LAWS2002: Introduction

BASIC CONCEPTS

- Definition: a contract is an agreement between parties that have intention to create legal rights and duties between them, which are legally binding upon them.
- An oral contract is as valid as a written contract however not as easy to prove. There are also tacit contracts which occur where no words are spoken but they are still valid.
- Contracts are not social obligations

Obligations

- The main function of a contract is to create legal obligations between persons or legal entities; it creates a *vincilium iuris* (legal relationship) between two people.
- One party has an obligation to give performance of some kind, while the other party has a reciprocal right to receive such performance. Hence, it can be said that every obligation involves a right and a duty.
- Debtor - party with duty to deliver performance
- Creditor - party with right to receive performance
- In cases of more than one obligation, the creditor and debtor for each obligation should be established.
- Obligations do not only arise from contracts but also from other sets of legal rules
  - ✓ Example: a delict creates an obligation between the wrongdoer and the victim, in terms of which the wrongdoer has the duty to pay compensation to the victim and the victim has the right to received payment from the wrongdoer.
- If one person acquires property of someone else without valid legal cause, the person who lost the property has the right to claim compensation on the basis of unjustified enrichment.
- In both cases the duty to give performance is imposed on the debtor without his/her consent.

- In contracts, both parties enter the agreement **voluntarily**
- Obligations in a contract are determined by the terms of the contract:

Essentialia

- These are the terms that identify a specific type of contract
  - ✓ Example: Contract of sale → *pretium* (price) and *merx* (a thing sold)
- If the *essentialia* are not present, it does not affect the validity of the contract but it will not be that type of contract.
  - ✓ Example: If *merx* is present but there is no *pretium* then it will not be a contract of sale but rather one of donation.

Naturalia

- Those terms automatically attached to a specific type of contract by law and without the parties having to specifically include them
  - ✓ Example: Contract of sale → warranty against latent defects. Therefore the buyer will be able to cancel the contract or claim reduction in price if the *merx* has a hidden defect and this term is an automatic part of the contract even if it was not specifically discussed by the parties
- Parties can exclude a *naturalia* by way of an express agreement between them:

Incidentalia

- Those terms that cover the residual matters for which the parties wish to make special provision or to alter or exclude the *naturalia*.
  - ✓ Example: Parties for contract of sale can include a clause that the *merx* be sold **"voetstoots"** (as is) meaning the seller does not have to give warranty against latent defects in the thing sold, thus excluding the *naturalia* of warranty against latent defects.

Perfomance

- An obligation means the debtor has a duty to render a certain performance and the creditor has the right to claim that performance; therefore the debtor has a duty to conduct him/herself in a different way.
- Performance can either be:
  - *Dare* →to give something
  - *Facere* →to do something
  - *Non facere* →to refrain from doing something

- The right to claim performance from the debtor is a personal right so it can only be claimed from a particular debtor who was party to the contract. This is different from a real right which allows the creditor to claim a particular object from whoever may possess the object.

Unilateral, bilateral and reciprocal

- A contract is always a bilateral legal act hence there must be two parties to the contract. A contract can never be a unilateral act (as one can never contract with him/herself)
- Obligations can be unilateral or bilateral:
  - A contract creates unilateral obligations if one party only has rights and the other party only has duties (one debtor and one creditor)
  - There is a bilateral obligation if both parties have rights and duties to performance
- Most contracts that create bilateral obligations, the parties exchange performances for one another. Hence, one party only has to give performance if the other party gives performance.

THEORIES OF CONTRACTUAL LIABILITY

Declaration Theory

- Parties are bound because they **declared** their intentions to enter into a legally binding contract in a formal way.
- ✓ Example: early Roman law, uttering specific formulae of words would specify formal entry into a contract.
- Focus: Declarations, either verbal or by conduct, when the parties entered into the contract. The declarations are viewed objectively and no consideration is given to the subjective, ie what the parties were thinking/intending with the contract.

Will Theory/Consensual Theory

- Parties are bound to a contract because they **intended** to be bound to a contract.
- Contract represents an expression of the free will of the parties, hence that they have chosen to enter into the contract.
- Focus: what the parties subjectively intended; it looks at the inner workings of the parties' minds.
- Parties are bound to the contract if they had the same subjective intentions regarding the contract. This agreement is the ***consensus***, hence the consensual theory
- If parties reached the same consensus then it does not matter whether the objective declarations are the same as they will be bound to the contract subjectively agreed upon.

Reliance Theory

- There are weaknesses in the will theory, namely because liability is based on subjective consensus and parties will only be bound to a contract if both parties had the same intentions. However if party A did not mean what he/she said or later denied having the same intentions it would be unfair to the other party B as that party could not read party A's mind and so would have reasonably believed he/she had reached subjective consensus with party B and that a binding contract had been concluded.
- Reliance theory aims to protect a potentially disadvantaged party to a contract and the reasonable belief of that party:

- If party A created the impression that the parties had reached consensus and party B reasonably relied on that impression, the contract is still binding on both parties even if there was no subjective consensus.
- Focus: whether one party reasonably believed that there was subjective consensus between the parties

- South African contractual law cannot be explained in terms of only one contractual theory, however the **Will Theory** is most often used and if there was no subjective consensus (but one party reasonably believed there was) then the reliance theory is used as the alternative basis for liability.
- Declaration theory does not receive much support in modern law because it can bind the parties to a contract that they perhaps did not intend to conclude. However, declarations do play an important part in determining the content of the contract.

RULES OF CONTRACT AND AUTHORITY FOR RULES

- Contractual liability is not based on subjective feelings about fairness; it only arises if it can be based on a legal rule.
- ✓ Example: there is a legal rule stating that a party who has signed a written contract will be bound to the contract despite that he may not have read it:

Caveat subscriptor

- Legal rules are open to interpretation or may not yet be authoritatively determined so must state the rule, explain possible interpretations or uncertainty and show how it may lead to different results
- Most contract rules are derived from the common law as developed through cases in courts. Must always cite the appropriate source of authority.

CASE: *Boots Co Ltd v Somerset West Municipality 1990* (simulated contracts)

Simulated contracts

- **Facts**: The plaintiff brought an action for recovery of damages caused to a car in an accident. Boots claimed it was the legal possessor (allowing him to institute action) of the car as per an agreement for its lease with a rental company, Hertz, and so it wanted to recover damages. An employee of Boots Co Ltd (Nel) was driving the car at the time of collision and signed an almost identical agreement for the same car with Hertz. This second agreement was only **supposed to have been entered into for tax purposes** and the car was part of an employment package from Boots Co Ltd.
- The plaintiff claimed the initial agreement was the genuine binding contract and this was supported by Hertz and the employee. It had to be determined if the plaintiff had *locus standi* to claim and recover damages in light of the two agreements.
- **Issue**: Did the first agreement constitute the only valid contract?
- **Court held**: Comrie AJ made reference to other cases and the Roman maxim which, when translated, means: **"the truth of the matter rather than the writing should be looked at"** and the court was satisfied with the evidence brought by the plaintiff. Although the arrangement was dishonest he accepted that the intention of the parties was the first agreement should be the only valid one.
- **Legal Principle**: Where there are two contracts appearing to cover the same subject matter the court will give effect to the **intention** of the parties, **not the simulated agreement.** Courts give effect to the **true, genuine** agreement between the parties and not the simulated or disguised agreement concluded for an ulterior purpose.

VALIDITY OF CONTRACTS

Requirements for Validity

REQUIREMENTS

A contract will only be valid if all of the requirements are fulfilled. These requirements are:

1) Agreement (consensus)
2) Contractual capacity
3) Certainty
4) Possibility
5) Formalities
6) Legality

1) Agreement

- Parties must have reached agreement on the following aspects of the contract:

1. Rights and duties created by the contract
2. Who the parties to the contract are
3. That the agreement will be legally binding on them

- There must be subjective agreement (*consensus*) so the contract is only valid if the parties had the same intentions on those aspects
- This principle is often qualified (see Mistake)

✓ Example: X gives Y his textbook before a test. X assumes Y will return the book after the test however Y assumes she may retain the textbook permanently
→ No subjective agreement, therefore in principle there is no contract

2) Contractual Capacity

- Both parties to the contract must have the necessary legal capacity to enter into a contract.
- Both parties must have the ability to understand the nature and effect of the contract and to act in accordance with that understanding.
- General rule: persons above the age of majority are presumed to have the necessary capacity to contract.

✓ Example 1: A agreed to take his friend B on an overseas trip after he drank 10 Tequila shots.
→ A was too drunk to understand the nature and effect of such a contract, the contract is invalid

✓ Example 2: X is 5 years old and agrees to sell her doll to her 12 year-old sister, Y, for 5 cents
→ The contract is invalid because X has no contractual capacity while Y only has limited contractual capacity.

3) Certainty

- Terms of the contract must be certain, hence it must be unequivocal what the parties' rights and duties are in terms of the contract.
- If the meaning of the terms is unclear, or if the parties must negotiate some terms, the contract will not yet be valid.

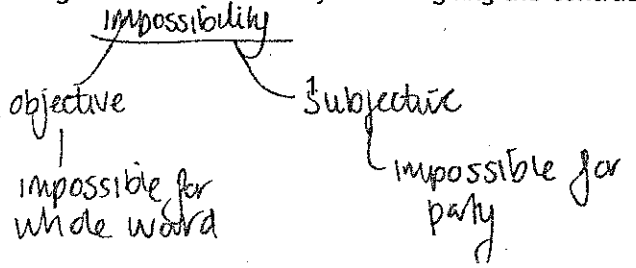
✓ Example: C and D agree C will sell his car to D at a "good price".
→ The price was not fixed with sufficient certainty the agreement is not yet valid.

4) Possibility

- At the **time** of conclusion of the contract it must be possible to perform in terms of the contract.
- If it is impossible to carry out the terms of the contract, the contract will be invalid.

✓ Example 1: S rents a holiday cottage from T for a week at the price of R1500. Unknown to both of them the cottage burned down the day before conclusion of the contract.
→ The contract is invalid for impossibility

✓ Example 2: The cottage burns down two days after signing the contract.



→ The contract is valid, but the rules regarding supervening impossibility of performance apply

5) Formalities

- A contract may take any form (written, verbal, tacit), however some contracts are regulated by statutes prescribing certain formalities, which must be met before the contract is valid.
- If formalities are not complied with there will be no binding contract
- ✓ Example: In terms of the Alienation of Land Act 68 of 1981 a contract for sale of land must be in writing and signed by the parties to make it valid and binding. and have all material terms
- ✓ Q and R verbally agree that Q will buy R's farm for R500 000, then the parties draw up a written contract which is signed by Q but not R.
  → There is no valid contract since the prescribed formalities have not been met
  Statutory or Self-imposed
- Parties may agree on their own formalities, however in those cases the contract will not be valid until those formalities have been met.
- ✓ Example: E and F agree that a contract for renting a flat will only be valid once E, the tenant, has signed the written contract. Before E can sign the contract, F informs E that he received a better offer from Z.
  → E has no rights against F because formalities have not been met

6) Legality

- A contract must not be contrary to a legal rule or public policy.
- The legal rule may come from the common law or be derived from a statute
- The contract will also be invalid if it is contrary to public policy.
- This is a value judgment that a judge will have to make and it must be made taking into account various policy issues including the Constitution.

Examples:

Statutory illegality

- In terms of the Liquor Act 59 of 2003, it is an offence to sell alcohol without a liquor licence.
- X sells Y liquor but he does not have a license so X has committed a crime so will be punished by the state but it does not mean that the contract of sale will be invalid; the Act will have to be interpreted and a decision made by a judge

Common law illegality

- In terms of common law it is illegal to interfere with administration of justice. Therefore, if A pays a judge B as a bribe to decide a case in A's favour, the contract is invalid as it is illegal.

Public policy Sasfin v Beukes

- Slavery is against public policy, therefore an agreement to pay all of one's income to somebody else reduces the debtor to a virtual slave and the agreement would therefore be invalid.

CONSEQUENCES OF VALIDITY

BINDING NATURE

- If all requirements are met the parties will be legally bound to the terms of the contract.
- If a party no longer wants or needs performance from the other party, he/she will not be allowed to simply withdraw even if it may seem fair or reasonable to do so.
- In the event of a party failing to carry out contractual duties, the other part will have legal remedies that would be enforced by legal machinery of the state:

Specific performance

- Court order compels the defendant to carry out contractual duties; hence he must give performance exactly as he agreed

Cancellation

- If breach of contract is serious the innocent party has the option of canceling the contract.

- Once it is cancelled the parties do not have to perform as per the contract
- If performance has already occurred, those performances will be returned to them

Damages

- Whether the contract is cancelled or not, the innocent party is entitled to claim damages to compensate him/her for any loss suffered as a result of the breach.
- Damages are aimed at putting the plaintiff in the financial position he/she would have been in had the contract been properly performed.

PRIVITY OF CONTRACT

- Contractual remedies are only enforceable against the other party to the contract
- Privity of contracts is a principle that contracts only create personal rights so they cannot be enforced by or against people who were not originally party to the contract.

NATURAL OBLIGATIONS

- These are valid but not directly enforceable (cannot be enforced in a court of law).
- If a party performs is valid and cannot be reclaimed.
- A debt owed in terms of a natural obligation cannot be set off against other debts, however if a party refuses to perform then the other party will not be able to use the legal system to claim damages or an order of specific performance
- Contracts entered into by unassisted minors and illegal gambling debts are examples of natural obligation.

CONSEQUENCES OF INVALIDITY

(1) INVALID (VOID) CONTRACTS < no enforcement, return of performances

- If one of the requirements for validity is not met the contract is invalid (void).
- No legally binding obligations were created by the contract so legally speaking the contract has no force or effect.
- There are two consequences of this:

a) **Contract cannot be enforced**

- Neither party can force the other party to perform, nor claim damages from the other

b) **Return of performances**

- Any performances already given in terms of the contract have to be returned.
- The claim for return will either be for ownership of property (where ownership was not transferred during performance) or on unjustified enrichment (if ownership was transferred)

(2) VOIDABLE CONTRACTS

- All requirements for a valid contract have been met but one of the parties acted improperly in getting the other party to agree to the contract. Duress, undue influence, fraud etc

(3) PARTIALLY VOID CONTRACTS (SEVERABILITY)

- It is possible for a contract to be partially invalid
- If the reason for invalidity affects certain parts of the contract it must be decided (by court) whether the contract forms one indivisible whole or whether the invalid parts can be severed (separated) from the valid parts.
- If they can be severed the invalid parts will be considered (***pro non scripto***) (as though never formed part of the contract) and the valid parts may be enforced
  - ✓ Example: A contract of employment contains several valid clauses regarding salary, duties and leave. If one clause is illegal such as an employee must work 30 hours of overtime a week, although the Basic Conditions Act 75 of 1997 provides that a person may be required to work 10 hours of overtime a week. Thus the illegal clause will be severed from the rest so that the legal clauses will remain binding but the employee will not be obliged to work that much overtime.

- if invalid clause is indivisible - whole contract struck down
- if invalid clause independent - can be severed.

Agreement

AGREEMENT AS A REQUIREMENT FOR VALIDITY OF A CONTRACT

- A contract is an agreement that creates legally binding obligations for the parties.
- The first requirement for validity if therefore agreement between the parties, although the others must be satisfied (contractual capacity, certainty, possibility of performance, legality and compliance with formalities)

REQUIREMENTS

- For there to be a valid agreement there must in principle, be **consensus** and **expressed agreement** between the parties.

(1) CONSENSUS

- There must be subjective agreement (consensus) between parties for a contract to be binding (despite some exceptions in "Mistake")
- The parties' *consensus* must relate to:

(1) Animus contrahendi

- Both parties must have serious intention to create a legally binding contract.
- If only one of the parties intends the agreement to be binding there is no *consensus* and therefore no valid contract.

(2) Parties to the contract

- Both parties must have the same intentions as to the legal subjects that will be bound by the contract.
- If one party is contracting on behalf of someone else but the other party believes he is contracting in his personal capacity there will be no *consensus* and thus no valid contract.

(3) Terms of the contract

- Both parties must have the same intentions about the obligations created by the contract

(2) EXPRESSED AGREEMENT

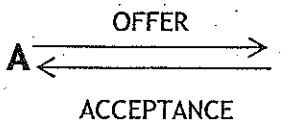
- The agreement must be expressed in an apparent, perceptible/discernable form.
- The parties may express their agreement verbally, in writing or by means of conduct.
- Mental, unexpressed, agreement is insufficient.
- Expressed agreement is usually reached by a process of **offer** and **acceptance**:
- Party making the offer →offeror
- Party to who offer is made →offeree.

Valid Offer

- An offer is an invitation by one party to create obligations with another party, which obligations will become legally binding upon acceptance by the other party
- An offer must comply with certain requirements.

Valid Acceptance

- Acceptance is the **affirmative response** of the offeree to the offeror's offer with the intention to create legally binding obligations.
- Acceptance must correspond exactly with the offer, and if the offeror's response differs in any respect from the offer there will be no acceptance.
- As soon as acceptance is complete, a legally binding contract comes into being.



= CONTRACT

serious intention to create legally binding obligations
offer & acceptance

ANIMUS CONTRAHENDI

- The parties must seriously intend to create legally binding obligations by means of a contract
- This serious intention is called *animus contrahendi* (the intention to contract)
- Without *animus contrahendi* an agreement is not legally binding or enforceable.
- Requirement of *animus contrahendi* applies to offer and acceptance.

CASE: *Church of the Province of South Africa, Diocese of Cape Town v CCMA 2002, LCC*

ecclesiastical nature not contractual

- **Facts:** Applicant, Anglican Church of Cape Town, licensed an ordained priest to act as its clergyman. In November 1999, the church's ecclesiastical tribunal found the priest guilty of misconduct and revoked his license to minister, thus depriving him of financial benefits (including monthly allowance) associated with the ministry. His ordination as a priest was not revoked. The priest contended that he had been unfairly dismissed in terms of the **Labour Relations Act** however the church contended that the Act did not apply as there was **no employment contract** between the church and the priest. They agreed the relationship between the church and its licensed priests was of an **ecclesiastical nature** and not of a contractual nature. A priest worked for God and not for the church. The financial benefits conferred on a licensed clergyman by the church was not intended to be a salary for services rendered but rather a contribution to enable the clergyman to carry out his calling.
- **Issue:** Did the parties, at the time of concluding the agreement, enter into a legally binding employment contract?
- **Court held:** The court ruled in favour of the church in that there was no valid employment contract because (1) there was no intention from the applicant to create a legally binding contract for employment as priest's employment is governed by ecclesiastical laws and (2) the licensing could be done in terms of other religious processes such as taking an oath. There was no real intention from the priest to enter into a legally enforceable employment contract as he also said his relationship by the church was governed by ecclesiastical law not civil law. Any money he received was to enable him to continue with his work. What confirmed this was in a religious realm? (1) Use the respondent's own testimony (subjective factor) and (2) Licensing is generally done in terms of religious processes/customs (objective factor).

BOTH PARTIES MUST HAVE animus contrahendi → "Meeting of the minds"

- **Legal principle:** If there is no intention to enter into a legally enforceable [employment] contract from **both parties** then the contract cannot be binding (meeting of the minds; mutual consensus).

SIMULATED CONTRACTS

- A simulated contract is a **disguised** transaction that attempts to conceal the true nature of the real agreement between the parties
- Parties use simulated contracts to deceive others about the true nature of the contract, usually to avoid application of legislation
- The courts will looks to and give effect to the substance of the contract, as opposed to it's form (the fake contract), thereby only enforcing the original, genuine contract
- A simulated contract is never enforced if it is known to be a simulation, and it can never be a valid contract because there is no *animus contrahendi* in relation to the simulation.

CASE: *Maize Board v Jackson 2005, SCA* (simulated contract)

- **Facts:** The Maize board is a regulatory board that controls all purchases and sales of maize and charges levies. The respondent had entered into an agreement with "Rainbow Chickens" whereby the respondent leased and managed the land he farmed on and further because the land was being leased to him by the company essentially the maize produced on it belonged to the company and as it was using that maize to feed it's own animals (chickens) it and the respondent should therefore not pay levies.
- However, the Maize board alleged that that agreement was simulated to disguise the true nature of the agreement which was to evade payments to the Maize board. The true nature of the agreement was a contract of sale between the respondent and Rainbow Chickens.
- **Issue:** Was there a simulated agreement and hence, which party should be believed?
- **Outcome:** The court used the general rule that **where there is a simulated contract effect should be given to the true nature of the contract and not what it appeared to be**

(ostensible form), thus the genuine intention should be given effect to. The court had to see if the simulated contract was consistent with the ostensible form so the court had to establish the meaning of the contracting parties. It used the objective factors:

(1) Respondent neglected to inform the bank of "other income" or existence of a lease agreement;
(2) He received money from Rainbow Chickens that was not on the contract; the formula for calculating payment was said to be meaningless: he received a bonus when he was not due for one
(3) Both agreements were signed simultaneously
(4) The court drew adverse inference against him as he did not testify about the above points in court.

- The court found the intention was not for lease but for sale and purchase with Rainbow Chickens and hence to evade payments to the Maize board. Therefore the Maize board's claim succeeded and the respondent was ordered to pay what he would have owed the Maize board, with interest.
- **Legal principle**: Where there is a simulated agreement, effect must be given to the **true and genuine intention** of the parties **instead of** the **ostensible nature** of a contract.

Formation of Contracts

GENERAL CHARACTERISTICS OF OFFER AND ACCEPTANCE

- Generally an offer and acceptance is made in any form and manner that the offeror thinks is fit
- It could be made verbally, in writing or by means of conduct (must be expressed)
- If the law prescribes any special formalities for the conclusion of a certain type of contract the offer and acceptance must also comply with such formalities.

CASE: *Wessels v Swart NO 2002, TPD*

An offer & acceptance may take place in any form unless there are prescribed formalities

- **Facts**: Plaintiff invested in a company on the advice of her brother however the company later went insolvent and the plaintiff lost her investment. She alleged that an oral contract was subsequently concluded with her brother that he would personally pay her the money she invested. Her brother paid a first installment of R30 000 but he died thereafter. She therefore claimed the balance from her brother's estate on the basis of the oral contract
- **Issue**: Was a valid contract formed?
- **Court held**: The existence of an agreement is a question of fact (look at surrounding circumstances) and if the plaintiff avers that there is a contract, she must prove its existence and terms. The offer and acceptance can be express or tacit and need not be in writing unless specified by the parties or required by law. On the evidence it was held there was a valid oral contract between the plaintiff and the deceased.
- **Legal principle**: An offer or acceptance may take any form unless there are prescribed formalities, and the existence of an agreement is a question of fact.

Example: A contract for the sale of land must be in writing according to the Alienation of Land Act 68 of 1981. Offer for the purchase or sale of land and its acceptance must therefore also be in writing.

OFFER

- An offer is an invitation from the offeror to the offeree to create legally binding obligations

REQUIREMENTS

(1) Offer must be made with ***animus contrahendi***
(2) Offer must be **complete** and have **certain or ascertainable** content
(3) Offer must be addressed to and brought to the **attention of the offeree**

(1) Offer must be made with *animus contrahendi*

- A true offer is made with the intention to be legally bound by the offeree's acceptance.

