whole amount of R90 000 from James alone, James may demand that ABC Loan Institution divide that amount among the three of them, which would mean that ABC Loan Institution would have to claim an amount of R30 000 from each of them.

2.4.3 The benefit of cession of actions

A surety who has rendered performance of the principal obligation is allowed by this benefit to demand the transfer by the creditor of all rights which the latter may enjoy against the principal debtor and the co-sureties, if any, to the surety. A surety who has settled the principal debt will, however, always enjoy a right of recourse against the principal debtor and co-sureties. The surety may refuse to pay the creditor where the creditor is unable to effect cession, for instance, where the creditor has allowed his or her rights against the principal debtor to be destroyed or diminished.

The benefit of cession of actions can be explained by the following scenario.

Scenario 4:

Angelina enters into a contract of suretyship with Marlon for money owed to Marlon by Martin. If Angelina pays that money to Marlon, she may demand that Marlon cede his claim against Martin to her. Instead of paying Marlon, Martin will now pay Angelina. In case Angelina is not the only surety (let us say there are two more sureties and Angelina has paid Marlon that money), she may demand that Marlon cede his claim against the other two sureties to her. Should Martin default against Angelina, those other two sureties will have to pay Angelina, and not Marlon.
2.4.4 The surety’s right of recourse against the principal debtor

A surety who has discharged his or her obligations to the creditor has a right of recourse against the principal debtor for the amount paid, as well as for any costs reasonably incurred. No cession by the creditor is required. This right is excluded if the surety carelessly neglected to raise a (non-personal) defence which was available to the debtor, or if, after paying the debt, he or she negligently failed to inform the debtor of payment, with the result that the latter also paid the amount to the creditor.

2.4.5 The surety’s right to a contribution from co-sureties

A surety who has discharged the principal debt fully is entitled by operation of law to recover a proportionate contribution from each of the solvent co-sureties. This right arises even when the co-sureties undertook liability independently, or in ignorance of each other. However, such surety has no right to such a contribution if he or she negligently failed to raise a defence in rem (a non-personal defence) that was available to the debtor.

2.4.6 The surety’s right to reciprocal counter-performance

If a creditor is contractually bound to render a counter-performance to the principal debtor against performance of the principal obligation by the debtor, the surety becomes entitled to claim the reciprocal counter-performance on discharge of the principal obligation, and to set it off against his or her claim against the principal debtor.

2.5 Discharge of the surety

A contract of suretyship may legally be terminated orally, except if the contract requires cancellation to be in writing. However, any variation of the terms of a contract of suretyship has to be in writing. The surety is discharged in various ways and this will be discussed next.

2.5.1 Termination of the suretyship obligation

The suretyship obligation may be discharged in the same way as obligations generally, for example, by payment of the principal debt. In the case of a continuing suretyship, the surety may, unless otherwise provided in the contract, terminate his or her future liability by giving reasonable notice to the creditor.

2.5.2 Termination of the principal obligation

It follows from the accessory nature of a contract of suretyship that it is automatically terminated when the principal obligation is terminated. If the liability of the principal debtor is terminated by novation or absolution, the surety is absolved from liability.

2.5.3 Conduct prejudicial to the surety

The surety is released if he or she is prejudiced by the creditor. The surety is thus discharged if the creditor makes his or her liability more onerous, for example, by
being too lenient towards the principal debtor. The surety is also released if the creditor, without the surety’s consent, agrees to a material variation of the principal obligation, or departs from its terms in a material respect.

ACTIVITY 12.2

Linda decides to open a bakery. She buys a bread-making machine for R200 000 from XYZ Factory and pays a R20 000 deposit. Bongani and Themba stand surety for the balance of the purchase price. The debt is now due and XYZ Factory wants to claim the whole balance from Bongani.

Advise Bongani whether or not XYZ Factory can claim from him alone, and also on his rights as a co-surety with Themba.

FEEDBACK

XYZ Factory can claim from Bongani alone, but he may demand that they divide the claim between him and Themba. If Bongani pays the whole balance, he is entitled to recover the proportionate contribution from Themba if he is solvent (see paragraphs 23.2.4.2 and 23.2.4.5 of the textbook).

