Law of contract

## Unit 1 Introduction to the law of contract

Law of contract is part of the law of obligations.

Obligation is a juristic bond in terms of which the parties or party on the one side have the right to a performance (creditor; personal right, claim or ius in personam) and the party on the other side has a duty to perform (debtor).

Sources: ex contractu, ex delictu, ex variis causarum figuris like undue enrichment, family relationships, negotiorum gestio and exercising administrative authority.

A contract is an agreement entered into with the intention of creating an obligation or obligations.
A juristic act is the lawful act of a legal subject which has at least some of the consequences that the legal subject intended to bring about.
A legal fact is a fact or set of facts to which the law attaches consequences.
Performance is human conduct which may consist in someone's doing something (facere) or not doing something (non facere).
Civil and natural obligations, obligatio civilis and obligatio naturalis: civil may be enforced directly by recourse to a court of law, the natural may not.
Legally relevant agreements are bilateral or multilateral juristic acts by which the parties cooperate to achieve the intended consequences. A contract is an example.
Legally irrelevant agreements are agreements which have no legal consequences because the parties did not intend to create legal consequences by their conduct. A dinner date is an example.

Legally relevant agreements:

1. agreements creating obligations; contracts
2. agreements extinguishing debts; like release or discharge
3. real agreements; an agreement whereby a right is transferred. Transfer by delivery, registration or cession.

Requirements for a valid contract:

1. consensus (agreement)
2. capacity to act
3. performance must be possible at time contract is entered into
4. conclusion, performance and object must be lawful
5. constitutive formalities must be complied with
6. contents or consequences must be ascertained or be readily ascertainable

The mere fact that a void contract does not give rise to an obligations does not mean that it cannot lead to the transfer of ownership through a valid real agreement. What is required for transfer of ownership is intention to transfer and intention to acquire. This may be apparent even from a void contract.

## Unit 2 Consensus

Two reasons why law will attach contractual liability to a contract: actual agreement of the intention of the contracting parties and where this does not exist but one of the parties has a reasonable reliance that it does. The will or intention as it is outwardly evidenced or manifested is of the utmost importance when one has to decide whether a contract has come into existence and what its terms are.

Two theories:
1. the will theory: notion that contracts are based on consensus; theory requires actual or conscious consensus between contractants. Mistake will not lead to a contract.
2. the reliance theory: consensus is primary basis of contractual liability because in most cases parties do actually correctly express their intentions. In the few cases where they fail, the erring party is bound because of the fact that he has created a reasonable reliance in the mind of the other that they have reached consensus. This is the secondary basis of contractual liability.

Consensus:
- unanimity between the parties as to consequences they wish to create: persons as well as content
- unanimity between the parties as to the fact that they wish to create juristic consequences: intention to be bound, to be able to enforce. There must be more than merely a causa, there must be justa causa: intention and a lawful object. Faked or simulated agreements will be void. Where only one party has the intention to be bound, there is dissensus, but based on reliance theory there may be a liability.
- awareness among parties of their unanimity: if the acceptance of an offer is never received, there is no awareness. For true concursus animorum it is usually required that there is acceptance and information that it is accepted.

Consensus is therefore when parties are unanimous about the consequences they wish to create and have communicated this unanimity to each other by means of offer and acceptance made with the intention of creating consequences by their actions.

## Unit 3 Formation of the contract: the offer

An offer is a statement of intention in which a person (offeror) discloses to what performance, and on what terms, he is prepared to bind himself to the person to whom the offer is addressed (the addressee or offeree).

1. The content of the offer must set out the essential and material terms of the envisaged contract clearly and in sufficient detail. If parties leave a term for later negotiation, there is no contract created, but there are exceptions where parties can leave certain terms for later negotiation.

2. The offer must contemplate acceptance and a resultant obligation. It must be a firm offer. Whether a proposal amounts to an offer or merely constitutes an invitation to do business, depends on the intention of the parties which must be ascertained from all circumstances of the specific case. There is one special kind of advertisement which does constitute an offer, a promise of reward.[1]

3. The offer must come to the attention of the offeree (addressee

4. An offer must as a rule be directed at a definite person or persons, although it may also be directed at undefined persons. If at unascertained persons, it may be accepted by any one of them. Example is a promise of reward or an auction.

In case of a simple auction, the bidder makes an offer which the auctioneer then considers and either accepts or rejects. Mere making of a higher bid does not mean displacement per se. Auction subject to conditions is different: conditions may relate to manner and time of payment, the passing of ownership etc. Without reserve means that the article will be knocked down to the highest bona fide bidder. With reserve, a reserve price is set, a minimum.
Conditions may be advertised beforehand and are not binding per se. There are two contracts potentially: contract which bind to the conditions and the substantive contract of sale.
Once a bid is made, the auctioneer is bound to accept and the buyer is obliged to pay. Once the bid is accepted, the contract of sale arises.

Another option is when the auctioneer offers to sell to the highest bidder, and every bid is then an acceptance of the auctioneer's offer.

A contract is a bilateral juristic act. Obligations will not arise where an offer has been made but not accepted.
An offer may lapse:
- After expiry or lapse of the prescribed time or of a reasonable time (facts of each case)
- Upon the death of either the offerer or the offeree
- Upon being rejected; a counter-offer or a conditional acceptance has the same effect
- Upon revocation; this must be brought to notice of the offeree before it can have any effect

**Unit 4 Formation of the contract: acceptance, moment of formation, place and negotiations**

Acceptance: an expression of intention by the offeree, signifying his assent to the proposal embodied in the offer. Requirements for valid acceptance:
1. It must be unconditional and unequivocal; if not, it is a counter-offer
2. It must be accepted by the person to whom it was addressed, see *Bird v Sumerville*
3. The acceptance must be a reaction to the offer, see *Bloom v American Swiss*
4. The acceptance must comply with any formalities set by law or by the offeror, see *Brand v Spies*

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[1] Bloom v American Swiss Watch

**Theories when concluding contracts by post**

Information theory: principle is that the primary basis for contractual liability is actual and conscious agreement. Offeror must have been informed of acceptance before actual consensus has been reached and the contract arises. General rule: an agreement is formed only when the acceptance is communicated to the offeror, see *Rex v Nel* and *Smeiman v Volkersz.*

Exceptions:

1. Where the offeror expressly indicates otherwise
2. Where the offeror tacitly indicates otherwise; usually offeror indicates that he will consider himself bound as soon as the offeree has complied with certain conditions, see *Rex v Nel.* Another example is the advertisement offering a reward
3. Contracts concluded by way of letter or telegram; possible jurisprudential theories:
   a. Declaration theory (uitingsteorie); agreement is concluded once offeree has expressed his acceptance, when he has written his letter
   b. Expedition theory (versendingsteorie); agreement is concluded as soon as he has posted his letter of acceptance
   c. Reception theory (ontvangsteorie); agreement when offeror receives the letter
   d. Information theory (verneingsteorie); agreement is concluded only when offeror has been informed, when he has read the letter.

Expedition theory

It was decided in *Cape Explosives Works v SA Oil and Fat Industries* that agreements entered into by letter arise at the place where and at the moment when the letter of acceptance is mailed. Practical obstacles as to prove the letter is received and read, as well as the reasonable measure of certainty that the Post Office will deliver within reasonable time has lead to this.

Parties may determine beforehand at what stage the contract will be considered concluded. Only when no express provision is made, does the rule apply.

Consequences of the expedition theory

Once posted, offeror may no longer revoke his offer and similarly, offeree may then no longer revoke his acceptance. Should he try to recover his letter, he will in fact be guilty of breach of contract.

Suggestion 1: application of the information theory in case of revocation of acceptance. Court in *A to Z Bazaars* assumed that the expedition theory was adopted for protection of the offeree and suggested that its operation may be neutralised ex post facto if the offeree withdraws a postal acceptance by a speedier means of communication which reached offeror before acceptance.

Suggestion 2: fault should play a role where the letter of acceptance is delayed or lost in the post

The theory is at present not yet extended to agreements concluded by telex, telefax and e-mail.

Place of formation: where the last act necessary to constitute the agreement is performed.

Generally, parties negotiating have complete freedom to end the process. In some legal systems, the capacity to break off negotiations is restricted by normative considerations and the relationship is governed by good faith and objective reasonableness. In SA law, duties to negotiate in good faith and to compensate for losses incurred owing to an unreasonable termination of negotiations by one does not exist, but should be recognised.

## Unit 5 Pacta de contrahendo - options and rights of preference

A pacta de contrahendo is a contract aimed at the conclusion of another contract. There are two recognised forms: the option contract and the contract of preference.

Option contracts
An offer (substantive offer) reinforced by an agreement (option contract) in terms of which the offeror (grantor) undertakes as against the offeree (grantee) to keep open his offer (usually for a specific period) to the offeree, or, in terms of which the offeree acquires the power to consider and accept the offer.

Consequences
A pactum de retrovendendo, an agreement whereby seller can repurchase the merx (sold thing) within a certain period also involved an option.
An attempt to revocation of the substantive offer will have no legal effect. The option contract is the only way to render an offer irrevocable.
Courts consider revocation (or denial) of the substantive offer a breach of contract.

*Hersch v Nel*
An option is analysed as an offer to sell with an agreement to keep the offer open for a certain time. It is considered more simple a right to buy with a corresponding duty to sell. But this creates the impression that the person granting option is contractually obliged to make the true offer to sell only at the stage when the holder of the option wants to exercise the option. Grantee has no right to buy, only the power to accept. It is a personal right to claim that the offer be kept intact.

