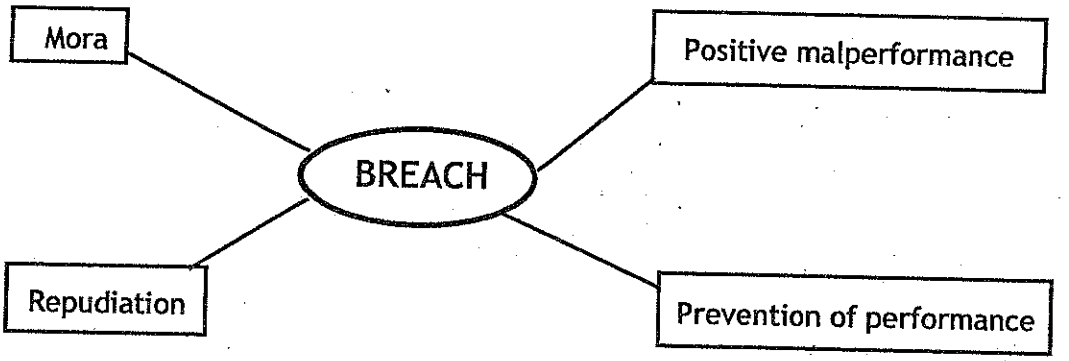
Breach of Contract

Pacta sunt servanda means that contracts entered into freely must be upheld, and therefore parties to a contract must fulfill their obligations; a breach of contract occurs when obligations are not honoured.

THE CONCEPT OF DIVIDED BREACH



Anticipatory breach

- Breach can take place before the performance becomes due
- Repudiation and prevention of performance

Malperformance

- Breach can only take place after performance is due
- Mora (negative malperformance) and positive malperformance

- Performance is due when it has to be delivered.
- Usually contracts will stipulate specific times when performance is due, but if no due date is given there are legal rules to ascertain a date
- Each form of breach is most often performed by the debtor but it is possible for a creditor to commit a breach of contract even though performance is due to the creditor.
- In reciprocal contracts, there is more than one debtor and more than one creditor so the party's positions in respect of specific obligations must be taken account of.
- It is important to distinguish between different types of breach is because the requirements and consequences are different
- A party's conduct may amount to more than one type of breach if all requirements are met

Remedies for breach

- Specific performance - aims to uphold the contract and to obtain performance as promised; it is the primary remedy for breach and can always be claimed in the event of a breach
- Cancellation - terminates the contract; this is an extraordinary remedy and can only be claimed in certain circumstances
- A party may also claim damages in addition to these remedies.

MORA DEBITORIS

- **Mora debitoris is late performance by the debtor where the performance is due, enforceable and possible.**
- Mora happens when performance is not made on time. It must be distinguished from positive malperformance which occurs on time but performance is defective.
  - Mora → time
  - Positive malperformance → quality
- Mora can be converted into positive malperformance if a debtor is in *mora* but then delivers a defective performance.
- Mora must also be distinguished from making performance impossible (prevention of performance)

Fault Possible Enforceable (& due)
FAT PIGGIES FAT

REQUIREMENTS

1) Delay in performance must be as a result of the *fault* of the debtor

- Delay in performance must not be a result of:
1. *Vis maior* (acts of God)
   - ✓ Example: A and B have an agreement that A will sell B a donkey. If there is a flood on the date of delivery and A cannot transport the donkey to B, A will not be in *mora*.
2. *Casus fortuitus* (things of chance)
3. Third person
4. Creditor's failure to accept performance by the debtor
   - ✓ Example: If A arrived on time to deliver the donkey but B was not home or refused to receive the donkey then A will not be in *mora*.

- It is not necessary for a creditor to show the debtor was in *mora*
- ***Excusatio a mora*** - A debtor who can show he/she was not at fault will not be in *mora*
- Warranties - If the debtor warrants performance on time, he will be bound by the warranty and lack of fault will not allow him to escape liability

2) Performance must remain *possible*

- Where performance is no longer possible the breach is not *mora* but another form of breach such as prevention of performance (impossibility due to one party's fault) or supervening impossibility (impossibility arising from *vis maior*)
- Performance can become impossible as a result of delay or other factors
- If performance is not possible there is no mora.
- ✓ Example: A and B agree that X will take photographs on their wedding day. If X does not arrive on the wedding day performance is both late and impossible but it is not *mora debitoris* because performance is no longer possible.

3) Debt must be due and *enforceable*

- Performance cannot be late if it is not due; the time for performance must have arrived
- ✓ Example: If a contract states a merx must be delivered "within a reasonable time" or "soon", it cannot be said exactly when performance will be late:

a) *Mora ex re*

- If the contract mentions the date on which performance is due, debtor will be in mora if he has not performed by that date → this is called *mora ex re*.
  - Creditor does not have to do anything to ensure that the debtor will be in mora as the mere passing of time is sufficient.
- If no time is stipulated then it may be possible to interpret the contract to determine a date or if there is a **tacit term** stipulating performance → debtor will then still be in *mora ex re*.

TACIT TERMS (No time stipulated)

- 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 (*West End Diamonds v Johannesburg Stock Exchange 1946*)

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

(2) Officious Bystander Test (*Reigate v Union Manufacturing 1918*)

- 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

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

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

Surrounding circs
Special knowledge
Express terms

necessity (not reasonable/convenient)
subjective (not objective)

- IMPORTANT: The courts do not easily read tacit terms into the contract; it is not enough that a term is reasonable, or convenient *(Wilkins v Voges)*
- 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)

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b) *Mora ex persona* (interpellatio)

- If there is no tacit term and interpretation of the contract is not possible, the creditor must place the debtor in *mora* by ***interpellatio*** (giving a time period)
- ❖ An *interpellatio* is a demand calling upon the debtor to perform on a particular day indicating that if performance is not given on this day the debtor will be in mora; this is ***mora ex persona***

Requirements for *interpellatio (Nel v Cloete* 1972)

1) Specific time for performance must be stipulated
2) Must be clear and unambiguous
3) Cannot require immediate performance, but the debtor should have a reasonable time to perform
4) What amounts to a reasonable time depends on the circumstances of each case

R U S C
Reasonable
Unambiguous
Specific time must be stated
Circumstances (determining reasonableness)

CASE: *Nel v Cloete 1972*

- ➢ Facts: A contract for sale of a house did not contain the date upon which the property should be transferred to the buyer and a part of the purchase price was to be furnished by a bank. Transfer of the property took a long time because the title deeds of the property could not be found and the attorney who acted for the seller eventually decided to request duplicate title deeds. 9 months after the conclusion of the sale the buyer sent an *interpellatio* to the seller, giving 2 months to effect transfer, failing which, the buyer would cancel the contract. When the transfer had not yet taken place on the due date and when he found out that the bank had cancelled his loan as a result of the long delay, the buyer cancelled the contract. The seller argued that the *interpellatio* did not give reasonable time to effect transfer of the property.
- ➢ Court held: Two months was a reasonable time to effect transfer, especially in light of the fact that such a ling time had already elapsed since conclusion of the contract. Allowing the debtor a reasonable time to perform meant the creditor did not need to take account of extraordinary circumstances such as title deeds going missing.
- ➢ In addition, it was admissible for the creditor to state in his *interpellatio* that failure to perform by the due date would entitle him to cancel the contract (notice of recission)

c) Performance is urgently required

- If a time is not stipulated for performance but performance is urgently required, such as in calling an ambulance or police service: Time is of the essence.

- ➢ *Federal Tobacco Works v Barron & Co 1904* and *Broderick Properties v Roodt 1962* time is of the essence
- ➢ Courts developed doctrine of **"time is of the essence"** whereby, in urgent situations the creditor does not have to stipulate a time for performance (*mora ex re*) or place the debtor in mora (*mora ex persona*) but obtains a **right to cancel automatically** if performance is not rendered soon → automatic right to cancel * not acceptable

Preferred view:

- ➢ *Alfred McAlpine v TPA 1977* Prove tacit term — officious bystander — business efficacy if performance urgent
- ➢ The doctrine should not be applied to the question of whether or not a party is in mora as that is determined by *mora ex re* and *mora ex persona*; the doctrine relates to the right to cancel which arises when the other party is already in mora.
- ➢ "The general principle is that, in the case of a contract in which no time for performance has been fixed, the debtor must be placed in mora by *interpellatio* before damages can be clamed on the grounds of such debtor's non-timeous performance. A mere failure to perform or mere non-performance in the absence of a fixed time for performance, although it may constitute a ground for defence of *exceptio non adimpleti contractus*, cannot give rise to a claim for damages because it can never be a breach."

- However, in cases of urgency it an be argued that there is a tacit term that performance should take place immediately and that failure to perform at that time will amount to *mora ex re*.

Fault of the debtor
Performance must be possible
Enforceable and due

CONSEQUENCES Damage Can Perpetuate Sorrow

1) Mora perpetuates the obligation

- Mora is a form of ongoing breach of contract
- When a debtor falls into mora for failure to perform on time, he/she remains in mora until such time as performance is rendered.
- If the debtor or creditor's performance becomes impossible at a time when the debtor is in mora (and impossibility is not caused by one of the parties) then the normal rules for impossibility of performance are suspended and the debtor remains liable to perform even though his performance is now impossible.
- Failure to perform therefore amounts to breach of contract and the debtor may be liable to pay damages

✓ Example: A sells his donkey to B for R5000. In terms of their agreement A is to deliver the donkey to B on 1 December 2005. A fails to do so and on 3 December 2005 the donkey is struck by lightning and killed.

- Since A was in mora at the time that performance became impossible, A remains liable to deliver the donkey notwithstanding the supervening impossibility. A's failure to deliver the donkey will amount to a breach of contract and normal remedies of breach apply.
- Alternatively if B was the party in mora in respect of payment of the purchase price and whilst in mora the donkey is struck by lightning, B will still be liable to pay the R5000.

2) Right to specific performance

- Creditor may insist on proper performance even though it is late.

3) Right to damages

- If the creditor suffers damages (loss) due to the debtor's mora, the debtor must compensate the creditor by paying damages.
- If the debtor's obligation is to pay money, the creditor is entitled to mora interest from the date of *mora* at a rate set in the contract, determined by trade usage or prescribed by the Minister in terms of the Prescribed Rate of Interest Act 55 of 1975

✓ Example: A sells his donkey to B for R5000 and A is to deliver the donkey on 1 December 2005 and B is to pay A on the same day:

(a) A delivers the donkey but B only pays the purchase price on 1 March 2006 → A can sue B for mora interest on the 3 months that B was in mora, so assuming the parties agreed to an interest rate of 12% per annum in the event of late payment, the mora interest payable by B is R5000 x 12% x 3/12.

(b) B pays the purchase price on 1 December but A only delivers the donkey on 15 December. B had bought the donkey in order to give donkeys rides at his child's birthday party. Due to A's failure to deliver, B had to hire C's donkey for R500 → B can claim damages of R500 from A as this represents the loss caused by the breach.

4) Right to cancel on basis of mora / Federal Tobacco Works v Barron & Alfred McAlpine v TPA

- There is no automatic right for the creditor to cancel on the basis of the debtor's mora. Cancellation is an extra-ordinary remedy and special factors are necessary:

(a) A *lex commissoria*

- A *lex commissoria* gives a party the right to cancel if the other party should commit a breach of contract.
- If such a clause is present and the debtor is in mora, the creditor can cancel on the basis of *lex commissoria*.

(b) Notice of rescission — Give last chance for debtor to perform

- If there is no *lex commissoria* a creditor may obtain a right to cancel by sending the debtor a notice indicating that she is in *mora* and stating that unless the debtor performs within a reasonable time, the creditor will cancel (**notice of rescission**)
- A notice of rescission must be distinguished from a notice of cancellation (notice informing the debtor that the creditor has actually cancelled the contract).
- Notice of rescission only serves to acquire the right to cancel; the creditor still has a choice whether to actually cancel or not if the debtor does not perform within a time set out in the notice of rescission. If he chooses to cancel, he can do so by sending a notice of cancellation
- One can send the *interpellatio*, notice of rescission and notice of cancellation in one document; it must then give a reasonable time period for both the *interpellatio* and notice of rescission; while the notice of cancellation is given in advance and it will only take effect once the debtor has failed to perform on time.

✓ Example: X agreed to repair Y's computer but they did not agree on a time by which the repairs must be completed. After one month, Y sends X the following letter: "I hereby call upon you to finish the repairs on my computer within 7 days (*interpellatio*) failing which you will be in breach (*mora ex persona*) and I will have the right to cancel the contract (notice of rescission). Please note I have already decided to cancel the contract if the work is not finished within the 7 days referred to above (notice of cancellation)."

(c) Time is the essence

- If the debtor is in *mora* and the need for performance is urgent, the rule indicates that the creditor automatically obtains a right to cancel without a *lex commissoria* or a notice of rescission. (Federal Tobacco v Barran)

➢ *Alfred McAlpine v TPA*: doctrine of time is of the essence cannot place the debtor in mora. The debtor must either be in mora as a result of the date which is expressly or tacitly stated in the contract (*mora ex re*) or as a result of an *interpellatio*.

- For the creditor to be able to cancel he/she must show two things:

1. The debtor is in mora (*mora ex re, mora ex persona*)
2. There is a right to cancel (*lex commissoria*, notice of rescission, time is of the essence)

Damage **C**an **P**erpetuate **S**orrow

Perpetuate obligation
Specific performance
Damages
Cancellation

MORA CREDITORIS

Nature of mora creditoris

- A creditor has an obligation to co-operate with a debtor to ensure that the debtor is able to deliver his performance
- Co-operation may take the form of accepting performance on the due day or supplying the debtor with information which will enable him to perform.
- When the creditor fails to give co-operation, he/she will be in *mora creditoris*.

✓ Example: X makes an appointment to have her hair cut at Y's salon on Saturday 8 July 2006 at 10:00am. By 11:00 X has not yet arrived

→ In relation to the haircut, X is the creditor (receives performance) and Y is the debtor (makes performance), so this is an example of *mora creditoris*.

CASE: *Ranch International Pipelines v LMG Construction 1984, WLD*

➢ Facts: Plaintiff was awarded a contract for construction of a pipeline and approached defendant to share the job on a subcontracting basis but this sub-contract was not reduced to writing. The defendant was supposed to perform in terms of the main contract but the plaintiff brought an urgent application for LMG to be restrained from entering the construction site, on grounds that LMG had not performed in adherence with the "required rate of progress". Plaintiff then entered into another agreement with VM. Plaintiff alleged breakdown in the contractual relationship with LMG due to a dispute for which no solution could be found and the main contract would be in jeopardy is the

subcontract was to continue. Plaintiff alleged further, that in the event of breakdown in contractual relationship there was an implied or tacit term that plaintiff could cancel unilaterally. LMG applied for an interdict in counter-application.

- Court held: It was not persuaded that a unilateral right of stoppage is tacitly agreed on as (1) this would not be in line with business efficacy and there were many other ways such a situation could be dealt with, and (2) there are often "general experience" disagreements in building contracts, so business efficacy demands that such a term actually be excluded, as usually in big contracts there are terms to account for impasses so it was not necessary.
- *Mora creditoris*: Creditor must co-operate with the debtor so the debtor is not prejudiced in performing his obligations. The duty of co-operation is the essence of *mora creditoris* and the creditor was compelled in *forma specifica* to co-operate with the debtor. If LMG committed any breach of contract entitling the plaintiff to cancel the it (plaintiff) may do so, but the impasse on which the plaintiff relied was "unimpressive" and insufficient. Plaintiff's application dismissed.
- Principle: Essence of mora creditoris is co-operation and creditor must co-operate with the debtor so as not to prejudice the debtor, creditor must co-operate (if debtor is not in breach) in fulfillment of debtor's obligations.

REQUIREMENTS

DJ Noble Fot Felines Rules

1) Debt must be *due*

- The creditor has no obligation to accept performance before the debt becomes due. If the debt is subject to a suspensive condition which has not yet been fulfilled, the creditor cannot be in *mora creditoris*.
- The exception is that the creditor may be obliged, before the due date, to provide the debtor with information or perform some other act to enable the debtor to perform on time
- For instance: the owner of a house may have a duty to supply a builder with plans before the builder's debt is due. In such cases the creditor can be in mora before performance is due.
- Where the contract contains the date for performance the creditor will be in *mora ex re* however if the contract contains no date the creditor will be in *mora ex persona* by way of *interpellatio* in which the debtor informs the creditor when he will deliver performance.

CASE: *Martin Harris & Seuns v Qwa Qwa Regeringsdiens 2000, SCA*

- Facts: Q and M entered into a building contract in terms of which Q commissioned building works to be carried out by M, a building contractor. Q delayed providing M with the necessary plans, specifications and instructions relating to the building works and this *inter alia* led to delays in completion of the project. Consequently, M claimed damages from Q for losses caused by such delays. Hence, Q committed the breach of *mora creditoris*.
- Court held: For *mora creditoris* to exist the debtor must call upon or demand the required co-operation from the creditor (except where the agreement or creditor has prescribed a time). There is not automatically a breach when the creditor does not co-operate but the duty means the credtitor can be called on to perform/co-operate. There is only a breach where such a demand has been made and the creditor has not acted in accordance with the demand.
-
- Principle:

2) Debtor must *tender* (offer) proper performance

- Where performance offered by the debtor is defective, the creditor has no duty to accept it.
- Rejection of improper performance does not amount to mora creditoris

3) Creditor must have *failed* to accept performance or failed to co-operate with the debtor

- *Martin Harris & Seuns v Qwa Qwa*
- Creditor must have caused the delay in performance by the debtor, by refusing to accept performance or not being available to receive performance, or failing to give his co-operation which the debtor needs to perform.

4) Creditor must be at *fault*

- Delay in performance must be due to the fault of the creditor, similar to the fault requirement in *mora debitoris*.
- If the failure to accept performance is due to *vis maior*, *casus fortuitus* or actions of a third party, creditor can use this defence.

5) Performance must remain *possible*

- If performance has become impossible due to the creditor's actions the form of breach will be prevention of performance instead of *mora creditoris.*

D_o T_{ickle} F_{at} $F_{eline's}$ P_{aws}

Debt must be due
~~Tender (offer) proper performance~~
Failed to accept performance or co-operate
Fault by creditor
Performance must remain possible

CONSEQUENCES

DRIPSCS

Mora creditoris *purges* mora debitoris

- A debtor cannot be in *mora debitoris* and a creditor be in *mora creditoris* at the same time, so if the debtor is in *mora debitoris* but the creditor refuses to accept performance the creditor will fall into *mora creditoris* and from that moment the debtor is no longer in *mora debitoris.*
- The debtor's mora is not purged retrospectively, as the consequences of *mora debitoris* still apply for the period during which the debtor was in mora
- ✓ Example: A owes B R10 000 to be paid on 1 August but on the due date A fails to pay the debt. A is in *mora debitoris* from 2 August. On 1 October A informs B that she will pay her debt on 2 October. When A arrives at B's house B is not there to accept payment, so B is in *mora creditoris* from 3 August
  - → A was in mora from 2 August to 2 October but from 3 October A is no longer in mora. For the period A was in *mora debtitoris* the consequences of *mora debitoris* apply and so C could claim mora interest from A for that time (but not after 2 October)

Risk of Damage, Destruction or Impossibility

- From the time when the creditor is in *mora creditoris* the debtor becomes liable for the damage or destruction or impossibility of his performance only if it arose from the debtor's intentional actions or gross negligence.
- Creditor therefore bears the risk of damage, destruction or supervening impossibility.

intentional / gross negligence

Sureties

- When a creditor falls into *mora creditoris*, sureties for the debt are released because the sureties operate to secure the debt in favour of the creditor
- If the creditor refuses to accept valid performance it is not fair to continue to hold sureties liable

Interest on the Debt

- As soon as the creditor falls into mora the debtor's liability for interest on the debt and for use of performance or occupational rent fall away
- However, this is not retrospective and the debtor's liability will remain in respect of the period for which he was in *mora debitoris.*

Cancellation by the debtor

- The rules for cancellation on basis of *mora debitoris* apply ***mutatis mutandis*** to *mora creditoris*:
- *Lex commissoria*, notice of rescission; time is of the essence

Specific performance

- The debtor can obtain an order for specific performance to compel the creditor to accept performance (***Ranch International Pipelines v LMG Construction***)

Damages

- If as a result of *mora creditoris* the debtor suffers financial loss, he may claim this as damages from the creditor.

DRIPS.CS

Damages
Risk
Interest on debt
Purge
Cancellation
Specific performance

REPUDIATION

- **Repudiation is behaviour by either the debtor or the creditor, which indicates that performance will not effectively be delivered (repudiation by debtor) or that effective performance will not be accepted (repudiation by creditor), and the party acts by words or conduct to clearly and unequivocally indicate that it no longer intends to be bound to the contract.**

Repudiation differs from mora

- Mere delay does not necessarily indicate that performance will not take place or that it will be ineffective
- In certain circumstances it can be difficult to determine whether a delay on the part of the debtor or creditor is also an indication that performance will never be made or accepted but this is usually not the case – Also, repudiation tested objectively so see what reasonable man would think

Repudiation differs from positive malperformance

- Repudiation takes place before performance is made while positive malperformance involves a performance which has been given but is defective.

Repudiation differs from prevention of performance

- Repudiation creates relative certainty that eventual performance will be absent or defective while making performance impossible creates absolute certainty that this will happen.
- A repudiating part can still change his mind and decide to deliver the performance but in the case of making performance impossible, this cannot happen.

REQUIREMENTS

"Behaviour of repudiating party"

1) Conduct indicating refusal to perform

- There is no need to show that the party who repudiates the contract had an actual **subjective intention** to breach the contract; the test is **objective** (depends on reasonableness).
- Court is not interested whether the repudiating party wanted or mean to repudiate but whether a **reasonable person** would look at the **behaviour of the repudiating party** and decide that it amounts to repudiation.

Highveld 7 Properties v Bailes: "The test to determine whether conduct amounts to a repudiation is whther, fairly interpreted, it **exhibits a deliberate and unequivocal intention no longer to be bound.** The test which has to be applied is an **objective one.** It follows that even a *bona fide*, subjective intention not to repudiate the agreement would not assist the respondent if he acted in such a way as to lead a **reasonable person** to the conclusion that he did not intend to fulfill his part of the original agreement."

& OK Bazaars v Grosvenor Buildings

Q: Is there conduct that leads a reasonable person to believe that one party no longer wishes to be bound?

CASE: *OK Bazaars v Grosvenor Buildings*

- The test to determine whether conduct amounts to repudiation is whether, fairly interpreted, it exhibits a deliberate and unequivocal intention no longer to be bound
- The test is objective, even if a party had a bona fide, subjective intention not to repudiate. It is decided from what would lead a reasonable person to conclude from the party's conduct.

CASE: *Culverwell v Brown* 1990, AD

- Facts: A deed of sale was concluded between Mr Brown (B) and Mr Culverwell (C) for a portion of land which C was to by from B as a trustee for a company. However, C defaulted on payments to be made in terms of the agreement and although several times new dates for payment were arranged, C still did not pay (R110 000 and a mortgage bond). Further, cheques made out by C were dishonoured.

He later only paid R35 000 so B instituted action to claim the balance (R75 000) and mora interest as C was in *mora creditoris*. In terms of clause 8 of the agreement there were leases on the other property, so C contended that B had breached the contract by extending the lease for the "fruit basket" on the property to a Mr Prinsloo (P), and so C cancelled the agreement. B argued there were no grounds to justify cancellation of the agreement so cancellation amounted to repudiation, which he accepted.

- With regard to C's allegation that B breached by entering into an agreement with P for the same property, the agreement between C and B stated that the plaintiff (B) should not enter into new lease agreements between the date of signature and date of transfer of ownership.
- Issue: Did C have a right to cancel?
- Court held: By entering into the agreement with P, B disabled himself from performing in terms of the agreement with C and this constituted breach *in anticipando*, and it had to be tested to determine if it was repudiation. The test for repudiation is whether the defendant's conduct **exhibited a clear and unequivocal intention to no longer be bound to the contract**. The court found that B's conduct "did not evince an intention not to be bound by the agreement of sale" since negotiations for that had been in progress since before the other agreement. C could not reasonably have believed it was B's intention to no longer be bound because he did not have knowledge of B's negotiations with P. Further, this **breach by B did not affect the ROOT OR A VITAL PART** of the contract and C was uninterested in the "Fruit Basket" anyway. Therefore, B had breached but it did not constitute repudiation entitling C to cancel, so C in fact did not have a right to cancel and as such repudiated the agreement.
- Principle: [1]Test for repudiation is objective, tested according to the reasonable man, to determine if the defendant's conduct exhibited a clear and unequivocal intention to no longer be bound to the contract AND for repudiation the [2]breach must go to the root of the contract.

- Because no subjective intention is required for repudiation, this is a dangerous form of breach to all the parties of a contract because a party who in good faith disputes the terms of an agreement can be seen to be repudiating.

CASE: ***Highveld 7 Properties v Bailes* 1999, SCA**

- Facts: Appellant and respondent concluded a sale agreement (original agreement) whereby the respondent sold land to the appellant. Initially it was only a sketch plan but the property was to be developed for residential estate on a golf course. At a later meeting the parties discussed boundary agreements to the property, namely the addition of some land to the property, and negotiations ensued regarding the price of these additions. The respondent averred that the appellant agreed on a certain price, however this was denied by the appellant. There was a series of letters and the respondent alleged there was a new agreement ("disputed agreement") which was a result of the original agreement being amended (property description and purchase price), and the respondent threatened legal action if the appellant would not pay the new purchase price. Basically, the respondent sought guarantee of the new purchase price.
- The appellant cancelled the original agreement on the basis that there was no agreement to amend the contract and the respondent had "no intention whatsoever of complying with the contract..." and had consequently "clearly and unequivocally repudiated the contract". The respondent refuted this, saying consensus had been reached and instituted action in the court *a quo* for an order that the dispute agreement be binding or that the original agreement still stand. The court *a quo* found no dispute agreement and thus the respondent had repudiated the original agreement. In an appeal:
- Issue: Did the respondent's words/actions/conduct amount to repudiation of the original agreement?
- Court held: Yes (see *OK Bazaars v Grosvenor*). The respondent's insistence that guarantees be delivered in terms of the disputed agreement and threat to compel the appellant to deliver by court order, **leads a reasonable person in the position of the appellant to conclude:**

1. No purpose is served by applying for approval or development plan and rezoning in terms of the original agreement
2. Serves no purpose to deliver guarantees for payment of purchase price in terms of original agreement
3. Respondent would not transfer the land in terms of the original agreement against performance by the first appellant of its obligations.

- Therefore, the respondent unequivocally and deliberately made it clear that he would not be bound to the contract and the original and disputed agreements differed materially from each other so the respondent repudiated and the appellant had a right to cancel.
- Principle:

2) No justification for refusal to perform

- In certain circumstances a party is justified in refusing to perform, such as A may refuse to perform if his performance is reciprocal to B's performance and B has breached by not rendering performance at all or rendering incomplete and improper performance.
- A party may be entitled to cancel as a result of the other party's breach provided the relevant requirements for cancellation are met.
- Consequently, if the party was legally entitled to withhold his own performance or cancel the contract, his conduct is justified and will not amount to repudiation or any other kind of breach.
- However, if he was not entitled to do so his conduct will amount to repudiation even if he in good faith believed he was entitled to withhold performance or cancel.
- A party will be justified if refusing to perform if withholding performance until have received proper performance or there is a legal right to cancel.
- This is tested objectively and can be used as a defence

Example*

X and Y agree that X will build a house for Y at the cost of R500 000 but the building work is defective (positive malperformance)

1. Y may be legally entitled to refuse to make payment on the basis of *exceptio non adimpleti contractus* and thus his refusal to pay will not amount to repudiation.
2. Y may decide to cancel the contract and if the requirements for cancellation are met it will not amount to repudiation. However if the requirements are not met Y's conduct is not justified and amounts to repudiation.