ACTIVITY 12.3

A surety who has not yet discharged his or her obligation to the creditor may, in certain circumstances, compel the principal debtor to pay the principal debt to obtain his or her release from the contract of suretyship.

List these situations.

FEEDBACK

These situations are as follows:

(a) where the debtor and the creditor have allowed the principal debt to remain undischarged for an unreasonable time
(b) if the debtor is recklessly squandering his or her assets
(c) where the creditor has obtained judgment against the surety.

3 REAL SECURITY

(Textbook par 23.3)

Real security gives the creditor a limited real right to the object of the security. This right is accessory to the obligation secured by it. This right may be derived from an agreement with the debtor or by operation of law. A real security right does not normally provide entitlements of use and enjoyment to the creditor. If the value of the real security is greater than the amount of the debt secured by it, the surplus which remains after the realisation (conversion into monetary value by sale) of the real security reverts to the debtor or his estate.
3.1 Pledge

Pledge is a form of real security which is constituted by agreement between the pledgor, who undertakes to deliver the article, and the pledgee, and the subsequent delivery of the (movable) property in question. Although the pledge between the pledgor and the pledgee may be valid even without the delivery of the article, the pledgee has no real security in the absence of delivery of the thing and its retention.

Note that the real right is acquired only when the article is delivered and that *constitutum possessorium*, by which the pledgor retains possession of the object, is not a valid form of delivery in the case of a pledge.

If the secured debt is not met, the article given in pledge may be attached and sold in execution. The proceeds of the sale are used to pay the debt. Any surplus that remains is paid to the debtor after recovery of the costs in respect of the sale.

An agreement between the parties to the effect that the article may be sold without intervention by law, for example, without attachment and sale in execution, is known as *parate ekskusie*. The pledge remains effective for as long as the creditor retains possession of the property.

The realisation of a pledge can be schematically illustrated:

![Diagram](image)

3.2 Notarial bonds

The registration of a notarial bond over the movable property of the debtor is another manner in which a creditor can obtain a preference over the movable goods of the debtor. The Deeds Registries Act 47 of 1937 defines a notarial bond as a bond attested by a notary public, hypothecating movable property generally or specifically.

3.3 Mortgage bonds

The Deeds Registries Act 47 of 1937 defines a mortgage bond as a bond attested by the Registrar of Deeds specially hypothecating immovable property. A mortgage bond arises by agreement, followed by registration. The agreement which gives rise to a mortgage bond is similar to that which gives rise to a pledge. However, in the case of a pledge the subject matter (the object which is pledged) is movable property, whereas in the case of the mortgage bond the subject matter is immovable property.

The parties to a mortgage bond are a mortgagor, whose property is mortgaged, and the mortgagee, in whose favour the mortgage bond is registered. In other words, if the mortgagor defaults in terms of his principal debt, for example, that part of the payment of a home loan which is due, the mortgagee (the financial institution from which the loan was obtained) is entitled to sell the property over which the bond was registered in execution to recover the outstanding debt.

The mortgage bond must be registered in a competent Deeds Office. Once a mortgage bond has been registered in respect of a particular immovable property, the Registrar of Deeds is precluded from attesting or executing a transfer of that property until
the bond is cancelled or until the property has been released from the operation of the bond by the written consent of the mortgagee.

Note that more than one real right may exist in respect of the same immovable property. More than one mortgage bond may therefore be registered over the same property. In practice, it often happens that the owner of a house has registered a first bond in respect of the purchase price and then later obtains a second bond to cover the costs of building alterations, for example, on that property.

The mortgagor remains the owner of the property and remains entitled to its use and enjoyment. A mortgage bond may secure an existing or a future debt, or a combination of the two. A mortgage bond which secures either a future debt or a combination of a future and an existing debt is known as a covering bond. *Parate eksekusie* (discussed under heading “3.1 Pledge” above) is not permitted by law if a mortgage bond has been registered over immovable property. If the debtor (mortgagor) defaults on that part of his or her debt which is due, the mortgagee must obtain a judgment and must be authorised by the court to sell the mortgaged property in execution (this is done by means of a writ of execution). The property is then sold in execution. Special rules, however, apply in respect of the mortgage of South African ships regulated in terms of the Ship Registration Act 58 of 1998.