**Termination of options**
1. Passage of time
2. Death of the grantor or grantee, in principle not automatically
3. Refusal
4. Lapse of the right

**Formalities**
Two contracts, both must comply with the requirements for the formation of contracts in general. Where the substantive agreement must comply with certain formalities, the question arises whether the option contract must comply with those as well. Looking at *Brandt v Spies* the answer is negative. However, in *Hirschowitz v Moolman* the court (*obiter*) held that these contracts must

conform to any formalities prescribed for the substantive contract. But there seems to be no compelling reason.

**Cession of options**

Claim arising from option contracts is so closely related to the substantive offer, can it be ceded apart from it? If it is immaterial to the grantor who exercises the option, it may be ceded. Intention is what matters.

An option in regard to land should be ceded in writing, but it does not appear in section 1 of Act 68 of 1957 and therefore it is now concluded not to be necessary.

**Rights of preference**

Occur when a prospective seller undertakes as against a prospective purchaser to give him preference if he should decide to sell. Thus the right to be granted the first opportunity to buy the thing is set.

Agreements differ from case to case. Examples:

1. Right of pre-emption (before the opportunity is offered to others) may be coupled with option granted by the purchaser.
2. Prospective seller may bind himself as against the prospective purchaser to offer the thing for sale to the latter at the first acceptable price or at the highest price which may be offered him. If he receives a bid from a third party, he must give the holder the opportunity to buy it at that price.
3. Seller may bind himself to offer it for sale on occurrence of a future event
4. Prospective seller may bind himself to sell to a third party only if the prospective purchaser is unwilling to buy.

No duty to sell, just the preferential right to buy should grantor ever decide to sell.

**Remedies**

*Owsianick-case:* the right of pre-emption entails a restriction on alienation and holder was entitled to an interdict. Only remedy furthermore is a claim for damages. Not possible to enforce the right positively. In *Associated SA Bakeries* the court also doubted whether holder could claim specific performance by means of an order directing to make an offer, but found another approach. If seller concludes a contract of sale with a third party, purchaser can step into shoes of third party by a unilateral declaration of intent. Contract is deemed to be concluded between seller and holder.

## Unit 6 Conflicting Rights

A:
1. Sells a thing to B, or
2. Grants B an option, or
3. Grants B a right of pre-emption
And subsequently sells it to C.

Position before delivery to C: B and C only have concurrent personal rights. Prior bested right enjoys preference regardless whether or not C had knowledge. B could be entitled to an interdict. C can institute an action for damages for breach of contract.

Position after delivery to C: if he had no knowledge, C has a real right and B only a personal right. B cannot claim from C.

If C had knowledge, he does become owner by delivery, but by virtue of the doctrine of notice (kennisleer) B is entitled to apply for an order in terms of which the delivery is cancelled and the thing may be transferred to B.

## Unit 7 Error (mistake)

The mistake may be material because it excludes consensus, or it may not be material because it only influences the decision to contract.

A mistake will be material if it bears upon the obligation, particularly when it bears upon the contents of an obligation. A mistake relating to performance or person will not be material if it does not affect the mistaken party's decision to agree.

- Error in negotio or mistake regarding nature of contract being entered into which is material
- Error in persona or mistake regarding the identity of the other party and which is material
- Error in corpore or mistake regarding the identity of the subject matter of the contract which is material
- Error in *substantia* (error in *qualitate*) or mistake regarding an attribute or characteristics of the subject matter of the contract which is apparently not material
- Error in motive or mistake regarding the reason or ground for entering into a contract, which is not material

SA law: it appears that where the performance is delivery of a thing and both parties have the same thing in mind, there is no error excluding consensus. A mistake relating to an attribute is at most a mistake in motive.

**Consequences of application of the intention theory to all instances of mistake**
Consistent application of the will theory (consensus) would mean that every material mistake would exclude all contractual liability. Courts have expressed preference for the reliance theory as

alternative basis for contractual liability where consensus has been excluded as a result of material mistake.

Alternatives

Estoppel: if a person, who relies on a misrepresentation made by another, acts to his own detriment, he may hold the other to his misrepresentation in the sense that he can prevent the other from relying on the true state of affairs. Since a fictional contract is maintained and no actual contract arises, there are no contractual rights which can be ceded. Protection is afforded to the estoppel-raiser alone.

Declaration theory: Question is not whether A's intention in fact coincides with B;s intention, but whether A's declaration of intention coincides with B's declaration of intention. Approach is objective. Objections are that our spoken or written words are not signs or symbols that move like a machine (think of slip of the tongue).

The reliance theory: a contract is based on intention of one party to an agreement and the reasonable impression or reliance on his part that the other party had the same intention.

Requirements:

1. Creation of reliance
2. Reliance must have been reasonable in the circumstances, a reasonable man would have been misled
3. It is uncertain whether fault on the part of the party whose conduct misleads is a requirements. In Sonap, this was found unnecessary
4. It is also uncertain whether the misled party must prove that he acted on the reliance to his detriment.

Criticism: is the qualification that the reliance must be reasonable sufficient?

Application in SA law

In the great majority of cases intention, declaration and belief coincide. Cases of mistake are exception.

The reliance theory is applied in two ways:

1. Direct reliance approach (*Sonap v Pappadogianis*):
    a. Was there a misrepresentation regarding one party's intention?
    b. Who made that misrepresentation?
    c. Was the other party actually misled and, if so, would a reasonable man also have been misled?
2. Indirect approach to reliance theory, iustus error approach; a party to a contract who laboured under a mistake and wishes to escape liability must prove
    a. That his mistake is material
    b. That his mistake is reasonable, which occurs when it is excusable in the eyes of the law:
        i. Where the mistake was induced or caused by a misrepresentation made by the other party or someone for whose acts he is liable. Misrepresentation must be legally wrongful or contra bonos mores.

   ii. Where the mistake was induced or caused by the failure of the other party to remove an incorrect impression (omissio). Only if the misrepresentator breached a duty to speak:
      1. Where he knew or ought reasonably to have known that the other laboured under a mistake
      2. Where he, before conclusion of the contract, created an impression which is in direct conflict with the agreement he seeks to enforce.

c. Fault seems not to be a requirement
d. Generally where the contract denier causes his own mistake and the other is not aware of this, the mistake will be unreasonable or *iniustus* (*George-case*)
e. In more general terms, an error is reasonable only when it can be shown that there is no ground for holding the party laboring under a mistake, bound to the apparent contract and he can be held so bound only when he has misled the other party into believing he was binding himself.

Courts use both iustus error and direct reliance approach, but the application is as follows:
1. Where an ostensible contract has been concluded which can be easily proved and it seems prima facie valid, iustus error is more appropriate
2. Where there is no prima facie agreement, parties may still incur liability if on the available facts, he misled the other to reasonably believe he bound himself contractually

The direct approach is used in all situations where a material mistake has occurred (and there is no contract):
1. When a party wishes to void an ostensible contract
2. If a party wishes to enforce a contract which differs from the contract ostensibly agreed upon
3. Where a party wishes to prove the existence of a contract where there is apparently no such contract.

Iustus error can only be used when a party wishes to void an <u>ostensible</u> contract concluded as a result of a material mistake.

| Steps to be taken when solving a mistake problem |
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| Determine whether the mistake is material |
| Decide whether the direct reliance approach or the iustus error approach can be applied |
| Apply the applicable approach(es) to the facts |

**Unit 8 Common Error**

Common error means that parties are in complete agreement, they know each other’s intention and accept it, but each is mistaken about some underlying and fundamental fact. The contract is then void, but there is no lack of consensus. Explanation is the implied term contract, meaning that

from the common error one can infer that parties implicitly agreed to make the existence of their contract depend on the truth of a material fact.
Unilateral and mutual mistake relate to dissensus and related principles while common error does not relate to mistake, parties are in complete agreement.

## Unit 9 Misrepresentation

Where misrepresentation, culpable or innocent, causes a material mistake, there is no contract because of absence of consensus. Where it results in mistake regarding motive, consensus exists, and a contract in principle arises.

A culpable misrepresentation is a wrongful pre-contractual false statement of fact fraudulently or negligently made by one party to a contract which induces the other party to enter into the contract or to agree to terms to which he would not have agreed had he known the truth.

**Requirements**
Act, wrongfulness, fault (intent or negligence), causation, damage.

There must be a misrepresentation, a false statement of fact, an act, including failure to remove an existing wrong impression.
The act must be wrongful. General criterion or norm is the legal convictions of the community. Objective test based on reasonableness. Failure to act positively will be wrongful if
1. There was failure to disclose a material fact, and
2. There was a duty to speak on the part of the misrepresentor and he failed to remove the false impression.

Mere opinion is not sufficient.
Misrepresentation must not just mislead, but also be of such a nature that it would mislead a reasonable man in same circumstances. If it is fraudulent, the misrepresentor cannot aver on this ground.
Mere puffing is not actionable because it is not considered wrongful. Puffing amounts to representations made in course of negotiations which representations praise and commend the properties of the representor's performance.
Liability on a delictual basis requires fault, but there also exists innocent misrepresentation (see below). Fault has two forms:
- Intent: the legally reprehensible state of mind which consists in directing the will at attaining a particular result while conscious of the wrongfulness of the conduct.
- Negligence: consists in the lack of the necessary degree of care required in circumstances under which the reasonable person in the position of the actor would have seen the possibility of harm to another and thus taken reasonable steps to prevent the harm ensuing. A delictual act for damages is available where negligent misrepresentation induced the conclusion of a contract.

