

LAW OF SALE AND
LEASE
LPL-401-8
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STUDY GUIDE 1- Learning Outcomes

Study Unit 1: Introduction to the contract of lease

1. Explain the relationship between the general principles of contract and specific contracts
2. Explain how and why contracts are assigned to different classes (types)
3. Set out the essentialia of a contract
4. Set out the naturalia of a contract

Study Unit 2: Definition and essential elements

5. Define a contract of lease
6. Set out the requirements for a valid contract
7. Set out the essential elements of a contract of lease

Study Unit 3: Legality of contracts of lease

8. Explain the general principle of legality
9. Explain what an "illegal lease" means
10. Explain the effect of illegality
11. Explain the *ex turpi causa non oritur actio* rule
12. Explain the *in pari delicto* rule
13. Explain the relaxation of the *in pari delicto* rule

Study Unit 4: The obligations of the lessor

14. Set out the different obligations of the lessor
15. Understand that failure to fulfill an obligation is a form of breach of contract by the lessor, and be able to identify the form of breach of contract and set out the relevant remedies available to the lessee

Study Unit 5: The lessor must deliver the thing

16. Explain the lessor's obligation to deliver the leased thing and the remedies available to the lessee should the lessor fail

Study Unit 6: The lessor may not disturb the tenant in his possession - the duty to give undisturbed use and enjoyment (*commodus usus*)

17. Explain the lessor's duty to give *commodus usus*
18. Explain the content of *commodus usus*
19. Briefly set out the facts of any relevant prescribed cases, the decisions in such cases and the reasons for such decisions
20. Apply the rules discussed here, and any relevant prescribed cases to practical problems

Study Unit 7: The lessor must deliver the thing in a specific condition and maintain it thus

21. Explain the lessor's obligation to deliver the leased thing in a specific condition
22. Explain the lessor's obligation to maintain the leased thing in the specific condition during the currency of the lease
23. Explain whether this duty is a contractual duty or an *ex lege* warranty
24. Explain and apply the remedies available to the lessee where the lessor breaches his or her obligation

Study Unit 8: The landlord must guarantee the tenant against eviction

25. Explain the lessee's rights against a landlord where the lessee is evicted
26. Explain the lessee's remedies in the event of eviction

Study Unit 9: The tenant's duties

27. Explain that the lessee has an obligation to pay the rent
28. Explain that the lessee has an obligation to use the property in a proper manner

Study Unit 10: The tenant must pay the rent

29. Explain the implications of certainty of rent
30. Explain the implications of place of payment
31. Explain the implications of time of payment
32. Explain the consequences of a failure to pay the rent on time

33. Explain what is meant by the presumption of payment
34. Briefly set out the fact of any relevant prescribed cases, the decisions in such cases and the reasons for such decisions
35. Apply the rules discussed here, and any relevant prescribed cases to practical problems

Study Unit 11: The tenant must use the thing in a proper manner

36. Explain that the lessee has an obligation to use the leased property for the purpose for which it was let
37. Explain the rules, which apply to the planting of trees
38. Explain the lessor's remedies where the lessee misuses the property
39. Explain the lessee's obligation to vacate the property and return it upon termination of the lease

Study Unit 12: The tenants real right

40. Explain what the *huur gaat voor koop* rule means
41. Explain to what type of leases the *huur gaat voor koop* rule is applicable
42. Explain how the lessee's real right is established
43. Explain the difference between onerous and gratuitous successors
44. Explain the effect of the lessee's real right
45. Briefly set out the fact of any relevant prescribed cases, the decisions in such cases and the reasons for such decisions
46. Apply the rules discussed here, and any relevant prescribed cases to practical problems

Study Unit 13: The lessor's tacit hypothec to secure the rent

47. Explain the nature of the lessor's hypothec
48. Explain what goods are subject to the hypothec
49. Explain whose goods are subject to the hypothec
50. Explain what debts are secured by the hypothec
51. Explain the legal effect of the hypothec
52. Explain how the doctrine of quick pursuit operates

Study Unit 14: Remission of rent

53. Explain what is meant by remission of rent
54. Explain what is meant by *Vis maior* and *casus fortuitus*
55. Explain when abandonment of property is possible
56. Explain by what amount the rent can be reduced

Study Unit 15: Compensation for improvements

57. Explain the type of leases to which the *placaats* apply
58. Explain the position regarding improvements on agricultural leases
59. Explain what is meant by an annexure
60. Explain the position regarding improvements on other leases
61. Explain the lessee's right to remove the annexure

Study Unit 16: Subletting, cession, delegation and assignation

62. Explain what is meant by subletting
63. Explain whether rural and urban premises may be sublet
64. Explain what cession means

Study Unit 17: The termination of a lease

65. Explain how a contract of lease can be terminated by mutual agreement; effluxion of time; notice; merger; destruction of the property; rescission of the contract; extinction of landlord's title; insolvency; death and legislation.

Study Unit 18: The Rental Housing Act 50 of 1999

66. Explain the application of the Rental Housing Act
67. Explain and distinguish the general and statutory provisions
68. Explain what the function and powers of the rental housing tribunal is
69. Explain the function of the rental housing information offices
70. Explain all the offences and penalties created by the Act

STUDY GUIDE 1- Notes

Study Unit 1: Introduction to the contract of lease

The relationship between the general principles of contract and specific contracts

Every specific contract is a contract, which means that all the general principles of the law of contract apply to it

How and why contracts are assigned to different classes (types)

⇒ It is the content (terms) of a contract which determines whether it is to be assigned to a specific class of contracts or whether it is to be regarded as a contract *sui generis*- a contract which does not fit into any particular contract

The essentialia of a contract

⇒ The essentialia are not terms that are essential for the validity of the contract, they are terms that are essential for the classification of a contract as one of a specific type i.e. determine the category into which a contract falls

⇒ Essentialia of a contract of sale:

1. An undertaking by the one contractant (the seller) to deliver a thing to his or her co-contractant
2. An undertaking by the co-contractant to pay a sum of money in exchange for the thing

⇒ Any specific contract is defined in terms of its essentialia

The naturalia of a contract

⇒ The class to which a particular contract belongs determines its naturalia included in the contract by operation of law (ex lege)- need not be expressly negotiated by the parties

⇒ It is necessary to classify a contract as a specific type as this is required to determine the natural terms of the contract.

⇒ May be excluded by agreement between the parties to a particular contract of that class

⇒ The parties are free to insert as many additional terms as they like- these are called incidental terms

Study Unit 2: Definition and essential elements

3 types of letting and hiring: the hiring of services which are conducted under supervision; the hiring of a person's services in order to obtain the results of the labour such as building a house and the letting and hiring of a thing which can be either movable or immovable

Definition a contract of lease

It is a reciprocal agreement between one party, namely the lessor, and another party, namely the lessee, where by the lessor binds himself or herself to give to the lessee the temporary use and enjoyment of the thing, in return for the payment of the rent

The requirements for a valid contract

⇒ There are 6 absolute requirements:

1. Consensus or apparent consensus
2. The parties must have contractual capacity
3. Prescribed formalities must be complied with
4. The obligations created by the contract must be possible of performance
5. The contractual agreement must be legal
6. Performance must be determined or determinable

The essential elements of a contract of lease

1. The lessor must deliver and the lessee must receive a thing or property for the temporary use and enjoyment of this thing or the property
2. There must be a thing or property which is being let
3. An amount of rent must be paid for the use and enjoyment of the leased thing

The parties must agree to deliver and receive a particular thing

⇒ An expression of the general requirement that performance must be possible

⇒ Supervening impossibility: where performance becomes impossible through no fault of the lessor. Obligations are terminated.

- ⇒ Prevention of performance: absolute or objective impossibility of performance- where performance is prevented permanently as regards everyone, and relative or subjective prevention of performance- where it is only performance by the debtor which is rendered impossible (breach of contract in the form of prevention of performance)

The letting and hiring of the leased thing must be temporary and not in perpetuity

- ⇒ A lease cannot be forever; only a contract in which the temporary use and enjoyment of the thing is granted to one of the parties can be a lease.
- ⇒ The requirement that a contract of lease must be of limited duration is complied with in the following cases: (i.e. temporary lease)
- If the lease is to run for a definite period
 - If the lease is to run until the occurrence of an event which is sure to occur although the date of its occurrence may be uncertain
 - If the lease is at the will or either the lessor or the lessee
 - If the lease is for an indefinite time with the rent payable periodically (in such a case the lease may be terminated by either party by reasonable notice given to the other)

The thing subject to the lease can either be corporeal or incorporeal or an object still to come into existence

- ⇒ In **Young v Smith and Another** it was argued, on the strength of **Graham v Local and Overseas Investments** that there is no doubt that an incorporeal thing can form part of a lease

The court said, "What was let is not corporeal property but the incorporeal right to trade". In contrast to this case, the view had been taken in a series of previous decision that the granting of an exclusive right to do business on certain premises is not the lease of a thing, but an innominate contract for the granting of something similar to a personal servitude. The view that an incorporeal thing, a right, can be hired is unconvincing. In the case of a usufructuary, it is very clearly the thing, which is the object of the usufruct, which is being let.

The fact that the lessor is the usufructuary of the thing merely means that the lessor is able, by virtue of his or her legally valid title, to protect the lessee in hi or her possession of the thing.

- ⇒ As long as the performances of the parties are ascertainable, there can be no objection to the landlords agreeing to deliver only a portion of an existing thing e.g. A lets a flat to B
- ⇒ A thing that has not yet come into existence can also be let. Called a *locatio conduction rei speratae*. If the thing does not come into being, the lessor's performance naturally becomes impossible.
- ⇒ An undertaking to make available a fungible (consumable) thing at a price, cannot qualify as a lease. Letting and hiring presumes that the use and enjoyment of the thing will be made available and not that the lessee will use up the thing

The lessee must pay rent for the leased thing

- ⇒ Where the counter performance for the use and enjoyment of the lease thing does not sound in money, the contract is not one of lease.
- ⇒ There is one exception- rural leases, where the rent is either a definite quantity or an agreed upon portion of the produce of the leased property

Study Unit 3: Legality of contracts of lease

The general principal of legality & meaning of an "illegal lease"

- ⇒ A contract is unlawful when its conclusion, performance or the reason for its existence is forbidden by statutory or common law, or it is contrary to public policy

The effect of illegality

Results in the contract being void and unenforceable. The onus of proving the illegality rests on the part alleging it

The ex turpi causa non oritur actio rule

- ⇒ From an immoral cause no action arises. This is an absolute rule of the law of contract and there are no exceptions.
- ⇒ The court will also refuse to enforce the contract. The unlawfulness of the contract means that the one party may not only not claim performance from the other but the unlawfulness also means that a party who has suffered damages as a result of such a contract may not claim damages from the other party by relying on the contract

The in pari delicto rule

- ⇒ Where 2 parties are both guilty the one who is in possession is in the stronger position. This rule is founded on public interest and prevents the lessee from claiming return of rent i.e. restitution.
- ⇒ What relief is available to the lease to the repayment of the rental?

The relaxation of the in pari delicto rule

- ⇒ Because the rule sometimes operates harshly it is sometimes relaxed
- ⇒ Where a party to an unlawful contract has performed but his or her performance is not disgraceful, he or she can recover that which he or she has performed from the other party.
- ⇒ The *par delictum* rule is therefore to be applied as a general rule to which an exception must be made whenever "simple justice between man and man demands it"

Study Unit 4: The obligations of the lessor**The different obligations of the lessor**

Study unit 5: to make available or deliver the use and enjoyment of the property

Study unit 6: to refrain from disturbing the lessee's use and enjoyment of the property

Study unit 7: to place and maintain the property in the condition agreed upon

Study unit 8: to warrant against eviction

Different types of breach of contract

- ⇒ Failure to fulfill an obligation is a form of breach of contract by the lessor,
- ⇒ Failure to deliver constitutes *mora debitoris*
- ⇒ Delivery of a defective performance constitutes positive malperformance
- ⇒ Delivery to someone other than the contracted lessee constitutes repudiation
- ⇒ Failure to prevent eviction constitutes positive malperformance

Study Unit 5: The lessor must deliver the thing**The lessor must deliver the thing**

- ⇒ The lessor must deliver the thing at the agreed time and place. He must make it available to the lessee. The delivery must be such that the lessee obtains the *vacuo possessio* of the thing.
- ⇒ The lessor must also deliver everything without which the thing cannot be used properly
- ⇒ Who the lessee is in the case where the lessor lets the same object to two different parties but establishes neither in possession of the object. Who should be considered the actual lessee?
 - A, the lessor, enters into a contract of lease with B, in terms of which B rents A's thing but, before B takes possession, A leases the same thing to C.
 - If C is not in possession and at the time of contracting with A, he was aware of the contract between A and B, the original lessee's (B) right prevails. B can thus prevent A from delivering the object to C, by means of an interdict
 - Where C contracted *bona fide* with A- some jurists consider the *prior est tempore potior est iure* rule to apply. Accordingly, B can prevent A from putting C in possession of the thing. Other jurists believe that C should be given possession. Our courts follow the view that the *prior est tempore potior est iure* rule is applicable and that B can prevent A from giving C possession, by means of an interdict

The lessee's remedies

- ⇒ If the lessor is in *mora debitoris* there is either a right to cancel the contract as an express or tacit term of the contract or a notice of rescission has been given as the normal remedy of cancellation is available
- ⇒ If the performance is defective, positive malperformance, the lessee can recover his or her loss, provided it was foreseeable, by means of an action for damages
- ⇒ Damages claimed may include both actual and consequential loss

Study Unit 6: The lessor may not disturb the tenant in his possession - the duty to give undisturbed use and enjoyment (commodus usus)

Except lawfully, as when he or she reasonably requires such right in order to inspect a property or when he or she needs to effect necessary repairs.

Sishen Hotel (Edms) Bpk v Suid Afrikaanse Yster en Staal IndustrieËle Korporasie Bpk

The AD: the lessee's right against the lessor to include a restraint upon the latter to refrain from direct or indirect conduct which negatively affects the profitability of the leased thing

The parties had concluded a twenty-year lease of a hotel. The site of the hotel was next to a national road

About eight years after the conclusion of the lease, the national road was diverted on application and at the expense of the lessor in order to expand its mining operations in the area. As a result, the hotel's profits declined and eventually turned into losses. About three years later the hotel was closed down and the lessee instituted an action against respondent for the payment of damages for breach of contract. The court a quo had dismissed this claim. The appellant raised the argument that the contract contained an implied term that the respondent would not take any steps to interfere with the access to the hotel and prevent the flow of custom to the hotel. The judge came to the conclusion that *commodus usus* could include the idea of profit where the lessee runs a business from the leased premises.

The judge found that because the lessee conducted the hotel business to make a profit, closing or diverting the road indirectly infringed the lessee's *commodus usus*.

Challenged by the decision in *Sweets from Heaven (Pty) Ltd v Ster Kinekor Films (Pty) Ltd*

Sweets from Heaven (Pty) Ltd v Ster Kinekor Films (Pty) Ltd

The question whether profitability is one of the *naturalia* of a commercial lease or whether the lessee has to rely on a tacit term once again came under the scrutiny of the courts in this case. Here, the first respondent, Ster Kinekor, was the lessee of an entertainment center. Ster Kinekor in turn sublet premises to third parties. The first applicant, Sweets from Heaven, has a five-year sublease with Ster Kinekor. The second applicant was a franchisee of first applicant and occupied the premises through first applicant with the consent of Ster Kinekor. The dispute concerned the first respondent's right to sublet to second respondent a shop situated virtually next door to the sweet shop of the second appellant. Both second respondent and second applicant sell sweets, confectionary and related products. The court a quo granted an interim interdict prohibiting the first respondent from giving the second respondent occupation of the premises. The applicants based their claim, first of all on the first respondent's failure to ensure free and undisturbed use and enjoyment, *Commodus usus*, of the leased premises in allowing second respondent to compete with the second applicant. The judge found that the lessor had not breached its obligation of providing *Commodus usus* and that in order for a lessee to succeed the lease contract would have to tacitly or otherwise prohibit the lessor from such conduct. It was thus held that the lessor was entitled to let business premises to competitors of the lessee virtually next door to the latter as no explicit terms to prohibit this were entered in the contract.

In the case *Sweets From Heaven*, the extension in *Sishen* was not regarded a *naturalia* of the lease contract as one could have expected

Part of this obligation may also include:

- ⇒ A lessor is not entitled to take the fruits of the leased property.
- ⇒ The lessor may not graze cattle on land let to another.
- ⇒ The lessor may not exclude the lessee from the leased property or from a portion thereof, or deprive him or her of the use thereof (e.g. he or she may not forcibly eject the lessee, nor unscrew the front door leaving the premises open nor have the electricity cut off).

- ⇒ It is also a breach of this obligation if a lessor who has undertaken to prevent plastic bags blowing onto land let for grazing, fails to do so.

Remedies

- ⇒ Interdict or cancellation
- ⇒ Remission of rent is not claimable!

Study Unit 7: The lessor must deliver the thing in a specific condition and maintain it thus

The lessor's obligation to deliver the leased thing in a specific condition

- ⇒ The condition in which the thing is delivered must be in accordance with the provisions, express or tacit, of the agreement. In the absence of any express agreement, the lessor must deliver the thing in the condition in which it was when the contract was entered into in accordance with any other implied agreement.
- ⇒ A lease creates continuous obligations. The lessor must thus ensure that the res is in a fit and proper state
- ⇒ Should the defects have occurred after the contract was entered into but during the subsistence of the contract, the lessor is compelled to effect repairs in order to eliminate the defects provided there are no stipulations to the contrary.

The lessor's obligation to maintain the leased thing in the specific condition during the currency of the lease

- ⇒ As soon as wear and tear and deterioration reach such a stage that the property is no longer fit for the purpose of lease, the lessor is compelled to carry out repairs in order to comply with the contractual obligation to keep the property in a fit state.
- ⇒ The lessor is liable for breach of contract only if he or she has fault. When he or she is unaware of the fact that a defect has occurred after the contract has been concluded he or she cannot be blamed if he or she fails to affect the repairs.
- ⇒ The lessee should notify the lessor of a defect unless the lessor was aware of the defect or ought to have known about it as an expert
- ⇒ What must be included under the term "repairs"? That the landlord is liable for repairs does not necessarily mean that he or she must make structural improvements; he or she must merely repair structural defects.
- ⇒ Where the lessee undertakes to effect repairs. What is meant by repairs in this case? As we have seen above, the lessor need not make structural improvements, but he or she must repair structural defects. If then the lessee undertakes to effect repairs, must he or she also repair structural defects?

Salmon v Dedlow

"The lessee will only be liable to make such repairs as are ordinarily required if he undertakes to keep a house in a good condition. He will not be required, either by his contract or by the common law, to make structural alterations to ensure its freedom from leaking"

- ⇒ The principle may be deduced that subsidiary parts of the property must be replaced or renewed by the lessee (where he or she has undertaken to do repairs), but that he or she need not renew the whole thing so as to ensure its continued existence. Where the existence of a thing is threatened by, for example the effluxion of time, the maxim *res perit domino* may well be applied. Naturally, however, the lessee will be liable where the deterioration is due to his or her failure to effect ordinary repairs.
- ⇒ **Sarkin v Koren** a lessee had undertaken to repair the thatched roof of the premises. if the lessee had not neglected ordinary repairs, the roof would have lasted the whole course of the lease. The lessee is not obliged to improve the roof in the sense of returning it to the lessor in a better condition than it was in when he took occupation.

Contractual duty v Ex lege warranty.

- ⇒ Question: are we dealing with ordinary contractual duties or with ex lege warranties?
- ⇒ If it (the duty to deliver the thing in a specific condition and maintain it thus) involves ordinary duties, the lessor is not to be held liable for damages arising from the fact that the res was not at any time in

the required condition, of which fact the lessor was either unaware, or of which fact the lessor ought not to have been aware, or if he or she had taken all reasonable precautions against it.

- ⇒ The reason for the distinction is that fault is normally a prerequisite for liability by reason of breach of contract. Fault is not a prerequisite for liability by virtue of breach of warranty
- ⇒ The last-mentioned point of view seems to be the more acceptable and is in accord with our positive law i.e. Contractual duty

Remedies available to the lessee where the lessor breaches his or her obligation

Cancellation: if the condition of the property on delivery is such that the property is unfit for the purpose for which it was let, or if during the currency of the lease, it falls into that condition and is not or cannot be repaired

Specific Performance:

- ⇒ **Marais v Cloete** an obligation to repair is generally so vague that the court cannot supervise an order of specific performance. Same view held in **Alexander v Armstrong** and **Barker v Beckett**. This view is criticized for being an unwarranted generalization.
- ⇒ The rule that a court cannot grant specific performance where the order would be difficult to enforce is open to doubt. It is the duty of the party in whose favour the order is given to repair and the court may then take the necessary steps.
- ⇒ According to our courts, he or she cannot enforce specific performance, the lessee may, however, obtain more or less the same result by making the repairs himself and deducting his costs from the rent. But the lessee may only do this after the lessor has failed to comply with the lessee's demands for repairs.
- ⇒ The tenant may only employ this remedy in the case of ordinary repairs; he or she cannot employ this device to effect structural improvements

Remission of rent: a remission of rent, in accordance with the degree of inconvenience suffered. In essence this is a claim for damages.