- Without this intention there can be no valid offer.
- An offer made as a joke does not become a contract on acceptance; similarly an invitation to negotiation or tentative declaration of intent will also not result in a valid contract if accepted.

Offer made *animo contrahendi* v tentative declaration of intent

- It can be difficult to determine whether one has a firm offer (made with *animus contrahendi*) or a suggestion or step to initiate or further the negotiation process.
- In attempting to determine whether the offer was made with the required *animus contrahendi* the court looks at **subjective and objective factors**
  - Objective factors can be ascertained without reference to what the thoughts or intentions of the parties were, and the words used and the surrounding circumstances are looked at (the nature of the offer).
  - Subjective factors give an account of what was in the minds of the parties

determination of animus contrahendi

CASE: *Gelbuild Contractors CC v Rare Woods South Africa (Pty) Ltd 2002*

Gelbuild shows: 1) Generally a tender/quote constitutes an offer

- **Facts**: Gelbuild requested a quote for the supply of certain materials from Rare Woods. Rare Woods complied, however in making the quote it inadvertently used the price of a different kind of wood and omitted some of the items on the list provided by Gelbuild. The total price quoted was therefore less than the actual price of the materials. When Rare Woods realized it's mistake it refused to supply the goods at the price indicated in the quote. Gelbuild argued that the quote constituted a valid offer which became a contract on their acceptance.
- **Issue**: Was a valid contract concluded in light of Rare Woods' error?
- **Court held**: **Generally a tender or a quote constitutes an offer,** however it is always a **question of fact.** For a quote to constitute a valid offer it should have been made *animo contrahendi* (with express of implied intention that Rare Woods would be bound to Gelbuild's acceptance thereof). The court looked at factors to decide if the quote was made with *animus contrahendi*

2) Factors for determining animus contrahendi

  1. Nature of the quote (is it usually an offer?)
  2. Words in which quote was expressed (terms of the quote)
  3. Surrounding circumstances
  4. Explanations/detailed account of events as per the parties' evidence

- Court therefore used both subjective and objective factors and found Rare Woods lacked the necessary *animus contrahendi* because Rare Woods had made it clear that the actual price of the materials might differ from the quote and the quote would be subject to the materials being available. Therefore Rare Woods did not intend to be legally bound to deliver the goods at the price quoted if Gelbuild accepted the quote.
- **Legal Principle**: Generally quotes constitute offers but these must be tested against the requirements for valid offers, including subjective and objective factors for *animus contrahendi*.

NEWS

CASE: *Pitout v North Cape Livestock Co-Op Ltd 1977, AD*

- **Facts**: Mr Pitout, son of the appellant, owed a man (Botha) a large amount of money so Botha sent his accountant to Mr Pitout's farm to attempt to recover the money. Mr Pitout was not home on that first day, but some time later Botha, the accountant and an attorney went to a farm which was actually owned by the appellant and entered into negotiations with her for livestock to settle her sons's debt.
- **Issue**: Whether the undertaking made during uncompleted negotiations had contractual force, hence was it made with *animus contrahendi*?
- **Court held**: Each case must depend on its own facts including particular acts or conduct of the parties and surrounding circumstances. The appellant had made an invalid offer because it was incomplete. She had not completed the *essentialia* because she was unaware of the nature of the contract, hence if it was a contract of sale or donation, also her son interrupted the negotiations and he had to complete the terms. The contract was to be between him and Botha, so it was his consent that was required to decide if the contract would occur. Therefore, the respondents could not claim from the appellant because she did not have the necessary *animus contrahendi*.

- **Legal Principle**: *Animus contrahendi* is imperative for a valid offer.

(2) Offer must be complete and have certain or ascertainable content

Complete offer

- All the material terms of the contract should be set out in the offer so that the contract will be formed on mere acceptance
- Material terms of the contract are the ***incidentalia*** and ***essentialia*** for that type of contract; ***naturalia*** need not be included in the offer since they automatically form part of the contract
- If there are outstanding matters still to be negotiated there is NO agreement
- However, in complex negotiations parties may divide their agreement into sub-contracts which can be negotiated separately.

Certain or ascertainable content

- Offer must be certain or ascertainable (capable of being made certain) content otherwise it is void for vagueness.
- ***Gelbuild Contractors CC v Rare Woods SA (Pty) Ltd 2002*** - the quote provided by Rare Woods stated the price was "subject to fluctuation", but even if an offer is made with *animus contrahendi* the terms MUST be certain. In relation to sale, the object should be clearly described and the price must be certain or capable of certainty. Something "subject to certainty" is not certain.
- A term in an offer will be sufficiently certain or ascertainable where it stipulates a method or a formula by which price can be ascertained.

(3) Offer must be addressed to and brought to the attention of the offeree

- Offer has to be communicated to the offeree in some way, so the offeree had to be aware of the offer before he can validly respond to the offer
- An offeree that responds to an offer without **awareness of its existence** does not have *animus contrahendi*
- Offers do not need to be addressed to a particular person, but can be addressed to a class of persons or the public at large.

OFFERS TO THE PUBLIC

- An offer can be addressed to the public as long as it meets the requirements of a valid offer, but this is a question of **fact**
- Usually public announcements are not sufficiently detailed and are therefore void for vagueness
- Further, *animus contrahendi* would be lacking because the person that makes the offer would have no control over how many people accept it
- If the announcement constitutes an offer the person/company making it would be bound to everybody who accepted it and thus if it/he/she is unable to give performance to everybody who accepted it he will be breaching the contract with them and be liable for damages.
- The person making the announcement will normally wish to retain the final choice as to whether the contract will come into being or not; the announcement therefore normally amounts to **mere invitation to negotiate**
- However, an offer to the public can be a valid offer if it is shown on the facts that it was made with the necessary *animus contrahendi* and that the terms were sufficiently certain and complete.

ADVERTISEMENTS

- Advertisements praise the goods and services of the advertiser with the aim of attracting customers
- Experience indicates customers generally do not regard adverts as firm offers
- General rule: advertisement is an invitation to the public to do business and not an offer.
- The principle extends to display of goods with price tags in shop windows, notices and call for tenders.
- The general rule however is not inflexible as there would be severe consequences if advertisements were treated as offers

- ✓ Example: Adverts usually contain the phrase "while stocks last" to avert the danger of the offer being accepted by more customers than the shopkeeper can supply.
- The question is always whether an advert or display of goods meets the requirements for a valid offer. Where an advert is worded in a way that shows *animus contrahendi* and has sufficient detail to be complete and certain it will constitute a valid offer.

CASE: *Crawley v R 1909, TS* – adverts are invitations to do business

- **Facts**: A tobacconist placed a placard outside his shop advertising the sale of a special brand of tobacco at a cheap price. Crawley saw the low price and went into the shop to buy a pound of the tobacco. The shopkeeper sold him one pound at the price advertised. Shortly after that, Crawley returned to buy another pound however the shopkeeper refused to sell it and asked Crawley to leave. He refused to leave and the plaintiff was arrested and convicted on the basis of it being wrongful and unlawful to remain on the premises after being asked to leave. Crawley contended he had a valid contract with the shopkeeper that justified him being in the shop
- **Issue**: Whether the placard amounted to an offer which could be accepted by Crawley
- **Court held**: The appellant had said he had a *bona fide* right to be in the shop and to be served with tobacco and to remain in the shop until he received it, hence that he had a contract with the proprieter which justified his being in the shop. Judge Smith held the appellant had no right to be in the shop after he was requested to leave and there was **no contract**. "The mere fact that a tradesman advertises the price at which he sells goods does not appear to me to be an offer to any member of the public to enter the shop and purchase goods...nor is a contract constituted when any member of the public comes in and tenders the price mentioned in the advertisement".
- The reasons for this are: advertisements are an announcement of a tradesman's intention to sell at the price advertised and nothing which obliges a tradesman to sell to any customer who chooses to present himself in a shop (and if he refuses to leave his presence is unlawful and wrongful). The appeal was dismissed.
- **Legal Principle**: The general rule regarding advertisements is that they are not offers; they are **invitations to do business**. However if they meet the requirements of an offer they can be deemed to be so.

CASE: *Carlill v Carbolic Smoke Ball Co 1893* – If offer sufficiently certain & advertiser has animus Contrahendi it is an offer.

- **Facts**: The Smoke Ball Company published an advertisement for a "carbolic smoke ball cure" which it claimed would prevent influenza if it was used as directed. The advert further stated that the Smoke Ball Company would pay 100 pounds to any person who contracted influenza after proper use of this device. Mrs Carlill relied on the advert and bought and used the product. She used it properly and still contracted influenza, so she sued for the 100 pounds.
- **Issue**: Whether a binding contract had been concluded between the parties and hence whether the advertisement constituted a valid offer which could be accepted by Mrs Carlill.
- **Court held**: The court considered subjective and objective factors, namely whether there was intention by the company to pay the 100 pounds and if it was a valid offer. The advert had said 1000 pounds was to be lodged at the bank so one view was that it could not be said there was no intention. Therefore it should be understood as a public offer a which could be acted upon. However, an offer made to all the world is impossible to contract so it was held such adverts are offers to negotiate; "offers to receive offers".
- Another point was there was no notification of an offer so no consensus and therefore no contract. However it was discussed that if an offer intimates a specific mode of acceptances sufficient to make the contract binding it is only necessary for the offeree to accept it.
- Finally, a person is not to notify the acceptance of an offer in an advert before the condition is performed. Court found the company did have the intention to be legally bound.
- **Legal principle**: If an advert is sufficiently certain and the offeror has the *animus contrahendi* and advert will be an offer.

TERMINATION OF AN OFFER

- The offeror is not bound by his unilateral offer because an offer itself does not create rights and duties.

- The offeree can therefore only call the contract into being by accepting the offer while it still stands.
- If the offer is terminated before acceptance there is no contract.

(1) Revocation
- The withdrawal of the offer by the offeror
- It is possible to revoke the offer anytime before acceptance
- It is effective only once it has been communicated to the other party, hence before a contract is concluded.
- Public offer: Revocation of an offer to the public can be problematic since revocation must be communicated to the other party.
- Option contract: An offer cannot be revoked if the offeror has agreed not to revoke his offer for a certain time period

(2) Rejection
- If the offeree rejects the offer, the offer will fall away
- Any conduct indicating the offeree is unwilling to contract on the terms offered will constituted rejection
- Rejection is only effective when it has been communicated to the offeror
- Counter-offer: constitutes an implied rejection of the first offer; it is a new offer made by the offeree in response to the offeror's original offer. Offeree thus becomes the offeror.
- Mere enquiry: counter-offers must be distinguished from mere enquiries or requests/suggestions to modify terms, as those do not terminate the original offer.

(3) Expiry
- A time period can be set for acceptance. If no acceptance within that time period then the offer lapses.
  - ***Dietrichsen v Dietrichsen 1911***: If a time period is not stipulated the offer lapses if not accepted within a **reasonable period**

(4) Death
- Death of either party will also terminate the offer because offers do not create rights of liabilities in estates of either party.

(5) Supervening impossibility
- Where performance of either party becomes impossible before conclusion of contract, the offer falls away (after the offer is made)

ACCEPTANCE

- Acceptance occurs when an offeree aggress to an offer to create legally binding obligations

REQUIREMENTS

(1) Acceptance must be made *animo contrahendi*
- Offeree must have intention to enter into a legally binding contract by his acceptance.
- Acceptance must be a conscious response to the offer

CASE: *Bloom v American Swiss Watch Company 1915, AD*
- **Facts**: Jewelry to the value of 5000 pounds was stolen from the American Swiss Watch Company and the following day the Company offered a reward of 500 pounds for information leading to the arrest of the robbers and recovery of the stolen property. The plaintiff/appellant gave such information however it was found by Judge Hopley that the plaintiff did not know about the reward. It was held the plaintiff's case was dependant on establishing a contractual relationship between him and the company. Since the offer was public it was still required that someone accept it to conclude a contract. The plaintiff did not give the information on the faith of the offer, so no *vinculum* could be established.

Legal relationship

- Reasons for this were the plaintiff brought witnesses but the court *a quo* did not find them credible; the plaintiff stated he did not know of the reward in a letter clearly and unambiguously addressed to the Attorney-General). The contract requires the consensus of two minds (meeting of the minds) but because Bloom did not know of the offer until after he gave the information those minds did not come together.
- **Court held**: He did not receive the reward because he did not have the necessary *animus contrahendi* for accepting the offer due to him being unaware of the offer.
- **Legal Principle: Without knowledge** on the part of the offeree there **cannot be** intention/***animus contrahendi*** on the part of the offeree to accept it.

(2) Offer must be accepted by the person to whom it was directed

- Only the offeree(s) can accept the offer; this is a consequence of privity of contract
- If the offer was made to the public or a specified class of persons, any member of the public or that class of persons can accept the offer.

CASE: Levin v Drieprok Properties 1975, A

- **Facts**: L addressed an offer to purchase certain immoveable property to W, however the owner of the property was W's company, Drieprok Properties. W signed and accepted the written offer on behalf of the company.
- **Issue**: Could the offer made to W personally be accepted by W in his capacity as director of Drieprok Properties.
- **Court held**: "it is a cardinal principle of the law of contract that a simple contractual offer made to a specific person can be accepted only by that person, and that consequently, a purported acceptance by some other person is ineffectual and does not bring about the conclusion of a contract...The manifest reason for this is that there is no intention on the part of the offeror to contract with such other person".
- The court held the offer was made to W on the assumption that he was the owner but this did not imply that the offer was actually directed to any person who was the owner of the property in question. The company was therefore unable to validly accept the offer addressed to W.
- **Legal Principle**: The offer may only be accepted by the person/party to whom it was directed, in the capacity that the offer was intended for and whom the offeror identified as the offeree.

- Identity of the offerees is a question of the intention of the offeror because it is possible that the offeror intends to make an offer to a specific person only or that he intends to make it to anyone willing to accept it (such as in advertisements).
- It is a question of **fact**

(3) Acceptance must correspond to the terms of the offer

- Must be complete and unequivocal assent to every part of the offer, therefore clear, absolute and unambiguous
- **General rule**: acceptance may not add or subtract anything from the offer, otherwise the acceptance generally amounts to counter-offer and the original offer is rejected.
- Exceptions to the general rule:

a) Offeree inserts terms implied by law (*naturalia*) into the contract

- These terms apply automatically to offers so the inclusion of such terms in acceptance cannot be seen as varying the offer

b) Offeree merely enquires whether the offeror will modify the terms

- Acceptance is valid and the offeror is bound only to the extent of the offer as it was made

c) Where there is unqualified acceptance by the offeree that is followed by immediate proposal to modify the obligations.

- These two declarations would need to be sufficiently separate to make the acceptance valid
- The offeror is bound only to the extent of the offer as it was originally made and is entitled to reject the proposal to modify the contract.

(3) Acceptance must correspond to terms of the offer:

CASE: *JRM Furniture Holdings v Cowlin 1983, WLD*

- **Facts**: Cowlin made a written offer for the sale of the shares in a company to JRM. JRM sent a letter of acceptance to Cowlin in which JRM first accepted the offer but then required additional guarantees and suggested a different method of payment.
- **Issue**: Did this constitute a valid acceptance?
- **Court held**: The trite rule is that acceptance must be absolute, unconditional and identical with the offer. Failing this, there is no consensus and therefore no contract. The court referred to the three exceptions discussed above and the question was whether the additional demands formed part of the acceptance or whether they were separable proposal to modify the contract after acceptance.
- On the facts of the case, the court held that the additional demands were not separable from the acceptance and the acceptance amounted to a counter-offer and the offer was not validly accepted.

(4) Must be made in the manner prescribed by the offeror

- An offeror may prescribe a specific method of acceptance
- The offeror may stipulate that the offeree must sign the written offer and deliver it to the offeror's home in order to accept the offer, the acceptance must take that form to be effective (***A to Z Bazaars v Minister of Agriculture 1975***)
- Courts always consider **intention** of the offeror to determine whether a mode of acceptance has been prescribed
- They infer that the offeror has prescribed a particular mode from the circumstances of the case, channel of communication having been chosen by the offeror (***McKenzie v Farmer's Co-op 1922***) channel of communication
- There are two methods of acceptance:
- Authorized: offeror allows a particular method of acceptance but does not intend that it be the only form of valid acceptance. Acceptance by another method will be equally valid and the ordinary rules relating to time and place of formation apply.
- Prescribed: offeror intends this be the only form of valid acceptance and by any other method it will be invalid. Rules for time and place of formation are altered according to the offeror's stipulated mode of acceptance.

(5) Acceptance must take place before the offer terminates

- General rule: acceptance is completed when it has been communicated to the offeror
- However, the offeror may prescribe the manner of acceptance and can even dispense the need that he be informed of acceptance.
- In cases of postal and electronic contracts acceptance is completed before the offeror even receives knowledge. (expedition theory / reception theory)

ACCEPTANCE BY SILENCE or INACTION

- Acceptance does not have to be explicit; it may also be tacit whereby it can be **inferred** from conduct
- However offerors can state that the offeree will be regarded as having accepted the offer unless he/she does something to indicate rejection.
- Can silence or inaction of an offeree be regarded as acceptance?
- **General rule**: No; an offeror cannot force an offeree to act positively to refuse an offer
- Example: inertia selling
- Silence may only be taken if there was a legal duty on the offeree to do something if he did not want to accept the offer.
- In certain circumstances, where there is a special arrangement between the parties it may be reasonable to rely on silence as acceptance, such as in **long-standing business relationships** between parties that have **regular dealings**

long-standing business relationships

legal duty

CASE: *Union Spinning Mills v Paltex Dye 2002, SCA*

- **Legal principle**: Where it is the ordinary practice of a merchant/manufacturer to send an 'order confirmation form' to a customer which includes the terms and conditions on which it ordinarily does business, the manufacturer can prescribe that silence or non-rejection will be

Electronic Transactions & Communications Act

s45(2) - failure to respond to unsolicited offers does not

regarded as acceptance by the customer. The contract will therefore come into being if the customer fails to reject the terms in the order confirmation form.

- Criticism: This was probably a situation in which the offeree was under a duty to at, there being a previous course of dealings between the parties' (i.e. the customer had a duty to reject the terms contained in the order confirmation form because it had ordered the goods in the first place)

Electronic transactions

- Contracts concluded by e-mail, SMS and online are regulated by the **Electronic Communications and Transactions Act 25 of 2002.**
- **S45(2)**: failure to respond to unsolicited communication does not amount to valid acceptance

PARTIAL ACCEPTANCE

- Parties must reach complete consensus on all terms of the agreement.
- If there are any parts that need to be negotiated, there will be no contracts.
- The offeree must thus accept an offer in its entirety.
- Exception to this rule: parties may intend separate parts of the contract to be binding in themselves so once agreement is reached on all parts it is put together in a comprehensive contract
- Partial acceptance of certain aspects of an offer may if intended by the parties, create a contract in respect of that part while negotiations for the rest continue.
- During further negotiations the parties may make separate offers in respect of outstanding parts without affecting the validity of the original contract
- If these further offers are accepted, further contracts will be concluded which will be added to the original contract.
- If the further offer lapses the original contract will stand as it is (***CGEE Alsthom Equipment v GKN Sankey***)

TIME AND PLACE OF FORMATION

THEORIES OF FORMATION

Information Theory

- The contract is concluded on the offeror's receiving knowledge of acceptance (hearing or reading).
- Acceptance must be communicated to the offeror. This accords with the notion of contract as an agreement; there will only be *consensus* when offeror hears of acceptance.

Expedition Theory

- Contract is concluded when and where the acceptance is transmitted (such as posted) to the offeror.
- This is applicable to postal contracts unless there is indication to the contrary (*Cape Explosive Works v SA Oil and Fat Industries*)

Declaration Theory

- Contract is concluded when and where the offeree declares or expresses his/her acceptance (offeror must be privy because must have knowledge)

Reception Theory

- Contract concluded when and where offeror receives the acceptance, whether aware of it or not

SOUTH AFRICAN LAW: INFORMATION THEORY AS THE GENERAL RULE

CASE: *Dietrichsen v Dietrichsen 1911, TPD*

- **Facts:** This dealt with a family agreement relating to the sale of a part of a farm. FJ and MH Dietrichsen offered to sell a portion of the farm to JJ Dietrichsen and FJ and MH signed a document while JJ took the signed offer with him. Three months later JJ signed the document accepting the offer but did not communicate such acceptance to his brothers.

- **Outcome**: The court held the information theory is the starting point unless there is a clear indication to the contrary. According to this theory, acceptance must be communicated to the offeror before the contract expires. This acceptance was not valid as it had not been communicated to the offeror.

- ***S v Henckert 1981*** - information theory applies to contracts concluded telephonically

EXCEPTIONS TO THE GENERAL RULE

There are three situations in which **information theory will not apply:**

1) Offeror stipulates a different method of acceptance

- The offeror, as initiator of the contract, may prescribe a different method of acceptance. The contract is concluded when and where the offeree complies with the offeror's instructions regarding method of acceptance

CASE: *Driftwood Properties (Pty) Ltd v McLean 1971, AD*

- **Facts**: Van Aswegen sent an unsigned "offer to purchase" to the owner of a property that he wanted to buy. The owner signed the document as the offeror and sent it back to Van Aswegen who signed the offer of 17 May 1969 and posted it to the owner. The owner never received it and only heard about the posted acceptance 40 days later, by which time he had sold the property to someone else.
- Clause 7 of the document: "...this offer is open and binding upon both parties until signature by both parties before 17 May 1969 failing which it shall lapse if only signed by one party".
- **Court held**: that clause 7 clearly indicated that the offeror (owner) intended the contract to be concluded upon **mere signature** of the document by the offeree. In other words, the offeror prescribed signature as a method of acceptance and dispensed with the need for communication to himself. The contract had therefore been validly concluded when Van Aswegen signed the document.
- **Legal principle**: contracts are concluded when an offeree adheres to the method of acceptance prescribed by the offeror.

2) Postal contracts

A postal contract is a contract concluded by mail. Initially it was unclear which theory applied to postal contracts. In 1921 the CPD determined that the **expedition theory** applied to postal contracts (hence contract concluded when acceptance posted/mailed)

CASE: *Cape Explosive Works Ltd v SA Oil and Fat Industries 1921, CPD*

- **Facts**: Two contracts had been concluded by way of letters sent through the post. In the first contract, the offer was made in a letter posted in Transvaal, while in the second contract the letter containing the offer was mailed from Durban. Both offers were accepted by posting letters of acceptance in Cape Province. An action was brought on the contracts; the defendants challenged the jurisdiction of the court on the basis that the contracts were not concluded in the area of the court's jurisdiction (Cape Town).
- **Issue**: Were the contracts concluded in Transvaal and Durban respectively (information theory) or in the Cape (expedition theory)?
- **Court held**: The court acknowledged the information theory accorded with the notion of contract based on consensus of the parties, however the court adopted the **expedition theory** for **postal contracts** on the basis of commercial convenience and certainty.
- If the offeror chooses to make his offer through the post he thereby implicitly consents to acceptance through the post so that the contract is concluded when and where the letter of acceptance is posted
- **Legal principle**: The expedition theory is applicable to postal contracts unless there is contrary indication (confirmed by AD in *Kergeulen Sealing & Whaling v. CIR* in 1939).