As the mortgagor’s security obligation is accessory to the principal obligation, it falls away once the principal obligation is discharged. The mortgagee cannot retain the mortgage as security for another debt incurred by the mortgagor while the mortgage is in force.

**ACTIVITY 12.4**

Explain fully the difference between a general notarial bond and a special notarial bond.

**FEEDBACK**

A general notarial bond does not confer any real security, unless the property subject to the bond has been delivered to the bondholder. Without delivery, the bondholder only has a preference over the property when the debtor becomes insolvent. The Security by Means of Movable Property Act 57 of 1993 provides that if a special notarial bond has been registered over specified corporeal movable property after the commencement date of the Act, the property is deemed to have been pledged to the bondholder, despite the fact that it has not actually been delivered to him or her (see paragraph 23.3.2 of the textbook).

**ACTIVITY 12.5**

What is a *kustingsbrief*?

**FEEDBACK**

A *kustingsbrief* is a special mortgage bond which is registered simultaneously with transfer of ownership of land, in favour of the seller or a third party, and as
security for the outstanding balance of the purchase price. (See paragraph 23.3.3 of the textbook.)

3.4 Liens and hypothecs

3.4.1 Liens

A lien is a form of real security which arises by operation of law, and not as a consequence of an agreement between the parties. A lien is the right to retain the possession of property (a right of retention). The person claiming the lien must therefore be in possession of the property which is the object of the lien. If he or she loses possession, he or she automatically loses the lien, which does not revive if he or she later recovers possession of the property. If physical control of the object of the lien was lost as a result of force, fraud or any other unlawful action, the lien is revived as soon as effective control is recovered. A lien may also be revived after it has been lost, provided that the control was lost in terms of an agreement and regained afterwards in terms of the same agreement.

There are three types of lien, which can be schematically illustrated:

![Diagram of Liens]

Note that salvage liens and improvement liens are known as enrichment liens. This type of lien is enforceable against any person, and not only against a contracting party. Study the example in paragraph 23.3.4.1 of the textbook to ensure that you understand which liens will operate against which parties and under what circumstances. Some liens originate from statutes and cannot be categorised as either enrichment or debtor and creditor liens.

3.4.2 Hypothecs

Hypothecs, too, are a form of real security and arise by operation of law, and not as a consequence of an agreement between the parties. Examples of hypothecs are the landlord’s tacit hypothec and the statutory hypothec which accrue to the seller under an instalment-sales transaction in respect of the object of a sale upon the purchaser’s insolvency.

ACTIVITY 12.6

Consider the following statements:

- It arises by agreement followed by registration.
- It must be registered by the Registrar of Deeds.
- It is a means of creating real security over immovable property.
Indicate which **ONE** of the following forms of real security has the above characteristics:

1. mortgage bond
2. notarial bond
3. pledge
4. lien

**FEEDBACK**

2 is **CORRECT**. A notarial bond arises by agreement followed by registration of the notarial bond; it is a means of creating real security over movable property. It is registered by the Registrar of Deeds. The notarial bond differs from the mortgage bond in that it relates to movable property, and not immovable property.

1 is **INCORRECT**. A mortgage bond is a means of creating real security over immovable property which arises by agreement followed by registration of the bond. It is attested by the Registrar of Deeds in accordance with the normal requirements for the transfer of real rights in immovable property. It affords a means by way of which real security over immovable property can be created.

3 is **INCORRECT**. Although a pledge is constituted by agreement, it is a means of creating real security over movable property and not immovable property, and the agreement is followed by the delivery of possession of the article to the pledgee, and not by registration by the Registrar of Deeds.