Damages: the lessee may claim damages for loss suffered as a result of the defect

- ⇒ Tenants knowledge- where the lessee knows of a defect at the time he or she enters into the contract, he or she loses his or her claim for damages against the lessor for loss caused by that defect. The lessee is under no duty to inspect the property before concluding the lease. Where he does inspect the property, he will lose his claim for damages in respect of all patent defects, which existed at the time of inspection.
- ⇒ Landlord's actual knowledge of the defect- he is liable for loss caused by such defect. Where the lessor gives a warranty without being certain, he is liable whether he was aware of it or not. Fault is not a prerequisite for liability based on breach of warranty.
- ⇒ Where the lessor should have known of the defect- *old writers*: lessor not bound to compensate a lessee for the loss sustained as a result of the lessor's failure to maintain the premises in proper condition unless he knew, or by reason of trade ought to have known, of their defective condition. *Cooper*: the lessor should be held responsible for the loss suffered by the lessee, caused by a defect in the leased thing, even if he, the lessor, had no knowledge of such defect.
- ⇒ Where the lessor has no actual or constructive knowledge- the landlord is not liable unless he or she has given an express warranty. Apart from his or her claim for damages for loss caused by the defect, the tenant may cancel the contract if the defect is serious, or claim remission of rent if the defect is less serious.

Study Unit 8: The landlord must guarantee the tenant against eviction

The lessee's rights against a landlord where the lessee is evicted (warranty against eviction)

The warranty against eviction binds the lessor to compensate the lessee who was evicted from the whole or part of the property by a 3rd person within a better title. The lessor has no title and the owner ejects the lessee, the lessor is liable in damages unless the lessee was aware of the lessor's lack of title

Glatthaar v Hussan

The plaintiff owned a portion of a farm. He sold it to Coetzee who took possession, and before he acquired ownership Coetzee let the property to the defendant. Coetzee did not at any time become the owner because he failed to pay and the plaintiff canceled the sale. After the sale had been cancelled, the plaintiff sued the defendant for ejectment whereupon the defendant pleaded that he was lawfully in possession as a lessee. The plea failed and the order of ejectment was granted. "I may let to you another's land, and if I do so you cannot question my title nor can I deny you the right to hold the land against me, but this will in no way prejudice the rights of the true owner." It is Coetzee who must make good to Hussan (the defendant) whatever loss he has incurred.

- ⇒ The same applies if the lessor originally had adequate title but allowed it to lapse before the end of the lease.
- ⇒ The lessor does not guarantee his title. The only obligation resting on the lessor is to place the lessee in undisturbed possession and to maintain him in his possession.
- ⇒ The law presumes the existence of an *ex lege* warranty against eviction in contracts of lease. The eviction of a lessee is usually governed by the same rules as eviction of a purchaser.
- ⇒ The lessee would have no claim against the lessor if he leaves as soon as a 3rd person threatens to evict him. He must go on paying the rent to avoid breach of contract.
- ⇒ The warranty does not apply if the disturbance is attributable to an act of God (includes expropriation)

The lessee's remedies in the event of eviction

- ⇒ A lessee may **rescind or cancel** the contract if he is totally evicted or evicted to a serious degree.
- ⇒ A lessee who when he enters into a lease, knows or ought to know that the lessor's title is limited, has no right to **damages** if he is required to leave as a result of the termination of the lessor title.
- ⇒ The lessee will, irrespective of his knowledge, have a right to damages if the lessor terminates his right of his own volition.

Study Unit 9: The tenant's duties

1. The tenant must pay the rent
2. The must use the thing in a proper manner
3. The tenant must restore the property to the lessor on the termination of the lease
4. The tenant must carry out any special obligation imposed on him by the agreement of lease.

Study Unit 10: The tenant must pay the rent**The implications of certainty of rent**

- ⇒ If the performance is vague or indefinite, the contract is void of vagueness since enforcement of an obligation, the rights and duties of which cannot be determined, is impossible.
- ⇒ Certainty can be attained in 2 ways:
 1. By expressly defining the rights and obligation the parties wish to create; or
 2. By the parties agreeing to identify an external standard by which the performance should be determined.
- ⇒ Rent is certain when the parties agree upon a definite amount of money, or a definite method whereby rent can be fixed. If the rent is indefinite the contract is void for vagueness

The implications of place of payment**Venter v Venter**

The AD was unanimous that where the contract fixes the date of payment, the debtor must seek out the creditor to tender payment. *Dare* implies having to do something. Where the lessee has assumed an obligation sounding in *Dare*, action on his part is implied

The implications of time of payment

- ⇒ If the parties have agreed that the rent must be paid on a specific day and at a specific place, there is of course no uncertainty about the time of payment. The lessee has until midnight of the pay to pay.
- ⇒ If the lessee has tried unsuccessfully to pay during the afternoon, he need not try to present payment during the evening as well, but if the lessee tries unsuccessfully during the morning, he is expected to try again later in the day. After that *Mora Creditoris* will arise

- ⇒ If payment on a specific day is excused (Sunday, public holiday) payment on the next business day is expected.
- ⇒ If it is the lessor's fault that payment could not be made on the day specified, he will be in *Mora*
- ⇒ If payment of the rent has to be made in advance, payment has to be made on the first day of the period of the lease without out any demand for payment having been made on the lessee
- ⇒ Where the contract states no specific day, the rent becomes due only after the expiry of the lease

The rent must consist in money

- ⇒ If no price is paid for the use of the thing, there can be no lease.
- ⇒ It is recognised that the lessee's performance may also consist in a portion from the proceeds of the thing leased.
- ⇒ Is it so irreconcilable with the character of a lease that the lessee's performance should consist in something other than the payment of a sum of money?

The AD in **Robin v Botha** decided that there was a lease despite the fact that, *in casu*, the lessee's performance did not consist of the payment of money.

- ⇒ Reasons behind the classification of contracts: in our modern law distinctions are drawn between contracts with a view to specific naturalia or to specific requirements which the law describes in the light of the characteristics of a particular kind of contract
- ⇒ Whether a contract, which does not require the "lessee" to render a performance in money, can and should be regarded in the same light as a contract in terms of which the lessee's performance sounds in money i.e. 2 items delivered?
 - It is possible to agree that each party will make available the thing, which he must deliver only for a limited time. If this contract really were a genuine lease, it would be impossible to distinguish, as in a normal lease, between lessor and lessee. This fact entails certain implications when we come to the arrangements relating to the consequences of the contract.
 - It is possible that the one party, as in a bywoner's contract, undertakes to make the thing he has to deliver available to the other on a permanent basis, just as a lessee permanently surrenders the rent to the lessor.
- ⇒ In this type of case there would admittedly be no difficulty in distinguishing between lessor and lessee for the purposes of the consequences of the contract, but problems will still arise in regard to the consequences of the contract, because the naturalia of a lease do not make provision for the case where the lessee's performance consists in the delivery of a thing.
- ⇒ Except in the case of the bywoner's contract, the rent can consist only in money. If the rent does not sound in money the contract is not a lease, with the result that it will be governed by the general principles of the law of contract.

The consequences of a failure to pay the rent on time

- ⇒ If the lessee does not pay the rent on time, he or she naturally commits a breach of contract and the normal remedies for breach of contract are at the landlord's disposal. The lessor may therefore uphold the contract, claim the rent owed and damages in addition. The lessor may also, in certain circumstances, rescind the contract
- ⇒ If there is a term in the contract that the land lord may resile if the tenant fails to pay the rent, the lessor automatically has a right of rescission and there are no problems
- ⇒ At common law, a landlord could not resile before the rent had been in arrears for a period of 2 years. In **Goldberg v Buytendag** the AD decided that the 2-year rule had become superfluous and that a lessor could acquire the right to rescind by giving the lessee a notice of rescission.
- ⇒ The lessor forfeits this right if he waives it expressly or by complication
- ⇒ Waiver takes place if the lessor claims the rent or takes receipt of rent for a certain period of the lease. The lessor can no longer resile on the ground on failure to pay rent for that particular period, but is not barred from resilling on the ground of subsequent failure
- ⇒ Waiver may also take place if the lessor does not resile within a reasonable time after he becomes entitled to do so
- ⇒ If, despite prior acceptance of late payment of rent, the lessor gives the lessee due notice insisting on future payment of rent being timeous and thereafter the lessee fails to pay timeously, the lessor will be entitled to cancel the lease on this ground. In Administrator's Estate **Bhujun v Bux** it was held

that the lessee must prove that “we had been lulled into a sense of false security” before he or she can rely on waiver in such a case

⇒ If a lessee fails to pay the rent he may use his tacit hypothec to secure the rent

Presumption of payment

Where the lessee produces slips for 3 successive yearly payments, there is a rebuttable presumption that the lessee paid the preceding rental

Consequences of failure to pay the rent- eviction procedure

⇒ In the past, in a claim for eviction it was sufficient to allege that the plaintiff is the owner of the property and that the defendant is in possession thereof.

⇒ It was unnecessary for the owner to allege that the defendant was in wrongful or unlawful occupation because ownership alone entitles possession of property

⇒ S 26(3) of the Constitution gave rise to the promulgation of The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 “PIE”

Ndlovu v Ngcobo; Bekker and another v Jika 2003

The question, which arose, was whether PIE applied to persons who once had lawful possession but whose possession for some reason, subsequently became unlawful. In this case, the tenant's lease in the Ndlovu appeal was terminated lawfully but he refused to vacate. In the Bekker appeal a mortgage bond had been called up; the property was sold in execution and transferred to the appellants and the erstwhile owner refused to vacate the property. In neither case did the applicants for eviction comply with the procedural requirements of PIE.

⇒ In cases where defaulting tenants or mortgagors fail to vacate the property they are said to be holding over. PIE applies to “unlawful occupier”, which is defined as meaning someone who occupies land without the express or tacit consent of the owner or person in charge or without any other right in law to occupy such land

⇒ Whether the term unlawful occupier includes holding over. The court in this case held that the significance of this question is that should PIE not apply to cases of holding over, then a landlord or bank can evict a defaulting tenant or mortgagee from an urban residence simply by satisfying the common law pleading requirements

⇒ If PIE is applicable to cases of holding over then the procedure that must be followed is that as set out in the Act itself which also embodies the requirements of S 26(3) of the Constitution. The court came to the conclusion that PIE did apply to cases of holding over. The consequence of this is simply that in order for an owner to obtain an eviction order the procedural and substantive safeguards provided for in PIE have to be met.

Eviction procedure

PIE makes a distinction between unlawful occupiers who have occupied land for less than 6 months and those who have occupied for longer than 6 months.

1. Less than 6 months: at the time when proceedings are initiated a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so after considering all the relevant circumstance (includes: The rights and needs of the elderly, children, disabled persons and households headed by women)

2. More than 6 months: In this instance a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so after considering all the relevant circumstances. (The rights and needs of the elderly, children, disabled persons and households headed by women as well as the fact that land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner)

Study Unit 11: The tenant must use the thing in a proper manner

The lessee has an obligation to use the leased property for the purpose for which it was let

⇒ The lessee must use the property for the purpose for which it was let and he or she must exercise the care of a bonus paterfamilias (reasonable person) in looking after the property.

- ⇒ Test for determining whether the lessee is misusing the property is whether he or she is changing the nature of the property
- ⇒ The lessee merely has the use of the property and cannot appropriate part of the property
- ⇒ Where the agreement gives no indication of the purpose for which the property must be used, the lessee must use it for the purpose for which such property is ordinarily used, provided that the lessee may not do anything, which may decrease the value of the property

The rules, which apply to the planting of trees

- ⇒ The lessee may plant trees, unless the nature of the property forbids it.
- ⇒ The lessee may also be liable to maintain trees where he has undertaken to do so
- ⇒ In dealing with the rights of the lessee (the same as those of a usufructuary). The following distinctions must be made:
 - ❖ *Silva caedua*- a lessee may cut down trees, which grow again after being cut down, and sell the wood for his benefit. He may not cut down *Silva caedua* where such trees have been planted for ornamental purposes
 - ❖ Fruit Trees- may not be cut down
 - ❖ Other trees- may only be cut down for domestic and agricultural purposes. Such trees may not be cut down where they were planted for special purposes

The lessor's remedies where the lessee misuses the property

- ⇒ He may claim damages
- ⇒ He may obtain an interdict restraining the lessee from misusing the property
- ⇒ He may cancel the contract where the misuse is of a serious nature
- ⇒ Abandonment of property: the lessor may both abide by the contract, and sue for the rent when due, or he or she may accept the lessee's repudiation of the lease and sue for damages for breach of contract.
- ⇒ Presumption as to cause of damage: A rebuttable presumption arises that the lessee caused the damage. The lessee must prove that the damage was not caused by him or by those whose acts he or she is responsible.

The lessee's obligation to vacate the property and return it upon termination of the lease

In the same condition as that in which he received it except for normal wear and tear.

Burns v D and G (pty) Ltd the court held that B was interfering materially with the ordinary comfort and convenience of the other tenants in the building. The court held that B's conduct constituted a breach of lease and the breach was sufficiently serious enough to entitle D and G to cancel the lease and eject B,

Study Unit 12: The tenants real right

What does the huur gaat voor koop rule mean?

Huur gaat voor koop= hire comes before sale, meaning that the lessee has a real right

Green v Griffiths: in South African law the lessee obtains a real right. **Rex v Stamp** the same **Trichardt and co v Webb** the court of the Orange FS decided that huur gaat voor koop applied in the OFS, this was the position even in the case of sales in execution.

Johannesburg Municipal Council v Rand Townships Registrar: lessee obtains a real right.

Graham v Local and Overseas Investments: the court recognised huur gaat voor koop but decided that it was not applicable in this particular case

To what type of leases is the huur gaat voor koop rule applicable?

- ⇒ Applicable only to houses and land!
- ⇒ Huur gaat voor koop developed out of the medieval use of land.
- ⇒ **James Bell and co v Irvins and Edwards** the court applied to rule to a lease of cattle. According to sound legal principles there can be no possible reason why the lease of immovables does not also acquire a real right in such movables

How the lessee's real right is established

⇒ As between the parties to the contract the mere contract offers enough protection: the lessee can enforce his or her right against the lessor even if he or she is not in possession of the premises and even if his or her right has not been registered.

Long Leases: more than 10 years:

⇒ In Roman-Dutch law registration was a requirement for the establishment of the lessee's real right.

⇒ An unregistered long lease was also valid against the lessee's successors who had notice of the lease

⇒ Even if a lessee's successor had no knowledge of the existence of the lease, the lessee was protected, by virtue of an unregistered long lease, for the first 10 years of the lease, provided that he or she was in possession of leased property.

⇒ An unregistered long lease was valid for the full term against *successores universali* in contrast with *successores singulari*. *Successores lucrativi*, that is someone who inherits the property and *successores onerosi*, that is someone who buys the property.

⇒ The position regarding a long lease before S2 of act 50 of 1956:

1. *Successores lucrativi* were always bound to the lease for the full period thereof.

2. *Successores onerosi* were bound for the full period of the lease in the following circumstances:

a) *Successores onerosi* were bound for the full period of the lease if the lease was registered against the title deed of the property.

b) Even if the lease was not registered thus, a successor onerosus was bound for the full period of the lease, if he or she knew of the lease.

c) Even if the lease was not registered, and if the successor onerosus did not know of the existence of the lease, he or she was still bound for the first 10 years of the lease, if the lessee was in possession of the leased property. In other words, in this case the lessee was protected for the duration of a short-term lease.

⇒ S2 of act 50 of 1956: no long lease would apply against the successors of the lessor unless it was registered against the title deed of the lease property.

⇒ The AD decided in **kessoopersahd and another v Essop** that the common law was not amended by S2 of act 50 of 1956.

⇒ S1 (2) of act 18 of 1969 replaced S2. The new S applies to leases entered into for a period of at least 10 years or for the natural life of the lessee or another person mentioned in the lease or which from time to time, at the will of the lessee is renewable indefinitely or for periods which are, together with the first period, amount to in all at least 10 years.

⇒ S1 (2) no such lease shall be valid against a creditor or *successores onerosi* of the lessor for a period of longer than 10 years unless it is registered or the creditor or successor had knowledge of the lease.

Short lease

⇒ The lessee's real right vests on his obtaining possession

⇒ Where the purchase has had actual or constructive notice of the lease, the lessee's title is good, even though he is not in possession. The lessee may register the lease and such registration will serve, as constructive notice to any would be purchaser.

⇒ A short-term lessee who is not in possession obtains a personal right only. The lessee can enforce this right against the lessor but not against any other holders of real rights.

The difference between onerous and gratuitous successors

Question: whether the short-term lessee who is not in possession under an unregistered lease, may maintain her lease as against gratuitous successors of the landlord, who do not have notice of the lease?

Answer: YES!

A lessor's successor may be classified according to the following:

1. Whether he or she has succeeded to a whole or a portion of the lessor's estate (universal successor) or to a particular item of the lessor's estate (singular or particular successor).

2. Whether he or she has given value for the property he or she has acquired from the lessor. One who has given value is an onerous successor. One who has not given value is a lucrative successor.

The essential difference between succession *titulo universalis* and *titulo particulari* or *singulari* is that since an estate consists of assets and liabilities, a universal successor takes over not only the assets but also the liabilities whereas a singular successor takes over only a particular asset but no liabilities. A universal successor: is bound to recognise a lease concluded by the lessor even if the lessee is not in occupation, or the lease has not been registered and even if he (the universal successor) has no knowledge of the lease.

A lease, which is not registered, should not bind a particular successor or if the lessee is not in occupation or by a lease of which he or she has no knowledge.

Our courts accept that a lease concluded by the lessor binds a universal successor, but the view is also held that a gratuitous successor is in that same position as a universal one. **Collins NO v Hugo and The Standard Bank 1883 and Caravan and Rivas v New Transvaal Gold Farms 1904** and led Wille to state that our courts have disregarded the distinction between universal and particular success and rather apply the test whether the successor is an onerous or gratuitous one.

→ This view is not supported!

De Wet has also long criticised this view followed by our courts. He maintains that the reason for the successor *titulo universalis* being bound to acknowledge the lease is that he or she, as successor in obligation, becomes debtor as a result of the contract of lease. He or she correctly remarks that this consideration does not necessarily always apply to every successor *titulo lucrative*.

The distinction between *successores lucrativi* and *successores onerosi* found express recognition in S1 of act 18 of 1969 in respect of long-term lease.

The effect of the lessee's real right

- ⇒ Huur gaat voor koop- it should not be concluded from the maxim that it is only the buyers right that has to give way to the lessee's; it applies to the rights of anyone who has established rights to the thing after the lessee's right has been established.
- ⇒ The tenant's real right enjoys preference if it conflicts with any subsequent vested right. The right of the lessee is preferred to purely personal rights irrespective of the time when they were vested. Non-preferent creditors of the lessor are always bound by the lessee's real right

Alienation on property: whether the new owner will, apart from having to allow the lessee to continue in his or her possession, also take over from the original lessor as debtor and creditor in terms of the contract of lease. According to general principles, this is impossible. Claims are transferred by cession and obligations by delegation. According to the general principles of our law, one would therefore say that the new owner need only tolerate the lessee's exercise of his or her real right but that this does not mean that the new owner simultaneously takes over the rights and obligations of the lessor.

Our courts take a different view of the matter. It is said that as soon as the new owner has taken transfer, he or she is, as owner, entitled to the rent and, further, that the seller by alienating the property, releases himself or herself from his or her obligations in terms of the contract of lease, so that his or her obligations will now rest on the buyer. **Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd** "The purchaser (new owner) is substituted ex lege for the original lessor and the latter falls out of the picture. The lessee, in turn, is also bound by the lease and, provided that the new owner recognises his rights, does not have any option, or right of election, to resile from the contract"

The buyer is bound by all the terms of the lease. If the actual terms of the lease differ from the apparent terms, the buyer is bound by the actual terms.

In **Wireohms v Greenblatt**, it was held that the doctrine *huur gaat voor koop* does not apply where ownership of the thing let passes by operation of law and not by virtue of the contract. Where it is the lessor's own doing that a portion of the leased property vests in the local authority, the lessee does have a claim against the lessor.