CONSEQUENCES

1) Acceptance of repudiation by the innocent party

- Some cases have constructed repudiation as a process of offer and acceptance whereby the party who repudiates makes an offer to cancel the contract to the innocent party who should then accept the offer, thus the breach of repudiation is only completed once the innocent party indicates that she accepts the offer to cancel. Conversely, should the innocent party reject the offer to cancel, the repudiation is a nullity having no legal effect and so the consequences of breach do not follow.
- This is incorrect because then it would mean that contracts could only be cancelled by mutual consent.
- The preferred view is that when a guilty party repudiates the act of repudiation constitutes breach of contract
- The innocent party then has an election of remedies. He/she can either choose to continue with the contract or cancel the contract
- Note: Even if the innocent party chooses to uphold the contract this does not negate the fact that the guilty party has committed repudiation and the consequences of breach still follow. The innocent party my be entitled to damages for losses caused.

2) Innocent party's election (double-barreled remedy)*

- Once the guilty party has repudiated the contract and if the innocent party has a right to cancel, the innocent party has an election between upholding or canceling the contract.
- Once the party has made his/her election to cancel he/she is bound by such election (*Desai v Mahomed*) and so may not change his/her mind
- However, if the innocent party decides to uphold the contract but the guilty party once again fails to perform or repudiates the contract, this constitutes a further breach in terms of which the innocent party has a further election
  - ***Culverwell v Brown***: It would be competent for the plaintiff to ask in another action in lieu of that decree, for cancellation of the contract and damages. And there is no reason in law why the plaintiff in an action should not claim specific performance, and ask alternatively (should there not be performance within the time fixed by the Court) for an order canceling the contract and directing the defaulting party to pay damages.
- The innocent party can exercise this further election in advance, by asking for specific performance and if the guilty party again fails to perform, cancellation.
- The innocent party must exercise her election within a reasonable time and must communicate her decision to cancel to the repudiating party.

Can an innocent party be forced to cancel the contract?

- Some case law suggests that the innocent party must cancel the contract if it would be wasteful to insist on specific performance:

CASE: *Unibank Savings v Absa* 2000, WLD

- Facts: Unibank bought Community Bank, which had been in financial trouble. Before being bought by Unibank however, Community Bank had agreed to take two managers from Absa Bank for a certain number of years on the understanding that their salaries would be paid by Absa and that Community Bank would repay the money spent on salaries to Absa. Everybody hoped that the two managers would save Community Bank from its financial woes.
- After the takeover of Community Bank by Unibank, Unibank decided that they no longer wanted the services of these two managers from Absa and they communicated this to Absa. Absa regarded this as repudiation, of the agreement to second their managers to Community Bank, but chose not to cancel the contract. Instead, they insisted that the contract be specifically enforced and carried on paying the two managers. They then claimed specific performance from Unibank (Unibank must repay the salaries to Absa as originally agreed).
- Unibank argued that in these circumstances there was a duty upon Absa to cancel the contract in order not to waste costs, since employment of the two managers was no longer necessary.
- Court held: There is no legal rule forcing an innocent party to cancel a contract and the right to claim specific performance will never be lost but the court has a discretion not to grant it if it would be wasteful.
- The court discussed **policy and principle:** in principle an innocent party may elect to claim for specific performance or to cancel the contract, although wasteful performance cannot be condoned when policy indicates otherwise. What circumstances ought a party to cancel? There is no rule imposing a duty to elect cancellation but it is limited. It does not depend on if the party has a legitimate interest but whether it ought to accept repudiation and sue for damages provided they would compensate the loss suffered. In many instances it is **better to claim damages than specific performance** and it is up to the **discretion of the court** to refuse a remedy in the **interests of justice**.
- A court must take into account morality, **policy** and all stresses which are likely to be caused by refusal of a legal right, although a party may always claim specific performance in the papers. The respondents had not shown that only damages would be an adequate remedy and on the facts there was no justification to interfere with a legal right of specific performance. Appeal dismissed.
- Principle: Court has a discretion in awarding specific performance and although the right to claim always exists, the court may exercise discretion and not grant an order. Policy must be considered.

3) Innocent party's contractual obligations

- If the innocent party elects to uphold the contract the contract will remain operative and both parties have to perform.
- However, does the injured party have to offer his own performance in a reciprocal contract, even though it is unclear whether the other party will perform?

CASE: *Moodley v Moodley* 1990, D&CLD

- Facts: Contract for sale of a house with a provision that the deposit must be paid when the contract is signed and the buyer must, within a certain time, provide the seller with a bank guarantee for payment of the rest of the purchase price. Directly after signing the contract the seller indicated he no longer wished to sell the house and so the buyer did not take steps to obtain the bank guaranteed cheque. The seller relied on the failure to procure the bank guaranteed cheque to justify canceling the contract.
- Court held: One party's repudiation, though not treated as a cause for cancellation may nevertheless (1) excuse the latter from formal acts preparatory to performance; and (2) entitle him, in appropriate circumstances, to suspend his own performance until the guilty party has re-affirmed his willingness and ability to fulfill his side of the bargain, provided that the aggrieved party, to the knowledge of the repudiating one, remained ready, willing and able to perform his part. ready, willing, able
- Because it was clear from the seller's behaviour that he would not accept the buyer's bank guaranteed cheque in any event, requiring it from the buyer would subject him to a waste of time and energy. The seller could therefore not rely on the buyer's failure to obtain the cheque to get out of the contract, as long as the buyer indicates that he is willing to perform.
- Principle:

4) Right to cancel

- Cancellation is an extra-ordinary remedy which an innocent party only has in certain circumstances:

1) Lex commissoria is present
2) Repudiation is serious (a repudiatory breach)

➢ *Swartz v Wolmaranstad Town Council* 1960, TPD:

- Whether the breach goes to the root of the contract or affects a vital part of the obligations or means that there is no substantial performance. It amounts to saying that the breach must be so serious **that it cannot be reasonably expected of the other party that he should continue with the contract** and content himself with an eventual claim for damages.

- The seriousness of the breach depends of the form of breach which it anticipates; courts would decided whether the breach contemplated by the repudiation would justify the cancellation of the contract if it were to materialize.

Breach must be so serious that it cannot be reasonably expected of the other party that he should continue with the contract.

Example: A has to deliver a car to B

- Before date of delivery A says he has already sold the car to his brother → The type of breach which this repudiation anticipates is non-performance and so B will be entitled to cancel
- Before date of delivery A says he will won't be able to install seat covers in the same shade of grey as was agreed upon. → This anticipates positive malperformance in relation to a small part of performance so B will not be entitled to cancel as it is not a serious/material breach
- Before date of delivery A says he can only deliver the car a week after the date originally agreed on → The breach this anticipates is *mora debitoris* (*mora ex re*) so B will only be able to cancel if there was a *lex commissoria*, notice of rescission or time is of the essence

- The innocent party's choice to cancel must be **conveyed to the party who has breached** and it can be done in writing, informally (telephone communication) or even through third parties (Sheriff of the court) as long as the guilty party will be notified of the cancellation (*Datacolour International v Intamarket* 2001 SCA)
- Note: Even if repudiation is not serious enough as to justify cancellation, it is still a breach of contract so the innocent party has other remedies such as damages.

communication

5) Specific performance

- The innocent part may elect to uphold the contract and wait for performance to arrive. If the guilty party does not perform on the due date he will also be in *mora debitoris*.

6) Damages

- The injured party has a right to claim damages if he/she satisfies the requirements of a damages claim.

(consequences)

SO ACED

- Specific performance
- Obligations of innocent party
- Acceptance
- Cancellation
- Election (double-barrelled)
- Damages

PREVENTION OF PERFORMANCE

- Prevention of performance (making performance impossible) is conduct by either the creditor or debtor which makes the delivery of his own or the other party's performance impossible.
- It can occur at any time before performance takes place, even after the date when performance has become due (anticipatory breach).

REQUIREMENTS

1) Absolute impossibility of performance

- Some authors argue that performance must be made absolutely impossible (impossible for any debtor to perform) rather than merely impossible for the particular debtor, as if performance is only relatively impossible it becomes a situation of repudiation rather than prevention of performance.
- This situation must be distinguished:
  - Impossible performance before conclusion of contract → no valid contract, no breach
  - Impossible performance after conclusion of contract → breach
  - Impossible performance due to *vis major* or *casus fortuitus* → supervening impossibility of performance
- Must be objectively impossible (to whole world)

2) Fault

- One of the parties must be responsible for the impossibility of performance to distinguish this from supervening impossibility of performance.
- The innocent party need not prove fault on the party of the party who breaches, but a party accused of making performance impossible may use absence of fault as a defence
- If a party has guaranteed performance, absence of fault will not be an excusing factor unless his inability to perform is due to the fault of the other party.

CONSEQUENCES

1) A party cannot rely on his own breach to escape from a contract

- If one of the parties rendered his own performance impossible he/she cannot rely on the impossibility to escape the consequences of the contract.

CASE: *Benjamin v Myers 1946 CPD*

- Facts: B leased a petrol station from M in terms of a contract of lease. The contract obliged B to keep a certain minimum amount of petrol and oil on the premises. When B failed to do so, M sued for breach of contract and cancellation. B's defence was that he had been prevented from keeping oil and petrol on the premises by government regulations, which determined that in wartime, petrol could only be bought from certain sources following certain procedures and as such, these regulations had rendered his performance impossible.
- Court held: The reason B could not obtain petrol was because he had previously breached the government regulations, thereby making performance impossible through his own conduct. Therefore, this was not a situation of supervening impossibility of performance but of B making his own performance impossible and so breaching the contract.

2) Counter-performances

- Where performances are reciprocal the impossibility of one set of obligations does not extinguish the need to render counter-performances, unless the contract is validly cancelled.
- If a debtor renders his own performance completely impossible and the creditor elects to uphold the contract, he must perform his part of the contract and claim damages *in lieu* of performance due by the debtor.
- Conversely, if the creditor renders the debtor's performance completely impossible and the debtor elects to uphold the contract, the debtor may claim counter-performance from the creditor subject to a reduction of the claim by the amount that he saves by not having to perform his side of the contract.

CASE: *Grobbelaar v Bosch 1964, EPD*

- Facts: G and B were business partners and in their partnership agreement it was stipulated that if one of the partners died, the surviving partner would receive all the assets of the partnership. In return, the estate of the deceased partner would get the proceeds of a life insurance policy taken

out on his life. B died first and it transpired the insurance company would not pay out the proceeds of the life insurance policy because B had supplied fraudulent information relating to the policy. The executor of B's estate argued that the agreement about distribution of the partnership assets had become impossible because the insurance company would not pay out and that B's estate should get a share in the partnership assets.

➢ Court held: This argument was rejected because the reason the payout of the policy had become impossible was because B had made it impossible by his own behaviour. B could not rely on his own breach to get out of the contract. Therefore, G was entitled to the partnership assets but in return had to pay out the nominal surrender value of the policy to B's estate, hence because G upheld the agreement he had to perform his part of the agreement and pay the nominal value to B's estate.

3) Specific performance

- Whole performance has become impossible: innocent party cannot claim specific performance but must be satisfied with damages
- Part of performance has become impossible: innocent party may ask for specific performance in relation to that part of the performance which remained possible.

✓ Example: X agrees to buy two horses from Y but one dies, X can claim for specific performance in relation to one of the horses.

4) Cancellation

- Where whole performance has become impossible: breach is so serious as to entitle the innocent party to cancel the contract
- If debtor renders his own performance impossible: creditor can elect to cancel the contract and recover any performance already made by him.
- If creditor renders a debtor's performance impossible: debtor can elect to cancel and restore any performance already made by the creditor.
- Only part of a divisible performance has become impossible: breach is committed only in respect of that part of the contract. The innocent party may therefore be entitled to cancel only that part of performance which has become impossible
- His/her own counter-performance will then be reduced proportionately but if it cannot be reduced it is arguable that a creditor can cancel the entire contract or accept partial performance and recover damages *in lieu* of the shortfall.

5) Damages

- The party who has rendered performance impossible must compensate the other party for financial loss suffered as a result of the breach by way of damages.

Specific **D**ams **C**an **C**ounteract **R**ain

Specific performance
Damages
Cancellation
Counter-performances
Reliance by party to escape own breach

POSITIVE MALPERFORMANCE

❖ **Occurs when the debtor delivers defective performance**

- *Obligatio non faciendi* - positive malperformance would occur when the debtor does the thing which he undertook not to do
- *Obligatio faciendi* - positive malperformance occurs when the debtor delivers an improper or incomplete performance
- Rarely the creditor can also be guilty of positive malperformance, such as where the creditor has a duty to co-operate with a debtor to allow the debtor to perform, and the creditor's performance is defective in this regard.
- For instance, the creditor must give the debtor drawings to allow the debtor to proceed with a building operation. If the creditor gives defective drawings he will be guilty of positive malpeformance.

- A tender of defective performance can constitute repudiation on the part of the debtor but once the performance has been accepted it is positive malperformance.
  - ✓ Example: D must deliver a car with coloured mags to C, but then he says he will not deliver the car → That is repudiation, however if C accepts the car with plain mags it is positive malperformance.

REQUIREMENTS

1) Fault

- This has not received much attention in case law however it is usually evident that a debtor who has positively malperformed, has acted either intentionally or negligently
- The innocent party does not have to prove fault on the part of the guilty party, but a person accused of positive malperformance may rely on the absence of fault as a defence unless he has warranted that his performance will be of a particular standard.

2) Breach relating to a material term

- Some cases have argued that in order to constitute breach, positive malperformance must be significant or must relate to a material term of the contract.
- This is incorrect, as the **materiality of the breach may relate to the right to cancel** but a person **can be in positive malperformance even in relation to a minor part** of a contract.
- Therefore, materiality of the breach affects the right to cancel, not the breach.

CONSEQUENCES

1) Creditor's duty to co-operate to enable the debtor to perform

- As soon as the debtor has delivered defective performance the creditor no longer has a duty to co-operate to enable the debtor to perform properly
- Nor does the creditor have to co-operate to enable the debtor to fix his defective performance.
  - ➢ *Reid v Spring Motor Metal Works* - "There is nothing to suggest there is any custom which requires a motor car owner to bring back his car repeatedly, or even once, to have a repair done properly which has not been done properly in the first instance".

2) Creditor's duty to perform

- In reciprocal contracts where the innocent party chooses to maintain the contract, the innocent creditor has to tender his own performance.
- If he demands proper performance from the guilty party **without tendering his own performance**, the guilty party may raise the defence of *exceptio non adimpleti contractus*.
- However, if the guilty party demands performance from the innocent party, the innocent party can likewise raise the *exceptio* (if requirements are met) and withhold own performance until such time as he receives proper performance from the debtor (***BK Tooling v Scope Precision Engineering***)

3) Right to reject defective performance

Debtors's performance is:

- Substantially or seriously defective → creditor may reject defective performance and claim proper performance; in effect the creditor is claiming specific performance and in reciprocal contracts the creditor would also tender his own performance
- Not seriously defective → creditor must retain the defective performance and claim damages
- Capable of being divided into separate parts → creditor may claim specific performance of a part of a contract, while canceling another part of the contract

4) Right to cancel

The creditor can only cancel due to positive malperformance in the following circumstances:

1) Lex commissoria
2) Positive malperformance is very serious (*Singh v McCarthy Motors*)

Whether or not the breach is serious enough to allow the creditor to cancel depends on whether one can reasonably expect the creditor to retain the defective performance and be satisfied with damages

$R_{ejection}$ C_{an} P_{revent} $C_{o\text{-}operation}$

Reject defective performance
Cancellation
Performance by creditor
Co-operation by creditor

CASE: *Singh v McCarty Motors 2000, SCA*

When can a party cancel in the absence of a lex commissoria?

- Facts: The appellant bought a Mercedes Benz from the respondent in terms of a written contract. The specific model was not in stock in Pinetown, but in Kingwilliamstown, and part of the agreement was that it would be delivered to Durban. However, the odometer was disconnected and the car was driven to Durban, approximately 760km, yet the odometer only read 160km. The appellant alleged he had bought a new vehicle which what not what he received as the vehicle had been driven that distance and so this constituted breach entitling the appellant to cancel. He claimed the respondent breached a material term and there was an implied *lex commissoria*, and the contract should be rectified to show the term providing that the respondent would transport the vehicle by road transportation carrier.
- The court *a quo* held that rectification could be granted and the respondent had thus breached the contract, however the breach was not serious enough as to allow rescission from the contract. Further, the *lex commissoria* was not tacit or implied. Appellant appealed:
- Court held (SCA): With regard to rectification, the contract is to be corrected in favour of the appellant, however with regard to cancellation, the issue was whether the appellant was entitled to cancel or not. For positive malperformance the innocent party may only cancel if there is a *lex commissoria* or if the breach relates to a material term.
- It is **not possible to apply one general principle** to test the seriousness of breach. The test whether the innocent part is entitled to cancel a contract because of malperformance by the other, in the absence of a *lex commissoria*, entails a [1]**value judgement** by the Court. It is essentially a [2]**balancing of competing interests** - that of the innocent party claiming rescission and that of the party who committed the breach. The ultimate criterion must be one of [3]**treating both parties fairly** under the circumstances, bearing in mind that rescission rather than specific performance or damages, is the more [4]**radical remedy**. The question is: is the breach so serious that the innocent party cannot be expected to abide by the contract?
- This breach did not justify cancellation because although the appellant bought a new car and wanted it to be transported by road carrier, his real complaint was not that it was driven that distance but that it was not driven by the respondent's representative (Reddy). As to the allegation that there was a tacit *lex commissoria* in the agreement, the court held the contract makes no provision for a right of cancellation in favour of the purchaser and on a balance of probabilities and the officious bystander test a tacit term could not be found. Appeal dismissed.
- Principle: The test whether the innocent part is entitled to cancel a contract because of malperformance by the other, in the absence of a *lex commissoria*, entails a [1]**value judgement** by the Court. It is essentially a [2]**balancing of competing interests** - that of the innocent party claiming rescission and that of the party who committed the breach. The ultimate criterion must be one of [3]**treating both parties fairly** under the circumstances, bearing in mind that rescission rather than specific performance or damages, is the more [4]**radical remedy**. The question is: is the breach so serious that the innocent party cannot be expected to abide by the contract?

Can the innocent party obtain the right to cancel by sending the guilty party a notice of rescission, as in *mora*?

- *Sweet v Ragerguhara 1978, D&CLD* - court held that a notice of rescission could give a right to cancel as in the case of mora but this did not extend to other forms of breach.

Remedies for Breach

EXCEPTIO NON ADIMPLETI CONTRACTUS

- Not remedy allowing innocent party to claim - defence allowing innocent party to withhold performance

- The *exceptio* is not a direct remedy which allows the innocent party to claim from the party who breached the contract, it is rather a defence which allows the innocent party to **withhold performance** in order to force the guilty party to perform.
- Where obligations are reciprocal (in exchange for one another) one party can withhold his performance if the other party does not perform.
- Therefore if one party has not performed or indicates it will not perform but sues the innocent party for performance, the innocent party may use the *exceptio* in defence and thereby indirectly force the guilty party to render complete and proper performance.

REQUIREMENTS

- Contract must be **bilateral**

1. One of the parties (guilty/plaintiff) claims performance from the other (innocent/defendant)
2. Defendant's performance is **reciprocal** to plaintiff's performance
3. Plaintiff's performance was due before or at the same time as the defendant's performance
4. Plaintiff has not performed and does not tender own performance, OR the performance is not complete and proper.

RECIPROCITY AND DIVISIBILITY

Requirement 2: performances must be reciprocal

- The *exceptio* operates only in contracts which create reciprocal obligations; hence the performances the parties intended to be in exchange for one another
- Reciprocal obligations can arise from one contract or from different contracts, as long as the **intention** is that they be undertaken in exchange for one another.

CASE: *Wynn's Car Care Products v First National Industrial Bank* 1991, AD

- Facts: W and X (computer company) concluded 3 contracts with one another, which, W alleged, formed part of a single transaction with reciprocal obligations. According to the first agreement X was to lease certain computers to W. The second contract was for X to maintain the computers and the third was for X to supply data-processing, network and other computing services. W failed to pay the full amount under the agreement of lease and when he was sued he tried to use the *exceptio* on the basis that X had failed to perform under the maintenance and computer services agreements.
- Court held: Whether the parties intended that the performances from the 3 contracts should be reciprocal is a **matter of interpretation of the contracts.** The mere fact that the agreements are for commercial and practical reasons linked to one another does not necessarily mean that the obligations are reciprocal. Interpreting various clauses from the contract of lease and taking into account the fact the parties had decided to embody the deal in 3 separate contracts, the court found no reciprocity. W was therefore not entitled to rely on the failure by the computer company to perform in terms of the maintenance and computer services contracts because these obligations were no reciprocal to the obligations under the agreement of lease. They chose to put it into 3 separate agreements.
- Principle: Whether the parties to a contract **intended** that the performances from the 3 contracts be reciprocal is a **matter of interpretation.**

- Not all obligations of one party in any one contract are reciprocal to all the obligations of the other parties, but this depends on **intention of the parties.**

CASE: *Clarke v Nourse Mines* 1910 TPD

- Facts: In terms of a contract of lease the tenant (T) had to pay monthly rental and the landlord (L) had to make the premises available to T. L also had to provide T with a copy of the lease agreement but failed to do so. T refused to pay rental until L complied with his obligation to provide the written agreement.
- The obligation for payment of rent was not reciprocal to providing the written agreement; rather it was reciprocal to availability of the premises, therefore T was not entitled to withhold payment.

- **Where performance is divisible the principle of reciprocity is applied separately to each different section of the performance**
- ✓ Example: A buys 2 plots on a new development from B. Plot 1 costs R100 000 and plot 2 costs R200 000. If B fails to deliver plot 2, A cannot refuse to pay the R100000 because A's obligation to pay R100 000 is reciprocal to B's obligation to deliver plot 1.

CASE: *Valasek v Consolidated Frame Cotton Corp* 1983, NPD

- Facts: V was employed by CFC and the contract stated that the period of employment was to be 3 years and his salary would be paid monthly, at the end of each month. At the end of July 1981, exactly one year before the 3 year period was to expire, V informed CFC that he no longer wished to work for them. They accepted this as repudiation and refused to pay him for his work in July, relying on the *exceptio*. The argument was that because he did not complete his three year contract he was precluded from claiming his salary for July
- Issue: Is CFC's obligation to the salary for July in exchange for V's obligation to work for them for three years?
- Court held: No; what was reciprocal to the obligation to pay a salary for July was V's obligation to work for July. Since V did work for July, CFC was obliged to pay for July. The principle of reciprocity therefore applied separately in respect of each month that V worked (contract was divisible into months).

Divisible contracts:

SEQUENCE OF PERFORMANCES

- The sequence of the parties performances determines who can use the exceptio
- The exceptio can only be raised when the parties either **have to perform together** or when the party raising the exceptio **has to perform last.** only may raise exceptio if performing last
- Example: A and B agree that A will build B a swimming pool for R20 000. The agreement clearly states that the payment will be made *upon successful completion of the pool*. When B asks A when he will start with construction of the pool, A says he does not have to perform because B has not yet performed, hence A is relying on the exceptio and withholds performance.
  - This is not allowed because the contract stated the payment was due upon completion of the pool and so the obligation to pay is reciprocal to completion of the pool.
- If the contract does not specify which performance must be given first, the *naturalia* of the specific type of contract will determine sequences of performances.
- **General rule:** Reciprocal performances must take place simultaneously.
- ✓ Example: In a contract of sale the buyer and seller will normally have to perform at the same time, so the buyer pays the purchase price at the same time as the seller delivers the thing.
- The exception to contracts of sale is ***locatio conductio*** **(letting and hiring)** where the rule is unless the parties agree otherwise the money must be paid last

Locatio conductio re - lease of a thing
X rents a car from Y at a rental of R300 daily
→ Y performs first, X can raise the exceptio

Locatio conductio operarum - contract of employment
V employs W as his secretary at a monthly salary of R10 000
→ W performs first, V can raise the exceptio

Locatio condutio operas - contract of mandate
S agrees to build a house for T at a cost of R500 000.
→ S performs first, T can raise the exceptio

DEFECTIVE OR PARTIAL PERFORMANCE

- Where one of the parties performs defectively or partially (when performance is indivisible) the other party has a choice to either reject the defective performance and claim specific performance or keep the defective performance and claim damages
- If the defective performance constitutes a material breach, the innocent party may elect to cancel the contract and *exceptio* does not apply if the contract is cancelled.
- ✓ Example: A sends a suit of clothes to the dry cleaner, B. B returns A's suit but there is a stain on the sleeve and some of the buttons are missing → A may either refuse to accept the suit as it is and claim

that it be properly cleaned and the buttons sewed back on, or he may accept is as it is and claim damages.

- Where partial or defective performance has been rejected and specific performance is claimed, the innocent party may withhold his/her own performance on the basis of the exceptio until such time as the other party makes or tenders complete and proper performance.
- However, when partial or defective performance has been accepted, is the party who delivered defective performance entitled to claim the reciprocal performance or can the other party raise the *exceptio* on the basis that the performance was partial or defective?

✓ Example: If A accepts the defective suit, can B claim that A pay the bill? Or may A use the *exceptio* against B on the basis that B's performance was defective.

CASE: *BK Tooling v Scope Precision Engineering* 1979, AD

Court held

- A party's right to reject a partial or defective performance is subject to the ***de minimis*** **rule:** where the performance is only incomplete or defective in a minor detail he/she may not reject it
- The party who accepted defective performance is entitled to withhold her own performance and may resist claims for performance with the *exceptio* until such time as the other party has performed both fully and properly.

- However, this would lead to an unfair situation where the party who had accepted defective performance can now refuse to give any performance in return and will benefit at the expense of the other party.
- Example: If A accepts the defective suit, B cannot force A to pay at all because A will be able to use the exceptio to defend himself against B's claim for counter-performance and then although half the suit has been properly cleaned A would not have to pay B at all.

BK Tooling v Scope Precision Engineering Reduced counter-performance

- Court developed a discretion to order reduced counter-performance (B would then be able to rely on the court's discretion to order that A has to pay at least part of the contract price, but it will be less than the agreed price
- For the discretion to operate, the party who claims the reduced-counter performance must prove:

1. The other party used the defective performance to his/her advantage
2. Special circumstances which make it equitable and fair to exercise the discretion
3. Amount of the diminished counter-performance
    - Therefore, the plaintiff must prove by what amount his claim must be reduced; usually this is the cost of bringing the defective performance to the proper standard

✓ Example: If A keeps the suit but refuses to perform, B can convince the court to order that A pay a reduced counter-performance B must prove:

- A is using the suit to his benefit
- It is fair that A should compensate B to some extent
- What the amount of the reduced counter-performance should be. Usually this would be the cost of fixing the defective performance which is the cost of dry-cleaning the jacket and sewing new buttons on.

