

Department of Mercantile Law

COMMERCIAL LAW 1A



Only study guide for CLA1501

University of South Africa, Pretoria

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INTRODUCTION

WELCOME TO COMMERCIAL LAW 1A (CLA1501).

Commercial Law 1A (CLA1501) is a **semester module**. We suggest that you approach your study of this module by first getting an overview of it. The overview will enable you to identify what you will need to have mastered by the end of the semester to complete the module successfully, and also how the different prescribed sections and study units (chapters) form part of the syllabus for this module. **All references to “chapters” refer to the relevant chapters in Schulze, H (general editor) *et al*, *General Principles of Commercial Law*, 8th edition (2015), Juta, Cape Town (hereinafter referred to as “the textbook”).**

OVERVIEW

In **section A**, you are introduced to the South African legal system in study unit 1 (chapter 1) and to the science of law in study unit 2 (chapter 2 of the textbook). In **section B**, you are introduced to the general principles of the law of contract. These general principles form the major part of this module. The general principles of the law of contract are important as they form the basis for other chapters and modules in commercial law. **Please note** that a **contract** is a source of obligations, as are a delict and unjustified enrichment, as discussed in study unit 2 (chapter 2 of the textbook). The law of contract is therefore a subdivision of the law of obligations which, in turn, is a subdivision of patrimonial law, which forms part of private law as opposed to public law.

Study unit 3 (chapter 3 of the textbook) is a brief introduction to the law of contract and includes the five basic requirements for the conclusion of a valid contract. The five basic requirements are discussed more fully in study unit 4 (chapter 4 of the textbook: consensus), study unit 5 (chapter 5 of the textbook: capacity to act), study unit 6 (chapter 6 of the textbook: the agreement must be possible, both legally and physically) and study unit 7 (chapter 7 of the textbook: formalities). With regard to study unit 7, it is important to note that although formalities are included as one of the basic requirements, only a limited number of contracts require formalities to render them valid.

It is also important to note what the consequences are if the basic requirements for the conclusion of a valid contract have not been met. Such a contract could nevertheless be valid, valid but unenforceable, void or voidable. In study unit 8 (chapter 8 of the textbook), you are introduced to the different terms that contracts may contain, their meanings, uses and consequences. Study unit 9 (chapter 9 of the textbook) deals with the interpretation of contracts. In study unit 10 (chapter 10 of the textbook), you are introduced to the various forms of breach of contract that may occur, and in study unit 11 (chapter 11 of the textbook) you are introduced to the remedies available for each type of breach of contract.

INTRODUCTION

In addition to the termination of a contract as a result of breach, contracts can be terminated in various other ways. These are discussed in study unit 12 (chapter 12 of the textbook), together with cession, which is a way of transferring rights and not strictly a means of terminating rights. Then we would also like to draw your attention to the various sections under each study unit. Please note that in study unit 4, for example, there are at least three aspects regarding the meaning of consensus that should be distinguished (namely, the intention to be contractually bound, a common intention and making the intention known). Similarly, in study unit 5 there are six factors that can influence a legal subject's capacity to act. Study these separately as they appear in each study unit (chapter of the textbook), but also as part of the bigger picture.

Lastly, and most importantly, in judgments delivered by, *inter alia*, the Constitutional Court there is a trend towards the Africanisation of South African law and the upholding of the principles of *ubuntu*, as well as the promotion of good faith and fairness in contracts.

The African concept of *ubuntu* is subtle and can be described as a set of values expressed through compassion, human dignity, group solidarity, conformity, respect, justice, good faith, fairness to others and other similar virtues. *Ubuntu* finds expression in the Zulu saying “*umuntu ngumuntu ngabantu*”, which means that a person is a person through other people.

This concept was given explicit application in our jurisprudence for the first time in *S v Makwanyane* 1995 (6) BCLR 665 (CC). Madala J noted that *ubuntu* advocates social justice and fairness.

In *AfriForum and Another v Malema and Others* (20968/2010) [2011] ZAEQC 2; 2011 (6) SA 240 (EqC); [2011] 4 All SA 293 (EqC); 2011 (12) BCLR 1289 (EqC) (12 September 2011) Lamont J remarked as follows:

Ubuntu is recognised as being an important source of law within the context of strained or broken relationships amongst individuals or communities and as an aid for providing remedies, which contribute towards more mutually acceptable remedies for the parties in such cases. *Ubuntu* is a concept which [*inter alia*] dictates a shift from (legal) confrontation to mediation and conciliation.

It is important, for example, to realise that some of the concepts used in the law of contract are similar to traditional concepts of *ubuntu* typically found in traditional African societies. Throughout this study guide we will indicate how *ubuntu* fits in with commercial law under the heading “**Africanisation and Commercial Law**”.

LEARNING OUTCOMES

The module has dual outcomes. The study units that deal with the South African legal system and science of law provide a general overview of the law and enable you to relate the different sections of the law to one another. The outcomes of the study units that deal with the general principles of the law of contract help you to identify, to analyse and to solve basic legal problems relating to the law of contract. You should be able to give advice on how contracts arise, the effect of a particular clause in a contract, the implications of breach of contract and how contracts are terminated.

PRESCRIBED STUDY MATERIAL

In conjunction with this study guide, you **must** use the **TEXTBOOK** for the module.

THE STRUCTURE OF EACH STUDY UNIT

Each study unit is based on a **chapter** of the textbook. At the beginning of each study unit, the **outcomes** for that particular study unit are set out. Once you have worked through a study unit carefully and methodically, you should have mastered these outcomes. Each study unit is divided into different **subheadings** that correspond to the headings used in the textbook.

Under each heading you will find comments on various aspects of the study material that relate to the subject discussed under that particular heading. The length of the comments varies in relation to the degree of difficulty of the subject in question. These comments do not replace or summarise the textbook; usually they simply provide an explanation or additional notes to help you understand the material in the textbook. As such, **they form part of the material for the examination.**

Most of the study units contain **activities** and **feedback**. The activities are based on the study material. The activities are very important and will give you an understanding of the study material. Please ensure that you do the activities on your own before you look at the feedback that has been provided. In order to complete each activity, you are expected to understand the work to which it relates. The answers provided are not necessarily complete and may simply refer you to relevant paragraphs in the textbook. Therefore, you must use the feedback to determine whether you have understood and completed the activities correctly.

HOW TO USE THIS STUDY GUIDE

The aim of this study guide is to steer you through the textbook. You need to make your own summaries of the course material in both the textbook and the study guide. For this study guide to make sense to you, you must have a copy of the textbook.

We suggest that you set about your studies in the following way: Begin each study unit by reading attentively through the relevant chapter of the textbook. Then you should take the headings, one by one, and both read and study the contents in the textbook, together with any comments that you might find under the same heading in the study guide. **Please note** that, to a large extent, the comments in this study guide supplement the study material in the textbook. For this reason, this study guide and the textbook should be studied together.

When you have mastered the material under a specific heading, you should **try to do the activities**, if any are **included**. Try to do these without looking at the answers. The activities are an important component of the study material and we want to encourage you to do them. These activities also provide **practical exercises to help you to achieve the outcomes mentioned**. Once you have done the activities, you should compare your answers with the answers in the study guide. Hopefully the activities will indicate any problems you might experience with the study material. By doing the activities carefully, you will be able to monitor your progress through the study material.

INTRODUCTION

Some of the activities are similar to the questions you will encounter in the examination. Therefore, if you are able to do the activities, you will have achieved some of the outcomes set at the beginning of the study unit. Remember, however, that in the examination you will not have access to your textbook and study guide. By that stage you should be in a position to answer the questions without the assistance of these resources.

SECTION A

Introduction

STUDY UNIT 1

The South African Legal System

LEARNING OUTCOMES

After you have worked through this study unit, you should be able to

- distinguish between the origins and the sources of South African law
- identify the various courts in South Africa, as well as their functions, jurisdiction and officers
- explain the operation and effect of the doctrine of *stare decisis*
- apply the various theoretical rules and methods used to interpret statutes
- describe the contents and typical aspects of a court judgment
- differentiate between the *ratio decidendi* and an *obiter dictum*

Prescribed study material: chapter 1

OVERVIEW

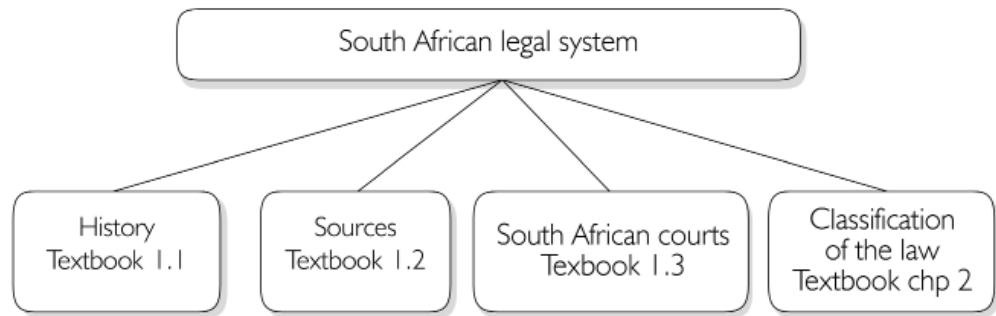
In this study unit you are introduced to the history and the sources of South African law, the courts in South Africa and their officers, the doctrine of *stare decisis*, the interpretation of statutes, and court judgments. The aim of this study unit is to provide you with a broad outline of the South African legal environment in which the state, its subjects and the business world function.

Please note that three legal systems contributed to the historical development and origins of the South African law and that six sources, some authoritative and others merely persuasive, can be consulted to find the South African law on a particular point. You are introduced to six types of courts, their jurisdiction and officers. Three aspects are important regarding the doctrine of *stare decisis*. How statutes are interpreted is discussed in four subdivisions, and we explain four aspects relating to court judgments.

INTRODUCTION

In **section A** you learn about the South African legal system. Since this section is intended as background information, the legal system is described very generally. We use diagrams to explain the relevant matters so that you can get an overview of how these various aspects relate to one another.

The following diagram forms the basis of the first two study units. You will note that we add more details about a specific aspect as we deal with that aspect.



ACTIVITY 1.1

Now that you have studied the South African legal system, please proceed to answer the multiple-choice question below. You are required to **motivate** your answer and to explain why the other three options are **incorrect** before you can look at the feedback.

Which **ONE** of the following is **NOT** an historical source of South African law?

- customary law
- Roman law
- Roman-Dutch law
- English law

FEEDBACK

- (3) is **CORRECT**. Roman-Dutch law was indeed adopted by the Cape Colony when Jan van Riebeeck established a settlement there in 1652.
- (1) is **INCORRECT**. Roman law was codified in the *Corpus Iuris Civilis* during the reign of Emperor Justinian, but Justinian was not the author of the codification.
- (2) is **INCORRECT**. Roman law as a legal system was never in force in the Netherlands, but over many centuries, Dutch customary law was influenced by Roman law to such an extent that the system became known as the Roman-Dutch legal system.
- (4) is **INCORRECT**. English law was never adopted as a system to replace Roman-Dutch law in the Cape, but after the Cape was occupied by England in 1806 and formally ceded to England in 1814, the legal system in force at the time at the Cape was influenced by English law.

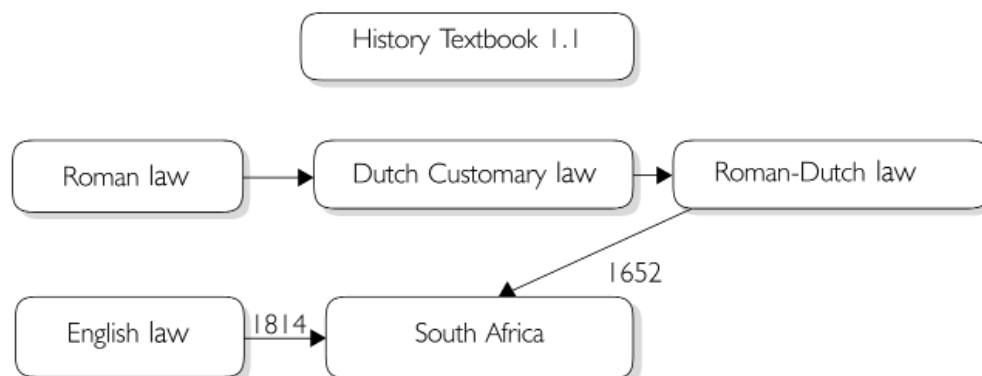
If you are still uncertain about the correct option, please study the relevant section in the textbook.

1. A BRIEF HISTORY OF THE LAW

(Textbook par 1.1)

A short historical overview is important in order to establish where South African law comes from. The history of the South African legal system goes far back to the Romans. Current South African law is a unique mixture of legal systems, firmly rooted in Roman law, Roman-Dutch law and English law.

The following diagram indicates the origin of South African law:



ACTIVITY 1.2

We sketched a brief history of the South African law above. In order to test your understanding and knowledge, you **must** complete the activity below. It is not enough to merely choose the correct option. You must **motivate** why you have chosen a certain option instead of the other options. By so doing you will enhance your understanding and knowledge of the history of South African law. You should only study the feedback after attempting the question on your own.

Which **ONE** of the following statements is **CORRECT**?

- (1) The Roman emperor Justinian was the author of the *Corpus Iuris Civilis*.
- (2) Roman law was in force in the Netherlands before 1652.
- (3) Roman-Dutch law was introduced in the Cape in 1652.
- (4) The English legal system was adopted in the Cape when the Cape was ceded to England in 1814.

FEEDBACK

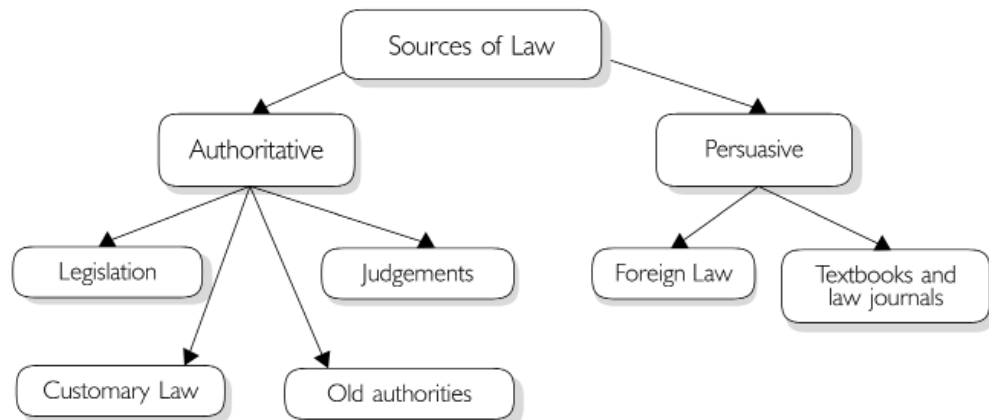
- (3) is **CORRECT**. Roman-Dutch law was indeed adopted by the Cape Colony when Jan van Riebeeck established a settlement there in 1652.
- (1) is **INCORRECT**. Roman law was codified in the *Corpus Iuris Civilis* during the reign of Emperor Justinian, but Justinian was not the author of the codification.
- (2) is **INCORRECT**. Roman law as a legal system was never in force in the Netherlands, but over many centuries, Dutch customary law was influenced by Roman law to such an extent that the system became known as the Roman-Dutch legal system.
- (4) is **INCORRECT**. English law was never adopted as a system to replace Roman-Dutch law in the Cape, but after the Cape was occupied by England in 1806, and formally ceded to England in 1814, the legal system in force at the time at the Cape was influenced by English law.

2. SOURCES OF THE LAW

(Textbook par 1.2)

You **must** study par 1.2 of the textbook to gain a better understanding of the sources of South African law. It is important to distinguish between the origins of our law

(where our law comes from) and the sources of our law (where the law can be found). The sources where we find South African law are shown in the following diagram:



When you study judgments of the courts (par 1.2.3 of the textbook) as a source of law, please also refer to par 1.4 (the doctrine of *stare decisis*) and par 1.6 (court judgments) of the textbook.

ACTIVITY 1.3

Briefly describe the factors that contributed to the preservation of Roman law.