- ***Yates v Dalton*** - The rule was later extended to contracts concluded by **telegram**

- **Fax transmission:** not certain whether it is regarded as postal communication or as authorizing a specific form of acceptance, or as communication *inter praesentes*

> argue → information OR expedition

Expedition theory only applies to contracts if:

a) Both offer and acceptance were made by mail
- If the offeror makes his offer by mail he implicitly assumes the risk of postal acceptance; the expedition theory will not apply where the offeror did not make the offer by mail (Sweiman)

b) Acceptance was correctly addressed
- The expedition theory will not apply where the offeree is responsible for the letter being incorrectly addressed
  - ***Levben Products v Alexander Films 1959***

c) Postal service functioned normally at the time
- The expedition theory will not apply where the letter of acceptance is not delivered as a result of extraordinary circumstances like war (strikes must be considered on facts)
  - ***Bal v Van Staden 1902***

d) Offeror did not indicate a different intention.
- If the offeror clearly indicates he does not wish the contract to be concluded upon mere posting of acceptance, expedition theory will not apply.

CASE: *A to Z Bazaars (Pty) Ltd v Minister of Agriculture 1975, AD*
- **Facts**: The Minister sent a written notice of expropriation to A to Z Bazaars (AZB) offering a certain amount of money as compensation for the expropriated property and indication that AZB must notify the Minister of acceptance in writing in accordance with s6(1) of the Expropriation Act 55 of 1965. AZB posted a letter of acceptance but then realized accepting the offer would be detrimental and sent a telegram rejecting the offer. The telegram reached the Minister before the letter of acceptance.
- **Court held**: In terms of s6(1) of the Act, the acceptance had to be personally delivered to the Minister. The offer therefore clearly indicated that mailing acceptance would not be sufficient to conclude a contract. When the telegram reached the Minister there was not yet a valid contract, therefore the telegram effectively rejected the offer.

3) Electronic contracts → e-fax
- Contracts concluded electronically (e-mail, SMS, online transactions) are regulated by the **Electronic Communications and Transactions Act 25 of 2002** which determines that the **receipt theory** applies to such contracts, unless the parties agree otherwise.
- Both offer and acceptance must have been concluded electronically
- An electronic contract will come into being at the time and place where acceptance is received by the offeror, unless the parties had a different agreement (s22)
- Place of receipt: is deemed to be the offeror's usually place of business or residence
- Time: where acceptance enters the information system designated or used by the offeror and acceptance is "capable of being retrieved and processed" by the offeror.

Information theory applies to telephonic contracts (***Tel Peda Investigation Bureau v Van Zyl 1965***)

Offeror prescribes diff mode

Information theory. Except — Postal / Electronic

Telephone – info theory – Tel Peda v Van Zyl

Fax – info or expedition

Telegram – expedition – Yates v Dalton

Post – expedition – Cape Explosive v SA Fats & Oils

Electronic – receipt – capable of being retrieved

option right - right to exercise option and bring about the main contract

PACTA DA CONTRAHENDO

- *Pactum da contrahendo* is an agreement to make a contract in the future (***Hirschowitz v Moolman***)
- It is a preliminary agreement that envisages the conclusion of the main contract in the future
- There are always two contracts involved: the main contract (contract of sale, lease, donation etc) and the *pactum da contrahendo* (facilitates formation of contract)
- Two main types of *pacta da contrahendo* are **option contracts** and **contracts of preference** (specifically pre-exemption contract)

OPTIONS

- An option is a contract to keep an offer (main/substantive offer) open, usually for a certain period of time. The main offer is irrevocable for the duration stipulated.
  - ✓ Example: A offers to sell his car to B for R50 000 (main offer) and B tells him he needs to take some time to consider the offer. A and B agree that A will keep the offer open until the following Friday (option contract)
    → A cannot revoke his offer until the following Friday (main offer irrevocable)
- Options can be granted gratuitously or for value (payment)

REQUIREMENTS FOR VALID OPTION CONTRACT

- Option is a contract in its own right, but is distinct from the main contract.
- For validity it must satisfy two requirements:

1) Option contract must satisfy all the requirements for valid contract
2) Offer in terms of main contract must satisfy all requirements for valid offer

Offer

1. Must be made *animo contrahendi* (*Gelbuild v Rare Woods; Pitout v North Cape*)
2. Must be complete and certain or ascertainable (*Gelbuild v Rare Woods*)
3. Must be addressed to and brought to the attention of the offeree

Acceptance
~~Agreement~~

1. Must be made *animo contrahendi* (*Bloom v American Swiss*)
2. Must be accepted by person to whom it was directed (*Levin v Drieprok*)
3. Must correspond to the terms of the offer (or will amount to counter-offer or rejection; remember three exceptions) (*JRM Furniture v Cowlin*)
4. Must be made in the manner prescribed by the offeror (*A to Z Bazaars; McKenzie v Farmers Co-op*)
5. Must occur before the offer expires

GENERAL PRINCIPLES REGARDING OPTIONS

Req 1 ▪ The option contract must be valid which *inter alia* means there must be agreement on the option (offer and acceptance)

Req 2 ▪ If main offer is invalid the option contract will fail for lack of certainty (***Brandt v Spies***)

- Generally option contracts do not need to comply with any formalities however the main contract may be subject to formalities.
- If offer in terms of the substantive contract must comply with prescribed formalities then acceptance must also comply with prescribed formalities (when the main offer accepted)
- Question regarding whether the option contract must comply with formalities is not settled in our law and this uncertainty is show in conflicting judgements regarding the Alienation of Land Act which requires the agreement for sale of land must be in writing and signed.

- ***Brandt v Spies***: a verbal agreement to keep open a written offer for sale of land is a valid option contract
- ***Venter v Birchholtz***: a verbal agreement to keep open a written offer for sale of land signed by the offeror is valid and effective (*obiter*)
- ***Hirschowitz v Moolman***: Where formalities are required for the main contract the same formalities are required for the ancillary contract (*obiter*)

DURATION OF AN OPTION

- Once the main offer is accepted that option contract falls away (has served its purpose) and the main contract comes into being.

DURATION – Lasts until:
① Accepted or rejected main offer
② Expiry of time

- If the main offer is rejected both the option contract and main offer immediately fall away.

Option contract can lapse by expiry of time:

- If there is a specified time then on expiry of that time the main offer lapses
- If no time period is stipulated the option will lapse after a reasonable time
- If parties say the option is to endure indefinitely:
  1) Void for vagueness
  2) Contrary to public policy
  3) Held to terminate after a reasonable period
  4) The courts have not yet decided on this question

LEGAL EFFECT OF AN OPTION

- An option creates rights and duties (obligations) for the parties.

The grantor of the option has the obligation:

- Not to withdraw the offer for the stipulated period
- Not to do anything to frustrate the grantee/holder's rights or chances of exercising the option

Grantee: If the option is granted gratuitously the grantee has no corresponding obligation however if the option is granted for a fee then the grantee has an obligation to pay that fee.

EXERCISE OF AN OPTION

- If the grantee wishes to exercise the option he should simply accept the main offer.
- Acceptance must comply with the requirements for valid acceptance
- The main contract will then become binding on the parties.

BREACH AND REMEDIES FOR BREACH

- If the grantor breaks his obligations in terms of the option contract, he commits breach of contract and the normal remedies of breach are available to the holder of the option.
- Where there is breach the option holder is put to an election (has a choice) whereby he can either uphold the option or cancel the contract
- Option holder (grantee) can also claim for any losses that were caused by the breach (***Sommer v Wilding*** and ***Boyd v Nel***)
- If option holder upholds the option he simply accepts the main offer as if there had been no breach, the grantor will then be bound to the substantive contract
- If grantor has concluded a competing contract he will have to breach one of the contracts and face the legal consequences of breach
- However, if the option grantor has already **transferred ownership** of the thing to a third party the option holder cannot usually force the third party to return the thing; this is because the option holder does not have a real right

option holder does not have a real right

- Option holder is therefore only able to claim damages from the option grantor
- One exception would be where the third party obtains ownership, whilst knowing the option exists. In such cases the **doctrine of notice** allows the option holder to claim the thing from a third party

Doctrine of notice / third party had knowledge of option

- Allows performance to be claimed from the hands of a third party if he knew about the contract before taking transfer of performance; this goes against privity of contract by which contractual rights cannot be enforced by third parties.

TRANSFER OF OPTION RIGHTS

- An option right (right to exercise option and bring main contract into existence) can be given exclusively to grantee or it could be cedable (can be transferred to another) but this depends on the grantor's intention and the relevance of the identity of the grantee to the grantor – if it is irrelevant the option is cedable.

PRE-EMPTION AGREEMENTS

- ❖ A **preference contract** is a contract that **grants one party a preferential right to conclude a further contract** with the other party.
- ✓ Most common example is a pre-emption agreement which relates to substantive contract of sale
- **Pre-emption agreement restricts ability** of the **grantor** to **alienate** the subject-matter of the preemptive right and **confers a right** on the other party (**grantee**) to be given preference in event of its sale
- A contract creating a right of pre-emption does not force the grantor to sell the subject-mater of the right
- Rather, it gives the grantee a preferential right to buy the thing should the grantor decide to sell.

Two forms of pre-emption

1) Should grantor decide to sell, he will make the first offer to the grantee (make first offer)
2) Should the grantor decide to sell, the grantee will have the first opportunity to make an offer to the grantor (grantee will have opportunity to make first offer)

REQUIREMENTS FOR A VALID PRE-EMPTION AGREEMENT

- ❖ A contract granting the right of pre-emption is a distinct contract in its own right; must therefore **satisfy all requirements of a valid contract**

- Certainty: the content of the pre-emption agreement itself must be determined or determinable. This does not extend to the envisaged substantive contract
- It is not necessary that the proposed substantive contract be certain at the time when the pre-emption contract is concluded.
- Reason is that the offer in respect of the main contract is normally not made at the time of conclusion of the pre-emption agreement
- Formalities: it is unclear whether pre-emption contracts must comply with the same formalities as the proposed substantive contract

LEGAL EFFECT OF PRE-EMPTION AGREEMENT

- A pre-emption agreement creates rights and duties for the parties but there is some uncertainty as to the exact contents of theses rights and duties

Negative duty

- A pre-emption contract **restrains the grantor's power** to sell the subject-matter of the pre-emptive right
- A negative duty is placed on the grantor: he must refrain from doing anything which will frustrated the rights of the grantee, therefore the grantor will be in breach of the contract if he sells the property to someone else without first giving the grantee the opportunity to buy the property
- Grantee can therefore get a court order preventing the grantor from selling the property to someone else.

Positive duty

- Can a pre-emption contract impose a positive duty on the grantor to do something to make or invite an offer from the grantee?
- Case law differs:
  - ➢ ***Owsianick v African Consolidated***: in an *obiter* - the right of pre-emption must be construed restrictively and consequently a pre-emption agreement imposes a negative duty on the grantor to refrain from frustrating the grantee's right.
  - ➢ ***Soteriou v Retco***: there was a positive duty on R to give preference to S and the content of that positive duty is embodied in the form of preference agreed upon.
  - ➢ ***Associated SA Bakeries v Oryx***: whether there is a positive obligation on the grantor depends on the wording of the contract

- It appears the existence of a positive duty depends on the terms of the specific pre-emption contract.
- If the contract requires the grantor to act positively he can be forced to carry out this positive duty by way of an order for specific performance
- If there is no positive duty the grantee cannot force the grantor to sell the property to him; he will only be able to prevent the grantor from selling the property to a third party by an interdict

EXERCISE OF RIGHTS OF PRE-EMPTION

a) Trigger event

- A trigger event must occur to activate the grantee's pre-emptive right; parties to the contract determine what the trigger event is.

- Usually the trigger event would be the grantor's decision to dispose of the subject-matter of the right
- It is advisable to describe the trigger event clearly and with sufficient detail.
- ➢ [***Owsianick v African Consolidated***]

b) Method of exercise

- Generally when a pre-emption contract is concluded there is **no offer** in relation to the main contract.
- When the trigger event occurs it will be necessary for one of the parties to make an offer in respect of the main contract, which the other party can reject or accept.
- Who makes the offer depends on the terms of the pre-emption agreement.
- In the case of the right of first refusal the grantor must make an offer to the grantee otherwise the grantor must give the grantee the opportunity to make an offer.
- Pre-emption agreement can govern the making and acceptance of an offer

c) Unreasonable offers

- Grantor cannot avoid his duty to make an offer by making an unreasonable offer because he must make a *bona fide* offer (act in good faith). If the offer is not made in good faith the grantor will be in breach of the pre-emption contract [***Soteriou v Retco***]

BREACH AND REMEDIES FOR BREACH

- If the grantor breaches the pre-emption agreement the normal remedies for breach apply
- Breach by the grantor by selling the subject-matter to someone else without first giving the grantee the opportunity to buy it →grantee has a special remedy: he can buy the property from the grantor on the same terms as the third party by his unilateral choice; he must just inform the grantor of his decision and the grantor has no choice in the matter.

CASE: *Associated SA Bakeries v Oryx* 1982, AD

- "If a seller concludes a contract of sale with a third party contrary to a pre-emptive right, the holder of the right can, by the unilateral declaration of intent, step into the shoes of the third party. A contract of sale will then be deemed to have been concluded between the seller and holder of the right. Should delivery already have take place, the holder of the right would not be able to pursue the *merx* in the hands of the third party with his personal right unless the latter was aware of the pre-emptive right"

- **Note:** the case says the grantee steps into the shoes of the third party, but this does not mean that the grantee takes over the rights duties of the third party. Rather a new substantive contract is formed between the grantor and the grantee, on the same terms as the contract between the grantor and third party.

There are two contracts:

1) Between the grantor and third party
2) Between grantor and grantee

- Both contracts have the same terms but it will be impossible for the grantor to perform by delivering the same property in terms of both contracts.
- He will inevitably have to beach one of the contracts of sale
- If he breaches the substantive contract of sale with the grantee of the pre-emptive right, the grantee will have the normal remedies for breach of contract
- However, if ownership of property has already been transferred to the third party the grantee will not be able to get the transfer of the property unless the third party was aware of the pre-emptive contract (**doctrine of notice**). If the grantee is unable to get the transfer of the property he will still be entitled to claim damages from the grantor.

OPTION v PRE-EMPTION

- The **pre-emption agreement** contemplates the **bilateral action** for the formation of the envisaged an offer must be made and there must be acceptance of such offer
- There is one exception: if the grantor has already sold the property to a third party in breach of the pre-emption agreement. In these cases the grantee can bring the substantive contract into being by his **unilateral choice.**
- The theoretical explanation for this is probably that the sale to the third party is deemed to be an offer to the grantee, which the grantee can then accept
- Alternatively, in the context of the **option agreement**, a firm, definite, irrevocable offer is already the table. The exercise of an option merely contemplates acceptance (**unilateral action**) on the part of the option holder [***Cohen v Behr 1946***]

Other Requirements for Validity of Contracts

CONTRACTUAL CAPACITY

- To form *animus contrahendi* and reach consensus all the parties to a contract must have necessary capacity, therefore they must be able to **understand the nature** of a contract and the **consequences** of entering into a contract

Mental Illness

- A person suffering from mental illness may not be able to conclude a valid contract **if at the time of concluding the contract** he/she is **incapable** of understanding the **nature and consequences** of the contract.
- This principle applies even where a mentally ill person derives only rights, no duties, from the contract, such as a *donatio*.
- In such cases, a curator is appointed to conclude contracts on behalf of the mentally ill person.
- Declaring a person mentally ill and detaining him/her in a mental health institution does not mean the person in question will never be able to conclude a contract.
- It depends on the **state of mind at the time of concluding the contract.**
- Where someone has been declared mentally ill there is a **rebuttable presumption** that he/she was incapable of contracting at the relevant time.
- To enforce such contract the person in question must prove that at the time of concluding the contract he/she was capable of understanding the nature and consequences (*lucid intervallum*).
- Where a person has not been declared mentally ill, the **presumption** is that person was capable of contracting at time of conclusion of the contract.

S.E.A.
(Substance
Effect
Amount)

Intoxication

- A person under the influence of alcohol or other drugs may be intoxicated to the extent that he/she was incapable of forming the necessary consensus to conclude a valid contract.
- This must ultimately be decided from the facts; it will depend on:

1) Substance consumed
2) Amount consumed
3) Effect on capacity of the particular party.

Prodigals

- A person who has been declared a prodigal by a court of law has **limited contractual capacity** and requires assistance from a curator to conclude contracts.
- Without assistance, a prodigal may only obtain rights and may not incur duties.
- A person who is incapable of controlling financial affairs but has not been declared a prodigal by a court still has full contractual capacity. *Declaration by court imperative

Minors

- Minors under 7 years of age →no contractual capacity, not even for contracts benefiting them. irrebuttable presumption
- Minors between 7 and 14 → limited contractual capacity – rebuttable presumption
- 14 - 21 →limited contractual capacity and may only conclude contracts with assistance of their guardians. Without assistance they can only obtain rights, no duties.
- Contracts concluded by minors without assistance are **not void** but **voidable.** They can be **ratified** by the minors themselves upon obtaining the age of majority or by their parents on their behalf.

- Even where a minor had parental assistance in concluding a contract, he/she may claim *restitutio in integrum* if the contract was to her detriment at the time of conclusion
- Contracts such as for land require permission of the High Court in addition to parental permission.

CERTAINTY

- Terms of a contract must be certain or ascertainable (capable of being made certain)
- A term is certain if the exact performance is clearly described in the contract
- If a contract contains a formula or method which enables the parties to ascertain the performance then the contract is not void for uncertainty
- ***Certum est quod certum redid potest*** →something is certain if it can be made certain

Examples

Market valued of a 1999 Toyota Conquest with 200 000km on the odometer
→ Yes
"As much as X paid for his car"
→ Yes
A fair price
→ No
Cost price plus 5%
→ Yes, can determine what the cost price of certain objects is and add 5% to that
Market value of a double bed mattress bought in 2004 and used only on weekends
→ No, it is a mattress

- A contract that is void for uncertainty is not irrevocably lost but is not valid until the parties have fixed the uncertainty.
- ✓ Example: A and B have an agreement that A will buy B's car for whatever A will pay. The contract is not valid until A indicates a price and B agrees to that price.
- If a contract is divisible, whereby the vague term can be separated from the rest of the contract, the contract will be valid and the vague term can be ignored.

GENERIC, ALTERNATIVE AND FACULTATIVE OBLIGATIONS

- A contract may contain terms creating certain obligations, and such terms allow one of the parties

Generic Obligations

- Performance can be selected from a *genus* (class) of things.
- ✓ Example: 10 tons of first-grade yellow maize
- ✓ Any new 2007 BMW 525i

0710044319

Alternative Obligations

- Performance can be selected from two or more alternative possibilities
- ✓ Examples: Car A or Car B
- ✓ Flat number 1, 2 or 3

Facultative Obligations

- There is a primary obligation together with a qualification that the debtor can substitute another performance if he wishes
- The creditor can only enforce the primary performance, but the debtor can choose to deliver the alternative performance
- ✓ Examples: Car A, but if you wish car B instead
- ✓ The flat as drawn on the plan, but it may be substituted for a flat of the same size and similar floor plan, in the same building.

DISCRETION TO FIX PERFORMANCE

- A clause that provides a third party may fix performance is **valid**, even if the third party is not completely independent of either of the parties.
- However, the court may set aside the third party's determination of performance if it was made in bad faith, it was a mistake or it was obviously unfair.
  - ✓ Examples: X and Y agree that Y will by X's house for what Z deems it to be worth (estate agents)
  - ✓ A price to be fixed by the bookkeeper of one of the parties

- There is **no discretion for one party to determine** his **own performance** or performance of the other party
  - ✓ Examples: Pay me what you want; I will decide what must be paid for the car

- Most writers agree that such a term was void for uncertainty however many commercial contracts contained those terms and they were enforced.
- Usually when persons purchase property the purchase price is not fixed in case and they therefore borrow the money from a bank and the loan agreement stipulated that interest is payable; the bank then registers the mortgage bond over the property to secure the loan.
- It is common in a mortgage agreement that a bank can unilaterally adjust the interest rate payable by the customer and this is done according to **prime lending rate** which changes over time (rate at which banks lend money to clients).
- Example: A takes a loan from the bank and the agreement is that A will repay the loan at an interest rate of prime minus 1%, so if prime is 12.5% A will repay at 11.5%. If the repo rate is reduced by 1% then the bank usually also reduces the prime rate by 1% so A would repay at a rate of 10.5%.

CASE: *NBS, Boland Bank v One Berg River Drive & Absa Bank; Friedman v Standard Bank 1999, SCA**

- **Issue**: The court had to decide whether such clauses in mortgage agreements allowing banks unilaterally to adjust their interest rates are void for vagueness.
- **Court held**: "Save perhaps, where a party is given the power to fix his own prestation, or to fix a purchase price or rental, a stipulation conferring upon a contractual party the right to determine a prestation is unobjectionable...All this does not mean that an exercise of such a contractual discretion is necessarily unassailable. It **may be voidable** at the instance of the other party. It is, I think, a rule of our common law that unless a contractual discretionary power was clearly intended to be completely unfettered, an exercise of such discretion must be made *arbitrio bono viri* (according to the power of the decision of a good man - in other words, not arbitrary....The discretionary powers vested in mortgages by the relevant deeds must therefore be subject to this inherent limitation."
- **Legal principle**: The judgement has limited application and discretion to fix performance will only be valid if:
  1) It is discretion to fix the other party's performance AND
  2) The discretion is subject to the *arbitrio bono viri* AND
  3) It is not discretion to fix a purchase price or rental

Arbitrio bono viri
According to the power of the decision of a good man - not arbitrary

It is uncertain whether discretion to fix performance will be valid if:
1) It is discretion to fix purchase price or rental
2) It is discretion to fix one's own performance
3) The contract expressly states that the discretion does not have to be exercised *arbitrio bono viri*

AGREEMENTS TO AGREE

- Will a contract to negotiate a second contract be enforceable?
- Example: A and B agree that in 30 days they will negotiate a contract for the sale of A's house to B, but is that first agreement a valid contract? Hence, if after 30 days B does not want to negotiate, can A go to court to enforce a contractual duty on B to negotiate.

Agreements to agree are GENERALLY UNENFORCEABLE, unless there is a DEAD-LOCK BREAKING MECHANISM (ie arbitrator)

CASE: *Southern Port Developments v Transnet 2005, SCA*

- **Facts**: Southern Port Developments, previously known as Tsogo Sun Ebhayi (TS), concluded a contract for the lease of certain land from Transnet. They wanted to use the land to construct and operate a casino. However, in order to do this they first had to obtain a casino license. This agreement (first contract) was therefore subject to the condition that it would only come into force if TS's casino license application was successful. They concluded a second agreement (bridging agreement) which determined that if the application should fail: "TS shall have the option to lease the properties on the terms and conditions of agreement (alternative agreement) negotiated between the parties in good faith...should the parties be unable to agree on any of the terms and conditions of...the alternative agreement...then the dispute shall be referred for decision to an **arbitrator** agreed on by the parties. The **arbitrator's decision shall be final and binding** on the parties"

Referred to arbitrator in event of dispute. Arbitrators decision shall be final & binding

- TS's license application was turned down and they wanted to negotiate a final lease agreement with Transnet for the lease of the property.
- **Issue**: Could the agreement to negotiate in good faith, which was contained in the bridging agreement, be enforced against Transnet?
- **Court held**: This case differed from *Premier Free State v Firechem* because in that case there was no provision for an event of a deadlock between the parties, however in the present case the parties had given steps for such deadlock. It was not only just good faith negotiations but there was provision to reach **resolution** and so the parties appointed an arbitrator by means of a clause in the agreement. This arbitrator made the agreement enforceable because as the third person he would make a decision in the event of a deadlock; thus the arbitrator's decision rendered this agreement certain and enforceable.
- **Legal principle**: Agreements to agree are generally unenforceable unless there is a **deadlock breaking mechanism** such as a third party.