- However, not all performances can subsequently be fixed
- In such cases the court will reduce the plaintiff's claim by an amount that is **fair, taking into account all considerations** of the case

CASE: *Scholtz v Thompson* 1996, CPD

- Facts: Sale of a grazing farm with an agreement that buyer must pay occupational rental from date of occupation until transfer, however at the time when the parties agreed that the buyer could occupy the farm there were still some livestock, workers and implements on the farm and the seller remained in the farmhouse for some time. The seller had therefore given defective performance (not given buyer full possession of the farm) the buyer could conduct some farming activities, but had to travel far to reach he farm every day. The obligation to give vacant possession of the property and to pay occupational rental are reciprocal. The buyer is entitled to use the *exceptio* to ward off a claim for occupational rental since the seller had not performed his obligation properly.
- Court held: On the question of whether the seller could claim a reduced counter-performance (reduced occupational rent) the HC held that since it was not possible retrospectively to fix the

performance (provide buyer with vacant possession) the seller could not prove the value of the reduced counter-performance and therefore was not entitled to anything. Case went on appeal

- Appeal, SCA: SCA held that in the HC the rule about reduced counter-performance as formulated in *BK Tooling* contained two assumptions: (1) "the shortfall in the plaintiff's performance firstly must be capable of being fully restored to contractual standard and (2) the cost of doing so must be capable of being qualified". SCA reduced the amount of the occupational rent payable by the buyer by 25% and awarded a claim for reduced rental to the seller.
- Principle: Where it is not possible to fix the defective performance, the exact value of the reduced counter-performance cannot be calculated. Nevertheless the court should attempt to award an amount that is fair in all the circumstances using a "fairly robust approach" to the calculation of the amount

SPECIFIC PERFORMANCE

- An order of specific performance requires the contractant to deliver performance agreed to in a contract
- Example: X and Y have a contract whereby X will buy Y's car. If X has paid and then sues for specific performance, he is suing for delivery of the car by Y.
- In cases of negative obligations, a claim of specific performance would take the form of an interdict to prohibit any breach of the negative obligation.
- Example: Y sells his dental practice to X; the contract of sale includes a restraint of trade agreement in terms of which Y undertakes not to practice as a dentist in Johannesburg for two years. If Y attempts to breach the restraint, X would ask the court for an interdict to stop Y breaching the restraint.
- In reciprocal obligations, a party can only sue for specific performance by the other party if he himself has made or at least tendered complete and proper performance of his reciprocal obligations.
- Impossibility and insolvency: specific performance cannot be granted (*Benson v SA Mutual Life Assurance*)

Court's Discretion to Refuse an Order for Specific performance

- In Roman-Dutch law a contractant is entitled to an order of specific performance unless the court exercises its discretion and refuses to grant such order, however in English law an order for specific performance is an exceptional remedy that will be granted only when it would be equitable to do so.
- South Africa follows the Roman-Dutch approach: an order for specific performance **will be granted, unless there are exceptional circumstances which justify refusal** of such an order.
- If the court refuses to grant an order for specific performance the innocent party will still have a claim for damages.
- Early SA cases were influenced by English law so courts would "exercise discretion" and refuse an order of specific performance whenever certain, rigid, circumstances were present.

CASE: *Haynes v Kingwilliamstown Municipality* 1951, AD

- Facts: According to a contract between Mrs Haynes (H) and the Kingwilliamstown Municipality (KWM), H was entitled to 250 000 gallons of water per day from KWM's dam. This was a regular continuing relationship and KWM honoured its obligations, however in 1949 a severe drought hit the Kingwilliamstown area and KWM therefore decided to reduce the daily flow to H to 1500-2000 gallons. Full compliance with the agreement would have worked great hardship to the inhabitants of Kingwilliamstown and would also have resulted in positive danger to their health. H, despite having an adequate supply of water from other sources, claimed specific performance by KWM. The court refused to grant the order.
- Court held: The Roman-Dutch law position appears to have been adopted, namely that a plaintiff has a right to claim specific performance and although a court will as far as possible give effect to the plaintiff's choice, the court does have a discretion in certain circumstances to refuse to grant specific performance. This discretion must be exercised judicially and is not circumscribed by rigid rules. Each case must be looked at on a basis of its own circumstances. The court then looked at circumstances that could be relevant, which by and large come from English law:
  1. Damages would adequately compensate the plaintiff
  2. It would be difficult for the court to enforce the order
  3. The thing can be readily bought anywhere
  4. Where specific performance entails the rendering of services of a personal nature

5. Where it would operate unreasonably harshly on the defendant or the agreement giving rise to the claim is unreasonable or;
6. Where an order of specific performance would produce injustice or would be inequitable under all the circumstances.

➢ This list of considerations influenced the court very strongly in the exercise of its discretion. It is arguable that these particular factors were elevated to rules so that there was no real exercise of discretion but merely an application of rigid rules

- *Benson v SA Mutual Life* re-aligns the SA law strictly with the Roman-Dutch law position
- It is therefore better to view the considerations outlined in *Haynes* as factors that can be taken into account when the court exercises its discretion rather than rigid rules on mere application produces a result.
- Therefore the judge must not be bound by rigid rules.

CASE: *Benson v SA Mutual Life Assurance Society* 1986, AD*

➢ Facts: In a share agreement between the respondent and appellant, the respondent claimed delivery of a large quantity of shares in the McCarthy Group. Allegedly, the respondent had bought 171500 shares and there was an implied term that delivery of the shares would occur within a reasonable time. Only some shares had been delivered and so the respondent claimed specific performance and damages since (allegedly) the failure to deliver the shares meant the respondent could not register them and he subsequently lost money. The appellant averred the respondent knew the remaining shares would not be delivered and could have bought shares from the stock market without difficulty, so an order for specific performance should not be granted. The court *a quo* rejected this and ruled in favour of the plaintiff/respondent. In an appeal:

➢ Court held: Previously the court's power to interfere was strictly circumscribed and it depended on whether the court *a quo* has exercised its discretion erratically or on an incorrect principal. Specific performance cannot be granted if it is impossible, unlawful or against public policy, however the court has a discretion to grant specific performance and must look at all relevant considerations as opposed to one rigid list.

➢ In *Haynes* the court was bound by rigid rules, however the court would no longer be circumscribed by rigid rules as there is no rule relating to a party's right for specific performance or the way in which discretion should be exercised.

➢ However, it is not an unfettered discretion, it is a judicial discretion (fair) which should not be exercised erratically or on wrong principles. Injustice must be prevented and sometimes justice demands that the plaintiff be denied specific performance, if it is in accordance with legal and public policy.

➢ Principle: Exercise of discretion by the courts is not bound by rigid rules as in *Haynes*, however it is limited in that it must be exercised fairly and in accordance with legal and public policy, and the court must aim to prevent injustice.

EMPLOYMENT CONTRACTS

- In employment contracts there may be practical problems in making an order of specific performance, because of the highly personal nature of performances by employers and employees.
- An order of specific performance could mean that an employer is forced to continue to employ an employee that he does not want, or conversely, that an employee is forced to continue to work for an employer when he no longer wishes to.
- Earlier SA cases held that no order for specific performance for a contract of employment would be granted unless one was dealing with a civil servant or an employee whose service was governed by statute.

➢ However in *National Union of Textile Workers v Stag Packings 1982, TPD*, court held that in principle all employees should be able to claim specific performance subject to the discretion of the court.

- The court may therefore refuse an order of specific performance if the circumstances of the case require it
- All relevant factors and practical considerations should be taken into account; two factors are particularly significant:

1) Inadvisability of compelling one person to employ someone whom he does not trust in a position which imports a close relationship and
2) Fact that no court could by its order compel a servant to perform his work faithfully and diligently.

Santos Professional Football Club v Igesund 2002, CPD

Court set out the following factors to consider in the context of employment contracts:

a) Disapproval of forced labour
b) Fact that damages were a sufficient remedy for the employer
c) Reluctance to interfere with an employee's right to freely exercise his/her skills or profession

These policy considerations were endorsed by the constitutional rights to freedom of movement, to choose a profession and to dignity.

Further practical considerations that were taken into account:

a) Highly personal nature of services rendered – a court cannot force an employee to work with enthusiasm and commitment
b) How does one restore the working relationship between the parties?

The court exercised its discretion and refused to grant specific performance

Case went on appeal:

CASE: *Santos Professional Football Club v Igesund* 2003, CPD

Factors to consider in exercising discretion - employment contracts

- Facts: An employment contract was concluded between the first respondent and the applicant, by which the respondent was to be coach for the applicant. The respondent repudiated (indicated intention to no longer be bound) and indicated he would coach another football team, however the applicant sought an order compelling the respondent to continue serving as head coach. A clause in the agreement stipulated that should the coach commit any breach the applicant would have the right to cancel and institute action for specific performance. Court *a quo* dismissed the claim.
- Issue: Should the applicant's claim for specific performance be granted? Was specific performance an appropriate remedy in this instance?
- Court held: Specific performance will usually be awarded where it is possible and reasonable and the court will only refuse it where there is a recognized hardship for the defaulting party. The respondent cannot avoid the consequences of the contract by merely alleging unwillingness to continue to performance even though there could be an infringement of certain constitutional rights (movement, occupation and profession). Where there is a personal relationship there is a constant danger of disputes and if the order were to be granted there is possibility, in such situations, that the respondent would work with diminished enthusiasm and commitment to perform. Further, the respondent may not be functionally optimal.
- Although there were compelling reasons not to grant the order, namely a disapproval or forced labour, damages would be a sufficient remedy for the employer, and there is a reluctance by courts to interfere with the employee's right to freely exercise his/her skills/profession, on appeal the order was granted.
- Reasons for granting the order were: it was not an ordinary employment contract as there was equal footing between the parties, he was not wrongfully dismissed and the relationship had not soured, he (resp) repudiated the contract and the club was willing to take the risk of employing an unmotivated worker in the event of the respondent not performing optimally, because it was his reputation on the line so if he performed badly it would only be to his detriment.

  Principle: Taking considerations and the Constitution and policy factors into account, the courts have some discretion to award specific performance or not in employment contracts.

Questions
1) Identify employment contract
2) Consider *Santos v Igesund* factors
3) Apply to facts
4) Should specific performance be awarded?

WASTEFUL PERFORMANCE

- It has been argued that the court should refuse to grant an order for specific performance if performance by the guilty party would be wasteful
- If the court refused to grant an order for specific performance, the innocent party will only be able to claim damages for the beach
- This will be subject to the rule that the innocent party has to mitigate his damages
- The innocent party's claim for damages may be reduced if it was wasteful for him to incur further expenses in terms of the contract

CASE: *Unibank Savings v Absa* 2000, WLD

- Courts have a discretion not to enforce an application for specific performance and **recognizable wasteful performance** may influence the court in exercising such discretion, if an **unjust** result may follow.
- The **right to specific performance** is never lost because of cancellation imputed to an innocent party however a court will deny specific performance if **adequate equities** are proved. This is not done according to any rule.
- In the instant case, whether specific performance or damages were awarded, the amount would have been the same and therefore the court exercised discretion and did not award specific performance, but damages instead.
- Majority: The court can **never force an innocent party to cancel a contract but if specific performance would be wasteful** then the court will **exercise discretion not to grant specific performance.** The **right to claim** specific performance **is never lost**, but a court has a discretion to grant it where it would be wasteful and cancellation would be more suitable.
- Minority: What is the point of the two employees continuing to work if there was no work for them? Insisting on specific performance in such situations leaves a contract that is "economic nonsense" when cancellation should be enforced and damages can be claimed for the loss suffered by the applicant. Further, the two employees were employed by Absa and so Absa had to give a fair retrenchment package. It is necessary for the court to apply a **modicum of realism** in the face of specific performance and exercising its discretion and in this case there was no economic viability and the court should have been realistic about commercial realities. This ultimately depends on the circumstances.
- Principle: The **right to specific performance** is never lost because of cancellation imputed to an innocent party however a court will deny specific performance if **adequate equities** are proved (performance is **wasteful**). This is not done according to any rule

MONETARY EQUIVALENT (SURROGATE) OF PERFORMANCE

- Some authors have argued that instead of claiming an order for specific performance *in forma specifica* (the debtor do exactly as he promised), the innocent party can claim the monetary equivalent of performance instead
- According to these authors, this is just an order for specific performance in another form
- ✓ Example: X and Y agree that Y will bake a wedding cake for X which will be decorated with roses made from icing. Y bakes the cake but does not decorate it with roses (positive malperformance). X decides to uphold the contract, however instead of claiming an order that Y must decorate the cake with roses, Y claims the monetary equivalent of the roses (what it would cost to buy the roses from someone else)
- The advantage of claiming the monetary equivalent as specific performance instead of damages, is that the plaintiff's claim will not be subject to the normal rules relating to claims for damages (such as plaintiff must mitigate his losses)
- This question was considered in *Isep Structural Engineering v Inland Exploration:*

CASE: *Isep Structural Engineering v Inland Exploration* 1981, AD

- Facts: The Johannesburg City Council (JCC) owned a piece of land that they leased to Isep. JCC then decided that they wanted to sell the property and they duly terminated the lease with Isep (provided adequate notice etc). This gave rise to a contractual duty on the tenant (Isep) to restore the property to its original condition and this would entail Isep's removing huge concrete ramps at an expense of R15 000, however Isep failed to remove the ramps. Inland Exploration (IE) offered to pay R77 500 for the land but included a term that the seller warrants that the ramps will be removed. JCC refused to accept this term, but agreed to the price of R77 500. In addition, it was agreed that JCC's contractual right against Isep would be ceded (transferred) to IE. IE thus instituted an action against Isep on the basis of what was originally JCC's right to have the property restored to its original condition. In this action, one would therefore treat IE as if it were JCC itself. IE claimed R15 000 from Isep, being the cost of having those ramps removed.
- Issue: Is this a claim for damages that must satisfy all the requirements of damages or is it a claim for specific performance in the sense that one is asking for the monetary equivalent (surrogate) of performance?
- Court held: 3 of 5 judges held that our law does not recognize a claim for surrogate performance. The law allows only two claims: specific performance (in the sense that you ask for the performance

that was originally agreed to in the contract) or damages (in the sense of the losses you sustain because of the breach of contract).

- Because IE was claiming damages it had to prove the requirements for damages and since it could not prove loss (financially worse off as a result of the breach) the claim was unsuccessfully. The court granted absolution from the instance.
- Principle: If one claims a sum of money instead of actual performance, one has to satisfy all the normal requirements for damages.

CANCELLATION

- In keeping with *pacta sunt servanda*, the general purpose of contract law is to achieve fulfillment of the contract.
- Cancellation is aimed at termination of the consequences of a validly concluded contract
- It is an extraordinary remedy which can be used in exceptional circumstances only.
- General rule: cancellation means that the obligations under the contract are extinguished so performances outstanding will not be performed in the future.
- Performances already made must be restored (*Nash v Golden Dumps*), subject to the doctrine of accrued rights
- Cancellation does not completely expunge the contract as the guilty party will still have to compensate the innocent party by paying damages

REQUIREMENTS

1) Right to Cancel

- The mere fact that a party has breached a contract is insufficient to justify cancellation by an innocent party, there must be a right to cancel and this depends on the specific form of breach
- If a party attempts to cancel a contract without **sufficient justification**, such as if the breach is not serious enough, the cancellation is ineffective and the contract still stands
- Additionally, a party who tried to cancel will be guilty of repudiation, so it must first be ascertained whether a party had the right to cancel

- Mora → *Lex commissoria;* notice of rescission; time is of the essence
- Repudiation → *Lex commissoria* OR when breach is serious (fundamental aspect of type of breach it anticipates)
- Prevention of Performance → If whole performance is imposible the breach is serious; if debtor renders own performance impossible the creditor can elect to cancel and recover damages; part of performance is impossible, then if it is divisble the innocent party may cancel in respect of that part of the contract
- Positive Malperformance → Lex commissoria OR very serious breach. Also Singh v McCarthy (value judgement; balance interests; treat both parties fairly; is the breach so serious that the innocent party cannot be expected to retain performance?)

2) Ability to Restore Performance (restoration)

- Because cancellation involves undoing the consequences of a contract it creates an obligation to restore any performance that has already been received.
- A party seeking cancellation must be able to **return performance** that was received in terms of the contract

Innocent party is unable to restore performance

- Inability of the innocent party to restore performance received prevents him from canceling the contract
- However, the innocent party will be able to cancel if the inability to restore is not due to the fault of the innocent party and he is not enriched by the performance made (***Feinstein v Niggli*** 1981 AD)

Exceptions - Cases where inability to restore performance will not prevent cancellation

1. Where deterioration of the asset is due to an inherent defect
   - ✓ Example: X delivers a car with an electrical fault to Y and the fault causes an explosion which destroys the car
2. Perishables

- ✓ Example: X delivers tomatoes instead of cherries to Y and the tomatoes go bad before Y can collect them

3. Where the object perished when used for the purpose and in the manner in which it was intended
- ✓ Example: X sells washing powder to Y but when Y uses it all his clothes turn grey. Y will not be able to return the washing powder

4. Where the contractant has used/altered the (defective) performance to produce a new product it would be unfair to bar cancellation on the basis that he is unable to restore the original performance
- ✓ This position is unsettled in our law: some authors suggest that it would be equitable to allow cancellation subject to restitution of the new product of providing a monetary equivalent of the original performance
- ✓ Example: X purchases 10kg of yeast from Y which he will use to make beer, however the yeast is ineffective and X cannot make beer.

No fault and not enriched, may still cancel → Feinstein v Niggli

Restoration of performance is only partially possible

- If restitution is rendered partially impossible due to no fault of the innocent party, the rules as above apply
- If restitution is rendered partially impossible due to the fault of the innocent party but it is still substantially possible, he is entitled to cancel the contract subject to supplementing the shortfall with a sum of money.
- If the innocent party is allowed to cancel the contract without making restitution of the performance (in full or in part), he must still restore whatever remains of the performance or any substitute that he may have received for performance

Restoration of performance by the guilty party

- Subject to the doctrine of accrued rights, the party who has breached the contract is obliged to return any performance that he has received in terms of the contract.
- If the guilty party is unable to restore performance the innocent party will be able to claim any losses resulting from this inability as damages.
- It is unclear whether this only applies if the guilty party's inability was due to his fault or not

3) Exercise of Right to Cancel (communication)

- Cancellation is a unilateral juristic act performed by the innocent party alone and does not require agreement by the guilty party (***Stewart Wrightson v Thorpe***)
- Cancellation can be effected extra-judicially (without court order) and does not require confirmation by court.

For an innocent party to exercise his/her right to cancel, he/she must:

1. Express his intention to cancel the contract by words or by conduct that manifests a clear election to cancel; AND
2. Communicate his election to cancel to the guilty party.

Requirement of communication to guilty party

- Some cases have held that the guilty party must have had actual knowledge of the innocent party's intention to cancel, however actual knowledge does not have to be proved if the innocent party can prove he took reasonable steps to notify the other party of his election to cancel (***Stewart Wrightson v Thorpe***)
- A guilty party who through his own fault lacks knowledge of the innocent party's decision to cancel cannot rely on such lack of knowledge
- There are no prescribed formalities for cancellation. Provided there is a clear, unambiguous (*Truter v Smith*) election to cancel, notification of cancellation can be express (words), implied (conduct) or contained in a summons. The parties may agree to dispense with the requirement of notice of cancellation
- Decision to cancel can be conveyed to the guilty party by a third party (***Datacolour International v Intamarket***). The issue is not whether the decision was conveyed but whether it reached the guilty party.
- Innocent party does not need grounds for cancellation. If the innocent party states an incorrect or inadequate ground for cancellation he will not be bound thereby. The contract will still be cancelled if the innocent party subsequently relies on a valid ground for cancellation which existed at the time.
- If a notice of cancellation is given before the right to cancel arises, it will be valid if the innocent party intended for it to be effective only when the right to cancel arises: In case of *mora debitoris* the innocent party can send the *interpellatio*, notice of rescission and notice of cancellation

simultaneously, and the notice of cancellation will only take effect once the time set in the notice has passed.

- ✓ Example: A says "I will have the right to cancel the contract if you do not perform by 01/10/2008 (notice of rescission) and I elect to choose this remedy of cancellation if you do not perform in time (notice of cancellation).
  - o If the debtor fails to perform by the date, the creditor does not have to do anything further since he has already communicated his election to the debtor so the contract is automatically cancelled on that date.
- ✓ However, cancellation will only become effective on the date so if the debtor performs before the time the creditor cannot cancel.

- ✓ Note: notice of rescission serves to acquire the right to cancel for a breach and it is not an exercise of cancellation in itself; notice of cancellation is the actual exercise of right to cancellation.

LOSS OF RIGHT TO CANCEL

- The innocent party will lose the right to cancel if he elects to uphold the contract
- Such election can be done expressly or by conduct (if innocent party conducts himself in such a way that clearly indicates he intends to uphold the contract), however it must be clear that the innocent party has **elected not to cancel** the contract
- If there is reasonable explanation for his conduct he will not lose his right to cancel
- A mere delay to exercise the right to cancel does not automatically mean that the right is lost.
- However, if the delay causes the other party to reasonably believe that the innocent party elected to uphold the contract, he will lose his right to cancel the contract.

CASE: *Mahabeer v Sharma* 1985, AD

- ➢ Facts: A contract of sale was concluded between M & S whereby M was to pay the purchase price in instalments. These payments were not made so S wrote to M and stated that the contract would be cancelled if payment was not made within 30 days (notice of rescission). M did not pay so 5 months after this letter was sent, S sold the property to someone else. At this time, M's attorney informed of the cancellation (notice of cancellation) and subsequent sale. M argued that the right to cancel lapses unless it is exercised within a reasonable time
- ➢ Court held: A mere delay in final notification cannot per se result in the loss of the right to cancel. The delay could however indicate an election to abide. Depending on the circumstances of the case, the failure to exercise the right to cancel within a reasonable time may justify an interference that the party has elected not to cancel the contract. On the facts, the court could not make such inference as the guilty party never believed that the innocent party had given up the right to cancel the contract. As a result, S's right to cancel was not lost.

EFFECT OF CANCELLATION

- Cancellation extinguishes all future unfulfilled obligations and creates an obligation to restore any performance that has already been made
- ✓ Example: A sells his stud bull to B for R10 000 to mate with his cows and the parties agree that A will deliver the bull to B on payment of a R5000 deposit. They agree B will pay the remainder of the purchase price in monthly installments of R1000 over the next 5 months. B pays the deposit and A delivers the bull, however the bull turns out to be impotent (positive malperformance) and A has therefore committed a breach. B elects to cancel.
  - → The effect of cancellation is firstly that it creates a duty to restore all the performances already made and B is therefore obliged to return the bull to A and A is obliged to return the R5000 to B. All B's future obligations are terminated, hence he will not have to pay the monthly installment.
- This principle is qualified by the doctrine of accrued rights:

DOCTRINE OF ACCRUED RIGHTS*

- Cancellation operates only partially if performance in terms of the contract is divisible
- This applies especially to contracts that create continuous obligations (rental contracts, employment, service) but can apply to contracts creating divisible obligations (sale of two horses)
- ➢ *Crest Enterprises v Ryklof* 1972: "Rights that have become due and enforceable before cancellation and are independent of any executory part of the contract are not extinguished by cancellation" (Executory part refers to that part of the contract that was due to be performed in the future)

- If the doctrine is applied the normal consequences of cancellation do not operate in respect of the rights to performance which have already accrued
- Accrued performances which have already been received do not have to be restored
- A party can still claim specific performance of an obligation that has accrued even if the rest of the contract has been cancelled.
- Three requirements for operation of the doctrine of accrued rights:

1) The contract must be divisible in separate parts
2) The right to accrued performance must have become due and enforceable before the cancellation
3) The accrued performance must be independent from any outstanding obligations at time of cancellation

1) The contract must be divisible in separate parts

- If the contract is not divisible the doctrine of accrued rights cannot apply.
- ✓ Example 1: A one year contract for the lease of a flat at a monthly rental of R1000 per month → The contract can be divided into 12 smaller parts consisting of the obligation to pay rental and the obligation to give occupation of the flat for one month.
- ✓ Example 2: A contract for the sale of a milk cow → not divisible.

2) The right to accrued performance must have become due and enforceable before the cancellation

The due date for the particular performance must have arrive before cancellation and there must be no unfulfilled conditions in relation to that performance.

Test to determine if performance is due and enforceable: Would you have been able to claim specific performance on the date of cancellation? If yes, the performance was due and enforceable. If no (for any reason) performance is not due and enforceable.

CASE: *Nash v Golden Dumps* 1985, AD

- Facts: GD had entered into a contract of employment with N. This contract was set out in a letter from GD to N. In addition to the contract of employment the letter also contained a share option agreement enabling N to buy shares in a company that was to be formed later. GD then committed breach and N elected to cancel their contract, but at the time of cancellation the new company had not yet been formed. N's rights under the share option agreement was therefore not due and enforceable at the time of cancellation, because the share option was subject to a condition (that the new company be formed) which had not been fulfilled at the time of cancellation.
  - → If the share option agreement had been cancelled the doctrine of accrued rights would not have applied, and N would not have been able to claim the shares once the company was formed.

3) The accrued performance must be independent from any outstanding obligations at time of cancellation

- All obligations that are reciprocal to the accrued performance must have been fully performed before cancellation.
- ✓ Example 1: On 1 January A and B enter into a five-year contract of lease in terms of which A leases his flat to B for R1000 per month, payable at the end of each month. B therefore gets occupation of the flat in exchange for paying the rent every month. At the end of May B fails to pay the rent and therefore commits a breach of contract. B does not pay the rent for three months (May, June and July) and at the end of July A cancels the contract.
- ✓ The cancellation will extinguish all future obligations and B will therefore no longer have occupation of the flat and A will not be entitled to any future rent as from the end of July. As concerns the rental from January to April, A's right to them have already accrued and they therefore do not have to be returned.
- ✓ A's right to three months outstanding rent was due and enforceable before cancellation (could have claimed rental on the date of cancellation). This right to performance is independent of the future obligations under the contract (she has already performed her reciprocal obligation, namely to give B occupation of the flat for the months May to July). Her right to payment of the three month's rent had therefore accrued before cancellation and A can still claim the R3000 from B notwithstanding the cancellation of the contract.

- ✓ Example 2: A cancels the contract on 12 August. The right for rentals May, June and July have accrued, however the rental for August is only due after cancellation (31 August). Consequently, the right to August's rent has not accrued (assuming performances are not divisible). A has to rely on a damages claim for compensation for losses suffered in relation to August.

✓ Example 3: Monthly rental is payable in advance on the 1st day of each month and A cancels the contract on 12 August → The right to rentals for May, June and July have accrued however in relation to August's rental, although the performance (payment of R1000) was due before cancellation, it is not independent/divisible from the future reciprocal obligation (giving B occupation of the flat for the whole month of August. A is therefore not entitled to sue for August's rent of R1000 (assuming performances are not divisible) but must be satisfied with damages.

CASE: *PBL Management v Telkom* 2001, TPD*

- Facts: Applicant and respondent had a sponsorship agreement whereby the respondent would make installments in return for promotional advertising and marketing rights regarding a sports competition (basketball). In terms of the agreement the respondent was to pay certain amounts on specified dates and was entitled to terminate the contract at any time, provided it gave 120 days written notice and it would not prejudice existing rights the parties may have had against each other. Further, it would release the parties from fulfilling their obligations incurred prior to such termination.
- Telkom gave notice of cancellation which was to take effect in February, however the applicants averred that on 30 January a certain amount of money was due. The respondents contended that the payment was independent of the performance of obligations up to that point, alternatively that the contract was ambiguous as to whether or not the payment due on 30 January was to be payment in advance or independent of the executory part of the contract.
- Issue: Whether the respondent was obliged to pay PBL the sum due on 30 January, hence was it a right that had already been accrued or independent?
- Court held: The principle that **rights already accrued are unaffected by termination of a contract** is applicable to this and all other similar instances. The contract was ambiguous as to whether payment was due in advance or an independent obligation, but construed in light of the background of the contractual setting and surrounding circumstances, parties had intended the payment due for 30 January to be payment in advance for exercise of Telkom's rights in advertising. From date of termination, Telkom had no existing rights or claims against the applicant, nor had the applicant incurred obligations prior to that termination.
- Principle: Rights already accrued are not affected by the termination of a contract

- If there are two agreements between the parties, cancellation of one agreement does not necessarily mean that the other has also been cancelled
- It will therefore not be necessary to use the doctrine of accrued rights to enforce an uncancelled agreement.