4 is **INCORRECT**. Although a lien is a form of real security, the subject matter of a lien is movable property and not immovable property. It arises by operation of law, not by agreement. The possessor of the property of another, on which the possessor has expended money or labour, acquires the right to retain the property in his possession until he or she has been compensated according to the agreement, or for his or her actual expenses or the increase in value of the property (whichever is the lesser) if there was no agreement. A lien is basically a right to retain something. The person claiming the lien must be in possession of the property which is the object of the lien. If he or she loses possession, he or she automatically loses his or her lien. It is therefore possession of the property and not registration which is required in the case of liens.

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### 3.5 Cession to secure a debt

A cession to secure a debt (cession *in securitatem debiti*) occurs when the cession of a personal right, for example, a right in respect of shares is effected as security for a debt.

Cession to secure a debt can be explained by the following scenario.

**Scenario 5:**

John owes Bert R750. Bert therefore has a personal right against John to the value of R750. Bert wishes to purchase goods from Carl for an amount of R750. Bert and Carl decide that Bert will cede his personal right against John to Carl as security for payment of the R750. When the contract has been concluded between Bert and Carl and the cession has taken place, Carl not only has a personal right against Bert
for payment of the R750, but also a personal right against John for R750 if Bert fails to honour his obligation.

The parties to a cession are the cedent, who cedes his or her personal right, and the cessionary, to whom that right is ceded. It is normally their intention that the right ceded will be transferred back to the cedent when the cedent’s debt to the cessionary (the R750 owed to Bert in the scenario above) is discharged. While the cession exists, the cedent has no claim against the debtor (John in the scenario above).

This scenario can be schematically illustrated:

Note that a cession to secure a debt may also be constituted by means of the pledge of a personal right. Different consequences apply in respect of the insolvency of the parties to the particular transaction.

ACTIVITY 12.7

Diana has a life insurance policy with ABC Insurance Company to the value of R110 000. Diana wants to buy a farm from Marie for R110 000. The parties agree that Diana will give Marie her right to claim against the insurance company, in case Diana fails to pay Marie the required amount.

Which ONE of the following statements is INCORRECT?

1. Diana provides security through suretyship.
2. Diana is called a cedent.
3. Marie is called a cessionary.

FEEDBACK

1 is CORRECT because it is the INCORRECT option. The transfer of a right by agreement is known as cession, whereas suretyship is an agreement by means of which one person renders himself or herself liable towards a creditor for the proper compliance of the obligations of a debtor. Cession of a personal right may be effected as security for a debt (see paragraph 23.3.5 of the textbook).
2 is INCORRECT because it is the CORRECT option. A person who cedes rights is called a cedent.

3 is INCORRECT because it is the CORRECT option. A person to whom rights are ceded is called a cessionary.

4 SELF-ASSESSMENT ACTIVITIES
1. How is security obtained?
2. Define a contract of suretyship.
3. What are the essential characteristics of a contract of suretyship?
4. Explain what is meant by the obligation of surety being accessory to the obligation of the principal debtor.
5. Discuss the benefit of excussion.
6. Discuss the benefit of division.
7. Discuss the benefit of cession of actions.
8. Discuss the surety’s right of recourse against the principal debtor.
9. Discuss the surety’s right to a contribution from co-sureties.
10. Discuss the surety’s right to reciprocal counter-performance.
11. Explain what is meant by the discharge of the surety.
12. What is a pledge?
13. What is a notarial bond?
14. What is a mortgage bond?
15. What is a salvage lien?
16. What is an improvement lien?
17. What is a debtor and creditor lien?
18. What is a hypothec?
19. Discuss cession in securitatem debiti.

5 EXPLANATORY NOTES

Lien: refers to a right to retain possession of property.
Mortgage bond: is a bond attested by the Registrar of Deeds specifically hypothecating immovable property.
Notarial bond: is a bond attested by a notary public, hypothecating movable property generally and specially.
Pledge: is created by agreement between the pledgor, who undertakes to deliver the article, and the pledgee, and the subsequent delivery of the (movable) property in question.
Surety: is a person who renders himself or herself liable towards a creditor of another.
Suretyship: is an agreement whereby a person renders himself or herself liable towards a creditor of another person for the proper performance of the obligations of the debtor.

