

STUDY UNIT 21

TERMS WHICH QUALIFY 1 OBLIGATION

ALTERNATIVE, FACULTATIVE & GENERIC OBLIGATIONS

* Alternative obligation

is an obligation in terms of which 1 debtor is bound to deliver one of 1 several specific things. Eg A has to deliver one of 3 horses: Amadayus, Medoly man & Casper. Unless otherwise agreed by 1 parties, 1 debtor is entitled to choose 1 particular horse he wishes to deliver, ^{to determine} 1 performance.

* Faculative Obligation

There is only one performance but 1 debtor can choose to deliver something else instead of what has been agreed upon. Eg 1 Debtor has to deliver Brave moment, but he chooses to deliver Casper. Creditor can only claim Brave moment but debtor can deliver Casper if he wishes.

* Generic Obligation - Performance

is described according to 1 genus, nature or ^R 1 characteristic for eg 1600 VW, 100 bags of A grade mealies. In 1 absence of an agreement debtor has a choice with regards to individualisation. Performance fixed by such individualisation.

Relevance of Divisible Obligations

or indivisible

2 factors det whether a performance is divisible
(i) \perp intention of \perp parties (ii) \perp nature of \perp performance
a performance may not be divisible eg: delivery of a horse or a house. A performance may be divisible eg: deliver 10 bags of wheat in equal instalments.

Relevance of divisibility

\perp ? whether a performance is divisible or indivisible plays a particular part in \perp event of initial or supervening impossibility of performance, breach of contract & its remedies. It also plays a role in partially unlawful contracts. However \perp agreement must be divisible eg: \perp unlawful parts are rejected and \perp lawful parts are upheld.

Time Clauses

Certain future event

a time clause is a term \perp qualifies an obligation with reference to a certain future event

Although it is uncertain when it will occur, eg when John dies.

Suspensive & resolutive time clauses

Resolutive - is only of effect until \perp time agreed upon eg: \perp employ you for one month only

@ \perp end of \perp month \perp obligations dissolve.

Suspensive - is \perp stage @ which \perp obligation becomes due is postponed until an agreed time

eg: You sell me your car today, but we agree \perp you will deliver \perp car only in a month's time.

Suspensive time clause has effect \perp in \perp meantime an obligation arises which can be ceded or novated or form \perp basis for suretyship as regards of which breach of contract can be committed by repudiation or prevention of performance

* A term is always a stipulation in a contract & det \perp contents of \perp contract. A condition is a condition precedent & sometimes a term. A term may be a condition, warranty, exemption clause, time clause.

DEFINITION OF A CONDITION

A condition is a term which qualifies contractual obligations in such a manner as to make \perp operation and consequences of it dependent on \perp occurrence or non-occurrence of an uncertain future event.

DIFFERENT CLASSIFICATIONS OF CONDITIONS

(i) Positive & negative conditions.

(ii) Casual, potestative & mixed conditions

does not depend on \perp intention of one of \perp parties
eg. if it rains next week

depends on \perp intention of one of \perp parties
eg. A offers B R200 if he travels to Cape Town by Bicycle.

CASUAL + PTESTATIVE

A offers B R2000 if B marries C.

Liability can arise from delict (mistake) nature of a contract) as well as breach of contract.

Suspensive & Resolutive Conditions.

A suspensive condition: suspends the full operation of the obligations & makes it dependant on an uncertain future event. Eg I sell my house to you on condition that you obtain a loan from the bank/building society. A claim arises but it cannot be enforced until the condition has been fulfilled. Until B obtains a loan I cannot claim the purchase price & he cannot claim transfer of the house.

Resolutive condition :

makes the ^{continued} ^{of the contract} existence of the operation or the obligations dependent on an uncertain future event eg A sell his car to B on condition that the obligation will lapse if he does not pay me within 30 days. Here the car & price may be claimed immediately but are terminated if payment not made after 30 days.

How conditions are fulfilled.

- (1) a positive condition is fulfilled when the event concerned occurs
 - (2) a negative condition ~~occurs~~ is fulfilled, when it is certain that the event can no longer occur.
 - (3) fictitious fulfilment of conditions occurs when a party to a conditional agreement ^{intentionally} prevents the fulfilment of the condition.
- The suspensive condition is deemed to be fulfilled & the obligation becomes unconditional & binding.