In **Genna-Wae Properties (Pty) Ltd v Medio-Tronics** the AD held that our law does not recognise that a lessee has a right, on a change in the person of the lessor, to elect whether he or she wishes to continue with the lease or not.

Study Unit 13: The lessor's tacit hypothec to secure the rent

The nature of the lessor's hypothec

- ⇒ The landlord's hypothec is not a lien
- ⇒ A lien's validity depends on possession of the goods (subject to the lien) by the creditor, while in the case of the lessor's hypothec, the goods must be on the leased premises; consequently such goods are in the possession of the debtor (lessee).
- ⇒ As soon as the rent is in arrears, the lessor acquires a personal right to attach all the *invecta et illata* on the premises. This right exists without the parties having to agree to it. It is therefore one of the *naturalia* of the contract
- ⇒ Is merely a personal right so that the lessor cannot pursue it in the hands of innocent third parties, even when it has merely been removed from the premises, the hypothec automatically confers a preference in the event of the sequestration of the lessee's estate. The hypothec is transferred into a real right in the property only after the property has been attached

What goods are subject to the hypothec?

Distinguish between the nature of the goods subject to a sub lessee, and goods belonging to 3rd persons

Nature of goods

- ⇒ The rule of Roman law was that all *invecta et illata* (literally: "things driven or carried onto the property") were subject to the hypothec. But Roman law drew a curious distinction between urban and rural property in this connection; the lessor acquired a hypothec over *invecta et illata* only in the case of an urban lease.
- ⇒ Today all *invecta et illata* on rural and urban property, as well as all the fruits of any property whatsoever, whether such fruits be separated or not, are subject to the hypothec. The lessor may hold all movables brought onto the property as security

Goods exempt from ordinary attachment

- ⇒ i.e. goods exempt from attachment by writ of execution in terms of a judgment for a debt
- ⇒ In **Harris v Tomlinson** it was held that such statutory protection merely defined the extent to which execution on a judgment may proceed and that it did not affect the common-law rights of the lessor.
- ⇒ Movable goods subject to a notarial bond and in the possession of someone other than the mortgagee are not subject to the lessor's tacit hypothec.

Money

Money present on the property is subject to the hypothec of the lessor. The proceeds from the sale of *invecta et illata* which have been deposited in the lessee's bank account are not, however, subject to the hypothec.

Other security

The Land Bank Act provides that the lessor's hypothec does not attach to sheep bought with an advance made by the Land Bank in terms of a farmer's assistance scheme.

Whose goods are subject to the hypothec?

Tenant

All the goods of the tenant are subject to the hypothec, unless they are brought onto the premises for a purely temporary purpose.

Subtenant

All the subtenant's goods permanently on the property are subject to the hypothec, but only to the amount of rent still owed by him or her to the lessee.

3rd persons

In Roman-Dutch law, the movable property of third persons was subject to the lessor's hypothec provided that the goods were brought onto the property with the permission of the owner of the goods and with the intention that they should remain on the property for an unspecified time

The AD held in **Bloemfontein Municipality v Jackson's** that “When goods belonging to a third person are brought onto the leased premises with the knowledge and consent, express or implied of the owner of the goods, and with the intention that they shall remain there indefinitely for the use of the tenant, and the owner, being in a position to give notice of his ownership to the landlord, fails to do so, and the landlord is unaware that the goods do not belong to the tenant, the owner will thereby be taken to have consented to the goods being subject to the landlord's tacit hypothec, and be liable to attachment.

4 factors to be taken into account when considering whether the goods of a 3rd person are subject to the hypothec of the lessor:

1. Provided that the lessor is aware that the goods on the property belong to a third person, those goods are not subject to his or her hypothec
2. If the third person is aware that the goods are being held on the leased property and he or she has given his or her permission that they may remain there in the possession of the other party, those goods will be subject to the lessor's hypothec.
3. If the goods of the third person are not merely temporarily on the leased property but are brought there for the indefinite use of the lessee, they will also be subject to the lessor's hypothec
4. The goods of a third person will only be subject to the hypothec of the lessor if they are brought onto the leased property for the use of the lessee.

The goods of third persons will only be subject to the hypothec in so far as the goods of the lessee and sublessee are insufficient to meet the rent owing to the lessor.

What debts are secured by the hypothec?

The lessor hypothec secures the rent only!!

The legal effect of the hypothec

The lessor cannot pursue the goods if they are removed from the premises, nor can he or she remove the goods or realise them him or herself.

Preference in Insolvency

S 85(1) of the Insolvency act 24 of 1936

“... A landlord's legal hypothec shall confer a preference with regard to any article subject to that hypothec for any rent calculated in respect of any period immediately prior to and up to the date of sequestration but not exceeding:

- a) Three months, if the rent is payable monthly or at shorter intervals than one month;
- b) Six months, if the rent is payable at intervals exceeding one month but not exceeding three months;
- c) Nine months, if the rent is payable at intervals exceeding three months but not exceeding six months;
- d) Fifteen months in any other case.”

Interdict or attachment

The lessor can apply for an interdict restraining the lessee from removing the goods from the premises.

- ⇒ S31 (1) of the Magistrates Courts Act of 1944 provides for an automatic rent interdict. That is, a notice is inserted in the summons prohibiting any person, under severe pain and penalties, from removing the goods (subject to the hypothec) from the premises, pending decision of the action.
- ⇒ In the Supreme Court where the common-law procedure applies, either an interdict or an attachment may be obtained. The effect of such an interdict or attachment is that the landlord does not lose his or her hypothec if the goods are removed from the premises. If the lessee is solvent, the lessor can obtain judgment for the rent and sell the goods in execution; if the lessee goes insolvent, the lessor is a privileged creditor in respect of the goods.
- ⇒ The tacit hypothec does not; give the lessor a real right to the goods, which are subject to the hypothec.
- ⇒ The lessor may not pursue the goods once they are in the possession of a 3rd party.
- ⇒ The lessor's real right exists only once he or she has confiscated the goods that are on the leased property or, if the goods have been removed, before they have reached their new destination.
- ⇒ The hypothec is applicable only if the lessee owes the lessor rent.

How the doctrine of quick pursuit operates

- ⇒ The doctrine of “quick pursuit” relates to when an attachment will be granted.
- ⇒ The lessor may apply to the court for an attachment order while the goods are in process of being removed or are in transit. He or she may of course also apply for an interdict to prohibit the lessee from removing the goods from the leased property.
- ⇒ **Ex parte Coull** the court granted an attachment order. In **Webster v Ellison** the AD while recognising the principle of quick pursuit, refused an attachment order, since the removal of the goods had been completed at the time the court was approached.
- ⇒ **Webster** case does contain very important dicta on quick pursuit. These dicta show that our courts will grant an attachment order where approached before the goods have reached their destination. Those goods that have not yet reached their destination at the time the attachment is requested may then be taken back to the leased premises, where the hypothec is revived.

Effect of termination of lease

The termination of the lease does not discharge the hypothec.

What will the position be if the goods are removed from the premises after termination of the lease?

Spayile v Bouwer although in Spayile the goods (cattle) were still on the premises and had not yet been removed

Frank v Van Zyl it was held that the landlord's hypothec was lost when the tenant removed movables to a new place. It was shown that before receiving notice of a rule nisi, the tenant had removed movables on the leased property to another farm.

Study Unit 14: Remission of rent

What is meant by remission of rent?

- ⇒ Remission of rent is a doctrine, which our law inherited from Roman law.
- ⇒ The lessee is wholly or partially released from his or her obligation to pay the rent if he or she is prevented by vis maior from having the full use and enjoyment of the thing
- ⇒ De Wet and Van Wyk are of the view that the rule is nothing but “an expression of the principles of supervening impossibility of performance” Where circumstances beyond the control of the parties make it impossible for the lessee to have the full use and enjoyment of the thing, they hold that it is really the lessor's performance which has become impossible
- ⇒ It must be conceded that in some cases where the doctrine is applied, it can indeed be said that the lessor's performance has become impossible.
- ⇒ If the thing becomes unsuitable for that purpose as a result of vis maior ensuing after the conclusion of the agreement, the lessor's performance becomes impossible
- ⇒ Only if it were the lessor's duty not only to deliver and maintain the property in a specific condition, but also to ensure that the lessee can use the property in a profitable manner would there be any question of supervening impossibility of performance.

Rules for the remission of rent

- ⇒ A lessee who is deprived through vis maior or casus fortuitus of the use and enjoyment of the property let to him or her is entitled to remission of rent, is that it is an example of supervening impossibility of performance which extinguishes the contract wholly or partially, as the case may be
- ⇒ Distinction should be drawn between cases of total destruction and cases where the lessee does not have use and enjoyment of the property
- ⇒ In the case of total destruction the contract would obviously be extinguished as a result of supervening impossibility
- ⇒ In cases where the lessor does not have use and enjoyment of the property the lessor is not being prevented from performing. The lessee remains in occupation of the property. The reason being that the lessee is entitled to remission of rent is that the continuous full beneficial use and enjoyment of the property was a supposition upon which the parties contracted and, therefore, on failure of their supposition the lessee is entitled to claim remission of rent. This is acceptable provided that “supposition” is interpreted as meaning simply a tacit stipulation.
- ⇒ The lessee will thus be entitled to demand remission of rent if the loss has been caused by a vis maior

What is meant by Vis maior and casus fortuitus?

Vis maior refers to a superior power of force, which cannot be resisted or controlled. Casus fortuitus (a species of vis maior) is an exceptional or extraordinary occurrence not reasonably foreseeable.

Drought

- ⇒ Drought is exceptional and unpredictable. In certain South African regions, droughts are commonplace and should thus not be considered as vis maior in these regions; in other regions drought may well be considered as vis maior.
- ⇒ Once the crops have been reaped the lessee naturally becomes owner of the crops and any loss of the crops thereafter must be borne by the lessee for res perit domino (the loss of the thing is to the prejudice of the owner).

Business leases

- ⇒ The principle of remission of rent is applicable to business leases as well. But the form of vis maior is usually of another variety.
- ⇒ A foreseeable occurrence is deemed to have been in the contemplation of the parties and is therefore not a ground for remission

When is abandonment of property is possible

Where the loss is so serious that the leased property becomes useless

Abandonment may be justifiable even though the loss is only imminent.

Where a tenant justifiably abandons the property, he is naturally only liable for the rent during the period of occupation.

Whether a release or remission is granted depends on whether the thing has become unfit for the purpose for which it was let

What amount the rent can be reduced i.e. amount of remission

The amount of remission is within the courts discretion. Where the lessee has paid in advance, he or she may of course recover the lessor.

Study Unit 15: Compensation for improvements

Our law relating to the lessee's rights to compensation for improvements is partly contained in articles 10-13 of a placaat of the States of Holland and West Friesland (Sept 1968).

De Beers Consolidated Mines v London and South African Exploration Co the court held that the above articles are applicable in South Africa. This decision was upheld on appeal to the Privy Council and was approved by the AD in **Van Wezel v Van Wezel's Trustee**

The type of leases to which the placats apply

Articles 10±13 only mention a lease of land, which means the common law still applies to all other leases.

Article 10 of the Placaat passed by the Estate of Holland, provides that a tenant of rural property who made improvements could only be compensated for them if the landlord gave it consent and it had vacated the property The position regarding improvements on agricultural leases

Business Aviation Corporation (Pty) and Another v Rand Airport Holdings (Pty) the court held that article 10 does not apply to urban property but only to rural leases. Consequently, a tenant has an enrichment lien entitling it to remain in occupation of the leased property after the lease had ended, until the amount of its claim for the improvements it had made to the property had been determined and paid.

Agricultural leases

Distinguish between annexures, improvements that are not annexures, trees and crops. The lessee cannot claim any compensation for improvements, which are not annexures.

Trees

Article 13

That in future no one shall be liable to pay to tenants, or their heirs, any compensation for any plantings, plantations or orchards unless the tenant can legally prove that they had an instruction or command, from the owners, in which case, and not otherwise, the owner shall pay compensation to the lessee at the price the trees cost at the time of the planting and no more.

In the absence of an agreement for compensation the lessee does not get any compensation for the planting of trees. And where the lessor merely promises to pay, without fixing the amount, the lessee gets only the price of the trees at the time of planting.

Crops

The lessee is entitled to a reasonable amount of compensation for ploughing, sowing and seed corn. Since the land is let for agricultural purposes, the lessor's consent is not necessary, for an agricultural lease implies ploughing and sowing

What is meant by an annexure?

Annexures include fences, dams, bridges and aqueducts.

Annexures made without the lessor's consent

Article 12

And if any structure is erected without the consent of the owner, the lessee shall be bound before the expiration of the lease to actually break down and remove the materials from the ground, under penalty that whatever shall be found thereon after the prescribed time, shall come to and remain for the benefit of the owner.

Annexures made with the lessor consent

Article 10

The lessor must compensate the lessee for such annexures, but further provides that the lessee of rural land cannot remain in occupation until such improvements have been paid for; the tenant of rural land may only institute action for compensation after vacating the land.

Article 11

And in the assessment of the compensation, account shall be taken only of the bare materials, without sand, lime and wages such as they shall be actually worth at the time of the said assessment just as if they were removed from the ground: Thus the said homesteads and lands shall be hypothecated for the satisfaction of the estimated amount of the aforesaid materials and remain so, until the same be actually paid
- Not sound public policy!

Necessary improvements

What is the position in the case of necessary improvements, irrespective of whether the improvements consist of annexures or not? Something necessary for the preservation of the property. The very fact that the placats do not make special provision for necessary improvements raises a strong presumption that no distinction should be made between necessary and useful improvements in the case of agricultural leases

In the **De Beer** case there is a dictum of Lord de Villiers to the effect that the placats should not be applied in the case of necessary improvements and that in such a case the lessee is entitled to compensation as if he or she were a *negotiorum gestor*- followed in **Bayley v Harwood**. Our courts reject this part of the placats.

The position regarding improvements on other leases

- ⇒ The placats do not apply and the common law must still be applied.
- ⇒ If the lessee does not remove his or her property, the lessor must pay compensation for necessary and useful improvements, but not for luxurious improvements
- ⇒ The scale of compensation is, of course, the measure by which the value of the property is enhanced, unless the improvements actually cost less, in which case the lessor must pay this lesser amount. In this case the consent of the lessor to the improvements is not necessary for the recovery of compensation, for the placats do not apply.
- ⇒ The lessee may remain in occupation until he or she has been compensated.

The lessee's right to remove the annexure

The lessee may remove all his or her movable property from the premises, unless it has been attached for rent under the lessor's hypothec

Agricultural leases: article 12 explicitly gives the tenant the right to disannex and remove all annexures, whether or not they became immovable by annexure.

Other leases:

The common law still applies. In Roman and Roman-Dutch law the rule was simple: *quidquid inaedificatur solo, solo cedit* (whatever is built on the soil is an accessory to the soil).

- ⇒ In civil law, as in Roman-Dutch law, the accessory has the same character as the thing to which it is acceded. In character, a house is an immovable both because it is built into the soil and because it is placed there presumably for a permanent purpose.
- ⇒ Therefore, permanent annexures made by the lessee become part of the property and fall under the ownership of the lessor
- ⇒ If a movable is annexed to an immovable with the intention that it should remain there permanently, the movable itself becomes an immovable but this does not happen where the movable was not intended to remain there for a permanent purpose
- ⇒ The presumption is that where a lessee fixes a movable to the property, he or she has no intention of fixing the movable permanently.
- ⇒ Whether an article, originally movable, has become immovable through annexation by human agency is in reality often one of some nicety. In this case, the elements to be considered are
 - The nature of the particular article
 - The degree and manner of its annexation
 - The intention of the person annexing it

Study Unit 16: Subletting, cession, delegation and assignation

What does subletting mean

- ⇒ Where the tenant in turn lets the leased property to another
- ⇒ Subletting is nothing but an ordinary contract of lease.
- ⇒ The lessor is incidentally also the lessee of the property, does not influence the contractual rights and obligations of the parties involved.

May rural and urban premises may be sublet

- ⇒ Main question: whether the lessee is entitled to sublet the property. Does the original lessee not perhaps commit breach of contract towards his or her landlord if he or she sublets the property?
- ⇒ If there is a clause in the contract that the lessee may not sublet, a lessee who disregards this will of course be committing breach of contract if he or she sublets the property.
- ⇒ However, breach of contract will arise only if he or she sublets and not if he or she merely allows another to have the use and enjoyment of the thing
- ⇒ Undoubtedly the Roman law of sublease was received in the Netherlands, that is, a lessee of urban as well as rural premises could sublet without the consent of the landlord.

Subletting of rural premises

Conflict of authority in Roman-Dutch law concerning the question whether or not a lessee of rural premises may sublet without the lessor's consent.

Depends on three placata: a placat of Charles V dated 1515, the Political Ordinance of 1580, and a placat of the States of Holland dated 1658.

1. Charles V dated 1515: "no tenants shall be allowed to transfer any lease after the expiration of the same, unless with consent..." This placat prohibited cession of a lease after the expiration thereof, but nowhere did it prohibit the cession of an original lease.
2. The Political Ordinance of 1580 merely re-enacted the placat of 1515. Grotius, writing in 1620, said: "A tenant may let the hired property again to another, unless otherwise agreed..."

In 1644 Neostadius wrote: "Although by the civil law a tenant was allowed to cede to another the land leased, by the placata of our princes it is otherwise". In 1698 Voet held: "It has been established by our customs that leased lands cannot be sublet without consent..."

3. In 1658 the placat of the States of Holland, Article 9 was enacted. It read: "... nor shall any occupiers or tenants, either pending and during the lease, or after the expiration thereof, make over directly or indirectly zoodanige hyre of lands by sale, exchange, donation or other contracts, without previous written consent of the owner..."

- ⇒ What does *zoodanige* refer? Whether *zoodanige* refers to this lease or whether it refers to the original lease- Van Leeuwen states that the lessee may sublet without consent, and he makes no special mention of rural property. The authors of the *Regtsgeleerde Observatien* held that the sublease of land was forbidden by the *placaat* of 1658. Van der Keessel noted that article 9 of the *placaat* of 1658 forbade the subletting of rural premises without consent.
- ⇒ Grotius, Van Leeuwen, Groenewegen and Wassenaar held that the lessee may sublet, while Voet, Neostadius, Van der Keessel and the authors of the *Regtsgeleerde Observatien* did not. However, it is most important to note that Grotius *cum suis* do not rely on the *placaats*. (Grotius obviously had knowledge of the first two *placaats* and we agree with him that they do not forbid a sublease of rural premises.)
- ⇒ **De Vries v Alexander** it was held that in terms of the *placaat* of 1658, a lessee of rural property cannot sublet without consent. The Orange Free State court in *Visser v London and Jagersfontein Diamond Mining Co* followed this case. However in, **Eckhard v Nolte** the Transvaal court held that the relevant *placaats* were not in force in South Africa and that a rural lessee could therefore sublet. But this view was overruled by the AD in *Rubin v Botha*.

*Neither of the above-mentioned two opinions is correct. The *placaat* of 1658 is doubtlessly part of our law, but S 9 does not apply to subletting. The correct point of view seems to be that the lessee of rural property is free to sublet.*

Subletting of urban premises

- ⇒ The rule of Roman law is still in force in the Republic and an urban lessee may sublet without consent- established by a long line of cases in South Africa.
- ⇒ The lessee must exercise this power to sublet judiciously. Voet says that the lessee may not sublet where the sublessee “is such a person that his using it would be ... more prejudicial to the thing hired than their use by the lessee”

Cession of the rights under a lease

When may cession take place?

- ⇒ General principles, the lessee may, by means of cession, transfer his or her rights in terms of the lease to a third party without the cooperation of the lessor.
- ⇒ A cession of rights from the lease of rural premises may, on sanction of nullity, take place only with the preceding written consent of the lessor, in terms of S9 of the *placaat* of 26 September 1658.

Consequences of a cession: cession does not affect the position of the lessee as debtor in terms of the lease. The effect of a cession by a lessee is that the cessionary becomes the lessor's creditor but the lessee remains the lessor's debtor.