CASE: *Nash v Golden Dumps* 1985, AD

- Issue: Whether the breach and cancellation related to both the employment contract and the share option agreement. If the cancellation related to both contracts the doctrine of accrued rights would not apply to the share option rights, as they were not due and enforceable before cancellation. N would therefore not have been able to claim the shares from GD.
- Court held: Where a document embodies two or more related but **separate** agreements, a cancellation may relate to one agreement only. In casu, a contract of employment and a share option were embodied in a single document. Although they were linked they were juristically **separate** agreements with independent sets of rights and duties (the contract was divisible). On the facts, GD had repudiated the employment contract only. Consequently N had only cancelled the employment contract and not the share option agreement. The share option was therefore still in existence and N was entitled to enforce the share option agreement when it became due and enforceable.

Relationship to Specific Performance

- A party cannot simultaneously ask for specific performance and cancellation because these are inconsistent remedies, nor can he/she claim specific performance and cancellation in the alternative. (Desai v Mahamed)

CASE: *Custom Credit Corporation v Shembe* 1972, AD

- The innocent party must **elect** between the right to specific performance which is aimed at enforcement of the contract whilst the right to sue for cancellation is aimed at the dissolution of the contract. "It is the election of the one or other of these two alternative rights which demarcates plaintiff its cause of action".

[Custom Credit Corp v Shembe & Desai v Mahamed]

(see in repudiation consequences : innocent party's contractual obligation.

- What is permitted is the "double-barreled remedy": a plaintiff claims specific performance on the basis of a breach of contract.
- If the court grants the order of specific performance the defendant must comply with the order, however if the defendant fails to comply with this order he commits a **further breach** that entitles the plaintiff to cancel the contract and get an award for damages (this can be time-consuming and costly).
- The double-barreled remedy enables the plaintiff to claim specific performance and in the same action to ask the Court that in the event of the defendant's non-compliance with this order within the stipulated time, the contract be cancelled and damages granted (*Custom Credit v Shembe*)

Questions

1. **What type of breach is it?**
2. **Is there a right to cancel?**
3. **Can damages be claimed?**

Also said in Culverwell v Braun.

Mistake

- The consensual/will theory is the point of departure in South African contract law.
- In other words, there can only be a valid contract if the parties have reached consensus (subjective agreement) on the following aspects of a contract (***Van Reenen Steel v Smith***):

1. Parties to a contract
2. Terms of a contract
3. Fact that the agreement is legally binding (*animus contrahendi*)

- In addition, the parties' consensus has to be outwardly expressed in some way, by conduct or words (declared agreement); this is usually reached by offer and acceptance.
- Problems arise when there is a difference between the parties' declared agreement and their actual subjective intentions.
- The parties may appear to have reached agreement but in fact one or both of them have a different subjective intention.
- The question is them whether or not there will be a valid contract between the parties.
- Usually the discrepancy between a party's subjective intention and his declared agreement is due to some mistake or error on his part, hence an **incorrect belief or understanding** relating to the contract.

- Law of mistake has two aims:

1) Determine whether a mistake has effected the existence of subjective consensus
   - If there is still subjective consensus between the parties, then the contract will be valid in principle.
2) Determine what the effect of such a mistake is on the validity of the contract

CLASSIFICATIONS OF MISTAKE

- The effect of mistake depends on the mistake made by the party, so classifications are very important
- There are various ways of classifying mistake:
- Causal or non-causal mistake (mistake affected the party's decision to enter into a contract)
- Mistake in motive or essential/material mistake (what the party was mistaken about)
- Common, unilateral and mutual mistake (which of the parties made a mistake)
- The different systems of classification are interrelated, so a mistake in motive can be a common, unilateral or mutual mistake.
- The courts use the same terms but the meanings may differ so judgements must be read carefully to determine what the courts mean by their terminology.

CAUSAL AND NON-CAUSAL MISTAKES

Non-causal Mistakes

- A mistake is non-causal if the party would have entered into the contract on exactly the same terms even if he had not made the mistake
- ✓ Example 1: A sees a dress that she wants and she thinks her favourite actress has a similar dress but would have bought the dress in any event. The mistake did not affect her decision to contract so it is non-causal.
- ✓ Example 2: B has always wanted to buy his neighbour S's red Ferrari and one day he sees that's has put a "for sale" sign in the car. He decides he must have the car whatever the price or terms, and approaches S who tells him he is selling it for R750 000. B accepts the offer. B mistakenly believes it has a V12 engine when in fact it has a V8 engine. This mistake is non-causal since B would have bought the car for the same price even if he had known the truth that it had a V8 engine.

Causal Mistakes

- A mistake is causal if it affected the mistaken party's decision to contract, in that he would not have contracted at all or he would have contracted but on different terms, if he had not made the mistake.
- ✓ Example 1: Regarding A and her dress, the mistake would be causal if A would not have bought the dress if she had known that her favourite film star did not have a similar dress
- ✓ Example 2: Regarding the Ferrari, the mistake would be causal if B would still have bought the car if he knew that it only had a V8 engine but he would only have been willing to pay R500 000 for the car.

The distinction is important because non-causal mistakes are regarded as completely irrelevant in our law.

- If a party would have contracted on the same terms even if he did not make the mistake, the mistake is ignored and the contract would be completely valid.

MISTAKE IN MOTIVE AND ESSENTIAL (MATERIAL) MISTAKE

- Causal mistakes can be subdivided into essential mistakes and mistake in motive.

Essential/Material Mistake

- A mistake is essential or material if it is causal and it leads to ***dissensus*** (lack of subjective consents) between the parties on any of the following aspects of the contract:
- Parties
- Terms
- Facts that an agreement is legally binding (*animus contrahendi*)

✓ Example: X and Y conclude a contract of sale of a car for R20 000 however Y is unaware that X is actually acting on behalf of Z in selling the car →There is dissensus as to the identity of a party to the contract as Y thinks X is the seller whereas it is actually Z

✓ X agrees to give Y a ride from Johannesburg to Durban. When they reach Durban, X asks Y for payment of R250, however Y thought that the ride was free →There is dissensus as to the terms of their agreement as X thinks that their agreement provides for payment for the ride whereas Y does not.

✓ X offers to sell his contract textbook to Y for R10. Y accepts X's offer, believing it to be a serious one, when in fact it was made as a joke →There is dissensus as to the existence of *animus contrahendi* as Y thinks X had *animus contrahendi* whereas he did not.

A non-causal mistake is not regarded as an essential or material mistaked even if it leads to a lack of consensus.

CASE: *Khan v Naidoo* 1989, NPD

➢ **Facts:** Mrs K's son gave her a document to sign, telling her that it related to the transfer of property to her. However, he was lying as he owed money to N and the document was suretyship for his debt. Mrs K could not read so she believed him, and by signing the document she entered into a contract with N in terms of which she would pay her son's debt to N. When N sued Mrs K on the suretyship contract, she argued that she was not bound to the contract with N because she never intended to stand surety for her son. According to her this was a case of essential mistake since there was no subjective agreement between N and Mrs K on the terms of the agreement.

➢ **Court held:** ON the facts that Mrs K loved her son so much, she would have signed the suretyship even if she had known what it was. Her mistake was therefore non-causal. Therefore her mistake was ignored and she was bound to the contract with N.

Mistake in Motive

- A mistake in motive only affects a party's reasons for contracting. Despite the mistake there is still subjective consensus between the parties, terms and *animus contrahendi*.
- Example: X buys a new car because he believes his old car has been stolen, but he actually just forgot where he parked it.
- Example: X sells his textbook to Y because he thinks he passes his final exam however he failed.
- It can be difficult to distinguish between an essential mistake and a mistake in motive.
- The Romans used a system of classification to make the distinction clearer:

Roman system of classification

Error *in negotio*

❖ A mistake as to the nature or terms of the contract
- X thinks he is lending his textbook to Y whereas Y thinks it is a gift
- Essential mistake

Error *in persona*

❖ A mistake as to the identity of a contractual party
- X thinks he is selling a computer to Y personally whereas Y intends to buy the computer in the name of his company, Z.
- Essential mistake (X and Y are not agreed on the parties of the contract)

Error *in nomine*

❖ Mistake as to the name of the party

- B thinks S' surname is Smith but it is Smit
- Non-causal mistake, so non-essential mistake.

Error *in corpore*

- ❖ Mistake as to which thing is the object of performance
- B buys a cell phone from S. B thinks he is buying a Nokia but S is actually selling a Samsung.
- Essential mistake (parties not agreed on the terms of the contract)

Error *in qualitate*

- ❖ Mistake as to the qualities of the object of performance
- B buys a bottle of wine from S believing it to be good quality wine, however it was badly made and it does not taste good
- Mistake in motive; not an essential mistake (since parties are agreed about which thing must be delivered by B's mistake only relates to his reasons for contracting)

Error *in substantia*

- ❖ Mistake as to what material the object of performance is made of
- B buys a bottle filled with a dark fluid from S shop, as B thinks the fluid is wine but it is really vinegar
- According to SA courts, this is still a mistake in motive and not an essential mistake (since the parties are agreed about which thing must be delivered - bottle of fluid)

- It is sometimes difficult to distinguish between an error *in corpore* and errors *in qualitate* or *substantia*. An easy rule of thumb that one can use is:
- If there is more than one physical thing, and the parties don't agree as to which physical things have to be delivered →error *in corpore* (essential mistake)
- If there is only one physical thing and the parties are agreed that is the thing that has to be delivered → error *in qualitate/substantia* (mistake in motive)

- ✓ Example: B buys dining room furniture from S
- ✓ B thinks he is buying both the table and chairs while S thinks he is selling only the table
- ✓ This is an error *in corpore* as there are different physical objects and the parties are not greed as to which must be delivered
- ✓ B thinks the table is made of solid oak wood, while in fact it is made from pine. Both B and S agree that only the table is being sold. This is error *in qualitate/substantia* as the parties are agreed on which object has to be delivered (table)

- Note: these categories are only useful guidelines and the fundamental test for essential mistake is whether the contractants are agreed upon the terms of the contract, the parties to the contract and *animus contrahendi* (***Van Reenen Steel v Smith* 2002, SCA**)

COMMON, UNILATERAL AND MUTUAL MISTAKE

- Mistakes can be divided according to which party was mistaken

Common mistake

- Both parties make the same mistake and the mistake is causal for them both
- Example: S sells a painting to B, both of them mistakenly believe that the painting was pained by B's great-grandfather. In fact it was painted by S's mother. Neither of them would have entered into the contract if they had known the truth.

Unilateral mistake

- Only one of the parties makes a causal mistake
- Example: B buys a jacket from S mistakenly believing that the jacket is made from genuine leather. B is the only party who is mistaken and he would not have bought the jacket had he known the truth

Mutual Mistake

- Both parties make causal mistakes but they make different mistakes.
- Example: B buys a handbag for S for R1000. B thinks the handbag is made from snake skin and S thinks that it is made from crocodile skin. The handbag is actually made with imitation leather. Neither B nor S would have agreed to the price of R1000 if they had known the truth.

There are two important points to remember:

1) **Non-causal mistakes are ignored. If both parties are mistaken, but the mistake is only causal for one of them, then this is a case of unilateral mistake and not common mistake.**

CASE: *Van Reenen Steel v Smith* 2002, SCA

- S bought shares in a company from V and both parties thought the company would be more profitable if more money was invested in it. They were mistaken; the company was doomed to failure.
- Court pointed out that this was not a case of common mistake. Although the mistake was causal for the buyer (would not have bought the shares if he knew the truth) it was not causal for the seller. Even if the seller knew that the business would never become profitable, he would still have wanted to sell his shares at exactly the same price. This was therefore a case of unilateral mistake.

- If the parties have different subjective intentions it is not always clear which party's subjective intention is wrong and which party's intention is right.

- Our courts are no consistent in their classification of these mistakes however it does not make much of a difference since the courts use the same approach to unilateral and mutual essential mistakes.
- One way of deciding which party is mistaken is determining which party is trying to escape the apparent contract, then he/she is the mistaken party. The party who is trying to enforce the contract is the non-mistaken party.
- Recent case law implies that this approach can only be used as a rule of thumb (*Seven Eleven v Cancun Trading* 2005 SCA). It may be possible that a party whose declaration differs from his subjective intentions (mistaken party), instead of trying to escape the apparent contract, try to enforce the contract on the basis of reasonable reliance, however the matter has not been settled.
- Another way: compare the parties' subjective intentions to their declared (objective) agreement.
- The court will first determine the objective meaning of the declared agreement. Thereafter the court will look at each party's subjective intention to see if it differs from the objective declaration. The party whose subjective intention differs from the declaration is mistaken
- If only one party's subjective intention differs from the objective declaration →unilateral mistake
- If both parties' subjective intentions differ from the objective declaration both parties are mistaken
  - If they make the same mistake →common mistake
  - If they make different mistakes →mutual mistake
- If the contract is fatally ambiguous (even after interpretation it does not have a clear objective meaning) and the parties have different subjective intentions →mutual mistake AND the contract will be void for uncertainty

OVERVIEW OF CLASSIFICATIONS OF MISTAKE

- **Non-causal mistake:** would have contracted on the same terms anyway; legally irrelevant
- **Causal mistake:** would not have contracted or would have contracted on different terms. This is subdivided into mistake in motive and essential mistake
- **Mistake in motive:** Only affects the reason for contracting; consensus is still present. Can be subdivided into unilateral, common or mutual mistake
- **Essential mistake:** Causal mistake that excludes consensus. Can be subdivided into unilateral, common or mutual mistake.
- Unilateral mistake: Only one party is influenced by mistake
- **Common mistake:** Both parties are influenced by the same mistake
- **Mutual mistake:** Both parties are influenced by different mistakes

EFFECT OF MISTAKE

- The effect of mistake depends on the nature of the mistake, and which party is mistaken.
- Non-causal mistakes are irrelevant and have no effect on the validity of a contract
- Mistake in motive does not have any effect on validity of the contract no the basis of rules of mistake. However, the mistaken party may have other remedies on the basis of the rules relating to misrepresentations.
- Essential mistakes in principle mean that the contract is invalid (void *ab initio*) because of the lack of subjective agreement. However this may be unfair to a party who reasonably believed there was a valid contract. For this reason the contract will sometimes still be valid despite lack of subjective consensus (deemed consensus)
- If there was consensus on some terms of the contract, and dissensus on other terms, the court will first determine whether the contract is divisible. If it is, the terms on which there is consensus will be valid.

COMMON MISTAKE

- ❖ A common mistake in motive exists if both parties make the same mistake as to their reasons for contracting and the mistake is causal for both of them
- Even though the mistake is common, it is still a mistake in motive and therefore the contract is valid in principle.
- However, there may be other principles which allow the parties to escape
- If one party's mistake in motive was due to misrepresentation (false statement) but the other party he may be able to set the contract aside on the basis of such misrepresentation and/or claim damages
- ✓ Example: B buys a car from S and both parties believe the car is a 2005 model when it is really a 2004 model, so the mistake is causal for both of them. S told B that the car was a 2005 model and since B's mistaken belief was caused by S's misrepresentation B can set the contract aside. It does not matter that S honestly believed his statement was true.

- If one of the parties gave warranty (guaranteed the belief was correct) the other party will have remedies for breach of contract
- If the contract was subject to a terms (condition or assumption) that the validity of the contract depended on the truth of the shared belief, the contract will be invalid due to the failure of the condition or assumption.
- ✓ Example: B buys a car from S - if the parties made the contract subject to an assumption that the car was a 2005 model the contract will be invalid because the assumption was incorrect.
- The condition/assumption can be either an express term or tacit term.
- If tacit, it must pass the usual test for tacit terms
- The mere fact that both parties make the same mistake and that it is causal for both of them does not necessarily mean that there was such a tacit condition or assumption, but this depends on the facts of each case

CASE: *Dickinson Motors v Oberholzer* 1952, AD

- ➢ **Facts**: O's son, O junior, bought a Plymouth car (Plymouth 1) from D on hire-purchase. Without telling anyone and before paying the car off, O junior sold Plymouth 1 and then bought another Plymouth (Plymouth 2) from someone else. Plymouth 2 looked exactly the same as Plymouth 1. Thereafter, O junior and O (the father) agreed to exchanged O junior's Plymouth for his father's Hudson and they did so. Both O and D thought that the car in O's possession was Plymouth 1 although it was really Plymouth 2. Consequently when O junior failed to pay the installments for Plymouth 1 to D, D threatened to repossess it from O. In order to keep the car, O agreed to pay £290 to D for the car
- ➢ **Issue**: Can O get out of the contract on the basis of common mistake in motive? This was mistake in motive and not an essential mistake (*error in corpore*) because the parties agreed about which car was being sold (the car which was found at O's house - Plymouth 2). The mistake related only to the qualities of the car and they both believed it belonged to D.
- ➢ **Court held**: The contract was invalid as it was subject to a tacit assumption that the car belonged to D. In terms of the tacit term, the validity of the contract depended on the truth of the assumption. Since the assumption was untrue, the contract failed.

CASE: *Wilson Bayly Holmes v Maeyane* 1995, TPD

- ➢ **Facts**: W was a company in a group of companies that was involved with labour disputes with their workers. The companies fired some of their workers, and the workers took W to court in terms of the Labour Relations Act. After some negotiations W agreed to pay the workers who had been fired (including M) an amount of R23 000 in order to settle the dispute. Both W and M believed that M was previously employed by W. In fact, they were both mistaken as M was never an employee of W (he was legally employed by a different company in the same group of companies). When W found out the truth it alleged that the settlement agreement was invalid due to the common mistake in motive. According to W the common mistake was causal for both of them (neither M nor W would have entered into the settlement contract if they had known that M had never been an employee of W)
- ➢ **Court held**: The settlement contract is binding and in this case there was no tacit term making the contract dependent on the truth of the common assumption. The essence of a settlement is that the parties wish to bring an end to the dispute, irrespective of the true legal position. They therefore intended that the contract be binding whatever the previous legal relationship between M and W.

COMMON ESSENTIAL MISTAKE

- Common essential mistake refers to the situation where the parties' shared subjective intentions on the terms or parties of the contract, or the fact that the agreement is legally binding differ from the objective meaning of their declaration.

- ✓ Example: X and Y sign a written contract for the sale of X's car to Y. Both intend the sale to be voetstoots however the written contract does not include this term
- Since there is subjective consensus between the parties (same intentions) the contract is valid. In such a case, the court will give effect to the parties' true subjective intentions, and not the objective meaning of the declaration.
- The written contract will therefore be rectified (corrected so that it reflects the parties true intentions)
- ✓ Example: The court will rectify the written contract of sale so that the voetstoots clause is included in the document.

UNILATERAL MISTAKE

Unilateral Mistake in Motive (Non-essential Unilateral Mistake)

- A unilateral mistake in motive exists when **only one party** makes a **causal** mistake as to the **reasons** for contracting
- ✓ Example: B buys a second-hand car from S because he thinks the car has only travelled 60 000km however the car has really travelled 160 000km. B would not have bought the car if he had known the truth
- In terms of rules of mistake the contract is valid, however there are other legal remedies which may provide some remedies:*
- ❖ If one of the parties caused the other party's mistake by **misrepresentation** →innocent party is entitled to set aside the contract
- ❖ If one of the parties gave a **warranty** →other party will have remedies for breach of contract
- ❖ If the contract was subject to a **term (condition/assumption)** that the validity of the contract depended on the truth of the belief →the contract will be invalid due to the failure of the condition/assumption

Essential Unilateral Mistake

- Unilateral essential mistakes exist when **only one** party makes a **causal** mistake and the mistake leads to a lack of consensus about the **terms, parties or animus contrahendi**
- In principle the contract should be invalid due to lack of subjective agreement between the parties however this may be unfair to the non-mistaken party if he reasonably believed the parties had reached this agreement
- ✓ Example: X sends Y his email in which he makes an offer to employ Y at a salary of R20 000 per month. Y sends an email back in which he accepts X's offer. Unfortunately, X made a typing error in the email and subjectively he intended to offer Y a salary of R10 000 a month. If the consensual theory is applied, there will be no contract between X and Y, however this may be unfair to Y as Y may have already resigned from his previous job upon belief of a contract between him and X.

The mistaken party will sometimes be bound to the declared agreement because of policy reasons

The courts use two approaches to unilateral essential mistakes:

1) **Justus error theory** - focus is whether the mistake is **essential** (material) and **Justus** (excusable/reasonable); if so, the **mistaken party** can **escape** the contract
2) **Reasonable reliance theory** - focus is whether the **non-mistaken party reasonably believed** that there was **subjective consensus** between the parties; is so, the non-mistaken party can **enforce** the contract despite the other party's mistake. If not, then the cannot enforce the contract
   - ✓ Example: X signs a contract in terms of which he undertakes to buy Y's car for R100 000. In fact X only intended to pay R80 000 for the car, however by signing the contract X created the impression that he intended to buy the car for R100 000.
     - → X can escape from the contract if his mistake was essential and reasonable (Justus error)
     - → Y can enforce the contract for R100 000 if he reasonably believed that X intended to pay R100 000 for the car.

- *Justus* error and reasonable reliance are two different ways of approaching the same issue, and their application will generally lead to the same result.
- In the above example: if X's mistake was reasonably Y's reliance on the contract would be generally regarded as unreasonable.
- The result would therefore be that X can escape from the contract and Y cannot keep X to the contract according to both approaches.

- There are situations when the approaches will lead to different results.

JUSTUS ERROR APPROACH

- Approaches unilateral mistake from the viewpoint of the mistaken part
- This theory will be used by the mistaken party if he wishes to escape the contract
- In order to escape, the **mistaken party** must meet 3 requirements:

1) Mistake must be **causal** AND
2) Mistake must be **material (essential)** AND
3) Mistake must be **Justus (excusable)**

1) Mistake must be causal

2) Material (essential) mistake

- The mistake must relate to an important aspect of the contract, such as **parties, terms** or ***animus contrahendi*** (legally binding nature of the agreement) (Van Reenen Steel v Smuth)
- It must not just be a mistake in motive or an error in qualitate or nominee (Allen v Sixteen Sterling)

CASE: *Diedericks v Minister of Lands* 1964, NPD

- **Facts**: M rented land to D and the contract of lease contained a clause which allowed M to repossess the land before expiry of the lease if they paid D R600. Before the lease expired M wanted to repossess the land, however both M and D forgot about the clause in the lease agreement. M entered into a second contract with D, in terms of which D sold M the right to repossess the land for R2000. When M found out about the clause in the earlier lease agreement M tried to escape from the second contract on the basis of Justus error theory.
- **Issues (1)**: Was this a unilateral mistake or a common mistake?
- **Court held**: Both D and M made the same mistake however the mistake was only causal fro M. If D knew about the clause in the lease agreement he would still have wanted to sell the right to repossess the land for R2000. D's non-causal mistake is therefore ignored. Therefore this was a unilateral mistake on the part of M.
- **Issue (2)**: Was this an essential (material) mistake?
- **Court held**: This was not an essential mistake as the parties subjectively agreed to the sale, all terms of the sale and they both intended it to be legally binding. M's mistake only related to his reason for entering into the second contract - he thought that he would not be able to repossess the land early unless he bought the right from D. Hence, this was a mistake in motive only and M could not escape from the contract.

CASE: *Allen v Sixteen Sterling Investments* 1975, D&CLD*

This was error in corpore regarding a property pointed out to the plaintiff.
Contract contained clause excluding defendant from liability for misrepresentation but court held this did not avail him as there was an essential mistake on part of plaintiff (would not have entered into the contract for that property) so contract void ab initio.

∴ Error in corpore and essential mistake as to terms.

3) Justus (excusable) mistake

- In addition to being an essential mistake, the mistake must alsso be reasonable or excusable in the circumstances of the case.
- The mistake will be Justus is:
- **Non-mistaken party caused the mistake; OR**

- ✓ Example: X buys a car from Y for R10 000. Y presented X with a written contract and both parties signed it. In terms of the written contract the car is sold "voetstoots" and carries no guarantees whatsoever. However, in order to convince X to sign the contract, Y lied to X by telling him that the car had a 1 year guarantee. X, unaware of the exclusion clause, believed him. Since Y caused X's mistaken belief as to the terms of the contract, X's mistake is justus
- ❖ **Non-mistaken party was aware of the mistake (knew that there was no subjective consensus between the parties); OR**
- ✓ Example: Y did not tell X that the car is subject to guarantee but he heard X explaining to his wife that the car has a 1 year guarantee. Since Y was aware of X's mistake, X mistake was Justus.
- ❖ **Non-mistaken party should as a reasonable person have been aware of the mistake (a reasonable person would have realized that there was no subjective consensus between the parties); OR**
- ✓ Example: X was a foreigner who did not understand English well and Y was aware of this fact so as a reasonable person should have realized that X would not have known that the contract contained a "voetstoots" exclusion clause nor what such clause meant
- **If the mistake was otherwise excusable.**
- This category is most controversial and it has not been settled whether, and in what circumstances a mistake can be excusable. Two possibilities have been mooted:

(a) Non-negligent mistakes

If the mistaken party was not negligent in making the mistake the mistake may be excusable

CASE: *Lake v Caithness* 1997, EPD

- ➢ **Facts**: C was a farmer who had just heard that he was seriously ill and was worried what would become of his family and employees after his death. He therefore told his neighbour L (whom he had known for a long time) that he wanted to sell his farm. The neighbour brought him a written offer to buy the farm and in the offer the buyer was identified as L Trust (family trust of which L was one of the trustees). C did not read the offer carefully and therefore did not notice who the buyer was. He signed the offer and thus concluded the contract for the sale of the farm to L Trust but when C discovered the buyer was the trust and not L personally he tried to escape from the contract of sale. According to C, he never intended to sell the farm to a trust as he wanted to sell it to L personally because he trusted him. This was a unilateral essential mistake as there was no consensus on who the parties of the sale would be
- ➢ Court held: C's mistake may be excusable because of the surrounding circumstances. C was seriously ill and in a state of despair about the future, and a reasonable person could have made the same mistake in the circumstances. C could therefore use a defence of Justus error in this case (and escape the contract)
- ➢ Note: the case was decided on exception and the court did not made a final finding on this issue. The case was referred to a trial court to decide whether the mistake was really excusable.

(b) Mistake Caused by Third Party

- If a third party caused the mistake the mistake may be excusable.
- This point has not been settled in our law and the SCA left the question open in ***Saambou-Nasionale v Friedman* 1979, AD**
- General rule: a mistake will not be Justus if the mistaken party was negligent or careless in making the mistake
- ➢ ***Diedericks v Minister of Lands***: The court held that even if there had been an essential mistake, M's mistake was not Justus since he had been careless. He could have avoided the mistake by taking moderate care - if he had read through the lease contact before entering into the sale, he would have become aware of the relevant clause.

CASE: *Allen v Sixteen Sterling Investments* 1974, D&CLD

Third party was the estate agent P.

SUMMARY OF JUSTUS ERROR

STEP 1: Decide who the mistaken party is

Two ways to determine this:

(1) Which party's intention differs from the declared agreement? He/she is mistaken
(2) Which party wants to escape from the declared agreement? He/she is mistaken

STEP 2: Can the mistaken party get out of the declared agreement?

According to the Justus error the mistaken party can escape the contract if she can prove:

(1) Mistake was causal

If not, the enquiry stops and the mistaken party will be bound to the contract
If the mistake is causal, go to next question:

(2) Mistake was essential

If not, the enquiry stops and the mistake party is bound to the contract
If the mistake is essential, go to next question:

(3) Mistake was justus

Mistake will be Justus if:

(a) Other party was aware of the mistake; OR
(b) Other party should as a reasonable person have been aware of the mistake; OR
(c) Other party caused the mistake; OR
(d) (possibly) Mistake was otherwise excusable (lack of negligence/3rd party misrepresentation)

If the mistake is justus the mistaken party can escape the contract
If the mistake is not Justus the mistaken part is bound to the contract

Lake v Cauthness

Lawen Sixteen; Diedericks v Minister.