EXEMPTION CLAUSES

An exemption clause is a term in which a party limits his present or future liability. An exemption clause against public policy could be void.

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"Guarantee" - may relate to \perp past, present & future
A sells his building to B & guarantee's \perp B can
use it as a funeral parlour. An obligation arises &
A can not later state \perp ordinances & regulations
prohibits this use as a funeral parlour. He
will be guilty of breach of contract for full damages
Because when he made his ~~statement~~^{guarantee}, he stood by \perp
truth of his statement \perp he will be liable even if his
guarantee proves to be groundless.

JURGENS EIENDOMSAGENTE V SHARE : SUSPENSIVE CONDITION

Share sold his house to Smith through \perp Jurgens
eiendomsagente, \perp purchase price was to be financed
as follows (i) a cash deposit of R1400 to be advanced by
Smith's employer after ~~he had~~ ^{\perp approval} of \perp transaction
(ii) A R45600 guarantee by \perp building society
(iii) A R10000 guarantee acceptable to Share, after
Smith had sold his house & received \perp purchase
price for it to be furnished ^{by} \perp 30th March 1984.

\perp contract further provided \perp commission was to be
paid to Jurgens even if \perp contract between Smith &
Share was cancelled. \perp cash deposit^{R1400} was paid, \perp
guarantee of R45600 was also furnished, But
although Smith sold his house he failed to
furnish \perp R10000 timely, whereupon Share
refused to continue with \perp transaction. Jurgens then
sued Share for their commission, Share's defence was
 \perp \perp furnishing of \perp R10000 guarantee by Smith was
a suspensive condition & because Smith failed to
fulfill this condition, he was not liable to pay \perp
commission.

The Appellate division rejected this argument & held that the contract contained 3 suspensive conditions i.e. (i) ^{approval of the transaction by Smith's employer} ~~advance of £1400~~
(ii) ~~obtaining of £45600 loan from a bank/building society~~
(iii) ~~sale by Smith of his own house~~. The court held because these 3 conditions had been fulfilled a ^{enforceable} ~~valid~~ contract of sale arose and Jurgens was entitled to their commission. The court held that the furnishing of a £10,000 guarantee was not a condition or part of one, but merely a term imposed a duty upon Smith to furnish £10,000. Once his house had been sold - Attached to it was a time clause requiring performance by 30th March 1984.

How does the court distinguish between provisions, terms & conditions in a contract?

Notes: The 3rd clause was a condition of the sale by Smith of his own house & Smith fulfilled this condition.
The sale by Smith of his own house - condition
The furnishing of £10,000 guarantee - term.

Provisions: ^{Design & planning service vs trigger} bet provisions of a contract which comprise all the arrangements embodied in the contract & refer to the entire content of the contract.
Terms: which refer only to those arrangements which create obligations.
Conditions: refer to arrangements by which obligations are qualified in such a way that their operation & consequences are made to depend on the happening or not happening of an uncertain future event.

Supposition

Parties arrange their relationships with reference to an uncertain event in the past or an ^{uncertain} present position in the present. This situation referred to as a contract subject to a supposition.

Fourie v CDMO Homes ° SUPPOSITION

Facts

CDMO Homes sold a piece of land bordered by a stream to F. The parties' agreement was subject to what was called the "condition" that there were pumping rights on the land. Neither party knew if the rights existed or not. When F found out there were no rights, he stopped paying his instalments and CDMO sued him for the arrears instalments. F counter-sued CDMO for a refund of the instalments he had already paid. Judgement on appeal went in favour of F. The Appellate Division held that the parties contracted subject to a supposition, and since the supposition turned out to be false, the contract was void ab initio, had it turned out to be true, it would have been valid & binding ab initio.

A condition always relates to the occurrence or non-occurrence of an uncertain future event, it can never relate to the past or present state of affairs.

was it Q?

was a condition in a contract of sale in actual fact a suspensive condition.

In the former case a parties agreement was subject to what was called a "condition" that there was pumping rights on a land, however a A.D held a condition qualifies obligations which makes the operation dependant on an uncertain future event & a condition can never relate to a past or present event in a past or position in a present. A AD held a parties contracted subject to a supposition (DEFINITION).
Jurgens: a condition can never relate to a past or present state of affairs, it only refers to a future event.