Difference between cession and sublease

- ⇒ Cession: The lessee transfers his or her contractual claim to possession to the cessionary through cession - only the cessionary is now entitled to possession, although the original lessee remains liable for the rent; only his or her rights have been transferred, after all, not his or her obligations. In consequence of the cession there is now a direct legal tie between the cessionary and the lessor.
- ⇒ Sublease: there is no legal tie between sublessee and lessor; the legal tie is only between lessee and sublessee: the lessee lets the thing to the sublessee, so that the lessee becomes lessor in relation to the sublessee

Floral Displays (Pty) Ltd v Bassa Land and Estate Co (Pty) Ltd:

“Whatever rights the sub-lessee may acquire he acquires from the lessee by virtue of the agreement of lease concluded by them; his rights do not derive from the lessor. But, when the lessee cedes or transfers his rights under the lease to a third party, he divests himself of such rights by a dispositive act which can in no sense be said to be the same as the act by which he sub-lets the premises”

- ⇒ Doubt about whether a cession of a contract of lease has to be in writing in terms of the Alienation of Land Act 68 of 1981. Van Rensburg and Treisman concluded that it does not have to be in writing.

Delegation

What is delegation? Where the lessee is replaced by another as debtor, and takes place by means of a novation agreement entered into by all three persons concerned.

Assignment

What is assignment? Refers to the case where another person replaces the lessee in his or her capacity as both creditor and debtor. He or she effects the transfer of his or her rights by means of a cession thereof to the other person and the transfer of his or her obligations are naturally a delegation governed by the normal principles of delegation. A sublessee may also cede his or her rights to another.

Prohibition of transfer

- ⇒ The lessee must comply with any contractual prohibition on cession, waiver, making-over or subletting by the lessee without the lessor's permission
- ⇒ Commits a breach of contract. Mere waiver of possession by the lessee in favour of a third party, without his or her obtaining remuneration for doing so, does not, however, contravene such a prohibition.
- ⇒ A prohibition relating only to cession does not prevent subletting, although a prohibition on subletting is apparently wide enough to cover cession as well

Study Unit 17: The termination of a lease

Mutual agreement

The agreement may be concluded orally even in the case where the contract of lease was required to be reduced to writing. Unless otherwise agreed upon, such agreement has no effect on already existing obligations.

Effluxion of time

- ⇒ A lease is terminated automatically by effluxion of time where the lease is for a definite period
- ⇒ Express renewal; the lease gives the lessee an option to renew the lease. Where no date is fixed for notice by the tenant of his or her exercise of the option of renewal, he or she may give notice that he or she wishes to exercise his or her option during the subsistence of the lease and within reasonable time before its expiry, but not after it has expired
- ⇒ Tacit renewal comes about if, immediately upon a lease's expiration, a lessee continues to hire the same property from the same lessor. Although the parties and the subject matter must be the same for renewal there may be a variation of the term of the original agreement. Renewal of a lease brings a new lease into existence.
- ⇒ The party claiming a tacit renewal must prove this,
- ⇒ The conduct that constitutes relocation depends on the circumstances of the case
- ⇒ Where the landlord had accepted rent under the mistaken impression that the lease was still in force, it has been held that there was no relocation
- ⇒ A tacit renewal is not a renewal of the old lease, but the creation of an entirely new lease
- ⇒ Until the contrary is proved, it will be presumed that the conditions of the new lease are the same as those of the original lease
- ⇒ Which terms of a lease are deemed to be incorporated on tacit renewal? Discussed in the case of **Doll House Refreshments (Pty) Ltd v O'Shea and Others** the court held that here there was a presumption that the property was relet at the same rent and that all those provisions that were incidental to landlord and tenant were incorporated in the tacit relocation. He further held that those provisions of the original lease which were collateral, independent of and not incidental to landlord and tenant, were not presumed to be incorporated in the reletting
- ⇒ As regards the duration of the tacit relocation, the old authorities distinguished between rural and urban tenancies. In the case of rural tenancies: most of the Roman-Dutch authorities (including Voet) held that the duration of the tacit relocation was only for a period long enough to enable the lessee to collect the fruits. Urban tenancies: most authorities hold that the tenant is bound only as long as he or she remains in occupation, that is, the tacit relocation is a tenancy at will and the tenant may leave without notice.
- ⇒ It is entirely a matter to be deduced from the conduct of the parties
- ⇒ It is best to presume that a tacit relocation gives rise to a periodic lease, that is, it may be terminated by reasonable notice by either party

Notice

- ⇒ A lease for an unspecified period may be terminated by either of the parties after reasonable notice has been given. Notice is reasonable if the lease will expire at the end of a rental period and if it offers the other party a reasonable opportunity to make alternative arrangements
- ⇒ A lease at will of either party can, of course, be terminated only by notice given by the person by whose leave the lease was given.

Confusio- Merger

The lease is therefore extinguished if the lessee buys or acquires the leased property by other means

Destruction of the property

A lease is terminated by destruction of the leased property, where such destruction is not the lessee's fault. Where the destruction is the lessee's fault, he or she is liable for rent for the remainder of the lease and, of course, for the value of the property as well. If the property is not totally destroyed, however, the lease is not terminated

Rescission of the contract- following breach of contract

- ⇒ A lease may also be terminated by one of the parties' resiling from the contract on the ground of the non-performance of obligations by the other party. Where the lessee cancels the contract unilaterally on the ground of the lessor's breach of contract, he or she remains liable for rent until he or she has quitted the premises altogether, that is until he or she has given the lessor the free and undisturbed possession thereof.
- ⇒ When the lessor cancels the contract on the ground of the lessee's breach of contract, he or she may also, according to **Eastern Investment Co (Pty) Ltd v Edwards** claim rent pro-rata for the period during which the lessee was in possession until the contract was finally cancelled
- ⇒ As far as a lessee's failure to pay the rent timeously (his or her mora debitoris) is concerned, the common-law rule was that the lessor could cancel the lease when the rent was two years in arrears.
- ⇒ Whether a lessor could acquire a right of cancellation before the rent was two years in arrears by giving a notice of rescission to the lessee. In **Goldberg v Buytendag Boerdery Beleggings (Edms) Bpk supra**, the AD decided that the two-year rule had become a superfluous historical anachronism without any useful function and that a lessor could indeed acquire a right to rescind by giving the lessee a notice of rescission.

Extinction of landlord's title

If the landlord's title is extinguished, this does not necessarily imply the termination of the lease, but the lessor will commit breach of contract if the lessee is evicted.

Insolvency**Landlord**

- ⇒ Insolvency of the landlord does not terminate a lease, provided of course, that all the necessary formalities have been complied with
- ⇒ In certain circumstances the lessor's insolvency does terminate the lease, that is, where the curator may sell the property free from the lease.
- ⇒ In terms of the Insolvency Act of 1936, as amended, a stipulation in a lease that the lease shall terminate or be varied on the insolvency of the lessor is null and void.

Lease

At common law the insolvency of the lessee terminated a lease

S37 of the insolvency act:

- I. A lease entered into by any person as lessee shall not be terminated by the sequestration of his estate, but the trustee of his insolvent estate may terminate the lease by notice in writing to the lessor: provided the lessor may claim from the estate, compensation for any loss which he may have sustained by reason of the non-performance of the terms of such lease.
- II. If the trustee does not, within three months of his appointment, notify the lessor that he desires to continue the lease on behalf of the estate, he shall be deemed to have terminated the lease at the end of three months.

- III. The rent due under any such lease, from the date of sequestration of the estate of the lessee to the termination or cession thereof by the curator, shall be included in the costs of the sequestration. This means that the lessor has, for the rent for three months, a preferent claim against the free residue of the insolvent estate. Where the trustee of the insolvent lessee continues the lease, he must, naturally, pay the rent in full.
- IV. The termination of the lease by the trustee in terms of this S shall deprive the insolvent estate of any rights to compensation for improvements, other than improvements made in terms of an agreement with the lessor.
- V. A stipulation in a lease that the lease shall terminate or be varied upon the sequestration of the estate of either party shall be null and void, but a stipulation in a lease which restricts or prohibits the transfer of any right under the lease or which provides for the termination or cancellation of the lease by reason of the death of the lessee or of his successor in title, shall bind the curator of the insolvent estate of the lessee or of his successor in title, as if he were the lessee or the said successor, or the executor in the estate of the lessee or his said successor, as the case may be.

Death and legislation

Definite period

Death does not terminate a lease where the lease is for a definite period

Lease for an indefinite period

- ⇒ Does the lease automatically terminate at the end of the month? If it does not, to whom must the lessor give notice? And as far as the estate is concerned, must the lease continue until an executor is appointed, so that he or she may terminate the lease by notice?
- ⇒ It may be argued that, pending the appointment of an executor, the Master steps into the shoes of the lessee and that the Master therefore may continue the lease (by failing to give notice). In such a case, notice may be given to and by the Master, until an executor has been appointed, whereupon the last mentioned may give and receive notice.
- ⇒ A lease from time to time will survive after the efflux of the period of lease during which the lessee died only if the necessary consensus can be construed.

Lease at will: the lease is terminated by the death of either lessor or lessee

Express provision

An executor in the estate of the lessee is bound by a provision in the lease for the termination of the lease by the death of the lessee or of his or her successor.

Legislation

- ⇒ S 6 of the Sexual Offences Act 23 of 1957: the lease of a house or a place which becomes a brothel after the conclusion of the contract, is terminated and becomes void as from the date of that event.
- ⇒ Where the inhabitant of a hotel room merely lives an immoral life does not fall under this S. In **Lomax v Killarney of Durban (Pty) Ltd** the proprietor of a hotel sued an occupant of one of its rooms claiming cancellation of agreement and ejection, the conduct complained about being that defendant had used the room for immoral purposes. An exception to the declaration was upheld. A landlord does not have the right to eject his or her tenant of a house, a flat or a room for privately living an immoral life, whilst disturbing no one and creating no nuisance, nor causing anyone any patrimonial loss.

Study Unit 18: The Rental Housing Act 50 of 1999

- ⇒ The Rental Housing Act 50 of 1999, which came into force on 1 August 2000, supersedes the Rent Control Act 80 of 1976. One of the biggest changes effected by the Rental Housing Act will be an expansion of consumer protection. In theory this will protect the most exploited people such as poor families paying exorbitant rents to live in backyard huts, shacks, garages and outbuildings.
- ⇒ Makes provision for rental housing tribunals
- ⇒ Can take up the cudgels on behalf of any complainant anywhere
- ⇒ They have the power to end unfair practices and to put a stop to overcrowding, unacceptable living conditions, exploitive rentals and lack of maintenance.

- ⇒ Able to impose fines or jail sentences of up to two years. They can hear complaints from landlords as well as tenants
- ⇒ Landlords' rights include prompt and regular receipt of rent, receipt of unpaid rent, the right to terminate a lease on grounds that do not constitute an unfair practice, the right to receive a property back in a good state of repair, to repossess a property through a court order and to receive compensation for damages.
- ⇒ Tenants' rights include the right not to have their home or property searched, their possessions seized (except by court order) or their privacy or communications infringed. Visits to inspect the property may be made only after tenants have received reasonable notice. Surprise visits are forbidden.
- ⇒ Tenants may now also demand written proof of how much interest has accrued to their deposits, which the lessor is compelled to place in an interest bearing account.

Application of the Rental Housing Act

Aims of objectives

- ⇒ The Act introduces stability into the rental housing market, thus encouraging private investment in the sector.
- ⇒ The Act empowers tenants to challenge irresponsible landlords to provide rental accommodation of a standard commensurate with rental levels.
- ⇒ The Act clarifies the respective rights and duties of the parties involved by introducing appropriate lease agreements and creating the basis for provincial tribunals to facilitate dispute resolution in the rental-housing sector.

Definitions

Dwelling: includes any house, hostel room, hut, shack, flat, apartment, room, outbuilding, garage or similar structure which is leased, as well as any storeroom, outbuilding, garage or demarcated parking space which is leased as part of the lease

Financial institution: a bank as defined in the Banks Act, 1990 (Act No 94 of 1990)

Head of department: the officer in charge of a department of the provincial government responsible for housing in the province

House rules: means the rules in relation to the control, management, administration, use and enjoyment of the rental housing property

Landlord: the owner of a dwelling, which is leased and includes his or her duly authorised agent or a person who is in lawful possession of a dwelling and has the right to lease or sub-lease it

Lease: an agreement of lease concluded between a tenant and a landlord in respect of a dwelling for housing purposes

MEC: the member of the Executive Council of a province responsible for housing matters

Minister: the Minister of Housing

Periodic Lease: a lease for an undetermined period, subject to notice of termination by either party

Prescribed: prescribed by regulation by the MEC, by notice in the Gazette

Regulation: a regulation made in terms of S 15

Rental housing property: includes one or more dwellings

Tenant: the lessee of a dwelling, which is leased by a landlord

This act: includes any regulation

Tribunal: a Rental Housing Tribunal established under S 7

Unfair practice: a practice prescribed as a practice unreasonably prejudicing the rights or interests of a tenant or a landlord

- ⇒ Business premises are excluded and the applicability of the act to situations where a dwelling is used simultaneously for industrial or commercial purposes or where a profession is carried out from "home" will have to be determined

⇒ It is assumed that hotels and holiday accommodation are excluded from the application of the act, but furnished dwellings; licensed clubs and boarding houses appear to be included

The general and statutory provisions

The general provisions

- ⇒ S4 (1): gives effect to S 9(4) of the Constitution and prevents or prohibits unfair discrimination against prospective tenants and/or the members of their households in advertising of, or negotiations concerning, dwellings to let, as well as against tenants, their household and bona fide visitors during a lease.
- ⇒ S4 (2): the right to privacy is actively protected in that the tenant's right to privacy limits the exercise of the landlord's right of inspection to a reasonable manner after reasonable notice and S 4(3) prohibits the landlord from searching the person, home or property, seizing possessions without court order and infringing of the communications of the tenant, household and bona fide visitors of the tenant
- ⇒ S 4(5)(a): prompt and regular payment of the rent and other charges.
- ⇒ S 4(5)(b): the recovery of unpaid rental or other moneys due and payable after obtaining a ruling by a rental housing tribunal or a court order.
- ⇒ S 4(5)(c): termination of the lease on grounds specified in the lease and not prescribed as a practice unreasonably prejudicing the rights or interests of the tenant.
- ⇒ S 4(5)(d)(i): on termination of the lease, the landlord has the right to receive his property in a good state of repair, save for fair wear and tear
- ⇒ S 4(5)(d)(ii): of the lessor's property after obtaining a court order.
- ⇒ S 4(5)(e): claiming compensation for damage to the property caused by the tenant, household or visitors of the tenant
- ⇒ S5 (1) leases need not be in writing; if the tenant requests so, the landlord must reduce the lease to writing (s 5(2)). The landlord cannot after conclusion of the contract unilaterally decide to reduce the lease to writing

Standard provisions:

- ⇒ All leases, whether in writing or not, are deemed to include the following standard provisions, which may not be waived by the tenant or the landlord (s 5(3) and (4)):
- ⇒ Receipts: The lessor must provide the lessee with a written receipt for each payment received from the tenant (s 5(3)(a). The lessor must also provide receipts to the lessee as proof of costs incurred by the lessor in repairing damage caused to the dwelling during the lease period- including replacing keys
- ⇒ Deposits: To demand a deposit is permissible, but the deposit may not be more than the amount specified in the contract (s 5(3)(c)).
 - ❖ The act does not limit the amount of the deposit.
 - ❖ The deposit must be invested by the landlord in an interest-bearing account with a financial institution and the lessor must pay the tenant interest at the applicable rate, which may not be less than the interest rate on savings accounts with a bank.
 - ❖ When the lease is terminated, the lessor may use the deposit and interest towards the payment of unpaid rental or any other amounts due and payable by the tenant under the lease, including the reasonable cost of repairing damage to the dwelling during the lease period and the cost of replacing lost keys.
 - ❖ The lessor must refund this to the tenant within 14 or 21 days of restoration of the dwelling to the lessor (s 5(3)(g) and (m)). If no money is owed in terms of the lease, the lessor must refund the deposit, together with the accrued interest to the lessee, without any deduction or set-off, within seven days of termination of the lease (s 5(3)(l)).
- ⇒ Inspection: before and after occupation to pick up any defects or damage to determine the lessor's responsibility for rectifying such defects or damage as well as to register such defects or damage in a list (s 5(3)(c)) which list must be attached to the lease, if the lease is a written lease (s 5(7)).
 - Upon termination the parties must arrange a joint inspection of the premises- three days before the end of the lease
 - If the lessor fails to inspect the premises in the presence of the lessee, such failure is deemed to be an acknowledgement by the lessor that the premises are in a good and proper state of repair. In this case, the lessor will have no further claim against the lessee who must then be refunded the full deposit including interest (s 5(3)(j)).

- If the tenant fails to respond to the lessor's request for an inspection, the lessor must inspect the premises within seven days from the termination of the lease in order to assess any damages or loss, which occurred during the lease period
- ⇒ Vacation without notice: If the lessee should vacate the premises before expiration of the lease, without notice to the lessor, the lease is deemed to have expired on the date that the lessor established that the tenant had vacated the premises. The lessor retains all his/ her rights arising from the lessee's breach of the lease contract
- ⇒ Tacit renewal: If the lessee should vacate the premises before expiration of the lease, without notice to the lessor, the lease is deemed to have expired on the date that the lessor established that the tenant had vacated the premises. If this should happen, the lessor retains all his/ her rights arising from the lessee's breach of the lease contract.
- ⇒ Written leases: written lease must include the essentials of the contract of letting and hiring of a thing, namely the names of the parties, a description of the premises, and the amount of rent
 - ❖ The addresses of the parties, any other charges payable, provision for a reasonable escalation, if wanted, when payments are to be made if they are not to be made monthly, the amount of the deposit, the period for which the lease is to be concluded as well as the notice period.
 - ❖ Attached to the contract must be a copy of the house rules, if there are any and the list of defects registered during the inspection must also be attached
 - ❖ Noncompliance with these provisions of the Act causes the agreement to be invalid, which leaves the contracting parties without the protection of the act and without the protection of the common law of lease.

Rental housing tribunals

- ⇒ Purpose is to make possible a process of dispute resolution
- ⇒ A rental housing tribunal may be established by the member of the executive council of a province responsible for housing matters (MEC).
- ⇒ Nominations for membership are invited by the media and by notice in the provincial gazette- between three and five members for a maximum period of three years
- ⇒ A chairperson chairs the tribunal.
- ⇒ One or two of the members must have expertise in property management or housing development, and one or two must have expertise in consumer matters pertaining to rental housing or property development
- ⇒ The chairperson determines on which days, during which hours and at which place the tribunal will sit
- ⇒ The quorum comprises three members of which at least one member must be an expert in property management or housing development and one must have expertise in consumer matters in the fields of rental housing or housing development

Staff and funding: appointed by the provincial department responsible for housing and funded by money from the provincial legislature.

What are the functions and powers of the rental housing tribunal?

The functions of rental housing tribunals S 13(1) & (2)

- ⇒ Main function is dispute resolution in regard to unfair practices.
- ⇒ If it appears prima facie that a dispute concerning an unfair practice exists, the tribunal must enter the particulars of the dwelling in the complaints' register. Thereafter an inspector investigates whether the dispute in question relates to an unfair. If it is, the dispute may be resolved through mediation- the tribunal appoints a mediator. The mediator may be a member of the tribunal, a member of staff or any person deemed fit by the tribunal.
- ⇒ If the view of the tribunal, mediation is not a viable option or if the mediator has certified that the mediation was unsuccessful, the tribunal conducts a hearing and makes a just and fair ruling

Powers of the tribunal

- ⇒ It may require a rental housing information office to submit reports and to give advice regarding any inquiries and complaints received. Inspectors can be required to appear in order to give evidence, to provide information, or to produce any report or other document concerning inspections conducted in respect of a complaint.

- ⇒ It may summon any lessee or lessor as well as any other person who may be able to give evidence relevant to a complaint, or any person who may reasonably be able to give information of material importance concerning a complaint or who has in his or her possession or custody or control any book, document or object and to produce any such book, document, or object
- ⇒ It may make a ruling that the regulations relating to unfair practices must be complied with or it may make any other ruling to terminate an unfair practice providing that such ruling is just and fair (s 13(4)(c)). It may also rule to discourage overcrowding, unacceptable living conditions, exploitative rentals or lack of maintenance
- ⇒ It may refer the matter to a competent body or local authority for investigation. A mediation agreement may be made a ruling of the tribunal
- ⇒ The tribunal's main priority is to eradicate unfair practices in the rental-housing sector.
- ⇒ May determine what constitutes a just and equitable rental to both lessee and lessor
- ⇒ Three determining factors which must be taken into account: the current economic conditions of supply and demand, the need for a realistic return on investment, and the measures introduced by the Minister of Housing in the national policy framework on rental housing
- ⇒ The legislator stipulates that a tribunal must consider five factors before reaching a decision:
 - ❖ The regulations on unfair practices
 - ❖ The provisions of the lease
 - ❖ The common law
 - ❖ National housing policy and national housing programmes
 - ❖ The need to resolve matters in a practicable and equitable manner
- ⇒ Rulings by a tribunal are deemed to be the equivalent of an order of a magistrate's court. A magistrate's court may refer a dispute regarding an unfair practice to the tribunal
- ⇒ Nothing precludes a person from approaching a competent court for urgent relief, or to institute proceedings for the normal recovery of arrear rental, or for an eviction order, this S is subject to the proviso "in the absence of a dispute regarding an unfair practice"
- ⇒ The lessee must continue to pay the rent and the lessor must maintain the property and may not evict the lessee from the date of the lodging of a complaint until the date of a ruling or three months, whichever is the earlier.