FEEDBACK

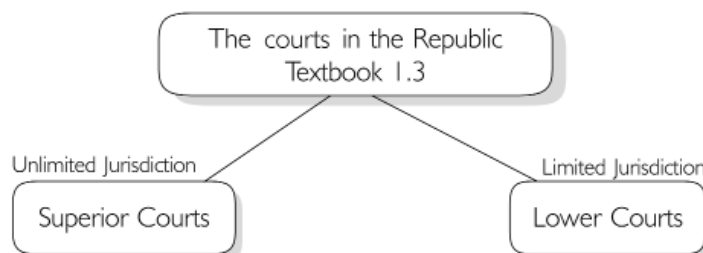
During the Middle Ages, traces of Roman law remained for two reasons, namely:

- Every person, wherever such person might be, was judged according to the law of his or her own tribe or country and, therefore, former Roman citizens were treated according to Roman law.
- The church exerted great influence during that period and canon law was based mainly on Roman law.

3. THE COURTS IN THE REPUBLIC

(Textbook par 1.3)

The following diagram shows the different courts in South Africa:



Jurisdiction means the capacity to hear a case and to pass a valid judgment. The jurisdiction of a division of the High Court is unlimited in the sense that such a court may hear any **type** of criminal or civil case. It is, however, limited in the sense

SECTION A: INTRODUCTION

that a division of the High Court exercises its jurisdiction within a **specified area**. A division of the High Court may hear constitutional matters, except those matters which, in terms of the Constitution, may be heard by the Constitutional Court only. For example, a division of the High Court may decide whether any fundamental right entrenched in the Constitution has been violated.

Please note under par 1.3.3 of the textbook that **the High Court is no longer the only court with jurisdiction to hear divorce matters**. Regional courts have jurisdiction over the geographical area of several magisterial districts. In terms of the Jurisdiction of Regional Courts Amendment Act 31 of 2008, **certain of these regional courts now have jurisdiction to hear divorce matters**.

Please also note under **par 1.3.6** of the textbook that magistrates exercise their jurisdiction within certain magisterial districts.

ACTIVITY 1.4

Identify and briefly describe the most important superior courts.

FEEDBACK

As you are aware by now, the courts in the Republic of South Africa are divided into superior and lower courts. The most important superior courts are the Constitutional Court, the Supreme Court of Appeal and the High Court.

Refer to par 3 above and par 1.3 of the textbook for a brief description of the superior courts.

ACTIVITY 1.5

Identify and discuss the roles of the officers of the superior courts.

FEEDBACK

Officers of the superior courts include

- registrars
- sheriffs
- in some divisions of the High Court, a Master's office that is presided over by a Master
- legal practitioners (advocates and attorneys)

You must peruse **heading 3** above and par 1.3 of the textbook in order to familiarise yourself with the roles of the above-mentioned officers of the superior courts.

4. THE DOCTRINE OF *STARE DECISIS*

(Textbook par 1.4)

As is clear from par 1.4 of the textbook, the hierarchy of the courts determines how the *stare decisis* doctrine is applied. The following diagram represents the application of this doctrine.

STARE DECISIS IN ACTION:

Meaning of symbols:

↑ bound by decisions of courts higher in hierarchy

↔ bound by own decisions

Constitutional Court:	bound by own decisions ↔
Supreme Court of Appeal:	bound by decisions of Constitutional Court ↑ bound by its own decisions ↔
Each High Court:	
Full bench:	bound by decisions of Constitutional Court ↑ bound by decisions of Supreme Court of Appeal ↑ bound by its own decisions ↔
Bench of two judges:	bound by decisions of Constitutional Court ↑ bound by decisions of Supreme Court of Appeal ↑ bound by decisions of full bench ↑ bound by its own decisions ↔
Single judge:	bound by decisions of Constitutional Court ↑ bound by decisions of Supreme Court of Appeal ↑ bound by decisions of full bench ↑ bound by decisions of bench of two judges ↑ bound by its own decisions ↔
Decisions of other divisions of the High Court	divisions of the High Court not bound by decisions, but decisions have persuasive authority
Magistrates' courts:	bound by decisions of divisions of the High Court ↑ in their area, decisions of divisions of High Courts in other areas have persuasive authority

ACTIVITY 1.6

Below is a scenario that is designed to test whether you can apply your knowledge of the doctrine of *stare decisis* to a given set of facts. You are required to **motivate** your answer and to explain why the other three options are **incorrect** before you can look at the feedback.

A decision is delivered by the magistrate's court in Bronkhorstspuit. An appeal is lodged with the division of the High Court in Pretoria and the case will be heard by

SECTION A: INTRODUCTION

a bench of two judges. There are conflicting judgments on the matter by several courts.

Which **ONE** of the following courts' decisions will the division of the High Court in Pretoria be bound to follow?

- (1) a decision by a single judge of the division of the High Court in Pretoria
- (2) a decision by a full bench of the division of the High Court in Pietermaritzburg
- (3) a decision by a bench of three judges of the Supreme Court of Appeal
- (4) a decision by a bench of two judges of the division of the High Court in Cape Town

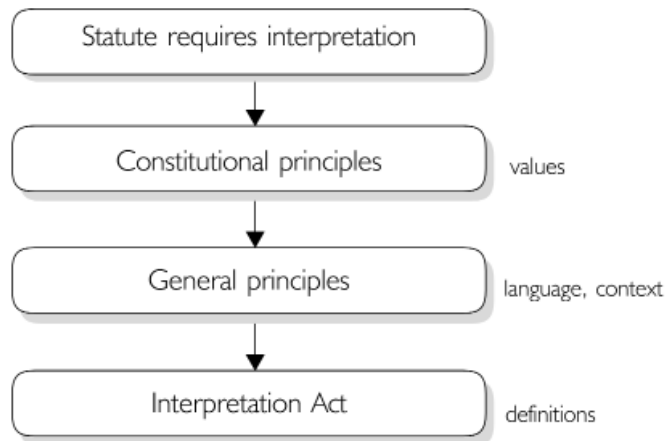
FEEDBACK

- (3) is **CORRECT**. The division of the High Court in Pretoria will be bound by the decision of the Supreme Court of Appeal, regardless of how many judges took the decision in the Supreme Court of Appeal, as this court is higher than the High Court in the hierarchy of the courts.
 - (1) is **INCORRECT**. In this case the division of the High Court in Pretoria will be bound by the decision of the Supreme Court of Appeal, as this court is higher than the High Court in the hierarchy of the courts. However, in the absence of a decision on the matter by the Supreme Court of Appeal, a bench of two judges will not be bound by an earlier decision of a single judge in its area of jurisdiction, although such earlier decision by a single judge will have persuasive power.
 - (2) is **INCORRECT**. In this case the division of the High Court in Pretoria will be bound by the decision of the Supreme Court of Appeal, as this court is higher than the High Court in the hierarchy of the courts. However, in the absence of a decision on the matter by the Supreme Court of Appeal, a High Court of one area of jurisdiction is not bound by the decisions of another High Court in another area of jurisdiction, although such earlier decision by a High Court in another area of jurisdiction will have persuasive power.
 - (4) is **INCORRECT**. In this case the division of the High Court in Pretoria will be bound by the decision of the Supreme Court of Appeal, as this court is higher than the High Court in the hierarchy of the courts. However, in the absence of a decision on the matter by the Supreme Court of Appeal, a High Court of one area of jurisdiction is not bound by the decisions of another High Court in another area of jurisdiction, although such earlier decision by another High Court will have persuasive power.
-

5. INTERPRETATION OF STATUTES

(Textbook par 1.5)

It sometimes becomes necessary for a court to determine what precise meaning must be given to a word or a phrase in an Act. The diagram that follows illustrates the process that a court follows to ascertain this meaning.



The court pronounces on the purpose and interpretation of the statute.

6. COURT JUDGMENTS

(Textbook par 1.6)

The contents and typical aspects of a court judgment are explained in **par 1.6** of the textbook. There you will find a copy of a court case, *National Sorghum Breweries Ltd v Corpcapital Bank Ltd* 2006 (6) SA 208 (SCA). All specific references in this section will be to that case. Although The South African Law Reports (abbreviated as SALR) are the official law reports of South Africa, there are other law reports as well, such as The South African Criminal Law Reports (SACLR).

Even if a previous decision is said to have binding authority, only certain parts of the judgment are important. The reader of a judgment must distinguish between two kinds of pronouncements by the court: those that relate to the reason for the decision (in Latin, the *ratio decidendi*) and those that are merely incidental remarks (in Latin, *obiter dicta* or, in the singular, an *obiter dictum*). The court will, however, not necessarily state expressly that a certain remark is its *ratio decidendi*: the reader must draw his or her own conclusion from the judgment. The *ratio decidendi* is the reason for the decision the court reached on the basis of the facts before it. The doctrine of *stare decisis* provides that only the *ratio decidendi* is binding on other courts in the hierarchy.

An *obiter dictum* is a statement made by the court, which is not part of the *ratio decidendi*. The court may, for example, refer to an alternative argument, or it may state what the position would have been had the facts been different. Although an *obiter dictum* is not binding, it may have persuasive authority, particularly if it was expressed by the Supreme Court of Appeal.

Now we want you to understand the *obiter dicta* and *ratio decidendi*. In *National Sorghum Breweries Ltd v Corpcapital Bank Ltd*, the *ratio* is that a creditor is free to cede its rights, and a non-variation clause in a contract does not restrict this power. Anything else that was said about lease or sale agreements in the judgment is *obiter* – those are statements that are not binding in terms of the doctrine of *stare decisis*. You can think of other examples of *obiter dicta* and *ratio decidendi*.

SELF-ASSESSMENT ACTIVITIES

- (1) Distinguish between authoritative sources and persuasive sources of South African law.
- (2) Contrast authoritative sources and persuasive sources of South African law.
- (3) A group of fishermen normally set their lines on a beach where no boats were permanently stationed. The fishermen did so with a view to catching a shoal of fish seen moving along the coast. No other fishermen were entitled to set lines within any reasonable distance in front of the lines already set.

Identify the case to which the above applies and outline the requirements that must be met before a customary rule will be recognised as a legal rule.

- (4) Explain the operation and effect of the doctrine of *stare decisis*.
- (5) Distinguish between *ratio decidendi* and *obiter dictum*.

7. EXPLANATORY NOTES

Advocate: An LLB graduate who has been admitted and enrolled as an advocate of the High Court. When an advocate practises as such, he or she is usually also a member of a Bar. There is a Bar for each of the various divisions of the High Court. In order to become a member of a Bar, a candidate must complete a pupillage and pass the Bar examination. An advocate may appear in any court, except the small claims court. In terms of section 34(2)(a)(ii) of the Legal Practice Act 28 of 2014 an advocate may now render legal services in expectation of a fee upon receipt of a request directly from a member of the public, provided that he or she is in possession of a prescribed certificate and a trust account.

Appeal: Taking a decision of a lower court to a higher court. The person bringing the appeal hopes to persuade the higher court to change the decision of the lower court. The person who takes the matter to a higher court is called the appellant, regardless of whether this party was the applicant or the respondent in the first case, or whether this person was the plaintiff or the defendant in the first case (see “Defendant” and “Plaintiff” below).

Attorney: An LLB graduate who has passed the board examination of the law society, has completed articles of clerkship and has been admitted and enrolled as such by the High Court. Attorneys may appear in the lower and the superior courts. Attorneys have traditionally dealt directly with members of the public who need legal advice or representation, but they may refer their clients to advocates. Apart from litigation, attorneys also give assistance in all kinds of legal matters such as the drawing up of contracts and wills.

Cede: To transfer, assign or hand over one’s right to claim something to another person.

Clerk of the court: The official who receives and issues legal documents and pleadings in civil actions in the magistrate’s court (see “Registrar” below).

Codified: Recorded in one comprehensive piece of legislation. The *Corpus Iuris Civilis* is a codification of the Roman law, which was compiled during the reign of Emperor Justinian in the sixth century. South African law is not codified.

Common law: This term is used in both a wide and a narrow sense. In the wide sense it is used to indicate law that is not contained in legislation and in the narrow sense it is used specifically to refer to the works of the old authorities.

Constitutional Court: The highest court in South Africa for constitutional matters.

Defendant: The person who is sued by the plaintiff in a civil action. In certain types of cases, the defendant is called the respondent.

Government Gazette: The state's official newspaper in which all Acts, proclamations and other information that needs to be brought to the public's notice are published. The *Government Gazette* is published by the Government Printer.

Judge: A court officer who hears and decides cases in the superior courts.

Judgment: The decision of a judge, a magistrate or other judicial officer in a case.

Jurisdiction: A court has two kinds of jurisdiction: jurisdiction regarding the type of matter (e.g. a magistrate's court may not decide on the validity of a will) and jurisdiction in a particular geographical area (e.g. the jurisdiction of the magistrate's court of Potchefstroom is limited to cases arising in the district of Potchefstroom; it may not hear cases that arose in Bloemfontein, for example).

Magistrate: The court officer who hears and decides cases in the magistrate's court. Regional magistrates hear matters in regional courts.

Minority judgment: The judgment of a judge or judges who disagrees/disagree with the judgment of the majority of judges who hear a case.

Non-variation clause: A clause that states that no amendment to, or variation of the contract, will be legally valid or binding unless it is reduced to writing and signed by all the parties.

Obiter dictum: A remark in passing that was unnecessary for the decision of the case and is, therefore, not binding in subsequent court cases.

Plaintiff: The person bringing an action in a civil case. In certain types of cases, the plaintiff is called the "applicant".

Quasi-: A prefix that means "similar to", "resembling".

Ratio decidendi: The underlying reason for a court's ruling.

Registrar: The official who receives and issues legal documents or pleadings in a superior court.

Statute law: The law created by the passing of an Act by Parliament or a provincial legislature.

Supreme Court of Appeal: A court of appeal for the High Court and its various divisions. Its appeal jurisdiction is unlimited, with the exception of matters that fall within the exclusive jurisdiction of the Constitutional Court. Parties cannot take their cases directly to the Supreme Court of Appeal, because this court hears only appeals against decisions of the High Court.

8. AFRICANISATION AND COMMERCIAL LAW

In traditional African societies people applied customary law to govern their relations in both private and public spheres. In circumstances where the African concept of *ubuntu* is practised, a lot of weight is attached to values such as human dignity, group solidarity, conformity, respect, justice, good faith, fairness and other similar virtues. In case of a dispute between traditional community members, community members normally defer to institutions such as the *kgoro* (loosely translated as a traditional court) to resolve the matter. Traditional courts invoke the spirit of *ubuntu* when disputes are heard. Fairness, justice, group solidarity and a sense of community are emphasised by the various role-players, including the chief and tribal headmen. Each dispute is adjudicated upon on its own merits and although customary law is unwritten, the principle of *stare decisis* is adhered to by the traditional courts. Section 211(3) of the Constitution, 1996 provides that the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law. The concept of *ubuntu* was given explicit application in our jurisprudence for the first time in *S v Makwanyane* 1995 (6) BCLR 665 (CC), where Madala J noted that *ubuntu* advocates social justice and fairness.

STUDY UNIT 2

Introduction to the Science of Law

LEARNING OUTCOMES

After you have worked through this study unit, you should be able to

- define the term “law”
- differentiate between different divisions and subdivisions of law
- describe patrimonial law
- define the term “right” and give categories of rights
- describe a legal subject
- distinguish between two categories of legal subjects/persons
- define the term “delict”
- name and describe the grounds of justification
- discuss unjustified enrichment

Prescribed study material: chapter 2

OVERVIEW

In this study unit you are introduced to the meaning of “law”, the meaning of “right”, public law, as well as private law and its subdivisions, which include patrimonial law.

Patrimonial law deals with different aspects of a person’s assets and liabilities, measurable in monetary terms. It includes the law of property, the law of succession, intellectual property law and the law of obligations. **Obligations** arise from three causes, namely, delict, contract and various other causes, notably unjustified enrichment. The law of delict, the requirements for a delict and the remedies, as well as the law pertaining to unjustified enrichment and the remedies, are discussed in detail in this study unit. **Contracts**, the third source of obligations, are dealt with in detail in chapters 3–12 of the textbook.