REASONABLE RELIANCE APPROACH

- The reasonable reliance theory (doctrine of quasi-mutual assent) looks at the facts from the viewpoint of the **non-mistaken party**
- The non-mistaken party will be able to enforce the contract if he reasonably believed that there was subjective consensus between the parties
- The reasonable reliance theory is aimed at determining whether the non-mistaken party can enforce the contract
- The contract will be **valid** if the following requirements have been met:

1) Mistaken party created the impression that he subjectively agreed to contract AND
2) Reliance on this impression by the non-mistaken party AND
3) The reliance was reasonable

1) Mistaken party created the impression that he subjectively agreed to the contract

- There is a difference between the mistaken party's subjective intention and his declaration.
- By his conduct, the mistaken party created the impression that there is subjective consensus between the parties
- ✓ Example: X signs a contract in terms of which he buys a car voetstoots from Y. Subjectively X does not intend the clause to form part of the contract but by signing the document he creates the impression that he is willing to be bound by the clause

2) Reliance on the impression

- Non-mistaken party must actually have relied on the impression created by the mistaken party's declaration.
- The non-mistaken party must honestly have believed that there was subjective consensus between the parties because of the mistaken party's incorrect declaration.
- ✓ Example: In the above example Y must honestly believe that X intends to buy the car voetstoots
- If the non-mistaken party is aware of the other party's mistake there is no reliance by the non-mistaken party
- If he attempts to enforce the declared agreement, he is said to be "snatching at the bargain" (knowingly and dishonestly trying to take advantage of the other party's mistake)
- Since there is no reliance the mistaken party will not be bound to the declared agreement and the contract will be invalid.

Sonap Petroleum v Poppadoglanis

CASE: *Sonap Petroleum v Pappadogianis* 1992, AD

- **Facts**: S and P entered into a finance lease in terms of which S was financing a deal for P to acquire a property. The agreement was supposed to provide for a lease of the premises for a period of 20 years after which P would be the owner of the property, however when S submitted the written offer to P the period of the lease was accidentally given as 15 years instead of 20 years. P, fully aware of the discrepancy, readily accepted the 15-year lease period as it meant that he would acquire ownership of the property sooner. When S realized the mistake and tried to change the lease period to 20 years, P refused.
- **Court held**: S was the mistaken party since his declaration (written contract of lease of 15 years) differed from his true intention (that he wanted to lease it for 20 years). There was therefore a misrepresentation of contractual intention by S however P knew that S wanted to lease the property for 20 years and not 15 years. P had not honestly relied on the impression created by S signing the contract. P was "snatching at the bargain" - even though he knew what S's true intention was he was trying to enforce the written contract. Because there was no reliance by P, S was not bound by the written contract.

3) Reliance must have been reasonable

- Even if the non-mistaken party honestly relied on the mistaken party's declaration, he must also prove that his reliance was reasonable, hence that a reasonable person would also have believed that there was subjective consensus between the parties

CASE: *National and Overseas Distributors v Potato Board* 1958, AD

Reliance on a mistake must be reasonable (justify)

The non-mistaken party's reliance is NOT reasonable is:

(1) He caused the mistaken party's mistake
(2) A reasonable person would have been aware of the mistake (Steyn v LSA)

CASE: *Steyn v LSA Motors* 1994, AD

Reasonable person ought to have been aware of a mistake.

SUMMARY OF REASONABLE RELIANCE APPROACH

STEP ONE: Decide who the mistaken party is

Two ways to determine this:

- Which party's intention differs from the declared agreement? He/she is mistaken
- Which party wants to escape from the declared agreement? He/she is mistaken

STEP TWO: Can the non-mistaken party enforce the contract?

The contract is valid (non-mistaken party can enforce it) IF:

(1) Conduct creating incorrect impression of the mistaken party's intention

If not, the enquiry stops and the non-mistaken party cannot enforce the contract.

If the mistaken party's declaration differs from her true intention, go to next step:

(2) Actual reliance by the non-mistaken party

If the non-mistaken party did not rely on the declaration (was aware of the mistake), the enquiry stops and the contract cannot be enforced.

If the non-mistaken party honestly believed that there was consensus between the parties, go to next step:

(3) Non-mistaken party's reliance was reasonable.

If a reasonable person would also have believed that there was subjective consensus between the parties, the non-mistaken party can enforce the contract

If the non-mistaken party's reliance was not reasonable, he cannot enforce the contract. His reliance is not reasonable if:

A reasonable person would have been aware of the mistake (Sleyn; National Petals)

~~He caused the mistake~~

RELATIONSHIP BETWEEN JUSTUS ERROR AND REASONABLE RELIANCE THEORY

- There is a large degree of overlap between the Justus error theory and the reasonable reliance theory
- In terms of both approaches, the contract is invalid if:
- Non-mistaken party was aware of the mistake (realised there was no subjective consensus); OR
- Other party should as a reasonable person have been aware of the mistake; OR
- Mistake was caused by the non-mistaken party

- For this reason the two approaches are sometimes regarded as two sides of the same coin: the Justus error theory explains when the mistaken party will not be bound and the reasonable reliance theory explains when the non-mistaken party will be able to enforce the contract
- However, the two approaches differ in one respect:
- Justus error theory offers an additional ground to escape the contract (in that the mistaken party will not be bound if his mistake was otherwise excusable - not negligent or misrepresentation by a third party)
- In such situations the two approaches may give different results in that the mistaken party will be bound if the reasonable reliance theory is used but that the contract will be invalid if the Justus error theory is applied.

➢ Example: ***Lake v Caithness*** - in terms of the reasonable reliance theory the seller would be bound:

- He misrepresented his intention (by signing the contract of sale he created the impression he was willing to sell to the trust)
- The other party relied on the misrepresentation (buyer actually believed that the seller was willing to sell to the trust)
- The other party's reliance was reasonable (a reasonable person would also have believed this and the buyer did not cause the seller's mistake.
- In terms of the Justus error theory, the seller would not be bound because his mistake was excusable in the circumstances (bad health and mental despair)

- The question is which approach should be followed in our law
- The SCA expressed preference for reasonable reliance in ***Sonap Petroleum*** however the High Courts and even the SCA still sometimes use Justus error approach in cases or unilateral essential error.
- Note: Must be able to apply both approaches should be applied separately to problems of unilateral essential mistake

MUTUAL MISTAKE

MUTUAL MISTAKE IN MOTIVE (non-essential mutual mistake)

- Mutual mistake in motive exists when both parties make different mistakes as to their reasons for contracting
- In terms of the rules of mistake, the contract is valid.
- However, one or both of the parties may have other remedies because of other legal principles (misrepresentation, warranties, conditions and assumptions)

ESSENTIAL MUTUAL MISTAKE

Mutual essential mistake exists in two situations:

1) Both parties' subjective intentions differ from their declared agreement, but they make different mistakes

✓ Example 1: X buys Y's car subject to a voetstoots clause. X believes voetstoots means that Y has to deliver the car to X's home. Y believes that voetstoots means that X has to collect the car from Y's home.

2) Contract is ambiguous and the parties have different subjective intentions

➢ Example 2: ***Raffles v Wichelhaus* 1864** - A seller and buyer agreed to the sale of a load of cotton on the ship "Peerless" which was to sail from Bombay later that year. Unknown to them, there were two ships called Peerless sailing from Bombay that year. The buyer intended to buy the cotton on Peerless (ship 1) which was to sail from Bombay in October, whereas the seller intended to sell the cotton on Peerless (ship 2) which was to sail from Bombay in December that year. This is an essential mistake since the parties were not agreed as to which load of cotton was to be sold (error *in corpore*)

- Since there is no subjective consensus in these cases, in principle the contract is invalid.
- Theoretically one could apply the *Justus* error theory and/or the reasonable reliance theory to these cases:
- In terms of the *Justus* error theory: both parties' mistake will usually be equally reasonable or unreasonable
- In terms of the reasonable reliance approach: both parties' reliance will usually be equally unreasonable (example 1) or equally reasonable (example 2).

Example:

➢ ***Raffles v Wichelhaus***: The buyer intended to buy the cotton on Peerless (Ship 1). The seller intended to sell the cotton on Peerless (Ship 2). Both parties' mistake was equally reasonable in the circumstances. If there was a valid contract the court would have to choose which ship had been sold. If they chose Ship 1, that would be unfair to the seller. If they chose Ship 2, that would be unfair to the buyer. The only fair solution would be to hold that there was no valid contract.

DAMAGES

- The innocent party can claim damages on its own, however it is usually claimed with other relief:

- Specific performance and damages
- Example: X is a builder who buys bricks from Y for a particular job. X and Y agree that Y will deliver the bricks on 1 July, however Y fails to deliver the bricks on the agreed date and X needs the bricks urgently to continue with the building job and the delay costs X R1000 a day → X can request an order for specific performance against Y to deliver the bricks and claim damages for his loss of R1000 a day until delivery is made.
- Specific performance and in the event of non-compliance with the order within the stipulated time, cancellation and damages (double-barreled remedy).
- Specific performance and in the alternative damages; the court will exercise discretion and may refuse to grant an order of specific performance (*Unibank v Absa*)
- Example: X sells his car to Y for R10 000 but X then changes his mind and refuses to deliver the car. Y discovers that the same type of car will cost him R2000 more if he buys it elsewhere. Y can therefore elect to uphold the contract and ask for specific performance and in the alternative, damages in the amount of R2000 should the court refuse to grant an order of specific performance.
- Restitution, specific performance and damages
- Example: X sells a donkey to Y for R10 000; Y pays the purchase price and X delivers the donkey. A few days later Y discovers that the donkey has an infectious disease which leads to one of Y's horses becoming sick. Y returns the donkey and cancels the contract, and he will also claim return of his R10 000 and damages for cost of treatment of his horse for the disease.

REQUIREMENTS FOR A CLAIM OF DAMAGES

Plaintiff must prove:

1) Breach of contract (by the other party)
2) Patrimonial loss
3) Causal connection between the breach and the loss (factual causation)
4) Loss is not too remote (legal causation; general and specific damages)
1) The onus is on the party claiming damages to prove these requirements. Once they have been proved the onus shifts to the defendant to prove there was a:
5) Duty on plaintiff to mitigate his losses (which he/she failed to do)

1) Breach of Contract

- *Mora debitoris*; *mora creditoris*; repudiation; prevention of performance or positive malperformance

2) Patrimonial Loss

- The law adopts a materialistic approach to loss in the context of contract.
- Loss must affect one's **patrimony**, hence it must cause **financial loss**. One cannot claim for non-patrimonial loss such as mental suffering or pain (*Administrator Natal v Eduoard*)
- Once-for-all-rule: a plaintiff must claim all damages, present and future loss, in one action.
- It can be difficult to calculate loss and the courts therefore do not insist that the plaintiff quantify his loss with mathematical precision. However, the plaintiff must **produce the best evidence** that he can to prove the quantum of his loss.

Isep Structural Engineering v Inland Exploration (produce best evidence possible)

- In satisfying the requirements for damages the pertinent question was whether JCC had suffered loss because of the breach by the less (failure to remove the ramps on the premises). If JCC had not suffered loss then IE as cessionary would not succeed in their claim for damages.
- On the facts it was difficult to prove that JCC had suffered loss. The terms of the cession were unclear. The price had remained R77 500 even though JCC refused to remove the ramps which indicated that the value of the land was the same even with the ramps on it. On the other hand, it was possible that IE was willing to pay the full price because they thought that they would be able to claim damages from the lessee as a result of the cession. Due to the conflicting evidence the court found that there was a lack of proof that JCC had suffered loss and thus granted absolution from the instance.
- In other words, the court held that IE had failed to prove that JCC had suffered loss as a result of the tenant's breach, since it could not prove that the land was worth less to JCC with the ramps on it (after breach) than if the lessee had removed them (if there had been no breach by the lessee).

3) Factual Causation

- Factual causation is a **question of fact** and the *conditio sine qua non* ("but for" test) is used to ask whether the loss would have occurred but for the breach of contract.
- If damage would not have occurred, the breach is the factual cause of the contract.
- Previously there was uncertainty whether the innocent party's claim could fail or be reduced if he partially caused his own losses due to his own **contributory negligence**, however this question has now been settled:
  - ➢ *Thoroughbred Breeders v Price Waterhouse*: Majority held that the concept of contributory negligence is foreign to the law of contract as liability for breach of contract is based on causation and not on the parties' relative degrees of fault. The legislature had not intended for the Apportionment of Damages Act to apply to claims for breach of contract, but to the law of delict.
- If the innocent party, after the breach has occurred, fails to take reasonable steps to prevent further loss, the rule relating to **mitigation of damages** will apply.

4) Remoteness of the Harm (Legal Causation)

- Remoteness (legal causation) is a limiting device – the normative element of causation.
- For policy reasons it may be occasionally be unfair to hold the guilty party liable for all the consequences of his breach.
  - ✓ Example: A restaurant owner purchases 10kg of chicken from his supplier but the supplier commits positive malperformance by delivering chicken infected with salmonella. As a result, customers get ill and sue for their medical expenses. One of the customers that got sick was a food critic who wrote a scathing review of the restaurant, and another customer who got sick died and his widow claimed for loss of support. The restaurant loses goodwill and begins to make losses. The restaurant owner, as a consequence of all his woes, loses all his hair and has a nervous breakdown. His wife is unable to cope with the whole situation and divorces him. What damages can the restaurant owner claim from the supplier?
    - → It would be unfair to hold the supplier liable for all the losses and so legal causation will play a role in limiting his liability.

- Legal causation entails that the harm must be **reasonably foreseeable at the time of entering into the contract.**
- Although the act giving rise to a claim for damages is breach of contract, the parties rights and duties are determined at the time of conclusion of the contract
- Foreseeability is therefore determined at the time of entering into the contract.
- Instead of using a straightforward test based on foreseeability to determine legal causation the courts complicate the issue by drawing a distinction between general damages (intrinsic loss) and special damages (extrinsic loss).
- There is criticism, but this distinction is ingrained in SA law of contract

General Damages (Intrinsic loss)

- This is the **normal** sort of harm that is expected to flow from breach, therefore it is the **natural and probable consequences of the breach.**
- Example: It is normal and probable that the failure to sterilize a woman will result in her having further children which she would have to support; the cost of supporting these children is general damages.
- The harm that occurs is reasonably foreseeable and thus not too remote.
- General damages can always be claimed by the innocent party

Special Damages (Extrinsic loss)

- Although the loss is factually caused by the breach it is unusual because of some special circumstances or interest of the innocent party.
- The guilty party would not in the ordinary course of events expect such loss in the case of breach.
- Example: A woman contracts with a doctor to perform sterilization because she suffers from high blood pressure, a medical condition which is aggravated by pregnancy. As a result of the unplanned pregnancy she suffers a stroke which paralyses her and she will never be able to work again.
  - o The woman's loss of income as a result of the stroke is special damages - not every woman who becomes pregnant after failed sterilization suffers from a stroke.

- Because special damages is not generally foreseeable (too remote) it is usually not recoverable.

- However, if the plaintiff can show on the facts that the loss was reasonably foreseeable the damages may be claimed
- The plaintiff must prove specific facts showing why, despite the unusual nature, the special damages were in fact foreseeable by the defendant
- However, it is not clear whether or not it is sufficient to prove reasonable foreseeability in order to claim special damages.

There are two competing principles:

1) Contemplation principle
2) Convention principle

Contemplation principle

- Reasonable foreseeability at the time of the contract is concluded is sufficient to claim special damages
- This is the accepted test in Anglo-American law and seems to be favoured in SA law but the case law is unclear on this point
- Foreseeabilty is deduced from the subject matter of the contract, the terms of the contract and the parties' knowledge of the special circumstances.

Convention principle

- Foreseeability is insufficient to claim special damages
- There needs to be some sort of agreement (convention) between the parties that the defendant would be liable for such losses
- This agreement could take the form of a tacit term; Business efficacy, officious bystander, necessity, both parties agree (subjective)
- The SCA has not finally settled which is the correct approach to follow.
- ➢ *Lavery v Jungheinrich* 1931: "this harm was so much in the minds of the parties as to virtually be a term of the contract"

CASE: ***Shatz Investments v Kalovyrnas* 1976** (favoured convention/agreement)

- ➢ Facts: K found an industrial area in Johannesburg where a new complex was put up. K leased the premises from S and set up a restaurant/take-away place in the complex. K insisted on a term in the contract that S would not allow any other take-away place in the complex and S agreed. K invested money in setting up his business and in the first two months he did very well, however S then broke the term of the contract by allowing a bakery to start operating a take-away. K therefore cancelled the contract and mitigated his loss by selling the equipment to S. K instituted a claim against S, not for loss of profits but for loss of goodwill.
- ➢ Court held: This was special damages but in the circumstances not too remote. In dealing the remoteness, the court favoured the contemplation principle but felt obliged to follow *Lavery*. Court held the convention principle was entrenched in our law. On the facts the court held that even on application of the convention principle the loss was not too remote. Not only had S been aware at the time of conclusion of the contract that K would suffer a loss of goodwill if he breached the contract, but the contract had been entered into on the basis of such knowledge, ie. S had tacitly agreed to be liable for such damages.

CASE: ***Thoroughbred Breeders v Price Waterhouse***

- ➢ SCA failed to resolve the convention/contemplation principle debate as the case dealt primarily with general damages (losses due to theft of an employee). The claim for special damages (extra interest on overdraft facility) failed as the plaintiff did not prove he was legally obliged to pay the interest on the overdraft.
- ➢ *Obiter*: Nienaber JA referred to the flexible approach to legal causation in delict and criminal law and raised the question as to whether a similar test would not be appropriate in the law of contracts so that the traditional distinctions between general and special damages and the contemplation and convention tests would be simply important factors that are taken into account in the flexible test.

5) Duty to Mitigate Losses

- The plaintiff who suffers damage as a result of a breach of contract has a duty to take reasonable steps to keep losses to a minimum or reduce losses
- Example: X is unfairly dismissed for her place of employment and elects to cancel the contract. X will have a duty to take reasonable steps to look for other employment.
- Rule of mitigation generally applies from the date of breach.
- The onus rests on the defendant to prove that the plaintiff failed to take those steps a reasonable person in his/her position would have taken

- What is reasonable depends on the **circumstances** at the time and the fact that the other party caused the loss by breaching the contract.
  - ✓ Example: In the case of unplanned pregnancy due to the failure to sterilize woman as contractually greed, the court would probably hold that the woman need not mitigate her losses by having an abortion since it would not be reasonable in the circumstances to expect her to do so.
- What if the plaintiff takes steps in mitigation but they are unsuccessful and/or increases the loss suffered? → Provided it was reasonable for the plaintiff to have taken those steps, he/she can recover loss.
- Likewise, all expenses incurred in taking reasonable steps in mitigation are recoverable from the defendant (***Signature Design Workshop v Eskom Pension* 2002**)
  - ✓ Example: *Unibank v Absa* - the plaintiff is entitled to uphold a contract after repudiation by the other party, even if it is wasteful to insist upon continued performance. However the court may exercise its discretion to refuse an order for specific performance. If the court does so the plaintiff will only be able to claim damages. The rule that the plaintiff must mitigate his damages will become relevant and the court may hold that the plaintiff is unable to claim damages because it was unreasonable for the plaintiff to insist on wasteful performance.
- For example, if the plaintiff in *Unibank* had claimed damages instead of specific performance he might not have been able to claim all the losses he suffered as a result of continuing to pay the employee's salary for the full remaining portion. The court may have decided that the plaintiff should have given the employees a retrenchment package that would cost less than the salary for the full remaining years.

MEASURE OF DAMAGES FOR A BREACH OF CONTRACT - SUBJECTIVE AND OBJECTIVE APPROACH

- The question is whether damages should be assessed subjectively or objectively
- Subjective approach: What financial losses did this particular creditor suffer because of the breach of contract? (Take account of creditor's personal circumstances)
- Objective approach: What would be the objective value of the performance to the ordinary person?
  - ✓ Example: In terms of a contract of lease, there is an obligation to the lessee to return the building to the lessor in the same condition that it was received in, subject to wear and tear. If the lessee fails to do this he commits a breach of contract. The lessor intends to demolish the building; a subjective measure of damages would find no financial loss to the lessor. Objectively however, damages would be the cost of reinstating the building.
  - ➢ ***Isep Structural Engineering v Inland Exploration*** adopts the subjective approach.

DETRIMENTAL AND BENEFICIAL CONSEQUENCES OF A BREACH

- A breach of contract can have both detrimental and beneficial consequences.
- To the extent that both flow from the breach and taking account of the question of remoteness, both should in principle be taken into account to determine the net effect on the creditor's financial position.
  - ✓ Example: If in a contract for the sale of a house the purchaser is given the right to occupation of the house and the seller fails to evict the tenants, he commits a breach of contract. The tenants, whilst in occupation of the house, are liable to pay rent to the owner of the house. The rental income is a beneficial consequence that must be taken into account in assisting the purchaser's net loss.

- Beneficial consequences are not always taken into consideration in determining damages because of **policy concerns of fairness, justice and equity.**
- Example: X builds a house for Y. As a result of poor construction work (positive malperformance) the ceiling of the house collapses and damages some of Y's furniture. However, Y has taken out insurance on his home and he is reimbursed for the damage to his furniture. The reimbursement is a beneficial consequence which should as a general principle be taken into account. However, the court may decide to ignore the reimbursement on the basis of fairness, since Y had to pay for the insurance. The court may therefore allow Y to claim for damage to the furniture even though it was covered by the insurance.

METHODS FOR CALCULATION OF DAMAGES

- Damages are ordinarily assessed according to one's positive *interesse* or negative *interesse*.

POSITIVE *INTERESSE*

Breach

- Innocent party should be placed in the financial position that he would have occupied had there been no breach of the contract (ie had the contract been performed properly)

- Positive interesse looks forward toward the fulfillment position of the contract
- The calculation of positive interesse damages involves the comparison of the two positions:
- Compare the hypothetical position that the innocent party would have occupied had the breach not occurred and the actual position now occupied because of the breach.
  - ✓ Example: X buys a stud bull from Y at its market value of R10 000 in order to mate with his cow. The bull is impotent and worth only R4000 so Y has committed the breach of positive malperformance. X elects to uphold the contract and claim damages.
- Compare X's actual position with the hypothetical position had the breach not occurred. The actual position is that X paid Y R10 000 but got a bull worth R4000 so X is R6000 poorer because of the breach. The hypothetical position is if there was no breach of contract X would have paid R10 000 and got a bull worth R10 000. Further, if X's cow had mated with a healthy bull X would also have a calf worth R1000 (assuming you can prove the mating and birth of the calf would have been successful). X would therefore have been R1000 richer if the contract was properly fulfilled.
- Consequently, to place X back in the position that he would have occupied had there been no breach of contract, X would be entitled to R7000 in damages from Y (R6000 + R1000).

NEGATIVE *INTERESSE*

Wrongdoing

- The innocent party should be placed in the financial position that he would have occupied had there been no wrongdoing (delict or fraudulent or negligent misrepresentation) that induced the contract.
- If the wrongdoing had not occurred, the innocent party would not have entered into the contract
- Therefore you place the innocent party in the position that he would have been had he not entered into the contract
- Negative *interesse* damages therefore look backwards toward restoring the *status quo ante* (as if there had never been a contract)
- The calculation of negative *interesse* damages involves the comparison of the hypothetical position that the innocent party would have occupied had the wrongdoing not occurred (had the contract not been entered into) with the actual position now occupied because of the wrongdoing.
  - ✓ Example: Y fraudulently told X that the bull was capable of mating and this caused X to buy the bull. When X finds out the truth he decides to uphold the contract and claim damages from Y. Compare X's actual position with his hypothetical position had Y not lied about the bulls' position because of the breach. Actual position is X paid Y R10 000 but got a bull worth R4000 and therefore X is R6000 poorer. The hypothetical position is that if there was no fraud X would not have entered into the contract to buy the bull and his financial position would have remained unchanged. X can therefore claim R6000 from Y.
- X cannot claim the R1000 for the calf because negative *interesse* damages are aimed at putting X into the position as if there had been no wrongdoing (as if he had not entered into the contract) and if there had been no contract he would not have gained a calf.

- The difference between positive and negative *interesse* is the wrong that one is dealing with.
- In positive *interesse* one is dealing with breach and in negative *interesse* one is dealing with a wrongdoing that induced the contract.
- In both cases one compares a party's actual position with the hypothetical position.
- In principle, the law of contract awards damages according to positive *interesse* however it may be possible for an innocent party to claim his negative *interesse* in certain situations.

There are three methods that can be used to calculate damages:

1. Differential approach*
2. Concrete approach*
3. Anglo-American approach

- All three methods are aimed at the same result which is to compensate the innocent party for the losses he suffers as a result of the breach
- The innocent party's actual position (after breach) with the hypothetical position he/she would have been in if the contract had been properly performed.
- The different methods group the losses and gains differently

1) Differential Approach

- Straightforward application of the principle of positive interesse
- Compares the innocent party's actual financial position (all actual losses and gains) with his hypothetical financial position if the contract had been properly performed (losses and gains he would have had if there had been no breach)

- Difference between actual position and hypothetical position is the innocent party's damages
- There is a slight difference in the calculation when the contract is upheld as opposed to when it is cancelled:

Contract upheld

- Take into account performance actually given and received (actual position) and performances that should have been given and received (hypothetical position)
- Actual position: use the **value** of the performance in possession and not what was actually paid

Example: X sells a car from Y for R10 000. The market value of such a car is R12 000, however it turns out that the car has faulty brakes (positive malperformance) and thus worth R9000 only. X elects to uphold the contract
X's AP: Take account of performances actually given and received - X paid R10000 but received a car worth R9000 so he is R1000 poorer because of the breach
X's HP: Take account of the performances that should have been given and received - X should have paid R10 000 and received a car worth R12 000. X would have been R2000 richer if the contract had been properly performed.
X's damages are therefore R3000 (AP of R1000 + HP of R2000)

Contract cancelled

- Parties must restore any performances actually received before damages are calculated
- When you work out the actual position of the innocent party, do **not include performances actually given and received** in calculation.
- However, when you work out that hypothetical position you must include the performances that each party should have given and received.
- Reason is that damages are aimed at placing the innocent party in the hypothetical position he would have been in if the contact had been properly performed

Example: X elects to cancel the contract so he would be under a duty to return the car to Y and Y will be under a duty to return the R10 000 to X.
X's AP: Performances actually made are not taken into account because they are returned. X's financial position is unchanged because of the breach
X's HP: X should have paid R10 000 and received a car worth R12 000. X would have been R2000 richer if the contract had been properly performed.
X's damages are therefore R2000 (AP of R0 and HP of R2000)

SUMMARY
(1) Determine actual position (now)
If the contract has been cancelled, leave out performances actually given and received
(2) Determine hypothetical position (if contract had been properly performed)
(3) AP - HP = damages

- This approach can be time-consuming but it is most reliable since it does not depend on correct classification of losses under various headings, as required by other methods.

2) Concrete Method

- Shortcut method to calculate damages
- Aims to calculate positive interesse but is simpler to use
- Instead of doing a full comparison of the innocent party's actual and hypothetical positions, court looks at each type of loss to determine whether it is claimable
- Four types of losses the innocent party can suffer:

1) Losses in relation to performance
2) Consequential losses
3) Lost profits
4) Wasted expenses (not claimed in terms of concrete method)

- Innocent party's loss is the sum total of categories 1, 2 and 3
- In order to calculate the innocent party's damages the beneficial consequences of the breach must also be taken into account
- The innocent party's gains as a result of the breach must be subtracted from his losses.