The function of the rental housing information offices

- ⇒ To advise lessees and lessor on their rights and duties in regard to the lease of a dwelling
- ⇒ The functions of these offices are consumer education and the provision of information on rental housing, advice to parties on their rights and duties related to the lease of dwellings, as well as to providing solutions to problems relating to dwellings
- ⇒ Records of enquiries received by the office must be kept and quarterly reports must be submitted to the tribunal

Regulations

- ⇒ The MEC may, by notice in the Provincial Gazette, make regulations relating to anything, which may or must be prescribed under the Act Offences and penalties created by the Act
- ⇒ These regulations may prescribe the procedures and manner in which the proceedings of the tribunal must be conducted, the forms and certificates to be used, the notices to be given by the tribunal and the functions, powers and duties of inspectors
- ⇒ Unfair practices: matters in respect of which such practices are suspected and in relation to which regulations will probably be enacted. These include the changing of locks, deposits, damage to property, demolitions and conversions, ejection, forced entry and obstruction of entry, house rules, intimidation, issuing of receipts, tenants' committees, leases, municipal services, nuisances, overcrowding and health matters, tenant activities, maintenance, reconstruction or refurbishment work

Offences and penalties

The failure to comply with general provisions and/or provisions pertaining to leases, or the failure to comply with a ruling or a request of the tribunal, or a contravention of a regulation, or the obstructing of procedures of the tribunal, or the producing of false documents and the making of false statements

- ⇒ Unfair discrimination
- ⇒ Infringement of privacy

⇒ Offences by the lessee: Where the lessee does not promptly pay the rent or charges, does not vacate the premises on proper termination of the lease by the lessor, does not return the dwelling in a good state of repair and does not pay compensation for damage caused by himself or herself, the household or visitors, will be guilty of an offence and liable to a fine or imprisonment not exceeding two years or to both

⇒ Refusal by the landlord to reduce the lease in writing

⇒ Lessor's failure to attach a list of defects and house rules to written lease

⇒ Obstructing tribunal proceedings:

A person summoned by a tribunal, who fails without good reason to appear or to remain in attendance, is guilty of an offence

An inspector, who fails to give evidence, to provide information or to produce a report, and a rental housing information officer, who fails to submit a report or to advise the tribunal, are guilty of an offence a person who refuses to be sworn or to make an affirmation as a witness, is guilty of an offence; a person who fails to answer fully and satisfactorily the questions of the tribunal, or who after having been summoned to do so, fails to produce a book, document or object is guilty of an offence, and a person who intentionally produces a false document or makes a false statement before the tribunal, is guilty of an offence and where a person does not comply with a ruling of the tribunal, he or she is guilty of an offence

Maximum amount of the fine: same as magistrates court R60 000

STUDY GUIDE 2- Learning Outcomes

Study Unit 1: The characteristics of a contract of sale

1. Explain the essentialia of a contract of sale
2. Distinguish between essentialia and the requirements for validity
3. Distinguish between sale and lease
4. Distinguish between essentialia, naturalia and incidentalia
5. Understand that claims can be sold
6. Explain the influence of the true intention of the parties in determining whether the essentialia for a sale exist
7. Distinguish between the undertaking and performance of an obligation
8. Distinguish between a contract of sale and a contract for the letting and hiring of work
9. Explain what an emptio rei speratae and emptio spei are
10. Distinguish between the emptio rei speratae and the emptio spei
11. Explain what an emptio ad mensuram is
12. Explain what an emptio per quantitatem is
13. Explain what an alternative sale is
14. Explain what a generic sale is
15. Explain how to determine if a trade-in is a contract of sale
16. Explain whether a contract of sale for a reasonable price, is valid
17. Explain whether a contract of sale in which no price is stipulated, is valid
18. Explain the determination of the price by a third party
19. Explain whether a contract of sale is valid where the price is determined by one of the parties
20. Briefly set out the facts of the prescribed cases, the decisions in such cases and the reasons for such decisions

Study unit 2: Formalities required for the conclusion for a binding contract of sale

21. Understand that formalities are only one of the requirements for a valid contract
22. Explain the formalities prescribed by the Alienation of Land Act 68 of 1981
23. Determine to which types of contract the provisions of the Alienation of Land Act apply
24. Describe the concepts "land" and "deed of alienation"
25. Describe the contents of the deed of alienation, which must appear in any document which purports to deal with the alienation of land
26. Distinguish between essentialia, naturalia and incidentalia
27. Describe the requirements for alienation through a representative
28. Determine who are representatives for the purpose of the alienation of land
29. Determine who the representatives of companies are
30. Expound the formalities for sales of land by public auction
31. Discuss how the variation and revival of deeds of alienation can take place
32. Set out the requirement that the contract must refer to the "cooling-off" right of certain purchasers or prospective purchasers
33. Discuss the consequences of non-compliance with formalities
34. Briefly state what formalities are prescribed by other statutes in respect of contracts of sale

Study unit 3: The "Cooling-off" right of certain purchasers of land

35. Understand that the "cooling-off" right is a statutory, peremptory naturalia
36. Set out what the "cooling-off" right entails
37. Describe what the effect of waiver of the "cooling-off" right is
38. Explain the purpose of the "cooling-off" right
39. Set out which purchasers or prospective purchasers have a "cooling-off" right
40. Explain how the "cooling-off" right is exercised
41. Describe the consequences of the exercise of the "cooling-off" right

Study Unit 4: The sellers Duties: the duty of custody

42. Explain what the duty of custody entails
43. Explain the standard of care, which the seller must exercise
44. Explain the effect of mora creditoris of the purchaser on the duty of care
45. Set out the remedies of the purchaser

Study Unit 5: The sellers Duties: the duty to deliver

46. Explain the seller's obligation where movables are sold
47. Set out the seller's obligation where immovables are sold
48. Set out what "undisturbed possession" means
49. Understand that the mere existence of servitude does not establish disturbed possession
50. Distinguish between the liability of the seller on the ground of failure to give undisturbed possession and the liability of the seller on the ground of eviction
51. Explain what the seller must deliver
52. Set out to whom the seller must deliver
53. Understand that the seller bears the onus of proof

Study unit 6: The sellers Duties: the sellers "guarantee" against latent defects in the thing sold

54. Set out the grounds for which the actio empti is the indicated remedy
55. Explain the seller's liability for breaching an express or tacit guarantee
56. Set out the seller's liability for misrepresentation and the purchaser's remedies
57. Set out the seller's liability for dicta et promissa and the buyer's remedies
58. Explain whether the buyer can be liable for dicta et promissa in the case of a trade-in
59. Set out the requirements for liability for latent defects
60. Explain what the effect is if an expert examines the thing sold
61. Set out what may be claimed with the aedilitian remedies
62. Explain whether the buyer can be liable for latent defects in the case of a trade-in
63. Set out the instances where the seller is not liable for latent defects
64. Explain the possible basis of the seller's liability for latent defects
65. Explain the liability of the manufacturer and dealer for consequential loss caused by latent defects
66. Explain how the different liabilities of the seller may overlap
67. Briefly set out the facts of the prescribed cases, the decisions in such cases and the reasons for such decisions

Study Unit 7: The sellers Duties: the seller's obligation to transfer ownership or to warrant against eviction

68. Understand that the sale is valid even if the seller is not the owner of the thing sold
69. Understand that the seller does not guarantee that he is the owner of the thing sold
70. Understand that the seller has a duty to transfer every right and benefit in respect of the thing sold, to the purchaser
71. Briefly explain the abstract system of transfer of ownership
72. Explain the seller's duty to transfer ownership if the seller is the owner of the thing sold
73. Explain the relationship between the payment of the price and transfer of ownership
74. Understand that the warranty against eviction is a naturale
75. Distinguish between misrepresentation and eviction
76. Set out the twofold nature of the seller's guarantee against eviction
77. Explain the requirements for liability for eviction
78. Distinguish between liability for failing to give undisturbed possession, latent defects and eviction
79. Explain the remedies for eviction
80. Set out the cases where limited liability for eviction exists
81. Give a theoretical explanation of the seller's liability for eviction
82. Briefly set out the facts of the prescribed cases, the decisions in such cases and the reasons for such decisions

Study Unit 8: The duties of the purchaser

83. Explain the purchaser's duty to pay the purchase price
84. Explain the purchaser's duty to take delivery of the thing sold
85. Explain the purchaser's duty to reimburse the seller for all
86. Necessary expenses incurred in connection with custody of the thing

Study Unit 9: The risk in contracts of sale

87. Explain the consequences of the risk rule

88. Explain how the risk rule differs from the normal rules regarding supervening impossibility of performance
89. Explain the relationship between the seller's duty of custody, the res perit domino rule and the risk rule
90. Understand that the risk rule is an arbitrary measure
91. Explain what accidental misfortune is
92. Understand that the benefit follows the risk
93. Set out what the benefits are
94. Set out the requirements for a contract of sale to become perfecta
95. Explain the application of the risk rule to certain types of sale
- 96.** Explain the consequences of the delay of the seller and the purchaser to give and receive delivery of the thing sold

STUDY GUIDE 2- Notes

Study Unit 1: The characteristics of a contract of sale

The essentialia of a contract of sale

- A contract of sale is a reciprocal contract in terms of which one person, the seller, undertakes to deliver a thing to the other, the buyer, and the latter, in turn, undertakes to pay the former a sum of money in exchange for the thing.
- 2 essentialia: the parties must agree that one of them will deliver a thing and the other will pay a price
- The requirements for contracts should not be confused with the characteristics (essentialia) of a specific contract
- How must one distinguish between contracts of sale and lease? In the case of a lease, addition to the above essentialia, a further essentialia, namely that the parties must agree expressly or tacitly that the lessee must restore the thing leased to the lessor at some or other time
- It is possible for a genuine contract of sale to be made subject to a suspensive or a resolutive condition, or for a right of rescission to be stipulated so that the thing may, after all, have to be returned to the seller in certain circumstances. However, such an obligation to restore the thing arises differently from the normal obligation to restore the thing hired out in a contract of lease. It arises not out of the conclusion of the contract, but out of the cancellation of the contract.
- It is not an essentialia of contracts of sale that the seller of a thing must undertake to stand in for his title. If in a contract of sale the seller guarantees his title, that clause would be a mere incidentale
- It is a Naturale that the seller stand in for eviction of the purchaser
- A personal right can be sold by means of a straightforward contract of sale.
- The parties representation (intention) in regard to the nature of their contract should in no way influence the court
- It may happen that the parties call their contract on of sale, and that this gives one of the parties the wrong impression about the content of the contract- although this gives rise to a material error, such an impression can be upheld in certain circumstances (the party's reliance is protected by either the Justus error or the direct reliance approach)
- A valid contract of sale is concluded as soon as the seller undertakes to deliver a thing and the purchaser undertakes to pay a price. By undertaking, the parties create obligations, and, by performing these obligations that they have created, the obligations are extinguished.

The undertaking to deliver a thing

- A contract in terms of which A undertakes to have a servitude registered over his land in favour of B, in exchange for monetary compensation, cannot be a contract of sale (**Brink v Stadler**) This is not an agreement to deliver a thing or an economic entity, but an agreement to cooperate in the creation of a right
- A Locatio conduction operas: (a contract for the letting and hiring of work) is an agreement whereby an independent contractor undertakes to render the result of his labour to the other party.
- Can be distinguished from a contract of sale in that a seller's obligation is essentially one to deliver, while that of the person accepting work is essentially a duty to do something.
- If a contract relates the manufacture and delivery of a thing not yet in existence, the contract will be a sale only if the manufacturer also provides the materials for the manufacture of the things (**SA Wood Turning Mills v Price Bros Ltd**)

The emptio rei speratae and the emptio spei

- A contract in terms of which one party undertakes to deliver a thing not yet in existence to another party in exchange for the payment of a sum of money, can pass as a contract of sale
- Forms of contract of sale of things not yet in existence are the emptio rei speratae and the emptio spei.
- In both these forms of sales, the seller has a duty not only to deliver the thing, but also to see that the thing materialises so that it can be delivered
- It must be possible to deliver the thing as from the conclusion of the contract.

Emptio rei speratae

- Occurs where, in the sale of a thing not yet in existence, it is the intention of the parties that the price will be paid only if the thing does in fact come into being.
- If, contrary to expectations of the parties, the thing does not come into existence, it is usually said that there will be no sale
- Suspensive condition construction:
 - The function of the condition construction in the type of sale under consideration is to explain why the purchaser cannot claim the thing immediately and to explain why the risk that the thing will not materialise, is borne by the seller.
 - If the concept of a genuine condition is employed, the condition that the thing must come into existence, the doctrine of fictitious fulfillment of a condition applies and may give rise to problems where the price has been fixed per unit.
 - It would be wrong to apply a condition in the present context because there is, in accordance with the intention of the parties, an obligation resting on the seller to bring the thing into being and then make the delivery. If it is the duty of a contracting party to see that a condition is fulfilled, it cannot be a genuine condition
 - This construction is INCORRECT AND UNNECESSARY. REJECTED!
- Correct construction: the buyer cannot claim the thing immediately, because a party to the contract can claim performance only after a reasonable time has elapsed- the buyer must therefore allow the seller reasonable time to prepare the thing. The seller carries the risk that the thing sold will not materialise, because that is what the parties have agreed to. If the parties have not agreed thus one is not dealing with an *emptio rei speratae*, but with an *emptio spei*

Emptio spei

- When a thing, which has not yet come into existence is sold and it is agreed that the buyer will be liable for the purchase price even if the thing never materialises
- A thing may also be regarded as future goods for the purpose of the *emptio spei* where the seller simply hopes to group together a number of existing things
- The genuine *emptio spei* must be distinguished from the case where an existing thing is bought in the hope that it may contain valuable components.
- *Emptio spei*- sale of a hope or expectation- is a figure of speech indicating that the buyer will have to pay up whether the thing materialises or not. The obligation of the seller is to bring into existence on the understanding that, the buyer will remain liable for the purchase price. That the seller is entitled to the price and is excused from his duty to deliver is familiar in contracts of sale which are *perfecta*

The emptio ad mensuram (sale of a group of things at a price per unit)

- The seller undertakes to deliver a group of things (or a particular mass) at price per unit.
- The price is not fixed, but determinable. The thing is of course fixed
- Sell the land *per quantitatem*- the true price has to be calculated by multiplying the true quantity, not the approximate, by Rx
- Sell the land *ad corpus*- the whole for the price, irrespective if there is an error in the quantity stated

Sales in the alternative and generic sales

- An alternative sale: where the seller has to deliver one of several specific things. The alternative thing must be specified and not as part of species i.e. not Sheep A or any other Sheep, rather Sheep A or Sheep B or C
- A generic sale: where the seller has to deliver a thing described according to its nature i.e. one sheep

The undertaking to pay a priceThe price as a sum of money

- There can be a contract of sale only if the one party undertakes to pay a price in exchange for the undertaking to deliver a thing. If there is no price, there is no contract of sale.
- A contract of donation: is an agreement whereby one person undertakes to give another something out of liberty without receiving or stipulating any counter-performance
- In South African law, a price and a contract of sale can exist only if it is expressed in an accepted unit of currency

- If the price was originally expressed in money and the parties later agree that the buyer may render performance in another form, or even that the seller is released from his obligation, this naturally cannot affect the nature of the original juristic act

Another performance together with the price

- Trade-in: the counter-performance consists partly in money and partly in delivery of an article.
- If their intention cannot be determined, the principal part of the counter-performance will be conclusive; if there is still uncertainty, the contract is regarded as a contract of sale, since contracts of sale occur more frequently than contracts of exchange.
- Exchange: an agreement in terms of which one party undertakes to deliver a thing to another party in exchange for the counter-delivery of another thing

A contract of sale for a reasonable price

- A sale at a reasonable price was unthinkable at common law because of the uncertainty of price
- English law acknowledges "reasonable price"
- In **Genac Properties JHB v NBC Administrators** the AD remarked that it is difficult to determine according to what principle a sale for a reasonable price should be regarded as invalid. Many writers favour the validity of such a sale.
- We are concerned with the intention of the parties. The parties undoubtedly agree that a price is being stipulated; the only question is the extent of the price. This is determined with reference to an objectively reasonable price
- It is a question of legal policy whether such a contract should be a contract of sale

A contract of sale in which no price is stipulated

- For a contract of sale to be classified as a sale, it is not necessary that the parties should expressly agree to a specific price.
- The price agreed on expressly or tacitly need not even be a specific sum of money- an express or tacit undertaking to pay an ascertainable sum of money will do
- If it can be said that the parties have tacitly agreed on an ascertainable performance on the part of the party receiving the thing, the contract will be above suspicion.
- Where the seller is a merchant- a tacit agreement that the seller's usual price has to be paid
- Where the seller does not have a usual price- there is a tacit agreement that the market price has to be paid

Determination of the price by a 3rd party

- A contract to deliver a thing at a price determined by a 3rd party is recognised in our law as a contract of ascertainable content, provided that the 3rd party is ascertained or ascertainable (**Reymond v Abdulnabi**)
- The 3rd party is ascertained where the parties had a specific 3rd party or officer in mind.
- The 3rd party is ascertainable if the parties have agreed on a method to nominate the 3rd party, which is capable of leading to the determination by the 3rd party.
- A contract to deliver a thing at a price determined by a 3rd party qualifies as a contract of sale subject to a suspensive condition.
- Problems arise where one of the parties to the contract intentionally prevents the fulfillment of the condition. 2 possible solutions:
 1. The intentional conduct can be regarded as either fictitious fulfillment of the condition or
 2. As a prevention of performance
 - Fictitious fulfillment: the price is regarded as fixed, although it has not yet been determined. A possible solution lies in the court trying to ascertain what the 3rd parties price would have been. The court may not simply fix its own price, the court must try to determine as closely as possible, in accordance with all the available evidence, what price the 3rd party would have fixed.
 - The doctrine of fictitious fulfillment of a condition rests on a fiction: the condition is deemed to have been fulfilled
 - Prevention of performance: by the party to the contract who prevents the performance. The innocent party's remedy is damages, whether he rescinds the contract or not. When the court calculates the damages it will have to determine the price the 3rd party would have stipulated
- Unreasonable price fixed: where the 3rd party does fix a price, but it appears to be unreasonable there are 4 possible solutions:

1. The contract of sale is valid, notwithstanding the unfair price. In English law, the price specified by the 3rd party is binding in the absence of mala fides, fraud, error or collusion.
2. The contract of sale is invalid as the parties intended for the price to be reasonable
3. The sale is valid, but the aggrieved party is not bound by the manifestly unjust determination of the price, as the court has a general power to correct such determination

Dublin v Diner “ both parties presumably relied upon the ability, competence and integrity of the 3rd party nominated by them. Where such a 3rd party determines a value, which is grossly inaccurate, it would be a harsh law, which would necessarily bind the oppressed party to the payment of the price determined. Whether the parties are bound by the courts determination, answered in only a single high court decision **Van Heerden v Basson** held that both parties are bound by the courts determination

4. The sale is valid but the aggrieved party is not bound by the manifest unjust determination of the price. The court has a general power to correct such determination, but the other party may elect whether or not to abide by the courts determination. Accepted by the High Court of 3 jurisdictions. This solution seems to be correct, because it does not allow the courts to create a new contract for the parties.