1. THE TERM “LAW”

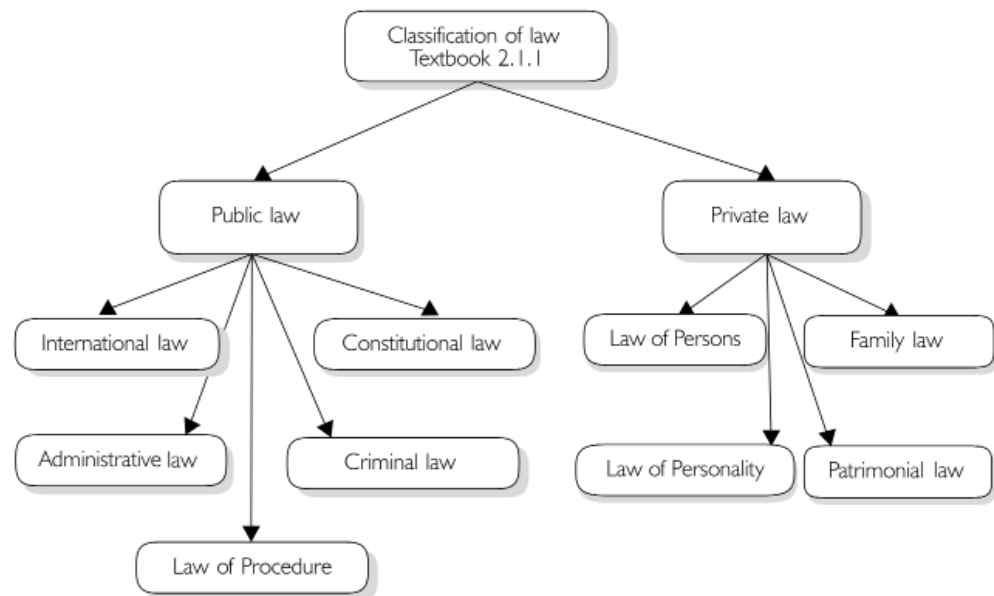
(Textbook par 2.1)

1.1 The meaning of “law”

Can you define the term “law” in your own words? The term “law” refers to a system of rules that applies in a community and which is binding on people. But not all rules that apply in a community are legal rules. People also abide by other sets of rules, for example, social and religious rules. Legal rules are characterised by the fact that they can be enforced by the state.

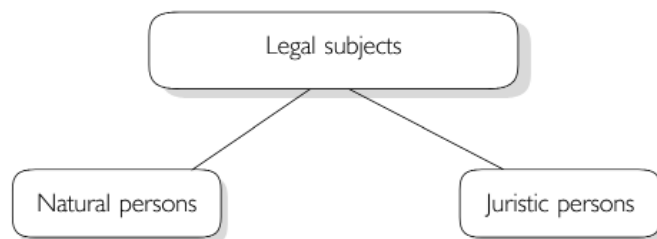
If a person does not follow the rules, he or she may, for example, be imprisoned or made to pay compensation to another person who has suffered loss because of what

the guilty person has done or failed to do. Traditionally, the main division in law is between **public law** and **private law**. The division between public law and private law is, however, not absolute and a certain amount of overlap normally occurs. Public law is concerned with the distribution and exercise of power by the state and the legal relations between the state and the individual. Private law, on the other hand, is concerned with the legal relationships between individuals. The following diagram shows a traditional classification of the law:

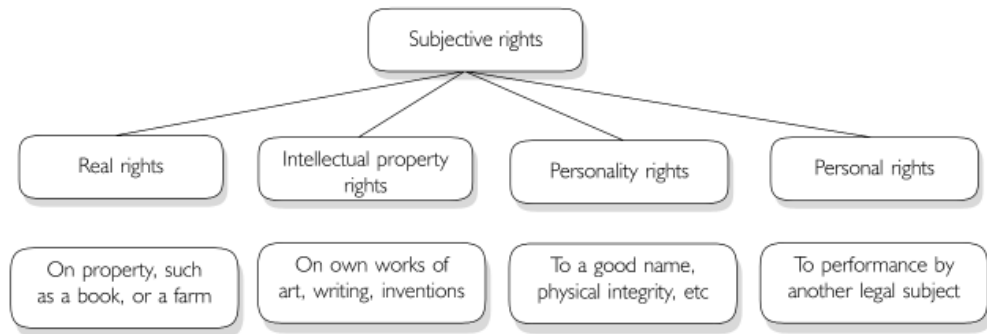


1.2 The meaning of “a right”

A right is any right that a legal subject has in respect of a legal object and which is protected by law. The law recognises two categories of legal subjects, namely, natural and juristic persons.



A **legally** protected right is referred to as a **subjective** right. The law recognises four categories of subjective rights that legal subjects may possess, namely, **real rights**, **intellectual property rights**, **personality rights** and **personal rights**. The following diagram shows what these rights are about:



ACTIVITY 2.1

Read the scenario below and answer the question that follows.

Kau is a famous inventor of new environmentally friendly trucks. He stands in his ultramodern workshop, admiring the revolutionary new electrically powered truck that he designed for the company, Big Trucks, which still owes him R5 000 000.

The above paragraph refers to four legal objects (a legal object is one of the four categories of subjective rights). Indicate the correct option.

The R5 000 000 owed to Kau is an example of ...

- (1) a real right.
- (2) a personality right.
- (3) a personal right.
- (4) an intellectual property right.

FEEDBACK

- (3) is **CORRECT**. Personal rights are rights in terms of which some type of conduct, referred to as performance, can be demanded from a person. Personal rights may come about through a contract, a delict or unjustified enrichment. Performance can entail giving something, doing something or refraining from doing something. Kau has a personal right to the R5 000 000 Big Trucks still owes him for the invention they bought from him, probably in terms of a contract of sale.
 - (1) is **INCORRECT**. A real right is a right that a legal subject has over property such as a book, a pencil or a farm. Kau has a real right over his workshop, if it is registered in his name.
 - (2) is **INCORRECT**. Personality rights are rights relating to aspects of a person's personality, for example, a person's physical integrity or reputation. Kau's well-earned reputation as a famous inventor of trucks is the object of a personality right.
 - (4) is **INCORRECT**. Intellectual property rights are rights to intellectual property. Examples of rights relating to intellectual property are an artist's right to the works of art he or she has created, a writer's right to his or her literary works, an inventor's right to his or her inventions, such as Kau's right to his invention, and a designer's right to his or her designs.
-

2. PRIVATE LAW (Textbook par 2.2)

2.1 The law of persons

Legal subjects can be bearers of subjective rights. In the case of natural persons as legal subjects, the law of persons determines

- who is a legal subject
- how a person becomes, or ceases to be, a legal subject
- the various classes (categories) of legal subjects
- the legal position (status) of each of these classes of legal subjects

Note the difference between **legal capacity** and capacity to act, which is discussed in study unit 5 (chapter 5 of the textbook) and which is one of the requirements for the conclusion of a valid contract.

2.2 Family law

Family law comprises the following two subdivisions:

- the law of husband and wife
- the law of parent and child

Please note that **family law** has nothing to do with the relations between relatives, for example, aunts and uncles or in-laws. More information regarding the law of husband and wife is provided in study unit 5 (chapter 5 of the textbook), where the effect of marriage on a person's capacity to act is discussed.

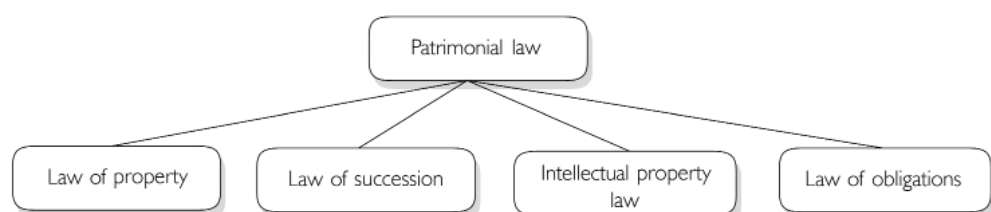
2.3 Law of personality

The **law of personality** is concerned with the protection of the physical and psychological integrity of legal subjects. Note that natural persons, as legal subjects, have subjective rights to aspects of the personality called personality rights. The law of personality defines what these rights are.

2.4 Patrimonial law

Patrimonial law involves the relations between persons as regards their patrimony. A person's patrimony consists of all his or her rights and duties that may be valued in money; it is therefore the sum of his or her assets and liabilities.

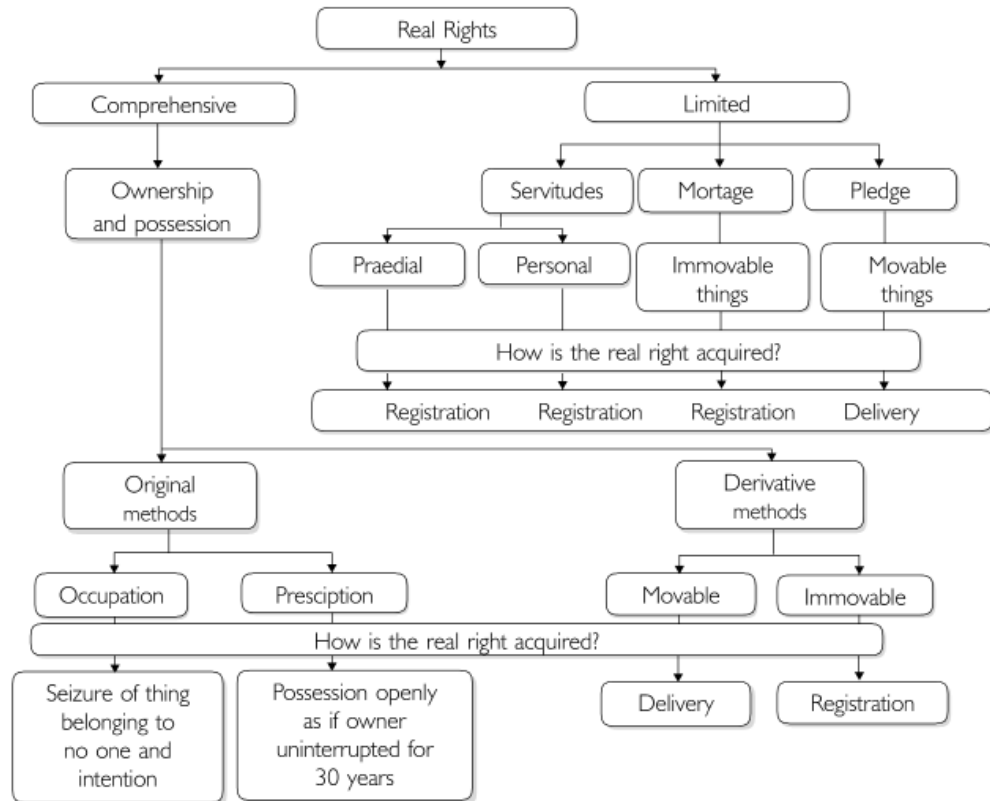
The following diagram shows the different subdivisions of patrimonial law:



2.4.1 The law of property

The subjective right that a legal subject has towards a material object is called a real right. Real rights can be comprehensive or limited.

The classification and acquisition of real rights can be shown as follows:



ACTIVITY 2.2

Read the scenario below and answer the question that follows.

Bruce provided in his will that ownership of his farm, Big Bull, near Mafikeng, would, on his death, pass to his son Kobus and that his widow, Mary, would have the right to stay on the farm and use it as long as she lived. During his lifetime Bruce used the property for dairy farming, growing wheat crops and cultivating vegetables.

Which **ONE** of the following statements is **CORRECT**?

- (1) Mary's right is an example of a type of personal servitude called a usufruct.
- (2) The farm, Big Bull, is called the dominant tenement.
- (3) Mary may replace the wheat fields with a dirt-track racing course for which a need exists in Mafikeng and which would require less work from her than cultivating wheat.
- (4) Kobus is entitled to the dairy products and vegetables produced on the farm.

FEEDBACK

- (1) is **CORRECT**. A usufruct is a personal servitude and attaches to the holder personally, whereas a praedial servitude attaches to the owner of property in that person's capacity as the owner of that property.

- (2) is **INCORRECT**. Whether a property is dominant or servient is only relevant in the case of praedial servitudes, where two properties are involved. Mary has a personal servitude called a usufruct.
 - (3) is **INCORRECT**, because a usufructuary may not alter the substance of the property. This means that Mary should maintain the farm as a farm and not as another kind of enterprise, for example, a sports facility.
 - (4) is **INCORRECT**, because in the case of usufruct it is not the owner of the property who has the right to the fruit and produce of the property, but the usufructuary. The rights of the usufructuary not only include the right to use and enjoy the property itself, but also the right to the fruit of the property. Mary, and not Kobus, is therefore entitled to the produce of the farm.
-

ACTIVITY 2.3

Which **ONE** of the following statements regarding the acquisition of ownership is **CORRECT**?

- (1) John will acquire ownership of the farm Bloemhof, which he has bought from his neighbour Gavin, when the farm is registered in his name at the deeds office.
- (2) Sizo cannot acquire ownership of the rabbits he sees in the veld, even if he succeeds in catching them.
- (3) Freda will become the owner of the car that her sister Brenda intends giving her for her birthday, as soon as Brenda collects the car from the dealer.
- (4) Solly can never become the owner of land adjacent to his plot, which he fenced in accidentally when he bought the plot 40 years ago and subsequently cultivated.

FEEDBACK

- (1) is **CORRECT**. In the case of immovable property such as a farm, ownership will be acquired by the new owner only on registration of the property in his or her name at the deeds office.
 - (2) is **INCORRECT**. One original method of acquiring ownership is by occupation of something that belongs to no one. The rabbits do not belong to anyone and, if Sizo succeeds in catching them, he will become their owner by taking possession of them.
 - (3) is **INCORRECT**. In the case of movables, ownership is acquired on delivery of the thing (in addition to other requirements, which are not relevant in the case of a donation) to the new owner. Only when Brenda delivers the car to Freda will Freda become the owner, not when Brenda promises it to her or collects the car from the dealer.
 - (4) is **INCORRECT**. The second original method of acquiring ownership is prescription in the case of something that belongs, or belonged, to someone else. By means of prescription, Solly can become the owner of the land that he accidentally fenced in, if he has occupied the land openly as if he were its owner for longer than 30 years. As the land belonged to someone else (his neighbour), ownership is acquired through prescription and not through occupation.
-

2.4.2 The law of succession

The law of succession deals with the rights of legal subjects to the property of a deceased person. This property is known as a deceased estate.

2.4.3 The law of intellectual property

Note that legal subjects may have subjective rights to intellectual property, called **intellectual property rights**. What these rights are and how they are protected is governed by intellectual property law, in general, and by copyright law, patent law and trademark law, in particular, depending on the particular class of immaterial object. (This topic is discussed in detail in chapter 18 of the textbook, but is not prescribed for the module **CLA1501**. It is included in this module simply for the sake of completeness.)

2.4.4 The law of obligations

The last subdivision of patrimonial law is the law of obligations. A legal subject may have a subjective right to performance by another legal subject, which is known as a personal right.

Such personal rights arise from obligations, and obligations arise from

- contracts
- delicts
- various other causes, for example, unjustified enrichment

In this section (section A) we only deal with the law of **delict** and **unjustified enrichment**. The **contract**, the third source of obligations, and the general principles of the law of contract are discussed in greater detail in section B below.

2.4.4.1 *Introduction to the law of delict*

If you refer back to the subdivisions of public law (see par 2.1.1 in the textbook), you will find criminal law. Criminal law deals with behaviour that the State prohibits as crime and that is punishable in the interests of the state and its subjects.

However, certain acts that are prohibited as crimes can also constitute delicts for which the innocent party may claim damages, among other things, if the requirements for a delict have been met (as opposed to punishment of the prohibited behaviour in the case of crimes). The law of delict stipulates what is required for an act to qualify as a delict and what remedies are available to the party who suffers the damage.

The elements or requirements of a delict are the following:

- (a) a voluntary human act
- (b) unlawfulness
- (c) fault (either intent or negligence)
- (d) causation
- (e) damage to or impairment of personality

Grounds of justification are special circumstances that turn an otherwise unlawful act into a lawful act.

The following grounds of justification are usually distinguished:

- (i) necessity
- (ii) self-defence
- (iii) consent: consent to injury
consent to the risk of injury

SECTION A: INTRODUCTION

- (iv) statutory authority
- (v) provocation

The remedies in the case of delicts are an interdict and payment of damages for three kinds of proven loss: the *actio legis Aquiliae* is used to recover **patrimonial damages** for **patrimonial** damage (economic loss or loss that can be assessed in terms of money); the *actio iniuriarum* is used to recover **sentimental** damages; and the action for pain and suffering is used to obtain compensation for **injury to the personality**, for example, emotional shock.

Note the difference between **damage** and **damages**: “**damage**” refers to the loss or harm the innocent party has suffered, while “**damages**” refers to the compensation that the wrongdoer pays to the party that suffered the harm/loss.

ACTIVITY 2.4

Read the scenario below and answer the question that follows.

Maria has a heart problem. She is extremely attached to her nephew, Boswell, whom she has raised. David is jealous of the relationship between Maria and Boswell and decides to do something to hurt Maria. Knowing that she has a heart problem, he visits her one evening and tells her that Boswell has been involved in a burglary, caught red-handed by the police and fatally wounded in a wild shooting incident. As a result of the shock, Maria suffers a heart attack, causing her considerable medical expenses.