The misrepresentation must have caused or induced the misrepresentee to enter into the contract where he would not have entered into at all or, alternatively, caused him to assent to terms in the contract which he with an unfettered will would not have assented to: causation.

Factual causation is the part of the test that is used to determine whether the misrepresentation actually caused to contract. *Conditio sine qua non* or but for test.
The second inquiry, legal causation, is used to determine whether a factual consequence may be considered legally close enough to the conduct that caused it to justify liability. Legal causation arises when determining for which undesirable or harmful consequences caused by the wrongful, culpable act, he should be held liable.

**Remedies**
Rescission (revocation) and restitution.
Rescission leads to restitution (restitutio in integrum). It is not clear whether restitution follows automatically upon cancellation of the contract or whether it must be specifically pleaded.

Rescission may be classified as a contractual remedy since it is governed by rules and considerations peculiar to contracts even when the act for which this remedy is afforded may be a delict. Misrepresentee may elect to cancel, in context of fraud this is known as *dolus dans causam contractui*. It is submitted this is true for negligent misrepresentation as well.[2]
But what if facts show that if there had been no misrepresentation he would still have entered into the contract, but on different terms? *Dolus incidens in contractum*. There is merit in the contention that since a contractant's consent has been obtained in an improper manner, he should be afforded the opportunity to withdraw from the contractual relationship under all circumstances.

If he chooses to uphold or rescind, he is bound. Good example: *British Diesels v Jeram*. Purchaser stated seller had misrepresented that the bodywork of the bus was free from defects. When he later discovered the defect,he returned the bus to seller who tried to remedy the defect. When he then instituted action for cancellation, the court decided that any right he may have had, had been forfeited by his choice not to exercise this right when, aware of the defect and misrepresentation, he was nevertheless content that seller tried to remedy the defect en thus rectify his misrepresentation.

Rescission within reasonable time after discovering misrepresentation. It may be pleaded both where innocent party himself takes the initiative and claims cancellation and return of the performance already rendered, and where he denies liability (defence) when misrepresentator institutes action.

In general, in case of rescission due to misrepresentation, as in the case of cancellation on grounds of duress, undue influence, commercial bribery or breach of contract, reciprocal restitution takes place.

**Damages**
Based on *Bayer v Frost*, remedies for fraudulent and negligent misrepresentation are placed on equal footing. Damages for a victim of a culpable misrepresentation are measured according to the

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[2] Bayer SA v Frost

normal delictual measure: damages are calculated according to plaintiff's negative interest. Rule of thumb: how much worse off is he financially as a result of the misrepresentation. Where a breach of contract is concerned, damages are calculated according to positive interest, party must be placed in the position that he would have been had party committed breach carried out the contract properly.

When the contract is cancelled, damages are usually the costs incurred in connection to conclusion and cancellation. If the contract is upheld, there is a difference between dolus dans and dolus incidens.
If dolus dans, loss is determined by deducting value of performance made by misrepresentator from that made by the misrepresentee and adding the difference of any consequential loss suffered.
If dolus incidens, loss is determined by deducting value of performance that the misrepresentee was prepared to render, had there been no misrepresentation, from the performance actually rendered, and adding any consequential loss suffered. Misrepresentee must prove that contractants had agreed on the putative performance.

In the opinion of Van der Merwe, there is no difference between dolus dans and dolus incidens, but this view is not followed by the courts.[3]

**Innocent misrepresentation**
Is a deviation from strict delictual principles.
- precontractual statement of fact
- Made innocently
- By one of contracting parties
- Which induced the other to enter into the contract, or
- Agree to terms that he would not have agreed to had he known the truth

Remedies
- Action for rescission of contract
- Restitution
- Damages

Restitution damages granted in terms of actio quanti minoris: the difference between the price paid and the actual value of the thing purchased.
Other action was the actio redhibitoria cancellation and restitution, granted to persons who had bought slaves or livestock at a market, when it emerged that they suffered from latent defects.
*Phame v Paizes* deals with innocent misrepresentation. See cases. Liability is not based on innocent misrepresentation per se, but on a dictum et promissum as defined. Dictum et promissum could just as well cover intentional or negligent misrepresentation. Seller's liability arises by operation of law.

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[3] De Jager v Grunder

The aedilitian actions are only available in case of contracts of sale.
Statements made during negotiations can either be:
- Puffing; mere sales talk, empty praising, mere bragging and without binding effect
- Misrepresentations; statements complying with the requirements of a delict and which induces a contract, but which parties did not intent to become a term of their contract
- Dictum et promissum; statement that complies with the description and is not intended by the parties to become a term of their contract. It must be material regarding quality.
- Terms of contract; statement made seriously and deliberately during negotiations of a verbal contract, if parties by mutual intention intended it to be a term of the contract.

## Unit 10 Duress or Metus (force or fear)

Duress occurs where a prospective contractant is forced or compelled by the other or someone for whose acts he may be held liable, to enter into a contract. The decision is influenced. Voidable, since there is consensus, but the consensus is obtained in a wrongful manner.
Duress is a form of delict.

Compulsion may be exercised by a direct application of physical force (vis absoluta, no act, therefore void) or indirectly by way of a threat of harm (vis compulsiva).

*Broodryk v Smuts:* elements are
1. Actual violence or reasonable fear
2. Fear must be caused by the threat of some considerable evil to contractant or his family
3. Threat of an imminent or inevitable evil
4. Threat or intimidation must be contra bonos mores
5. Moral pressures used must have caused damages

Requirements:
1. Act of duress which is cause of contract
2. It must be an unlawful or illegal action which is threatened; action is unlawful when unlawful action is threatened in order to achieve a lawful result, but also when lawful action is threatened to obtain an unlawful result. A threat of prosecution is wrongful if it is employed by a contractant to exact a performance which is more advantageous than that to which he is reasonably entitled, Van der Merwe.
3. The threat must be aimed at the life, person, honour or property of the person threatened or his next of kin.
4. Duress must contain a threat of immediate and unavoidable harm and the fear must be reasonable, justified and not frivolous.
5. Threat must come from other contracting party or a third party.

Remedies: rescission and restitution and damages.

## Unit 11 Undue influence

*Preller v Jordaan*: accepted as part of SA law, see cases. This was reaffirmed in *Patel v Grobbelaar*.
It is a ground for rescission of a contract which is available to a contractant who has been persuaded by someone who has influence over him to conclude a contract which with an unfetterd will he would not have concluded. *Preller v Jordaan*: the Appellate Division held that the concept of dolus is wide enough to serve as a basis for undue influence, but Van der Merwe et al are probably correct that it is directly derived from English law.

## Unit 12 One general ground for rescission of a contract

Traditionally our law approached voidability on the assumption that there are two grounds for rescission, namely misrepresentation and duress. Eventually another was recognised, undue influence.
At all times, in the eyes of the law, consensus has been obtained in an improper manner. This is suggested as the general ground for rescission, but not yet accepted. In principle a contractant would be entitled to plead any facts which support this conclusion. The general ground seems stated in *Plaaslike Boeredienste v Chemfos*, but this is not sure. The Supreme Court had to deal with commercial bribery (again) in *Extel v Crown Mills.* Court held, with approval of *Chemfosi,* that in such cases, the agreement between briber and person bribed was void for want of legality, while the agreement between briber and innocent contracting party is voidable. Commercial bribery thus may be a fourth ground for rescission.

## Unit 13 Performance must be possible

Performance may be impossible for everyone, absolute or objective impossibility, or just for the debtor concerned, relative or subjective impossibility.

If objectively possible, the fact that debtor cannot perform has no effect on the contract. Debtor remains liable.
If performance was impossible at time of contracting, no obligation results with regard to that performance (void). Interesting is whether damages may be recovered if debtor knew of the impossibility. According to De Wet et al, fault is the only basis on which the innocent party should be able to claim damages (negative damages on basis of a delict, misrepresentation). There must be a culpable (intentional or negligent) misrepresentation, This is applicable not only to sale, but to all contracts.

Since the contract is void, parties must return what each has obtained through the performance of a void contract. If it is destroyed by no fault, then apparently its value may not be claimed. Also it is according to case law possible that undue enrichment cannot be used to compensate for use and enjoyment.

Absolute impossibility will not be an excuse where defendant has guaranteed possibility of performance.

## Unit 14 Conclusion of the contract, its performance and its object must be lawful

A contract is unlawful when
1. Its conclusion, or
2. The performance to be rendered, or
3. The reason for its conclusion or the object thereof
   a. Is forbidden by law, whether statutory or common law, or
   b. Is contrary to public interest or policy, or
   c. Is contrary to good morals

A statute can prohibit the conclusion by expressly or tacitly prohibiting the conclusion or by declaring the contract to be void or to be of no force or effect. The subject matter is not in itself unlawful. Implied statutory invalidations can have widespread and inequitable results. In each case the intention of the legislator has to be ascertained.
In some cases the prohibition of conclusion under certain circumstances merely entails that the contract cannot be enforced, although not unlawful, like wagering and gaming contracts.