WELLS V SA ALUMENITE CO.: EXEMPTION CLAUSE

WHAT WAS THE EXEMPTION CLAUSE IN THIS CASE?
Facts: SA Alumenite Co sued wells for a lighting plant that he had bought from a company. Wells argued that he was induced to buy a lighting plant by a misrepresentation made by a CO's representative. He in turn claimed rescission of a contract. However in turn wells had signed an order form exempting a CO from liability made any representations made by its representatives. It was held that in the absence of an allegation that a CO made a fraudulent misrep, wells defence could not succeed.

- * Liability for fraudulent misrep cannot be excluded by agreement
- * Liability for negligent/innocent misrep can be excluded.

STUDY UNIT 23 - BREACH OF CONTRACT

5 forms of breach of contract

- mora debitoris
- mora creditoris
- malperformance
- Repudiation
- ~~Positive~~ Prevention of performance

4 ways in which debtor can breach a contract

- (i) mora debitoris
- (ii) Repudiation
- (iii) Positive malperformance
- (iv) Prevention of performance.

4 ways in which creditor can breach a contract

- (i) mora creditoris
- (ii) Repudiation
- (iii) Prevention of performance

Define breach of contract

Breach of contract can be defined as \perp culpable interference by one of \perp contracting parties with \perp rights of \perp other contracting Party.

Explain breach of contract

\perp parties may have miscalculated as regards their expectations or arrangements in \perp \perp debtor is not able to render or deliver performance & \perp creditor is not able to accept performance. Such \perp malperformance occurs which can be negative, eg. debtor fails to perform timeously or positive

defective performance is rendered. A contract can be breached in several ways. Eg a debtor can fail to pay his telephone account, A creditor can fail to open his gates to allow a pool company inside to repair his pool. I can kill a horse after selling it to prevent you from becoming a true owner.

STUDY UNIT 24 - MORA DEBITORIS

What mora Debitoris means?

Any obligation must have a time limit otherwise it will be valuelers. Where a debtor neglects or fails to perform timeously, ^{when performance is due} where performance remains possible in spite of his failure to perform he is guilty of breach of contract called Mora Debitoris. He is ^{then} in Mora.

Mora Debitoris relates to time of performance alone & not nature of performance.

For Mora Debitoris to arise

- debt must be due and enforceable
- time for performance must have arrived.
- obligation must not be subject to an unfulfilled suspensive condition.
- debt must not have become prescribed
- Not be necessary creditor must perform something prior for debtor to perform.

When Mora Debitoris Occurs:

- Delay in performance if a date for performance is fixed and that day arrives.

Time for performance can be set in 2 ways.

1stly It may be agreed upon in a contract either expressly or tacitly ~~that when~~. When a date arrives a debtor will automatically fall into mora known as mora ex re.

When no date/time has been set for performance ~~fixed~~ in a contract, a creditor must set a time by making a demand interpellatio on a debtor to perform @ a set time. When this time arrives & debtor fails to perform, he will be in mora ex persona.

Forms of Mora Debitoris: / Mora ex re & Mora ex Persona

Mora Ex Re

This occurs if a date is fixed for performance and a debtor fails to perform on or before a specified day. He is then automatically in mora. A debtor is only in mora ex re if it was an intention of the parties that he should perform on or before a specified day.

Mora Ex persona

Where no time has been fixed for performance a debtor must perform within a reasonable time after the conclusion of a contract. If he fails to perform

he will not automatically be in mora.
where a contract is silent about a date for performance & debtor fails to perform within a reasonable time creditor must make a demand interpellation on debtor to perform on a specified time.

⊗ NEL V CLOETE

Facts of case

Cloete sold a house to Nel. Nel paid the deposit & balance was to be paid against transfer. Cloete kept on delaying transfer because he discovered that title deed was missing. Nel then sent a demand (notice) to cloete on the ~~12 August~~ ^{13 June} 1969, that the transfer was to take place before or on the 12 August 1969. 2 months had passed & still no transfer had taken place. Nel informed Cloete that he was cancelling contract because transfer did not take place. & claimed a refund of deposit paid.