6 AFRICANISATION AND THE LAW OF SECURITY

In Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC), the Constitutional Court held that “… it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of ubuntu, which inspire much our constitutional compact.” In the context of security law, this means that the contract of suretyship should be infused with the values of ubuntu. It should be noted that the values of ubuntu permeate the law regulating suretyship. This is evident from the number of benefits (rights) afforded to a surety.
LEARNING OUTCOMES
After you have worked through this study unit, you should be able to:

• explain the need for the Consumer Protection Act
• explain the respective consumer rights and their importance
• advise a consumer on how his or her rights are protected
• explain the application and purpose of both the Consumer Protection Act and the Financial Intelligence Centre Act

OVERVIEW
This study unit introduces you to the Consumer Protection Act by providing you with a brief background of the Act. You are also given a brief overview of the objectives of the Financial Intelligence Centre Act.

Prescribed study material: chapter 24 (paragraph 24.1.3.2.4) and chapter 30 of the textbook

1 INTRODUCTION
(Textbook paragraph 30.1)
This section of the prescribed book contains a brief background to the introduction of the Consumer Protection Act. From this background you will understand that the Act provides a single comprehensive legal framework for consumer protection that never before existed in South Africa. The aim of the Act is to promote the economic welfare of all citizens and to provide a coherent and consistent framework to regulate consumer-business interaction. You are also given a brief overview of the objectives of the Financial Intelligence Centre Act (“the FICA”). One of the main objectives of the Act is to act as a deterrent as far as money-laundering is concerned and also to prevent money-laundering.

2 THE CONSUMER PROTECTION ACT 68 OF 2008
(Textbook, paragraph 30.2)
2.1 Purpose and structure of the Act

(Textbook, paragraph 30.2.1)

The Act promotes and advances the social and economic welfare of consumers in South Africa. Chapter 2 of the Act introduces eight fundamental consumer rights, namely:

- the right to equality in the consumer market
- the right to confidentiality and privacy
- the right to choose
- the right to disclose and information
- the right to fair and responsible marketing
- the right to honest dealing and fair agreements
- the right to fair, just and reasonable terms and conditions
- the right to fair value, good quality and safety

Chapter 3 of the Act deals with the protection of those rights. See paragraph 30.2.1 of the textbook for the consumer rights and paragraph 30.2.4 of the textbook for the protection of those rights.

2.2 Application of the Act

The Act applies to every transaction for the supply of goods or services or the promotion of goods or services and the goods or services themselves taking place within South Africa. However, the Act does not apply to any transaction exempted from the application of the Act (see paragraph 30.2.2 of the textbook for such transactions). Also study the definitions of the following important terms contained in the provision on the application of the Act: transaction, goods, service, supply, supplier, promote, and consumer.

ACTIVITY 13.1

In your own words, write brief notes on the purpose of the Act, and how, in your opinion, the Act will protect the consumer.

FEEDBACK

Think about your own daily activities as a consumer, and how the Act protects you. You may, for example, have bought electronic equipment that was faulty.

ACTIVITY 13.2

Does the Act also apply to transactions for the supply or promotion of goods or services to the State?

FEEDBACK

The Act has a wide field of application but will not apply to transactions for the supply or promotion of goods or services to the State.
2.3 Fundamental consumer rights in terms of the Act

2.3.1 Right to equality

Section 8 of the Act prohibits any unfair discrimination by the supplier of goods and services against any person on the grounds listed in section 9 of the Constitution of the Republic of South Africa, 1996. Consumers who allege breach of the equality section may institute proceedings before the equality court or file a complaint with the National Consumer Commission. (See paragraph 30.2.6.1 of the textbook for a discussion on the Consumer Commission.) The National Consumer Commission is established in terms of the Act. It is an organ of state which has jurisdiction throughout the Republic. Also take note of the enforcement functions the Commission has.

ACTIVITY 13.3

A pharmaceutical company promotes a combination of vitamin pills ONLY for persons over the age of 60 years. Will this action constitute a contravention of the Act?

FEEDBACK

The Act allows differentiation on reasonable grounds, but it does not allow discrimination. It will not constitute a contravention of the Act to market any goods or services in a way that gives preference to a particular group of consumers.