POSSIBILITY

- At time of conclusion of contract, it must be possible to render the required performances; if performance is impossible then the contract is void from the beginning (***ab initio***)
- Subjective impossibility will not affect the validity of a contract
- Objectively impossibility will render a contract **void**

Objective Impossibility – renders contract void

- Performance would be impossible for **all people**. If it was still possible for some people to deliver particular performance, it would still be objectively impossible
- A generic obligation cannot be objectively impossible due to the maxim: *genus non perit* (a genus cannot be destroyed)
- However, if the *genus* is limited it is possible the performance will be objectively impossible.
- ✓ Example 1: "10 tons of first-grade yellow maize" →can never be objectively impossible because even if there was no maize of that kind in the whole of South Africa, there would likely be maize somewhere else in the world
- ✓ Example 2: "10 tons of first-grade yellow maize produced on B's farm in 2007" → this will be objectively impossible because if the crop fails in 2007 then there can be no performance.
- An alternative obligation will only be impossible if **all** alternatives are impossible.
- If the primary performance of a facultative obligation is impossible, the contract is void for impossibility even if the second performance is still possible.

Subjective Impossibility does not affect validity.

- Where a performance is not possible for a specific debtor, even if it is possible for other people, it would be subjectively impossible.
- The contract is valid, and the debtor is guilty if he is unable to perform.
- If performance is physically possible but is totally impracticable because performance is highly dangerous, difficult or costly, the performance will be regarded as objectively impossible.

- The test is of **commercial reasonableness:** practical and economic expedience and fairness.
- ✓ Example: If a load of imported cars fell into the ocean while being transported they might conceivably be retrieved by extensive searching, however this would be costly and difficult and would make it practically impossible. Performance will therefore be deemed to be objectively impossible.
- Impossibility may be a result of **factual or legal factors**
- If there is legal rule preventing a party from performing, performance will be objectively impossible and the contract will be invalid.
- Validity of the contract will also be affected by illegality.

CASE: *Wilson v Smith 1956, WLD* Exception to impossibility causing invalidity

- ➢ **Facts:** A portion of land was sold while both parties were under the impression that the piece of land could be subdivided. Unbeknownst to them a town-planning ordinance (subordinate legislation) prevented such subdivision at the time of the conclusion of the sale. It was therefore objectively impossible to carry out the contract of sale
- ➢ **Court held:** Generally, a contract would be void if performance is impossible at the time of its conclusion. There is an exception to this rule when it appears from the surrounding circumstances and the terms of the contract that the parties foresaw the possibility that performance may be impossibility, and despite this possibility wanted to conclude a valid contract.

surrounding circumstances

- ➢ In other words, they decided to conclude a valid contract, despite the risk of impossibility. Usually the party who takes the risk of being bound to give an impossible performance, would bargain for some form of compensation from the other party. Such contracts will be valid despite that fact that one of the performances is impossible. *FORESIGHT*
- ➢ **Legal principle:** A contract can be valid even if performance is impossible, if that is the parties' intention.

→ if they foresaw the impossibility but still wanted to conclude the valid contract

FORMALITIES

- ❖ General rule: there are no formalities for valid formation, variation or cancellation of contract
- ❖ A contract can take any form: verbal, in writing or tacit (Wessels v Swart)

There are two situations in which formalities are required:

1. Statutory formalities - legislation requires certain contracts to comply with certain formalities for reasons of policy
2. Self-imposed formalities - parties set their own formalities for the valid creation, alteration or cancellation of a contract.

STATUTORY FORMALITIES

- ❖ Statutory formalities are those formalities prescribed by statute for a particular type of contract
- To determine applicability of statute to an agreement, one must determine the type of agreement to which the statute applies.
- If the agreement is the type contemplated in the statute then the contract is subject to statutory formalities
- The most common statutory formality is writing; it can be a formality for creation of a valid contract but it could also be a convenient method of proving the existence of the contract.
- Where there is doubt as to whether writing is required for validity, the **presumption** is that it is merely required for **purposes of proof.**
- If a statute requires a contract to be in writing all the **material terms** must be written: these are the ***essentialia*** and ***incidentalia*** that the parties intend to be included.

It is problematic when parties use printed contracts and do not complete all the clauses on the document:

PRESUMPTION: writing is required merely for purposes of proof

buyer seller

CASE: *Johnston v Leal 1980, AD*

- *Pro non scripto* - as though the terms were not part of the contract.
- **Facts**: There was a contract for the sale of land and the applicable legislation was s1(1) of the Formalities in Respect of Contracts of Sale of Land Act 71 of 1969. The legislation required the whole contract of sale, particularly the *essentialia* and *incidentalia* (material terms) be in writing. The terms had to be set forth with sufficient accuracy and particularity to enable identification of the parties, purchase amount, subject matter and other material terms to serve as proof. The effect of s1(1) if it was not complied with was the contract would be **void *ab initio***.
- The plaintiff (Leal) and the defendant (Johnston) had a contract for the sale of land whereby Johnston was to purchase the property, and they used a printed form. The parties, property description, price, manner and time of payment and date of occupation had been determine however **clause 11** of the contract - which provided if the purchaser had not accumulated a certain amount of money to be paid to the seller by a certain date, the sale would be cancelled - had not been filled in and hence no amount or date of payment were specified. The appellant did not pay so the seller subsequently cancelled the contract on grounds of breach and claimed for damages.
- The appellant's response was: in terms of s1(1) of the Formalities Act an agreement of sale should be in writing (all material terms) and since not all material terms were in writing (clause 11) the contract was void and unenforceable. The respondent excepted to that plea so rejected it and the court *a quo* found in favour of the appellant.
- **Issue**: Was there a valid contract in light of clause 11 not being filled in?
- **General rule**: If the statutory formalities are not complied with the contract is invalid.
- **Court held**: There were three possible reasons for leaving blank spaces in the printed document:
  1. The parties had agreed to a suspensive condition that a loan in a certain amount should be obtained by a certain date but by mistake they **omitted to fill in the blanks**.
  2. Parties were unable to reach agreement on an amount of the loan and the period in which the loan had to be obtained and left the issues to be **agreed upon later**.
  3. Parties agreed the agreement would not be subject to a suspensive condition but by mistake they **did not delete the clause or right "nil" in the blank spaces**.
- **Legal principle**: A contract containing blank spaces is valid as long as there is a mutual understanding for the reason of existence of the blanks.
- **Factual Outcome**: Appeal was dismissed.

CONTRACTS SUBJECT TO STATUTORY FORMALITIES

- There are various statutes prescribing formalities in relation to specific types of contracts:

Alienation of Land Act 68 of 1981

- "Alienation" includes any sale, donation or exchange of land
- "Land" includes all interests and rights in land
  - (Note: this includes granting servitudes)
- A contract for alienation of land must **be in writing and signed by both parties, or agents acting on written authority** (s2(1)).
- Contracts for alienation of land have significant economic value and the aim of formalities is to promote certainty and reduce disputes
- Non-compliance with formalities, contract is null and void (s28(2))
- **Only one party has performed** in terms of a contract which does not comply with the formalities, the formalities can be recovered. In addition, the following can be claimed:
- Buyer: may recover interests on payments made AND compensation for necessary
- expenditure and useful improvements
- Seller: may claim compensation for occupation, use or enjoyment of the land by the purchaser AND compensation for any intentional or negligent damage to the land by the purchaser or any person who is responsible.
- **Both parties have performed in full**: neither party can recover performance and effectively the alienation is valid despite failure to comply with formalities.

National Credit Act 34 of 2005

- ❖ A credit agreement is a contract whereby a consumer borrows money or buys goods or services but he does not make full payments immediately and interest is charged on outstanding amounts
- Formalities for these agreements aim to prevent the exploitation of consumers by reducing certain information to writing:
- s93 of the Act provides that all credit agreements must be in a form prescribed by regulation or if no form is prescribed for that type of credit agreement then it must comply with the prescribed requirements for that category or type of transaction
- Non-compliance: does not render the contract void because they are not requirements for validity of contracts, instead there are criminal penalties imposed by the credit grantor (s161)
- Credit agreement may not contain certain clauses such as certain exclusion clauses (s90)
- Forbidden clauses in such contracts are void and the court may sever those clauses from the rest of the contract or the clause can be altered or the entire contract can be declared invalid if it is not divisible (s90(4)).

Suretyships (General Laws Amendment Act 50 of 1956)

- A contract of suretyship is a contract between the creditor and a third party (surety) whereby the third party undertakes to settle a debt in the event that he debtor defaults on the debt.
- Due to potentially negative effects of such contracts, formalities aim to protect the third party
- Contracts must be **in writing and signed by or on behalf of the surety** (s6). The debtor need not sign the suretyship
- Non-compliance: renders the contract null and void

Electronic Communications and Transactions Act 25 of 2002

- The Act provides for the conclusion of electronic contracts that are subject to formalities.
- If a contract is required by law to be in writing, an electronic contract will be valid if it is accessible and in a manner **usable for subsequent reference** (s4(4)).
- In cases where the law requires the contract to be signed the electronic document must be signed with an **advanced electronic signature** (s13 read with s1)
- Certain kinds of transactions are specifically excluded from the provisions and cannot be concluded electronically:

1. Alienation of land
2. Long-term leases
3. Wills
4. Bills of exchange (cheques and promissory notes)

✓ This implies credit agreements and suretyships can be concluded electronically.

see contents & contracts

RECTIFICATION OF CONTRACTS SUBJECT TO STATUTORY FORMALITIES

- ❖ Rectification occurs when the contractual document incorrectly reflects the parties' intentions
- The court will rectify the document to bring it into accordance with the parties' true intentions.
- The question whether a contract subject to statutory formalities can be rectified will be discussed under the doctrine

VARIATION AND CANCELLATION

- Cancellation: contracts required by law to be in writing may be cancelled orally unless the contract contains a non-cancellation clause
- Variation: Any variation (change by subsequent agreement of the parties) must, as a general rule, comply with the formalities prescribed by law

CASE: *Impala Distributors v Taunus Chemical Manufacturing 1975, TPD*

- **Court held**: formalities prescribed by law generally require that the **whole contract be in writing.** If there is an **oral variation** then the whole contract will not be in writing and this is contrary to he law.
- **Oral cancellation** will **not be contrary to the law** as the whole contract is still in writing.

SELF-IMPOSED FORMALITIES

- Self-imposed formalities are those formalities imposed by the parties themselves.
- Parties may agree to whatever formalities they wish, but the mere fact they agree to record an agreement in writing does not necessarily mean writing is required as a formality.
- Self-imposed formalities will always depend on the intentions of the parties.

There are three possible scenarios:

1) The agreement will not be binding unless and until certain formal requirements are met; writing is thus a formality. A contract is only formed one the agreement is reduced to writing
2) Parties require their contract be reduced to writing simply to **record the agreement**
3) The parties may have a contract that is partially verbal and partially in writing.

- Where there is doubt as to whether writing is required for validity of the contract or merely for proof, the **presumption** is that it is merely required for purposes of proof.
- ***Goldblatt v Fremantle***: Only when it is clear writing is a formality will the contract be void if is does not comply.

Formalities are generally required for:

- Formation (conclusion)
- Variation (alterations) - non-variation clauses
- Cancellation: non-cancellation clauses
- Waiver of rights: non-waiver clauses
    - Note: The fact formalities are required for one of these functions does not necessarily mean they are required for the other functions

ENFORCEABILITY OF NON-VARIATION CLAUSES (Shifren Principle)

- Previously there were two opposing views regarding whether parties may vary a contact informally despite existence of a non-variation clause:
    1. A non-variation clause restricts the parties' freedom to change their minds and alter their contract by subsequent agreement. Therefore, parties should be able to change a contract by mutual consent
    2. Parties agreed to the non-variation clause and should be bound by it (*pacta sunt servanda*). If effect was not given to such a clause it would be limiting the parties' freedom to use non-variation clauses and therefore oral variations should not be allowed.

CASE: *SA Sentrale Graanmaatskappy v Shifren 1964, AD**

- **Facts**: Shifren let premises to the appellant and clause 11 of the agreement forbade any cession (transfer of personal rights from one party to another) or sub-letting without the written consent of Shifren. Clause 19 was a non-variation clause, and the contract also contained a cancellation clause that entitled the innocent party to cancel the contract for any material breach.
- The Co-op wanted to cede its rights under the contract to a third party and Shifren **verbally** agreed to such cession but the parties failed to put this consent in writing. Consequently the Co-op was not permitted to cede its rights in terms of clause 11 and such cession constituted a breach of contract which entitled Shifren to cancel.
- Shifren thus relied on clause 11 (requiring written consent) and the Co-op argued that by implication Shifren agreed to change clause 11 since it gave oral permission for the cession.
- **Issue**: Was it possible to orally change clause 11 in light of the non-variation clause? It depended on the nature and effect of a non-variation clause.
- **Court held**: The non-variation clause was valid and there was no good reason for refusing to support the clause as it promotes certainty. The argument that it limits contractual freedom

is not of much bearing because it is a self-imposed formality and ***pacta sunt servanda*** should be given effect to. Contracting parties could effectively stipulated that any variations were to be written and that oral agreement which purported to vary the contract would be disregarded. A "non-variation" clause allowed parties to make fundamental law for themselves and a term in a written contract providing that all amendments to the contract comply with the specified formalities, is binding (remains in force).

- **Legal principle**: Oral variation of a contract where there is non-variation clause will be ineffective and the contract will be enforced as if there had been no variation (unanimously reconfirmed in *Brisley v Drotsky 2002, SCA*)

- Non-variation clauses are **interpreted restrictively** so do not cover matters not specifically stated in the clause.
- ***Golden Fried Chicken v Sirad Fast Foods***: oral cancellation, waiver and renewal of contracts with a non-variation clause will be valid unless the clause specifically prescribes formalities for those transactions.

FORMALITIES FOR CANCELLATION OF CONTRACT

- Generally parties may cancel a contract informally, however a non-cancellation clause can be prescribed with the effect that an oral cancellation will not suffice.
- Example of clause: "no cancellation of the contract will be of any force or effect unless it is reduced to writing"
- A non-cancellation clause can be informally varied unless the contract contains a non-variation clause.

CASE: *Impala Distributors v Taunus Chemical Manufacturing 1975, TPD**

Non-cancellation clause

- **Facts**: Clause 9 was a non-cancellation clause: "this agreement may be terminated by the mutual consent **in writing** of the parties".
- Clause 18 was a non-variation clause: "No variation of this agreement shall be of any force or effect unless **evidenced in writing**"
- Impala Distributors cancelled the contract orally and Taunus agreed to such cancellation (orally) however when Impala Distributors later sought to rely on this cancellation, Taunus said it did not agree to such cancellation in writing
- **Court held**: If clause 9 had stood on its own it would not have prevented an oral cancellation of the contract; the oral agreement to cancel would denote a tacit agreement to scrap the requirement if writing for cancellation and hence constitute a variation of the contract. The parties could thus have informally varied the non-cancellation clause. The presence of the non-variation clause however, entrenched both itself and the non-cancellation clause and prevented oral cancellation of the contract
- **Legal principle**: The TPD **extended the *Shifren* principle to non-cancellation clauses** so that where parties agree any cancellation and/or variation of the contract should be in writing, they cannot cancel orally.

- A non-cancellation clause applies to cancellation by **mutual agreement** only and it does not affect the right to cancel for **material breach.**

RELAXING THE SHIFREN PRINCIPLE

- Although it is sound in theory, in practice it can produce injustices and hardship on strict application
- Example: where one party in good faith relies on verbal permission to act then strictly speaking constitutes breach of written contract. The original contract would remain unchanged and the party will be in breach of contract. However, when the contract is no longer suitable to the other party, that party could invoke the non-variation clause to allege breach and then cancels the contract.
- Certain doctrines may be useful to mitigate the harsh consequences that might flow from strict application of the principle

These are possibilities and have not be confirmed by case law:

1. Waiver
2. Estoppel
3. Norms of public policy (good faith)

Waiver

- ❖ A waiver is a deliberate abandonment or surrender or an existing legal right by the right holder, acting with full knowledge of that right.
- Waiver can be express or implied
- It is always a question of fact and the courts are not eager to find that a person has waived his rights
- Doctrine of waiver may be used to escape a non-variation clause if we can distinguish a tacit waiver of right from a variation of the relevant clause. It is difficult to draw distinction between these concepts however.
- The main difference between variation and waiver is that waiver relates to rights which have **already accrued** while variation relates to **future obligations** of the parties.
- ✓ Example: X rents a cottage from Y and the rent is payable on the first day of every month. In terms of the contract Y is entitled to cancel the lease if X is more than 3 days late with any payment. In April X is 5 days late because his salary was paid to him late. X and Y agree that (1) Y will not cancel the lease because of the late payment for April and (2) from May X will only have to pay on the 7th of each month.
  → (1) Waiver: Y had right to cancel the lease but waived it. (2) Variation: changed date of payment.

- No-waiver clause closes the loophole afforded by waiver: "no relaxation, indulgence or latitude which may be granted by a creditor should be construed as a waiver or abandonment of any of his rights under the contract"
- The courts give effect to no-waiver clauses but intepret them strictly.
- ➢ ***Miller v Dannecker 2001***: court held *pactum de non petendo* (agreement not to sue) did not amount to a waiver and therefore was not affected by the no-waiver clause.
- Unlike no-waiver clauses, *pactum de non petendo* does not amount to permanently abandoning a right but agreeing not to enforce that right in court (for a specific period of time)

Estoppel

- ❖ Estoppel is the creation of an incorrect impression in a party's mind and that party reasonably relies on that impression; A will be estopped from denying the correctness of the impression created
- ✓ Example: A creates the incorrect impression in B's mind and B reasonably relies on this impression to his detriment, then A cannot subsequently deny the correctness of this impression.
- In *Shifren*, Steyn CJ mentioned that estoppel may soften the Shifren principle
- ➢ ***Miller v Dannecker***: Estoppel may be used as a defence to prevent the other party from relying on the non-variation clause
- Case law indicates that estoppel will not be successful in defeating the Shifren principle because of the strict requirements for estoppel (*Brisley v Drotsky*)
- One reason it is usually unsuccessful is because it is generally not reasonable to believe that an oral variation will be binding if there is a non-variation clause in the contract.

Good Faith

- ❖ A person who **fraudulently or in bad faith** seeks to rely on a non-variation clause will be prevented from doing so on grounds of **public policy**.
- ❖ Fraud exists where a party **deliberately leads** the other party **to believe** he will not enforce the written contract so that the other party will breach the contract.
- Enforcing such clauses in these circumstances would amount to condoning the fraudulent and unconscionable conduct of the landlord.

In the absence of fraud, an aggrieved party cannot allege bad faith to escape the non-variation clause:

CASE: *Brisley v Drotsky 2002, SCA**

- **Facts**: The parties had entered into a written contract of lease in terms of a standard form contract which determined that rent was payable on the first day of each month. The contract gave the landlord right to cancel if rent was not paid on time and also contained a non-variation clause stating that all amendments to terms of the contract had to be **in writing.**
- The parties subsequently concluded an oral agreement that for the first six months the lessee would not he to pay the rent by the first of the month. Pursuant to this agreement, the lessee did not always pay on the first of the month. Five months later, contrary to the oral agreement, the landlord alleged late payment of rent and purported to cancel the lease, arguing that the oral variation of the agreement was invalid because it was not in writing.
- The lessee argued that in the circumstances it would be unreasonable, unfair and in conflict with the principles of *bona fides* if the non-variation clause was invoked.
- **Issue (1)**: Whether the Shifren principle should be retained or overruled. If retained, oral variation would be ineffective, but if it was overruled the oral variation would be a good defence against the landlord's claim.
- **Court held (1)**: Shifren principle should be retained because:
  1. There would be **adverse consequences for commercial enterprises** if the rule was changed
  2. Would cause **legal uncertainty**
  3. Would be **problematic to prove** subsequent variations
  4. In principle there is nothing wrong with entrenching clauses in a contract (Constitution)
  5. It is a **myth** that the Shifren principle favours economically stronger parties; it protects both parties
- **Issue (2)**: Could the principle of good faith be used to override the Shifren principle, hence could the non-variation clause be defeated if it would be in bad faith to enforce it.
- **Court held (2)**: Shifren principle could not be excluded simply because non-variation clauses would be unreasonable, unfair and in conflict with the principle of *bona fides*. Good faith is an **ethical value** that underlies the law of contract and informs various rules of contract law, however it is not a substantive rule of law.
- Moreover, the principle of *pacta sunt servanda* also underlies law of contract and the court held that principle prevails in this scenario. The non-variation clause therefore had to be enforced even if it entailed some bad faith.
- In considering **constitutionality**, the court held the Constitution does not provide basis for overturning the Shifren principle because the court had already taken into account the various competing interests in upholding the Shifren principle.
- **Legal principle**: Mere bad faith is insufficient to defeat a non-variation clause; the party wishing to get around the principle must prove **fraud or unconscionability.**

Balance:
good faith v pacta sunt servanda

Fraud: a party deliberately leads the other party to believe he will not enforce the written contract so that the other party will breach the contract.

Contents of Contracts

- A contract is an obligation-creating agreement and the terms of the contract determine which obligations are created
- Not all terms create obligations: some are descriptive, interpretation clauses, facilitate proof of facts and some terms qualify obligations

Kinds of Terms

Essentialia; Naturalia; Incidentalia

- ***Essentialia:*** Those terms identifying the type of contract being dealt with. The *essentialia* for a contract of sale are the price and the object. If *pretium* or *merx* are missing it is not a contract of sale
- ***Naturalia:*** Terms automatically attached to a contract by operation of the law without being specifically included by the parties. Example: warranty against latent defects
- ***Incidentalia:*** Terms covering residual matters for which parties wish to make special provision or to alter or exclude the *naturalia*

- These classifications are important for **certainty:**
- Essentialia are the minimum terms on which parties must agree before the contract can be binding
- Incidentalia are not compulsory but if parties wish to include them they must reach agreement before the contract will be binding
- If parties wish to exclude naturalia they must reach agreement on the exclusion.
- Also important for **formalities:** contract must be in writing to be valid in some cases so the *essentialia* and *incidentalia* which the parties want to included must be in writing. *Naturalia* need not be in writing

Express; Implied; Tacit terms

- **Express terms:** parties agreed on expressly, verbally or in writing
- **Implied terms:** part of the contract by operation of the law (or trade usage) if the parties did not tacitly or expressly agree on the inclusion
- **Tacit terms:** parties did not expressly agree on but which are read into the contract because of parties' actual or imputed intentions

Terms and Statements

- During the course of negotiations parties may make statements of fact or opinion to induce the other party to contract.
- These are **pre-contractual statements** and are not usually intended to form part of the contract. However, it is possible parties intended the statements to be terms of the contract in the form of warranties, conditions or assumptions
- It is important to distinguish between pre-contractual statements that form part of the terms of the contract

Incorporation and Interpretation of Terms

Two important questions must be considered:

(1) Which terms form part of the contract?

