

# STUDY UNIT 13 - PERFORMANCE MUST BE POSSIBLE

## 2 types of Impossibility

• Performance may be impossible for everyone i.e. absolute or objective impossibility.

• It may be impossible for  $\perp$  debtor concerned, although not for other people i.e. relative or subjective impossibility

eg. A sells B Ferrari car, if car already belongs to C case of relative impossibility - only B cannot deliver  $\perp$  car. (can still deliver car)

eg. If car is destroyed before sale concluded absolute impossibility. No one can deliver  $\perp$  car.

## Consequences of Subjective Impossibility.

If performance is objectively possible,  $\perp$  fact  $\perp$  it is impossible for  $\perp$  debtor to perform has no effect on contract. Debtor remains liable to creditor, he cannot carry out his obligations results Breach of contract - he will be held liable in damages

## Consequences of Objective Impossibility.

If performance impossible @  $\perp$  time of contracting, no obligation results with regard to  $\perp$  performance i.e. void. Obligation regarding counter-performance will also be void even if possible. ~~CONTRACT IS VOID.~~

Damages:  $\perp$  aggrieved party recover his <sup>damages</sup> loss if loss was suffered?

De Wet & Van Wyk  $\Rightarrow$  fault is  $\perp$  only basis on which  $\perp$  innocent party should be able to claim damages.

relative  
imp  
contract  
valid.

absolute  
imp  
contract  
void.

he can claim his negative damages on a basis of delict (misrep) which a other party committed.

General principle:

- (1) a innocent party may recover damages, there must have been a culpable (intentional or negligent) misrep on a part of a defendant.
- (2) <sup>principle</sup> applicable not only to sale, but also to all other contracts

RESTITUTION: see w/s. ①  
②

### STUDY UNIT 14/ CONCLUSION OF A CONTRACT

ITS PERFORMANCE & ITS OBJECT MUST BE LAWFUL.  
SEE W/S.

### DISTINCTION BET WAGERS & OTHER CONTRACTS

If a party has no financial or legally recognised interest in a outcome of a contract apart from a prize he is liable to win if a result is in his favour, such an interest is absent & a contract is a wager. Only the intention of a parties can decide if a contract is a wager. see w/s.

a law attaches 3 possible legal consequences to wagers:

- (1) Some are entirely valid & enforceable. eg wagers a are not against public policy such as wagers which depend completely on a outcome of a game of skill & in which at least one of a parties has an interest.

- (2) most wagers are unenforceable, but not void
- (3) some are prohibited by statute & void.

↓ reason why most wagers are against public policy is <sup>bc</sup> cause society is of ↓ opinion ≠ wagers encourage wastefulness & prodigality which is regarded as harmful to ↓ individual, ↓ family & society.

### STUDY UNIT 15

### THE PERFORMANCE MUST BE LAWFUL

Discuss ↓ presumption ≠ parties intended ↓ agreement to be carried out in a lawful manner?

- performance must be legally possible
- performance is unlawful, contract is void, ie without ↓ legal consequences which ↓ parties contemplated.
- where an agreement can be carried out in 2 <sup>different</sup> ways, 1 of which is lawful & ↓ other unlawful, there is a presumption ≠ ↓ parties intended ↓ agreement to be carried out in a lawful manner.

Explain what is meant by unlawful performances. performance is unlawful if it is contrary to a rule of positive law, good morals or public policy. eg a contract to commit a crime.

PERFORMANCE WHICH ARE CONTRARY TO GOOD MORALS  
(contra bonos mores)

What is regarded as good behaviour in community must be determined. Performance regarded as contrary to good morals is restricted mainly to cases of sexual misbehaviour, in particular extramarital intercourse. eg A promises to have sex with B if B will give her a house.

AGREEMENTS CONTRARY TO PUBLIC POLICY

see w/s.

AGREEMENTS IN RESTRAINT OF TRADE

See w/s

STUDY UNIT 16

THE OBJECT OF A AGREEMENT MUST BE  
LAWFUL: IUSTA CAUSA

Justa Causa.

A causa is a serious intention to be bound by a contract. causa must be justa in a sense that parties must have a lawful object in concluding a contract. Justa causa affects both a requirement of consent & a requirement of lawfulness. If a reason or purpose of a contract is unlawful (turpis) contract is void. - ex turpi causa non oritur actio (from an immoral cause no action arises)

Both parties must have a same illegal purpose in mind if one party not aware of other parties motive, contract does not have an illegal purpose.