2.3.2 Right to privacy

The right to privacy is covered under sections 11 and 12 of the Act, containing restrictions on direct marketing. “Direct marketing” means to, in the ordinary course of business, approach a person, either in person or by post or via electronic communication, for the purpose of promoting or offering to supply goods or services to him or her or requesting a person to make a donation.

A consumer has the right to restrict unwanted marketing by doing the following:

- refusing to accept the direct marketing
- to request the discontinuation of the direct marketing
- to pre-emptively block the direct marketing

ACTIVITY 13.4

You arrive home after a stressful day at work and after dinner a salesperson visits your house. They are normally well trained in selling techniques, and before you know it, you have bought a set of gardening books that you do not really need.

What are your rights as a consumer in this instance?

FEEDBACK

Section 16 of the Act has introduced a cooling-off period for sales contracts concluded by direct marketing to protect the consumer. This is an additional right
that the consumer has and it is not a substitution for any other right to rescind a
transaction or agreement that may otherwise exist. In terms of this cooling-off
right, a consumer may, without penalty or reason, rescind a transaction resulting
from direct marketing. This right is exercised by giving notice to the supplier – in
writing or in any other recorded manner – within five business days after the date
on which the transaction was concluded or the goods were delivered.

2.3.3 Right to choose

This right is about the consumer’s right to make a choice in the following respects:

• Suppliers

Section 13 of the Act prohibits a supplier from requiring the consumer – as a condition
for entering into a transaction – to purchase goods or services from a supplier or a
designated third party or enter into an additional agreement for the supply of these
goods or services. (This is known as “bundling”)

• Fixed-term agreements

This matter is regulated by section 14 of the Act, in terms of which fixed-term
agreements may not exceed the maximum period prescribed by the minister concerned
for the different categories of consumer agreements.

A consumer may cancel a fixed-term agreement before the expiry date of its fixed
term by giving 20 business days’ notice. The notice must be given in writing or in
any other recorded manner. However, the consumer will be liable for any amount
owed in terms of the agreement up to date of cancelation.

ACTIVITY 13.5

You have entered into a one-year contract with a gym. The contract states that
after one year, the agreement will automatically be renewed. Does the Act make
provision for the automatic renewal of a fixed-term agreement?

FEEDBACK

A notification of impending expiry, in writing or any other recordable form, must
be sent by the supplier to the consumer not more than 80 days or less than 40
days before the expiry of a fixed-term agreement. This is the case, unless, on the
expiry date, a consumer expressly directs a supplier to terminate an agreement
or agrees to renew the agreement for a further fixed term.

• Repairs and maintenance services

This matter is dealt with under section 15 of the Act. See paragraph 30.2.4.3.3 of the
textbook for the transactions or consumer agreements to which section 15 applies.
Advance reservations, bookings or orders

Section 17 of the Act allows consumers to cancel advance reservations, bookings and orders, subject to a reasonable cancellation fee (with certain exceptions).

In terms of the Act, the consumer will not necessarily forfeit the full amount or deposit paid for an advance booking, but the supplier may impose a reasonable cancellation fee. A charge is unreasonable if it exceeds a fair amount in the specific circumstances. The following will be taken into account to determine if it is a fair amount:

- the nature of the goods or services that were reserved or booked
- the length of notice of cancellation provided by the consumer
- the reasonable potential for the service provider, acting diligently, to find an alternative consumer between the time of receiving the cancellation notice and the time of the cancellation of the reservation
- the relevant practice of the relevant industry

Examination of goods

In terms of section 18 of the Act, a consumer may not be held liable for loss of or damage to goods displayed by a supplier unless the loss or damage was caused by gross negligence or recklessness, malicious behaviour or criminal conduct by the consumer. This right further gives the consumer the right to select or reject any particular item from the goods displayed or sold from the open stock.

Delivery of goods or supply of services

In terms of section 19 of the Act, every transaction contains an implied condition for the supply of goods and services on the date and at the time and place agreed upon at the supplier’s own cost, and that the goods to be delivered remain at the supplier’s risk until the consumer has accepted their delivery.