Cloete raised the defence that Nel's demand was without legal effect it was premature and an unreasonably short period of time for him to perform.

Court a quo held demand was not premature but 2 months was unreasonably a short period for him to apply to deeds office for a duplicate deed.

↓ A.D confirmed ↓ demand was not premature & ↓ period of time was not unreasonable.

Note: this case provides authoritative answers on when a debtor is in mora debitoris

- ↓ general rule is that when no time has been expressly or tacitly agreed upon for performance ↓ debtor must perform within a reasonable time after ↓ conclusion of ↓ contract, if he fails to perform he is not yet in mora. He will must be placed in mora by a demand interpellation stating a date for performance. & If he then fails to perform before or on ↓ specified time, he will be in mora ex persona.
- Where a time for performance is agreed upon and if ↓ debtor fails to perform on or before ↓ specified time he automatically & immediately is in mora ex re.
- If ↓ period allowed for in ↓ demand is unreasonable then ↓ period demand is invalid & without legal effect.

Goldstein & Wolff v Maison Blanc.

Facts

Maison Blanc had ordered dresses from Goldstein & Wolff. ↓ dresses were to be delivered on Jan/February 1945. Goldstein & Wolff delivered ↓ dresses on 1 April 1945 & Maison Blanc refused delivery and contended payment of ↓ purchase price & ↓ it was

entitled to cancel the contract since a date was stipulated for performance & Goldstein & Wolff were already in mora ex re. Time was of essence to the contract since Maison Blanc required the dresses in good time for the winter season. Maison Blanc's contention was upheld by the Cape Provincial Division.

NOTE

Court found that the contract had fixed a date for performance that is Jan/Feb 1945. Performance had to take place on or before 28 February. When performance did not take place Goldstein & Wolff were automatically in mora ex re on 1 March 1945.

The court also deduced from the surrounding circumstances that the parties had tacitly agreed that time would be of essence to the contract & the respondent would have a right to cancellation if performance did not take place timeously.

Mora EX RE with a tacit lex commissoria

3 Remedies of a Creditor in Mora Debitoris.

- Performance by debtor may be enforced
- Creditor may cancel a agreement
- Damages Creditor may claim damages for any loss suffered
- Damages may be claimed together with specific performance & cancellation.

A contract may be cancelled on a ground of mora debitoris when time is of a essence
& time is of a essence in a ffg circumstances

1) When a contract contains a cancellation Clause or lex commissoria

A creditor may resile from a agreement if he stipulated a right to resile. He may resile immediately, if debtor fails to perform timely

2) Tact cancellation Clause

where it is clear from a circumstances a a parties intended time to be of a essence of a contract. A ~~tax~~ a there is a tact lex commissoria. a nature of a agreement is such a failure to perform timely would justify cancellation of a contract
Goldstein & Wolff v Maison Blanc.

3) Notice of Rescission

Time can be made of a essence by giving a debtor notice of rescission
Reasonable period of time must be given in which to perform like demand

Sweet V Ragerghara & Others.

Facts

Sweet bought immovable property from Ragerghara & Others. In terms of 1 contract, vacant occupation of 1 ^{property} contract was to be given on 1 Jan 1977. This was not done as 2 people were living on 1 property. On 12 Jan 1977

Sweet notified 1 sellers 1 he was cancelling 1 contract. They said he was not entitled to do so. Sweet then sent a notice of rescission in which he gave 1 sellers 30 days to give him vacant occupation. They failed to do so. Sweet asked 1 court for a declaratory Order 1 1 contract had been validly cancelled.

Court held 1 1 notice of rescission was not relevant because a notice of rescission is used to rescind 1 contract in 1 case of mora debitoris. 1 this was not a case of mora debitoris but positive malperformance. Occupation had been given 1 there was timely performance, however it was not vacant occupation 1 defective performance. How defective is 1 Perf. to justify cancellation is postponed for further evidence.

Note:

Study Unit 25 - Mora Creditoris

Define Mora Creditoris

where \perp co-operation of \perp creditor is necessary for \perp fulfillment of \perp obligation of \perp debtor, where \perp creditor fails to co-operate timeously, ~~and~~ performance remains possible.