A wager is an agreement, entered into without the intention to pursue an independent interest, in terms of which each of the parties stands to gain a particular advantage at the expense of the other, dependent on the result, determination or occurrence of an uncertain situation or event.
Gambling is the participation in a game based on chance, without the intention to pursue an independent interest, in terms of which the winner or winners stand to gain a particular advantage at the expense of the loser(s), depending on the result of the game.

Intention to pursue an independent interest is the distinction from other contracts. Only the intention of parties can decide. Was it the sole intention to bet on something or was it the intention to pursue an independent interest?
Possible legal consequences:
1. Some are valid and enforceable, like when they are not against public policy (game of skill) and in which at least one of parties has an interest
2. Most wagers are unenforceable but not void
3. Some are prohibited by statute and void.

Society is of opinion that wagers encourage wastefulness and prodigality which in turn is regarded as harmful to the individual, the family and society.

## Unit 15 The performance must be lawful

Where an agreement can be carried out in two different ways, namely lawful and unlawful, there is a presumption that the parties intended the agreement to be carried out in a lawful manner.
Performance is unlawful if it is contrary to a rule of positive law, or good morals, or public policy.
Public policy reflects the public opinion of the community at a particular time and varies from country to country and from era to era.

Courts take all relevant interests into account when deciding whether a particular contract is contrary to public policy. Interests may be competing. Courts then have to balance the different interest against each other.
Public policy generally favours the sanctity of contract (freedom of contract) but will nevertheless take the necessity of simple justice between man and man into account. Individual interest thus plays a role. The unfairness or unreasonableness as well as the interest which is protected is taken into account. Van der Merwe et al suggest that the concept of good faith may also play a role.

*Sasfin v Beukes*: contractual terms gave bank immediate and effective control over a party's income as a doctor. Contrary to public policy. Unreasonable restriction of freedom by going beyond what was reasonably necessary to protect bank's interest in having security for indebtedness.

Courts will use power sparingly and will only use it in cases where the impropriety of the transaction and the element of public harm are manifest.

Agreements in restraint of trade
Four forms:
1. Where seller of goodwill agrees not to carry on his trade in competition with purchaser
2. Where employee agrees with employer not to compete with him after leaving service
3. Where partner agrees not to compete with partnership after leaving it
4. Where distributor of products agrees with retailer that retailer will sell only those products.

Conflict: sanctity of contract and freedom of trade

History:
Traditional approach: principle of freedom of trade was given precedence over the principle of sanctity of contract. In *Magna Alloys*, the Appellate Division refused to follow English law, and reinstated common law, namely that sanctity takes precedence over freedom of trade. Test is whether an agreement is contrary to public policy in which case it is not invalid, but only unenforceable.
A restraint of trade is contrary to public policy if the effect of the restraint is unreasonable. This is judged on the basis of the broad interests of the community and the interests of the contracting parties themselves, *Basson v Chilwan*. Four questions in *Basson*:
1. Is there a protectable interest?
2. Is there actual infringement of the interest?
3. If so, is the restriction reasonable as to time, area and prohibited activities? Does the interest weigh up qualitatively and quantitatively against the interest of the other (to be economically active and productive)?
4. Is there another facet of public policy having nothing to do with the relationship between parties but which requires that the restraint should be either maintained or rejected?

Protectable interest
Proprietary interests, goodwill and trade secrets are generally recognised as protectable interests. In *Basson* the court refused to view capital investment in a business enterprise as such.

Actual infringement
There must be at least a likelihood of infringement, *Macphail v Janse van Rensburg*.

Reasonableness
Restriction only of freedom to participate in the commercial and professional world with regard to area, time and activities in as far as is necessary to protect the other party's protectable interest.

Time of determining reasonableness
Ex nunc: circumstances obtaining at the time when it is asked to enforce the restriction, not when the agreement was concluded, *Magna Alloys' case*.

When a party alleges he is not bound, he bears the onus of proving enforcement would be contrary to public policy.

A court is entitled to declare the agreement partially enforceable or unenforceable. Power is subject to certain limitations:

1. Party seeking partial enforcement must first raise issue and establish a basis. Other must prove partial enforcement is contrary to public interest
2. Court will not partially enforce when an unreasonable restraint requires major plastic surgery to make it reasonable
3. Court can have regard, among other factors, to matters such as whether the restraint was calculated to be unduly oppressive or designed to terrorise and whether partial enforcement would not operate harshly or unfairly.

**Unit 16 The object of the agreement must be lawful: iusta causa**

If the reason for or purpose of the agreement is unlawful (turpis), the agreement is void - ex turpi causa non oritur actio (from an immoral cause no action arises). If one of the parties is not aware of the other's motive the contract does not have an illegal purpose.

**Unit 17 The consequences of illegality**

When an agreement is void, restitution should, in principle, be granted. However, in pari delicto potior est conditio possidentis, where two parties are <u>equally</u> guilty, the one who is in possession is in the stronger position. The maxim applies only to actions based on unjustified enrichment.

*Minister of Justice v Van Heerden*: court held that the state can recover the performance itself, or, where this no longer exists, the value thereof, together with fruits and whatever has accrued to it, with the condictio ob turpem causam, the enrichment action. In all cases where an innocent has performed, he can therefore recover the value from the guilty party. *Jajbhay-case*: the par dictum

rule is founded on principles of public policy, but it demands also that justice be done. Par dictum is therefore applied as a general rule, to which an exception must be made whenever *simple justice between man and man* demands it.

Two instances where illegality of contract does not have the effect that the contract is void, but only unenforceable:
1. Certain wagering and gambling contracts
2. Contracts in restraint of trade which are against public policy

Wagering and gambling contract
At common law not void, still not, just unenforceable. Law is opposed to gambling and betting because of sociological and community considerations.
An obligation is in fact created, but unenforceable, naturalis obligatio. Test should be whether court is asked to enforce the unenforceable claim.
- It cannot be enforced
- It can be validly discharged
- A wagering debt can be ceded
- A wagering debt cannot be novated or serve as basis for suretyship
- A wagering debt cannot be enforced by means of delictual action.

Position of agent and stakeholder
A instructs C to enter into wagering agreement with B or to act as stakeholder: two agreements, namely mandate and the wagering agreement.
- Contract of mandate is revocable
- Agent is not liable to principal for breach of contract. Not agreed upon by authors. A breach of contract relating to mandate should be possible. A mandate entered into with a view to wagering agreement is not unlawful.
- Principal may sue his agent for any stake which the latter has received from the other party. *Dodd v Hadley*: where a wagering contract is performed, and the money paid over, the money is not tainted as the proceeds of theft would be, and it may form the subject of a contract to receive and hold it for another person.
- Agent may hold principal liable for expenses incurred in carrying out instructions

Position as regards loans made by and to parties to a wager or gamble
1. A loan made by an outsider to any of the parties to a wager may be reclaimed.
2. A loan by one of the parties to the wager or game, to any other party, in order to enable to continue with the wager, cannot be reclaimed
3. A loan by one of the parties to another at time of settling up after wager may be reclaimed since settling-up is not an integral part of the wager.

## Unit 18 Formal requirements

Examples:
Section 2(1) of Act 68 of 1981: no alienation of land shall be of any force or effect unless it is contained in a deed of alienation signed by parties thereto. Parties to cancelled contract may orally revive it, *Neethling*.
Section 5 of the General Law Amendment Act provides that no donation shall be invalid merely for lack of registration or notarial execution, but it requires writing in case of executory contracts of donation.
Section 6 of the General Law Amendment Act requires writing in the case of contracts of suretyship.
Section 1(1) of the Formalities in respect of Leases of Land Act: writing, notarial execution and registration.
Negotiables: writing plus delivery.

**Formalities stipulated by the parties**

1. Parties agree that their agreement must be in writing. Contract becomes binding only when it is reduced to writing and both have signed it, *Glodblatt*. It can also be meant to facilitate the proof of its terms. In that case it is immediately binding, *Maw v Grant*. The latter intention is always presumed. Parties cannot unilaterally depart from a clause in such agreement. But by mutual agreement is it possible.
2. Non-variation clause; any variation of the contract, *and of that clause*, must be in writing, *Shifren.* May parties cancel the whole contract orally where they have previously agreed that dissolution will only take place in writing? *Impala Distributors v Taunus*: not possible. A waiver by one party does not amount to an oral agreement to dissolve the contract, *Van As v Du Preez*.

## Unit 19 Parties to the agreement

<u>Simple joint liability</u>: each joint debtor is considered liable for his own proportionate share only
<u>Joint and several liability</u>: debtors are liable both jointly and severally. If a creditor releases one of debtors, such a remission must be regarded as merely personal. Only a portion of the debt. If one of the debtors pays the full debt and obtains cession of the creditor's claim, he can then hold the other debtors liable, but according to majority judgment *Gerber v Wolson,* the ordinary rule applies: simple joint liability.
<u>Joint (or common) liability</u>: debtors are jointly liable only, and the co-creditors may only claim performance jointly.

Third parties
Parties can place on third parties a general (negative) obligation to refrain from interference, or impose a specific (positive) duty on a third party and also stipulate rights for him.