Return of goods

In terms of section 20 of the Act, a consumer in certain circumstances has a right to return goods to the supplier within ten business days after delivery. See paragraph 30.2.4.3.7 of the textbook for the circumstances under which a consumer may return goods to the supplier.

Unsolicited goods or services

See paragraph 30.2.4.3.8 of the textbook for the circumstances under which goods or services may be regarded as unsolicited in nature.

ACTIVITY 13.6

Which ONE of the following statements with regard to a consumer’s right to choose is CORRECT? Give reasons for your answer.

1. The supplier of goods sells the goods to a consumer subject to a condition that the consumer makes use of the services of a particular installer.
2. The decision about the duration of a fixed-term contract where a consumer concludes a contract of sale of goods with the supplier is always made by the supplier.
3. The risk of goods bought by a consumer, but not yet delivered, rests with the supplier, as the sale agreement has already been concluded.
4. The consumer has the right to reject any particular item from the goods sold or displayed before he or she concludes the transaction for the supply of those goods.

FEEDBACK
3 is CORRECT. In terms of section 19 of the Act, every transaction for the supply of goods and services has an implied condition that the goods to be delivered remain at the supplier’s risk until the consumer has accepted delivery, unless the parties expressly agreed otherwise.

1, 2 and 4 are INCORRECT statements regarding a consumer’s right to choose.

2.3.4 Right to disclosure and information
The right to disclosure and information includes the following:

- information in plain and understandable language
- disclosure of the price of goods and services
- product labelling and trade descriptions
- disclosure of reconditioned and gray-market goods
- to receive sales records
- identification of deliverers and installers

See paragraph 30.2.4.4 of the textbook for a discussion of these rights.

2.3.5 Right to fair and responsible marketing
The aim of this right is to create fair business practices in respect of advertising and selling. This right regulates the general standard and specific types of marketing. It applies to the following: general standards for the marketing of goods and services, bait marketing, negative-option marketing, direct marketing to consumers, catalogue marketing, trade coupons and similar promotions, customer-loyalty programmes, promotional competitions, alternative work schemes, referral selling and agreements with persons lacking legal capacity. See paragraph 30.2.4.5 of the textbook for more information about this right.

2.3.6 Right to fair and honest dealing
The Act protects consumers against unconscionable, unfair, unreasonable, unjust or improper trade practices and deceptive, misleading, unfair or fraudulent conduct and regulates unconscionable conduct; false, misleading or deceptive representations; fraudulent schemes and offers; pyramid schemes and other possibly unreasonable conduct and trade practices. See paragraph 30.2.4.6 of the textbook for more information about this right.
2.3.7 **Right to fair, just and reasonable terms and conditions**

This right provides measures for guarding against unfair, unreasonable or unjust contract terms, for example:

- A supplier must not supply, offer to supply or enter into an agreement to supply goods or services at a price or on terms that are unfair, unreasonable or unjust.
- A supplier is not allowed to market any goods or services, or negotiate or enter into a transaction or agreement for the supply of goods or services in a manner that is unfair, unjust or unreasonable.
- A supplier must not require a consumer or a person to whom goods or services are supplied at the consumer's direction to waive any rights, assume any obligation or waive any liability of the supplier on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.

A consumer will, in terms of the right to fair, just and reasonable terms and conditions, have the right to be notified about certain terms and conditions; to receive written consumer agreements; and not to be exposed to transactions, agreements, terms or conditions prohibited by the Act. The Act also gives the court the powers to ensure fair and just conduct, terms and conditions.

2.3.8 **Right to fair value, good quality and safety**

This right entails a consumer's right to demand quality service and a right to receive goods that are reasonably suitable for the purposes that they are intended for, goods of good quality, and which are in a working condition and free of any defects. The goods must also be usable and durable for a reasonable time to comply with any applicable standards.

The right is also about the implied warranty of quality in terms of section 56 of the Act in every transaction pertaining to the supply of goods to a consumer, a warranty on repaired goods, a warning concerning the fact and nature of risks (where an activity or facility supplied is subject to any risk of an unusual nature or character of which a consumer could not reasonably be expected to be aware), the recovery and safe disposal of designated products or components (e.g. containers for dangerous substances), and safety monitoring and recall (e.g. of defective or hazardous goods).