Formula in terms of concrete method
Losses relating to performance
+ Consequential losses
+ Total profit
= Total losses
- Beneficial consequences
= Total damages claimable

1) Losses relating to performances

- ❖ Difference in value of performances actually given and received by the innocent party (actual performances) and performances which should have been given and received by the innocent party if the contract was properly performed (hypothetical performances)
- To simplify calculation, items that are duplicated are ignored
- The result is that losses in relation to performances are calculated differently if contract is upheld than when it is cancelled.

Example: X bought a horse from Y for R10 000 for breeding purposes however the horse was infertile and as a result the horse is only worth R4000. If the horse had been fertile it would have been worth R11 000.

Contract upheld

HP: Received R11000 (horse)	~~Gave R10000 (price)~~	*duplicated*
AP: Received R4000 (horse)	~~Gave R10 000 (price)~~	*duplicated*

Since the price paid by X is duplicated under both the actual and hypothetical positions, these two items cancel each other out.
X can therefore claim the items that are left - the difference between the performance tat he should have received and the performance actually received:
X's loss is therefore: R11 000 (should have received) - R4000 (actually received) = R7000

Contract cancelled

HP: Received R11000 (horse)	Gave R10000 (price)	
AP: ~~Received R4000 (horse)~~	~~Gave R10000 (price)~~	*both returned*

Since all performances actually given and received have to be returned when the contract is cancelled, the only items left in relation to performances are the performances that should have been given and received (hypothetical performances)
X can therefore claim the difference between what he should have received and what he should have paid:
X's loss is therefore R11 000 (should have received) - R10000 (should have paid) = R1000.

- ❖ In terms of the concrete method losses in relation to performances are therefore calculated as follows:
- ❖ Contract upheld: performance that should have been received - performance actually received
- ❖ Contract cancelled: performance that should have been received - performance that should have been given in return

2) Consequential losses (*damnum emergens*)

- ❖ Further expenses and losses caused by the breach, which would not have been incurred if the contract had been properly performed.
- ✓ Example: X builds a house for Y at a price of R500 000. The construction work is defective (positive malperformance) and as a result the ceiling collapses onto Y causing him injury. His medical costs are R5000. This loss is caused by the breach; if the construction work had been properly done Y would not have been injured.

3) Lost profits (*lucrum cessans*)

- ❖ Income, fruits and profits that the innocent party would have received if there had been no breach.
- ✓ Example: X has a delivery business and as a result of defective repair work by Y (positive malperformance) the van breaks down. During the time the van is being fixed X cannot use it to make deliveries. He would have earned R10 000 in that time from making the deliveries. The profit is R10000.
- ✓ Example: A beer factory sells 100 crates of beer to a store for R10 000 and the store will sell the beer to its customers for R15000. However, it will cost the store R500 to transport the beer from the factory to the store. Before any performance is made the beer factory burns down and is therefore unable to supply the beer. The profit (income the store would have earned) is R15000.

4) Wasted expenses and opportunities foregone

- ❖ Expenses incurred as a result of the contract which are wasted as a result of the breach
- ❖ These are not claimed as they are not a result of the breach; there is no factual causation and to compensate for this would be to overcompensate the plaintiff.
- ✓ Example wasted expenses: X has a delivery business and as a result of defective repair work by Y (positive malperformance) the van breaks down. X had to pay his driver a salary of R3000 during the time the van was broken even though he could not use him to make deliveries. The cost of the driver's salary was wasted because of the breach.
- ✓ Example opportunities foregone: M is offered a job as a full time lecturer at a University but is currently working at a law firm. She leaves her job at the law firm and accepts the job at the University, which pays much less than what the law firm pays. If the University breaches the employment contract she cannot claim damages of the difference in salaries because he leaving her old job (rejecting) amounts to an opportunity foregone.
- Note: These expenses would have been incurred (and opportunities given up) by the innocent party in any event, even if the contract was properly performed.
- The innocent party does not suffer any loss in relation to wasted expenses and opportunities foregone (AP and HP are the same)
- Therefore, no damages can be claimed in relation to this category in terms of the concrete method.

Beneficial consequences of a breach

- Beneficial consequences fall into two main classes: saved expenses and income gained.
- Saved expenses: Expenses the innocent party would have incurred if the contract had been properly performed (HP) but which he did not actually have to pay as a result of the breach
- ✓ Example: A beer factory sells 100 crates of beer to a store for R10 000 and the store will sell the beer to its customers for R15000. However, it will cost the store R500 to transport the beer from the factory to the store. Before any performance is made the beer factory burns down and is therefore unable to supply the beer. The profit (income the store would have earned) is R15000 → If the contract had not been breached the store would have had to give the beer worth R10000 (hypothetical expense) to their customers in order to earn the lost income of R15000. However, as a result of the breach, they no longer have to give the beer. In addition, they no longer have to spend R500 in transporting the beer from the factory. The store has therefore saved R10500 in expenses as a result of the breach.
- Income gained as a result of the breach: income that the innocent party actually received but would not have received if the contract was properly performed.
- ✓ Example: Where a house is sold but the seller fails to evict the tenants, the buyer receives rental from the tenants (AP). If the contract had been properly performed (tenants had been evicted), the buyer would not have received this income (HP). The buyer has therefore received income as a result of the breach.

- Note: beneficial consequences of the breach will always show a gain (innocent party was better off than before).
- In order not to overcompensate the innocent party, these gains must be set-off against his losses as a result of the breach
- Once the losses have been determined, you must reduce the claim for damages by subtracting all the beneficial consequences of the breach.

SUMMARY
(1) Determine losses as a result of the breach
Total loss = losses relating to performances + consequential losses + lost profits
If upheld: performance should have received - performance actually received
If cancelled: Performance should have received - performance should have given
(2) Determine gains (beneficial consequences) as result of breach
Total gains = saved expenses+ income gained because of breach
(3) Subtract total gains from total losses
Damages = total losses - total gains.

PENALTY CLAUSES

- Parties are free to exclude remedies from their contracts and may include certain remedies in the form a penalty clause.
- ❖ **Definition:** A penalty clause provides that in the event of a breach the breaching party will pay a specific penalty which is usually a sum of money.

Reasons for using a penalty clause

- (1) Can eliminate the difficulty of proving loss and the quantum thereof; one can thus avoid protracted and costly litigation in respect of a damages claim
- (2) One can get around the legal limits of damages (such as the mitigation rule and problems of remoteness) by claiming the penalty under the penalty clause
- (3) Can give a right to claim damages for non-patrimonial losses caused by breach of contract
- (4) Can act *in terrorem*, so the thought of the penalty hanging over a party's head discourages him from committing a breach of contract
- (5) Can benefit the debtor by spelling out the risks to which he is exposed (promotes certainty). This advantage will not accrue where, as it is usually the case, the contract reserves the right for the creditor to claim either the penalty or the damages.

CONVENTIONAL PENALTIES ACT 15 OF 1962

- ❖ A penalty clause can be unfair to the debtor, especially if the penalty is out of proportion to the actual losses suffered by the creditor.
- ✓ Example: We agree to a penalty of R5 million if you do not complete my house on time. However, the only loss I suffer is inconvenience and the cost of renting another house for a month (R10 000).
- For this reason penalty clauses are subject to the Conventional Penalties Act which aims to protect debtors against unfair penalty clauses.

Definition (s1):

The Act defines a penalty clause as:

1) A clause in the contracts which provides that on breach of the contract
2) One party will make performance to another (by paying a sum of money or delivering or performing something)
3) This performance must be intended by the parties either as a penalty or as liquidated damages. The court interprets this as meaning that the clause must either be intended to act *in terrorem* or as a pre-estimate of loss.

Section 4

- S4 also includes forfeiture clauses in this ambit of the definition.
- A forfeiture clause is a term "whereby it is provided that upon withdrawal from an agreement by a party thereto under circumstances specified therein, any other party thereto shall forfeit the right to claim restitution of anything performed by him in terms of the agreement, or shall, notwithstanding the withdrawal, remain liable for the performance of anything thereunder."
- Example: a contract for the sale of a house provides that the buyer must pay a deposit of R50 000 as soon as the contract is signed. If the contract stipulates that the buyer will lose the deposit if the seller cancels the contract because of a breach by the buyer, that clause is a forfeiture clause.
- Therefore, forfeiture clauses are penalty clauses

- National Credit Act 34 of 2005: prohibits certain types of forfeiture clauses in credit agreements [s90(2)(i)].
- If the forfeiture clause is forbidden in terms of the National Credit Act the clause will be void

Consequences of Penalty Clauses

- S1: a penalty clause as defined will be enforceable
- S2(1): one cannot recover both the penalty and damages
- Additionally, unless the contract expressly provides, one cannot recover damages instead of the penalty. They are mutually exclusive.

damages and penalty clause mutually exclusive.

- S2(2): one cannot enforce a penalty clause where one accepts or is obliged to accept a defective or non-timeous performance unless a penalty clause expressly states that it can be enforced in these circumstances.
- S3: where the penalty is markedly out of proportion to the prejudice suffered by the creditor the court may reduce the penalty to be fair in the circumstances.
- The onus is on the penalty debtor to prove that the penalty is out of proportion to the prejudice suffered.
- Prejudice suffered by the creditor: a subjective test which is not limited to the concept of damages in a breach of contract case, so it is not limited to proprietary interests.
- It includes sentimental losses, convenience, future losses and remote losses that are caused by the breach
- Note: this is a discretion and the court may refuse to reduce the penalty clause even if it is disproportionate to the prejudice suffered by the creditor.

TERMS THAT LOOK LIKE PENALTY CLAUSES BUT DO NOT FALL WITHIN THE DEFINITION

- ❖ Roukoop stipulations: This is a clause in a contract which allows a party to withdraw from the contract on payment f a sum of money. Since this right of withdrawal is provided for in the contract, the withdrawal is not a breach and this there is no penalty in terms of the Act.
- ❖ Clauses permitting restitution and/or cancellation after breach are not penalty clauses but spell out the normal consequences of breach.
- ❖ Acceleration clause: stipulates that on default, all outstanding instalments are immediately due and payable. This is not in itself a penalty clause because you are not paying more than you would have paid in the first place. The only difference is that you now have to pay everything at once, rather than over a period of time.
  - ✓ Example: I have to pay R10 000 over 10 months. I pay the first 2 months on time but am late with the third payment so the acceleration clause determines that R8000 must be paid in a lump sum. It is not a penalty clause since R8000 would have had to be paid anyway.
- An acceleration clause would be a penalty clause if the sum that becomes payable on default includes the interest that you would otherwise have had to pay. This is because you are paying interest but do not have use of the money.
  - ✓ Example: I have to pay R12 000 over 12 months with interest at 10% pa. At the end of the first month X will pay R1000 plus interest of R100 (R12000 x 10% x-1/12). At the end of the first month, the payment of R1000 plus interest is later so the acceleration clause will make the remaining capital amount of R10 000 payable immediately. If, in addition, the clause requires that the monthly interest, that would have been payable with each monthly payment, must also be paid, the clause will be a penalty clause. Interest is a payment for use of a sum of money over a period of time. In this case, we have to pay the interest without the use of the money over the remaining 10 months. The clause is therefore a penalty clause.

misrep

Aedilitian Remedies

- Additional remedies will be available for misrepresentation by the seller in a contract of sale
- These remedies are available if the seller made a *dictum et promissum* (misrepresentation about the qualities of the merx).
- The aedilitian remedies take two forms:

3) Actio redhibitoria
4) Actio quanti minoris

✓ Example: X bought a car from Y for R100 000 as a result of Y's false statement that the car was a 2004 model (*dictum et promissum*). In fact the car is a 2003 model which is worth only R80 000. X can claim that the purchase price be reduced to R80 000. In other words, Y must repay him the R20 000.

RESTITUTIO IN INTEGRUM

- The innocent party has an **election** to claim *restitutio in integrum* in cases of misrepresentation
- The contract is therefore **voidable**
- This remedy entails the setting aside of the contract and return of performances already given

a) Misrepresentation

- The misrepresentation must comply with all the elements set out above

b) By the other party to the contract or his agent

- The contract can only be set aside if the other party (or his agent) was responsible for the misrepresentation
- If the misrepresentation was made by an independent third party, the innocent party will not be allowed to claim *restitutio in integrum* but may be able to claim delictual damages from the third

c) Fundamental

- The contract can only be set aside if the misrepresentation was fundamental (innocent party would not have contracted at all without the misrepresentation) and not if it was merely incidental (*dolus dans*)

Loss of Right to Rescind

Election

- The innocent party will therefore lose the right to rescind (set aside the contract) if she elects to uphold the contract.
- Such election can be done expressly or by conduct which clearly indicates that she intends to uphold the contract, such as by continuing to carry out her side of the contract
- However, if there is another reasonable explanation for her conduct, she will not lose her right to set aside the contract
- A mere delay to exercise the right to rescind the contract does not automatically mean that the right is lost (Manaheer v Sharma)
- However, if the delay causes the other party to reasonably believe that the innocent party elected to uphold the contract, she will lose her right to cancel (as a result of the doctrine of estoppel)

Incapacity to Return Performance

- As a general rule, all performances received in terms of the contract must be returned if the contract is rescinded
- The court will therefore generally not grant *restitutio in integrum* if the innocent party is unable or unwilling to return performances received by her.
- However, there are exceptions to the rule:
- Inability to restore performance is not due to her own fault:
    1) Deterioration of the asset is due to an inherent defect in the asset
    2) Perishables
    3) The object perished when used for the purpose and manner in which it was intended
    4) The object perished due to circumstances outside the control of the innocent party
- If she was enriched by receiving the performance, she will have to compensate the other party to the extent of her enrichment
- If her inability to restore performance is due to her own fault she will be obliged to give the other party the monetary value of the performance as compensation

CASE: *Dibley v Furter* 1951, CPD

- In relation to the right to rescind, the court held that there was no unreasonable delay from which one could draw an inference that the plaintiff had elected to abide by the contract. The plaintiff had done nothing that was inconsistent with an intention to cancel the contract. The right of rescission is only lost if the plaintiff, through his own fault, is unable or unwilling to restore that which he received in terms of the contract or he has parted with the merx in such a manner that he has no substitute that he can offer to return in its place.
- In this case a cow and a stove were received as part of the farm. Before the plaintiff discovered the graveyard on the property, the cow died and the stove was sold. With regard to the stove, the court held that the plaintiff was entitled to return instead the 45pounds that he received for the stove. With regard to the cow, its death was an inherent risk in farming and there was no negligence on the part of the plaintiff whatsoever.

DAMAGES IN DELICT

- If the innocent party suffered losses as a result of the misrepresentation he will be entitled to claim delictual damages to compensate him for the losses, provided the following requirements are met:

a) Wrongful conduct

- The wrongful conduct would consist of the misrepresentation

b) Fault

- Delictual damages can only be claimed if the party making the misrepresentation acted with fault
- A claim for delictual damages will therefore only be available for fraudulent (intentional) misrepresentations
- Delictual damages cannot be claimed for innocent misrepresentation

c) Loss

- The party claiming delictual damages must have suffered patrimonial loss as a result of the misrepresentation

d) Causation

- The innocent party's loss must have been caused my the misrepresentation
- This can be either:
- Fundamental misrepresentation (*dolus dans*) - the innocent party would not have contracted at all if not for the misrepresentation
- Incidental misrepresentation (*dolus incidens*) - the innocent party would still have entered into the contract if there was no misrepresentation but would have contracted on different terms

CASE: *Bayer v Frost* 1991, AD

Facts: B manufactured chemical products, including a type of weed-killer. B's representative told F that the weed-killer could be applied to certain areas of F's farm by a helicopter without damaging the adjacent crops. These crops were damages when the weed-killer was applied. F claimed delictual damages for the losses from B on the basis of misrepresentation.

Failure by appellant to take reasonable steps to ensure accuracy would consequently render its conduct unlawful. C

But for the misrepresentation, respondent would not have contracted

Delictual damages can be claimed from a third party if he was responsible for the misrepresentation

Measure of damages

- The innocent party's loss is determined according to her negative interesse
- Damages are calculated by comparing his actual financial position with his hypothetical financial position if there had been no misrepresentation
- We therefore have to distinguish between fundamental and incidental misrepresentation

Fundamental Misrepresentation

- The innocent party would not have contracted at all if there had been no misrepresentation
- Damages must therefore place him/her in the position as if there had been no contract

If the innocent party rescinds (sets aside) the contract

- Before damages are calculated all performances already received in terms of the contract must be restored (restitution)
- Damages will be the losses not made good by the return of performances, namely:

1. Wasted expenses (reliance interest)
2. Consequential losses (indemnity interest)
   - ✓ Example 1: X bought a house from Y for R500 000. Y negligently misrepresented to her that the house was structurally sound and X spent R50 000 on legal costs to transfer the house into into her name. When she moved in however, one of the walls collapsed due to a structural defect and destroyed X's furniture worth R10 000. If X rescinds the contract, the house must be returned to Y, and X will receive back the R500 000 he paid. X can claim R50 000 for the legal costs (wasted expenses) plus R10 000 for the furniture (consequential losses)

If the innocent party chooses to uphold the contract

The parties will retain all performances received. The innocent party may claim the following as damages:

1) Wasted expenses (reliance interest)
2) Consequential losses (indemnity interest)
3) Difference in value of performances actually given and received (restitution interest)

   - ✓ Example 2: (see example 1) If X upholds the contract she retains the house and cannot get back the price she paid. X can therefore claim R100 000 (difference between actual value of the house and the purchase price) as well as R50 000 for the legal costs (wasted expenses) plus R10 000 for the furniture (consequential losses)

- If the market value of the performance that was received cannot be determined the courts may use the costs of repairing the performance to calculate damages

CASE: ***Ranger v Wykerd* 1977, AD**

- **Facts:** R (buyer) bought a house with a swimming pool from W (seller) for R22 000. W fraudulently misrepresented that the pool had no defects, in fact the pool leaked and R would never have bough the house if he knew the pool leaked. However, he elected to uphold the contract and claimed delictual damages from the seller.
- **Issue:** What was the amount of the buyer's loss as a result of the misrepresentation?
- **Court held:** The normal rule to determine the buyer's loss was to calculate the difference between the purchase price of the house and the actual value of the house with the defective pool. However, it was not possible to determine the market value of the house with the defective pool, since no market existed for such houses (nobody wanted to buy a house with a leaking pool). In this case the loss should be determined by using the reasonably costs of repairing the pool (R1000).

Incidental Misrepresentation < AP - HP consequential losses

- The innocent party would still have contracted if no misrepresentation had been made, but he would have contracted on different terms
- Rescission is not an option in these cases
- The court will compare his financial position in terms of the actual contract with his hypothetical position if he had entered into the fictional contract
- In terms of this principle, the innocent party can claim the difference between his actual performance and the performance that he would have given in terms of the fictional contract.
- In addition, the innocent party can claim consequential losses (indemnity interest).
- However, he will not be able to claim wasted expenses (reliance interest) since he would have entered into the contract anyway

- ✓ Example 3: (see example 1) If X had known about the structural defect he would still have bought the house, but he would only have paid R400 000 for it. X can claim R100 000 (difference between the actual price and price he would have paid if no misrepresentation had been made - fictional contract), as well as R10 000 for the furniture (consequential losses). However he would not be able to claim R50 000 for the legal costs (wasted expenses) since he would have spent it anyway.

- In principle the innocent party must prove that the other party would have agreed to the fictional contract but this may be difficult to prove
- Our courts resolve this problem by assuming (unless otherwise proved) that the other party would have agreed to accept the true value of his performance if there had been no misrepresentation

- ✓ Example 4: In example 3 above, the court will determine the true value of the house (the house and the structural defect). If the true value of the house is R400 000 the court will assume that Y would have agreed to sell it for R400 000 if there had been no misrepresentation. X will therefore be able to claim R100 000 difference between the actual price and the fictional price)
- ✓ If the true value of the house is R450 000 X will only be able to claim R50 000 (difference between actual price = R500 000 and the fictional price = R450 000) unless X can convince the court that Y would have accepted a lower price.

COMPARISON OF REMEDIES

- Each of the remedies have their own set of requirements.
- The main differences between the requirements for the remedies are:

Fundamental vs incidental misrepresentation

- Restitutio in integrum can only be claimed for a fundamental misrepresentation but not incidental misrepresentation
- Delictual damages can be claimed for both fundamental and incidental misrepresentations

Fault

- Fault is not a requirement for restitutio in integrum so *restitutio* can be claimed for intentional (fraudulent), negligent or innocent misrepresentations.
- Delictual damages can only be claimed for a fraudulent or negligent misrepresentation but not for innocent misrepresentation

Loss

- Loss is not a requirement for *restitutio in integrum* so the innocent party can therefore rescind the contract even if he did not suffer any loss as a result of the misrepresentation
- However in order to claim delictual damages the innocent party must prove that he suffered loss because of the misrepresentation

Misrepresentation by the other party to the contract

- *Restitutio in integrum* can only be claimed if the other party (or his agent) was responsible for the misrepresentation.
- If a third party made the misrepresentation the innocent party will not be entitled to rescind the contract
- Delictual damages can be claimed from any person who is responsible for the misrepresentation even if the wrongdoer was not a party to the contract

RELATIONSHIP BETWEEN MISTAKE AND MISREPRESENTATION*

There is a close relationship between mistake and misrepresentation
A misrepresentation consists of conduct creating a false impression, which is a mistake in the mind of the contractual party
All misrepresentations therefore cause mistakes, however not all mistakes are caused by misrepresentations (for example a party's own carelessness or inexperience can cause a mistake)
A misrepresentation can cause two types of mistakes:

1) Mistake in motive

- A mistake in motive only relates to the reasons for contracting
- In terms of the rules relating to mistake, the contract is valid
- The innocent party will therefore not be able to escape the contract on the basis of mistake
- However, the innocent party will still be entitled to his remedies for misrepresentation:

- For fundamental misrepresentation by the other contractual party, he will be entitled to *restitutio in integrum*
- For fraudulent or negligent misrepresentation he will be entitled to delictual damages from the person who made the misrepresentation

2) Essential (material) mistake

- An essential mistake is a causal mistake that leads to a lack of subjective consensus between the parties
- If the essential mistake was caused by a misrepresentation by the other party the contract will be invalid in terms of the rules relating to mistake.
- In addition, the innocent (mistaken) party is entitled to remedies based on misrepresentation (*restitutio* and delictual damages)

MISREPRESENTATIONS AND EXCLUSION CLAUSES

- The distinction between a misrepresentation causing a mistake in motive and a misrepresentation causing an essential mistake becomes very important if the contract contains an exclusion clause excluding liability for misrepresentations.
- Misrepresentation cannot be used to escape the contract.
- Example: "No representations other than those expressly contained herein, have been made by either party"

Mistake in motive

- If the misrepresentation only caused a mistake in motive the contract is valid
- The innocent (mistaken) party will be bound by the exclusion clause and will therefore not be able to claim his remedies based on misrepresentations.
- However, the parties cannot exclude liability for a fraudulent misrepresentation

Essential (material) mistake

- If the misrepresentation caused an essential mistake, the contract (or exclusion clause) is invalid (void *ab initio*)
- The innocent party will be able to claim his remedies based on misrepresentation

CASE: *Du Toit v Atkinson's Motors* 1985, AD

This is a perfect example of how the two remedies overlap

- The seller made two misrepresentations to the buyer:

(1) A misrepresentation as to the year model of the car. This misrepresentation caused a mistake in motive. If this was the only misrepresentation made by the seller, the buyer would have been bound to the contract, including the clause excluding the seller's liability for misrepresentation.

(2) A misrepresentation as to the exclusion clause (by non-disclosure). The seller had a legal duty to point out the exclusion clause since it was an unexpected clause. This misrepresentation caused an essential mistake (no subjective consensus on the terms of the contract) which was *justus* because it was caused by the seller.

- The contract was therefore invalid (void *ab initio*) and the buyer was therefore not bound to any terms of the contract (including the exclusion clause). The buyer could therefore use his remedies for misrepresentation.

- An essential mistake does not necessarily lead to invalidity of the entire contract
- If the mistake relates to a term (exclusion clause) which can be severed from the rest of the contract, the rest of the contract will stand

THIRD PARTY MISREPRESENTATIONS

- If the innocent party was induced to enter into a contract as a result of misrepresentation by a third party, his remedies are limited

Mistake in motive

- Since there is still subjective consensus between the parties, the contract is valid; the innocent party will not be able to escape on the basis of mistake.
- In principle he still has remedies based on misrepresentation however the *restitutio* is only available if the other contractual party made the misrepresentation
- His only remedy would therefore be a claim for delictual damages against the third party.

CASE: *Karabus Motors v Van Eck* 1962, CPD

- **Facts**: V bought a car from K but A (third party) misled V about the year model of the car. V tried to set aside the contract on the basis of the misrepresentation
- **Court held**: V was not entitled to claim restitutio in integrum since the other party (K) was not responsible for the misrepresentation
- The rules relating to mistake did not help V either as the misrepresentation by X caused a mistake in motive only. The contract was therefore valid since there was still subjective consensus between V and K. However, V would be able to sue X for delictual damages, provided he could prove fault and loss.

Essential Mistake

- In these cases there will be no subjective consensus between the parties
- It is unclear whether the contract will be valid in terms of the rules relating to mistake
- In terms of the **reasonable reliance theory**: the contract will be valid because the other contractual party did not cause the mistake
- In terms of the **Justus error theory**: the contract may be invalid because the mistake was excusable (this point has not been settled in our law)
- The only remedy for misrepresentation would be a claim for delictual damages

Improperly Obtained Consensus

INTRODUCTION

- Although consensus has been reached, it may have been obtained in an improper manner
- ✓ Example: A agrees to sell his house to B because B threatened to hurt A's children if he did not agree
- X buys a car from Y because Y told him it was a 2004 model while it is really a 2003 model
- If the contract was formed because of improper behaviour of one of the parties, it is in principle valid but the innocent party has the **choice** of setting it aside and may in addition, have a claim for delictual damages.
- Currently our law recognizes four specific categories of improperly obtained consensus, each with its own set of requirements

Misrepresentation

- Misrepresentation occurs when one of the parties is induced to enter into the contract by words or conduct that creates a false impression
- ✓ Example: A buys a car from B because B told him the engine had been overhauled in the previous month however the engine had never been overhauled.

Duress

- Duress occurs when one of the parties is induced to enter into the contract by threats of harm
- ✓ Example: A donates his car to B after B threatened to harm A's daughter unless he does so

Undue influence

- Undue influence occurs when a person improperly exploits the influence he has over someone else so as to induce that person to enter into a contract
- ✓ Example: A is ill and worried what will happen to his family after his death. A's priest convinces him that in the circumstances it would be best to donate his farm to him, which A does

Bribery of agent

- This occurs when a party enters into a contract as a result of a secret bribe given to his agent or representative.

CASE: *Extel Industrial v Crown Mills* 1999, AD

- ➢ **Facts**: C manufactured food products and ought several shipments of sausage casings from E. Unknown to C, E had bribed two of C's employees to influence C to buy the sausage casings from E rather than another supplier. When C found this out, it refused to pay E.
- ➢ **Court held**: The contract of sale between C and E was voidable at the choice of C since C was an innocent party and its agreement had been improperly obtained. C could therefore set aside the contract

- The dividing line between these categories is not always clear. For example, the difference between undue influence and duress is often a matter of degree
- Example: X threatens to leave his wife is she does not sign an ANC; is this duress or undue influence
- For this reason it has been suggested that instead of these categories our law should recognize a general ground of improperly obtained consensus
- Van Huyssteen argues that a contract should be voidable on the ground of **abuse of circumstances** (one party exploited the circumstances leading to the contract in a legally reprehensible way)

Examples of abuse of circumstances:

- The parties had unequal bargaining power and the stronger party exploited it to get an unfair advantage in the contract
- One party unconscionably exploited the other party's needs, such as by charging a thirsty man for water
- However, such general ground is not recognized in our law (***BOE Bank v Van Zyl***) and a person who claims that consensus has been improperly obtained has to rely on one of the four recognized grounds.
- Additional grounds may however be developed by our courts from time to time (***Extel Industrial v Crown Mills***)

REMEDIES FOR VOIDABLE CONTRACTS

- A contract that has been formed because of the improper behaviour of one of the parties is voidable
- Voidable contracts must be distinguished from void contracts

Void/invalid contracts

- The contract is invalid (void ab initio) because one of the requirements for validity of the contract has not been met
- The contract never existed; it does not create any legal rights or duties and can never be enforced

Voidable contracts

- These contracts are potentially void; one of the parties has a **choice** whether or not to have the contract declared void
- If the innocent party chooses to uphold the contract it is entirely valid and may be enforced like any other contract
- However, if she chooses to set the contract aside, the contract becomes invalid.