- Representation (on behalf of a third party)

- Stipulations for the benefit of a third party (pactum in favorem tertii or stipulatio alteri); C (third party) will be in a position to claim a benefit only when he has accepted the benefit or stipulation or even "contract", *Mutual Life Insurance of New York v Hotz*. Before he can accept, it must be clear that there is intention to create stipulation. The juristic basis is uncertain. Possible constructions:
    - The acceptance completes or confirms the right which the parties have intended for the benefit of C, *Consolidated Frame Cotton v Stihole*. There is only one contract. C becomes a party to it
    - Acceptance creates an impression that some sort of contract is formed between one party and C. There will therefore be two contracts.
    - Other possibility is that C's right to enforce rests upon representation or on a quasi-contractual relationship, but these are not satisfactory explanations.
- A benefit may be stipulated for a third person who is not yet in existence: unborn child or in the formation of a company.

## Unit 20 The contents and interpretation of the agreement

*Essentialia* of a contract are positive provisions of law, not requirements for a valid contract. The positive rules may not be changed by parties. They are terms which the law requires as essential to place a contract in a certain category, like sale, lease etc.

*Naturalia* of a contract are positive provisions of law which may be changed by the parties unless the law contains a provision to the contrary. If nothing is stipulated, the usual positive rules become operative.

*Incidentalia* of a contract are not positive provisions. These are special arrangements by the parties.

Terms in a contract serve to determine the contents of a contract. A condition is a term which makes the enforceability or consequences of the contract dependent on the occurrence or non-occurrence of an uncertain future event.

Express terms:

1. Written or oral words
2. By conduct such as silence, gestures etc showing statement of will.
3. In so-called ticket cases, certain terms are considered to be part of the contract because of the conduct of parties. From English law:
    a. Did the person who received the ticket know there was writing or printing on the ticket?
    b. Did he know that the writing or printing referred to terms of the contract? If both yes, terms are part of contract.
    c. Did the party issuing take the steps which were reasonably necessary to bring the reference to the terms to the notice of the other? If not, not part, question of fact.

Implied terms: by law (ex lege) and tacit (implied on the facts).
Naturalia are expressions of legal policy which means that the new naturalia may develop over time to fulfil the needs of changed circumstances.

Something which parties regard as obvious may form part of the contract, even if they have said nothing about it and even if they have made no other signs or gestures relating to it. Courts usually use the hypothetical bystander test. A term can only be implied if it is necessary in the business sense to give efficacy to the contract. This was expressly applied in the *Van den Berg-case*. It is purely an assumption of what parties intended, imputed intention. Courts infer from facts including the business efficacy of the contract, what reasonable parties would have agreed upon in the particular circumstances, the surrounding circumstances and the express terms of the contract. Their starting point however is that the courts must not make a contract for the parties. Intention must be capable of clear and precise formulation. If the alleged term conflicts with an express term, it cannot possibly be in accordance with the intention of the parties. Unless there is something to the contrary in the contract, it may be accepted that the parties have contracted on the basis of well-known trade usages.

An express term is proved by direct evidence and a tacit term by circumstantial evidence. There is also a distinction between interpretation of a word in a contract, and implying terms, referring to the question which new words the court must read in the contract.

Terms implied by law are not based on intention of parties. *Scholtz* is a good illustration of the distinction between terms implied by law and tacit terms.

Interpretation of contracts

Primary rules of interpretation

1. The intention of parties can be determined only from the language (oral or written) used as well as from background circumstances.
2. Words are given their grammatical and ordinary meaning except when such a meaning leads to an absurdity or to something which the parties obviously never envisaged, or when it can be proved that the words were used in a technical sense
3. The contract is interpreted as a whole that is each clause or term is read in context of the rest

Secondary rules of interpretation

If a word or clause in a contract is ambiguous

1. The meaning which best fits the nature and purpose of the agreement is considered
2. The interpretation which renders the contract valid will be preferred
3. Attention is paid to the way in which it is carried out by parties in order to find an indication of the original intention
4. Surrounding circumstances are taken into account to establish intention
5. If a general word is followed by one or more specific, the general word is limited by the specific words
6. Courts lean towards an equitable interpretation when the words of the contract are ambiguous. The principle "all contracts are governed by the norms of good faith" is applied.

Tertiary rules
1. Ambiguity: interpretation to place the least possible burden on debtor
2. Clause is interpreted against party in whose favour it was inserted.

Parol evidence rule
The written document is the only admissible evidence about its contents. No extrinsic evidence is allowed. This prohibition only extends to evidence which tends to contradict the provisions of the contract as reflected in the document.

Good faith
Intention is determined by means of a method prescribed by law. Other objective methods are naturalia and implied terms. The rules are particularly used to ensure a contract has a fair and reasonable operation. Underlying justification for all objective methods is found in the principle of good faith.

## Unit 21 Terms which qualify the obligation

Performance must be fixed or determinable at the moment the contract is concluded.
Id certum est, quod certum reddi potest, that which can be ascertained is also certain

An alternative obligation is an obligation in terms of which debtor is bound to deliver one of several specific things.
Facultative: only one performance, but debtor may perform something else instead of what has been agreed upon.
Generic obligation: performance is described according to genus, nature or characteristics. Before the performance has been fixed, the doctrine of supervening impossibility can hardly play a part since the rule is genus non perit, a genus does not perish.

Two factors play a part in determining whether a performance is divisible or not:
- nature of the performance
- intention  of parties

Question is important in the event of initial impossibility or supervening impossibility of performance and breach of contract and remedies relating to it. Also in agreements which are partially unlawful. One of the most important tests is to determine whether the performance is divisible in such a way that the invalid performance can be cancelled out only by a corresponding counterperformance. If not, the agreement as a whole is not divisible either.

A time clause: term which qualifies an obligation with reference to a certain future event although it may be uncertain when it will occur. Can be resolutively or suspensively.

Resolutively: obligation is of effect only until time agreed upon
Suspensively: effect of obligation is postponed until an agreed time. Debtor cannot be in mora debitoris before time comes. Creditor is obliged to accept performance, otherwise mora creditoris,

but not before the date. If debtor performs before date he cannot reclaim it with condictio indebiti, enrichment action. If the time clause is inserted in favour of creditor, debtor cannot tender performance before set date (unless he pays interest).

Term: always a stipulation in a contract
Condition; sometimes a condition precedent, sometimes a term.

A condition is a term which qualifies a contractual obligation in such a manner as to make its operation and consequences dependent on whether an uncertain future event will happen or not.

Positive or negative
Casual: do not depend on the will of one of the parties.
Potestative: depend on will of one of the parties
Mixed: When A offers B R2 000 is B marries C
Suspensive: suspends the full operation of the obligations under the contract and renders it dependent on the uncertain future event
Resolutive: renders the continued existence of the obligation or operation of the contract dependent on an uncertain future event

A positive is fulfilled when the event concerned occurs
A negative when the event can no longer occur
Fictitious fulfillment occurs when a party intentionally prevents fulfillment of  condition or when a debtor deliberately causes fulfillment of a resolutive condition in order to evade his obligations.

Consequences of the suspensive condition:
1. Rights exist which may be alienated
2. Conditional debtor may not prevent fulfillment
3. Debtor cannot be in mora debitoris
4. Debtor must take proper care of goods or commits breach of contract
5. Debtor may reclaim performance in spite of condition with condictio indebiti. A conditional claim cannot be discharged
6. A conditional claim cannot be set off
7. A conditional claim can be novated

Exemption clause is term in which party excludes or limits present or future liability.

Supposition: contract may be subject to it, an uncertain event of the past or present; there are either no obligations whatsoever or there are wholly unconditional obligations, depending on correctness of supposition.

Modus or charge differs from supposition. It is a term which charges creditor to do or perform something in the future in order to keep performance which debtor performed.
Guarantee: may relate to past, present or future.

## Unit 22 Performance

Discharge is normally a bilateral juristic act where cooperation of creditor is required.
Discharge can be a unilateral juristic act where cooperation of creditor is not required for performance.
Anyone can perform as long as it is done with the intention that the debt is to be discharged on behalf of debtor. Creditor may not refuse performance duly tendered without falling into mora creditoris.
Where it may be of importance to creditor who performs, he may refuse to accept performance by a third party.
Discharge must take place as against creditor or his representative. Parties may also agree that payment may be made to a third party, known as a solutionis causa adiectus.
If debtor tenders anything else it is not due performance and may be refused by creditor. If creditor accepts it, debtor is conditionally released, solutum datio.
Manner of performance is determined by contract itself, trade usage or general principles of law.
Payment must be in cash, unless parties stipulate otherwise, or unless there is a contrary commercial usage. A cheque is not legal tender, unless it can be proved that creditor has explicitly or tacitly agreed to accept a cheque, or unless payment by cheque between parties concerned has become a matter of usage. A receipt as such is not final proof of payment. Onus on debtor to prove receipt is genuine.

Appropriation of payments: When debtor owes money in respect of different debts and makes payment, he may specify debt. If he does not, creditor may select, but must give notice to debtor of selection.

Contract is to be carried out at place indicated by contract. If no place indicated, one must determine it from intention. When an amount of money has to be paid, creditor must go to debtor to collect.

Time of performance
If debtor does not perform at fixed date, breach of contract: mora ex re, breach as the result of the nature of things.
Intention determines date of performance. If day falls on Sunday or public holiday, payment may be made on following business day, unless expressly or impliedly stipulated that performance must be made on such Sunday or public holiday. If business day, debtor may perform until midnight. If date fixed in favour of creditor, debtor may not perform before fixed date, unless interest is also paid.
If no fixed date of performance: immediately, or, at any rate, within a reasonable time. Failure to perform within reasonable time does not place debtor in mora, a letter of demand is a further requirement.