This deals with incorporation

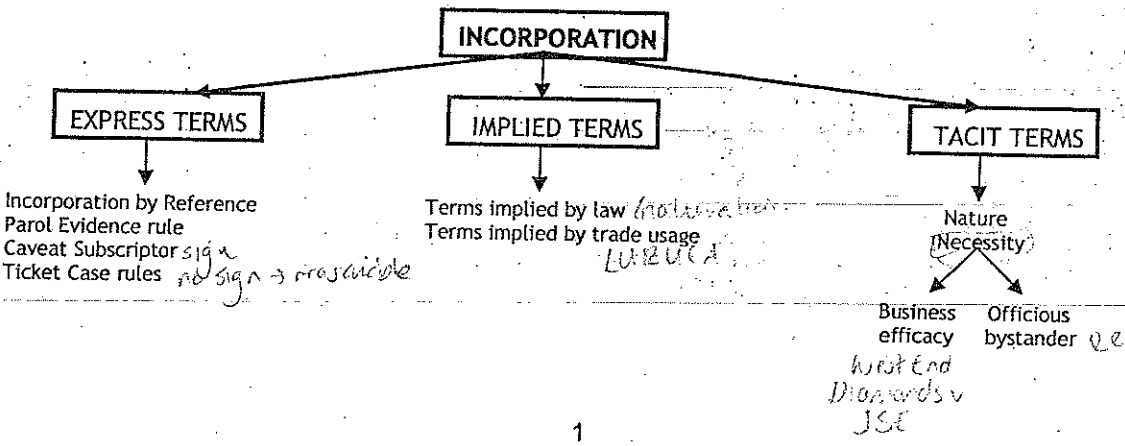
(2) What do the terms mean?

Once it has been established the terms are incorporated it must be determined what the terms mean and this is dealt with under interpretation

Note: only interpret express terms

INCORPORATION OF TERMS INTO CONTRACT

A contract may contain express, implied and tacit terms and the rules of incorporation indicate how these terms form part of a contract. There are special rules relating to each type of term:



EXPRESS TERMS

- Express terms are those terms **expressed in writing or speech** (written or verbal terms) and are explicit.
- Parties may have suggestions during negotiations for contract but not all of these suggestions become part of a contract and so rules for express terms help to determine which terms are incorporated into the contract.
  - **General rule:** only express terms that the parties intended to form part of the contract will be incorporated
- No special rules apply if a contract was concluded purely verbally.
- The party alleging the terms form part of the contract has the onus of proving it was intended to be incorporated.
- Having a written contract is advantageous as it is a form of proof and there are four rules which can be used to determine incorporation.

(1) INCORPORATION BY REFERENCE

- Terms may be written in a **separate document** and that document can be referred to.
- The terms need not be repeated in the contract as long as the other document can be identified with **sufficient certainty.**
- Example: At an auction there are specific "terms of sale" contained in an advertisement

(2) PAROL EVIDENCE RULE*

- Applies to **written contracts** regardless of whether writing was intended as a formality or merely as proof
- Parol evidence (**extrinsic evidence**) is evidence outside of the written contract itself and includes evidence of what the parties did before, during or after the conclusion of the contract.

The rule has two components:

- Integration rule - what forms part of the contract
- Interpretation rule - meaning of express terms of contract
- Integration rule: when a contract has been reduced to writing the written document is generally regarded as the **exclusive memorial** of the agreement between the parties.
- Courts will assume the parties intended the document to reflect all of the express terms of the contract
- Court will thus not consider parol evidence that differs from the written document.

CASE: *Union Government v Vianini Pipes 1941, AD*

- "when a contract has been reduced to writing the writing is, in general, regarded as the **exclusive memorial of the transaction** and...no evidence to prove its terms may be given except the document...or proof of its contents, nor may the contents of the document be contradicted, altered, added to or varied by parol evidence."

- When parties reduce the whole agreement to writing the document is the **best evidence** of that consensus and parol evidence thus is not useful and a waste of the court's time.
- The rule aims to reduce disputes about which terms form part of the contract and save time.

Exceptions

Application of the rule means external evidence is NOT allowed

(1) If the parties intended the document to be the **sole memorial** of their agreement →rule applies
The parties intended the document to be a partial record of the agreement →not apply (Extrinsic evidence may show the parties only intended to record the contract partially).
- ✓ Example: parties write down the most important details of their agreement but they intend other terms which they discussed verbally to also form part of the agreement. Parol evidence rule will not apply and a party may bring evidence to prove the verbal terms

(2) Only applies to express terms →not applicable for tacit or implied terms

(3) Evidence disputing validity of contract →not apply
(A party may always bring evidence to show the contract was invalid or void)

(4) Evidence regarding subsequent verbal variation to the contract →not apply
This is subject to the Shifren principle

APPLY
2 ° Sole record
° Rescission Condition
(Scaled Aqua v Kelly)

NOT APPLY
Partial record
Tacit or implied
Validity
Variation
Rectification
Simulated transaction
Suspensive condition

(5) Rectification of the document →not apply

If party alleges the document incorrectly reflects parties' intentions such as by omitting a term or recording it incorrectly, rule does not apply

- ✓ Example: A party may bring verbal evidence that the parties intended the contract to contain a *voetstoots* clause but that it was left out of the written document by accident

(6) Evidence that the document was a **simulated transaction** →not apply

(7) Evidence that the entire contract was subject to suspensive condition →not apply

- ➢ ***Sealed Africa v Kelly 2006***: Oral evidence that the contract was subject to a resolutive condition → rule applies. This is because such a condition by its nature contradicts the terms of the written agreement and such evidence is therefore excluded by the parol evidence rule

Evidence **may be brought** of a collateral oral agreement which induced the written contract.
The test seems to be that the oral agreement has to be a separate contract, and that it must not be inconsistent with the terms of the written contract.

Evaluation

- The rule is subject to many exceptions, some are hard to distinguish
- Rule has been called confusing and misleading
- Existence of so many exceptions undermines the purpose of the rule to reduce disputes
- Prevents the courts from finding and giving effect to true consensus of the parties, because it excludes evidence of verbal agreements.

(3) CAVEAT SUBSCRIPTOR

- ❖ "Beware she who signs a contract"
- ❖ The document containing the contractual terms was **signed**
- ❖ General rule: party who signed the contract is **bound to all terms contained** in the document even if he/she did not read them or intend to be bound.
- This is an exception to the principle that parties must reach subjective consensus on the terms of a contract.

(4) TICKET CASE

- ❖ The document containing contractual terms was **not signed** by the party
- ❖ The rules provide that a party **will be bound to the terms** contained in the document if he/she was willing to be bound or if the other party took **reasonable steps** to bring those terms to his attention.
- The name is derived from the fact that such terms are usually printed on the back of tickets or on signs

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TACIT TERMS*

Nature

- Tacit terms are read into a contract to fill gaps that the parties did not expressly agree on. They can exist in two forms:
- ❖ **Unexpressed terms:** Terms both the parties intended to form part of the contract but which they did not express. Terms are normally so obvious the parties did not think it necessary to express them
- ❖ **Imputed terms:** Terms that the parties did not think about but if they had thought about the terms they would have agreed upon them. They are read in because of the parties' hypothetical intention.

Test: Necessary Implication

NECESSITY Technipak Sales

- The key is **necessity**
- To decide whether a term is a necessary implication of the contracts the courts use a two-pronged test:

(1)

Business Efficacy

- Is the term necessary to give business efficacy to the contract? business efficacy ⇒ commercially viable
- Will the contract be commercially viable without the term?
- If not, then the term will be incorporated into the contract

CASE: *West End Diamonds v Johannesburg Stock Exchange 1946, AD*

- ➢ Facts: W Co entered into a contract with the JSE to list their shares on the Stock Exchange. However thereafter W Co went bankrupt and was liquidated. The JSE then removed W Co from the list of

Tacit terms are read into a contract to fill gaps parties did not agree on
Unexpressed - parties intended but did not express, so obvious
Imputed - parties did not think about, but had they they would have agreed.

companies on the Stock Exchange and W Co argued that the JSE had no right to do so and had committed breach of contract.

- **Court held**: The contract was subject to a tacit term that the JSE could remove W from the listing if it was liquidated. The term was **necessary to give the contract business efficacy** as JSE could not list an insolvent company.

(2) **Officious Bystander Test**

- Officious bystander is a busybody, someone who gives advice even if he has not been asked
- What would have happened if such an officious bystander was present while the parties were negotiating the terms of the contract if he/she had asked them whether the wished to include the tacit term?
- If they would have agreed on the term, it will be incorporated

CASE: Reigate v Union Manufacturing 1918, KB

- "A term can only be implied...if it is such a term that it can be confidently said if at the time the contract was being negotiated someone had said to the parties: 'what will happen in such a case?' they would have both replied: 'of course and so will happen, we did not trouble to say that, it is too clear"

In applying these tests the courts take into account other factors:

- Other express terms of the contract
- Surrounding circumstances
- Special knowledge by the parties.

Knowledge Express Surrounding circs

- IMPORTANT: The courts do **not easily read tacit terms into the contract;** it is not enough that a term is reasonable, or convenient.
- The test is on **necessity**
- It is not whether two reasonable parties would have agreed on the term but whether the particular parties would have agreed (subjective test)

CASE: Wilkins v Voges 1994, AD*

- **Facts**: V bought a piece of land from W and W knew that V intended to develop the land as a township. However, V did not know that the local municipality wanted to build a road thought the land which would prevent him from developing it as a township. W knew about the municipality's plans but said nothing about them. V alleged that the contract contained a tacit term that the seller warranteed/guaranteed that no obstacle existed which might delay, interfere with or limit V from developing the land as a township. The court found in favour of W, that there was no tacit term.
- **Court held**: The tacit term that V proposed was not readily reconcilable with the agreement because the agreement placed no such obligation on W, there was no incentive for W to agree to that obligation, there was fundamental inconsistency about seeking to rely on an imputed tacit term because this would arise when both parties would have regulated the term if they had thought about it yet at the time he the respondent must have been aware of the development. Even if W had been aware of obstacles it could not be an imputed tacit term because that requires that it is read into the contract if both parties overlooked it (but he had knowledge) and it was inconceivable that he would have agreed to such warranty considering he had knowledge of the obstacles. Finally, a term so obvious to the parties as to occur as a matter of course would most likely be uncomplicated and this was not, and since it was a written agreement the **courts are slow to import tacit terms into contracts and not a single compelling reason had been given to convince the court to do so.**
- **Legal principle**:

IMPLIED TERMS

Terms implied by the law

- Implied terms are incorporated into a contract because of the operation of a legal rule
- They automatically form part of a contract even if the parties did not agree to them
- If parties expressly agree to exclude them then they will not be included
- Example: warranty against latent defects in a contract of sale
- The legal rule imposing the implied term may come from common law, statute or trade usage

naturalia

Terms implied by trade usage

- Trade usage refers to an established practice in a certain trade or business

- Terms are implied by trade usage when a particular practice in trade is so common that people involved in that trade will assume that practice is a term of the contract.

Requirements - practice must be:

1. Long-established
2. Reasonable
3. Uniformly observed
4. Certain
5. Universal (well-known)
6. All the requirements must be met

LURUCA

Long-established Universal Reasonable Uniform Certain All requirements met

CASE: *Bertelsmann v Per 1996, TPD*

- **Facts:** B was an advocate who had been briefed by an attorney P, to represent a client in the High Court. The attorney was merely acting as an agent for the client and the contract for the advocates services was thus formed between the advocate and the client not between the advocate and the attorney. Due to privity of contract the advocate could only claim payment of his services from the client. Nevertheless it has become common practice in the legal profession that the briefing attorney will pay the advocate and then claim the money back from the client
- B and P did not discuss this issued when B was briefed by P. After B had completed the case he sued P for payment and alleged that the practice of attorneys paying advocates had become a trade usage so it was an implied term that P would pay him.
- **Court held:** The matter had to be referred for evidence. The court could not find whether the practice had become a trade usage unless there was evidence to show that it had become so wide-spread it was universal and uniformly-observed.

INTERPRETATION OF EXPRESS TERMS*

- Interpretation is concerned with how the courts find meaning of express terms
- Interpretation is not applicable for implied or tacit terms
- The process of interpretation is aimed at finding the common evidence of the parties, however since parties' own evidence is unreliable interpretation must be dealt with using objective factors.
- Courts use a staged approach to interpretation (Delmas Milling approach):

First stage - linguistic treatment (written or verbal terms of the contract)
Second stage - surrounding circumstances
Third stage - canons of construction

- The general approach to interpretation is closely allied to the parol evidence rule which applies to written contracts and has two components: integration and interpretation
- In interpretation, the court may only look at the document to ascertain the meaning and this rule has exceptions
- If the meaning of the contract is unclear after the court has examine the document the courts may hear oral evidence as to the meaning.
- Courts will not look at all available evidence in the first stage of interpretation. Instead they try to determine meaning of terms by looking at the contract itself.
- The other stages are only considered if the meaning of the contract is still clear and unambiguous

CASE: *In re Soper's Estate 1935*

- **Facts:** Ira Soper was married to Adeline but wanted to start a new life so he pretended to commit suicide and moved to a different town where he assumed a new name (John Young) and 'married' Gertrude who was unaware of his previous life. He also formed a business partnership with X who was also unaware of his background. One of the terms of the partnership contract was that if one of the partners died the other partner had to pay the proceeds of an insurance policy to the deceased's partner's wife.
- Ira committed suicide for real and Adeline read about the suicide in the newspaper and realized that the first suicide was fake and so she was still married to Ira. She claimed the proceeds of he insurance policy.
- **Issue:** Did "wife" refer to Adeline or Gertrude (wife at time partnership was concluded)
- **Court held:** The first stage of interpretation only looked at the contract itself and the words used were clear and unambiguous: the money had to go to Ira's "wife", meaning legal wife, so Adeline could claim. Surrounding circumstances were not considered as solution was found in the first stage.

Delmas Milling approach

STAGE ONE: INTENTION AS EXPRESSED IN CONTRACT*

- "Linguistic treatment"
- Consider words (written or verbal) used by parties in contracting.

General rules:

1. Interpret words according to their **ordinary grammatical meaning (dictionary meaning)** but the court may deviate from that meaning if it would lead to results which are inconsistent with the rest of the contract
2. Consider meaning of the **word or phrase in the context of the contract** as a whole.
   - The court will look at background evidence or factual matrix of the contract. The precise meaning of these phrases is unclear however it is clear that evidence of an identificatory nature to identify persons and objects referred to, are allowed.

CASE: *Pritchard Properties v Koulis 1986, AD*

"Latter" was crossed out on their printed contract

- Facts: K leased premises from P in terms of a long-term lease. The contract provided that the lessor (P) could terminate the lease with one month's notice *"if the lessee fails to pay the rent...promptly on the due date, or if the lessee contravenes...any...of the other terms of the lease and fails to remedy such latter breach within seven days after the receipt of written notice calling upon him to do so"*
- K failed to pay rent on time so P terminated the lease with one month's notice.
- Issue: Did P first have to give K 7 days written notice to remedy the breach in terms of the clause?
- P argued that the clause should be subdivided as follows:
  - "If the lessee fails to pay the rent...promptly on the due date;"
  - Or if the lessee contravenes ...any...of the other terms of the lease and fails to remedy such **latter** breach within 7 days after the receipt of written notice calling upon him to do..."
- Hence, P argued the written notice did not apply to failure to pay rent on time. K argued that the court should take account of the fact the word latter had been deleted
- Court held: The court did not accept the argument because (1) the clear and uncontradicted circumstances which emerged from the writing itself was that the parties' by deletion of the word and their initialing of it, indicated **unequivocally** that the deleted word was to form no part of the contract and to draw further inference from the word would be erroneous (incorrect). (2) *The court could only consider evidence of surrounding circumstances when the clause was ambiguous or could not be construed*: clause 4 was unambiguous, certain and reasonably capable of interpretatin and could be construed without seeking aid from surrounding circumstances outside the written contract and without relying on inferences to be drawn from the fact of deletion of "latter"
- Legal principle: Must give effect to the written contract and hence inquire under stage 1 (linguistic treatment) first.

- Some cases have held that background evidence includes evidence of the nature and purpose of the contract and its genesis (events leading to it's formation)

CASE: *Botha v Venter 1999, OPD* – look at context / purpose of contract & words

- Facts: B bought a pump engine from V and the contract stipulated that the engine was to be 'in working order'. The engine worked for 6 hours and then broke down. The question was what the phrase 'in working order' meant: V argued it meant the engine had to work at the time of delivery and that he had not breached the contract.
- Court held: In order to determine the meaning of the phrase, the court looked at the purpose of the contract. V knew that B had bought the engine to pump water from a borehole to 3 dams and that it would take approximately 36 hours to fill the dams. The phrase 'in working order' therefore mean that the engine had to be capable of working for that amount of time. V therefore breached the contract.

- If clear meaning can be found from this stage that meaning will be given to the contract. It is irrelevant which party the meaning favours.
- Only proceed to stage two if the contract/clause is still unambiguous and unclear after linguistic treatment

STAGE TWO: SURROUNDING CIRCUMSTANCES

- The concept of surrounding evidence is much wider than background evidence as is used in stage one.
- Includes evidence of matters probably present to the minds of the parties when they contracted as well as the conduct of the parties after conclusion.

linguistic treatment (considering word & context) not sufficient as still ambiguous → stage TWO

CASE: *Van der Westhuizen v Arnold 2002, SCA*

- **Facts:** A bought a car from V and they agreed on a price, and because the vehicle was in poor condition they discussed the issue of road-worthiness. They then entered into a written contract that the car was sold "voetstoots" and that no warranty whatsoever has been given or is given to the buyer or seller or his agents. Four months later the true owner of the car (a bank) claimed the car from A based on the implied warranty against eviction (part of the naturalia of a contract of sale)
- **Issue:** Whether the phrase "no warranty whatsoever has been given or is given to the buyer by the seller excluded the implied warranty against eviction – did it exclude the implied term (naturalia)
- **Court held:** The contract was ambiguous so surrounding circumstances had to be considered. It includes evidence of matters that the **parties probably had in mind when they contracted.** The parties had only been concerned about the physical condition of the car and had never thought about the possibility that the buyer might be evicted.

- Evidence about what the parties said during negotiations is only allowed as a **last resort** if consideration of the factors set out above does not lead to a clear conclusion on the meaning. "stage 4"

THIRD STAGE: CANONS OF CONSTRUCTION

- If a clear meaning for the term cannot be found from surrounding circumstances the court will apply certain rules

Equitable construction*

- Court finds the fairest interpretation of the term so that one party is not unreasonably advantaged over the other
- Adopt interpretation which leads to least convenience

Construction favouring validity

- If a phrase is capable of two meanings, one of which leads to invalidity of the contract, the meaning making the contract valid will be used

Eiusdem generis*

- "Of the same kind"
- Find the meaning of general terms that are used together with the words of a specific nature.
- Court will limit the wide ambit of the general would to matters similar to the things covered by more specific phrases

Change of language

- If parties worded one clause in a particular way and they word a similar clause differently, the court assumes change of wording means the clauses should be interpreted differently.

Contra proferentem*

- Use as last resort
- A term will be interpreted against the party who was responsible for the wording of the clause
- Reasoning is that the drafter should have made sure the clause was clear and unambiguous
- If it is not clear which party chose the wording, the clause will be interpreted in favour of the debtor for that performance

RECONSIDERATION OF THE STAGED APPROACH

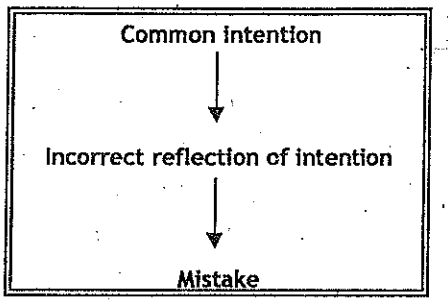
- Has been criticized because the dividing line of interpretation between the stages of interpretation is not clear, such as distinction between background evidence (stage one) and surrounding circumstances (stage two):
- ***Delmas Milling v Du Plessis*** - court held evidence of matters probably present to the minds of the parties were part of surrounding circumstances
- ***Van der Westhuizen v Arnold*** - court held it was part of background evidence

- Courts do not keep to their own rules, such as by skipping to stage three instead of starting with stage one.
- Staged approach prevents courts from finding the true intention of the parties.

RECTIFICATION OF CONTRACTS*

- Rectification occurs when a written contract which incorrectly reflects the parties' common intention is rectified to reflect the parties' consensus.
- Based on the idea that courts will enforce the parties' subjective agreement and not declared agreement (will theory v declaration theory)

- Rectification does not change a contract but the actual document
- In order to get a document rectified a party **must prove:**
  1) The **common intention** of the parties
  2) The document **incorrectly reflects the intention** of the parties
  3) The incorrect document was due to a **mistake** by one of the parties
     - Some argue that mistake is an unnecessary requirement and rectification should be possible whenever the document does not correctly reflect the intention of the parties.



CASE: *SA Breweries v Ribeiro 2000, WLD*

- R signed a document acknowledging that he owed money to SAB. Later he alleged the document was incorrect and he did not personally owe money but the company.
- The court refused to rectify the document since R could not give any explanation why he signed the document if it was incorrect.

- Documents may even be rectified if it would lead to invalidity of contract:

CASE: *Akasia Road Surfacing v Shoredits Holdings 2002, SCA*

- The court gave the example: A and B agree A will sell an unspecified portion of his farm to B, but the written document incorrectly states that A will sell his hotel to B. The true agreement is void for vagueness however if the court refuses to rectify the document it would result in enforcement of an unintended agreement. The court will thus rectify the document which will be void for vagueness.

or it would lead to unfair results

CONTRACTS SUBJECT TO PRESCRIBED FORMALITIES

- Can a contract subject to statutory formality be rectified? ie. Land
- Argument for rectification: it would be unfair to enforce a document that neither party intended
- Argument against rectification: it would undermine the purpose of statutory formalities (eliminate disputes and uncertainty)
- Courts have chosen a compromise:

The document can be rectified if it appears valid

- Court looks at the written document and asks whether it appears valid *prima facie* without having regard to evidence. (material terms present?)
- Court will not take into account which terms the parties intended to include in the contract; simply look at the document and ask whether it looks valid (if it contains all material terms)

Document cannot be rectified if it appears invalid essential term missing

- Document cannot be rectified if an essential term is missing

CASE: *Weinerlein v Goch Buildings 1925, AD*

Rectification allowed - certain

- **Facts**: The parties entered into a contract for sale of a piece of land, describing it as "stand nr 589". However, this was incorrect as the parties intended to buy and sell stand 589 and 587.
- **Court held**: the document could be rectified since it appeared valid on the face of it (contained description of land being sold)

✓ Rectified

CASE: *Magwaza v Heenan 1979, AD*

Rectification not granted - uncertain

- **Facts**: This case also dealt with sale of land? the clause describing the property referred to a map that indicated the extent and boundaries of the land, however they did not attach the map.
- **Court held**: The document could not be rectified because the document did not comply with formalities for sale of land because the land was not identified.