Restitutio in integrum (rescission and restitution)

- The remedy of setting aside a voidable contract is called *restitutio in integrum* (return to the previous situation)
- It's purpose is to (1) undo the consequences of the contract and (2) to place the parties in the legal position as if there had never been a contract.
- The effects of this remedy are:
- The obligations created by the contract become invalid; there are no longer legally enforceable rights
- Any performances already received in terms of the contract must be returned
- **Note:** The effects of this remedy are not the same as cancellation of a contract on the basis of breach of contract
- Rescission operates retrospectively to completely undo the consequences of the contract
- Cancellation on the grounds of breach of contract does not completely undo the consequences of the contract as certain rights and duties can still be enforced despite cancellation (accrued rights)
- In addition, there is still an obligation to compensate the innocent party by way of damages for any losses caused by the breach

Delictual Damages in a Contractual Context

- The improper conduct which led to the formation of the contract will usually also constitute a wrongful act for the purposes of delictual liability
- Provided all the elements for a delictual action are present, the innocent party will be able to claim delictual damages from the wrongdoer
- Delictual damages are aimed at undoing the consequences of the wrongful act
- The damages are therefore calculated according to the plaintiff's negative interesse (financial position had there been no wrongful act)

MISREPRESENTATION

- A misrepresentation is a pre-contractual statement or conduct which creates a false impression in the mind of a contractual party and which influences his/her decision to contract

✓ Example: X takes his cellphone to be repaired but Y the owner of the shop tells him it cannot be repaired and X will rather have to buy a new cellphone, which he does. In fact, X's phone could have been repaired cheaply and easily.

- It is important to distinguish misrepresentation from contractual terms
- Statements of fact made during the course of negotiations are usually not regarded as terms of the contract
- Consequently, if they prove to be untrue, they will only give rise to the remedies for misrepresentation
- However, it is possible that the parties intended these statements to form part of the terms of the contract
- In such a case, the statements can either be a **warranty** or a **condition/assumption**
- If a statement is a term of the contract there are special legal consequences

Warranty

- If a party guaranteed the truth of the statement, he will be guilty of breach of contract
- If the statement proves to be untrue →the remedies for breach of contract will be available.

Condition / assumption

- If the statement is a condition or assumption of the contract, the validity of the contract is still dependent on the truth of the statement.
- If the statement proves to be untrue →the condition/assumption will fail and the contract will lapse.

Example

- ✓ Y buys a stud bull from X for R10000 in order to mate with his cow. X told Y that the bull was fertile but it turns out to be infertile. X was aware of this when he sold the bull to Y (fraudulent misrepresentation by X). Y would never have bought the bull if he had known the truth
- ✓ If X's false statement is merely a misrepresentation →Y has the remedies for misrepresentation (*restitutio in integrum* and negative *interesse* damages)
- ✓ If X guaranteed the bull's fertility →X's failure to deliver the bull will also amount to breach of contract (positive malperformance) and Y will be entitled to specific performance or cancellation and positive interesse damages for breach
- ✓ If the contract was made subject to the assumption that the bull was fertile →the contract will fail because the assumption was untrue. The contract is therefore not enforceable and any performances received must be returned. However, Y will **not** be able to claim damages since there was no delict and no breach of contract

TEST for determining whether a statement is a term of the contract

→ Consider the intention of the parties

- As a rule of thumb, a pre-contractual statement will become a term of the contract if it is repeated in the contract itself
- ✓ Example: X and Y entered into a written contract of sale. The written contract states that the bull was fertile. The statement will generally be regarded as a term of the contract and the court will interpret the contract to decide whether it was a warranty or an assumption

FRAUDULENT, NEGLIGENT AND INNOCENT MISREPRESENTATIONS

- Misrepresentations can be classified according to the state of mind (fault) of the person making the misrepresentation

Fraudulent (intentional) misrepresentation

- The person making the misrepresentation knew the statement was untrue and that it would influence the other party's decision to contract

Negligent misrepresentation

- The person making the misrepresentation did not know that the statement was untrue but the reasonable person would have realized it

Innocent misrepresentation

- The person making the misrepresentation did not know that it was untrue and a reasonable person would also not have realized it

Example

- X buys a stud bull from Y after Y incorrectly told her that the bull was fertile
- If Y knew hat the bull was fraudulent →the misrepresentation is fraudulent
- If Y honestly believed that the bull was fertile but a reasonable person would have been aware that it was infertile →the misrepresentation is negligent (a reasonable person would have tested the bull before selling it
- If Y honestly believed the bull was fertile and a reasonable person would also have believed it →the misrepresentation is innocent (Y tested it but it showed the bull was fertile)

- Fault in the form of **intention** or **negligence** is not a requirement for misrepresentation in general, however fault does play a role in determining which remedies are available to the innocent party

ELEMENTS OF MISREPRESENTATION

A statement or conduct creating false impression will only amount to a misrepresentation is all the following requirements are met:

1) False representation
2) Of fact
3) Which was intended to induce the contract
4) Actual inducement (causation)
5) Materiality

CASE: *Novick v Comair Holdings* 1979, WLD

The party seeking to avoid a contract on the ground of misrepresentation must prove the following elements of the case:

(a) that the representation relied upon was made
(b) that is was a representation as to fact. A promise, prediction, opinion or estimate or exercise of discretion is not a representation as to the truth or accuracy of its content; it can however, often be construed as a representation that the person making it is of a particular state of mind
(c) that the representation was false...When a prediction, opinion or estimate is relied upon, what must be shown is not merely that it was, at the time when it was expressed, of the person who expressed t
(d) that it was material in the sense that it was such as would have influenced a reasonable man to enter into the contract in issue
(e) that it was intended to induce the person to whom it was made to enter into the transaction sought to be avoided
(f) that the representation did induce the contract...does not mean that the misrepresentation must have been the only inducing cause of the contract. It suffices that one of the operative causes which induced the representee to the contract as he did

1) False Representation

- There must be conduct which created a false/incorrect impression in the other party's mind.
- Usually this will take the form of positive conduct (active misrepresentation)

Examples of active misrepresentation:

- X sells a car to Y and tells him that the car is a 2004 model. The car is actually a 2003 model
- V buys a jacket from W's shop. W displayed the jacket with those made from genuine leather although it is made from synthetic leather. By displaying the jacket together with the genuine leather jackets, W created the impression that it was also made of genuine leather

- A misrepresentation can also take the form of negative conduct - failure to remove a false impression if there was a legal duty to act (misrepresentation by non-disclosure/silence)

Examples of misrepresentation by non-disclosure:

- X sells a car to Y but fails to tell Y that the car has been in a serious accident and that the chassis is bent. This will be misrepresentation by silence if X had a legal duty to disclose this
- V is employed as a cashier by W and V fails to inform W that he was previously convicted of stealing from his employers. This will be misrepresentation by silence if V had a legal duty to disclose this.

2) Of Fact

- Only facts can be untrue or incorrect
- Our courts generally hold that the misrepresentation must refer to something that can be factually established

- Opinions or predictions
- Earlier cases held that an expression of opinion or prediction could not give rise to an actionable misrepresentation
- Examples: "I think that this is a good unit trust to invest in"
- The price of gold will rise in the next three months

- However, in ***Feinstein v Niggli*** the SCA held that a statement of opinion generally entails at least one implied statement of fact, namely that the person expressing the opinion honestly holds (believes) that opinion.
- In addition, the opinion could also imply a representation that there are facts on which the opinion is based
- If the person did not honestly believed his opinion or the implied statement as to the existing state of affairs, there will be a misrepresentation.

CASE: *Feinstein v Niggli* 1981, AD

- **Facts**: N bought a business from F. Before they entered into the contract, F told N that the business would generate enough profit in future to cover N's payments to F as well as N's living expenses (opinion/prediction as to future profit). N later found that the business was not as profitable as predicted by F. He wanted to set aside the contract on the basis of F's misrepresentation.
- **Court held**: Although F's statement was a prediction or opinion, it also entailed two implied statements of fact: (1) Implied representation that at present the level of turnover was substantial (earning substantial profits) and (2) An express representation that he believed if the level of turnover was

maintained its net income would be sufficient to cover the quarterly instalments and living expenses. F was guilty of misrepresentation and his appeal was dismissed. "A statement of expectation or a statement in the future tense may impliedly say something as to the existing position and so import an implied representation"

- ➢ The representations were intended to and did induce the respondents to purchase the business, F wanted to get rid of it and N did not know about its profitability. His representations that the business was making substantial profits contributed towards inducing them to pursue the proposition to concluding the contract.
- ➢ They therefore relied on F's **opinion** and that it constituted a misrepresentation. The contract was as such, revocable.

Puffing

- Extravagant statements praising a product will generally not be regarded as misrepresentations but rather as "puffs"
- A puff is a statement that will not mislead even a gullible person
- Examples: Stud deodorant makes you irresistible to women; Wishy-washy powder makes you clothes whiter than white

- The question whether the statement amounts to a mere puff or whether it is a misrepresentation depends on the (1) form of the statement and (2) surrounding circumstances.

CASE: *Phame v Paizes* 1973, AD

- ➢ "Relevant considerations could include the following: whether the statement was made in answer to a question from the buyer, its materiality to the known purpose for which the buyer was interests in purchasing, whether the statement was one of fact or of personal opinion and whether it would be obvious even to the gullible that the seller was merely singing the praises of his wares, as sellers have ever been want to do"

3) Intended to Induce Contract

- The party making the misrepresentation must have realized that his statement would influence the other party's decision to contract.
- This is not the same as saying that he must have been aware that the statement was untrue (fraudulent misrepresentation)
- It will still be a misrepresentation as long as he realized that the statement would have an effect on the other party's decision to contract

4) Actual Inducement (causation)*

- A misrepresentation will only be actionable if it induced (caused(the other party to contract on the terms that he did
- In other words, a misrepresentation is only legally relevant if it is **causal**
- Inducement consists of two elements:

1) The innocent party actually believed the misrepresentation
2) The innocent party contracted on the terms that he did because of the misrepresentation

Note: The test for inducement is subjective and enquiring into the innocent party's state of mind and not what the reasonable person would have done

Causal misrepresentation can take two forms:

1) Fundamental misrepresentation - the innocent party would not have contracted at all if he knew the truth (*dolus dans*)
2) Incidental misrepresentation - the innocent party would still have contracted if he knew the truth but on different terms (*dolus incidens*)

✓ Example: X buys a car from Y for R100 000. Y tells him that the car is a 2003 model while in fact it is a 2002 model:

- If X would not have bought the car at all if he had known the truth, this is a fundamental misrepresentation
- If X would still have bought the car but he would have paid R80 000 for it, this is an incidental misrepresentation.

❖ If the misrepresentation was not causal, the misrepresentation is legally irrelevant and the innocent party will have no remedies.

CASE: *Bird v Murphy* 1963, D&CLD

- **Facts**: B saw that M was selling his Mercedes Benz and decided to buy it if M was willing to accept an offer of R2 600 for the car. When B approached M to buy the car, M told him it was a 1957 model but it was a 1953 model. When B discovered the truth he sued M for the misrepresentation.
- **Court held**: B did not have a claim against M because on the facts it was clear that he had made the decision to buy the car for R2 600 long before M made any misrepresentation to B. M's misrepresentation did not influence B's decision to contract as h would have bought the car anyway.

5) Materiality

- The misrepresentation must be material in the sense that a reasonable person would also have been induced to contract by the misrepresentation (objective test for materiality)
- If a reasonable person would not have been misled by the misrepresentation or it would not have influenced his decision to contract, the misrepresentation does not give rise to any remedies
- The requirement of materiality is somewhat controversial but it is useful to distinguish between puffs and misrepresentations.
- However, the requirement does become problematic when a person intentionally exploits the gullibility and/or inexperience of the other party by making a fraudulent misrepresentation.

CASE: *Lourens v Genis* 1962, TPD

- **Facts**: L, a farmer, wanted to drill bore-holes on his farm. G told him that his son had X-ray eyes and that he could see water under the ground. L agreed to pay G and his son 15 pounds to point out a place where he could bore and find water. The boy pointed out a place where he said he could see water 200 feet under the ground and that the plaintiff would get at least 300 gallons of water per hour out of it. L had paid the money and had bored there, but obtained practically no water. L sued G for misrepresentation.
- **Court held**: L could not claim on the basis of misrepresentation as no reasonable person would have believed G's representation. If L believed it he had caused his own loss by his unreasonable stupidity

- The requirement of materiality in the case of fraudulent misrepresentation has been criticized as requiring materiality in this context is putting the gullible at the mercy of an unscrupulous fraudster

CASE: *Orville Investments v Sandfontein Motors* 2000, TPD

- The court held that the requirement of materiality did not apply to fraudulent misrepresentation and the innocent party can sue even if a reasonable person would not have been misled by the misrepresentation, as long as the innocent party herself was misled.

- The decision in *Orville* has not been confirmed by the SCA and so the issue cannot be regarded as settled in our law

NON-DISCLOSURE: MISREPRESENTATION BY OMISSION

- Silence or failure to disclose information will usually not amount to a misrepresentationeven if it creates a false impression in the mind of the other party.
- However, if there was a legal duty to disclose the information the failure to do so will amount to a misrepresentation by omission (non-disclosure)
- The **test** for determining whether there was a legal duty to disclose is the **legal convictions of the community.**
- Although there is no closed list, such duty has been recognized in the following situations:

- **Contracts *uberrimae fide*** (contracts of utmost good faith) impose a duty to disclose any relevant information to the other party

Examples:

- **Insurance contracts:** the person taking out the insurance (the insured) has to disclose any facts which may have a bearing on the risk undertaken by the insurer, even if the insurer does not specifically ask him about this. For example, if the insured's house has been burgled 5 times in the past month, he must disclose this to the insurer
- **Partnership contracts:** Partners have to disclose information which may have an impact on the working relationship or the trust between the parties, even if not asked about this. For example, if a partner was previously convicted of fraud he has to disclose this to his partners
- **Agency contracts:** An agent must disclose to the principal any benefits that he may receive from the transaction or any conflicts of interest. For example, if an investment broker will receive a commission

from an investment company if he invests the principal's money with them, he must disclose this to the principal.

- ❖ The seller of goods has a duty to inform the buyer of any **latent defects** in the merx of which the seller is aware.
  - A latent defect is an abnormal quality in the merx which renders it useless or less useful for the purposes for which it was bought or for which it is normally bought
  - Latent implies that the defect is hidden
  - This duty is only applicable for contracts of sale

CASE: *Dibley v Furter* 1951, CPD

- ➢ **Facts**: D (the buyer) bought a farm from F (the seller) on which D planned to live and farm. The farm had a graveyard on it which had been used until quite recently before the sale. However, the graveyard was no longer visible since the land on which it had been built had been ploughed over. The seller was aware of the existence of the graveyard but did not tell the buyer about it. When the buyer found out about the graveyard he wanted to rescind the contract. The buyer tried to argue that the graveyard constituted a latent defect and that the seller had a duty to disclose it to him
- ➢ **Court held**: A latent defect must diminish or destroy the usefulness of the thing sold for the purpose for which it has been sold or for which it is commonly used. The test for usefulness of the thing sold is objective (its usefulness would be diminished or destroyed for everyone and not just the particular purchaser concerned). The graveyard did not amount to a latent defect as the graves did not materially destroy or impair the usefulness of the property (it could still be used to live on and for farming)

- ❖ When a positive statement, which was only a **half-truth**, was made. The statement is true on its own but it creates a false impression because other relevant facts are not disclosed

CASE: *Marais Edlman* 1934, CPD

- ➢ **Facts**: M bought a farm from E but before the sale was concluded M asked E about the water yield of a particular borehole. E told M: "I have pumped...water [from that borehole] for 3 years...day and night if it was necessary, and it never failed". However E failed to mention that the three years of pumping had occurred 14 years earlier.
- ➢ **Court held**: E had misled M by telling him a half-truth. The statement by E created the impression that the 3 years of pumping had taken place recently and the statement therefore amounted to a misrepresentation.

- ❖ When a positive statement was made and **circumstances change so that statement is no longer true**

CASE: *Mayes v Noordhof* 1992, CPD

- ➢ **Facts**: M (the buyer) bought land from N (the seller) and during negotiations M asked N whether there were any informal housing settlements in the area. The seller told him that there were no such settlements and the statement was true at the time. However, before the contract of sale was concluded, N was informed by the municipality that an informal housing settlement would be established in the area. N failed to disclose this fact to M.
- ➢ **Court held**: This was an instances of fraudulent non-disclosure as N knew that it was important to M whether there was an informal housing settlement in the area. He made a previous positive statement that there was non and his failure to disclose that the circumstances had changed created the impression that the previous statement was still true.

- ❖ Duty to disclose **unexpected terms** to a contract →see mistake

- ❖ When a matter falls within the **exclusive knowledge** of one of the parties and "honest men" would recognize a duty to disclose this knowledge in accordance with the legal convictions of the community.

- ❖ A matter falls within the exclusive knowledge of a party if practically speaking, the other party could only get the information from him.

CASE: *Dibley v Furter* 1951, CPD

- ➢ **Court held**: Even though the existence of the graveyard was not a latent defect the seller still had a legal duty to disclose it to the buyer. The existence of the graveyard was a peculiar fact and the seller should have realized that potential buyers might not want to buy the farm if they knew about the graveyard. The buyer did not have any knowledge of the graveyard, nor did he have any reason to suspect it existed. This resulted in the seller having an unfair advantage over the buyer.

- In order for them to bargain on an equal footing the seller had the duty to disclose the existence of the graveyard to the buyer. This was fraudulent misrepresentation by the seller since he deliberately kept silent.
- The justification of the decision seems to be that the seller had exclusive knowledge of the existence of the graveyard.

- The question is whether **in a practical business sense** he was the only source of the information for the other party.
- Even if the other party could theoretically get the information from another source, the court will take into account what could reasonably and practically be expected from the other party in the circumstances.

CASE: *Waller v Pienaar* 2004, CPD

- Facts: W bought a house from P and the house was prone to cracking because of the condition of the soil underneath the house. The seller (P) failed to disclose this fact to W, even though he was aware of the problem. When W sued him on the basis of misrepresentation by non-disclosure, the seller argued that he did not have a legal duty to disclose the poor condition of the soil to W. According to the seller this fact did not gall within his exclusive knowledge since W could have discovered it by reading an engineer's report filed with the local municipality which report was available to the public.
- Court held: Requiring the buyer to inspect the municipality's file before conclusion of the sale would have been expecting too much from him. In a practical business sense the seller was therefore the only source of this information for the buyer. The matter therefore fell within the seller's exclusive knowledge.

- It is not enough that the matter falls within the exclusive knowledge of one of the parties
- A duty to disclose will only arise if "honest men" would recognize a duty to disclose the information (***Absa Bank v Fouche***)

CASE: *Absa Bank v Fouche* 2003, SCA

- Facts: F rented a safety deposit box from A and left her valuables inside the box. Thieves broke into the bank and stole the safe containing the safety deposit box. F's valuables were stolen so she sued A on the basis of representation by non-disclosure. According to F, the security system of the bank was inadequate in several respects as *inter alia* the bank did not have motion sensors inside the bank to detect people moving about when the bank was closed, nor did it have a security guard watching the premises at night). F would never have rented the security box is she had been aware of these facts. She argued that A had a legal duty to disclose these facts to her.
- The court accepted the information about the bank's security fell within their exclusive knowledge however the issue was whether the legal convictions of the community placed a legal duty on the bank to disclose.
- Court held (majority): The test for establishing wrongfulness in a pre-contractual setting is the same as that applied in the case of a non-contractual non-disclosure (*Bayer v Frost*). The test to be used is the **legal convictions of the community** (*Carmichele*). In a contractual setting non-disclosure has been synthesized in a general test which takes account of the fact that it is not the norm that one contracting party need tell the other all he knows about anything that may be material. A party is expected to speak when the **information he has to impart falls within his exclusive knowledge** and that the right to have it communicated to him would be **mutually recognized by honest men** in the circumstances.
- Exclusive knowledge is knowledge which is inaccessible to the point where it's inaccessibility produces an involuntary reliance on the party possession the information: an honest person, embodying the legal convictions of the community. An honest person would have realized that security was not tight but the likelihood of a break in occurring at that time was not high. There was no duty on the bank officials to disclose the information about the security measures and if there had been their conduct would be fraudulent misrepresentation.
- Minority: Found in favour of Fouche as there should have been a duty on A to inform her. It was negligent misrepresentation which caused her loss.

REMEDIES FOR MISREPRESENTATION

Misrepresentation gives rise to the usual remedies for improperly obtained consensus

1) ***Restitutio in integrum***
2) **Delictual damages**

UNREAD DOCUMENTS

- Unilateral essential mistakes often occur because a party did not read a document containing contractual terms
- These situations are so common that specific rules have been developed to deal with them
- There are two sets of rules depending on whether the document was signed or not:

Caveat subscriptor rule

- Document was signed by the mistaken part

Ticket case rules

- Document was not signed by the mistaken party

- These rules are actually just an application of the general principles relating to unilateral essential mistake and both can be explained in terms of the *Justus* error theory and reasonable reliance theory.

CAVEAT SUBSCRIPTOR

- "Let the signatory beware"
- A person signing a contractual document bears the responsibility to make sure that he is aware of the terms contained in the document
- ❖ General principle: a party who signs the document containing contractual terms will be bound to those terms even if he did not read them
- ***Burger v CSAR***: "It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning of the words which appear over his signature"
- Reason for this is, his conduct in signing the document is generally taken as an indication that he intended to consent to the terms in the document (reliance by the other party)
- This rule applies even where the signatory did not subjectively intend to be bound to all or some of the terms contained in the document.
- ✓ Example: X signs a written cell phone contract without reading it and one of the clauses provides that the cellphone contract can only be terminated after 3 years. X was unaware of this clause and would not have entered into the contract if he had known about it. In terms of caveat subscriptor X is bound to the clause despite the unilateral essential mistake (one party, causal and dissensus)

- The rule can be explained in terms of the rules relating to unilateral essential mistake:
- If the signatory is wiling to be bound to the unread terms without knowing what they were, he is bound on the basis of actual subjective consensus
- If the signatory is willing to be bound to the unread terms but he signed anyway, he will generally be bound in terms of both the Justus error theory and reasonable reliance theory.
  - Justus error: will be bound because his mistake was not Justus (acted carelessly or negligently in signing the contract without reading it)
  - Reasonable reliance: will generally be bound because of the non-mistaken party's reasonably reliance on the signatory's signature as indicating consent to the terms

CASE: ***Bhikagee v Southern Aviation* 1949, EPD**

- ➢ Facts: B signed a ticket to charter a plane from S. The ticket B signed contained a clause exempting the airline from liability if the flight was delayed. B alleged that he was not bound to this term as he had not subjectively consented and according to B he had seen the clauses on the ticket but did not know what they meant since he could not read English.
- ➢ Court held: B is bound to the exemption clause on the basis of caveat subscriptor. He knew that the document contained terms of the charter and should therefore have made sure what the contents of the document was before signing. The fact that B couldn't read English was not an excuse as he could have asked his companion to read to document to him. By signing the document without knowing what the contents were, he took the risk of being bound to all the terms contained in the document

CASE: ***George v Fairmead 1958, AD****

- ➢ Facts: G went to stay at F's hotel and the receptionist gave him a register to sign, unbeknown to him the register contained a clause excluding liability for theft. Certain items were stolen from his room.
- ➢ Court held: He was bound to the exclusion clause as his mistake was not Justus and he was negligent as the exclusion clause was right above where he signed.
- ➢ G was mistaken and it was an essential mistake relating to the terms and *animus contrahendi*.

EXCEPTIONS TO THE GENERAL RULE

- These can also be explained in terms of the *Justus* error theory and reasonable reliance theory
- The party who wants to escape will be successful in arguing that his mistake was Justus while the party who wants to keep the contract will not be able to show his reliance was reasonable.

1) The other party knew about the mistake

- If the other party was aware that the mistaken party did not read the document and that he did not intend to be bound to the terms, the mistaken party will not be bound.

2) The other party should, as a reasonable person have known about the mistake

- If a reasonable person in the position of the non-mistaken party would have realized that the signatory did not read the document and that he did not intend to be bound to the terms, the mistaken part will not be bound

3) The other party caused the mistake

- If the non-mistaken party caused the mistake by misleading the signatory as to the nature or contents of the signed document, the mistaken party will generally not be bound
- The non-mistaken party's misleading conduct is called a misrepresentation, which can either by active misrepresentation or by silence/non-disclosure:

Misrepresentation by positive conduct

- A party actively says or does something to mislead the other party

Examples:

✓ The non-mistaken party told the signatory that he was signing just as a receipt but the receipt contains contractual terms

✓ The non-mistaken party told the signatory that the document contained only the terms that were previously discussed between the parties. In fact, the document contains different or additional terms
  - In both cases the signatory will not be bound because the other party misled him as to the effect of the document.

Misrepresentation by silence

- Takes place when a party did not actively do something to mislead the other party, but he had a legal duty to act in order to prevent the other party from being misled

✓ Example: X sells his house to Y during winter and knows that the roof leaks in summer when it rains. If there was a legal duty to disclose this fact to the buyer a failure to do so would constitute a misrepresentation by silence.

- The decisive question is whether there is a **legal duty to act** and if so, the failure to act will amount to misrepresentation and the mistaken party will be able to escape the contract
- If there is no legal duty to act there will be no misrepresentation and the mistaken party will be bound to the contract
- The question whether there was such a legal duty to act is determined by the legal convictions of the community
- Although the case law is not always consistent on this point, it appears that such a duty may arise in two situations in the context of the *caveat subscriptor* rule:

(1) Document is misleading in itself

- If the **form of the document could easily lead a reasonable person** to make a mistake as to its **nature or contents**, the other party has the **duty** to take positive steps to inform the signatory of the true nature or contents of the document

CASE: *Brink v Humphries* 2005, SCA

- Facts: X Company applied for credit facilities with H. B signed the credit application in his capacity as director of X company. The credit application contained a clause binding B as surety for any debts of X company to H. B had not seen the clause binding him as surety when he signed the document. H sued B as surety for X company's debts.
- Issue: Was B bound to the clause binding him as surety for the company's debts?
- Court held (majority): The law recognizes that it would be unconscionable for a person to enforce the terms of a document where he misled the signatory (intentionally or not) and where such a misrepresentation is material the signatory can rescind the contract because of the misrepresentation provided he can show he would not have entered into the contract if he had know the truth. Where the

misrepresentation results in a fundamental mistake the contract is void *ab initio*. Therefore, the law gives effect to the principle that a person, in signing a document, is taken to be bound by the ordinary meaning and effect of the words which appear over his/her signature while also protecting the party who was under justifiable misapprehension.