## Unit 23 Breach of contract

Five forms of breach:

1. Default by debtor, mora debitoris (debtor)
2. Default by creditor, mora creditoris (creditor)
3. Malperformance (debtor in case of positive malperformance)
4. Repudiation (debtor or creditor)
5. Prevention of performance (debtor or creditor)

Objective prevention of performance: objectively impossible by killing a cow. Subjective prevention: performance not possible because cow is sold and delivered to a third party. If it is clear that a breach of contract will occur before due time, there is a breach of contract in anticipando (cow killed two months before actual delivery date).

Breach of contract is the culpable interference by the one contracting party, with the rights of the the other contracting party.

## Unit 24 Mora debitoris

Mora debitoris relates to the time of performance alone and not to the nature of the performance. For this to arise, the debt in question must be due and enforceable. A time may be set expressly or tacitly. If expressly, debtor falls into mora automatically, mora ex re. Otherwise, creditor must make demand (interpellatio) on debtor to perform at set time. If he fails, it is mora ex persona.

Mora ex re
Automatically into mora because dies interpellat pro homine, the day makes demand instead of the man. Day must be a dies certus an ac quando, a specific day which is bound to arrive at a certain time. In case of a reciprocal agreement the creditor must tender performance in his demand, otherwise his claim can always be defeated with the exceptio non adimpleti contractu. Delay must be due to fault of debtor. And it must be imputable to him. Where the delay is merely temporary and is not due to fault of debtor, it merely excuses him, there is an excusatio a morae.

Mora ex persona
Where no day is fixed for performance. Time fixed in demand must leave debtor a reasonable period for performance, taking into account the circumstances parties were aware of when contract was concluded or which they could reasonably have foreseen at the time. A demand is a notice from creditor that he requires performance within a stipulated period which must be reasonable. See *Nel v Cloete*. It is unreasonable to assume that debtor is in mora from time of receipt of the demand, like was expressed in the *West Rand case*. Also *Broderick Properties v Rood* seems wrong. Court held in this case that creditor could claim damages even without a demand provided that time is of the essence and that a reasonable time has elapsed. Debtor should at least be able to determine beforehand when he will be expected to perform.

Remedies
- Performance by debtor may be enforced
- Creditor may cancel contract in certain circumstances
- Creditor may claim damages with regard to any loss suffered. Damages may be claimed together with specific performance or with cancellation.

Mora debitoris in itself does not entitle the creditor to resile from a contract. Cancellation is allowed when time is of the essence of the contract, which is

1. When the contract contains a cancellation clause; if creditor has stipulated this right, also known as lex commissoria
2. Where there is a tacit cancellation clause; time is of the essence where all the circumstances indicate that the parties did intend time to be of the essence regarding the contract and that there is a tacit lex commissoria or cancellation clause. *Goldstein and Wolff v Maison Blanc:* there is a strong presumption that time is of the essence in a mercantile transaction proper. Intention of parties however is decisive
3. Where the creditor has given a notice of rescission; it must be clear and unequivocal. *Sweet v Ragerguhara*: applicant sent a notice, but since there was no mora, it was not possible to obtain a right of rescission by sending a notice. A notice must, like a demand, leave a reasonable time to perform. Demand and notice of rescission may be combined in one document, *Nel v Cloete.*

## Unit 25 Mora Creditoris

Mora creditoris: creditor is guilty of breach of contract if he fails to cooperate timeously. Failure occurs when he fails to accept proper performance tendered by debtor or when he fails to perform an act which is necessary to enable the debtor to perform.

Only in certain circumstances:

1. The debt is capable of fulfilment
2. Debtor is ready to perform and tenders proper performance; in *Ranch International Pipelines* Ranch committed mora creditoris in that they interdicted their sub-contractor from entering the site to complete the work
3. Creditor culpably fails to perform an act necessary for the debtor to perform on his part, OR
4. Creditor culpably fails to cooperate.

Consequences

1. A creditor and debtor cannot be in mora creditors and mora debitoris at the same time
2. Debtor’s duty of care is diminished if creditor is in mora
3. Risk of supervening impossibility of performance lies with creditor if he is in mora
4. Mora creditoris ought to have the result that sureties are released, the creditor’s right of pledge falls away and, in case of debt which yields interest, debtor is released from obligation to pay interest. Legal position is not decided yet
5. Creditor must compensate for any loss the creditor has occasioned debtor as a result of delay in accepting the performance tendered

6. In common law, debtor could free himself by consignation (payment into court). This has fallen into disuse. Whether he can free himself by means of abandonment is also doubtful
7. Debtor may resile in the same circumstances as creditor may on account of mora debitoris
8. In case of reciprocal agreements, debtor remains entitled to the performance due to him even though creditor refuses to accept performance tendered to him.
9. There is some justification to be found in common law for the view that debtor should be able to compel creditor to accept performance tendered, *Ranch International Pipelines.*

## Unit 26 Positive malperformance

Malperformance is performance of something which does not comply with the terms of the contract or it is the doing of something which contracting party undertook not to do.
1. Debtor tenders faulty or defective performance
2. Debtor does something he is not permitted to do in terms of the agreement

Remedies
1. Retain defective performance and sue for damages to compensate loss caused by defect
2. Reject defective performance and claim proper performance
3. Reject defective and claim damages as compensation
4. Resile from contract if he reserve that right, OR if the breach is so serious that he cannot reasonably be expected to abide by the contract and be satisfied with damages.

## Unit 27 Repudiation

Repudiation: when one contracting party conducts himself in such a manner that the other can conclude with reasonable certainty that the former will not render performance or will not render further performance. Examples: denial of liability, refusal to perform, disputing terms of the contract.

Objective test is applied: whether the party renouncing has acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract, *Tucker's Land v Hovis*.

Theories with regard to repudiation
1. Traditional approach - acceptance of repudiation; repudiation has to be accepted to constituted a breach. Acceptance had the effect of terminating the contract as well. Only remedy was cancellation of contract by acceptance coupled with claim for damages. Originally English law.
2. Offer to commit breach; repudiation is actually an offer to commit a breach of contract, converted into a completed act of breach by acceptance. Also unacceptable.
3. Repudiation constitutes act of breach; repudiation creates the prospect of eventual non-performance with reasonable certainty. This is for the most part accepted in *Tucker's Land*. Repudiation constitutes an infringement of an existing obligation, a breach of an ex lege term (naturale) which forms part of every contract and which imposes the duty on a contracting

party not to repudiate. This term flows from the requirement of bona fides which underlies the law of contract. This view differs from Nienaber who upheld the view under 2.

Remedies

1. Upholding contract or cancellation of the contract; acceptance of repudiation is actually an act of rescission.
2. Specific performance; granted in some cases in English law, and in the case of subjective protection of performance (*Wireohms v Greenblatt).* Order following anticipatory repudiation is suited to ensure that performance takes place at time agreed on.
3. Damages; calculated with reference to date on which performance was due and not with reference to date of repudiation.

Innocent party's obligation to perform is suspended as long as the party repudiates the contract, provided innocent party is willing, ready and able to meet his obligations at all time and the other person is aware of this, *Erasmus v Pienaar*. Cancellation only if breach would have entitled the innocent party to cancel the contract.

After *Tucker*, the courts used traditional terminology of offer and acceptance. But according to Van der Merwe there is no reason to assume that the Appellate Division has reverted to the traditional approach.

## Unit 28 Prevention of performance

Prevention takes place where performance is made impossible by a contracting party after conclusion of contract.
Two forms:

1. Absolute or objective, where performance is prevented permanently and as regards everyone
2. Relative or subjective, where it is only performance by debtor which is rendered impossible; actually a case of repudiation

Remedies: innocent can cancel or uphold. No specific performance can be claimed.
Requirements: fault. If there is no fault, there is supervening impossibility, but no breach
Onus: absence of fault must be proved by party preventing performance

Mora creditoris: creditor fails to render cooperation timeously, but performance is still possible. Repudiation: eventual non-performance is reasonably certain. Prevention of performance: non-performance is absolutely certain.

## Unit 29 Remedies on the ground of breach of contract

Specific performance: performance of that which the parties agreed to in the contract. Innocent always entitled to this subject to court's discretion to refuse to grant such an order. Indirect form of special performance is the defence of exceptio non adimpleti contractus. Defence which may be

raised where both parties must perform simultaneously or where one, against whom the defence is raised, must perform before the other who raises it.
Each case is judged in light of own circumstances. Discretion is not in all respects unfettered (*Benson)*. Crystallised guidelines:

1. When specific performance has become impossible; the law does not force one to do the impossible.
2. Where it is impossible for the court to control specific performance, like when a party has to build a house. The court cannot supervise the building. An alternative to the specific performance will be added, like build or pay so much damages. But surely, the aggrieved party can bring non-compliance with the court order to the notice of the court, in which case he can be punished for contempt of court. Service contracts, two consideration for initial reluctance to order specific performance, *Pougnet v Ramlakan*, *Diner v Dublin* and *Lottering v Lombaard*:
   a. The inadvisability of compelling employer to employ a person whom he does not trust in a position which involves a close relationship
   b. Fact that it is impossible for the court to ensure that employee does his work properly. Now, courts are more readily to order.
3. Undue hardship
4. Inability to fulfil obligations
5. Where it concerns the freedom of the individual.