A producer, importer, distributor or retailer is liable for harm caused to any person by the supply of unsafe goods, product failure, defect or hazard, or inadequate instructions or warnings. This is the case irrespective of whether the harm resulted from any negligence on the part of the aforementioned persons.

**ACTIVITY 13.7**

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

1. A supplier may require a consumer to whom goods are supplied to waive any rights that the consumer has in terms of the Consumer Protection Act.
2. As soon as a consumer takes delivery of goods from a supplier, the consumer will be liable for any harm caused to any person by the goods.
3. A consumer has a right to receive information in plain and understandable language.
FEEDBACK

3 is CORRECT. See 30.2.4.4 of the prescribed textbook.

1 is INCORRECT. See 30.2.4.7 of the prescribed textbook.

2 is INCORRECT. See 30.2.3.8 of the prescribed textbook.

2.4 Protection of consumer rights

The Consumer Commission is the body responsible for promoting dispute resolution between consumers and suppliers, and also receives complaints concerning prohibited conduct or offences. The Consumer Commission may issue a compliance notice to any person who fails to comply with the provisions of the Act. The Commission will then take the matter to the National Prosecuting Authority for prosecution, or apply to the consumer tribunal for the imposition of a fine if the person fails to comply with a compliance notice. See paragraph 30.2.6 of the textbook.

3 THE FINANCIAL INTELLIGENCE CENTRE ACT (“THE FICA”)
(Textbook, paragraph 24.1.3.2.4)

The main objectives of FICA are to establish a financial-intelligence centre and money-laundering advisory council to assist with measures against money-laundering and to impose specific “Know-Your-Customer” (KYC) standards.

FICA imposes four obligations on financial institutions:

• to identify clients
• to keep records of transactions
• to report suspicious transactions to the Financial Intelligence Centre
• to train employees to comply with FICA provisions.

4 SELF-ASSESSMENT ACTIVITIES

1. Briefly discuss the purpose of the Consumer Protection Act.
2. The Consumer Protection Act has a wide field of application but also stipulates when the Act will not apply. Mention the transactions in respect of which the Act does not apply.
3. List the eight fundamental consumer rights.
4. The Consumer Protection Act allows for differentiation on reasonable grounds. What will be included under differentiation?
5. Gary has just turned 17 years old. He approaches you for advice on the following matter: The owner of the local market refused to sell him a packet of cigarettes. Gary feels that the owner of the store is unfairly discriminating against him and that the Act will protect him. Give Gary the correct advice.
6. When will a transaction, an agreement, term, condition or a notice be unfair, unreasonable or unjust in terms of the Consumer Protection Act?
5  EXPLANATORY NOTES

**Agreement**: an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between or among them.

**Consumer**: any person, including a juristic person, to whom goods or services are marketed or supplied in the ordinary course of a supplier’s business, unless the transaction is exempted from the application of the Act. However, transactions in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, is more than or equals the threshold value determined by the Minister, are excluded from the application of the Act.

**Retailer**: a person who in ordinary course of business supplies goods to a consumer.

**Supplier**: includes any person, including a juristic person, who markets goods or services.

**Market**: to supply or to promote goods or services.

6  AFRICANISATION, THE CONSUMER PROTECTION ACT AND FINANCIAL INTELLIGENCE CENTRE ACT

Africanisation (ubuntu) is an important aspect of the Consumer Protection Act and the Financial Intelligence Centre Act. These Acts promote an economic environment that supports and strengthens a culture of consumer rights and responsibilities, business innovation, and enhances performance. It is stated in the preamble of the Consumer Protection Act that the people of South Africa recognise “That apartheid and discriminatory laws of the past have burdened the nation with unacceptably high levels of poverty, illiteracy and other forms of social economic inequality”. The Consumer Protection Act promotes the spirit of ubuntu by protecting consumers (sellers and purchasers) against any deceptive, misleading, unfair or fraudulent conduct in trade practices.