Which **ONE** of the following statements is **CORRECT**?

- (1) David did not commit a delict, as the element of a voluntary human act is absent.
- (2) David committed a delict, as the elements of a voluntary human act, unlawfulness, fault, causation and damage are present.
- (3) David did not commit a delict, as the element of unlawfulness is absent: David had a ground of justification, in that he acted in response to provocation by Maria.
- (4) David committed a delict, although he did not cause Maria's heart attack.

FEEDBACK

- (2) is **CORRECT**. David did commit a delict. There was a wilful act in the form of the words he spoke; there was wrongfulness, as his conduct was in conflict with the community's sense of reasonableness; there was fault, in that he acted intentionally by foreseeing the consequences and reconciling himself to them; there was causation, in that his wrongful behaviour caused Maria's heart attack and the patrimonial damage ensuing from her subsequent medical expenses; and she suffered damage in the form of medical expenses and shock.
- (1) is **INCORRECT**. David did commit a delict. The element of a voluntary human act is present, as the things he said comply with the requirement of human conduct and he was in control of his behaviour.
- (3) is **INCORRECT**. David did commit a delict. The element of unlawfulness is present, as his conduct was in conflict with the community's sense of reasonableness and he had no ground of justification. Provocation requires an immediate, reasonable retaliatory response. Maria's relationship with

Boswell does not constitute provocation and David's response was, in any event, not a reasonable response.

- (4) is INCORRECT. If all the elements of a delict are not present, a delict has not been committed. David did commit a delict, as the element of causation is present in that his intentional, wrongful behaviour caused Maria's heart attack and her subsequent patrimonial damage in the form of medical expenses.

Note: Compensation for **patrimonial damage** in the form of medical expenses is recovered by means of the *actio legis Aquiliae*. Compensation for shock is recovered by means of the **action for pain and suffering**.

2.4.4.2 Introduction to the law of unjustified enrichment

Remember that personal rights originate from obligations, and obligations, in turn, arise from delict, contract and unjustified enrichment. The object of the subjective right known as a personal right is **performance**. The right to performance thus arises from a contract, a delict and unjustified enrichment. The performance, that is, the object of the right in the case of unjustified enrichment is the payment of an amount equal to the amount by which one person has been enriched to the detriment of another person, which is known as **restitution**.

The South African law does not recognise a general enrichment action, and an action based on unjustified enrichment can be instituted only in certain specific instances. The obligation imposed upon the enriched person takes one of two forms, namely,

- (a) restitution
- (b) payment of a sum of money

SELF-ASSESSMENT ACTIVITIES

- (1) What does the term "law" mean?
- (2) Describe a legal object.
- (3) Describe a subjective right.
- (4) Draw a distinction between a legal subject and a juristic person.
- (5) Name different classes of subjective rights.
- (6) Draw a distinction between different ways in which ownership can be acquired.
- (7) Draw a distinction between praedial servitudes and personal servitudes.
- (8) Draw a distinction between ownership and possession.
- (9) Define a "delict".
- (10) Name and describe the grounds of justification.
- (11) What remedies does the law grant to a person who has suffered damage or non-patrimonial prejudice?
- (12) Name and describe the two forms that an obligation imposed upon the enriched person can take.

3. EXPLANATORY NOTES

Delict: Any unlawful culpable act whereby a person (the wrongdoer) causes the other party (the prejudiced person) damage or an injury to personality, and whereby the prejudiced person is granted a right to damages or compensation, depending on the circumstances.

Immovable things: Two types of property are usually distinguished, namely, movable and immovable. Immovable things or immovable property is *property that cannot be physically moved, for example, land, houses, flats and other buildings*.

Juristic person: An entity that is recognised as a legal subject, for example, a company, a university, the state, and so on. Juristic persons have rights and are subject to duties.

Law: A system of rules that apply in a community.

Legal object: Any entity that can be the object of a legal subject's claim to a right.

Legal subject: A human being or entity subject to the law.

Negligence: A form of fault where the wrongdoer did not direct his or her will in order to achieve a particular result (which is called intent), but acted differently from what a reasonable person in the same circumstances would have acted, for example, by not realising what harm could result from his or her actions, or by not caring about possible consequences.

Negotiorum gestio: *Negotiorum gestio* arises when one person voluntarily, and without the permission or knowledge of another person, manages the affairs of the latter.

Patrimonial law: The law that regulates the relationship between persons as regards their patrimony. A person's patrimony consists of all his or her rights and duties that may be valued in money (that is, the sum of a person's assets and liabilities).

Restitution: The act of restoring something that has been taken away, lost or surrendered to the rightful owner.

Right: Any right that a legal subject has regarding a specific legal object and which is protected by law.

Unjustified enrichment: Unjustified enrichment takes place when there is no valid legal ground for the person who has obtained the benefit to have done so and it was done at the expense of the other.

4. AFRICANISATION AND COMMERCIAL LAW

The law, be it formal (e.g. common law and statutory law) or informal (e.g. customary law and practices), is aimed at protecting people and their property, and regulating relationships between people and between people and the state. Thus, the law is not only there to maintain order within society, but also to make sure that people and their belongings receive protection and that those who suffer loss or are prejudiced because of the wrongful acts of others are compensated. It is only fair that the owners of property receive protection from the law (e.g. a lawful owner of property may not be unlawfully deprived of or evicted from the property) and that those who have suffered any form of loss or damage due to the fault of others receive some form of compensation. This ties in with the concept of *ubuntu*, which is more in favour of restorative justice – which concerns repairing the harm – than retributive justice – which concerns punishing the offender.

SECTION B

General principles of the Law of Contract

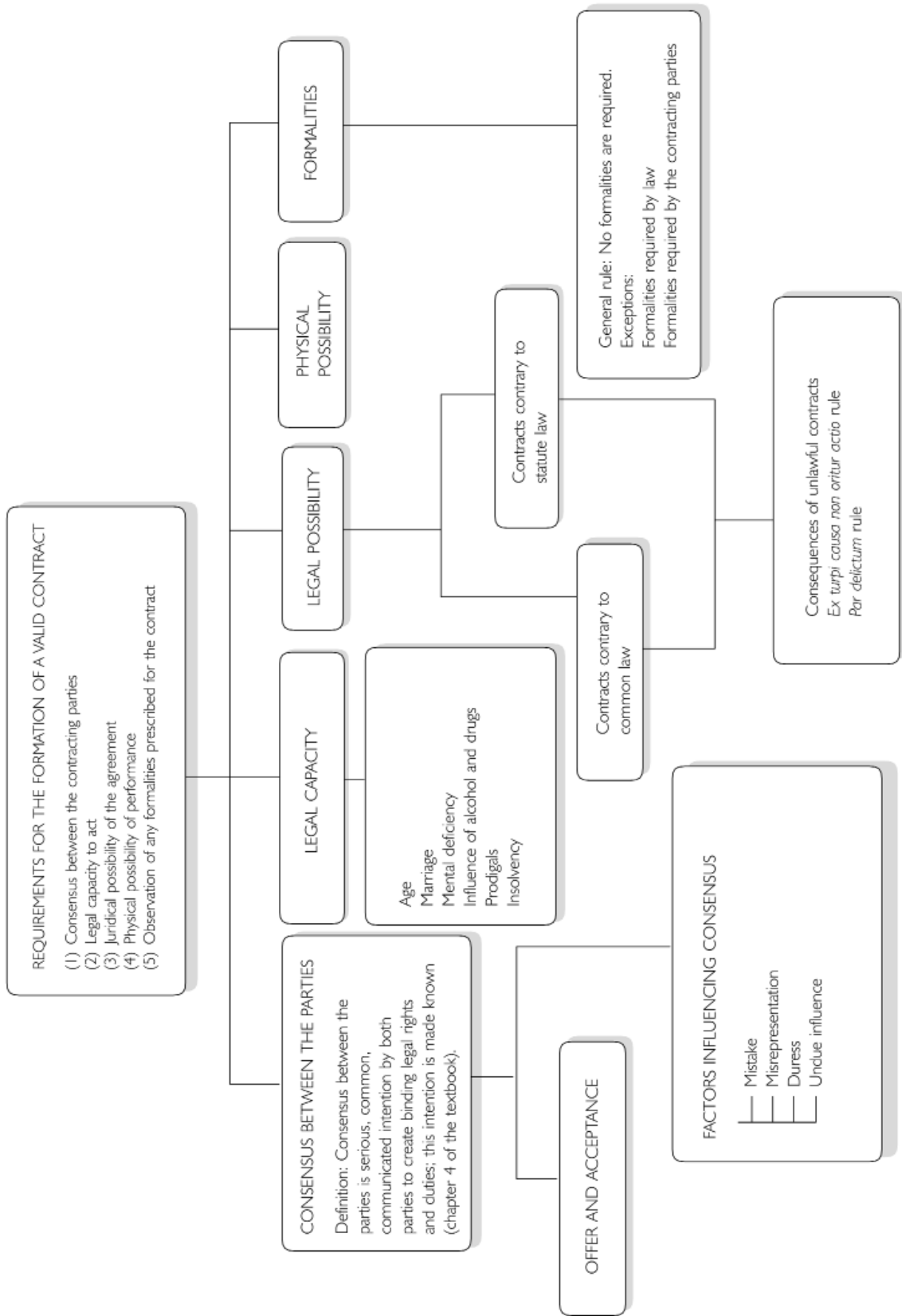
SECTION B: GENERAL PRINCIPLES OF THE LAW OF CONTRACT

In **section A** you were given a general overview of the origin and sources of the law as well as the judicial process and the classification of the law. When you are faced with a legal problem, you should now be able to identify the part of the law under which the problem falls. Doing so will enable you to trace the correct sources so that you can determine the current legal position on the matter or refer the matter to a specialist in that particular field of law.

Section B is devoted to the general principles of the law of contract. The overall aim of this part is to familiarise you with the basic principles of the law of contract. Although you may never be required to draw up contracts, in practice you may find it necessary to advise clients, employees or an employer on whether existing contracts or proposed contracts meet the requirements for legally valid contracts (chapters 3 to 7 of the textbook); which stipulations may be found or included in contracts and what their legal consequences are (chapter 8 of the textbook); how to interpret contracts (chapter 9 of the textbook); and how to determine whether a breach of contract has occurred and what the remedies are (chapters 10 and 11 of the textbook).

In addition, you must be able to determine in practice when the rights that arise from a contract have been terminated or transferred (chapter 12 of the textbook). If you should find that a certain juristic act does not constitute a contract, you need to be able to determine whether another obligation has nonetheless come about and what the remedies would be if there were other obligations, as already discussed in study unit 2 (chapter 2 of the textbook) and referred to repeatedly.

Scheme 1: Requirements for the formation of a valid contract



STUDY UNIT 3

Law of Contract: Introduction

LEARNING OUTCOMES

After you have worked through this study unit, you should be able to

- describe a contract
- distinguish between contracts and other agreements
- explain what an obligation entails
- explain what performance entails
- list five basic requirements for the conclusion of a valid contract
- understand how freedom to contract may be limited
- explain what electronic transactions (e-commerce/contracting electronically) entail

Prescribed study material: chapter 3

OVERVIEW

In order to master chapter 3 of the textbook, you should first know what this study unit is all about and read it in conjunction with your textbook. This study unit consists of four subdivisions. The first subdivision deals with the contract as a source of obligations, the second lists basic requirements for the conclusion of a valid contract, the third deals with a person's freedom to contract and the fourth deals with the conclusion of contracts by electronic means.

1. THE CONTRACT AS A SOURCE OF OBLIGATIONS

(Textbook par 3.1)

Before one can speak of obligations, a valid contract must have been concluded. In other words, a valid contract must exist before obligations may arise or come into being.

What is a contract?

Can you think of any examples of contracts you entered into in the past?

A contract is an agreement between two or more persons. This agreement is entered into with the intention to create legal obligations. If the agreement does not create a legal obligation that is enforceable, then that agreement is not a contract. What this means is that **not all** agreements are contracts; however, **all** contracts are agreements. Therefore, the main difference between contracts and other agreements is the requirement that there must be intention to create legal obligations.

Let us take the example of a hostess who engages a professional caterer to provide food for a party to which ten guests have been invited. If five of the guests fail to attend

the party, the hostess has no right to sue any of them for breach of contract. Why? This is a **social appointment** and there was no intention to create legal obligations.

However, the situation becomes different if the caterer fails to supply the food and drink as requested by the hostess. In this instance, the hostess has a right to sue the caterer for breach of contract. Why? Because the parties in question intended to create legally enforceable obligations.

An obligation may arise from a contract or a delict, or from unjustified enrichment, as discussed in study unit 2 above. The two most important aspects of a contract are the parties' intention (aim) to create legal obligations and the legal results (rights and duties) that flow from such intention.

Therefore, a holder of a right is entitled to performance, and any person who has to render that performance has a duty towards the holder of a right.

ACTIVITY 3.1

Victor and Yvette arrange to go to the theatre together. Victor waits for Yvette who, in the meantime, has decided to go ice-skating with Sonya and Liezel. Victor is upset and wishes to know whether he may take legal action against Yvette. Advise Victor.

FEEDBACK

Victor and Yvette's arrangement was a purely social engagement and not a contract. They had no intention of creating a legal obligation. All that Victor has at his disposal is a social sanction (e.g. to end their friendship).

2. REQUIREMENTS FOR THE FORMATION OF A VALID CONTRACT

(Textbook par 3.2)

An agreement must comply with the basic requirements for the conclusion of a valid contract in order for such agreement to be regarded as valid. There are four requirements for the conclusion of a valid contract as listed in par 3.2(a)–(d) of the textbook. The fifth requirement, namely, formalities (in par 3.2(e) of the textbook) is not always required in order for a contract to be valid (see par 7.2 of the textbook). However, formalities may be prescribed by the law for a contract to be valid (see par 7.3.1 of the textbook). Further, parties to a contract may also prescribe formalities with which to comply in order for the contract to be valid (see par 7.3.2 of the textbook)

3. FREEDOM TO CONTRACT

(Textbook par 3.3)

Any person is entitled to enter or not to enter **into a contract with any other person on the grounds of his or her choice. However, freedom to contract may be restricted in certain circumstances. This restriction can be in force in terms of the**

Constitution of the Republic of South Africa, 1996 or the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. For example, a person may not conclude contracts that are unlawful and a person may be forced to enter into a contract with another person if the basis of a failure to enter into a contract with another person was discriminatory and thereby prohibited.

ACTIVITY 3.2

Which **ONE** of the following statements is **INCORRECT**?

- (1) Freedom to contract is considered to be one of the cornerstones of the modern law of contract.
- (2) One is generally free to choose with whom and on what grounds one wants to contract with another person.
- (3) Freedom to contract may not be limited.
- (4) A person may not conclude contracts that are unlawful or illegal.

FEEDBACK

- (3) is the **CORRECT** answer. Freedom to contract can be limited in circumstances, for example, a person may not conclude contracts that are unlawful or illegal.
 - (1) is **INCORRECT**. Freedom to contract is considered to be one of the cornerstones of the modern law of contract.
 - (2) is **INCORRECT**. One is generally free to choose with whom and on what grounds one wants to contract, but freedom to contract can be limited in certain circumstances.
 - (4) is **INCORRECT**. Freedom to contract can be limited in certain circumstances, for example, a person may not conclude contracts that are unlawful or illegal.
-

4. CONTRACTING ELECTRONICALLY

(Textbook par 3.4)

Since the inception of the internet in the 1990s, the use of the internet for commercial and non-commercial transactions has been increasing exponentially. As a result, the Electronic Communications and Transactions Act 25 of 2002 (ECT Act) was promulgated to regulate all electronic transactions. The textbook provides details regarding the transactions that are included and those that are excluded from the ambit of this Act. Further, a contract may be concluded partly or wholly through data messages.

SELF-ASSESSMENT ACTIVITIES

- (1) Describe a contract.
- (2) What is the difference between an agreement and a contract?
- (3) What are the requirements for the conclusion of a valid contract?
- (4) Can freedom to contract be limited?
- (5) What does “contracting electronically” mean?

5. EXPLANATORY NOTES

Duty: A responsibility imposed by law that obliges or binds a person to render performance (i.e. to do something or to refrain from doing something).

Obligation: A legal relationship that creates rights and duties.