General principle: one may not use one's freedom to contract to deprive oneself wholly of one's personal freedom.

Imprisonment cannot be imposed for failure to pay a sum of money.

## Unit 30 Exceptio non adimpleti contractus

A defence which occurs in the case of reciprocal contracts. Where a party is sued for performance, he may withhold it until claimant has tendered proper performance or has performed fully, provided claimant has to perform first or simultaneously by raising the defence of the exceptio.

Reciprocal: aimed at accomplishing an exchange of performances. Not duty on one unless the other counterperforms.

To determine reciprocity:

1. By interpretation of the contract; sale and locatio conductio operis are classified as such
2. Parties must perform simultaneously; payment must be due for instance.

When can the defence be raised?

1. Where a plaintiff has not performed at all
2. Where a plaintiff has performed defectively and the contract is upheld; defendant will often have the benefit of the plaintiff's performance while the plaintiff will receive noting in return. This problem was determined in *BK Tooling v Scope Precision Engineering*.

Plaintiff in an action must have his pleadings in order and must

1. Allege in his particulars of claim he rendered full performance from his side

If unable, he must allege and prove

2. That defendant is utilising the defective performance
3. That circumstances exist which render it fair that the court should exercise discretion in his favour
4. By how much the counterperformance should be reduced. Usually the amount which it would cost defendant to convert plaintiff's defective or incomplete performance.

If the contract is cancelled, the remedy lies in the law of unjustified enrichment, not in the law of contract. What can be recovered is the amount by which the other has actually been enriched at his expense or the amount by which he himself has been impoverished, whichever is the smaller.

If the contract is deliberately breached, in older cases the guilty party was not entitled to an enrichment action. This matter is still left open after doubt was cast in the *BK Tooling-case.*

**Unit 31 Rescission**

Rescission of a contract or cancellation of a contract is a juristic act as a result of which the consequences of a valid contract are terminated.
Cancellation only available in exceptional circumstances, like:
- where breach is material
- Where the contract provides for a right to resile
- Where restitution is possible

Cancellation may take place by summons, in writing or orally.
It must be within a reasonable time after breach comes to knowledge, act of cancellation must be clear and unambiguous and it must be with immediate effect.
Innocent party may resile on date before that on which the right of rescission arises with effect from the latter date, or after the date on which the right arises.
Innocent cannot claim rescission and specific performance. It can be in the alternative.

The right naturally lapses when the innocent party elects not to exercise it. Test is whether a reasonable man would infer from all circumstances the right has been waived. A failure to exercise within a reasonable time is of evidential value in establishing the loss of right through failure, *Mahabeer v Sharma*. If he sues for performance without alternative of rescission, he forfeits his right.
Rescission takes effect as soon as the guilty party obtains actual notice of the rescission, *Swart v Vosloo*.
Consequences: contract is dissolved and obligation arises to restore what has been received in terms of the contract.

If the party who can resile makes impossible the restitution of what he has received, he forfeits his right to rescission. He may resile if he is not to blame for his inability, provided he returns the surrogate. In *Harper v Webster* defendant induced plaintiff to buy several hundred head of cattle by

means of representation that the were free of disease, which they were not. Already 66 were slaughtered or sold before this was found out. Partial impossibility of restitution was not due to any fault on part of plaintiff. He could still resile.

**Unit 32 Damages**

1. There must be a breach
2. The innocent must have suffered damages
3. There is a causal link between breach and damage
4. The damages are general damages

Prove that pecuniary loss occurred. Test is to compare the present value of the estate with the value it would have had, had the breach not occurred. If less, than debtor must place creditor in the same patrimonial position as he would have been had proper and timeous performance taken place. This is positive interest. It also applies to betrothals, *Guggenheim v Rosenbaum*. In *Denys v Elvy*, cattle was sold at an auction subject to reserve, but B failed to tell the auctioneer of the reserve price and the cattle were sold at a lower price. A should have claimed the difference between purchase price and market value of the cattle, so the court held.

Types of patrimonial damage
1. *Damnum emergens*; amount actually lost
2. *Lucrum cessans*: loss of profit of prospective damage

Causality
1. Factual causality: causal connection between breach and damage; would the damage have been incurred had guilty party properly fulfilled his part of the contract. Conditio-sine-qua-non
2. Legal causality: May the innocent hold the other liable for all consequences of the breach? There is a distinction between general damages and special.

General damages flow naturally from the type of breach committed. *Thoroughbred Breeders:* the degree of probability required is a realistic possibility of the type of damage occurring. This is not infinite, but reasonable foreseeability. Court held that the loss suffered (thefts by M after the audit which could not be redeemed from M) was general damages.

Special damages do not flow naturally and liability only exists in certain circumstances. Two principles:
1. Contemplation principle: liability limited to those damages which can be fairly said to have actually been contemplated by the parties, or may reasonably be supposed to have been contemplated as a probable consequence.
2. Convention principle: Parties must have contracted from the premise that such damages would be paid. Case law: liability is limited by means of this principle.

Amount is usually calculated with reference to the date on which performance was due, but there are exceptions.
Duty to prevent, limit or mitigate damage or loss. Must do what is reasonable to mitigate. Guilty party not liable for damage which the innocent could have limited or mitigated by exercising reasonable care. Onus on guilty party.

Amount of damages:
1. If obliged to do something, damages are equal to amount it would cost to procure someone else to effect proper performance
2. Failure to deliver goods etc, market price at time and place when delivery should have taken place; market price = monetary value of a performance is accepted to be market value of the performance
3. More difficult to assess is damage which will occur in future.

Kinds of compensation: Nominal damages, which allows creditor to sue for damages although no loss was suffered (infringement of person's right of ownership) and Substantial damages; compensation for actual damage and loss of profit.

Feelings of injured party are not taken into account in assessment of damages for breach of contract.
Unique position in *Klopper v Volkskas*: banker dishonours a cheque while sufficient funds are available for payment. Client is entitled to damages without having to prove the extent of his damage.

**Unit 33 Penalty clauses**

A penalty clause can only be relevant where there is a breach of contract. Dual function:
1. Eliminate problems of calculation and proof of damages
2. Stabilise or strengthen the obligation

Roman-Dutch law: in principle enforceable, judge has power to reduce excessive penalty.
English law: distinction between penalty and a genuine pre-estimate of damages or liquidated damages. Former is a threat in terrorem, wholly unenforceable. Second is enforceable. Only such damages for breach of contract may be recovered as are in the contemplation of parties at moment of concluding contract.
SA: Roman-Dutch approach at first, later English.

Before 1962
Like English law, *Tobacco Manufacturers Committee.* Depended on true intention of parties. Indications: threat in terrorem, purely arbitrary penalty. Exception: a forfeiture clause in contracts of sale and hire-purchase. This clause is enforceable in event of rescission of a sale of hire-purchase agreement. Starting point for this exception was Voet: seller must restore, unless it has been agreed that he may retain it as penalty. Say seller rescinds a contract, reclaims the house and is entitled to

R6 000 already paid by virtue of the forfeiture clause. May he claim arrear as well as future instalments as well? *Lindstrom v Venter*: no.
Forfeiture clause relating to improvements brought about by purchaser, enforceable?

*Auby and Pastellides*: particular clause was not intended as a threat against breach and was consequently not a conventional penalty.
*Evrard v Fixed Property*: even if it was a conventional penalty, it was covered by Voet. Effect: enforceable.

A pure acceleration clause, an agreement that on default of payment of one instalment, all future instalments become due immediately, was wholly enforceable. It does not place an additional obligation on the guilty party.

Forfeiture clauses under the Hire Purchase Act are enforceable only in so far as seller will not be placed in better position than when purchaser had fulfilled his duty.

Present law: Conventional Penalties Act of 1962
A penalty stipulation is capable of being enforced. No longer necessary to determine whether it is intended as penalty or as pre-estimate of damages. A penalty is any sum of money for the payment of which or anything for the delivery or performance of which a person may so become liable.
A creditor is not entitled to recover both penalty and damages, or, except when expressly provided, to recover damages instead of penalty. A person who accepts defective or nontimeous performance is not entitled to penalty unless expressly provided. Court may reduce when penalty is out of proportion to prejudice suffered. Onus is on debtor to prove it is out of proportion, *Smit v Bester.* When determining extent of prejudice, not only the proprietary interest is taken into account, but every other rightful interest which may be effected. It thus may include impairment of reputation or personal dignity and may possibly cover any substantial inconvenience.

Forfeiture clause, irrespective of whether it refers to instalments already paid or to arrears of future instalments, is to be treated as a penalty stipulation, thus enforceable subject to reduction. This refers only to cases where a party resiles as a result of the breach of contract of the other party.

## Unit 34 The exceptio doli

Defence introduced in about 200 BC, raised when plaintiff acted contrary to requirements of good faith at moment contract was entered into or at moment of enforcement. *Bank of Lisbon:* not part of SA law.
A defendant should be able to raise the lack of bona fides in circumstances where a plaintiff attempts to enforce a right for purposes other than that for which it was acquired originally. But this position is at present uncertain.