X not rectified because not valid (not certain)

Johnston v Leal

- On a printed contract, clause 11 related to the suspensive condition whereby the purchaser had to raise up a loan but the amount and date by which it had to be done were left blank.
- This could not be rectified even if the parties reached agreement on inclusion and forgot to fill it in because this is subject to statutory formalities as it is for the sale of land and it does not appear to be valid on the face of it because the certain material terms were not stated.

RELATIONSHIP BETWEEN INCORPORATION, INTERPRETATION AND RECTIFICATION

If a dispute arises as to contents of an agreement, it is possible that more than one set of rules may be involved

Courts approach such problems in the following way:

1) Determine the **express terms** of the contract using rules relating to **incorporation of express terms**
2) Determine the meaning of the terms by **interpretation of express terms**
3) Ask whether the parties intended the disputed term to form part of the contract but omitted it from the document by mistake. If so, the document can be rectified to insert the term

SPECIAL TERMS

EXCLUSION CLAUSES*

- Exclusion clauses are terms which limit or exclude the liability that a party would normally have had in law.

The parties could exclude or alter liability:

1. Imposed by a term implied by law (*naturalia*)
2. Breach of contract
3. Any misrepresentation made during the course of negotiations
4. Delictual damages and losses

Example - Exclusion Clause

The visitor's parking permits issued at the University contain the following clause: "The University accepts no liability whatsoever for damage to, loss from or theft of the vehicles, their attachments or contents from whatever cause arising. Vehicles are driven and parked on University property at the owner's risk"

Must first determine if an exclusion clause has been INCORPORATED into a contract

Incorporation

- The onus of proving whether an exclusion clause has been incorporated is on the person wishing to rely on it.
- If the document containing the clause was signed →caveat subscriptor
- If the clause was printed on a ticket or a sign and reasonable steps were taken to bring this to the attention of the other party → ticket case rules
- If document containing the clause is referred to →incorporation by reference.

CASE: *Afrox Healthcare v Strydom 2002, SCA*

- Strydom argued that he did not know there was an exclusion clause and that the administrative clerk had a legal duty to point it out to him.
- The court found that the hospital could rely on the exclusion clause and they were not liable. The court relied on the fact that the exclusion clause was expected and the administration clear did not have a legal duty to point out the exclusion clause.

ESCAPING EXCLUSION CLAUSES

- Exclusion clauses exist for protection of one party however in some instances they lead to exploitation, especially where there is little negotiating power.
- The courts strike down or try to mitigate the effect of such clauses

Two main ways of limiting the effect:

1) Striking down on the basis of invalidity
2) Mitigating the effect of the clause by restrictive interpretation.

(1) INVALIDITY

- An exclusion clause may be invalid for any reasons affecting validity of contract
- It the clause is invalid it can be severed however if the contract is not severable the contract will fail.
- It may be invalid because of:

1. Lack of certainty
2. Failure to comply with formalities
3. Impossibility
4. Lack of agreement
5. Illegality

Lack of consensus

- Parties must meet subjective agreement on all the terms of the contract; if one is unwilling or unaware to the exclusion clause, he should not be bound to it
- This is qualified by the rules relating to mistake: the clause may still be biding despite the absence of subjective consensus is party reasonably believed that the other party consented to the clause
- A party wishing to escape an exclusion clause on the basis of lack of agreement will have to prove there was no actual consensus on the clause and in addition that the other party did not reasonably believed there was such consensus.
- Consensus obtained in an improper manner: duress, undue influence, misrepresentation - a party may set aside the contract and invalidate the exclusion clause.

COMMON LAW ILLEGALITY

Excluding liability for fraud

- ❖ **No (invalid and unenforceable)**
- It is contrary to public policy to exclude liability for fraud. Insofar as an exclusion clause purports to exclude liability for fraud committed by a party the clause will be invalid and unenforceable. (***Wells v SA Alumenite***)
- If the clause also excludes liability for non-fraudulent conduct the part excluding fraud may be severed

Excluding liability for intentional misconduct (*dolus*)

- ❖ **No (invalid and unenforceable)**
- It is against public policy to exclude liability for damage caused intentionally and intentional breach of contract (***Government of RSA v Fibre Spinners & Weavers***)

Excluding liability for the intentional wrongdoing of an employee

- ❖ **Yes, as long as the employer is not benefiting**
- Vicarious liability means that an employer is liable for his employee's wrongdoing while in the course and scope of the employment.
- If liability in this instance could be excluded it would condone intentional misconduct, however the employer cannot be responsible for the intentional wrongdoing of his employee and he should be allowed to escape liability.
- If the employer benefited from the intentional misconduct of his employee then the clause will be invalid and unenforceable but if he did not the clause will be upheld.

CASE: *FNB v Rosenblum 2001, SCA*

- ➢ Facts: R rented a safe deposit box from FNB in which certain valuables were placed but the contents were stolen. R sued FNB for the loss caused by this theft, alleging the employees of FNB had committed the theft themselves or caused the theft by virtue of their negligence. FNB invoked the following clause in the contract:
- ➢ "The bank hereby notifies all its customers that while it will exercise every reasonable care, it is not liable for any loss or damage caused to any article lodged with it for safe custody whether by theft, rain, flow of storm water, wind, hail, lighting, fire, explosion, action of the elements or as a result of any clause whatsoever, including war or riot damage and whether the loss or damage is due to the bank's negligence or not"
- ➢ Issue: Can an employer exclude vicarious liability for the willful misconduct or theft of its employees?
- ➢ Court held: A clause that excludes vicarious liability of an employer for theft or other willful misconduct committed by its employees is not in itself contrary to public policy. However such a clause would be against public policy where the employer benefits from the employee's wrongdoing. FNB did not benefit so the clause was valid.

Excluding liability for negligence and gross negligence

- ❖ **Yes as long as it is clear and unambiguous**
- It is not against public policy to exclude liability for negligence and gross negligence as long as it is done clearly and unambiguously (***Afrox Healthcare v Strydom***)

Excluding liability for breach of contract

- ❖ **Yes**
- One can validly exclude liability for breach even if it is fundamental breach of contract
- However, there is a presumption that the parties did not intend to exclude liability in such circumstances; the wording of the exclusion clause must thus be clear and unambiguous.

CASE: *Elgin Brown v Hamer Industrial Machinery 1993, AD*

- ➢ Facts: There was a contract between EB and IM whereby EB would overhaul two fishing trawlers including their engines. The engines were also required to be thoroughly tested before delivery, however EB failed to overhaul and test the engines and thus committed breach of contract. The contract contain an exclusion clause limiting liability for breach of contract
- ➢ Issue: Can an exclusion clause validly exclude liability for breach of contract?
- ➢ Court held: an exclusion clause (provided it is clear and unambiguous) can exclude liability for breach of contract even if it is a fundamental breach (going to the root of the contract)

STATUTORY ILLEGALITY

- Statute may also regulate exclusion clauses
- Example: National Credit Act prohibits certain types of exclusions in the context of credit agreements: may not exclude any consumer rights or limit liability in terms of implied warranties.

CASE: *Johannesburg Country Club v Stott 2004, SCA*

- ➢ Facts: A man who was a member of the club had signed a contract exempting the club from any liability: "The Club shall in no circumstances whatsoever be liable for any loss of or damage to the property of any member or guests brought onto the premises of the Club whether occasioned by theft or otherwise, nor shall the Club be held responsible or in any way liable for personal injury or harm however caused to members or their children or their guests on the Club premises and/or grounds." The man's wife had signed the same contract. However, the man was hit by lightning and killed while playing golf at the club and the wife instituted a dependant's action for loss of support and burial expenses against the club, but it contended they could not be liable for loss of support due to the exclusion clause
- ➢ Court held: The clause did not deal with a claim of a dependent spouse and the real inquiry was whether a member's claim for lost support was subject to the exclusion. The court considered the words "personal harm" and found that a loss of support claim did not constitute "personal" harm but rather a claim for financial loss. Further, the claim for funeral expenses also did not constitute "personal" harm and so was not covered by the exclusionary words. It would be against public policy to exclude liability for death although it did not make a decisive decision on this. Finally, "personal harm" did not exclude harm caused to the dependents, which were the deceased's children and wife.
- ➢ In light of the Constitution, note: s28 (children), s10 (dignity) and s11 (life), s26 (housing), s27 (health care, food, water)

(2) INTERPRETATION OF EXCLUSION CLAUSES

The full effect is given to an exclusion clause if it is clear and unambiguous (Durban Water Wonderland v Bothma)
If it is ambiguous it will be interpreted **restrictively** (limit the extent of the clause)

1) ***Eiusdem generis:***
   - ➢ ***Cardboard Packing Utilities v Edblo TVL***: a contract contained an exclusion clause excluding liability for: "rain, the flow of storm water, wind, hail, lightning, fire, action of the elements, any Act of God or force majeure, or as a result of any cause whatsoever". According to this, liability for fire started by an employee would not be excluded because the listed causes constitute a class of natural causes.

If there is no usage for the eiusdem generis rule then ***contra proferentem*** *will be applied:*

2) ***Contra proferentem:***

The court will interpret the contract against the party who drafted the terms because that party had the opportunity to formulate them clearly.
This occurs in two steps:

a) Court will determine which grounds of liability could possibly be covered by the exclusion clause (5 factors, natural causes, other relevant factors)

b) Court will try to interpret the clause so that it only excludes liability for some of these grounds. It is here that the court makes certain assumptions:
   i) It will not easily accept that parties intended to exclude liability for negligence
   ii) It will not easily accept that the parties intended to exclude liability for a fundamental breach of contract

If the clause is wide enough to exclude liability for negligence and/or fundamental breach as well as liability on some other ground, the court will interpret the clause so that it only covers liability for the other ground (as long as the other ground is a realistic possibility)

CASE: *Galloon v Modern Burglar Alarms 1973, CPD*

Application of the contra proferentem *approach*

- **Facts:** Galloon had contracted with MBA for the installation, monitoring and maintenance of an alarm system at his jewelry store. If the alarm went off, MBA was to be alerted at its control room and it could take necessary action. When MBA came to repair the alarm after the break in, their workers negligently failed to reactivate to alarm once the repairs were completed and as a result Galloon was burgled and lost R45000 in stolen watches and jewelry. Galloon sued MBA for negligently failing to reactivate the alarm and MBA relied on the following clause:
  - "the lessor shall not be liable for **any damage whatsoever**, whether by burglary or any other means, caused to the lessee by non-operation of the alarm for any reason, and whether the lessor was aware of such operation or not."
- **Issue:** Does the exclusion clause cover the negligence in question?
- **Legal rule**

1. Where the clause clearly and expressly exempts the person in whose favour it is made (*proferens* is MBA) from the consequence of the negligence of his employees, full effect must be given to the provisions. Example: "MBA will not be liable for any losses incurred by Galloon due to the negligence of MBA's employees". If one clause does not expressly refer to negligence, go to step 2
2. Where the clause does not expressly refer to negligence, the court must determine whether the words used are wide enough in their ordinary meaning to cover negligence on the part of MBA employees. Example: "MBA will not be liable for any losses caused by his employees". *If the words are wide enough, go to step 3*
3. If the words are wide enough to cover liability for negligence the court must then consider whether negligence is the only basis of liability which is contemplated by the exclusion clause. If liability may be based on some other ground the clause is ***interpreted against the proferens*** so that it only excludes liability for the other ground (must not be fanciful or remote)

- **Court held:** the exclusion clause was framed in general terms and did not expressly exclude negligence of the defendant (step 1). Although the words may have been wide enough to cover negligence (step 2) it was not clear and unambiguous. The court held that the clause had to be interpreted *contra proferentem* (step 3). It then considered on what grounds MBA could have been held liable for damages to G if there had been no exclusion clause in the contract. Two possibilities existed:
  - MBA would have been liable for damages if the non-operation of the alarm was due to their negligent repair or installation of the alarm
  - MBA would have been liable if they failed to repair the alarm system within 24 hours after G notified them of the defects in the alarm, even if this was not due to MBA's negligence. MBA could therefore be liable for non-negligent breach of contract
- Because some ground for liability other than negligence did exist, namely liability for non-negligent breach of contract, the court held that **negligence was not covered by the exclusion clause** and the plaintiff could claim

CASE: *Durban's Water Wonderland v Botha 1999, SCA* – courts give full effect to excl clause if clear & unambiguous

- **Facts:** The plaintiff took her daughter to the theme park but on a particular ride the hydraulics were not working and so the woman and her daughter were flung from the ride and landed in a flower bed. She sued for hospital expenses and pain and suffering, however the park brought up the exclusion clause which stated (loosely:) management is unable to accept liability or responsibility for damage or injury arising from any nature or negligence...". Negligence was specified in the disclaimer. However Mrs Botha argued on a basis of incorporation in that there was no contract because she did not see the notice with the exclusion/disclaimer.
- How is one bound to a ticket case contract?
- **Court held:** regarding ticket cases, naturally nothing is signed so caveat subscriptor cannot be applied, but if the party relying on the exclusion clause took **reasonable measures** to ensure the notice was **visible to all customers** it is taken as having been seen by the other party. This requires an objective enquiry into what "reasonable measures" are:
- In this case the signs were placed at eye level on the windows by the counters where people have to pay entrance fee and they words were painted white on glass; each letter was about 2cm high and

the board was 650x800, and finally the exclusion of "negligence" was clear and expressed. Considering this, the park was found to have taken reasonable measures to bring it to her attention and there could be no liability.

CONDITIONS

Nature of conditions

- A condition is a term that makes the existence of a contractual obligation dependent on whether an **uncertain future event** will or will not occur.
- Therefore: (1) future event; (2) uncertain
- Time clause: relates to future event which is certain (certain to occur but uncertain when)
- Supposition: relates to **past or present** event that parties are uncertain of.
- ✓ Example: A will pay B for his car if it is a 1945 Ford Model T → parties are uncertain about the model at the time, but if it is that model the obligation to pay for it will come into existence.

Classification of Conditions

Positive and Negative

- ❖ **Positive condition:** obligation arises if future event **does happen**
- ❖ **Negative condition:** obligation arises if future event **does not happen**
- ❖ This distinction is important when it becomes clear the obligation will not be fulfilled (p 168 Comrades)

Potestative, Casual, Mixed

- ❖ **Potestative condition:** fulfillment of the condition depends entirely on the will and corresponding act of one of the parties. This is not easily distinguished from a terms of the contract
- ✓ Example: A promises to pay B R10 000 is B runs the Comrades but fulfillment of this depends entirely on B.
- ❖ **Casual condition:** fulfillment of the condition is unrelated to the will of the parties. It depends on the will of a **third party or even an outside event**
- ✓ Example: A will give B R100 if it snows in Johannesburg this year
- ❖ **Mixed condition:** fulfillment of the condition is partly within one party's power and partly dependent on the will of a third party.
- ✓ Example: A will give B R100 if he marries his sister →B can propose to A's sister but fulfillment of the condition depends on the sister's decision to marry B or not.

Suspensive and Resolutive*

Distinction between the two relates to the effect of the condition on the obligation that it qualifies

- ❖ **Suspensive condition:** suspends or postpones the operation of the contract until the condition is fulfilled or it is certain that it has failed.
- ✓ Example: A will pay B R100 to climb Table Mountain. The obligation to pay is suspended until B climbs the mountain and once B has done it the obligation becomes unconditional and A must pay. However if it becomes clear that B will never climb it the obligation falls away.
- ❖ **Resolutive condition:** a fully operational contract comes into force at the time of conclusion of the contract but it may be terminated (resolved) if condition is fulfilled.
- ✓ Example: A will pay B R100 monthly until B graduates and gets a job. When B fulfills the condition the obligation of monthly payments terminates, however if it is clear B will not graduate and get a job the condition falls away and the obligation continues indefinitely.

Legal Effects of Conditions

RESOLUTIVE CONDITION (obligation →condition)

- **Creates a valid contract**
- When contract is concluded the obligations arise immediately
- On fulfillment of the condition the obligation is terminated, this can be done retroactively or from the time the condition if fulfilled
- If the resolutive condition fails (not fulfilled) the contract continues to operate unconditionally and there is no longer any uncertainty that the contract will end.

SUSPENSIVE CONDITION (condition →obligation)

- **Does not create contractual rights and duties**
- On fulfillment of the condition the obligation becomes unconditional and fully operational. Fulfillment of the condition does not create a new obligation.

- Where it becomes certain the suspensive condition will not materialize and fails (either within the stipulated time or reasonable period) the contract/onligation qualified by the condition fails and the contract becomes void *ab initio* (***Ming-Chieh Shen v Meyer***)

What is the status of a contract before fulfillment of the condition?

- There is a valid contract the conclusion of the contract but operation of the contract is simply postponed until the fulfillment of the condition
- Position is different for contracts of sale which are subject to suspensive conditions →Although there is some kind of contractual relationship between the parties before the condition is fulfilled it is not a contract of sale yet (***Corandimus v Badat***)

Distinction between terms and conditions

- It is important to distinguish a condition from a normal term:
- Term creates obligations (imposes duty on a party to perform in future). If party fails to perform it is thus a breach
- Conditions do not create contractual rights and duties; serves only to qualify the operation of a obligation with reference to occurrence or non-occurrence of a future event.
- Non-fulfillment of a condition does not constitute breach and a party therefore cannot be forced to comply with a condition nor can damages be claimed from him if the conditions are not fulfilled.
- If it becomes clear that such condition cannot be fulfilled the contract falls away.

CASE: *Briscoe v Deans*

- A contract for the sale of a house contained the term: "This sale is subject to the condition that the roof of the house is leak-free". The roof of the house leaked.
- The question was whether this was a condition or a term imposing an obligation. If it was a **condition**, the sale would fall away since the condition had not been fulfilled. If it was a **term** the seller would have a duty to ensure the roof was leak-free and could then be forced to repair the roof to comply with the contract.
- **Court held**: This was a question of interpretation and merely calling a term a condition does not make it a condition. The question of whether it is a condition depends on the intentions of the parties. On the facts, the parties intended the term to be a true condition and not a term imposing obligations. The sale thus fell away.

Waiver of conditions for sole benefit of one party

- Sometimes a party wishes to enforce a contract despite non-fulfillment of a condition.
- Can he waive the condition unilaterally (without consent of other party) so the contract becomes unconditional
- Example: A contract for the sale of a house is dependent on the condition that the buyer gets a loan from the bank to pay the purchase price. The bank refuses to grant the loan however the buyer wishes to continue with the sale, since his father promises to help with the payment.
  - The suspensive condition has not been fulfilled and so the contract of sale will fall away and the buyer will not be entitled to transfer of the house. However, if it is possible for him to waive the condition the sale will become unconditional and he will be entitled to enforce it despite the fact the bank refused to grant him the loan.
- **A condition may be waived unilaterally by a party, provided the condition was inserted *solely for the party's benefit***

CASE: *Ming-Chieh Shen v Meyer 1992*

- A condition that is exclusively for the benefit of one party can be waived by such party; the condition will fall away and the obligation becomes unconditional
- One can only waive such condition before it lapses; once the condition lapses the contract falls away and one would need a new contract
- Other party must be notified of the waiver within the time stipulated for fulfillment of the condition. If no time is stipulated the notice of waiver must be given within reasonable time

DOCTRINE OF FICTIONAL FULFILLMENT CONDITIONS.

- In some circumstances a condition will be regarded as fulfilled in law even though it is in fact unfulfilled
- Where one party frustrates the fulfillment of the condition it is deemed to be fulfilled because it would be unfair to allow a party to escape contractual liability by his own **deliberate actions**
- This doctrine usually finds application in the context of suspensive conditions but may also apply to resolutive conditions

Requirements

Scott v Poupard 1971

1. One party must deliberately prevent fulfillment of the condition
2. Breach of the duty on the party not to prevent fulfillment
3. Actions of such party must cause the non-fulfillment of the condition

SUPPOSITIONS

- Where parties enter into a contract on the basis of mistaken motive they cannot avoid the contract on the basis of doctrine of mistake
- Parties can however put a term in the contract which elevates the reason for entering the contract to a term of a contract itself. This term is called a **supposition** (parties unaware of a fact of the term)
- Supposition contains: subjective uncertainty (parties unsure about state of affairs) AND it must relate to something in the past or present.
- Example: A is a collector of classic cars and wants to buy B's Mercedes only if it is a 1969 model. B is unsure of the year of model and is not prepared to guarantee that it is a 1969 model.
  → If it is a 1969 model, there is a **valid** contract of sale
  → If it is not a 1969 model the contract will be **void**

MODUS

- A modus is a term which qualifies the creditor's right to retain the performance rendered by the debtor; the creditor may have to give something, do something or refrain from doing something.
- Therefore, a modus explains how to use the performance (ie. Money)
- Example: A gives B R100 000 but he may only use the money to buy a car
- Example 2: A donates money to the Department of Health on condition it is used to build a hospital
- Contract is valid and fully operational
- Failure to comply with a modus constitutes breach of contract and normal remedies for breach will flow

TIME CLAUSE (DIES)

- A time clause is a term which qualifies the operation of a contract by making it dependent on a future event which is **certain to occur** although it may be **uncertain** as to **when it will occur.**
- Example: I will give you R10 000 when Sean Connery dies
- Two types of time clauses:

Resolutive

- Contract is full operational now but will terminate on a certain date or when a certain future event occurs
- Example: A five year contract of lease
- Effect of fulfillment of a resolutive time clause: contract comes to an end. This does not operate retroactively (obligations due before termination) but the parties can agree to the contrary.

Suspensive

- Operation of the contract is suspended/postponed until that future time or event occurs.
- Example: When the contracts to print soccer World Cup T-shirts are allocated, I will form a company with you and we will tender to print the T-shirts.
- Effect of suspensive time clauses: depends on whether the parties intended the clause to be in favour of the **debtor (*pro debitore*)** or in favour of the **creditor (*pro creditore*)**
- If suspensive time clause *pro debitore*: enforceability of the debtor's obligation is suspended until the time/event stipulated but the debtor may perform at any time before such time/event if he so wishes. Hence, the creditor cannot enforce performance until that date but the debtor may apply earlier
- If suspensive time clause is *pro creditore*: creditor is not compelled to accept performance at any time before such time/event if he so wishes. Hence, the creditor can claim performance from the debtor before the due date but the debtor cannot choose to perform earlier.
- If clause is in favour of both debtor and creditor, both enforcement and performance are postponed to the time/event stipulated.

WARRANTIES

- A warranty is a term whereby a party assumes contractual liability for the existence of a certain state of affairs or the occurrence of an event.
- It can relate to the past, present or a future state of affairs or event
- A party can even give a warranty that he will comply with his contractual obligations.