Right: An advantage that entitles the holder of the right to demand that another person do something or refrain from doing something (an example of an obligation to refrain from doing something is a restraint of trade agreement, as discussed in chapter 6.2.1.3(e) of the textbook), or pay a sum of money.

6. AFRICANISATION AND COMMERCIAL LAW

The general principles of the law of contract are interrelated with the African concept of *ubuntu*, which advocates social justice and fairness. Most principles in the law of contract are aimed at ensuring fairness and reasonableness in the interest of justice.

STUDY UNIT 4

Consensus

LEARNING OUTCOMES

After you have worked through this study unit, you should be able to

- explain what is meant by the concept of “consensus”
- explain the basis for contractual commitment
- describe the requirements for a valid offer and acceptance
- explain consensus and defects in will
- describe the special rules regarding a valid offer and acceptance
- indicate where (place) and when (moment) contracts are formed/concluded
- explain what “mistake”, “misrepresentation”, “duress” and “undue influence” entail
- explain how the existence of mistake, misrepresentation, duress and undue influence can influence/affect consensus

Prescribed study material: chapter 4

OVERVIEW

In this study unit we address a very important and rather difficult aspect of the law of contract, namely, consensus. The existence of consensus between the parties is the first requirement for the conclusion of a valid contract. In par 4.1 of the textbook, there is a discussion of the following three requirements that must be met for consensus to exist: every party must have the intention to be contractually bound, the parties must have a common intention and every party must make his or her intention known to every other party. These requirements will be discussed below. Par 4.2 of the textbook (offer and acceptance) provides more detail regarding how the intention is made known to the other party and accepted and how the offer falls away. It also provides information regarding special rules in respect of invitations to make an offer, *statements of intent*, tenders and auctions.

The moment and place of formation of the contract is important in determining the court that will have jurisdiction (see chapter 1 of the textbook and study unit 1 of the study guide) in the case of a dispute with regard to the contract. The last section of this study unit deals with consensus and defects in will. If the defect in will relates to mistake, the contract can be void, provided that certain requirements are met. If the defect in will is a result of misrepresentation, duress and undue influence, the contract is voidable. As these actions constitute delict, the remedies lie within the law of delict.

1. THE CONCEPT OF CONSENSUS

(Textbook par 4.1)

1.1 Consensus as the basis for contractual commitment

The basis of consensus is a common intention to be contractually bound, which the respective contracting parties make known to one another.

1.2 The intention to be contractually bound

The parties must intend to create a **legal obligation**. This intention to create a legal obligation is absent if the parties are not serious about their contract, but enter into it as a joke, for example. Similarly, this intent is absent if, for example, a lecturer pretends to sell one of her students a book as a way of explaining the rights and duties of the respective parties to a contract of sale. So, when Jill, in explaining the duty of the seller to deliver the thing sold, hands over her book to Peter as a way of showing him her obligation to deliver it, neither she nor he intends to be contractually bound, and thus no contract has arisen. Moreover, the intention to create a legal obligation is absent if parties agree to perform the impossible: for example, if Sheila says that she will pay Jim R1 million if he flies to Mars, she lacks the intention to create a legal obligation.

ACTIVITY 4.1

You are now required to test your understanding of the above concepts. Below is a case study that you must analyse. Thereafter, you must choose the correct option and motivate why you think the other options are incorrect.

Kamo, a 40-year-old bachelor, has finally decided to get married. He requests his closest friend, Matome, to be his best man. Matome gladly agrees. However, Matome does a disappearing act on the day of the wedding. Matome, who is a bachelor at 45, apparently confided in one of their mutual friends that he was ashamed to be the best man because he did not even have a girlfriend.

Which **ONE** of the following statements is **CORRECT**?

- (1) A contract arises between Kamo and Matome, as consensus exists.
- (2) No contract arises, as Kamo and Matome have no intention to be legally bound.
- (3) A contract arises, as a common intention exists and every party has made it known to the other party.
- (4) No contract arises, as nothing was put in writing.

FEEDBACK

- (2) is **CORRECT**. The essence of the element of consensus is that all of the parties must have the serious intention to be contractually bound, which means that they must intend to create legal rights and obligations. If Kamo and Matome agree that Matome should be Kamo's best man, they have no intention that their agreement should create legal obligations (rights and duties).

- (1) is INCORRECT. Although consensus is the basis of every contract, the parties themselves must intend to be contractually bound by their agreement.
 - (3) is INCORRECT. Although consensus is the basis of every contract, the parties themselves must intend to be contractually bound by their agreement.
 - (4) is INCORRECT. Generally, a contract does not need to be in writing to be binding on the parties.
-

1.3 Common intention

The parties to the proposed contract must have the same intention. This shared intention is absent if, for example, one party intends to buy a specific house and the other party intends to let that house to him or her under a contract of lease. In these circumstances, the parties are negotiating at cross-purposes and, as a result, no contract is formed. A contract would arise here if both parties intended to be bound by either a lease of the house or, alternatively, a sale and purchase of the house.

1.4 Making the intention known

An intention is a subjective attitude. Unless it is communicated, expressed or manifested, it remains only a thought. It must be transmitted from one person's mind to another person's mind.

The intention can be declared in some way or another. Can you think of any examples? One way is a declaration in writing. The written terms in terms of which a party is willing to contract may be detailed and expressed formally. An example would be a *joint-venture* contract between multinational companies, in which the scale of the proposed business and the money involved necessitate that the terms of the contract be set out in detail. Building contracts are often exceptionally detailed and so they are written down. A second way in which a party's intention can be made known is through spoken words. Because the words are spoken, the contract that results is known as an *oral agreement*.

Words are not necessarily essential to the formation of a contract. Intention can also be made known through people's conduct. For example: a customer enters a shop, chooses 12 apples and puts them down on the shop counter. The shopkeeper rings up the total price on the till. The customer sees this total and takes enough money out of her purse to pay the amount in question. The customer hands over the money, picks up the 12 apples and walks out of the shop. No words have passed the lips of either the customer or the shopkeeper, yet a contract of sale was concluded between the two parties, and then performed. By going up to the counter with the apples that she wished to buy, the customer implicitly offered to buy them. The shopkeeper accepted this offer to purchase by ringing up the price on the till. In these circumstances, intention was declared through conduct.

2. OFFER AND ACCEPTANCE

(Textbook par 4.2)

2.1 The concepts of “offer” and “acceptance”

Contracts are usually concluded through the process of offer and acceptance. The person making the offer (the offeror) proposes terms to the other party (the offeree) for the offeree’s acceptance.

By accepting the offer, the offeree agrees, finally and without reservation, to the offeror’s proposed terms in words or by conduct. An example of an express offer would be the following: “I offer to sell you this car in front of us for R10 000.” And an express acceptance of that offer would be the following: “I agree to buy it.”

2.2 Requirements for the Offer and Acceptance

OFFER	ACCEPTANCE
(a) Undertaking made with the intention that the offeror will be legally bound	(a) Undertaking that the offeree will be legally bound
(b) Complete	(b) Unconditional
(c) Clear and certain	(c) Clear and certain
(d) Usually made in words or by conduct Exceptions: – legal requirements (e.g. sale of land) – if the offeror specifies as a term of the offer that the offer must be accepted in a specified manner	(d) Usually made in words or by conduct Exceptions: – legal requirements (e.g. sale of land) – in the way that the offeror specifies
(e) Addressed to the following: – a specific person or persons (e.g. Mrs Jones) – unknown persons (e.g. all teachers). This class of offerees has several members, but as a restricted group it is not as numerous as the general public. – the general public – anyone who is willing to do what the offer requires (e.g. in the case of a reward)	(e) Accepted by the following: – Mrs Jones or Mrs Jones’s authorised agent – any teacher (i.e. a member of this restricted group) – any member of the public who does what the offer requires. Here the offeree must know about the offer. Take the example of a reward: Will offers a reward for information. Jim does not know about Will’s offer, but gives Will the information. No contract arises between Will and Jim, so Will has no legal duty to pay Jim the reward.
(f) Communicated	(f) Communicated

Regarding requirement (a) above, namely that the offer and the acceptance must contain an undertaking made with the intention to be legally bound, note that by advertising an item for sale, a shopkeeper makes an invitation to do business concerning that item with a view to attracting offers. Thus, the shopkeeper does not make an offer to sell the item. Instead, it is the purchaser who makes the offer to buy the item.

Regarding requirement (c) above, namely, that the offer and the acceptance must be clear and certain, one example of an unclear and uncertain offer is an offer that states: "The lowest price that I will accept for this book is R50." This offer leaves the offeree guessing what price the seller would accept – R55? R65? R100? We don't know: the terms of the offer are too vague.

2.3 The falling away of the offer

How long does the offer remain open for acceptance? It falls away in the following five circumstances:

- (a) **Expiry.** An offer expressly limited to a certain period of time falls away if it has not been accepted within that period. So, for example, an offer of employment that will remain open for four days may be accepted on the third or the fourth day, but not on the fifth day. An offer that contains no time limit will expire within a reasonable time if it has not been accepted before then.
- (b) **Revocation.** Here the offeror withdraws, revokes or annuls the offer before it has been accepted. Note that the offeror does not revoke or annul the contract because no contract has been formed yet. It is important that the offeror informs the offeree about the withdrawal of the offer, and that he or she does so before the offeree accepts the offer.

Example: If Charles offers to sell his car to Bill and later changes his mind and wishes to sell the car to Edward, Charles must inform Bill that he withdraws the offer before the offer is accepted by Bill. If the offeree has already accepted the offer, a contract exists and the offeror's attempt to withdraw the offer may amount to breach of contract (in the form of repudiation). (See chapter 10 of the textbook.)

- (c) **Rejection.** If the offeree rejects an offer, he or she cannot then change his or her mind and try to accept it.

Example: Alfred says to Bill, "I offer to sell you this lawnmower for R250." Bill replies: "No, thank you." Even if Bill changes his mind immediately after his refusal, Alfred's offer has fallen away. It is, however, possible for this offer to be superseded by another new offer, which may be accepted.

- (d) **Counter-offer**

Example: Anne says to Betty, "I offer to sell you this washing machine for R500." Betty replies, "I will buy it for R450." An important term of Anne's offer is that the price should be R500. Betty does not accept this term and instead proposes a lower price, thus altering a term of Anne's offer. Anne's offer falls away because Betty has made a counter-offer to her. Betty's counter-offer is now open for Anne to accept or to reject. If Anne rejects Betty's counter-offer, Betty cannot fall back on Anne's original offer, as it would no longer be open for acceptance.

- (e) **Death** of either party before the offer is accepted.

ACTIVITY 4.2

In which of the following situations could we speak of a valid offer?

- (1) Vusi is considering selling his motor cycle as soon as he takes delivery of his new car.
- (2) Ratanama Butchery has the following notice on the shop window: "Half a lamb at R18,99 a kilogram."
- (3) An advertisement in the newspaper reads as follows: "Beach cottage at Hartenbos for exchange. Call Steve at 033 435 656."
- (4) Rupert puts his house on the market because he wishes to move to an old-age home. Daphne views the house and sends Rupert a letter in which she informs him that she will purchase it for R250 000. Rupert passes away before he receives the letter.
- (5) The police say they will pay a reward of R100 000 to anyone who can provide them with information relating to the killing of a top football star.

FEEDBACK

- (1) Vusi's intention has not yet been made known to a potential addressee with the intention of being legally bound.
 - (2) The notice is simply an advertisement, that is, an invitation to do business. Clients who are interested and inquire about the meat will make offers to buy the meat.
 - (3) All we have here is an intention, in principle, to enter into an exchange contract. An offer must contain complete details of the contract that the offeror has in mind. There are still several essential uncertainties.
 - (4) Daphne's expression of her intention does not amount to an offer. An offer is valid only if it comes to the notice of the addressee.
 - (5) One of the requirements for offer and acceptance is that the offer must be addressed to a particular person or persons, or in general to an unknown person or persons. The reward offered by the police is an example of an offer addressed to unknown persons. Thus, it constitutes a valid offer.
-

2.3.1 The continued existence of the offer: The option

It is possible to entrench the continued existence of the substantive offer by means of an option. The offer cannot be withdrawn while the option exists. This option is a separate contract. The option gives the option-holder the right to choose whether or not to conclude the main contract (which will arise from the substantive offer) with the option-giver. The option-holder's right is usually limited to a specified time.

- (1) **Entrenched substantive offer (to sell a horse)**
ANDREW \longrightarrow **BRIAN**
- (2) **Offer to keep the entrenched substantive offer (1) open for two weeks**
ANDREW \longrightarrow **BRIAN**

If Brian accepts offer (2) but has not yet accepted the entrenched substantive offer (1), an option exists in which Andrew is the option-giver and Brian the option-holder. At this point, the horse has not yet been sold. Now Brian has two weeks in which to decide whether he wishes to accept Andrew's offer to sell the horse.

During these two weeks, Andrew may not withdraw this (entrenched) substantive offer; neither may Andrew offer, in the meantime, to sell the horse to a third party, Charles.

The option binds Andrew to keep the entrenched offer open in favour of Brian for two weeks. Before the end of those two weeks, Brian may decide to reject Andrew's substantive offer.

If Brian rejects Andrew's substantive offer within, for example, four days, the option comes to an end and the substantive offer also comes to an end. Since the option ended before the end of the specified two weeks, Andrew now has the right to offer the horse to Charles or to accept Charles's offer to buy it.

However, if Brian accepts Andrew's substantive offer within the specified two weeks of the existence of the option and he lets Andrew know that he wishes to buy the horse, the option comes to an end, and the contract of sale is concluded.

ACTIVITY 4.3

Read the scenario below and discuss the subsequent situations.

Gabriel is transferred from Kuruman to Kimberley and wishes to rent a house from Tracy, but he is uncertain whether his wife, Nancy, who is still living in Kuruman, will be satisfied with the house. Tracy gives Gabriel an option for two weeks to reach a final decision on whether or not he wishes to rent the house.

- (1) On the first weekend, Nancy comes to visit, but she is not satisfied with the house. Gabriel informs Tracy that he will not be renting the house.
- (2) Nancy becomes ill and is able to undertake the journey to Kimberley only after three weeks.
- (3) Nancy is so anxious to see the house that she comes to inspect it the very next day. She likes it and Gabriel informs Tracy of their decision to rent the house.

FEEDBACK

- (1) Both the option and the substantive offer (to rent the house) expire as soon as Gabriel informs Tracy that he is no longer interested in the house.
 - (2) Both the option and the offer to rent expire after the two-week period of the option has lapsed.
 - (3) As the option is exercised, the lease is concluded.
-

2.4 Special rules in regard to offer and acceptance

In the following instances, special rules may apply to the offer and acceptance:

- invitation to make an offer (par 4.2.4.1 and par 4.2.2(a) of the textbook)
- offers of reward (par 4.2.2(e) of the textbook)
- options (par 4.2.3.2 of the textbook)
- an intention to contract (par 4.2.4.2 of the textbook)
- calling for tenders (par 4.2.4.3 of the textbook)
- auctions (par 4.2.4.4 of the textbook)

Auctions are either public auctions organised for official purposes (e.g. sales of unclaimed goods and sales in judicial execution of a court order), or auction sales (sales on the initiative of private persons). Both kinds of auction are subject to the conditions of auctions published before the sale. Auctions are either subject to reservation or not. This difference is illustrated in the following table:

AUCTIONS SUBJECT TO RESERVATION	AUCTIONS NOT SUBJECT TO RESERVATION
<ul style="list-style-type: none"> • Usual: if the conditions of auction expressly provide that goods will be sold subject to reservation, or if conditions are silent on the matter. 	<ul style="list-style-type: none"> • Exceptional: if the conditions of auction expressly provide that goods will be sold without reserve.
<ul style="list-style-type: none"> • Goods are sold only if the minimum price set before the sale is reached or exceeded. The auctioneer is the agent of the seller and runs the sale on the seller's behalf. The minimum price is the lowest price at which the seller is willing to sell the goods. A reserve price of R10 000, for example, would mean that a buyer's bid to purchase the goods for R10 000 would be acceptable, but that a bid for R9 500 would not be acceptable. 	<ul style="list-style-type: none"> • The terms of sale expressly (orally or in writing) state that the goods are sold without a reserve price. Actually, there is a reserve price here: the goods must be sold for at least one cent (the smallest unit of currency), because if they are sold for nothing, the contract would not be a sale – it would be a gift (donation).
<ul style="list-style-type: none"> • Offerors: interested potential buyers attending the auction, or their duly authorised representatives. These buyers or their agents bid for the goods (make offers to buy them). 	<ul style="list-style-type: none"> • Offeror: the auctioneer.
<ul style="list-style-type: none"> • Offeree: the auctioneer. 	<ul style="list-style-type: none"> • Offeree: the buyer or agent who makes the highest bid.
<ul style="list-style-type: none"> • Offer to buy. An interested buyer or his or her agent makes a bid. The auctioneer decides whether or not a contract comes into existence. The auctioneer may accept or reject bids, and need not choose the highest bid. The auctioneer decides whether to accept any bid. If he or she does decide to accept a bid, a contract is formed. 	<ul style="list-style-type: none"> • Offer to sell to the highest bidder. The auctioneer offers to sell the goods to the highest bidder. So, the person who decides whether or not a contract comes into existence is the buyer (or his or her agent) with the highest bid. If that buyer or his or her agent accepts the auctioneer's offer to sell the goods, a contract is formed.