- The appellant testified that in his experience a personal suretyship is almost always included in an application for credit and in the last 10 years he had dealt with many credit applications and where surety was required he was informed. There were three features of whether a reasonable person would have been misled: 1) Heading of the form read "credit application"
  2) Blank parts at the end of the first page would have drawn attention
  3) Manner in which suretyship clause included in the contract would not alert a signatory.
- The respondent's conduct was misleading and the appellant's mistake was Justus as he was unjustifiably misled. Therefore the obligation was void *ab initio*
- Minority: The appellant was inclined documents without reading them and so was negligent, he also had knowledge that suretyship would accompany credit agreements. The form was not long or complicated and was written in bold and capital letters at some times. While courts should come to the rescue of parties who have been misled or induced to enter into agreements of this kind, they should be mindful of what was stated in *National and Overseas v Potato Board*, that our law allows a party to escape liability by mistake, but where the other party has not made a misrepresentation the scope for the defence of unilateral mistake is very narrow. There is no basis here that the mistake was reasonable.

(2) The document contains unexpected or unusual terms

- According to our courts the non-mistaken party has a legal duty to point out an unexpected or unusual term in the document to the signatory
- If he does not do so, his conduct will amount to a misrepresentation by silence
- A term may be unexpected because it differs from what the signatory was led to believe by pre-contractual representations made by the non-mistaken party.

CASE: *Sheperd v Farrell's Estate Agency* 1921, TPD

- Facts: S saw an advert for F estate agency which read: "Our motto: No sale, no charge". He instructed F to sell his business and signed a written contract with them. The written contract contained a clause that he had to pay commission to F if the property was sold within a stipulated period, even if the estate agency was not involved in the sale. S had not read the clause and did not intend to be bound by it. The business was sold but not by F. F tried to enforce this clause against S on the basis of the *caveat subscriptor* rule
- Court held: S was not bound to the clause as the advertisement was a pre-contractual statement which created the impression that S would only have to pay commission if F actually sold the property. The clause in the written contract differed materially from the impression created by the advertisement (unexpected clause) so F had a duty to point it out to S. Since F did not S was not bound to the clause.

In some cases, the courts have held that the clause was unexpected because of the nature of the contract or the surrounding circumstances of the case

CASE: *Fourie v Hansen* 2001, WLD

- Facts: D rented a vehicle from Avis but as a result of a defect in the vehicle an accident occurred in which D was seriously injured. D's curator (F) claimed delictual damages from Avis and Avis argued that they were not liable since the signed rental contract contained a clause exempting Avis from delictual liability,
- Court held: (*obiter*) The exclusion clause was an unexpected or unusual and Avis therefore had a duty to draw D's attention to it. However, nothing of the kind had been done. The form of the document discouraged one from reading it and discovering the existence of the exemption clause. It was "just another clause squashed into two columns of close print". The very least that Avis should have done was to make the exemption clause stand out by printing it in a different coloured ink, or underlining it, or printing it in a different size of typesetting from the other clauses. A had therefore misled D by not drawing attention to the term

CASE: *Diovo v Brian Porter Motors Ltd* 1994, CPD

- Facts: D took his car to B for repair and B presented D with a Job Card to sign. The job car contained an exclusion clause in terms of which B was not liable for any damage, theft etc. D signed the job car but did not see the exclusion clause. D's car was stolen from B's premises and the issue was whether the exclusion clause was binding

- Court held: D was not bound as when signing, D was under the impression that he was merely signing to authorize repairs. The exclusion clause was an unexpected clause. B was therefore under a legal duty to bring the exclusion clause to D's attention.

    - A major problem with this principle is deciding when a term is unexpected
    - This appears to depend on the facts of a case
    - However, according to the SCA, the question is decided objectively and not subjectively (*Afrox Healthcare v Strydom*)

CASE: *Du Toit v Atkinson's Motors* 1985, AD*

- Facts: D saw an advertisement by A advertising a certain car for sale. The advert stated that the car was a 1979 model and D signed a written contract setting out the terms of the sale without reading it. Later D found out that the car was actually a 1976 model and he wanted to sue A on the basis that the advert amounted to a misrepresentation. However, the written contract contained a clause exempting A from any liability for misrepresentations as to the year model of the car sold. D alleged that he was not bound to the exemption clause since he had not read it, and did not subjectively intend to be bound to it
- Issue: Was D bound to the exemption clause on the basis of the caveat subscriptor rule?
- Court held: Normally a party who signs a contractual document without reading it will be bound in terms of the caveat subscriptor rule. However, he may escape if the other party misled him as to the nature or contents of the signed document. Such a misrepresentation could take the form of silence if the other party had a legal duty to inform the mistaken party about the nature or contents of the document.
- In certain circumstances there can be a legal duty to point out an exclusion clause to the signatory. If there is no such duty and the other party fails to point out the term to the mistaken party, the mistaken party will not be bound to the exclusion clause as a result of his **unilateral essential mistake.**
- There were two mistakes: (1) The misrepresentation in the advert about the year model of the car (active misrepresentation) and this caused mistake in motive (reason for buying the car). (2) The failure to point out the exclusion clause to D and this caused a unilateral essential mistake on the part of D.
- **Legal duty:** There was a legal duty because it was an unexpected term and pre-contractual representation indicated it was the year model that D wanted. A knew the year model was important to D and so misrepresented by silence, D's mistake was Justus. The advert was aimed at crediting the impression that the vehicle had a particular attribute.
- If certain characteristics were attributed in an advert to a res which was offered for sale and an unsuspecting purchaser requests and signs a document in which the seller's liability for representations concerning the res is excluded, the seller's silence in respect of the provision can constitute misrepresentation.

*This can be used in mistake and misrepresentation questions

CASE: *Afrox Healthcare v Strydom* 2002, SCA

- Facts: S went to a private hospital owned by A for an operation. Upon admission, S signed a document containing contractual terms without reading it. While S was in the hospital he was negligently treated by the hospital staff. S sued A for delictual damages however the contract contained a clause exempting A from any liability for medical negligence by its staff. According to A, S was bound to the exclusion clause on the basis of caveat subscriptor rule. S argued that he was not bound to the clause because this was an unusual or unexpected clause and A therefore had a duty to draw his attention to it.
- Court held: Persons who signed a written agreement without reading it did so at their own risk and so were bound by the provisions contained therein as if they were aware of them and expressly agreed thereto. One exception to this rule, is where there is a legal duty to point out certain provisions. The respondent's subjective expectations about what the agreement between himself and the appellant would contain played no role in the question of whether a legal duty rested upon the admission clerk to point out the content of the exclusion clause. What was important was whether a provision such as this exclusionary clause was **objectively speaking, unexpected.**
- **Today exclusion clauses are the rule rather than the exception** and there is no reason to differentiate between private hospitals and other service provides. The relevant clause was not, objectively unexpected and so there was no legal duty to point it out.

- The rule that a party has a duty to point out unexpected or unusual clauses can be criticized
- The question is: why there should be such a duty if the mistaken party could have found out about the unexpected clause by simply reading the document before signing it.

- Some authors and judges argue this duty undermines the caveat subscriptor principle and that it should not form part of our law
- Other authors have welcomed the duty to point out unexpected clauses;
- Christie: "...it is a known fact of life that people habitually sign contract without reading them because they assumed that the contracts do not contain unexpected terms." A reasonably person would therefore not assume that the signatory intended to be bound to the unexpected terms.
- Whether the rule is justified or not, the SCA has confirmed that the duty to point out unexpected terms forms part of our law (***Afrox Healthcare v Strydom***)

TICKET CASE RULES

- The ticket case rules apply if the document containing the contractual terms was not signed by the mistaken party
- A common example is if the contractual terms were printed on a ticket handed over to the mistaken party or printed on signs or notices as well as other documents incorporated into the contract

Examples:

- X buys a ticket for a music festival and an exclusion clause is printed on the back of the ticket
- Y takes his car to Z's garage for repair. On the wall in the reception area there is a sign stating that clients have to pay for repairs in case before their cars will be returned to them.
- W takes his clothes to a dry-cleaning business for cleaning where they hand him a receipt for the clothes. At the bottom of the receipt there is a printed term that the dry-cleaners will be entitled to sell W's clothes if he does not collect them within 3 months.

TEST

There is a three question test which must be applied to determine whether a party who failed to read these terms will be bound.

1. Did the party know that the document contained writing?
2. Did the party know the writing set out contractual terms?
3. Did the other party take reasonable steps to bring the terms to his attention?

CASE: ***King's Car Hire v Wakeling*** **1970, NPD**

Explains relationship between the test

If the answer to (1) and (2) is YES → party will be bound to the unread terms

If answer to either (1) or (2) is NO, go to question (3):

- If answer to (3) is YES → will be bound
- If answer to (3) is NO → will not be bound

Reasonable steps

- Depends on the facts of each case, however it does not mean "everything reasonably possible", rather it means steps that are reasonably sufficient (***King's Car Hire v Wakeling***)
- If the document is not obviously contractual in nature, more steps need to be taken to bring it to the other party's attention (***CSAR v McClaren***)

CASE: *CSAR v McClaren*

- Facts: M left a bag fro safe-keeping at the cloakroom or a railway station operated by C, and received a cloakroom ticket from the attendant. M's bag was lost while it was in C's possession. He sued C for damages but C argued that they were not liable since there was an exclusion clause printed on the back of the cloakroom ticket
- Issue: Was Mm bound to the exclusion clause printed on the back of the ticket
- Court held: The court applied the three question test set out about.(1) Did M know there was writing or printing on the ticket? Yes (2) Did M know the writing contained contractual terms? No. (3) Did Cc take reasonably sufficient steps to bring the terms to M's attention?
- The nature of the document plays a roll in determining what steps would be reasonable. If the document is not obviously contractual in nature, more steps need to be taken
- The ticket in this case was obviously not a contractual document; it was given to M as a cloakroom voucher and so the main purpose of the ticket was to enable M to claim his bag. A reasonable person would not have expected to find contractual terms on such a voucher. Because C did not take any steps to bring these terms to M's attention, M was not bound to the exclusion clause.

CASE: *Durban's Water Wonderland v Botha* 1999, AD

- Facts: B and her daughter were injured when flung from a ride at the appellant's amusement park as a result of mechanical failure in the machinery. She instituted action for damages on the basis of negligence, however painted on the windows of the ticket offices at the entrance to the park was:

"management...must stipulate that they are absolutely unable to accept liability or responsibility for injury or damage of any nature whatsoever"

- ➢ Court held: The respondent was bound to the exclusion clause because: (1) Language in the disclaimer that any liability founded upon negligent in design or construction of amenities fell in the ambit (2)use of words "do not/unable to accept liability" mean liability would not be incurred, (3) she had been aware there were notices of the kind in question at an amusement park but did not actually see on the day, (4) whether respondents were bound by the disclaimer on the basis of quasi-assent which involved the enquiry into whether the appellant was reasonably entitled to assumed from the respondent's conduct in purchasing the ticket that she assented to terms of the disclaimer or was prepared to be bound without having read them - the answer is whether the appellant had given reasonably sufficient measures to ensure it was seen - yes, a reasonable person would have seen the sign.

- The ticket case rules can also be explained in terms of general principles applying to unilateral essential mistake:
- If the mistaken party was aware of the printing and that it contained contractual terms but he does not bother to read them, the he will generally be bound on the basis of actual subjective consensus (he was willing to be bound to the unread terms without knowing what they were)
- If the mistaken party was not willing to be bound to these terms he may be bound on the basis of the reasonable reliance theory and the Justus error theory.
- However this will only apply if the other party took reasonable steps to bring the terms to his attention:
  - ❖ Justus error - he will be bound because his mistake was not Justus (acted carelessly or negligently in not noticing the terms contained in the ticket)
  - ❖ Reasonable reliance - he will be bound because the non-mistaken party could as a reasonable person assume:
    (a) he had seen the terms; and
    (b) his conduct in contracting anyway indicated that he consented to these terms (a reasonable person would believe that the mistaken party intended to be bound to the terms)
- If the steps taken were not reasonable the mistaken party's mistake will be excusable (Justus error) and the other party would not be reasonable in assuming that he had seen those terms and consented to them (no reasonable reliance)
- The mistaken party will therefore be able to escape the clauses in terms of both the Justus error theory and reasonable reliance theory.

CASE: *Cape Group Construction v Govt of United Kingdom* 2003, SCA

- ➢ Facts: C faxed an offer to do some construction work to U, setting out the terms of the offer in the body of the fax. C's letterhead appeared at the bottom of the fax and right below the letterhead there was a reference to further terms and conditions. This reference was printed in the same typeface as the letterhead. The terms and conditions referred to C's standard conditions of trade, including an exclusion clause regarding liability for damage, but the page containing the additional terms was not faxed to U. U dud not see the reference and therefore did not enquire what the further terms and conditions were. U accepted C's offer telephonically. U suffered some losses due to negligent construction work by C and sued them for damages. C raised the exclusion clause as a defence to the claim.

MISREPRESENTATION

NATURE

DEFINITION: A misrepresentation is a pre-contractual statement or conduct which creates a false impression in the mind of the contracting party, and which influences her decision to contract.

- Misrepresentation must be distinguished from contractual terms:
- Statements of fact made during negotiations are usually not regarded as terms of the contract.
- If they prove to be untrue they will give rise to the remedies for misrepresentation.
- However it is possible that the parties intended these statements to form part of the terms of the contract.
- The statement can either be a warranty or condition/assumption:
  - Misrep: restitutio in integrum
  - Condition: breach
  - Assumption: contract lapses.

TEST WHETHER STATEMENT IS A TERM:
→ Intention of the parties
→ rule: will be term if it is repeated.

Fraudulent (intentional) misrepresentation
- Person making statement KNEW statement was untrue AND that it would influence his/her decision to contract.

Negligent misrepresentations
- Person making the misrepresentation did NOT know statement was untrue, but a reasonable person would have realized it

Innocent misrepresentations
- Person making the misrepresentation did NOT know statement was untrue AND reasonable person would NOT have realized.

ELEMENTS (Novick v Comair)

- False representation of fact
- Intention to induce contract
- Actual inducement (causation)
- Materiality

① FALSE REPRESENTATION

- Must be conduct which created a false (incorrect) impression in the other party's mind
  → Positive conduct (active misrepresentation)
  → Negative conduct (misrep by non-disclosure/silence ≈ legal duty

② OF FACT (existing fact or opinion) →

- Only facts can be untrue or incorrect so misrep must refer to something that can be factually established.

°Opinions or predictions
Earlier cases held that an expression of opinion or a prediction could not give rise to an actionable misrepresentation.

However *Feinstein v Niggli* → opinion may give rise to actionable misrepresentation if intended to induce a contract.

- Puffing - Extravagant statements praising a product generally not regarded as misreps, but puffs.
- whether statement is puff depends on (1) form of statement & surrounding circumstances

③ INTENDED TO INDUCE

- Party making the misrepresentation must have realized that his statement would influence the other party's decision to contract.
- This is not the fault requirement
- Not the same as saying he must have been aware the statement was untrue (fraudulent misrep)
- It will still be misrep if he realized the statement would have an effect on the other party's decision to contract

④ INDUCEMENT (actual causation)

- A misrep will only be actionable if it induced (caused) the other party to contract on the terms he did
- Misrep is only legally relevant if it's causal.

Inducement has two elements:
① Innocent party actually believed the misrep
② Innocent party contracted on terms he did because of misrepresentation.
* TEST is subjective (for inducement)

Causal misrepresentations take two forms:
① Fundamental misrepresentation
② Incidental misrepresentation
- If misrep not causal it is legally irrelevant and innocent party has no remedies.

* Bird v Murphy.

QUESTIONS

① Identify & define
② Each requirement
③ Elaborate and case law
④ Remedies:
⑤ Rescission - requirements
⑥ Damages - requirements
⑦ Conclusion.

⑤ MATERIALITY
- Must be material in the sense that a reasonable person would also have been induced to contract by the misrepresentation
- objective test
- If a reasonable person would not have been misled by the misrepresentation or it would not have influenced to the contract; misrep does not give rise to remedies.
- useful to distinguish between puffs and misreps
- requirement becomes a problem when a person intentionally exploits gullibility and/or inexperience of another person.

*Lavens v Gerris:
→ A reasonable person must believe in the misrep

*Orville Investments v Sandfontein: requirement of materiality does not apply to fraudulent misrepresentation however this has not been confirmed by SCA.

NON-DISCLOSURE: MISREPRESENTATION BY OMISSION
Silence or failure to disclose information will usually not amount to misrepresentation if it creates a false impression unless there was a legal duty
TEST to determine legal duty: LCC
Duty recognized in:
① Contracts uberrimae fide ← insurance, agency, partnership
② Inform buyer of latent defects
*Dibley v Furter
→ 'latent defect must diminish or destroy usefulness
③ Positive statement: half-truth
*Marais v Edlman
→ have duty to correct a half-truth
④ When positive statement made but circumstances change so it is no longer true
*Mayes v Noordhof
→ must inform or it creates impression that previous statement untrue
⑤ Unexpected terms (mistake)
*Shepard v Farell's Estate Agency
*Faure v Hansen
*Diovo v Bnon Porter
*DuToit v Atkinson's Motors
*Afrox Healthcare v Strydom.
⑥ When a matter falls within exclusive knowledge
- Honest men would recognize a duty to disclose this knowledge in accordance with LCC.
- Other party could only get the info from him
*Dibley v Furter
→ disclose info to bargain on equal footing.
Q: does it make practical business sense?
Court takes into account what could REASONABLY have been expected from the other party
*Waller v Pienaar → practical business sense

*Absa Bank v Fouche
→ Test is legal conviction of community
→ Party must speak when the knowledge falls within his exclusive knowledge and the right to have it communicated to him would be mutually recognized by honest men
Exclusive knowledge is inaccessible to the point where its inaccessibility precludes a duty on the party to disclose it

• RESTITUTIO IN INTEGRUM
- Innocent party has an election to claim restitutio in integrum
- Contract is voidable
① Misrepresentation (must be)
② By other party or agent
- If made by third party innocent party cannot claim restitution but can claim damages.
③ Fundamental
Must be fundamental not incidental misrep
- Innocent party would not have contracted

LOSS OF RIGHT TO RESCIND
- If elect to uphold the contract
- Mere delay does not mean one loses right unless it causes other party to reasonably believe you are upholding (Manabeer v Shama)
- All performance must be returned, if not, restitutio not granted
EXCEPTIONS:
Not due to own fault: (Feinstein v Niggli)
① Inherent defect
② Perishables
③ Used for purpose intended
④ Outside control.
- Enriched? compensate party
- If due to own fault must give monetary value! (Dibley v Furter)

DAMAGES in DELICT
If innocent party suffered loss can claim delictual damages
① Wrongful Conduct
② Fault (fraudulent misrep)
③ Loss
④ Causation: loss must be caused by misrep.
Fundamental / Incidental. Bayer v Frosts
But for the misrep would the misfortune have occurred

FUNDAMENTAL MISREPRESENTATION
Innocent party RESCINDS
- Return performances
→ claim consequential loss
→ claim wasted expenses

Innocent party UPHOLDS
- Retain performances
→ claim wasted expenses
→ Consequential losses
→ Difference in valued performances given and received.
• If market value of performance cannot be determined use cost of reasonable repairs (Crongeac Wykerd)

INCIDENTAL MISREPRESENT
→ Rescission not an option!
→ Claim AP-HP
→ Consequential losses (not wasted expenses)

Specific Performance

COURTS DISCRETION TO REFUSE ORDER FOR SP.

- SA follows Roman-Dutch law so an order for specific performance will be granted unless there are exceptional circumstances which justify refusal of such an order.
- A contractant is therefore entitled to an order of specific performance unless the court exercises its discretion.
- Used to follow English law which was an exercise of discretion but only according to rigid rules.

Haynes v kinguilliamstown
- rigid rules to determine if SP should be awarded.
1) Damages
2) Difficult to enforce
3) Thing can be readily bought
4) Rendering services of personal nature
5) Unreasonable, harsh.
6) Injustice or be inequitable

↓

Benson v SA Mutual Life Assurance*
- → Exercise of discretion is not bound by rigid rules as in Haynes
- → No rule relating to a persons right for specific performance
- → Not an unfettered discretion, judicial discretion
- → Injustice must be prevented, sometimes justice demands that SP be decreed; only if in accordance with legal and public policy.

*An order for specific performance, requires the contractant to deliver performance agreed to in a contract

- Negative obs: SP would be interdict to prevent (restraint of trade)
- Reciprocal obs: a party can only sue for SP by other party if he himself has made or tendered performance.

Benson v SA Mutual: SP won't be granted if there is impossibility, insolvency or contra bonos mores

MONETARY EQUIVALENT (SURROGATE) OF PERFORMANCE

- Some have argued that instead of claiming SP in forma specifica, innocent party can claim monetary equivalent instead.
- Advantage is that pls claim will not be subject to normal rules relating to claims of damages (mitigation).

Isep Structural v Inland
- → our law does not recognize claim for surrogate performance, only 2 claims which is for specific performance and cancellation
- → If one claims money instead of actual performance, must prove damages requirements.

WASTEFUL PERFORMANCE

- Has been argued that court should refuse to grant an order for SP if performance by guilty party would be wasteful.
- If SP is refused, innocent party can only claim damages, subject to mitigation

Unibank v Absa 2000
- → Right to specific performance is never lost but court has a DISCRETION to award it if it is wasteful (adequate equities are proved)
- → Court can never force a party to cancel but that may be only option if SP denied.

EMPLOYMENT CONTRACTS

- May be practical problems in ordering SP, because of HIGHLY PERSONAL NATURE of performances by employers and employees
- Early cases: no order for SP unless civil servant or employee governed by statutes

National Union Textile v Stag Packings
- In principle all employees should be able to claim SP subject to discretion of the court

- Two factors particularly significant to decide if SP should be awarded
1) Inadvisability of compelling one person to employ someone who he does not trust in a position which imparts close rel.
2) No court could compel a servant to perform his work faithfully and diligently

Santos Professional FC v Igesund 2002
a) Disapproval of forced labour
b) Damages are sufficient remedy
c) Reluctance to interfere with an employee's right to freely exercise skills or profession
- Endorsed by constitutional provisions: dignity, freedom of movement, choose profession.
d) Highly personal nature
e) Restoration of working rel.

Santos Professional FC v Igesund 2003
order granted b/c not normal contract, equal bargaining power, he (resp) repudiated, his reputation on line
→ Take policy factors and constitutional provisions into account and courts may decide

Cancellation

GENERAL

- General purpose of contract law is to achieve fulfillment of a contract, this in line with pacta sunt servanda
- Cancellation terminates consequences of a validly concluded contract
- Extraordinary remedy, only used in exceptional circumstances

GENERAL RULE: All obligations under the contract are extinguished, so outstanding performances will not be performed in future

- Performances already made must be restored (**Nash v Golden Dumps**), subject to doctrine of accrued rights
- A contract is not completely expunged as the guilty party must usually pay damages.

LOSS OF RIGHT TO CANCEL

- The right is lost if the party elects to uphold the contract (claim specific performance)
- Election can be done expressly or by conduct, but it must be clear and unambiguous that the innocent party elected to cancel (**Truter v Smith**)
- If there is a reasonable explanation for his conduct, the right is not lost.
- A mere delay in exercise of a right to cancel does not mean the right is lost, however if the delay causes the other party to reasonably believe the innocent party elected to uphold, he will lose his right.

Mahabeer v Sharma*
→ A mere delay in notification to cancel cannot per se result in the loss of the right to cancel.
→ Depending on circumstances, failure to exercise the right to cancel within a reasonable time may justify an inference that the party has elected not to cancel.

REQUIREMENTS

① Right to cancel

- Mere breach is insufficient to justify cancellation as there must be a right to cancel
- Without sufficient justification, cancellation is ineffective and such party may be guilty of repudiation
- Right comes from the type of breach

② Ability to restore performances

- Cancellation involves undoing a contract so creates an obligation to restore performances already rendered
- Party seeking cancellation must be able to restore performances

INNOCENT PARTY UNABLE TO RESTORE PERFORMANCE

- It prevents cancellation, except where the inability to restore is not due to fault of innocent party and he is not enriched by performance made (**Feinstein v Niggli**)
- Also: ① Deterioration due to inherent defect
  ② Perishables
  ③ When product used in manner for which intended
  ④ Used/altered defective performance to produce a new product

PARTIALLY POSSIBLE PERFORMANCE (RESTORATION)

- If there is no fault of the innocent party
  → See above
- Due to fault of innocent party but still possible
  → entitled to cancel but must supplement the shortfall with a sum of money.
- Innocent party allowed to cancel without making restitution, but he must still restore whatever remains of the performance or any substitute he may have received.

→ Innocent party does not need grounds for cancellation
→ If notice of cancellation is given before right to cancel arises it will be valid if innocent party intended it to be effective only when right arises (ie. in future)

EFFECT of CANCELLATION

→ Cancellation extinguishes all future unfulfilled obligations and creates an obligation to restore any performance that has already been made.
- This is qualified by the doctrine of accrued rights.

RESTORATION BY GUILTY PARTY

- Subject to the doctrine of accrued rights the party who breached the contract is obliged to return any performance she received
- If he is unable to restore perform- innocent party can claim damages
- Unclear whether this applies to fault

③ Exercise of right (communication)

- Cancellation is a unilateral juristic act and does not require agreement (**Stewart Wrightson v Thorpe**)
- Can occur extra-judicially
- ① Express intention to cancel by words or conduct and ② communicate

COMMUNICATION (Truter v Smith)

→ Actual knowledge need not be proved if innocent party can prove he took reasonable steps to notify other party (**Stewart Wrightson v Thorpe**)
→ Guilty party who through his own fault lacks knowledge of the other party's intention to cancel cannot rely on it
→ No prescribed formalities: must be clear and unambiguous election, can be express, implied or by summons. Can be conveyed by third party (**Datacolor International v Intamarket**)

DOCTRINE OF ACCRUED RIGHTS

- cancellation operates only partially if performance is divisible
- Applicable to contracts creating continuous obligations such as rental agreements, employment
- Also can apply to contracts creating divisible obligations

Crest Enterprises v Ryklof: "rights that have became due and enforceable before cancellation and are independent of any executory part of the contract are not extinguished by cancellation."

→ If doctrine is applied normal consequences of cancellation do not operate in respect of rights already accrued (ie. do not have to restore them)
→ Restoration need not occur.

REQUIREMENTS

① Contract must be divisible in separate parts

- If contract is not divisible the doctrine cannot apply
- Lease agreements and employment contracts are divisible

② Right to accrued performance must be DUE and ENFORCEABLE

- Due date for particular performance must have arrived before cancellation and there must be no unfulfilled conditions in relation to that performance.

Test to determine if performance is due and enforceable:
→ Would you be able to claim specific performance on the date of cancellation?
If yes, performance due and enforceable
∴ performance must be due and possible

Nash v Golden Dumps - rights must be due and enforceable at time of cancellation.

③ Accrued performance must be independent from any outstanding obligations at time of cancellation

- All obligations that are reciprocal to the accrued performance must have been fully performed before cancellation
- Example: renting a flat, payment and flat.

***PBL Management v Telkom* 2001**
→ Rights already accrued are unaffected by termination of the contract.
- If contract was ambiguous as to whether payment due in advance or an independent obligation, construe in light of background of contractual setting and surrounding circumstances

*If there are two agreements between parties, cancellation of one does not necessarily mean the other has been cancelled. ∴ doctrine not required for uncancelled contract
Nash v Golden Dumps: where a document embodies two or more related but separate agreements, a cancellation may relate to one agreement only
→ look at divisibility.

Requirements
① Divisible
② Due and enforceable
③ Independent.

D I D.

Relationship to specific performance
- A party cannot ask simultaneously for SP and cancellation as they are inconsistent remedies **(Desai v Mahamed)**

- **Custom Credit v Shembe:**
→ innocent party must elect btw the right to SP which is aimed at enforcement whilst right to sue for cancellation is aimed at dissolution
→ "It is the election of the one or other of these two alternative rights demarcates plaintiff its cause of action"