Determination of the price by one of the contracting parties

- The parties may not validly entrust the determination of the price to one of the contracting parties. Our common law authorities are in denial that parties can enter into such an agreement, or even into an agreement that the nominee of one of the parties can determine the price
- The SCA questioned the validity of this rule in **NBS Boland Bank v One Berg River Drive v ABSA bank** they held that the rule is not only illogical but out of step with other modern legal systems. The court suggested that a term conferring a discretion on one of the parties to determine the price is valid, unless an unfettered discretion is conferred upon the party

Study unit 2: Formalities required for the conclusion for a binding contract of sale

Requirements for a valid contract: capacity to act, consent, and possibility of performance, lawfulness and compliance with formalities

Formalities prescribed for contracts in terms of which land or interests in land are bought and sold

Ss 2 and 3 of the Alienation of land act 68 of 1981 as amended

2. (1) No alienation of land after the commencement of this S shall, subject to the provisions of S 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.
(2) The provisions of subS (1) relating to signature by the agent of a party acting on the written authority of the party, shall not derogate from the provisions of any law relating to the making of a contract in writing by a person professing to act as agent or trustee for a company not yet formed, incorporated or registered.
3. (1) the provisions of S 2 do not apply to the sale of land by public auction.
(2) If, in terms of a sale of land by public auction, the purchase price or any other charges is or are payable by the purchaser in more than two installments over a period exceeding one year:
 - (a) The provisions of this Act apply to that sale as if it were a sale under a contract;
 - (b) In such application of S 6, the conditions of sale determined in terms thereof shall be read in public immediately before the auction; and
 - (c) The seller shall forthwith after the auction furnish the purchaser with a copy of the contract, failing which the purchaser may cancel, the sale.
- The purpose of the alienation of land act is to attain certainty concerning the provisions of the contract and to avoid disputes and possible malpractices

The types of contract to which the provisions of the alienation of land act apply

- Every alienation of land must be contained in a deed of alienation
- A deed of alienation is a document under which land is alienated
- To alienate means to sell, exchange or donate, irrespective of whether such a sale, exchange or donation is subject to a suspensive or resolutive condition

- **Soya Ltd v Tucker's Land and Development corporation** a contract of sale which is subject to a suspensive condition does not, in law, become a contract of sale until the condition has been fulfilled
- Any contract in terms of which one party undertakes to deliver land while the other undertakes to deliver an asset in a person's estate as counter-performance, will qualify as a contract of exchange in terms of the wider meaning given to Exchange in the definition of "Alienate"

The concept of "land"

- Given its ordinary, common law, meaning but also means:
 1. Any unit
 2. Any right to claim transfer of land
 3. Any undivided share in land
 4. Any interest in land
 5. Initial ownership referred to in S62 of the Development facilitation act 67 of 1995

Deed of alienation

- S 2(1) any alienation of land must be contained in a deed of alienation
- The content of the deed of alienation: identity of the parties, the essentialia of the contract, the other material terms on which the parties have agreed and the signature of every party to the contract

The identity of the parties

- It must be clear from the document who the alienator of the land is and who the alienee is
- It must be evident from the document that the parties intended to contract with each other.
- The alienation will be void if it emerges that someone other than the offeree accepted the offer (**Hersch v Nel**). The document may make it clear that the offer is in fact intended for somebody other than the person to whom it is addressed, and that the latter's only function is to transmit the offer to the person for whom it is intended- in such a case, the owner can validly accept the offer which is in fact intended for her (**Hill v Faiga**)

The essentialia of the alienation

- For a deed of alienation to be valid, it must embody the essentialia of a contract of sale, exchange or donation
- The essentialia of a contract of exchange of land are an undertaking by one party to deliver land to the other party, and an undertaking to deliver to the alienator in return anything which is capable of being an asset in a person's estate
- The essentialia of a contract of donation of land are an undertaking by the alienator to transfer land to the donee and the parties' intention that the donee will render no counter-performance.
- Whether the performance to which the parties intend to bind themselves has been set out clearly enough in the deed of alienation to comply with the formal requirements
- The general principle concerning alienation of land is that such land must be described in the alienation in such a manner that it is capable of objective identification
- **Clements v Simpson**: the test for compliance with the statute, in regard to the *res vendita*, is whether the land sold can be identified on the ground by reference to the provisions of the contract, without recourse to evidence from the parties as to their negotiations and consensus
- Objective identification can be achieved by:
 1. Either by a description which is definite to be capable of being related to a particular entity of immovable property
 2. Or by indication of a person who has the right to select a particular portion of property from a larger whole, or has the right to select one of a number or portions
- The following have also been accepted as sufficient to identify the land in question:
 - A reference to the physical location of the property
 - Reference to the popular name of the entity
 - A reference to an objectively determinable relationship between the land and a particular person
 - A reference to a plan or diagram on which the boundaries of the land are marked
 - A description which refers to existing boundaries
 - A reference to a description of the land which is contained in a particular deed of transfer, or even in another contract – incorporated into the deed of alienation by reference
- Identification of the land cannot depend upon an agreement which is not reflected in the deed of alienation, or on an agreement still to be entered into

- The nature and extent of any counter-performance which is to be tendered must appear from the deed of alienation itself, or be capable of determination by reference to objective criteria laid down by the deed of alienation

Other material terms

- All the material terms of a sale, exchange or donation must be contained in a deed of alienation (i.e. must be in writing) They must appear in the document when it is signed
- Essentialia are material terms.
- A document which contains no more than the essentialia of a contract of sale, exchange or donation, and which has been signed by the parties, will constitute a valid deed of alienation if all the requirements for a valid contract have been complied with. The duties of the parties are partly determined by the naturalia of the contract which they have entered into
- 2 approaches can be discerned with regard to the question as to which incidentalia should be regarded as material terms:
- The wide approach: regards all the terms on which the parties have agreed as the material terms of their contract and includes every terms relating to:
 - The content and properties of every performance which is to be rendered
 - When, where and how the performance is to be rendered
 - The cooperation which each party requires regarding the performance by the other
 - The remedies which a party will have if the other party commits a breach of contract, as well as the requirements for the enforcement of the remedies
- In **Jones v Wykland properties** the court formulated the following test to determine whether a term is material:
 1. Did the parties apply their minds to the term?
 2. Did they agree, either expressly or tacitly
 - a) That the term should form part of their contract; and
 - b) Be binding on them?
- A non-material term is one which contains information only and which is not intended to bind the parties.
- The more restrictive approach regards not all terms the parties have agreed to as material. Essentialia are regarded as material
- In **Trustees v Mitchells plain trust v Weeder** the court held that “all that the requirement that all the material terms of a contract be reduced to writing only if the characteristic of materiality is amenable to objective determination, albeit subject to a value judgment by the court in borderline cases. In determining such a borderline case whether a particular term is material or not, the court will have regard to the object of the formalities legislation and will weigh the importance of the term in the context of the detailed scheme of the particular agreement under consideration”. The court regarded a term determining which of the parties had the power to appoint the conveyancer as being not material

The signatures of the parties or their agents

- **Van Niekerk v Smith** -Signature does not necessarily mean writing a person's Christian name, can be any mark that identifies it as the part of the party. To sign, as distinguished from writing ones name in full, is to make such a mark as will represent the name of the person signing
- Signatures may be affixed anywhere as long as it is clear that they were intended to cover the whole document.
- If the seller inadvertently signs in the place left of the purchaser, the deed can be rectified- *prima facie* there is a valid contract. A person who signs a deed as an agent on behalf of another, must indicate that she is acting in a representative capacity

Rectification

- A deed of alienation may be rectified if it does not correctly reflect the common intention of the parties
- Before it can be rectified it must be a *prima facie* valid deed of alienation, to be *prima facie* valid it must at least:
 1. Contain the essentialia of the type of contract in question
 2. Disclose the identity of the parties
 3. Be signed by the parties or their agents

- If an essential term has merely been incorrectly reproduced in the document the contract is *prima facie* valid and capable of rectification, provided that all the requirements for rectification have been complied with. The same goes if a non-essential (but material) term is inadvertently omitted

Alienation through an agent (representative)

- **Agent:** in the context of the legislation we are dealing with here, it denotes a person who has been authorised by another, the principal, to conclude alienation on his behalf.
- S 2(1) the agent may conclude the alienation only if the principal has authorised him in writing to do so
- The following persons are not agents within S 2(1) and consequently do not require written authorisation: (they derive their authorisation from our common law or from a statutory provision)
 1. A father as the natural guardian of his child
 2. The guardian of a minor
 3. The husband or wife who is married in community of property
 4. A partner who acts on behalf of his co-partners
 5. The curator of a person who is unfit to manage his own affairs
 6. The executor of a deceased estate
 7. The trustee of an insolvent estate
 8. The liquidator of a company

Nature and extent of the required written authority

- The agent's authority must be in writing, but its form is immaterial
- The document in which the authority is granted need not apparently be signed
- The agent need not be named. It is sufficient if the identity can be objectively determined
- An agent can "act on written authority" only if she is aware that the written authority exists- she need not have the authority in her possession when she signs the deed of alienation- it is sufficient that the written authority that the written authority exists and the agent knows that it exists
- The agent may derive her authority to act on behalf of the principal from a general authorisation, or she may be specially authorised to conclude alienation. A special authority need contain no more than the basic information required identifying the transaction, which the agent is to conclude on behalf of the principal. An authorisation to sell land must describe the land in such a way that it can be identified. The purchase price may be left to the discretion of the agent and need not be stated in the authority. If the deed of alienation exceeds the authority of the agent, the principal is not bound.
- The principal cannot ratify a deed of alienation which was entered into on her behalf by a person who did not have the necessary written authority when she signed the deed, or who exceeded her authority when she signed
- The doctrine of the "undisclosed principal" cannot find application in regard to the alienation of land. This means that if an agent enters into a deed of alienation without disclosing that she is acting as a representative, the undisclosed principal cannot derive any direct benefit from the contract. If an agent does not indicate that she is an agent, she will be personally bound by the deed of alienation. The principal will be entitled to a cession of the rights which the agent has acquired, provided that she compensates the agent for any expenses the latter has incurred in connection with the transaction

Agents and representatives of companies

- When a company acts through its organs, the act is that of the company itself- the organs of a company are not agents of the company and consequently do not require written authority when they enter into a deed of alienation of land on the company's behalf
- It is a general principle of the law of agency that no-one can act as a representative of a non-existent principal
- S35 of the Companies Act – it is possible for a person to conclude a contract as agent for a company which is still to be incorporated
- S 2(2) of the Alienation of Land Act- S 2(1) shall not derogate from the provisions of any law relating to the conclusion of a written contract by a person professing to act as the agent or trustee of a company not yet formed, incorporated or registered.

Sales of land by public auction

- S 3(2) S2 does not apply to the sale of land by public auction

- The Alienation of land act 68 of 1981 also prescribes formalities in the case where land is sold on installments by public auction- where land is sold by public auction but the purchase price, or any other charge payable by the purchaser, is payable in more than 2 installments over a period of more than one year
- The seller must provide the purchaser with a copy of the contract of sale immediately after the auction
- A contract of sale comes into existence at an auction when a bid is knocked down to the buyer, even if the seller should subsequently fail to furnish the buyer with a copy of the contract, the oral contract will still be valid. The buyer then has the right to cancel the contract.

The variation and revival of deeds of alienation

- A subsequent agreement, which has the effect of varying any of the material terms of the deed of alienation, the subsequent agreement must also be reduced to writing and must be signed. An informal (oral) variation of the deed of alienation ought to be regarded as without effect and ought not to affect the validity of the original deed.
- A unilateral waiver by one party to a deed of alienation of a right, which he derives from the deed, is not a variation of the deed and therefore need not be in writing.

The “cooling off” right of the prospective purchaser or purchaser to revoke the offer or terminate the contract of sale

S 2(2A) of the Alienation of land act: the deed of alienation must contain the right of a purchaser or prospective purchaser to revoke the offer or terminate the deed of alienation in terms of S 29A. S 29A of the Act confers on certain purchasers or prospective purchasers of residential land the right to terminate a deed of alienation or to revoke an offer to purchase land within five days after signing the alienation or offer.

The consequences of non-compliance with formalities

Failure to comply with S 2(1) of the Alienation of Land act

S 2(1): “no alienation of land shall be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority”

S28:

1. If the person to whom the land has been alienated has rendered full performance and the land has been transferred to her, the alienation is ab initio valid in every respect, notwithstanding the fact that the formal requirements were not complied with. A void contract is not enforced but a contract, which has become completely valid with retrospect
2. If the person to whom the land has been alienated has rendered only partial performance, or has rendered full performance, but the land has not yet been transferred to her, each party is entitled to reclaim from the other that which she has performed. The alienee is entitled to interest calculated from the date of payment to the date of recovery, as well as to reasonable compensation for necessary and useful expenses. The alienator is entitled to compensation for the occupation, use and enjoyment which the alienee may have had of the land, as well as compensation for any damage intentionally or negligently caused to the land by the alienee or any 3rd person for whose actions the alienee may be liable.

Failure to comply with S 2(2A) of the alienation of land act

- S28 is not applicable to situations where one of the parties render partial or full performance
- **The consequences of visiting invalidity upon the contract:** in **Sayers v Khan** the court held that such contracts were void. The normal position would then be that any party that rendered any performance in terms of a void contract may reclaim her performance. In **S three Dolphin Coast medical Centre v Cowar Investments** it was held that the contract is voidable at the instance of the purchaser- correct view because the “cooling off” right is exclusively to the benefit of the purchaser

Formalities prescribed for the sale of land on installments

- Same formalities as a normal alienation- with the addition of the following:
- Requirements relating to the language of the contract (s 5), contents of the contract (s 6), invalid terms (s 15), the recording of the contract against the title deed of the land (s 20), and the relief the court may grant if the contract does not substantially comply with the provisions of Ss 5 and 6 (s 24)

Formalities prescribed for the alienation of time-sharing interests

- The Property Time-sharing Control Act 75 of 1983
- The consequences of non-compliance with the required formalities (s 9), the contents of the contract (s 4), the invalidity of certain provisions (s 5), and the restriction on the receipt of consideration by virtue of a contract (s 7(1)).

Study unit 3: The “cooling off” right of certain purchasers of land

- Naturalia can be either directory or preemptory in their operation
- Directory in nature means that the parties are free to make an alternative arrangement
- Preemptory naturalia have been created by legislature
- S 29A of the Alienation of Land act 68 of 1981 confers on certain purchasers or prospective purchasers of residential land the right to terminate a deed of alienation or to revoke an offer to purchase land within five days after signing the alienation offer
- This right is exercised by delivering a written notice to the seller. A purchaser or prospective purchaser cannot validly waive the rights conferred upon him in terms of S 29A, and any such waiver will therefore be void.

Application of the “cooling off” right

- Purpose of S 29A is to protect purchasers against high pressure selling techniques, their own inexperience in property transactions, and their irrational (emotional) decision making
- Land for the purpose of S 29A is confined to residential land and extending its meaning to all forms of residence

Land includes, besides its common law meaning:

1. Land, whether registerable or not, which is used, or intended to be used, mainly for residential purposes;
2. Any housing interest as defined in S 1 of the Housing Development Schemes for Retired Persons Act 65 of 1988, and any proposed housing interest;
3. Any share in a share block company as defined in S 1 of the Share Blocks Control Act 59 of 1980, and any proposed share which confers on the holder of such share the right to occupy land owned or leased by the share block company and which is used, or intended to be used, mainly for residential purposes;
4. Any unit as defined in S 1 of the Sale of Land Act 95 of 1986, and any proposed unit.

The cooling off right is not available where S 29A(5):

1. The purchase price of the land, or the price offered for the land, exceeds R250 000, or such higher amount as the Minister may prescribe;
2. The purchaser or prospective purchaser is a trust or a person other than a natural person;
3. The purchaser has purchased the land at a publicly advertised auction;
4. The seller and purchaser have previously entered into a deed of alienation of the same land on substantially the same terms
5. The purchaser or prospective purchaser has reserved the right, in terms of the deed of alienation or offer, to nominate or appoint another person to take over the rights and obligations of the purchaser as stipulated in the offer or deed of alienation in question;
6. The purchaser purchases the land by exercising an option, which was open for exercise for a period of at least five days.

Exercise of the “cooling off” right

- The written notice will be effective only if it is signed by the purchaser, identifies the offer or deed of alienation that is being revoked or terminated, and is unconditional (s 29A(3)).
- A purchaser or prospective purchaser who signs an offer to purchase land, or a deed of alienation in respect of land (the later transaction), within five days after having signed an offer or a deed of alienation in respect of other land (the earlier transaction), and before he has exercised his “cooling-off” right in respect of the earlier transaction, will, on signature of the later transaction, be deemed to have exercised his “cooling-off” right to revoke or terminate the earlier transaction (s 29A(8))
- Purchaser must forthwith notify the seller in the earlier transaction of the revocation or termination of that transaction in writing (s 29A(8))
- This automatic exercise of the “cooling-off” right does not apply to a purchaser or prospective purchaser who bona fide intends to purchase both the land to which the earlier transaction and the land to which the later transaction relate (s 29A(10)).

Effect of the exercise of the “cooling off” right

Every person who received any amount from the purchaser or prospective purchaser in respect of the offer or deed of alienation must refund the full amount of such payment to the purchaser within 10 days of the date on which the written notice was delivered to the seller (s 29A(4)).

Note: there are 3 definitions of land in the Alienation of Land act 68 of 1981. Not one of these definitions is restricted to the common law meaning of land
S28 is a more detailed regulation than S29A

Study unit 4: The seller’s duties: the duty of custody

- The purchaser carries the risk of accidental damage to, or even of destruction of, the thing sold after the sale is perfect.
- The seller is liable if the damage or destruction of the article is her fault

The degree of care

- The degree of care required of the seller is that which a reasonable person would bestow with regard to the custody of the thing
- The onus of proving that she has in fact bestowed the required care rests of the seller
- If there is mora on the part of the purchaser as regards the acceptance of delivery (mora creditoris- delay of the creditor to accept performance) the seller will be liable only if the thing is damaged or destroyed intentionally or by her gross negligence.
- If the seller is in mora regards delivery of the thing (mora debitoris), she is liable in all cases except where the thing would have been destroyed even if it had been delivered on time.

The purchaser’s remedies

- The purchaser may cancel the contract if, as a result of the seller’s neglect of her duty of custody, the thing which is tendered differs materially from the thing which was sold- may also claim damages
- Where the damage or destruction of the thing can be imputed to a 3rd person, the seller herself incurs no liability

Study unit 5: The seller’s duties: the duty to deliver

The nature of the seller’s obligation

- The seller of moveable property need not seek out the buyer, but he must place the thing at the disposal of the buyer, he must ensure that the thing is ready for delivery
- There is also a duty on the seller to give the buyer notice, if necessary, in order to obtain his cooperation
- The duty to deliver immovable property implies that the seller must admit the buyer to possession of the thing, and that the seller must give transfer to the buyer. The duty to give transfer means that the seller must, at his own expense, arrange for the registration of the property in the name of the buyer, and, if there is any bond on the property, he must see that this is cancelled in order to bring about a transfer of the property.
- In practice, the parties often expressly agree that the purchaser will pay for the cost of the transfer
- The act of delivery must be of such a nature that the buyer will obtain undisturbed possession (*vacua possessio*) of thing by taking delivery of it.
- The seller of immovable property must remove from the property sold all movables, which are not included in the sale agreement.
- The seller must remove both unlawful and lawful possessors **York & co v Jones**
- Does the mere fact that servitude is registered against the title deed of the thing sold mean that the seller cannot give undisturbed possession? If this were the case, it would mean that the bona fide seller of a res aliena (a thing which belongs to someone else) could never give undisturbed possession
- Mostert submits that the term “undisturbed possession” means that, at the time when transfer of possession takes place, there must be no interference with the physical possession of the buyer, and that the existence of a servitude (and, of course, of another burden like a mortgage) does not necessarily mean that there is interference with the buyer’s physical possession. Such interference

takes place only if the holder of the right is exercising his right at the time that possession is transferred to the buyer. - Correct view

- Undisturbed possession is therefore lacking when there is a “defect” (disturbance) in the physical possession obtained by the buyer at the time of delivery. Eviction, on the other hand, can only occur if there is a defect in the title, which is transferred to the buyer.

Subject matter of the obligation

- If the thing sold is not a specific article, but an undefined article, the seller must abide by the arrangements made in the agreement
- When such a description (objected indicated in terms of its quantity) is encountered and it is clear from the surrounding circumstances that it is merely a descriptive of a specific object, we are dealing with the sale of a specific thing. Our courts have held that the actual amount is immaterial- provided that the seller was bona fide
- When no deduction can be made from the surrounding circumstances that the description is merely descriptive of a specific object, 2 further possibilities exist:
 - a) If no qualifying words are used in indicating the amount, the determination of the amount must be regarded as a guarantee and the seller must deliver the amount indicated.
 - b) If qualifying words are used, there can be a minor deviation from the stipulated amount.
- The thing must be delivered in the condition in which it was when the contract was concluded
- The seller must also deliver all accessories and attachments together with the thing sold, except where they have been excluded by agreement. In the case of immovables, any objects which have lost their movable character by attachment must be regarded as part of the thing sold
- The precise nature of an accessory varies according to the nature of the thing and the intention of the parties and is thus essentially a question of fact
- The seller must transfer to the purchaser all the fruits and profits produced by the thing after the sale has become perfect. Fruits include civil fruits as well as natural fruits separated after the contract of sale has become perfect

To whom must delivery be given?