ACTIVITY 4.4

Tom, a tobacconist, has placed a placard outside his shop advertising the sale of a special brand of tobacco at a very low price. John, a chain smoker, sees the low price and goes in to buy a kilogramme of tobacco at R100 as displayed on the placard. Tom refuses to sell it to John at that price and asks him to leave. John contends that Tom must give him the kilogramme of tobacco because he has accepted a valid offer from him.

Which **ONE** of the following statements is **CORRECT**?

- (1) John accepted Tom's offer with the intention of being legally bound on the basis of the placard.
- (2) Tom made an offer to John with the intention that he would be legally bound by the mere acceptance of the offer by John.

- (3) The placard outside Tom's shop constitutes an invitation to John to make an offer.
- (4) By offering Tom the R100, John made it clear that he unconditionally accepted Tom's offer.

FEEDBACK

- (3) is **CORRECT**. The general rule is that an advertisement or display in itself does not constitute an offer, but is an invitation to do business. If John reacts to Tom's invitation, he makes Tom an offer to buy the advertised or displayed item. If Tom accepts John's offer, consensus is reached and a contract of sale arises.
 - (1) is **INCORRECT**. Tom did not make John an offer, but only invited John or the public to do business. When a member of the public reacts to a price-marked article, he or she makes the dealer an offer to buy the displayed item.
 - (2) is **INCORRECT**. Tom did not make John an offer. John is the one who made Tom an offer to buy his tobacco for R100. It is one of the requirements of offer and acceptance that the offer must be made with the intention that the offeror (John) will be legally bound by the mere acceptance of the offer by the offeree (Tom).
 - (4) is **INCORRECT**. By offering Tom the R100, John was making Tom an offer to buy the tobacco. John was reacting to Tom's invitation to do business, which is not considered to be an offer.
-

3. THE MOMENT AND PLACE OF FORMATION OF A CONTRACT (Textbook par 4.3)

A contract arises at the moment when and at the place where consensus is reached. It is important to establish the exact **moment** of consensus for deciding whether the offer can still be revoked (withdrawn), whether the offer has expired because of the lapse of time, and whether and when the contractual duties become enforceable. Contractual duties are enforceable if one contracting party has the right to compel the other contracting party to perform the latter's contractual duties.

It is important to establish the exact **place** of consensus for deciding which court has jurisdiction to hear a claim concerning the contract.

Example: If the contract was concluded in Pretoria, the Pretoria magistrate's court would, in principle, have jurisdiction regarding the contract because the contract was concluded in the district over which that magistrate's court exercises authority.

3.1 PARTIES IN EACH OTHER'S PRESENCE (HERE AND NOW)	3.2 PARTIES NOT IN EACH OTHER'S PRESENCE (NOT HERE AND NOT NOW)
<p>General rule – ascertainment theory: Anna makes an offer and Bert accepts it. Anna learns of this acceptance of the offer at the moment when and at the place where Bert accepts it; the contract comes into existence then and there. Bert's acceptance of the offer comes to Anna's notice. The justification for the ascertainment theory is that if Anna is to become contractually liable, it is only fair that she should be the first to know whether or not her offer has been accepted by Bert.</p> <p>The ascertainment theory also applies to contracts concluded by telephone. Because of the immediacy of communication between the parties communicating over the telephone, they are regarded as being in each other's presence, even though they may be speaking to each other by satellite linkup from opposite ends of the earth, thousands of kilometres apart.</p>	<p>Exception – dispatch theory (expedition theory; posting rule): Communication by post or telegraph is not as direct as communication by telephone. For example: Anna in Cape Town posts an offer to Bert in Johannesburg. This offer is governed by the dispatch theory (also called the expedition theory or the posting rule).</p> <p>The dispatch theory is an exception to the general rule (ascertainment theory). In terms of the dispatch theory, the contract is concluded at the moment when and at the place where the letter of acceptance is posted. In the above example, the contract is concluded in Johannesburg when Bert posts his letter accepting Anna's offer.</p>

The dispatch theory applies if, in the letter containing the offer, the offeror does not specify any particular method of acceptance. By sending the offer by post, the offeror in these circumstances tacitly indicates to the offeree that the latter may, in turn, validly accept the offer by post. The posting rule is not absolute or compulsory: for example, if Anna wished to make sure that she knew about Bert's acceptance of the offer, she would still be free to state, in her letter containing the offer, that if Bert wishes to accept her offer, his letter of acceptance must come to her attention. This term of Anna's offer would thus exclude the application of the posting rule (the dispatch or expedition theory) and would apply the general rule (the ascertainment theory) to Anna's offer.

The application of the dispatch theory can also be excluded if the posted acceptance is cancelled by a method of communication that is quicker than post. So, if Bert has posted his letter accepting Anna's offer and then changes his mind and decides to reject her offer, he is free to communicate his rejection of the offer to Anna by, for example, telephoning her.

The function of the dispatch theory is to protect the offeree. In the case of contracts concluded by electronic media other than the telephone, the particular circumstances of the case will determine which theory will apply and will, consequently, also determine the time and place of conclusion of the contract. As indicated above, the offeror may regulate the matter in his or her offer.

The Electronic Communications and Transactions Act 25 of 2002 (ECT Act) regulates contracts concluded by electronic means where the parties failed to, or chose not to, regulate contract formation specifically. The ECT Act provides that, in the absence of a different agreement between the parties, an agreement concluded electronically is concluded at the time when and at the place where the acceptance of the offer is

received by the offeror. This is the “reception theory” and it takes precedence over the common-law principles.

When parties conclude contracts using both traditional and electronic methods of communication, it is advisable for them to expressly indicate the time and place of formation to eliminate uncertainty.

ACTIVITY 4.5

Susan in Klerksdorp makes a written offer by letter to Gerald in Kenton-on-Sea to purchase his beach cottage for R1,5 million. Gerald accepts her offer by letter, but while the letter is in transit, he receives an offer of R2 million from Olga. What should Gerald do if he wishes to accept Olga’s offer? Explain with reference to how the different theories work.

FEEDBACK

The dispatch theory (expedition theory or posting rule) would apply to Gerald’s acceptance of Susan’s offer. The contract between them comes into being as soon as Gerald posts the letter in which he accepts the offer. However, the law permits Gerald to undo the consequences of the dispatch theory (the conclusion of the contract between Gerald and Susan) by rejecting her offer by way of a communication medium that is faster than the post. Thus, if Gerald can succeed in reaching Susan telephonically or by e-mail and tell her that he no longer accepts the offer, the ascertainment theory will apply.

4. CONSENSUS AND DEFECTS IN WILL

(Textbook par 4.4)

We will now discuss the circumstances that affect consensus and, therefore, the existence of the contract, namely, mistake and improperly obtained consensus. If mistake complies with certain requirements, consensus is absent and no valid contract comes into existence. If consensus is obtained by improper means, a valid contract does come into existence, but it is voidable at the instance of the prejudiced (innocent) party.

4.1 Absence of consensus (mistake)

Mistake is a misunderstanding by one or more of the parties to a contract about some aspect/s of the proposed contract, for example, a fact that is material to the contract or a legal rule. If mistake meets the requirements discussed below, there is no consensus and no contract arises.

If mistake does not meet the requirements, a valid contract arises even though consensus is absent and the party who is labouring under a mistake is held to his or her intention, as expressed, which – because of the mistake – is not his or her true intention. Therefore, although consensus is set as a requirement for a valid contract, there is an exception to the rule, namely, if consensus is absent and there is a mistake regarding aspects that the law regards as irrelevant.

Example: John takes a white appliance to the cashier thinking that it is a washing machine while the cashier knows it is in fact a tumble dryer. If the requirements for mistake are not met, John is kept to his intention, as expressed, by his action, which says, “I offer to buy this washing machine.”

4.1.1 Requirements to be met before mistake will render a contract void

A contracting party who seeks to rely on the ground of mistake to deny the existence of a contract will have to prove all the requirements discussed below and will have to prove that a contract was therefore not formed. In other words, these requirements are cumulative.

The requirements are that the mistake must relate to a fact or a legal rule or principle, the fact, legal rule or legal principle to which the mistake relates must be material, and the mistake must be reasonable.

4.1.1.1 The mistake must relate to a fact, legal rule or principle

The scenario in par 4.1 above where John thinks that the appliance is a washing machine when it is actually a tumble dryer is an example of a mistake of fact.

4.1.1.2 The mistake must concern a material fact, legal rule or principle

“Material” means essential, important and relevant (to the contract). “Legally material” means essential, important or relevant in the eyes of the law for legal purposes.

MISTAKES REGARDED AS LEGALLY MATERIAL	MISTAKES NOT REGARDED AS LEGALLY MATERIAL
<p>(a) Mistake about the identity of the other party: for example, because of a misdialled telephone number, an employer offers a job to someone other than the offeree actually intended.</p>	<p>(a) Mistake about a person’s attributes: for example, his or her full names or his or her character.</p>
<p>(b) Mistake about the content of the intended contract:</p> <ul style="list-style-type: none"> – <i>Time of performance:</i> for example, one contracting party thinks that the contract relates to the renting of a bus on 31 May, while the other party thinks it relates to the renting of a bus on 30 June. – <i>Place of performance:</i> for example, one party thinks that the goods will be delivered in Bloemfontein, while the other party thinks that the goods will be delivered in Port Elizabeth. – <i>Method of performance:</i> for example, one party thinks that the goods must be delivered by courier, while the other party thinks that they must be delivered by train. – <i>Performance to be rendered:</i> for example, one party thinks it is renting a bus, while the other party thinks it is leasing a truck. 	<p>(b) Mistake about the attributes of the object of performance:</p> <p>Here there is no mistake about the performance to be rendered (i.e. the identity of the subject matter of the contract), but about its attributes, for example, whether the bus is green or red, has plastic or cloth seats, and so on, unless the attribute has been made a condition of the contract (see chapter 8 of the textbook and study unit 8 below).</p>

<p>(c) Mistake about the interpretation the law attaches to the proposed contract:</p> <p>For example, the nature of the contract. One party thinks he or she is acquiring ownership by paying a monthly amount, while the law interprets the contract as a contract of lease.</p>	<p>(c) Mistake in the motive (the underlying reason) for concluding the contract:</p> <p>The example given in the textbook is of the person who mistakenly thinks that his bicycle has been stolen and therefore buys a new bicycle from a dealer. The underlying reason for the purchase of the new bicycle is the mistaken belief that the old bicycle has been stolen and should be replaced. The mistake in motive can be caused by the misrepresentation of the other party, or his agent, and the contract that results will then be voidable. Suppose that my bicycle has not been stolen, but that the dealer, desperate for business and aware that my bicycle has not been stolen, lies to me that it has been stolen. Because of this lie, I buy a new bicycle. I later find out that my old bicycle has not been stolen. My reason for buying the new bicycle was the dealer's lie (his or her intentional misrepresentation) that my bicycle had been stolen.</p>
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In the example of the appliance, there is no mistake about the identity of the other party (John wishes to buy from the shopkeeper), or the time and place of performance (the appliance will change hands there and then) or the performance (it is a contract of sale). There is, however, a mistake about the object of performance (a washing machine and not a tumble dryer).

If this mistake is also reasonable, the requirements for absence of consensus are met. Mistakes that are not legally material in this example are the following: the name of the shopkeeper (attributes of the other party), whether the appliance is white or cream (attributes of the object), or John's mistaken belief that his old washing machine has been stolen (mistake in motive).

4.1.1.3 *The mistake in fact or law must be reasonable*

If the mistake is unreasonable the contract does exist even though consensus is absent. The reasonableness of the mistake is tested objectively. The standard of reasonableness is the reasonable person. One asks whether the reasonable person in this situation would make the same mistake if he or she were to judge the particular circumstances.

The reasonable person has no fault. He or she is innocent of intention and negligence. So, if a particular contracting party wishes to rely on mistake to deny a contract, then that contracting party must have no fault in respect of the mistake. The contracting party will fail in the task of showing this lack of fault if he or she was negligent or careless, or paid insufficient attention to the proposed contract.

ACTIVITY 4.6

In light of the quotation in the above example, when do you think mistake in relation to the scenario of the tumble dryer would be unreasonable?

FEEDBACK

The mistake would be unreasonable if, for instance, John had not examined the appliance, had carelessly failed to notice that, for example, there were no pipes leading out of the appliance, or had not read the instruction brochure.

If, however, the party who is relying on mistake can prove that his or her unreasonable mistake can be laid at the door of the other contracting party and can be blamed on that party, the position is different. In that case, he or she can rely on the guilty party's misrepresentation, which is one of the improper ways of achieving consensus.

ACTIVITY 4.7

In which **ONE** of the following situations does consensus **NOT** exist?

- (1) Ben tells Tim that he is selling a 2015 Toyota Etios car and Tim is interested in buying the car. However, the car is, in fact, a 2013 model.
- (2) Moshe wishes to sell a desktop computer to a certain Johan Dube. However, Moshe is not sure whether the prospective purchaser that he is speaking to over the telephone is Johan Dube or John Dupe.
- (3) Martin persuades Anna, at gun point, to sell him her luxury 2005 Mercedes Benz S Class for R1 000, although it is worth R250 000.
- (4) Dr Mary Matheys convinces her patient, Dan, who is very ill, to sell his luxury sports car to her at a cheap price shortly before he undergoes TB treatment.

FEEDBACK

- (2) is **CORRECT**. A mistake that is material can exclude consensus. In this case there is a misapprehension in respect of the identity of the other contracting party, and no consensus is reached.
- (1) is **INCORRECT**. This is a case of misrepresentation, which does not exclude consensus.
- (3) is **INCORRECT**. In this case there is also consensus, although it was obtained by duress.
- (4) is **INCORRECT**. In this case there is consensus, although it was obtained by undue influence.

4.2 Obtaining consensus improperly

In this section we will consider methods of achieving consensus that are disapproved of by the law. These are circumstances where the assent of one party is obtained in an improper way. Why does the law come to the assistance of victims of these improper methods of obtaining consensus?

- (1) **Misrepresentation**: Contracting parties must not make untrue statements when negotiating contracts. The legal system regards untrue statements as unlawful.
- (2) **Duress**: Contracting parties must not intimidate other contracting parties to conclude contracts. The legal system regards intimidation as unlawful.

- (3) **Undue influence:** Contracting parties must not abuse their power of influence to persuade other parties to conclude contracts. The legal system regards undue influence as unlawful.

4.2.1 Misrepresentation

We will analyse the requirements of **all** forms of misrepresentation and discuss each rule separately. To misrepresent something to a person in order to persuade him or her to conclude a contract could amount to a delict if it meets the requirements for a delict. This means that you should bear in mind the principles of the law of delict (as discussed in study unit 2 above) when you are studying this part of the study material.

Misrepresentation can be described as follows:

- A false (untrue)
- statement about an existing fact or state of affairs (including qualities or characteristics)
- made by one party to the proposed contract (Abel)
- to the other party to the proposed contract (Bob)
- before or at the time when the contract is entered into
- with the aim of inducing (influencing) the latter party (Bob) to enter into the contract
- with the result that, on the basis of this statement, the party to whom the statement is made (Bob) concludes a contract which would not have been concluded otherwise or would still have been concluded, but subject to materially different terms.

Let's now look at certain aspects of misrepresentation:

Regarding **requirement (a)** in the textbook, misrepresentation can be made by an express statement (written or spoken words) or tacitly by conduct (e.g. one party shows the other party a sample of the goods). Misrepresentation can also take place by concealment of the facts (non-disclosure) when one party stays quiet when he or she has a duty to speak. Whether or not a duty to speak exists will depend on the particular circumstances of a case.