## Unit 35 The transfer of claims: cession

Cession is the transfer of personal right by means of an agreement. It belongs to the category of real agreements. It is a method of transfer, not a causa (reason); sale is a causa for transfer and not a method.
A right can only be ceded in its entirety, unless debtor consents to splitting of claim. Any right that is transferable by agreement in terms of positive law is capable of cession.
Just as cession may take place without formality, so it may be effect freely. To this there is an exception that the law as well as parties themselves may prohibit cession. Closely connected is the rule that a right is not capable of cession where the claim is so intimately connected with the person of the creditor that the exercise of it by somebody else will encumber the debtor with a materially different obligation.

Effect of cession is that the right is transferred from cedent to cessionary.
1. The right is no part of estate of cessionary
2. Cessionary alone is entitled to collect, novate or set-off debt
3. Once cedent has ceded to a third party, he can no longer cede it to a fourth person. This comes from the rule nemo plus iuris in alium transferre potest quam ipse habet
4. Should cessionary wish to safeguard his position he has to see to it that the debtor is informed of the cession. Crucial requirement is good faith, not so much ignorance of the cession. Appearance is accepted as the truth. Defence is not extinction of debt by payment, but what is usually called estoppel by negligence or estoppel by silence or inaction.
5. Claim is transmitted in its entirety
6. Disadvantages attached to the right are also transferred. Debtor has a defence against cessionary, but not an action. Rules of estoppel may prevent debtor from relying against cessionary on a defence which he may have had against cedent.
7. Cession may also be used as a form of security. Transaction is known as out-and-out security cession in securitatem debiti.

## Section 36 Termination of obligations

Release: an agreement between creditor and debtor according to which creditor releases debtor from his obligations under their contract.

Novation: agreement between creditor and debtor to an existing obligation whereby the old debt between them is extinguished and a new obligation is created in the place of the old one. There is a presumption of the novation agreement that a valid debt exists between parties. It can also be novated conditionally. A party can fall back on the original agreement only if the novation agreement includes an express or a tacit term to that effect.

Delegation: assignment. Both rights and duties are transferred by agreement. Consent of all parties is necessary. Old obligations are in fact terminated and totally new obligations are created by agreement. This is novation coupled with variation of parties.

Settlement: an agreement whereby parties terminate a dispute between them. Dispute is concerned with existence or non-existence or precise extent of debt. Parties can fall back on old claim only if it was an express or implied term of the settlement.

**Unit 37 Termination of obligations continued**

Set-off: extinction of debts owed reciprocally by two parties.
1. Debts must be similar in nature
2. Debts must be liquidated. Debt is liquidated when its exact value is certain, or when the amount is admitted by debtor, or even if claim is disputed, it is of such nature that the accuracy of the amount can clearly and promptly be established by proof in court, or a taxed bull of costs
3. Debts must be due. An unconditional obligation cannot be set off against conditional. Natural, although unenforceable, can be set off
4. Debts between same persons and persons in same capacity

Generally it is said that the debts are extinguished automatically, but it has also been held that when debtor has paid his debt he may later enforce his counterclaim against creditor.

**Unit 38 Termination of obligations continued**

Merger (confusio): the occurrence in the same person of the capacities of creditor and debtor in respect of the same obligation.
Consequences are that merger as such gives rise to termination of the obligation.

Prescription, acquisitive and extinctive.
Prescription is strong if, after the lapse of the prescribed period, the debt is entirely wiped out or extinguished. It is weak if it not merely rendered unenforceable. Prescription Act of 1943 deals mainly with weak prescription. 30 years after creation of a debt, it ceases to exist even in weakened form. Prescription Act of 1969 provides for strong prescription. Payment by debtor of a debt after extinguished by prescription shall be regarded as payment of the debt, under this act.

General rule: it starts to run as soon as the claim becomes due and enforceable. Under Act of 1943, the fact that creditor is not aware of the existence of his claim does not prevent prescription from running, unless it is based on fraud. Under Act of 1969, prescription of all claims will not start where the debtor wilfully prevents creditor from coming to know of the existence until creditor becomes aware. A debt is not deemed to be due until creditor has knowledge of identity of debtor and of facts from which debt arises.

Suspension:
1. If suspending circumstances exist when prescription would normally have commenced to run, it does not in fact commence to run until the suspending circumstances cease to exist
2. If suspending circumstances exist after prescription has already started, the further running is suspended.

Act of 1969, section 13: delay in completion of prescription in certain circumstances, instead of for the suspension of prescription. This means that circumstances which under the previous Act suspended prescription, will have no effect on the running of the prescription, except where those circumstances cease to exist less than a year before the time for completion of prescription, in which case completion will be delayed until a year haas passed since the cessation of the suspending circumstances.

Where prescription is interrupted, period which has already passed falls away completely and prescription must run anew. It is interrupted by an acknowledgment of liability by the debtor.
To whom? To creditor or his agent.

Act of 1943: Prescription was interrupted by service of process. Once an action is enforced through the process of the court, an instance, which is not subject to prescription but is governed only by rules of court, comes into existence alongside the claim, or rather alongside the action. A summons which is so defective that it is a nullity and not even capable of amendment with leave of the court, effect no interruption. Under Act 1969 it is different. Acknowledgement of liability and service of process both too lead to interruption. But interruption by service shall lapse and the running of prescription shall be deemed not to have been interrupted if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute but abandons the judgment or judgment is set aside. Prescription shall run afresh from day on which the judgment becomes executable, as opposed to the situation under Act 1943, from date of interruption.

Waiver:

1. There is disagreement in the High Courts as to the validity of an undertaking before the existence of the obligation
2. It should be valid if the undertaking mainly effects the interests of the parties and is not manifestly contrary to public interest
3. The SCA has decided that an undertaking given after prescription has been completed is valid.

Ancillary claims: all which are dependent on the main claim become prescribed together with the main claim.

If performance becomes impossible after conclusion of the contract, the obligation is terminated. Performance may become physically or legally impossible. Supervening impossibility of performance: absolute not relative impossibility.
Effect:

1. Termination obligation is not the only effect
2. It has the further effect of excusing debtor

Exceptions:

1. Where performance has become impossible through fault (intention or negligence) of debtor
2. Where debtor bears risk of performance becoming impossible.

General principle: release and excuse where performance becomes impossible through no fault of his own, by vis maior or casus fortuitus.
Vis maior: some force, power or agency which cannot be resisted or controlled by the ordinary individual:

1. Acts of God
2. Acts of man such as legislation, acts of external or internal enemy

Casus fortuitus: a species of vis maior and imports something exceptional, extraordinary or unforeseen, and which human foresight cannot be expected to anticipate, or if it can be foreseen, it cannot be avoided by the exercise of reasonable care or caution.

Creditor remains bound to make the reciprocal performance:

1. Where performance by debtor has become impossible through fault of creditor
2. Where creditor bears the risk.

Where a divisible performance becomes partially impossible, the whole obligation is not terminated but debtor is only released proportionally. If an indivisible performance becomes partially impossible it should have the same consequences as total impossibility, unless creditor is prepared to accept partial performance.

A judgment is NOT a novation necessaria.

Sequestration means that all property passes to trustee etc.

## Unit 39 Principles underlying the law of contract and the constitution

Principle of autonomy postulates the ideal that individuals should be allowed the greatest possible measure of self-determination and self-realisation compatible with the interests of the other individuals. The principle of freedom of contract is an expression thereof. Another aspect is consensuality, meaning that contractual liability arises from concurrence of intentions of parties to an agreement to create obligations for themselves. The sanctity of contracts also flows from the principle.
Prescriptive specific rules of law play a limited role in this system. Principle of good faith is the counterbalance of the principle of autonomy.
Courts have denied that they have a general equitable jurisdiction to refuse the enforcement of unfair contractual terms which are clear and not against public policy, *Bank of Lisbon.* Courts insist that public policy requires that contract validly concluded should be strictly enforced. After this case the current position is that good faith forms the foundation of the substantive contractual rules and that its supplementary operational function is to fill gaps in our law, to clarify any uncertainty and to extend and adapt existing rules of contract law. The mere fact that terms are unfair does not mean they are also contrary to public policy.

Law of contract

*Du Plessis v De Klerk:* interim Constituion provided for indirect horizontal application. All legislation must not be in conflict with the protected human rights. Legislature may enact legislation expanding application of particular human rights to private sphere. Values underlying protected human rights must be taken into account when applying the open-ended standards or principles in the law of contract. Open-ended standards are formulated in such a way that policy considerations, consideration based on underlying legal or moral values or even values of social utility, play a role in application.

Constitution provides for direct and indirect application. Section 8(2): BR binds natural and juristic persons if and to extent that is applicable, taking into account nature of the right and of any duty imposed by the right. Section 39(3): BR does not deny existence of any other rights or freedoms recognised or conferred by common law, customary law, or legislation to extent that they are consistent with the BR. 8(3): court must develop the common law to give effect to the particular human right when necessary.
Effect is that a re-evaluation of a balancing of values by the courts is necessary and will take place, leading to a gradual shift of the way in which values are balanced against each other and development of new rules.
Present legal position hold that it must be decided in cases of restraint of trade and the right to freely engage in economic activity, whether such agreement conflicts with public policy. It is argued that the fact that freedom to engage in economic activity is specifically protected as fundamental right, whereas freedom of contract is not, or at least not directly, should lead to reversal of this position. These agreements should thus be prima facie void. Courts rejected the arguments. The legal position set out by *Magna Alloys* is regarded as striking a correct balance between principles of freedom of trade and sanctity of contract.