Examples:

- ✓ The seller of a car gives a warranty that the car is a 1996 model
- ✓ The seller of a car gives a warranty that the car's engine will not malfunction in the next three years
- ✓ The seller of a car gives a warranty that he will transfer ownership of the car to the buyer

- If the state of affairs does not exist or occur, the contract is valid and fully operational. Failure to comply with the warranty will constitute a breach of contract and normal remedies for breach apply
- A warranty imposes absolute liability on a person giving warranty and so he will be unable to escape liability on the basis of impossibility of performance or absence of fault
- Warranty must be distinguished from a condition or supposition and pre-contractual statements inducing a contract, since there are different consequences.
- Test is the **intention** of the parties

Example:

- ✓ X sells his business to Y and tells Y that the business will make a profit of at least R100 000 over the next 6 months. The statement turns out to be untrue since the business only makes a profit of R40 000 over the 6 months.
- ✓ If the statement was a warranty →X will be liable for breach of contract and will have to pay contractual damages of R60 000
- ✓ If statement was a condition → condition has not been fulfilled and contract will fall away; X will not be liable for breach of contract and will not have to pay any amount to Y as damages.
- ✓ If statement was a pre-contractual statement →it will at most amount to misrepresentation and X will not be guilty of breach but Y might have other remedies.

LEGALITY

There are causes and consequences of illegality: causes establish illegality and consequences determine what occurs after illegality has been established.

ILLEGALITY

CAUSES

Statutory
- Prohibited legislation

Common law
- Rules for specific contracts
- Offending *boni mores*
- Offending public policy

CONSEQUENCES

1) *Ex turpi causa* (enforcement)
2) *Par delictum* (other relief)
3) Severance

STATUTORY ILLEGALITY

- When contracts contravene statutes, it must be determined whether the contract is valid or invalid.
- Simply because the contract is **forbidden by statute** does **not** always **mean the contract** will be **invalid**; the legislature may have intended to make certain conduct an offence without the validity of contract being affected,
- The specific statute determines whether the contract is valid or void.
- If legislation specifically determines a contract will be invalid or "of no force or effect" then the contract is void and no further enquiry is necessary.

- Often statutes forbid particular conduct but contain no provision about validity of forbidden contracts.
- Intention of the legislature in respect of such contracts must be ascertained, hence did the legislature intend that contracts in contravention of the statute be valid or void?
- Guidelines and presumptions to aid courts in determining intention of the legislature:

(1) **Wording** of the statute - peremptory words such as "shall" and "must" indicate the legislature intended something (the contract to be void) specific.

(2) Provision framed in the **negative** - "no person shall..." indicates something is absolutely forbidden and hence any contract in that light is void.

(3) **Mischief** - see what mischief the statute is aimed at preventing. The court must judge whether upholding the contract would bring about the exact problem the legislature attempted to eradicate. If upholding the contract will bring about the mischief, the contract is invalid. If the mischief can be prevented by other means (criminal penalties), the contract will be valid.

(4) **Balance of convenience** test - look at effect of declaring the contract void. If declaring it void would lead to greater inconvenience and injustice than allowing the forbidden act itself. If that is so, the contract is valid.

(5) **Criminal sanction** - There are two opposing views:
   a. Existence of criminal sanction could indicate the legislature regarded the particular conduct in a serious light and therefore contracts based on such conduct should be invalid.
   b. Presence of a criminal sanction could mean the legislature did not intend that the courts increase the penalties already imposed by finding the contract void.

(6) **Policy** considerations

- ❖ All factors must be considered cumulatively.

CASE: *Metro Western Cape (Pty) Ltd v Ross 1986, AD*

- **Facts**: A general dealer, M, operated a business in contravention of a provincial ordinance (delegated legislation) which prohibited the carrying on of business without a license.
- **Issue**: Was the contract of sale concluded between M and a customer in the course of M's business invalid as a result of statutory provision?
- **Outcome**: The "carrying on of business" included conclusion of sales in the course of that business and the sale to a customer was therefore also illegal but this did not mean the contract of sale was invalid: the court had to interpret the ordinance to find the intention of the legislature.
- **Mischief** that the ordinance aimed at preventing: the purpose of the ordinance was to protect the public by ensuring that businesses were run by suitable persons on a suitable premises. The legislation was not aimed at regulating the relationship between trader and customer or the conclusion of contracts between them. Further, there were sufficient other penalties to ensure that traders were

Be Nice When Meeting Police Commissioners
Balance - negate wording mischief policy criminal sanctions
of convenience

licensed. It was therefore unnecessary to invalidate the contract to achieve the purpose of the ordinance.

- **Balance of convenience:** Declaring the contract invalid could cause considerable unfairness and inconvenience to members of the public who did business with an unlicensed trader. These customers would have no contractual remedies against the trader due to the *ex turpi causa* rule and the *par delictum* rule might prevent the customers from reclaiming the performances they gave to the trader which would be unfair to the customers considering they did not know whether the trader was licenced or not.
- Taking these factors into account the court held that the legislature did not intend contracts concluded by unlicenced traders to be invalid, although they were illegal. → public

CASE: *Henry v Branfield 1996 D&CLD*

- **Facts:** H had emigrated to South Africa from Zimbabwe but the Zimbabwean exchange control regulations prohibited her (H) from taking her funds out of the country. H entered into a contract with B to try and circumvent the regulations. They agreed that H would pay Z$380 000 to B's agent in Zimbabwe. B would then pay an equivalent amount of money, less 10% commission, to H in South Africa. H paid over the money to B's agent in Zimbabwe but B never got any benefit from that money as it was stolen by the agent. When B refused to pay the money owed to H, H tried to enforce the contract.
- **Issue:** Was the contract valid and enforceable?
- **Court held:** In applying the **mischief test:** if the contract would be declared valid would the mischief be perpetuated? Since the regulations aimed to prevent the sale of foreign currency in an unauthorized manner, if the contract was upheld it would perpetuate the mischief.. Therefore on this basis the contract should be invalid.
- **Balance of convenience:** if the contract was declared void, would there be injustice to innocent people? This contract involved two individuals, both of which had knowledge what they were doing was illegal and so they were equally guilty. The transaction did not involve many people such as in *Metro Western Cape v Ross* and on this ground the contract should be void because it would not cause harm to many innocent people.
- Contract between the parties was prohibited by the South African exchange control regulations, which stipulated that: "no person shall sell foreign currency (except through an authorized dealer)". Essentially, the contract was of sale of foreign currency and B was not an authorized dealer.
- **Legal principle:** Guidelines for establishing intention of the legislature must be considered.

COMMON LAW ILLEGALITY

Contracts are illegal in terms of the common law because they either offend the ***boni mores*** or are contrary to **public policy**

Boni mores refers to good moral standards, usually relating to sexual conduct, protection of families and children, honesty etc. Contracts that undermine these moral values are illegal under common law

Public policy - wide concept probably embracing *boni mores*; generally understood as referring to protection of public institutions such as the integrity of government, judicial process etc. Since Bill of Rights' inception courts have accepted public policy now also requires law to further the values an protect rights in Constitution.

Price Waterhouse Coopers v National Potato Co-op: " Since the advent of the Constitution public policy is rooted in the Constitution and the fundamental values it enshrines"

Certain contracts are illegal in or unenforceable according to established rules of common law. These are:

(1) Gambling Contracts
(2) Champerty (*pactum da quota litis*)
(3) Restraint of trade
(4) Prohibition of interests in *duplum*
(5) Clauses which oust the jurisidiction of the courts

(1) Gambling contracts - Wagers and Bets

Not void or voidable according to common law, but **"tainted with immorality"** and courts refuse to enforce gambling debts →encourage prodigality and waste resources; bad for society as a whole

Wagers and bets give rise to natural obligations rather than civil obligations; so they are unenforceable. Therefore if a person gambles for money he/she is not entitled to return of the money. There cannot be a claim in the courts

Halsey v Jones 1962, AD Lotto ticket

- **Facts:** A person bought a "sweepstakes ticket" and won a prize however the organizers or the sweepstakes lost his ticket and refused to hand him the prize. The plaintiff sued in contract and delict

- **Court held**: Allowing the plaintiff's action would amount to enforcing a gambling debt which is not allowed in our law. Delictual claim also dismissed since it was on the basis of the contractual relationship between the parties but the contract was illegal.

Taint of immorality does not only render the gambling contract unenforceable but also any other obligation which replaces the gambling debt or is closely associated with it.

Gibson v van der Walt 1952, AD Horse

- **Facts**: Plaintiff was a bookmaker and defendant owed him a large gambling debt for some time. Defendant offered to give the plaintiff a horse in settlement of his debt but when the defendant failed to deliver the horse the plaintiff sued arguing that the gambling debt had been novated and could not be enforced.
- **Court held**: A debt which is closely related to the gambling debt will also be tainted with immorality and would also not be enforced. To decide whether a debt is so closely related to a gambling debt as to be unenforceable one needs to determine whether the new debt is merely a device for enforcing the gambling debt.

Gambling debts are no longer regulated by the common law but by statute: National Gambling Act 7 of 2004. S16 distinguishes between three kinds of gambling activities:

S16:

1) Licensed gambling activities
- License is needed in terms of the Act
- Debts arising out are fully enforceable provided there is valid license

2) Unlicensed but lawful gambling activities
- Need not be licensed, but Act provides provinces may make any legislation regarding such gambling activities in a specific province. (ie. Social gambling)
- Subject to common law rules, create natural obligations

3) Unlicensed unlawful gambling activities
- Prohibited in terms of Act
- Operator required a license or informal bets
- Not enforceable at all

Gambling debts incurred by minors and "excluded" persons are not enforceable
(excluded person is registered with the Gambling Board to prevent him/her from taking part in gambling activities)

allowed because of S 34. Contingency Fees Act

Champerty (*pacta de quota litis*)

An agreement whereby a person agrees to provide funds for litigation by another person in exchanged for a share in the proceeds if the case is won
Were regarded as void and contrary to public policy because were said to encourage frivolous litigation and speculation in law suits, and it could lead to practices undermining the integrity of the judicial system (bribing witnesses, lying in court etc)
Contingency Fees Act 66 of 1997 allows SA lawyers to conclude certain forms of *pacta da quota litis* with their clients: may agree to a "no win, no fee" arrangement, or if the case is won the lawyer will charge more than the usual fee ("factoring") but subject to certain maximum limits.

CASE: *Price Waterhouse Coopers v National Potato Co-operative Ltd 2004, SCA*

- **Facts**: Co-op had lost a large amount of money due to fraud by one of its members and intended to sue their auditing firm (Price Waterhouse) because they had not properly performed the auditing functions and thus not detected the fraud. However, the Co-op did not have enough money to litigate so agreed with the Farmer's Indemnity Fund (FIF) that FIF would provide half the money in return for half the proceeds of the litigation. Price Waterhouse used the defence that that agreement constituted champerty
- **Court held**: Whether or not champertous agreements are allowed is an issue of **public policy** and nowadays public policy is determined by values of the **Constitution** and interests of the community. Rule against champerty is based on fear of undermining the judicial system but that now has sufficient safeguards against dishonest litigants. The constitutional right of access to the courts (s34) and "constitutional values underlining freedom of contract" the agreement is not contrary to public policy.

Restraints of Trade

- Often found as part of an employment contract or a sale of a business. The purpose of such a contract or clause in a contract is to restrict the right of the employee or the seller of a business to carry on a particular business, profession or occupation.
- Usually the right is only restricted to a certain area and for a limited time.
- Concluded to protect business contacts, specialized knowledge or trade secrets of the employer or buyer from being exploited by the other party.

There are competing interests regarding restraint of trade:

- Employee - the freedom of employee to practice his trade or occupation (against the restraint)
- Employer - *pacta sunt servanda* (for the restraint)

PREVIOUS RULES

- Roman-Dutch law did not contain specific rules on enforceability of restraint agreements and before 1894 South African law followed the English rules, favouring **invalidity of restraints of trade.**
- Under English law these were the rules:
  - Presumption that a restraint of trade contract is invalid (rebuttable)
  - Restraint of trade would be valid if the person seeking to enforce it could prove that the restraint was **reasonable** and **not contrary to public policy.**

CURRENT RULES

Those rules were overturned in *Magna Alloys v Ellis 1984:*

1) There is no rule in Roman-Dutch law to effect that restraints are unenforceable
2) The issue to be decided in our law the issue should be decided in accordance with rules governing **legality and public policy**
3) A fundamental rule of our law is that it is in public interest that contracts voluntarily concluded should be enforced therefore a restraint is in principle **valid**
4) Restraint will be invalid if it is against **public policy**
5) **Public policy** encompasses a number of factors: people should be able to contract freely and pursue careers; if restraint unreasonable it would likely be contrary to public policy.
6) Person arguing the restraint is *contra bonos mores* bears the onus of proving this
7) Decision whether a specific restraints contrary to public interest must have regards to the circumstances of the time at which the court is asked to enforce it
8) A court may decided to enforce those parts of the restraint which are not contrary to public policy, such as the part that relates to duration.

CASE: *Magna Alloys v Ellis*

1. Restraint of trade is **in principle valid**
2. May be **unenforceable** if against **public policy**
3. **Onus** of proof is on party wishing to escape the restraint
4. **Unreasonableness** of the restraint is just one factor to consider when deciding whether restraint is contrary to public policy
5. Court may restrict scope of a restraint of trade by **severing** the portions which are contrary to public policy and enforcing the rest.

Example: a restraint of trade prohibits X from practicing as an attorney in Johannesburg, Midrand and Tshwane for the next 10 years. →The court could find the restraint goes too far and is therefore against public policy and it may reduce the restraint to 3 years which is more reasonable and then it could be enforced.

Note: These issues relate to **enforceability** of the restraint agreement rather than its **validity** and the question is whether the enforcement is against public policy at the time when the court order is sought
It is possible that a restraint may be enforceable at one time but in a change of circumstances the restraint may become contrary to public policy and therefore unenforceable [***CPT Ltd v Argus Holdings***]

Factors to decide whether a restraint of trade is unenforceable.

CASE: *Basson v Chilwan 1993, AD*

- **Facts:** A contract restrained Basson, a person skilled in building busses, from working on any similar business in the rest of South Africa for a period of 5 years from the date on which he left the employ of Chilwan
- **Court held:** The reasonableness of otherwise of the restraint is judged on the basis of the broad **interests of the community** on one hand and the **interests of the contracting parties** on the other. As far as broad interests of the community are concerned, there are two conflicting considerations: (1)

(1) Agreements should be abided by (even if it promotes unproductivity) and (2) unproductivity should be discouraged (even if it breaks an agreement)

must be a protectable interest being served

- As for the parties concerned: a restraint is unreasonable if it prevents one party, after termination of their contractual relationship, from participating freely in the commercial and professional world without a **protectable interest** of the other part being served; the restraint must not go further than is necessary to protect this interest
- A restraint that is unreasonable between the parties will be against public policy however if the restraint is reasonable there might be other policy factors which require it be unenforceable.

Courts use the following factors:

BIND GP

(1) **Nature** of restricted activities
(2) **Geographical area** in which restriction operates
(3) **Duration** of the restraint
(4) Whether restraint protects a **legitimate interest** like trade secrets, customer base and goodwill of a business, and is this interest threatened by the other party?
(5) Differences in **bargaining power** of parties
(6) Any other **policy factor** which may be relevant

BIND GP
Bargaining power **I**nterest **N**ature **D**uration **G**eographical area **P**ublic policy

NOTE: A restraint of trade cannot be used only to reduce or exclude competition from an ex-employee and an employee cannot be prevented from using his skills and experience even if the employer spent time and money training him.

CASE: *Sunshine Records v Frohling 1990, AD*

- **Facts:** A contract between a record company and a pop group called the "Rag Dolls" contained various clauses which restrained the group's ability to work for other companies or for themselves. The contract imposed very extensive duties, obligations and restrictions on the band but there was no reciprocal duty on the party of Mr Beggs (for Sunshine Records). Clauses considered to be unfair were such that: the group could not work for another recording company for 7 years from the date the recorded works went on sale, however there was no obligation in the contract to publish the works so the group could be suspended from working indefinitely; the appellant also had full control over the production and sales of the records; the Rag Dolls were restricted from performing for anyone other than Mr Beggs and the contract was renewable at the instance of Sunshine Records.
- **Court held:** In balancing the interests, the interest the employer wanted to protect had the effect of him being in complete control of the group and the Rag Dolls were as such at the mercy of the company. The contract was found not to be partially enforceable and so unfair clauses could not be severed, it was unenforceable as a whole.
- The enforceability of contracts in restraint of trade is a matter of public interest depending on the circumstances prevailing at the relevant time.

Effect of the Constitution

After the advent of the Constitution it was argued that the rule in ***Magna Alloys v Ellis*** which favours contractual freedom rather than freedom of occupation is unconstitutional; the onus should be shifted to the employer to prove that the restraint is reasonable.
This argument was unsuccessful in ***Knox D'arcy v Shaw*** and ***Fidelity v Pearman*** as the common law rule was found to be acceptable and constitutional.
However, ***Canon KwaZulu Natal v Booth*** held to the contrary
The criticism leveled in Knox D'Arcy is that it does not take account of the real inequality in bargaining power found in many contracts is restraint.
The view that favours freedom of contract does not give effect to the constitutional value of equality.

CASE: *Coetzee v Comitis 2001, CPD*

- **Facts:** The plaintiff alleged that NSL's rules, regulations and constitution for transfer of professional soccer players whose contracts had terminated were **contrary to public policy** and **unlawful**. The reason for this was in *Magna Alloys v Ellis* it was held that enforcing an agreement in restraint of trade must not offend public policy and *Eastham v Newcastle United* the transfer system is comparable to buying and selling of humans and incongruous to the spirit of sport (slavery).
- **Court held:** A player is helpless in terms of the NSL rules as he does not have a say in the transfer fee and is at the "mercy of the arbitrator". It reduced players to being like **objects**. The regulations impact on three fundamental rights: (1) freedom of movement; (2) right to choose a profession freely; (3) right to dignity. The players were at the mercy of the employer once the contract is expired and no matter

slavery ~ buying and selling humans which is absolutely morally reprehensible

link to Sunshine Records v Frohling

that the player entered the contract freely and voluntarily because it is only the procedure for those choosing to play professional football; it is their career, and rights must be upheld.
- ➢ Restraint of trade was unreasonable and public policy requires that it be declared unlawful.

Prohibition of Interests *in duplum*

- Roman law contained a rule which limited the creditor's claim for interest to the amount of the capital debt. A debtor could not be required to pay more than double the amount originally borrowed
- Original rule: if A borrowed R1000 from B then the *in dulpum* rule would determine that the maximum amount of interest B was entitled to was R1000, so the maximum A would have to pay would be R2000.
- ➢ ***Std Bank v Oneanate***: validity of ancient rule was questions and SCA held that rule was **still valid** since it was designed to protect borrowers from exploitation by lenders. The rule prevents outstanding overdue interest from accumulating until the amount owed becomes so large that the borrower will never be able to repay it.
- Since the rule is aimed at protecting borrowers it cannot be waived by borrowers or altered by banking practice. Moreover, capitalization of unpaid interest does not alter the application of the *in dulpum* rule.
- Capitalization is the practice where unpaid interest is added to the outstanding capital amount. In this way the unpaid interest becomes capital and interest is charged on it. This would technically mean that the interest never accumulates and the *in duplum* rule can therefore find no application. However, ***Standard Bank v Oneanate*** makes it clear that one cannot circumvent the *in duplum* rule in this way.
- The rule does not apply in its original wide sense; it has been limited to mean that the outstanding overdue interest may not exceed the capital amount [***Santam v SAB***]
- **Modern rule**: If X borrowed R1000 from Y, X cannot pay more than R1000 in interest in total.
- Example: X borrows R1000 from Y at 10% interest per month. The R1000 is payable in 18months time. X pays R100 per month as interest until he pays the capital amount of R1000. He could therefore pay R100 every month for the next 18 months at which time he repays the capital amount. X would therefore pay a total of R1800 in interest. This is allowed in terms of the modern *in duplum* rule.
- However, if X stops paying the interest on the due dates then the amount of overdue (due but not paid) may not exceed R1000.
- Example 2: If X stops paying interest after two months he has therefore paid interest of R200 and at the end of the 18 months he will owe the original debt of R1000 plus the total overdue interest payments of R1600. In terms of the modern *in duplum* rule Y can only claim a maximum of R1000 as interest as this is equal to the amount of capital borrowed.

- Rather than rendering particular types of contracts or clauses in contracts illegal, the effect of the modern rule is to restrict certain practices in relation to claims of interest. The underlying idea is that the lender should take steps to collect overdue interest timeously; he cannot simply sit back and allow the debt to accumulate until it becomes impossible for the debtor to repay it all.

Clauses ousting the jurisdiction of the courts

- Clauses that prevent or restrict a party from having a legal dispute adjudicated by the courts may be against public policy in terms of common law, as well as constitutional right of access to the courts.
- S34 of the Constitution provides for access to the courts: everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before the court, or where appropriate, another independent and impartial tribunal or forum.
- ➢ ***Zondi v MEC for Traditional & Local Govt Affairs***: s34 is an express constitutional recognition of the importance of the fair resolution of social conflict by impartial and independent institutions.
- However, there are various clauses which limit a party's right to have access to courts:

a) Conclusive proof clauses

- The creditor may, by producing a certificate or other document, conclusively prove the amount by which the debtor is indebted to him and the debtor cannot dispute the amount of the creditor's claim in court even though she may still dispute the fact of the indebtedness. Such a clause has been held to be illegal and contrary to public policy because it allows the creditor to be the sole judge of the amount which the debtor owes and excludes jurisdiction of the courts
- ➢ ***Ex Parte Minister of Justice: In re Nedbank v Abstein***

b) Time Bar clauses

- Prevents a party from institution a legal claim if he does not do so within a specified time period
- According to the SCA such a clause is not unconstitutional and against public policy; it depends on whether the party's right to claim was created by the contract or whether it existed independently of the contract.
- If the right to claim was created by the contract, he had not rights except what was provided for in the contract, including the time bar

- Time bar would therefore be valid and enforceable since it does not limit any pre-existing right of access to courts [***Napier v Barkhuizen***]

CASE: *Napier v Barkhuizen*

- **Facts:** B insured his car with N, and after B's car was damaged in an accident N refused to pay for B's damages. Two years later B sued N for payment, alleging that N was legally obliged in terms of the insurance contract to pay B's claim and that N had wrongfully repudiated the contract (B was claiming specific performance). Normally B would have three years in terms of the Prescription Act to institute such a legal action against N, however the insurance contract provided that B would lose his right to enforce the contract by a court action unless B served a summons on N within 3 months from the date that B's claim was rejected by N
- **Court held:** B's right of access to courts had not been infringed since his right to claim was created by an insurance contract. Without the insurance contract B would have had no claim against N for the damage to B's car since N had not caused the damages but had merely undertaken to compensate B if his car was damaged by someone else
- **If a party had a pre-existing right to legal recourse which existed independently of the contract, the clause may infringe his right of access to the courts if the time period is unreasonably short.**

c) Clauses preventing debtors from obtaining administration orders

- A clause preventing a debtor from applying for an administration order in terms of s74(1) of the Magistrates Court Act is against public policy and unenforceable (*Bafana Finance v Makwakwa*)
- The reason is the clause restricts the debtor's right to seek redress in court and it undermines the policy objectives of s74, namely to protect a low-income debtor who is unable to pay his debts and to ensure that all creditors are treated equally.
- A debtor can apply for an administration order if he cannot pay all his debts immediately when they are due and the court determines how much the debtor can pay each week. The debtors must pay the administrator who will divide it up between creditors and none of the creditors may take legal steps against the debtor in this time.

d) Parate eksekutie or self help

- If a debtor fails to repay a debt the creditor would have to obtain a court order allowing him to seize certain of the debtor's assets and to sell them to cover the debt.
- Parate eksekutie clauses allow a creditor to seize a particular asset and sell it in execution without first having to obtain a court order.
- This deprives the debtor of legal and procedural protection that a court would normally give.
- According to the common law, such clauses were not enforceable (in relation to immovable property) however there have been cases which allowed parate eksekutie in terms of movables.
- Common law rules have been recognized in case law since the Constitution came into effect.
- ***Chief Lesapo v North West Agricultural 2000 CC:*** A statutory provision authorizing parate eksekutie is contrary to public policy and invalid, because self-help by the creditor denies the debtor protection afforded by the judicial process and legal rules and this violates the constitutional right to fair hearing.
- This extended to include a notarial bond (form of security over all or some of the movable goods of a debtor) which authorized the creditor to take possession of a debtor's movable property and to sell it to satisfy the debt
- This decision was overturned by the SCA [***Bock v Duburoro***]

Common Law
Movables ✓
Immovables X

CASE: *SA Bank of Athens Ltd v Van Zyl 2005, SCA*

- Parate execution has long been acceptable under the common law, provided that the terms of the agreement authorizing the procedure are **not unconscionable or incompatible with public policy**, for example: (a) entitling the creditor to determine the fact of the debtor's fault, or (b) authorizing the creditor to seize the debtor's property without the court's *imprimatur*

Effect of these judgements:

- Clauses allowing parate eksekutie are not generally void; only those clauses which in fact entitle the creditor to take the law into his own hands and prevent the debtor from resorting to the courts will be illegal
- If a clause which allows parate eksekutie is so wide and far-reaching that it can only be exercised in an unconscionable manner, then the courts will find it to be illegal.
- However, if the clause can be exercised in a legal or illegal manner, the courts will not find the clause itself to be illegal.
- However, the creditor may not resort to illegal means of exercising the clause.
- The court, distinguishes between the validity of the contractual clause and the creditor's behaviour in enforcing the clause.