The textbook gives the example of someone who applies for an insurance policy. This applicant has a duty to make certain relevant statements and may not simply remain silent, otherwise his or her failure to mention the relevant facts will constitute misrepresentation. Another example comes from the law of sale. In *Cloete v Smithfield Hotel (Pty) Ltd* 1955 (2) SA 622 (O), the hotel's septic tank was on the municipality of Smithfield's land. The municipality stated that the tank could no longer remain on the municipality's land. The defendant company sold the hotel to Cloete, but did not inform Cloete that the tank would have to be moved.

Cloete claimed damages for the defendant company's fraudulent concealment of this important fact that the municipality no longer wanted the tank to be located on municipal land. The court awarded damages: the defendant company had a duty to tell Cloete about this important change.

Giving an honest opinion or estimate, even if the opinion turns out to be mistaken, does not constitute a misrepresentation, but giving a dishonest or reckless opinion may constitute a misrepresentation. The other person will not have any remedy

against the person who gives an opinion, unless in delict where it can be proven that the opinion was given negligently.

Regarding **requirement (b)** in the textbook, the person who makes the misrepresentation must be

- the contracting party him- or herself or
- the contracting party’s employee acting within the course and scope of the employee’s employment or
- the contracting party’s authorised agent or
- the contracting party’s co-conspirator

Regarding the co-conspirator, when we say that someone is in “collusion” with a contracting party, we mean that the two parties conspire with each other and agree to commit a crime. The crime here would be the crime of fraud (intentional misrepresentation), which is discussed in par 4.4.2.1.1(a) of the textbook.

Example of collusion: James and Ken hate Lionel and agree to deceive him. James owns a mare. They agree to tell Lionel that the mare is in foal. In this way, they aim to persuade Lionel to buy the mare. The mare is, in fact, not in foal. A few days later, Ken sees Lionel in town and tells him that James’s mare is in foal. Without checking the facts independently himself, Lionel, very keen to buy this mare because he understands her to be in foal, telephones James and offers to buy the mare. James sells the mare to Lionel, who later finds out that the mare is not in foal. The person who made the misrepresentation was Ken. But since Ken had conspired (colluded) with James to deceive Lionel, Ken’s intentional misrepresentation to Lionel may be laid at James’s door, and so Lionel may rescind the contract.

The feature common to the employee, the agent and the co-conspirator is that they are all linked to the contracting party who is responsible for the misrepresentation. Contrast this set of circumstances with a different set of circumstances in which a misrepresentation is made to one of the contracting parties by an outsider – a person who has no contractual link with the contracting parties.

Example: Nick owns a farm. Paul wishes to buy a farm in the district. One day he hears Oscar saying that the water supply on Nick’s farm is good. Without making any further enquiries of his own, Paul offers to buy the farm from Nick. Nick does not know that Paul (mistakenly) thinks that the water supply on the farm is good; nothing is said about this issue. After the sale, Paul finds out that the water supply on the farm is, in fact, poor. Oscar is neither an employee, nor an agent, nor a co-conspirator of Nick’s. In this case Paul will not be able to have the contract of sale that he concluded with Nick set aside on the grounds of misrepresentation because Nick did not make a misrepresentation to Paul.

The misrepresentation must have occurred during the negotiations before the contract was concluded. It must have occurred while the parties were discussing the terms on which each of them would be willing to do a deal with the other. So this requirement would not be met if the misrepresentation had been made long before the negotiations started; nor would this requirement be met if the misrepresentation were made after the contract had already been concluded.

Regarding **requirement (c)** in the textbook, the misrepresentation must be **unlawful**. An act will be unlawful if it is contrary to the values of the community. An **innocent misrepresentation** is made without any fault on the part of the person who makes

it. You may wonder why the victim of innocent misrepresentation should be granted a contractual remedy when the person making the misrepresentation was innocent, or blameless. The answer is that the fault or innocence of the person making the misrepresentation is an aspect that is different from the lawfulness or unlawfulness of the conduct (here, the making of a misrepresentation). In general, it is unlawful to mislead another person, whether **deliberately, negligently** or even **innocently**.

Regarding **requirement (d)** in the textbook, there must be a chain of causation between the misrepresentation and the contract as it stands. Before this requirement can be met, we must be able to say that if the misrepresentation had not occurred, the contract would not have been concluded on the same terms. The victim of the misrepresentation would either not have entered into the contract at all, or even if he or she had entered into the contract, he or she would have done so on terms that are different from those to which he or she finally agreed.

Example: During a drought, the soil on a particular farm looks dry and unsuitable for growing mealies. An interested buyer approaches the farmer and casually asks whether the soil is suitable for mealies. The farmer, anxious to sell the farm, which has never been fertile, tells the potential buyer that the soil is very fertile and has produced good crops. If the buyer then buys the farm because of this misrepresentation by the farmer, we can say that if the farmer had not made the misrepresentation, the potential buyer would not have bought the farm.

Regarding the possibility that, but for the misrepresentation, the deceived party would not have concluded the contract on the same terms, we can vary the facts of the present example as follows: Suppose the interested buyer has already decided to offer the farmer R1 million for the farm. After being assured that the soil is fertile, the interested buyer decides to offer R2 million for the farm. The farmer accepts this offer and a contract is concluded. Here, if the farmer had not made the misrepresentation about the fertility of the soil, the interested buyer would have offered R1 million instead of the R2 million that he or she offered.

The importance of the element of causation in **requirement (d)** is also apparent from the last sentence in par 4.4.2.1(d) of the textbook: a contracting party who knew that the statement was false before he or she entered into the contract is not entitled to argue that the misrepresentation led him or her to conclude the contract.

Example: Let's change the facts of the sale of the arid farm again. Suppose the farm is very dry during the drought and the interested buyer who approaches the farmer has attended agricultural college and so recognises an arid farm when he or she sees one.

The farmer tells him or her that the soil is very fertile and that it produced good crops in the past. The prospective buyer tells the farmer that he or she will consider whether or not to buy the farm. After the farmer's misrepresentation, but before the conclusion of the contract, the prospective buyer finds out that the soil of this farm has always been poor and has never produced good crops. Yet for his or her own particular reasons, the buyer decides to go ahead and purchase the farm anyway. After buying the farm, he or she is not entitled to complain that the farmer's misrepresentation concerning the fertility of the soil led him or her to buy the farm.

As regards **requirement (e)** in the textbook, a contract is voidable even though the misrepresentation occurred innocently without any form of intention or negligence. If, however, there was any intent or negligence present, it gives rise to the possibility

that the misrepresentation could meet the requirements for delictual liability, in which case the additional delictual remedy for damages is available to the injured party.

4.2.1.1 *The effect of misrepresentation*

As regards the consequences of misrepresentation, consensus does exist between the parties. Yet consensus is defective in nature. So, the contract itself is **voidable** at the instance (choice) of the deceived party because the law protects contracting parties against unlawful conduct such as misrepresentation.

The contract may be set aside by the person who is the victim of the misrepresentation but not by the person who made the misrepresentation. The deceived party may choose to rescind or to uphold the contract. If the deceived party decides to uphold the contract, it means that as far as he or she is concerned, the contract still stands: the deceived party still regards him- or herself as bound by his or her contractual duties, and regards him- or herself as entitled to expect the party who made the misrepresentation to perform his or her contractual duties.

But if the deceived party decides to rescind the contract, he or she demands that the parties be returned to the position they were in before the contract was concluded. This choice between upholding or rescinding the contract is a golden thread running through all three kinds of misrepresentation (intentional, negligent and innocent). The remedy of rescission is a contractual remedy based on the wrongfulness of the deed. Whether or not there may also be a further delictual remedy open to the deceived party depends on whether the misrepresentation was made intentionally or negligently.

(a) Intentional misrepresentation

Intentional misrepresentation is also called fraudulent misrepresentation.

The following is a special aspect of intentional misrepresentation: The statement was made by a party who knew that the statement was untrue, or who did not honestly believe in the truth of the statement, or who made the statement recklessly, without regard to whether it was true or false.

Remedies

Contractual remedies: The victim may choose to uphold or to rescind the contract.

AND

Delictual remedies: The victim can claim damages, irrespective of whether he or she chooses to uphold or to rescind the contract.

These damages for misrepresentation are delictual: the victim must be placed, as far as money can achieve this, in the position in which he or she would have been if the delict (intentional misrepresentation) had never happened. The law looks back at the position of the victim before the misrepresentation took place. These delictual damages are awarded for the victim's **negative** interest. Note that these damages are not contractual damages – they are delictual damages. (The contractual basis of damages does not apply to misrepresentation, but to breach of contract. If the contract has been breached, the damages are awarded for the victim's **positive** interest. As far as money can achieve this, the victim of the breach of contract must be placed in the position in which he or she would have been if the contract had been properly performed.)

SECTION B: GENERAL PRINCIPLES OF THE LAW OF CONTRACT

(b) Negligent misrepresentation

A special aspect of negligent misrepresentation is that the representation was made **negligently**, with the aim of inducing the contract. Here the misrepresenter does not intend to make a false statement, otherwise he or she would be guilty of making an intentional (**fraudulent**) misrepresentation. But the misrepresenter does intend to induce the contract.

Here the misrepresenter honestly believes that the statement is true: the belief is genuine, sincere and actually held. But the misrepresenter fails to take the steps that a reasonable person would have taken in the particular circumstances to satisfy him- or herself that the statement is true.

Remedies

Contractual remedies: The victim may choose to uphold or to rescind the contract.

AND

Delictual remedies: The victim can claim damages, irrespective of whether he or she chooses to uphold or to rescind the contract. These damages for misrepresentation are claimed in terms of the law of delict: the victim must be placed, as far as money can achieve this, in the financial position in which he or she would have been if the delict (negligent misrepresentation) had never happened (positive interest).

(c) Innocent misrepresentation

The following is a special aspect of innocent misrepresentation: The statement is made without intention or negligence on the misrepresenter's part. It is, however, made with the intent to induce the contract. With regard to the example in par 4.4.2.1.1(c) of the textbook regarding the sale of the painting, note that the contract is between Fikile (the seller) and Willem (the buyer). Also note that nothing is said about whether the art expert is Fikile's (the seller's) employee or agent. The art expert is not Fikile's co-conspirator: there is no agreement to commit a crime.

Remedies

Contractual remedy only: The victim has the choice to uphold or to rescind the contract.

There are NO delictual remedies: Because the misrepresenting party's misstatements were not intentional or negligent, the requirement of fault has not been met and there can be no question of delictual damages.

ACTIVITY 4.8

Read the following scenarios and indicate the type of misrepresentation that features in each of them:

- (1) Erna's family owned a porcelain jug, which they had always believed had come to South Africa from Batavia in 1680. When Erna urgently needed funds for an expensive operation, she decided to sell the jug and told prospective buyers that it was over 300 years old. She did not, however, consult any antique dealer to ascertain whether the jug was actually as old as she claimed. It turned out to be no more than 100 years old, since her grandfather had brought it back with him from Ceylon in 1902.

- (2) Because he is keen to sell his car, Bradley declares that it is a 2010 model, in spite of the fact that he knows it is a 2006 model.

FEEDBACK

- (1) Erna is guilty of negligent misrepresentation. A reasonable person would have had the age and origin of an antique confirmed before making any claims about it.
- (2) Bradley is guilty of intentional misrepresentation. He is under no illusion as to the true facts, yet makes untrue statements. Intentional misrepresentation could constitute the crime of fraud if requirements for this crime are met, and it could also, as in this case, be the delict of intentional misrepresentation if the requirements for delict are satisfied.
-

4.2.2 Duress

Duress (intimidation) can be described as follows:

- an unlawful threat of harm or injury
- made by one contracting party or someone acting for that party,
- which causes the other contracting party to conclude the contract.

Effect of duress

Because the coerced party does consent to the contract, there is consensus and a contract arises. However, because the consensus is obtained in an improper way, the contract is **voidable**. The party that is coerced to agree to the contract may also claim damages on the grounds of delict, because duress constitutes a delict.

Requirements

- (a) There must be actual physical violence or damage, or a threat of violence or damage directed at the life, limb or freedom of the threatened person, or his or her property, which causes a reasonable fear that the threat may be executed.
- (b) If duress is caused by a threat, the threat must be imminent (about to occur) or inevitable (so that the victim cannot escape).
- (c) The duress must be unlawful, that is, the party exercising it uses it to obtain some benefit he or she would otherwise not have obtained.
- (d) A party to the contract or someone acting on his or her behalf must be responsible for the duress.
- (e) The duress must cause the victim to conclude the contract. This requirement will not be met if the threat has been removed and the victim freely enters into the contract, or if the victim ratifies the contract (confirms its validity with retrospective effect). This requirement is also met if the party placed under duress concludes the contract or concludes it on particular terms that he or she may not have accepted but for the duress.

An example of duress that convinces a person to conclude a contract on particular terms is the following: A car owner is willing to sell his or her car for R10 000. A prospective buyer comes up to the seller and, holding a pistol to the latter's head, says, "If you don't sell me this car for R1 000, I will kill you." The seller hands over the car and accepts the R1 000. We may deduce that, but for the buyer's threat to the seller's life, the seller would have been willing to sell the car for R10 000, rather than for the R1 000 that the seller actually agreed to receive as the price.

Remedies

Contractual remedies: The victim of the duress may choose to uphold or to rescind the contract.

AND

Delictual remedies: These entail damages, irrespective of whether the victim chooses to uphold or to rescind the contract. These damages are delictual in nature: the victim must be placed, as far as money can achieve this, in the position in which he or she would have been if the delict (**duress**) had never happened. The law looks back at the position of the victim before the duress took place (**negative interest**).

ACTIVITY 4.9

Roy holds a firearm to Tito's head and threatens to kill him should he refuse to sell his car to him (Roy). Tito agrees to sell the car to Roy and the two parties sign a contract of sale.

Which **ONE** of the following statements is **CORRECT**?

- (1) There is no consensus between Roy and Tito.
- (2) A valid contract was not concluded between Roy and Tito because of the absence of consensus.
- (3) The contract is void as a result of duress.
- (4) The contract is voidable because Tito signed it under duress.

FEEDBACK

- (4) is **CORRECT**. Even if a contract is concluded as a result of duress, consensus exists. But the party who entered into the contract because of the duress may rescind the contract. Such a contract is voidable, and not void.
 - (1) is **INCORRECT**. Even if a contract is concluded as a result of duress, consensus exists. But the party who entered into the contract because of the duress may rescind the contract.
 - (2) is **INCORRECT**. Even if a contract is concluded as a result of duress, consensus exists. A valid contract comes into existence. However, such a contract is voidable at the instance of the prejudiced (innocent) party.
 - (3) is **INCORRECT**. A contract concluded under duress is voidable at the instance of the prejudiced (innocent) party, and not void.
-

4.2.3 Undue influence

Undue influence may be described as follows:

- improper, unfair conduct
- by one contracting party (Abel)
- that persuades the other contracting party (Bob) to conclude the contract
- against the latter's (Bob's) free will.

Undue influence differs from duress in that there does not need to be a threat.

Special relationship

Undue influence occurs mainly where there is a special relationship between the parties, such as between a doctor and a patient, an attorney and a client, and a guardian and a minor. But the existence of such a special relationship does not necessarily mean that undue influence has occurred. The existence of this special relationship does not even lead the courts to presume that undue influence has occurred. Nor is a special relationship an essential requirement for undue influence.

In *Patel v Grobbelaar* 1974 (1) SA 532 (A), the plaintiff owned a farm. For the balance owing on money apparently lent by the first defendant to the plaintiff, the plaintiff registered a second mortgage over the farm. The plaintiff firmly believed that the first defendant had supernatural powers.

As a result of this belief, the plaintiff successfully claimed that he had been unduly influenced by the first defendant to register the second mortgage over the farm. The mortgage was set aside.

If there is a special relationship, we need to look for possible abuse of that relationship. Has the “stronger” or more intelligent party taken advantage of the other’s ignorance, naivety, frailty, stupidity or mental dependence? The abuse of this relationship weakens the independent will of the victim and allows it to be easily influenced by the other party. But for the abuse of the relationship, the contracting party would not have concluded the contract.

Effect of undue influence

The victim of undue influence has exercised his or her will and has entered into a contract. Consensus exists, but it is defective in nature. The contract is therefore **voidable**.

Requirements for undue influence

- (a) The contracting party who allegedly exercised the undue influence must have acquired an influence over the victim.
- (b) This contracting party must have used his or her influence to weaken the victim’s ability to resist, so that the victim’s independent will became easily influenced.
- (c) The influence must have been used unscrupulously, with a lack of regard for the *morality* or rightness of the conduct, to persuade the victim to agree to a transaction the victim would not have concluded of his or her own normal free will and which was to the victim’s disadvantage.

