

# Study Unit 20

## CONTENTS & INTERPRETATION OF AGREEMENT

**Essentialia** - are positive provisions of law.  
Essentialia of a contract are those terms which law regards as essential to place a contract in a certain category eg: Sale, lease, insurance.

**Naturalia** - are positive provisions of law.  
The law says this or that rule applies to a specific contract. These provisions may be changed by parties unless law contains a provision to the contrary.  
eg: seller's duty to give undisturbed possession to purchaser of thing sold.

Naturalia of a contract of sale

**Incidentalia** -

Law makes no positive provision. Special arrangements made by parties to agreement.  
Eg: it is essentialia of a contract that there should be a thing to be sold eg: a bag of potatoes. Naturalia of a contract is that potatoes must be edible (unless parties have excluded such a warranty) however it is incidentalia of a contract that potatoes must be fetched from Joburg Station on Friday. This is an arrangement parties have agreed to.

## Terms & Conditions

Terms serve to determine contents of a contract.  
Conditions are terms which make enforceability or consequences of a contract dependent on occurrence or non-occurrence of an uncertain future event.

Condition usually means condition precedent a true condition on which the continued existence or operation of the contract depends. Term always means a stipulation in the contract.

eg I agree to buy X's house. If I get married at the end of the month and if he effects certain repairs to the house after the sale.

The stipulation of the marriage is a condition precedent. If the marriage takes place the condition is fulfilled and then the contract becomes fully operative and X has to do the repairs to my house (Term) in the contract.

Condition precedent determines whether or not the contract will take full effect.

Explain why a contract can be concluded without words.

Contracts inferred from conducts

The creation of contracts are inferred from the conduct of the parties. Where I make my will known by nodding my head, gesturing with my hand or performing under the contract. Eg I want to buy a newspaper from the newspaper vendor. I hand him the money & he hands me the newspaper. Not a word is said bet both the parties. Yet there's no doubt about the will of the parties.

## Ticket cases.

### 3 fold test

With regard to so-called ticket cases our law follows an English decision which lays down a 3 fold test to determine whether a person who receives a ticket is bound by its terms.

It must first be asked whether a person receiving a ticket knew there was writing or printing on the ticket and, if he knew, whether the writing referred to the terms of the contract. If both questions can be answered affirmatively then the terms on the ticket form part of the contract. If answered in the negative a further question is posed: Did the party issuing the tickets take steps which were reasonably necessary to bring the reference to the notice of the other party. If he did then the terms form part of the contract if not the other party is not bound by it.

Express terms - based on intentions of the parties, in writing or orally or by conduct.

Implied terms - if not express, it is implied.  
2 kinds

\* Terms implied by law (naturalia) is a legal rule read into a contract as one of its naturalia. eg: the law reads into every contract of sale an implied warranty against latent defects.

\* Tacit terms (terms implied from facts)

- terms pertaining to the circumstances of the contract.
- terms implied from factual circumstances

## Hypothetical bystander test

is adopted from English law & our courts use it to determine whether a tacit term can be implied in a contract.

According to Reigate v Union

A term can only be implied if it is necessary in a business sense to give efficacy to a contract.

If @ a time a contract was being negotiated someone had said to the parties. "What will happen in this case" They would have both replied so & so will happen" We did not trouble to mention it. It is so clear. It is too clear.

## When courts infer a tacit term

Courts infer the existence of a tacit term from the facts of each case, facts include: business efficacy of a contract, what reasonable parties would have agreed upon in particular circumstances, & the

express terms of a contract. Tacit terms are based on objective rather than subjective terms intention of the parties. Tacit terms are based on the intentions of the parties, Tacit terms must comply with express terms of a contract.

## DISTINCTION BETWEEN EXPRESS & TACIT TERMS

lies in the mode of proof, Express terms proved by direct evidence & tacit term by circumstantial evidence. In interpreting express terms &

implying terms both based on the intentions of the parties. Express terms: what the parties intended when

they expressed themselves about a matter. Implied terms what the parties intended without saying anything whatsoever about a matter.

Distinction between Tacit & Terms Implied by law.  
Tacit terms are based on the objective intentions of the parties & terms implied by law are legal rules which are read into the contract as if naturalia.  
Terms implied by law, not based on the intentions of the parties.

Distinction between a tacit guarantee of a bull was fertile and a term implied by law to contracts of sale (a guarantee against latent defects)  
SCHOLTS CASE

MINISTER VAN LAND BOU TEGNIECEDIENSTE V SCHOLTZ.

Facts: S a breeder of stud bulls sold one bull to the Minister for breeding purposes (the bull subsequently turned out to be infertile). Thereupon M claimed cancellation of the sale and a refund of the purchase price paid. M relied on a "tacit consensual warranty" that the bull was fertile which S breached by delivering an infertile bull. Claim was made more than a year after the sale had taken place. On behalf of S it was alleged that a purchaser who wishes to cancel a contract of sale on the grounds of a latent defect can only do so by the *actio Redhibitoria* which prescribes one year from the date of sale) and that M did not prescribe. M's claim had prescribed. The AP rejected this argument and held the parties could incorporate a consensual warranty in their contract, a breach of which would constitute ordinary breach of contract. <sup>Nature of every contract of sale.</sup>



Court further held  $\pm$  S & M had <sup>tacitly</sup> incorporated such a warranty in their contract. An action based on breach of contract has prescription period of 2 years. Court held  $\pm$  M's claim had not prescribed.

Note - case provides an excellent example of  $\perp$  distinction between  $\perp$  naturalia & tacit incidentalia of a contract. Distinction bet a consequence attached to  $\perp$  contract by  $\perp$  operation of  $\perp$  law ex lege & a term not attached by law but tacitly det by  $\perp$  parties.

### Van Den Berg v Tenner.

T sold half share in his farm and 49% of  $\perp$  shares in Jacer Brickwork of which he was  $\perp$  only share holder to VDB for R50 000, of which VDB paid R10 000. VDB then wanted to withdraw from  $\perp$  sale. T then sold  $\perp$  farm to Mobile Earthmoving Services & Jacer Brickworks to V, N, & W. VDB & T then cancelled their 1st contract & entered into a 2nd one which stated  $\pm$  VDB will be refunded his R10 000 when  $\perp$  sale or payment in terms of MESA & JNEW goes through. When  $\perp$  sale consequently failed. VDB claimed immediate payment of his R10 000. He alleged  $\pm$  it was a tacit term of  $\perp$  2nd contract  $\pm$  should  $\perp$  sale fail he will be paid immediately to him. T argued  $\pm$  since  $\perp$  sale in terms of 2nd contract was a suspensive condition &  $\perp$  failure of  $\perp$  sale meant non-fulfillment of  $\perp$  condition, extinguished  $\perp$  debt / obligation

to pay £10000. Judgement was given in favour of VDB since the appellate division held the ~~terms of fund~~<sup>from</sup> ~~time~~ fund from which payment was to be made & the time payment was to be made did not constitute suspensive condition. & the tacit term = VDB consented did form part of the contract. For a tacit term to exist not necessary for the parties to have actually intended the term.