- Delivery to the agent will be equated with delivery to the purchaser himself
- Once the thing is in the hands of the purchaser or his agent, the seller’s duty to deliver will have been discharged
- Where provision has already been made in the agreement that the thing will be transported after it has been made available: the carrier will, as a general rule, be acting as the mandatory, messenger or even, in certain circumstances, as the agent of the purchaser. In such cases, the seller can be expected to do no more than deliver to the carrier. However, where the seller, instead of making the thing available, assumes responsibility for delivering the thing elsewhere, any carrier whom he employs for that purpose, is naturally his mandatory, or even his agent, and therefore the seller will not be released merely because he has made the thing available to the carrier. In such a case, the seller's duty of custody naturally continues until delivery is finally accomplished.

Special delivery obligations

- Where the seller has undertaken special delivery obligations, he must deliver according to his undertaking.
- In a CIF (cost, insurance, freight) agreement, the seller undertakes to ship and insure the goods and to include valid contracts of carriage and insurance. The buyer pays for the freight and insurance.

Onus

- The sell that has transferred possession of the thing to the purchaser in accordance with all these requirements has discharged his obligation to provide vacua possessio. The onus rests on the seller to prove that he has complied with these requirements
- Failure to deliver is a breach of contract and the buyer has the ordinary duties for breach of contract. The action is the actio empti

Study unit 6: The seller's duties: The sellers "guarantee" against latent defects in the thing sold

- The general principles of the law of contract- a seller who delivers a thing with the same characteristics it had when the contract was entered into, would have no further liability for defects in the article, unless she was guilty of a misrepresentation, or unless she had expressly or tacitly guaranteed the presence or absence of certain characteristics- the general liability of the seller
- In the case of contracts of sale- sellers are in certain circumstances held liable for defects in the thing sold, even if they gave no express or tacit guarantee as regards such defects, and even if they were entirely unaware of the defects

Liability on the ground of breach of warranty, that is breach of contract

- Actio empti- the general action afforded for breach of contract
- Although the actio empti was initially a purely contractual action, nowadays the mere breach of contract is not the only ground in terms of which the actio empti may be instituted.
- The South African courts have held that the actio empti may also be used by a buyer to claim damages from a seller who misrepresents the characteristics. In this case, it is not breach of contract, but delict, which is the ground for the actio empti
- Our courts have held that the actio empti may also be used to claim damages from manufacturers or dealers whose products are defective. It is not certain whether liability is based on the breach of an ex lege warranty or misrepresentation
- The sellers performance will be defective if he delivers a defective article after guaranteeing (expressly or tacitly) the absence of such defects, or delivers a thing without commendable characteristics which he has guaranteed **Minister van Landbou-Tegniese Dienste v Scholtz**
- The non-compliance with the terms of the agreement as regards the characteristics of the thing is ordinary breach of contract (positive malperformance)- the purchaser has the normal remedies as regards damages and where appropriate, rescission.

Liability for misrepresentation at the time the contract was entered into

- The seller is liable for misrepresentations on the ground of delict. The misrepresentation may take the form of a false statement about the presence of commendable qualities in the article, or the absence of bad ones.
- The misrepresentation can be a commissio or an omissio (there may have been a failure to remove an existing misconception about the absence of bad characteristics)
- The seller commits a wrongful omission only if he was under a duty to act in accordance with generally accepted community standards
- Positive law: a "duty to speak" rests upon the seller who is aware of any latent defects in the article sold **Glaston House v Inag**
- The seller is also liable for misrepresentation if he deliberately conceals poor qualities, which though admittedly not latent defects, do nevertheless have this effect, means that the parties do not contract on an equal footing **Dibley v Furter**
- Misrepresentation is a delict and can be either intentional or negligent
- **Bayer South Africa v Frost** placed the remedies for intentional and negligent misrepresentation on the same footing
- The misled party has the choice either of rescinding the contract on the ground of such misrepresentation or maintaining it, and in any event, that she is also entitled to damages according to his negative interest.
- Where the contract is cancelled, the innocent party's damages will usually be the wasted costs which he may have incurred in connection with the conclusion and cancellation of the contract
- Where the contract is upheld the innocent party's damages will be assessed in 1 of 2 ways:
 1. If it appears that the misled party would not have entered into the contract were it not for the misrepresentation, the innocent party would have been in had there been no contract at all *Dolus dans*. Loss is usually determined by deducting the value of the performance made by the misrepresentor from that made by the innocent party, and by adding any consequential loss to the difference
 2. When it appears that, in the absence of the misrepresentation, the innocent party would still have contracted, but on other terms, the innocent party must be placed in the financial position she would have been had she concluded a contract on those different terms *Dolus incidens*. Loss is

determined by deducting the value of the performance that she would have been prepared to render had there been no misrepresentation from the performance that the innocent party actually rendered, and adding to that any consequential loss that the innocent party may have suffered.

Liability for *Dicta Et Promissa*

- **Phame v Paizes** the AD held that the aedilician actions (*actio quanti minoris* and the *actio redhibitoria*) are available to the buyer if the seller made a false, material statement to the buyer during the negotiations bearing on the quality of the thing sold and going beyond mere praise and commendation
- Where a *dicta et promissum* is made, a purchaser can either claim that the contract be set aside in terms of the *actio redhibitoria*, or he can claim a reduction in price under the *actio quanti minoris*.
- A culpable misrepresentation can also amount to a *dictum et promissum* if the statement complies with the definition of a *dictum et promissum*
- The courts are divided on the question whether the aedilician actions are also available to the seller for a *dicta et promissum* made by the purchaser in regard to the thing traded in as part of the purchase price? There were 2 cases where the courts said that they were not.
- In **Jansen van Rensburg v Grieve Trust** the court held that the aedilician remedies should be available to the seller for *dicta et promissum* made by the purchaser regarding the trade-in, because this is an instance where the common law should be extended and adapted
 “In a trade-in agreement, it would be unjust, inequitable and unreasonable should the seller be liable for latent defects in, and misrepresentations relating to, the vehicle sold by him, while no such liability attaches to the purchaser in regard to the vehicle traded-in by him”
 The court furthermore regarded the extension of the application of the aedilician actions to be consonant with the spirit of the values contained in the constitution.

Aedilician liability for latent defects

A seller is liable if she sells a thing with latent defects, even if she did not give an express or tacit guarantee

Requirements for liability

There must be a defect in the article

- A defect is an abnormal; characteristic in a thing which makes it less useful for its normal purpose
- **Dibley v Furter** “they (redhibitory defects) are those defects which either destroy or impair the usefulness of the thing sold for the purpose of which things of that kind are ordinarily intended to be used
- The test is an objective one- whether the thing can be used for the purpose for which it is normally intended. It is possible for a number of minor defects to culminate in an impairment of the thing’s usefulness for the purpose for which it is normally intended
- **Knight v Trollip** if the thing does not comply with the special purpose for which it was bought to the knowledge of the seller, this must be regarded as a defect
- Our courts correctly regarded the presence of a servitude, which was not communicated to the purchaser when the contract was entered into, as a latent defect. In **Southern Life Association v Seagall** it was stated that the purchaser may act only in terms of the *actio quanti minoris*. A further requirement laid down is that the seller must deliberately have concealed the servitude, or have guaranteed that the thing was free of any servitude.
- In **Munnich v Botha** it was held that “as in my opinion the existence of the servitude is a defect... this is a case where the *actio quanti minoris* will lie...” without mention of the further requirements postulated in the **Segall** case
- De wet criticised these decisions- he argued that these are cases of a defect in the owners title and not a defect in the thing itself. According to these authors, the seller is liable for a defective title in the event of eviction, and thus this case must be brought under that heading

The defect must not be insignificant

- Consequences of the rule *de minimus non curat lex* the law does not concern itself with trifles

The purchaser must not have known of the defect

- It is self-evident that, if the purchaser knew of the existence of the defect, she cannot claim the aedilician remedies- depends on the facts of the case

The defect must be latent

- Objective test: whether a reasonable person in the purchasers position would have noticed the defect if he had inspected thing
- If the defect would have been reasonably discovered by a reasonable person possessing the same knowledge as the expert, knowledge of the defect is ascribed to her

The defect must have existed at the time the contract was entered into

- Did the defect exist when the agreement was entered into; or did it develop later? If it developed later after the conclusion of the contract, the prejudiced is naturally that of the purchaser
- The onus of proving this fact rests of the purchaser. If she proves that the defect existed shortly after the agreement was entered into, this may contribute to the discharge of the onus, but is in no way decisive

The scope of the liability for latent defects

- The *actio redhibitoria* is available in modern law if the purchaser can prove that a reasonable person would not have bought the article had she been aware of the defects
- The purchaser may set the contract aside and claim *restitutio in integrum* under the *actio redhibitoria*. This means that the seller must repay the purchase price with interest and compensate for all reasonable expenses incurred in connection with the thing from the time of its receipt
- The purchaser must return the thing, unless it has been destroyed or materially damaged, the action is not available.
- Normal wears and tear must, be borne by the seller. Where the purchaser has alienated the thing, there can be no rescission if the intention to waive her right of rescission can be deduced from her conduct
- The *actio quanti minoris* is intended for less serious cases- where a reasonable person would still have bought the thing, but would have paid less for it had she been aware of the defect
- With the *actio quanti minoris*, reduction in price is claimed in terms of the agreement- difference in value between the purchase price and the true value of the defective article
- The purchaser may positively enforce her claim for restitution or a reduction in purchase price by way of the *actions redhibitoria or quanti minoris*, but she may also enforce it negatively by relying on the guarantee as a defence when she is sued for the purchase price
- **Wastie v Security motors** it was held that not only the buyer but also the seller can invoke the aedilician actions where the thing traded in has a latent defect. The court held that, where a part of the purchase price consists in something other than money, the same principle that applies to the thing sold, applies to the non-monetary part of the price. The reason is that in contracts of exchange both contracting parties are protected by the *aedilician* action against latent defects in the things which are the subject matter of these contracts, and that it would be unfair and illogical not to afford similar protection of the seller in respect of the thing traded in (see **Janse van Rensburg v Grieve trust** for a discussion)

Cases where the aedilician remedies are not available to the purchaser

1. In the case of sales in execution by the sheriff, trustee or curator bonis of an insolvent estate
2. Where the purchaser has waived his rights. This waiver may be tacit or express, at the time the agreement was entered into or thereafter

Waiver at the time the contract was entered into

- A voetstoets clause may be expressly included in an agreement by mentioning the clause by name, or it may be tacitly included
- A voetstoets clause cannot afford a seller any protection against misrepresentation, since it has nothing to do with misrepresentation
- Where there was a n omission the AD held in **Van Der Merwe v Meades** that a seller will only be deprived of the protection afforded by a voetstoets clause where the purchaser can prove that the seller was actually aware of the existence of a defect in the thing sold at the time of making the contract *dolo molo* (intentionally) kept silent about its existence to the purchaser with the purpose of defrauding him.
- **Glaston House v Inag** on the inferences that may be drawn concerning conscious knowledge
- Possible that the voetstoets clause and a guarantee against defects may be found in the same contract
- The purchaser may possibly forfeit her rights to both restitution and reduction in price if she voluntarily pays the purchase price after becoming aware of the defects in the thing

- It remains a question of fact whether or not payment with the knowledge of the defects amounts to a waiver of rights
- Waiver of rights by acceptance of the article: it is generally accepted that the purchaser's remedies relating to rescission are affected, but not the remedies relating to reduction of the price
- The acceptance of the thing may consist in its inspection by the purchaser, followed by discovery of the defects, either by chance or by expert inspection, followed by the decision to retain the article nonetheless by exercising powers of ownership over the thing.
- It used to be thought that, if the purchaser does not subject the thing to an inspection within a reasonable time after receipt thereof to reveal any latent defects she thereby loses her remedies relating to rescission. Since latent defects cannot be revealed by normal, reasonable inspection, it would be fruitless to conduct such an inspection at any stage- the purchaser will detect nothing.

Theoretical explanation of the aedilician liability latent defects

- The seller who is liable for latent defects in the article is liable for no more than restitution or a reduction in price, and not for damages.
- Our courts are inclined to put warranty against latent defects in the same category as warranty against eviction. An objection to the explanation of liability as a guarantee: it would mean that seller who delivers an article with latent defects commits breach of contract in the form of breach of warranty, and should consequently be liable for the full damage suffered by the purchaser, while it is clear that our law allows only restitution or a reduction on price and not damages. To speak of warranties as liabilities is unqualified and unacceptable.
- In the absence of a provision to the contrary, the law reads into the contract a guarantee against latent defects, but that the law also prescribes a remedy- restitution or a reduction in price, according to the circumstances
- If there appears to be latent defects in the article, the purchaser claims, on the contract itself, the remedy prescribed by law- restitution in price or rescission but not damages
- Would a seller who refuses to grant a reduction in price in fact be committing a breach of contract (repudiation), with all the implications this entails (rescission)?
 - Olivier: a seller's failure to inform a buyer of latent defect may, in certain circumstances, be regarded as negligent misrepresentation. According to his, this wrongful misrepresentation satisfies the *sine causa* requirement, for enrichment and the seller is consequently liable for enrichment
 - De wet and Van Wyk: the liability of the seller for latent defects is a particular form of liability based on neither breach of contract nor fraud. The liability of the seller may be seen as being simply a consequence of a rule of positive law which provides that a seller incurs limited liability if she has sold something which turns out to have had a latent defect

The liability of manufacturers and dealers for consequential damages caused by latent defects

Both the manufacturer and the dealer are liable under the ordinary aedilician remedies for latent defects. They are also liable in terms of the *actio empti* for consequential loss caused by the latent defects

Liability of the manufacturer

- A manufacturer is liable for consequential damage on the ground of the presence of latent defects, even if she was not in fact aware of the defect and even if she gave no express warranty. The manufacturer's liability is part of South African Law **Holmdene Brickworks v Roberts construction**
- Where the liability is founded on a delict, damages are calculated according to the purchaser's negative interest but, where the liability is founded on a breach of contract (breach of warranty), damages are calculated according to the purchaser's positive interests.
- The liability is probably founded either on the breach of a warranty implied by law or on a misrepresentation taking the form of a failure to disclose the presence of the defect because of knowledge of the defect imputed to the manufacturer
- **Holmdene Brickworks v Robertson Construction** on the facts of that particular case, there was no likelihood that the basis of liability would lead to different practical results, and the court therefore, merely approached the question as one of breach of contract.

Liability of the dealer

- Pothier: a dealer who specializes in the sale of a certain type of good is also liable for consequential loss caused by defects in the goods, even if she was in fact unaware of the defect- this principle was applied in our law for a number of years
- Position currently regulated by the AD decision in **Kroonstad Westelike Boere Ko-operatiewe Vereniging v Botha**- a dealer who was unaware of latent defects in the thing sold is in fact liable for consequential damage caused by the defect; but only where he publicly professes to have attributes of skill and expert knowledge in relation to the kind of such goods sold. Whether a dealer has in fact professed to have such skill is, according to the court a question of fact
- In **Langeberg Voedsel v Sarculum Boerdery** the AD applied the **Kroonstad** case. The court found on the facts that the seller was a merchant dealer who actually professed to have attribute of skill and knowledge in relation to the goods he sold, and that the seller was liable for consequential loss resulting from the latent defect of which the seller was unaware. An important aspect of the case was that the court questioned the validity of the rule regarding the merchants liability in modern commercial practice
- Neither the courts nor Pothier have worked out just what the basis of the dealer's liability is. All that is said is that the *actio empti* is available in such a case. As in the case of a manufacturer the claim is not based on ordinary aedilician liability **Kroonstad Westelike Boere Ko-operatiewe Vereniging v Botha**
- **Jaffe & co v Bocchi** court expressed the opinion *obiter* that the liability of the dealer is based on non-fulfillment of a genuine, tacit warranty. However, in such a case it is probably more correct to work with misrepresentation or, if necessary, with a warranty implied by law against latent defects.

Study unit 7: The seller's duties: The seller's obligation to transfer ownership or to warrant against eviction

- The seller is not required to be the owner of the thing sold for the contract to be valid
- If the seller is not owner of the thing, but the seller must guarantee that no one with a better title will evict the purchaser

Transfer of ownership

- If the seller is owner of the thing sold, he is obliged to transfer ownership of it to the buyer. The action for the transfer of ownership is the *actio empti*

Abstract system of transfer of ownership

- Ownership is transferred if there was a valid, real agreement: a mutual intention that ownership should pass coupled with delivery or registration
- In our law, the abstract system of the transfer of ownership is followed (**Commissioner of Customs and Excise v Randles Brothers and Hudson**). This means that the invalidity of the preceding contract does not affect the validity of the transfer of ownership
- Delivery must be made to the purchaser himself or to his representative
- Whether delivery to a carrier amount to delivery to the purchaser himself on the ground that the carrier is the agent of the purchaser. The carrier may therefore be regarded as the purchaser's representative, except if the seller assumes responsibility in terms of the contract having the goods delivered elsewhere.
- Whether delivery to the purchaser's representative necessarily means that ownership passes to the purchaser? Depends on the intention of the parties, which is a question of fact. The seller's intention may be deduced from the mere fact that the seller has delivered the thing to the carrier. The purchaser must have a similar intention, which cannot be deduce simply from the fact of delivery by the seller to the carrier. Such an intention will exist only if the goods handed over to the carrier comply with the requirements of the contract

The relationship between the payment of the price and transfer of ownership

- In the absence of an express or tacit agreement, ownership of movables passes to the purchaser despite the fact of delivery only if the purchase price has been paid or credit is given. The effect of this rule is that, if goods are sold for cash and have been delivered, and if the price is not paid, the seller may reclaim the article, even where it has come into the hands of a bona fide third party
- A cheque is not equivalent to cash, as it is merely a means of obtaining cash.

- Payment by way of a cheque account can therefore be regarded as payment subject to a resolutive condition
- There is a presumption that all transactions are cash transaction, but it is possible to rebut this presumption by proving that there was an express or tacit agreement that credit was given, provided that the intention of the parties was clearly apparent.
- A tacit agreement that credit has been given, has, been construed in the following instances:
 1. Where the purchaser offers security for payment of the purchase price.
 2. Where the purchaser agrees to pay interest on the purchase price.
 3. Where a date is laid down for payment after delivery is due.
 4. Where the sale is in fact a cash sale and a substantial period elapses before the seller asserts his rights, the inference can be made that credit was given. What constitutes a substantial period is a question of fact, which depends on the circumstances of each case.
 5. If there had been a course of dealing on credit between the parties, or where a commercial usage with this purport is applicable.
 6. Although the parties may agree that the purchaser may discharge his obligation to pay the purchase price by means of the acceptance of a bill or the giving of a cheque or promissory note, this does not on its own imply an intention to give credit. It will, however, imply an intention to give credit in cases where:
 - a) A negotiable instrument, which is not payable on demand, is given as payment;
 - b) The purchaser has undertaken to accept a bill as payment of the purchase price at the time of delivery, but payable after sight.
- A tacit agreement can either be concluded at the time of the conclusion of the contract or as an amendment of the parties original agreement

Warranty against eviction

- If the seller is not owner of the thing, the law implies a warranty into the contract that no-one with a better title will deprive the purchaser of his possession, or will hinder him in the exercise of those powers which he would normally have enjoyed as owner. This warranty is thus a naturale of the contract of sale.
- The fact that the seller is liable only for eviction naturally does not imply that he may sell an article belonging to another, with full knowledge that he is not the owner, since he himself would then be guilty of a misrepresentation
- Content of the seller's guarantee implied by law is of a twofold nature:
 1. The seller has, on the one hand, a negative duty, that is, to guarantee that no-one with a better title will deprive the purchaser wholly or partially of his use and enjoyment of the thing, or will hinder him in the exercise of those powers which he would normally have enjoyed as owner.
 2. Once the purchaser has given the seller notice of a threat to possession, the seller has a more positive duty to assist the purchaser in his defence, and, by so doing, avert the impending eviction.
- If the purchaser is not assisted in his defence by the seller, the seller is liable on the ground of breach of contract to compensate the purchaser, either for the costs incurred in opposing the 3rd party's claim or for the damage resulting from the fact that the seller did not avert eviction by rendering such assistance or by assisting in some other way

Requirements for liability for eviction

Defective title must have been derived from the seller

The purchaser must have been evicted

- Eviction in its true sense means the actual confiscation of possession of a thing by a 3rd party who proves in a lawsuit that he has a better title to the thing than the purchaser
- Most common law forms of eviction: the true owner claims the thing from the purchaser; the holder of a servitude exercises his right against the purchaser; someone with a temporary right to the thing enforces that right against the purchaser
- The meaning of eviction has been extended to include cases involving more than actual judicial deprivation of the possession of the thing **Lammers v Giovannoni**
 1. It now also includes cases where the purchaser is compelled by a court order to pay a sum of money if he wishes to retain the thing. The view is that the purchaser has been evicted to the amount he has had to pay in order to retain the thing. Judicial deprivation of possession has taken place.