\perp creditor is guilty of breach of contract

Failure of \perp creditor to cooperate occurs when \perp creditor fails to accept \perp proper performance tendered by \perp debtor or creditor fails to perform an act necessary to enable \perp debtor to perform.

WHEN MORA CREDITORIS OCCURS / CIRCUMSTANCES

- (1) When \perp debt is capable of fulfillment, when \perp debt is capable of being discharged
- (2) \perp debtor is ready to perform and tenders proper performance.
- * (3) Creditor Culpably fails to perform an act necessary to enable \perp debtor to perform
eg creditor fails to open storeroom where debtor has to deliver goods.
- (4) Creditor Culpably fails to co-operate
Eg Jaafar hires a Rolls Royce from Fatmah & agrees that fatmah will deliver \perp Rolls Royce to Jaafar \perp next day, fatmah arrives \perp next day @ \perp said time, but Jaafar is not @ home to receive \perp Rolls Royce

Consequences of Mora Creditoris.

- (1) A debtor & creditor in respect of the same obligation cannot be in Mora debitoris & Mora creditoris at the same time. If a debtor in Mora tenders performance he purges his Mora & incurs no further liability.
- (2) A debtor's duty of care is diminished if the creditor is in Mora, he is only responsible for intentional loss and loss occasioned by gross negligence. Eg Fatimah has to deliver a horse to Jaafar, Jaafar is in Mora. Fatimah's duty of care is diminished, she is only responsible for intentional loss & L.O.B.G.N.
- (3) Supervening impossibility of performance means that performance has become impossible after the conclusion of the contract, the obligation is terminated. The creditor carries the risk of supervening failure of performance after the contract is in Mora.
- (4) Sureties are released, Debtor released from his obligation to pay interest, Creditor's right of Pledge falls away.
- (5) The Debtor must be compensated by the Creditor for any loss incurred by the Debtor due to the delay by the Creditor in accepting performance.
Eg Jason delivers a horse to Harry but Harry refuses to take delivery & is in Mora. He must compensate Jason for costs incurred eg: transportation costs.

(6) Consignation - Debtor was able to free himself from \perp debt ~~per~~ by making payment into court or \perp proceeds from \perp thing promised or delivering \perp thing itself

(7) Debtor may rescind from \perp contract by reason of *mora creditoris*.

(8) Debtor remains entitled to performance
(9) Debtor should be able to compel creditor to accept performance.

Ranch International Pipelines V LMG.

Factos Ranch International Pipelines was awarded a ~~building~~ contract by Flour Engineers to erect a pipeline. Ranch entered into a subcontract with LMG to do part of \perp work. Ranch brought an urgent application against LMG to vacate \perp work site and not to enter there again. Ranch's ~~action~~ did not allege a breach of contract by LMG but rested its whole case on an employer's absolute right to terminate a building contract @ any time and erect \perp contractor even if he is completely innocent. LMG brought a counter application to prevent Ranch from interfering with its work. $\text{\&}\perp$ court granted it.

\perp judgement contains an emphatic recognition of a creditor's duty to co-operate to enable his debtor to render performance and of *mora* ~~de~~ *creditoris* as separate form of breach of contract.

Note

Mora Creditoris occurs where \perp cooperation of \perp creditor is necessary for \perp fulfillment of \perp obligation of \perp debtor, ~~He~~ is guilty of breach of contract, if he fails to co-operate timely, when performance remains possible.

STUDY UNIT 26

POSITIVE MALPERFORMANCE

Positive malperformance takes place when a contracting party does not comply with \perp terms of \perp contract by either doing something in a manner which does not comply with \perp terms of \perp contract or doing something which he undertook not to do.

2 Forms of Positive malperformance.

- 1) \perp debtor renders faulty or defective performance. He builds \perp house, but with inferior materials.
- 2) He does something which he is permitted not to do in terms of \perp agreement.

Legal Remedies

- 1) He may reject \perp defective performance and claim proper performance
- 2) He may reject \perp defective performance and claim damages from \perp other party as compensation

(3) He may retain \perp defective performance & sue for damages to compensate for \perp loss caused by \perp defect.

(4) He may rescind from \perp contract if he reserved himself \perp right to rescind & if \perp Breach of contract is so serious he cannot be expected to abide by \perp contract & be satisfied with Damages.