Effects
(1) Clauses generally not void unless creditor takes law into his own hands
(2) If a clause allowing parate eksekutie is so wide and far-reaching that it can only be exercised in an unconscionable manner → illegal
(3) If can be exercised in a legal or illegal manner → legal
(4) Distinguish between validity of clause and creditors behaviour in enforcing it.

- ***Bock v Duburoro Investments***: court considered various types of parate eksekutie clauses. The following are against public policy and invalid:

(1) A clause allowing the creditor to seize (take possession of) the debtor's assets against his will without a court order is unconstitutional. This applies whether the assets were movable or immovable however a creditor could still get possession of the goods provided he applied for a court order to do so.
(2) A clause allowing a creditor to keep the debtor's assets as payment of the debt.

The following are not against public policy and thus valid and enforceable:

(1) A clause allowing a creditor to sell (realize) the debtor's assets after he has lawfully obtained possession of them (whether by court order or the consent of the debtor) However the debtor may approach the court if the creditor uses such clause unconscionably (for example, by selling goods at a price far below their true value.
(2) A clause allowing the creditor to buy the debtor's assets is valid, provided this is done at a fair price and not simply the amount of the debt.

CASE: *De Beer v Keyser 2002, SCA*

- **Facts**: This case deals with a franchise agreement for a micro-lending business. The franchisee (holder of the franchise) wanted to escape from the agreement and start his own business. He used several arguments to prove that the franchise agreement was invalid.

CONTRACTS OFFENDING AGAINST THE BONI MORES & PUBLIC POLICY

Contracts may be illegal according to the common law because they undermine the good morals (*boni mores*) of society.

"Ella Feels Mack Can't Sing Like Sinatra"

E F M C S L S

Such agreements include:

1) Selling people as slaves
2) Contracts for sale of sex
3) Agreements to defraud creditors
4) Trading with the enemy
5) Agreements to commit crime or a delict
6) Agreements undermining the institution of marriage
7) Agreements which are legal, but are made for an illegal purpose of which both parties are aware

CASE: *Maseko v Maseko 1992, WLD**

- **Facts**: A nurse bought a house in Dube from her savings and she made many improvements. She got involved in a relationship with a man and during that relationship she signed as surety for his debt to Wesbank for money lent to buy a car. When she learned that he was defaulting on his payments to Wesbank she became afraid she would be called on to pay the debt and thus lose her house. Her attorney advised her to marry her boyfriend (a different man) and live together as man and wife for a month. After the month they were to divorce and conclude a settlement agreement according to which the house in Dube would be granted to the husband so that it would not be attached for the debt to Wesbank. The nurse and her "husband" also agreed when the danger of losing the house had passed he would transfer the house back to her. When she claimed retransfer of the property however, her ex-husband argued he did not have to perform in terms of the illegal contract.

Courtheld: This was an agreement to conceal the plaintiffs assets from creditors since she had signed surety at Wesbank, and possibly other creditors.
- There was fraud on creditors
  fraud on court
  and undermining institution of marriage
> The agreement was morally reprehensible because it aimed to mislead existing creditors (and potential) and that was immoral & contra bonos mores
> Undermined marriage because was only a marriage of convenience
> Fraud because said the divorce was due to irremediable breakdown but was not so misrepresented the facts

Could not enforce contract - ex turpi causa. Par delictum would be relaxed in this case but could not because would conflict with divorce agreement which was valid & could not be set aside > Def shall retain his sole & excl pty"

- Agreements which offend the *boni mores* also offend public policy since it against public policy to enforce immoral contracts.

Offending public policy includes

- Contracts interfering with justice
- Contracts which deprive people of benefits of their earnings
- Contracts contrary to welfare of children

CASE: *Eduoard v Administrator Natal 1989, D&CLD*

- A woman sued a provincial hospital for breach of contract because she contracted with the hospital that they would, upon the birth of her third child, sterilize her because she and her husband could not afford to raise more children. The doctor failed to perform the sterilization and the couple had a fourth child. Hospital argued that the contract was contrary to public policy and therefore invalid.

UNFAIR CONTRACTS

- No general rule that contracts must be fair to both parties; contracts that create an unequal bargaining power are in principle completely valid
- There are good policy reasons for this because *inter alia* the judicial system would be overloaded with parties disputing a contract simply because the performances owed by both parties are not worth the same.
- Further, fairness is a subjective concept so what may be fair to one person may not be fair to another.
- However, there is a need to control grossly exploitative contracts, often referred to as "unconscionable", or shocking, outrageous, preposterous or unreasonable.
- There are certain strategies for dealing with this, in South Africa there are the following mechanisms:

1. Public policy
2. Legislative intervention
3. Principle of good faith
4. Constitution

PL PC

1) Public Policy

Courts have been prepared to set aside exploitative contracts on basis of offending public policy.

CASE: *Baart v Malan* 1990, EPD

- Case concerned a settlement agreement between a divorced couple whereby the husband would get custody of the children and wife agreed to pay her entire gross salary plus annual bonus as maintenance. The payments were to continue for 20 years until the children reached the ages of 29 and 35 respectively.
- Court held this contract was clearly **unconscionable** and contrary to public policy because it deprived the wife of all her benefits from work.

In principle not all unfair contracts will be illegal, it is only those that offend public policy.
What role does unfairness in contracts play in public policy then? How do you know when an unfair contract is contrary to public policy?

CASE: *Sasfin v Beukes 1989, AD*

- **Facts:** Dr Beukes got a loan from Sasfin because he had a cash flow problem, but in order to secure the loan Sasfin obtained a cession of all of B's book debts (money owed to him by patients) and this had the effect of completely depriving B of income whether or not he owed money to Sasfin at the time. Therefore Sasfin was entitled to keep all the money from Beukes' debtors even after he had paid off

Sasfin v Beukes Cont'd

the loan. Moreover, nothing in the contract compelled Sasfin to collect the money from the debtors so they could sit and wait for the claims to prescribe if they wanted to.

- **Court held**: The contract was so exploitative that it amounted to slavery because B had to work but obtained no benefit from is income. It was thus contrary to public policy
- "No court should therefore shrink from the duty of declaring a contract contrary to public policy when occasion so demands. Power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts resulting from an arbitrary and indiscriminate use of power. One must be careful not to conclude a contract is contrary to public policy merely because its terms offend one's individual sense of propriety and fairness"
- The court held that an agreement having such force and effect was clearly unconscionable and incompatible with the public interest and was therefore contrary to public policy.

In determining whether an unfair contract is illegal, the courts weight up competing factors:

1. *Pacta sunt servanda* - contracts should be enforced
2. Need for commercial certainty
3. Any infringement on freedom of contract limits the autonomy of contracting parties
4. Bargaining power
5. Courts should not protect people against their own bad decisions because every person should look out for themselves.
6. Contracts that are grossly exploitative and which reduce one party to the status of a slave are not in the public interest.

- Most factors listed are not in favour of courts striking contracts down; therefore contracts will only be contrary to public policy in extreme cases.
- Unfortunately, many of the considerations are based on untrue assumptions because in reality parties do not have equal bargaining power and commercial contracts usually favour the stronger party.

2) Legislative intervention

- There is legislative intervention to attempt to redress unequal bargaining power
- Labour law: sets minimum standards of wage, leave, work hours of work to protect workers
- 1998 Law Commission in its report on *Unreasonable Stipulations in Contracts and the Rectification of Contracts* (Project 37) recommended that legislation should be adopted to give courts a broader discretion to declare terms or contracts void if they were unfair towards one of the parties, however this recommendation has not been implemented yet
- **Consumer Affairs legislation** has created an extra-legal mechanism to deal with unfair business practices and Consumer Protectors.(National and Provincial) may investigate and prohibit unfair business practices which are brought to their attention. Various sanctions can be used against people who adopt such business practices but in general only grossly unfair business practices have been outlawed.

3) Principle of good faith

- Courts attempted to ameliorate unequal bargains by way of common law principles such as principle of good faith.
- Entails that the contracting parties should be honest and not be allowed to take undue advantage of each other.
- This forms on duress, mistake and fraud
- Some have argued that the principle of good faith should be used to strike down unfair contracts:

CASE: *Eerste Nasionale Bank v Saayman 1997, SCA*

- **Facts**: a contract of suretyship for debts of her son was signed by a very old almost blind lady who had no livelihood other than shares she ceded at the bank. She did not read the contract before signing and the bankwas unaware of the fact she did not read it. Was she bound to the contract?
- **Court held**: Majority found she was not bound to the contract because she lacked contractual capacity, yet the minority (Olivier JA) held she had capacity but the court should not enforce the contract on the basis of policy and the principle of good faith which forms a part of policy. Its function is to ensure propriety, reasonableness and fairness in the law of contract. It is based on the **legal convictions of the community**. Good faith required the bank to ensure that the old lady understood the effect of her cession of shares before allowing her to sign, but the bank had not done so and the contract was against public policy.

  - This minority judgement has been rejected by majority judgements of the SCA in subsequent cases. Most important of these is:

CASE: *Brisley v Drotsky*

- Case concerned the effect of non-variation clauses and the respondent argued that enforcement of such clauses was contrary to good faith and thus the court should overrule the ***Shifren* principle.**
- Majority of the SCA held that the principle of good faith was not an independent legal principle which could override existing laws; existing rules of contract law had to be applied even if this had unfair results or a party acted in bad faith.
- The judgement therefore closes the door on using "good faith" to strike down unfair contracts.

4) Constitution and Contracts

- **s8(3)(a)** "in order to give effect to a right in the Bill, must apply, or if necessary, develop the common law to the extent that legislation does not give effect to that right"
- The fundamental constitutional rights are a major source of public policy ad the advent of the Constitution should therefore have an impact on the rules relating to legality of contracts on the grounds of public policy.
- However, courts seem reluctant to change common law rules to accommodate fundamental rights

Direct infringements

CASE: *Knox D'Arcy v Shaw 1996, WLD*

- Argued the common law rule relating to restraints of trade as set out in *Magna Alloys v Ellis* infringed upon rights to freely engage in economic activity and that we should revert to the English position which presumes that restraints of trade are invalid.
- Court held: Common law position does not unduly infringe on any constitutional rights and the Constitution does not interfere as a matter of policy in the private affairs of parties, preventing them from entering into contracts, even if those contracts are contrary to their interests. Constitutional principle of individual autonomy must be weighed against right to engage in economic activity and current common law rule provides sufficient protection.

CASE: *Garden Cities Inc v Northpine Islamic Society 1999, CPD*

- Facts: N bought land in the old District 6 which was set aside for the building of a Mosque. Contract contained a clause which forbade the buyer from installing a sound amplification system to broadcast the call for a prayer. Instead they agreed to install a light at the top of the mosque which would flash when the time for prayer arrived. Buyer signed the contract but subsequently installed and used the sound system and when G applied for an interdict N argued the clause in the contract was invalid because it infringed upon his right to freedom (s15)
- Court held: the case was decided on the basis that the electronic broadcast of the call or prayer was not part of Islamic religion and that a clause forbidding the would not infringe on s15, and even if it was N relinquished that right by signing the contract →***pacta sunt servanda.***

Unfair contracts

- Common law rules about legality favour the notion of *pacta sunt servanda* and individual autonomy above other considerations but has the Constitution changed this?

CASE: *Brisley v Drotsky 2002, SCA*

Discussion of the Shifren principle

CASE: *Afrox Healthcare v Strydom 2002, SCA**

- Facts: A patient, Strydom, was admitted to a private hospital (A) for an operation and he signed a contract with the hospital containing an exclusion clause which excluded the hospital's liability for all damage suffered including damage caused by the hospital staff's gross negligence. After he underwent the operation S alleged that he suffered damages as a result of negligent conduct of a nurse and the hospital relied on the exclusion clause while S argued the exclusion clause was illegal on grounds of public policy. His argument was based on three grounds:

1. Unequal bargaining power
2. Constitutional right to health
3. Good faith

- **Court held**: With regard to (1) There was no evidence to suggest that the respondent (Strydom) occupied a weaker bargaining position during conclusion of the contract
- (2) It first had to be decided whether s39(2) empowered and obliged the Court to consider constitutional provisions not yet in operation when the contractual relationship between the parties had commenced. The agreement was in August 1995 but the Constitution only came into effect in February 1997 and retrospective effect of s39(2) had not been pertinently decided at that time
- (3) Although abstract considerations such as good faith were the basis and reason for existence of legal rules they were not rules in themselves and Courts have no discretion and do not operate of abstract ideas but on the basis of legal rules.
- The court also took into account *caveat subscriptor* and *pacta sunt servanda*.

1. **Good faith** is not a legal rule but a factor to be weighed up in determining public policy
2. ***Pacta sunt servanda*** and the rationale of **commercial certainty** are very important in determining public policy
3. Fundamental values of **freedom and human dignity** favour recognition of contractual autonomy even in unfair contracts
4. Fundamental value of **equality** is not very important; it is assumed people are in equal contracting situations.
5. Courts are **not willing** to give credit to **claims of inequality** in **bargaining power** and unless it results in *startling* unfairness (unconscionable), contracts will be enforced.

CASE: *Johannesburg Country Club v Stott 2004, SCA*

- A man who was a member of the club had signed a contract exempting the club form any liability for 'personal injury or harm however caused to members or their children or their guests'. The man's wife had signed the same contract . However, the man was hit by lightning and killed while playing golf at the club and the wife instituted a dependant's action for loss of support against the club, but they contended they could not be liable for loss of support due to the exclusion clause.
- Although *pacta sunt servanda* and contractual autonomy are adhered to, enforcement of this contract would be against public policy mainly because of the children of the deceased who were not party to contract but have lost the breadwinner. +

CONSEQUENCES OF ILLEGALITY

TURPI CAUSA RULE

***Ex turpi causa non oritur action* - no action arises from an illegal cause**
The courts will not enforce an illegal contract
It is **inflexible** and courts have **no discretion to relax** it
Applies when one of the parties attempts to enforce the contract against the other party, such as when a creditor sues the debtor for performance
Application of this rule means such actions will always fail.

- ✓ **Example**: A and B concluded a contract by which A will pay R1000 for cocaine. A pays the money but B refuses to deliver the drugs.

→ *Ex turpi causa* will apply and so X cannot enforce the contract and hence cannot get his money back.

PAR DELICTUM RULE

***In pari delicto potior est conditio defenditis* - when both parties are equally guilty the position of the defendant is strongest.**
If a contract is illegal and **both parties** have **equal guilt**, the position of the defendant is stronger, so the plaintiff fails in the attempt to claim relief. This is because courts do not want to assist parties that come to court with "unclean hands".
Equal guilt refers to whether both parties had knowledge that the contract was illegal.
If the **plaintiff** was **unaware** the rule will **not apply.**
Rule applies when a party is seeking **other legal relief**, usually return of performance by way of an enrichment action or *rei vindicatio*

- ✓ Example: A and B agree that A will pay R1000 for cocaine. A pays the money but B refuses to deliver the drugs

→ X will not reclaim her money because she was aware that drugs are illegal and cannot seek return of performance for an illegal contact.

Relaxation of the *par delictum* rule

Occasionally application of the rule leads to unfair results but courts only have discretion to relax the *par delictum* rule and not the *ex turpi causa* rule.

Courts take certain factors into account:

CASE: *Jajbhay v Cassim 1939, AD*

- **Facts**: C rented property from J but the contract was illegal in terms of the Group Areas Act. Although C paid his rent on time, J decided he did not want to continue the lease so he requested a court order to evict C from the premises.
- **Court held**: the *par delictum* rule applied because both parties had knowledge of the contract
- The court further held the rule will be relaxed to do **simple justice between man and man**. The rule should not be relaxed in this case: the tenant was not enriched by remaining in possession of the premises since he was paying his rent and there were no considerations of fairness or public policyu that required relaxation of the *par delictum* rule. Both parties were equally guilty and had entered into an illegal lease but the position of the defendant was the strongest.
- There are four factors which influence the decision to relax the rule:
  1) Public policy
  2) Degrees of moral turpitide (was on party more blameworthy than the other?)
  3) Doing justice between the parties (would disallowing the plaintiff's claim lead to unjust enrichment of the defendant?)
  4) Whether relaxing the rule would amount to indirect enforcement of the contract

CASE: *Henry v Branfield 1996 D&CLD*

- **Court held**: H was not entitled to repayment of the money he paid over to B's agent because if the court gave such an order H would receive money in South African in Rands and this was exactly what the parties aimed to achieve with their contract. Relaxing the *par delictum* rule would therefore amount to indirect enforcement of the contract which would be to do what the statute prohibited. This was contrary to public policy

SEVERANCE

- As in *Maseko v Maseko*, a whole contract can be illegal, however in some instances only part of an agreement will be illegal while the rest is acceptable.
- The question arises whether the whole of the contract should be void if only part of it is legal.
- **General rule:** if the illegal portions of the contract can be severed from the rest of the contract and what is left is substantially what the parties agreed on then the rest of the contract remains valid.
- Whether illegal portions of the contract can be severed depends on intentions of the parties, established from various factors:
  1) Are the illegal sections part of main purpose of the contract or subsidiary?
  2) Are they in separate sections and could they easily be removed?
  3) Are they interlocking and interdependent with the legal terms?
  4) Does the contract consist of separate promises, some legal and some illegal?
  5) Would the parties have concluded the contract without the illegal parts?

Shifren exercise

Nicole won he Teen Queen beauty contest in 2007. The contract she signed with the organizer, (Jolly Lackson) when she won the competition contained the following clauses:

14 Nicole may not get engaged, married or pregnant during the period of her reign, which will last until 30 June 2008. If Nicole breaches this clause, Jolly will be entitled to cancel the contract, strip Nicole of her title and claim an amount of R500 000 from Nicole for her breach.

21 This contract is the sole agreement between the parties, and no variation of the agreement will be of any force and effect unless it has been reduced to writing and signed by the parties.

At one of the functions Nicole attends near the end of her reign, she meets and falls madly in love with Harry. She asks Jolly whether it would be possible for her to get engaged to Harry before the end of her reign. Jolly tells her "No problem, just make sure that you keep it a secret from the press." On 31 May 2008 Nicole and Harry get engaged at a private ceremony to which only Jolly is invited. A week later Nicole is horrified to read the following article in the newspaper.

TEEN QUEEN STRIPPED OF HER TITLE

Nicole, the reigning Teen Queen has been fired by the organizer, Jolly Lackson after breaching her contract with him. In a statement released early this morning, Mr Lackson said that he had cancelled the contract with Nicole, since she brought the competition into disrepute by getting engaged to Harry, even though the contract clearly stipulated that she may not get engaged during her reign. Her place as Teen Queen will now be taken by the runner-up, Paris Lohan. Miss Lohan and Mr Jackson have been dating for the past few months.

Nicole is very upset. She wants to retain her title and asks you for legal advice. Advise Nicole.

Shifren exercise

This issue deals with one of the 6 requirements of validity of contract, formality, but more specifically self-imposed formalities. Self-imposed formalities are those formalities that are imposed by the parties themselves, and it does not necessarily mean writing is a formality for validity, it just depends on the intention of the contract. However formalities do not only apply to formation of the contract they may also apply to variation, cancellation and waiver of rights, & such formalities requirements are inserted in a contract in specific clauses.

It is the non-variation clause that concerns us for this question and it is that clause which has sparked much debate/controversy.

A landmark case, SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren 1964, set precedent on this matter by creating the principle that a term/clause in a written contract providing all variations must comply with the specified formalities is binding & therefore must be upheld. As s21 of the contract in the case between Jolly Jackson & Nicole, states any variation to the contract must be done in writing, and Nicole & Jolly only had an oral agreement to vary the contract, effectively Nicole has breached the contract by going against section 14. Therefore Jolly could cancel the contract and ship her of her title.

However, the Shifren principle, or 'Straitjacket' as it has been referred to, is strict but can be mitigated in 3 ways: waiver, estoppel & good faith, the last of which bears relevance to this situation.

It has been decided in 2002 that mere bad faith does not defeat a non-variation clause / the Shifren principle (Brisley v Drotsky), except if one party acted fraudulently sought to rely on the non-variation clause.

Although the contract between Jolly and Nicole is prima facie in breach because of the oral variation & Nicole's violation of section 14, certain factors from the given facts must be considered to determine if there was fraud:-

(1) Jolly verbally agreed to Nicole getting engaged to Harry, most likely being aware of the agreements s14 that she may not or he could cancel the contract, ship her title & claim R500 000;

(2) He said she should not let the press find out about it;

(3) She was "horrified" to see the story in the newspaper, indicating she did not know the story would come out & hence that she didn't leak it

(4) Jolly was the only person invited to the engagement ceremony (so he or Harry leaked it to the newspapers); and

(5) The title went to the girlfriend of Jolly Jackson (for the past few months).

Owing to this it could be inferred that Jolly gave Nicole the impression she could contravene clause 14, knowing he could simply enforce s21 (non-variation) and claim his money & get his girlfriend the title of Teen Queen. Therefore he deliberately led Nicole to believe the written contract would not be enforced so he could breach & fraudulently benefit...
As fraud has occured the non-variation clause can be defeated/overruled & Nicole can keep her title