2. It also includes cases where the purchaser in turn sells the thing to a third party who is subsequently evicted by the true owner and now sues the seller (the original purchaser). This original purchaser can now sue his seller on the ground of eviction (who, in turn, can sue his seller, etc), although there is no question that judicial deprivation of possession has taken place.
3. Where the police seize the thing sold as suspected stolen property, the buyer is evicted as soon as it becomes certain that the police will not return the thing to the buyer in terms of section 20 of the Criminal Procedure Act 51 of 1977 **Vrystaat Motors v Henry Blignaut**. In this case, permanent dispossession has lawfully taken place even though the third party has no better title to the thing than the buyer.
4. The purchaser's action for eviction is also available even where there was neither judicial deprivation of possession of the thing nor a lawsuit instituted to recover a sum of money. Once it has been established that eviction is juristically inevitable, the buyer may act against the seller. This principle that an inevitable occurrence may be anticipated is encountered in several spheres of our law. The buyer thus has a claim for eviction where he can show that:
 - a) The third party has made a demand on him (a mere notice of his right by the third party is insufficient); and
 - b) The buyer has voluntarily surrendered the thing to the third party, or has admitted the demand and legally bound himself to comply with it; and
 - c) The seller had no title that could have made resistance of the true owner possible; in other words, the third party had a legally unassailable claim to the thing (**Olivier v Van der Berg; Lammers and Lammers v Giovannoni**)

Van Staden v Pretorius

- The eviction in regard to which the warranty exists must be one in respect of a flaw in the title of the seller which either existed at the time of the sale or, if arising subsequent thereto, is due to some act on the part of the seller ... The threat that occurred to the ... [buyer] did not arise out of any flaw in the title of the seller. At no time was there any such defect.
- A buyer who fails to obtain dominium of the property purchased runs the risk of being unable to obtain transfer because of a *concursum creditorum* or of an attachment by a creditor followed by a sale in execution ... In such event the purchaser is entitled to a claim for damages against the seller because of the latter's failure to carry out his obligation to give transfer and repayment of any amount paid in pursuance of the sale
- This claim does not arise out of any guarantee against eviction, but simply because of the failure to implement the duty to effect transfer into the name of the purchaser.
- Criticism: The mere fact that the seller may, in addition, be in breach of his duty to give transfer does not mean that this act does not amount to eviction as well
- The seller is in no way liable for unlawful interference with possession. The position is different where the seller has not yet placed the purchaser in possession, in which case the seller must discharge his duty to provide undisturbed possession and must therefore evict unlawful possessors.

Notice

- The purchaser must give the seller notice a 3rd parties claim to possession of the thing **York v Jones**
- This notice must be given in good time so that the seller may have the opportunity to fulfill his general obligation to protect the purchaser in his possession
- If the purchaser fails to give the seller notice, he has no right of recourse against the seller- unless he can prove that the 3rd party's claim is juridically unassailable in any case, or that it is the seller's fault that the notice did not reach him in time

Virilis defensio (proper and competent defence)

- Meaning of *Virilis defensio* defined in **York and co v Jones**
- "Nothing more is expected of a purchaser than that he should conduct his case as a reasonable litigant"
- Measures which the judge considered reasonable:
 - The plaintiff company employed an attorney and an advocate to act for it.
 - The proceedings it brought were brought in the proper form.
 - The pertinent facts were laid before the court.
 - No manifest error in law was made in the presentation of the case to the court.
 - No wrong concessions of fact or law were made.

- Whether the purchaser today still needs to conduct a *Virilis defensio* as a prerequisite for his claim against the seller. Distinguish between 2 situations:
 1. The third party's claim is legally unassailable and notice has been given to the seller. To conduct a *Virilis defensio* in such a case would amount to a waste of time and energy. In **Lammers and Lammers v Giovannoni** it was clearly stated that a *Virilis defensio* is not necessary in such a case. Even if notice has not been given, a *Virilis defensio* will not be necessary, but the onus of proving that the claim is unassailable has to be discharged by the purchaser before he can succeed in his action against the seller.
 2. The third party's claim is not unassailable. In such a case, notice must be given in any case before the purchaser may sue the seller. Must the purchaser still conduct a *Virilis defensio*? The reason given above naturally does not hold good for this case, but it may be argued that, after notice has been given, the seller has only himself to blame if the purchaser is evicted. After all, it is part of the seller's contractual obligation to assist the purchaser in his defence: why must the purchaser have to take it upon himself after he has given the seller notice of the claim? If this is correct, it appears that the requirement of *Virilis defensio* has in fact no independent existence.

Remedies on the ground of eviction

- If the above-mentioned requirements have been complied with, the seller has breached the contract with the purchaser.
- The normal principles relating to the calculation of damages for breach of contract, and the possibility of rescission on the ground of such breach of contract, should apply to eviction as well.

Rescission on the ground of eviction

- The AD held in **Alpha Trust v Van der Watt** that in a case of eviction, the purchaser is entitled to claim from the seller repayment of the purchase price and compensation for his damage in terms of the *actio empti*. Earlier in the decision, the judge came to the conclusion that the *actio ex empto* is fundamentally aimed at claiming damages, with the purchase price as a minimum
- It was expressly decided that the buyer does not have to cancel the contract between himself and the seller. He is entitled to claim the purchase price. Rescission is thus not used when the purchase price is claimed, but apparently the purchase price is claimable as a form of minimum damages. In light of this decision, rescission apparently no longer plays a part as far as eviction is concerned

Damages for eviction

- Damages ought to be calculated according to the buyer's positive interests, irrespective of whether the buyer upholds the contract or resiles from it.
- If he resiles, he ought to be able to claim, apart from the purchase price, such damages as he may have incurred as a result of the eviction.
- If he upholds the contract, he ought to be able to claim only the damages he sustained as a result of the eviction
- The **Alpha** case changed this position somewhat- Rescission is not taken into account, and the buyer who has been totally evicted is in any case, entitled to claim, as a minimum amount of damages, the purchase price by means of the *actio empti*.
- This decision leaves open the possibility that, where the thing sold is a fast diminishing or depreciating asset, the buyer who has had a long period of uninterrupted use and possession of the thing, may not be able to recover the full purchase price on eviction. The court can then free the seller from the repayment of a part of the purchase price. Only damages, which were reasonably foreseeable at the conclusion of the contract, will be claimable. Where appropriate, the purchaser will also then be entitled to compensation for forfeited profits or to reimbursement for expenses incurred in opposing the 3rd parties claim.
- **Lammers & Lammers v Giovannoni:**
 - The purchaser can claim that the seller reimburse him for improvements which he has effected to the thing sold.
 - Here the purchaser, to the knowledge of the seller, made improvements to the article, a car, which increased its value.
 - When threatened by the true owner, he handed the car over to the owner after notifying the seller. The seller did nothing about the matter, but when sued by the purchaser, alleged that he was only responsible for the original value of the car. As far as the improvements were concerned he argued that the buyer had a claim in enrichment as well as alien against the true owner. Consequently he should never have surrendered the car and hence he, the seller, was not liable, since the buyer had obviously not put up a *Virilis defensio*.

- On appeal the majority held that, in such a case, the buyer is not obliged to put up a *Virilis defensio* after notice to the seller; consequently the seller is liable on the ground of breach of warranty for all foreseeable damage (the value of the improved product)
- As far as partial eviction is concerned: the buyer will be able to claim compensation, calculated according to his positive interest, for that part of the thing of which he was dispossessed.

Cases where liability for eviction exists

- In **Vrystaat motors v Henry Blignaut** the court held that the parties might exclude the seller's liability for damages, but not for the return of the purchase price. A clause excluding the seller's liability for eviction would thus exclude liability for damages, but not for the return of the purchase price
- Where both parties reasonably believe in good faith that a thing which they know is not the seller's, is available for sale, and, without the purchaser implying expressly or by means of his conduct that he is content to buy in the hope that he will not be evicted, the purchaser is entitled to be reimbursed for the purchase price on eviction, but not for his loss
- Where the seller in good faith sells the thing with uncertain rights (*incertum ius*) or as an *emptio spei*, the purchaser is without a remedy if eviction takes place.

Theoretical explanation of the seller's liability for eviction

- Fault on the part of the seller is not a requirement for liability, because the seller is liable for eviction even if he acted in good faith.
- The remedies of the buyer for eviction differ, however, in two respects from the ordinary remedies for breach of contract: Cancellation is irrelevant and the measure for the assessment of damages is not the value of the thing sold during eviction, but the purchase price as a minimum.
- The view that the seller's liability is based on a warranty implied by law can be accepted, because damages are assessed in all other respects as with ordinary breach of contract.

Study unit 8: The duties of the purchaser

- To take delivery of the thing and to compensate the seller for the custody of the thing

The purchaser's duty to pay the purchase price

- Payment of the price is performance of the obligation to pay the price. Payment must be made in accordance with the terms of the contract
- Payment may be made by the purchaser himself, his representative or even by someone who is acting against the will of the purchaser, provided that the intention is to discharge the debts of that particular debtor thereby
- A person who is authorised to sell on behalf of the seller, is not necessarily authorised to receive payment
- The purchaser must also pay interest on the purchase price when he is in delay (*mora debitoris*).
- The general rule is that payment is made on delivery. Should a seller demand payment without tendering delivery, she can be confronted with the *exceptio non adimpleti contractus* (a defence available to a party to withhold performance until the claimant has tendered proper performance, or has performed fully, provided that the claimant has to perform first or simultaneously with the defendant.
- In **Wehr v Botha**: "it must be remembered that such a provision is a qualification of the normal rule that a payment and delivery take place *pari passu* [simultaneously]." In this case the contract stipulated that the buyer of immovables would supply a bank guarantee payable on registration for the balance of the purchase price. "The date upon which the purchaser is obliged to provide the guarantee depends upon when the seller will be able to lodge with the Registrar of Deeds the necessary documents required to effect the transfer"
- If the purchaser fails to pay the purchase price, the seller may claim it as well as damages in terms of the *actio venditi*

The purchaser must take delivery of the thing

- The purchaser must take delivery of the thing at the place where, and time when, delivery must take place. If no time is mentioned, the purchaser must take delivery of the thing within a reasonable time.
- It is not the duty of the purchaser to separate the article, which she must receive from other articles, to receive an article other than the one specified, or to receive a thing, which does not comply in a material respect with the terms of the agreement.

- Need not accept delivery in installments, unless she has agreed thereto. If the purchaser receives more than she is entitled to, and does not return the residue, she must compensate the seller for the residue. The purchaser who neglects to take delivery of the article falls into *mora creditoris*

The purchaser must reimburse the seller for all necessary expenses incurred in connection with custody of the thing

Study unit 9: the risk in contracts of sale

The consequences of the risk rule

- Once the contract of sale is *perfecta* (perfect), the risk of any accidental misfortune, which may befall the thing, rests on the purchaser
- A contract becomes *perfecta* before delivery of the thing to the purchaser has taken place
- The rule relating to risk in sales is in conflict with the general principle regarding supervening impossibility of performance. In the case of mutual agreements, the supervening impossibility of one performance has the effect of extinguishing the obligation to counter-perform. In the case of a contract of sale, however, this does not happen and it is only the seller who is freed from his obligation to deliver the thing by supervening impossibility of performance, while the purchaser is still liable for payment of the purchase price.
- The normal rules regarding supervening impossibility apply to contracts of sale, which are not yet *perfecta*.
- The purchaser carries this risk, even though the thing sold has not been delivered to him and there is no possibility that he has already become owner of the thing - thus this is not a case of *res perit domino* (the owner carries the risk)
- Ownership of a thing passes from the seller to the purchaser only when delivery or registration occurs and not when the contract is concluded or *perfecta* occurs
- **Pahad v Director of Food Supplies and Distribution** the risk in contracts of sale is an arbitrary measure which owes its origin to "an accident of history", without there being any justification on the grounds of fairness.
- The seller must undertake custody of the thing before delivery takes place, like a reasonable person. If he does not comply with this obligation, he is liable for the full loss (*id quod* interest) of the purchaser.

Requirements for the contract to become perfect

- The term *perfecta* has a specific juristic meaning which is related to the transfer of risk
 - When can the contract of sale be considered *perfecta*? Normally a contract of sale will be *perfecta* as soon as it has been entered into, but there are exceptions.
 - A sale is *perfecta* if the following 3 requirements have been met:
1. The purchase price must be determined (or capable of being determined) by a simple calculation
 - The purchase price is not ascertained in the case of a sale *ad mensuram* (sale of a group of things at a price per unit). It is capable of being determined by means of a simple calculation
 - Purchase price can be obtained ascertained only after the mass has been weighed, measured or counted.
 - The sale *ad mensuram* must not be confused with the sale *per aversionem* (purchase in bulk). In such a case, the price of the thing has already been ascertained, and thus the risk passes immediately
 2. The thing sold must be ascertained
 - A certain thing must be capable of being pointed out as the subject of the sale
 - In the case of a sale in the alternative, the thing is indefinite until the person who must point out the article does so, or until only one remains after the other has been destroyed
 - The thing is also indefinite in the case of a generic sale, which is where a number of articles of a particular class, grade or description are sold. In such cases, the object of the sale is ascertained only when appropriation or individualization has taken place

- Question related to individualisation is whether it may take place unilaterally, or whether it must be bilateral. In the last-mentioned instance, there must be some measure of cooperation between purchaser and seller. The legal position is at present uncertain.
- Bilateral individualisation is unpractical where the parties live far apart and is also contrary to the general rule that the debtor must point out the thing to be delivered if the parties have not agreed on someone else. It seems that unilateral individualisation should be required, coupled with a notice of individualisation to the buyer. Unilateral individualisation implies a decision on the part of the seller to appropriate the thing, coupled with an overt act aimed at making his intention known
- Where a contract to sell indefinite things provides for delivery to a carrier, delivery to such carrier of goods, which comply, with the requirements of the contract is sufficient individualisation for the purposes of the transfer of the risk.

3. The agreement must be unconditional

- A condition is a term of a contract, which renders the operation of the obligations dependent on the occurrence of an uncertain future event.
- A suspensive condition suspends the full operation of the obligations under the contract and renders it dependent on the uncertain future event.
- A resolutive condition renders the continued existence of the obligations or operation of the contract dependent on an uncertain future event
- A sale subject to a suspensive condition, which has not yet been fulfilled, is thus not perfecta.
- If the sale is subject to a suspensive condition, which is not fulfilled, the seller bears the risk of accidental destruction of, or damage to, the thing, that is, he cannot recover the purchase price from the buyer. If the condition is fulfilled, the seller bears the risk of accidental destruction of the thing until fulfillment of the condition, at which stage the risk passes to the buyer. In this case (fulfillment of the condition) the buyer bears the risk of accidental damage from the time the contract is entered into. This means that, when the condition is fulfilled, the seller can deliver the damaged article and recover the full purchase price.
- It is not at all clear why this distinction should be acknowledged today. It is contrary to the requirement that a contract of sale must be unconditional before it is perfecta and gives rise to complications in determining, for instance, who is entitled to the benefit accruing to the thing.
- If the sale is subject to a resolutive condition, which is not fulfilled, the risk of both accidental destruction of, and damage to, the thing passes to the buyer immediately on conclusion of the contract, which means that, in either case, the seller is entitled to the full purchase price. If the condition is fulfilled, the buyer bears the risk of destruction of the thing until the moment of fulfillment, at which stage the risk reverts to the seller. If the condition is fulfilled, the risk of accidental damage to the thing is, however, borne by the seller from the moment of conclusion of the contract
- According to the *pactum displicentiae*, the buyer acquires the right to return the thing to the seller within a certain or reasonable period of time if he is no longer satisfied with it
- In most cases the effect of this pactum is resolutive, and then there is no good reason to depart from the ordinary rule that the risk of destruction passes to the buyer. It is a different matter when the thing is merely damaged: then the buyer may still return the thing, and, if the damage is severe, he will probably do so. In effect, the seller bears the risk of such damage.
- In **Florida Rand Shopping Centre v Caine** the court said that, if the purchaser does not approve of the goods in the case of sales "on approval"; there is no sale, because the condition is not fulfilled.

Effect of delay of the seller on the risk rule

- If the seller is in *mora* as regards delivery of the thing (*mora debitoris*), he must carry the risk from the moment he fell into *mora* unless he is able to prove that the thing would have been damaged even if he had delivered in time.
- The purchaser's delay in regard to taking delivery of the thing (*mora creditoris*) does not affect the risk: the seller's duty of custody is merely lessened thereby.

CIF, FOB and FOR agreements

- The view in our case law is that a CIF agreement is an agreement subject to a suspensive condition, that the risk passes only on actual delivery
- As regards an FOR agreement, it is also said that the agreement is conditional and that the risk passes only when the goods have in fact been loaded free on rail. Hamman is of the opinion that, in the case of CIF, FOB and FOR agreements, one must construe a tacit agreement that the seller will carry the risk until the goods have been placed on board or on rail.

- Although
- The thing must be delivered elsewhere, this does not affect the question whether the contract is perfecta or not, and the risk passes immediately the contract has been entered into.
- The seller's duty of custody continues to exist until he (or his representative) has delivered the thing to the purchaser (or his representative). In the meantime the care, which the seller or his representative (e.g. the railways) must exercise in respect of the thing must be that of a reasonable man.
- In the case of CIF agreements, the risk passes immediately; it would appear that the positive law is in fact as has been expounded. In any case, where the seller takes it upon himself to transport the article somewhere else, he may also be liable as a carrier. Then the onus rests on him to prove that the harm, which has befallen the thing, was caused by *casus fortuitus* (chance), *damnum fatale* (unavoidable loss) or *vis major* (act of God).

Prescribed Cases

1. SA Wood Turning Mills (Pty) Ltd v Price Bros (Pty) Ltd 1962 (4) SA 263 (T) **SG2 SU1 ***
2. Minister van Landbou-Tegniese Dienste v Scholtz 1971 (3) SA 188 (A) **SG2 SU6***
3. Glaston House (Pty) Ltd v Inag (Pty) Ltd 1977 (2) SA 846 (A) **SG2 SU6**
4. Dibley v Furter 1951 (4) SA 73 (C) **SG2 SU6***
5. Phame (Pty) Ltd v Paizes 1973 (3) SA 397 (A) **SG2 SU6**
6. Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 (3) 670 (A) **SG2 SU6***
7. Kroonstad Westelike Boere-Ko-operatiewe Vereniging Bpk v Botha and Another 1964 3) SA 561 (A) **SG2 SU6***
8. Lammers and Lammers v Giovannoni 1955 (3) SA 385 (A) **SG2 SU7***
9. York and Co (Pty) Ltd v Jones 1962 (1) SA 65 (SR) **SG2 SU5 SG2 SU7***
10. Alpha Trust (Edms) Bpk v Van der Watt 1975 (3) SA 734 (A) **SG2 SU7***
11. Kessoopersadh v Essop 1970 (1) SA 265 (A) **SG1 SU12***
12. Poynton v Cran 1910 AD 205*
13. Spies v Lombard 1950 (3) SA 469 (A)*
14. Weilbach v Grobler 1980 (3) SA 998 (OPA)*
15. Goldberg v Buytendag Boerdery Beleggings (Edms) Bpk 1980 (4) SA 775 (A) **SG1 SU10**
16. De Jager v Sisana 1930 AD 71 **SG1 SU10**
17. Sishen Hotel (Edms) Bpk v Suid-Afrikaanse Yster- en Staal Industriële Korporasie Bpk 1987 (2) 932 (A) **SG1 SU6***
18. Bayer South Africa (Pty) Ltd v Frost 1991 (4) SA 559 (A) **SG2 SU6***
19. Van der Merwe v Meades 1991 (2) SA 1 (A)*
20. Janse van Rensburg v Grieve Trust CC 2000 (1) SA 1315 (C) **SG2 SU6***
21. Genac Properties JMB (Pty) Ltd v NBC Administrators CC (Previously NBC Administrators (Pty) Ltd 1992 (1) SA 566 (A) **SG1 SU10**
22. Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd 1995 (2) SA 926 (A)*
23. Sweets from Heaven (Pty) Ltd v Ster Kinekor Films (Pty) Ltd 1999 (1) SA 796 (W) **SG1 SU6***
24. Ndlovu v Ngcobo, Bekker and Another v Jika 2003 1 SA 113 (SCA). **SG1 SU10**