The example given in the textbook of the elderly farmer who gives his doctor a farm is based on the most important court case regarding undue influence (*Preller v Jordaan* 1956 (1) SA 483 (A)).

Remedies

Contractual remedies: The victim of the duress may choose to uphold or to rescind the contract. In South African law there has been no recognition of a delictual remedy of damages for undue influence to date.

ACTIVITY 4.10

In which **ONE** of the following situations does undue influence occur?

- (1) Donald wants to buy a hair dryer for his wife. He takes a small box from the shelf and pays for it, thinking that it is a hair dryer, while the cashier knows that it is actually a steam iron.
- (2) Molefi wishes to buy Jan's farm. He asks Jan about the water supply to the farm and Jan assures him that it is good. Molefi buys the farm and later finds out that the water supply to the farm is, in fact, poor.
- (3) Ralph finds an uncut diamond in his backyard. He doesn't know what it is and what it is worth. Sello, Ralph's attorney, goes to Ralph and promises him a loaf of bread in exchange for the diamond. Ralph agrees because Sello tells him that it is just a worthless stone.
- (4) Pat wants to sell his television set for R1 500. Teddy comes up to him and, holding a gun to his head, says, "If you don't sell me this television set for R200, I will kill you." Pat takes the R200 and hands over the television set to Teddy.

FEEDBACK

- (3) is **CORRECT**. This is an example of a situation where one contracting party by his or her conduct improperly or unfairly persuades the other contracting party to conclude a contract with the former, contrary to the latter's independent will. Sello used Ralph's ignorance or lack of knowledge to his advantage. It was Ralph's ignorance or lack of knowledge coupled with the incorrect information from Sello that caused Ralph to exchange an uncut diamond for a loaf of bread. Ralph's assent to the contract was obtained improperly so that his independent will was not exercised. The elements of undue influence are present in this situation, seeing that Sello acquired influence over Ralph, Sello's influence weakened Ralph's ability to resist and, lastly, Sello used his influence unscrupulously to persuade Ralph to consent to a transaction Ralph would not have entered into of his normal free will and which was to Ralph's disadvantage. Note that although a contract induced by misrepresentation is generally voidable at the instance of the deceived party, in this example the contract is probably void as it is contrary to statutory law, which prohibits the trading in uncut diamonds.
- (1) is **INCORRECT**. This is an example of a mistake. Mistake exists when one or more of the parties to a proposed contract misunderstand a material fact or legal rule relating to the proposed contract. In this instance, Donald wanted to buy a hair dryer and not the steam iron. There was therefore a mistake about a material fact. However, the cashier is not to blame as he or she did not know that Donald wanted to buy a hair dryer and not a steam iron.
- (2) is **INCORRECT**. This situation is an example of a misrepresentation. A misrepresentation is an untrue statement or representation concerning an existing fact or state of affairs that is made by one party to the contract, thereby inducing the other party into concluding the contract. The other party's assent is obtained in an improper manner. Jan gave Molefi incorrect information, knowing that it was incorrect. The statement that the water supply on the farm was good was not true and Jan knew that. This is a misrepresentation because if Molefi had known that the water supply was poor he probably would not have bought the farm.
- (4) is **INCORRECT**. This situation is an example of duress. Duress is an unlawful threat of harm or injury, made by a party to the contract or by someone acting on his or her behalf, that causes the other party to conclude a contract. Pat did not sell his TV set to Teddy for R200 of his own free will. He was

threatened with a gun to sell at that price and he was afraid he would lose his life if he sold it at the price he actually wanted.

AN ADDITIONAL EXPLANATION OF THE DIFFERENCES BETWEEN VOID AND VOIDABLE CONTRACTS

VOID CONTRACTS	VOIDABLE CONTRACTS
<ul style="list-style-type: none"> No contract exists at all. It may help to indicate this fact by putting inverted commas around the word "contract". 	<ul style="list-style-type: none"> The contract does exist, but because consent to the conclusion of the contract was improperly obtained, the consensus is flawed or defective.
<ul style="list-style-type: none"> The contract does not give either party contractual rights. The contract is a nullity. Neither party has the right to enforce the contract. 	<ul style="list-style-type: none"> The party whose consent was improperly obtained may set aside the contract if his or her consent was obtained by misrepresentation, duress or undue influence.
<ul style="list-style-type: none"> The contract cannot be ratified. It cannot be given validity afterwards, that is, with retrospective effect. 	<ul style="list-style-type: none"> Until that party does set the contract aside, the contract remains current, with concomitant rights and duties on either side.
<ul style="list-style-type: none"> Both contracting parties may disregard the contract as though the contract were never concluded. 	<ul style="list-style-type: none"> The party whose consent was improperly obtained has a choice between upholding the contract or rescinding it. If a party upholds the contract, he or she recognises the continued existence of the contract; if he or she rescinds the contract, he or she does away with the contract. So the party that exercises the choice must choose one of these courses – he or she may not choose both courses. The alternatives are mutually exclusive, that is, if one is chosen, the other one is automatically lost and can never be chosen again thereafter.

SELF-ASSESSMENT ACTIVITIES

- Briefly describe the requirements that must be fulfilled for consensus to be reached between the parties to a contract.
- Lido wants to sell his BMW 320i to Lara for R150 000. But Lido does not, in any way, express his intention to Lara. At the same time, Lara wants to buy the BMW 320i from Lido for R150 000. Similarly, Lara fails to express her intention to Lido.

Has a valid contract come into being between the parties?

- Describe the requirements for the offer and acceptance.
- Draw a distinction between an offer and an invitation to make an offer.
- Name circumstances under which an offer will lapse or fall away.
- Describe an option in the context of offer and acceptance.
- Various types of statements should be distinguished from true offers. Think of examples of statements that are not offers.
- Draw a distinction between the information (ascertainment) theory and the dispatch (expedition/posting rule) theory.
- Explain electronic signatures.
- Discuss the requirements for mistake, misrepresentation, duress and undue influence.

5. EXPLANATORY NOTES

Acceptance: A declaration by the offeree through which it is indicated that he or she agrees to the terms of the offer exactly as put in the offer.

Auction: A public sale where the price is neither set nor arrived at by negotiation, but is discovered through the process of competitive and open bidding. If the auction is held subject to reservation, the goods will be sold only if a predetermined price is fetched or exceeded. On the other hand, an auction is held without reservation if the conditions of sale state that the goods will be sold to the highest bidder.

Consensus: The agreement between contracting parties or the (common) intention of the contracting parties to be contractually bound (which is the primary basis of every contract). All the parties to the contract must be aware of one another's intention.

Dispatch (expedition) theory: A contract comes into being at the place where and at the time when the letter of acceptance is posted, unless the parties agree otherwise.

Duress: An unlawful threat of harm or injury, made by a party to a contract or by someone acting on his or her behalf, which causes the other party to conclude a contract.

Electronic agreements: Contracts that are concluded, for example, by facsimile (fax), SMS, e-mail or via the internet.

Entrench: The application of an extra safeguard to ensure the continued existence of an offer.

Information (ascertainment) theory: A contract comes into being at the time when the acceptance is communicated and at the place where the parties happen to be at that moment.

Misrepresentation: An untrue statement or representation concerning an existing fact or state of affairs that is made by one party to the contract with the aim of inducing the other party into concluding the contract.

Mistake: Mistake exists when one or more of the parties to a proposed contract misunderstand a material fact or legal rule relating to the proposed contract.

Offer: A declaration made by the offeror in which he or she indicates an intention to be contractually bound by the mere acceptance of the offer, and in which he or she sets out the rights and duties he or she wishes to create.

Option: An offeror may bind him- or herself by an agreement with the offeree not to revoke the offer, in which case the offer remains open for a specified period. Such an irrevocable offer (together with the agreement that makes it irrevocable) is known as an option.

Reception theory: In the absence of a different agreement between the parties, an agreement concluded electronically is concluded at the time when and at the place where the acceptance of the offer is received by the offeror.

Undue influence: Any improper or unfair conduct by one of the contracting parties by means of which the other contracting party is persuaded to conclude a contract with the former, contrary to the latter's independent will.

Void: "Void", in relation to a contract, means not valid or legally binding, or of no legal effect.

Voidable: "Voidable", in relation to a contract, means valid and binding but may be annulled or rendered unenforceable for a number of legal reasons by a party to the transaction who is legitimately exercising his or her power to avoid the contractual obligations.

6. AFRICANISATION AND COMMERCIAL LAW

Traditional African societies put a high premium on consensus. The parties to a proposed contract will normally talk until they reach an agreement in respect of all the terms and conditions before a contract is concluded. During lobolo negotiations, for example, delegations normally negotiate until they reach consensus on the relevant issues. It is important to note that, traditionally, the contracts were concluded between the family and the household and not between individuals. This is mainly because the concept of individual rights played second fiddle to communal (collective) rights. Parties to a contract must reach consensus, otherwise there will be no contract. This approach is in line with the principles of *ubuntu* or fairness, as no one should be forced to enter into any contract against his or her will. The Constitution of the Republic of South Africa, 1996 also contains values and principles relating to freedom to contract, public policy, reasonableness and equality.

STUDY UNIT 5

Capacity to Perform Juristic Acts

LEARNING OUTCOMES

After you have worked through study unit 5, you should be able to

- distinguish between legal capacity and capacity to act
- describe the factors that can influence a natural person's capacity to act
- describe the different age bands according to which a person's capacity to act is determined
- determine whether certain contracting parties have the capacity to perform juristic acts
- explain what protection the law gives to persons with limited capacity to perform juristic acts
- describe the consequences in cases where contracts are concluded by persons without the required capacity

Prescribed study material: chapter 5

OVERVIEW

In this study unit we discuss the second requirement for the conclusion of a valid contract: capacity to perform juristic acts. But whichever requirement is discussed, remember that non-compliance does not necessarily render the contract void: it could still be valid, voidable, valid but unenforceable, or another legal remedy could be available. Note the consequences of each specific instance of non-compliance.

There are five factors that can influence a natural person's capacity to act, which must not be confused with a person's legal capacity. These factors are age, marriage, mental deficiency, the influence of alcohol or drugs, prodigality and insolvency. Please note the different age bands for which the law provides different rules, the consequences of the different forms of marriage on capacity to act, and the differences in the legal position when a person has been declared mentally deficient or a prodigal, as opposed to when a person is merely suffering from mental deficiency or prodigality, without having been so declared by a court.

1. INTRODUCTION

(Textbook par 5.1)

Although all legal subjects (see chapter 2, par 2.2, of the textbook) have legal capacity, not all legal subjects have the capacity to perform juristic acts. The differences between legal capacity and capacity to act have been summarised in the following diagram:

LEGAL CAPACITY	CAPACITY TO ACT
<ul style="list-style-type: none"> • The capacity to acquire and to bear rights and duties. 	<ul style="list-style-type: none"> • The capacity to <ul style="list-style-type: none"> – perform juristic acts – participate in legal transactions – conclude valid contracts
<ul style="list-style-type: none"> • All legal subjects have this capacity, namely, <ul style="list-style-type: none"> – natural persons (human beings) – juristic persons (e.g. companies) 	<ul style="list-style-type: none"> • Only natural persons have this capacity. <ul style="list-style-type: none"> – Natural persons must act for juristic persons.
	<ul style="list-style-type: none"> • Exceptions: <ul style="list-style-type: none"> – natural persons with no capacity to act – natural persons with limited capacity to act <p>Reason for exclusion or limitation of capacity to act: the law's view of whether the person can</p> <ul style="list-style-type: none"> – form and declare his or her will – judge the rights and duties (i.e. the consequences) that ensue from his or her acts
	<ul style="list-style-type: none"> • Example of a person with full capacity to act on his or her own: an unmarried major

2. AGE

(Textbook par 5.2)

The age of a natural person affects his or her capacity to perform juristic acts.

2.1 Majority

A person attains full capacity to perform juristic acts when he or she reaches the age of majority, that is, when he or she turns 18 (comes of age), or by marrying (before turning 18).

ACTIVITY 5.1

Discuss the capacity, or otherwise, to perform juristic acts of the following persons:

- (1) Karin, 16 years old and unmarried
- (2) Adam, 17 years old and divorced
- (3) Jenny, aged 25 and unmarried
- (4) David, aged 26 and certified mentally deficient
- (5) Ajax Gardening Services CC, a close corporation
- (6) Sello, married in community of property
- (7) Duiker, 16 years old and left behind by parents who emigrated to Russia because he had his own job and flat

FEEDBACK

- (1) Because Karin is under 18, she probably does not have the capacity to perform juristic acts (but see par 5.2.2.3(b) of the textbook).
 - (2) Adam obtained capacity to perform juristic acts when he got married, a status that he does not lose upon divorce (par 5.2.1 of the textbook).
 - (3) Jenny has the capacity to perform juristic acts because she is older than 18 and there are no factors indicating that the position could be different (par 5.2.1 of the textbook).
 - (4) Whether David has the capacity to perform a juristic act will depend on whether he is mentally deficient at the time of the act (par 5.4 of the textbook).
 - (5) Although it has legal capacity, a legal entity does not have the capacity to perform juristic acts. Natural persons must act on behalf of legal entities (par 5.1 of the textbook).
 - (6) The general rule is that each spouse in a marriage in community of property has full capacity to bind the joint estate. However, this rule is qualified with regard to certain assets of the joint estate and certain transactions which involve the joint estate. In these instances Sello has to obtain his wife's consent to the qualified transactions unless he carries out the transactions in the ordinary course of his profession or trade, in which case the requirement will be waived in certain circumstances (par 5.3.2 of the textbook).
 - (7) Duiker has full capacity to perform juristic acts. He is clearly emancipated since he lives separately from his parents and is economically independent. His parents consciously left him behind when they emigrated to Russia, not out of neglect, but because of a conscious decision on their part that it would be best for him (par 5.2.2.3(b) of the textbook).
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ACTIVITY 5.2

Which **ONE** of the following statements is **CORRECT**?

- (1) In line with the common law, the Children's Act 38 of 2005 provides that a person becomes a major when he or she reaches the age of 21 years.
- (2) A minor may obtain full capacity to act upon marriage.
- (3) A married minor loses the capacity to act if he or she should divorce before reaching the age of majority.
- (4) A person will only have full capacity to act when he or reaches the age of majority.

FEEDBACK

- (2) is **CORRECT**. Upon marriage a minor obtains full capacity to act as if he or she were 18 years old, unless the minor's capacity is flawed for reasons other than his or her age.
 - (1) is **INCORRECT**. In terms of the Children's Act a minor becomes a major when he or she reaches the age of 18 years (which is the age of majority).
 - (3) is **INCORRECT**. A married minor retains the capacity to act acquired upon marriage even if the marriage is dissolved by divorce before he or she reaches the age of majority.
 - (4) is **INCORRECT**. A person may obtain full capacity to act upon marriage or emancipation in certain instances. Refer to par 5.2.2.3(b) of the textbook.
-

2.2 Minority

A minor is any natural person who has not yet turned 18 and who is still unmarried. Minors are under the guardianship of their parents or guardians. Who is the guardian of a minor child? In the case of children born in wedlock, both parents have guardianship, which they usually exercise independently. In certain circumstances, the law requires both parents' consent. These circumstances are explained in the textbook (par 5.2.2.2).

On the death of one of the parents, the other parent becomes the minor child's only guardian. If both parents should die, the court appoints a guardian for the minor. In the case of a child born out of wedlock (a child whose parents are not married), the mother is usually the child's guardian. The Children's Act 38 of 2005 provides for the parental rights of unmarried fathers in certain circumstances.

If the court grants the parents of minor children an order of divorce, the court may make any order that it considers to be in the best interests of the children, including an order regarding the guardianship of the minor children. Such an order could, for example, award guardianship exclusively to one of the parents.

2.2.1 The minor under the age of seven years

Absence of capacity to act: A child under the age of seven has no capacity to act whatsoever. He or she may not contract – even on terms that are to his or her advantage. A guardian must act for the minor. The guardian needs to have capacity to act. The guardian sees to the minor's maintenance (including food, clothing, shelter, education and health requirements). The guardian may create rights (e.g. purchasing a book for the minor) and duties (e.g. paying for the book) in connection with the separate estate of the minor.

If a minor suffers loss because of a contract that was concluded on his or her behalf by the guardian, the minor may apply to the High Court for restitution (i.e. an order cancelling the contract and for the return of everything that has been performed in terms of the contract). The minor must apply within one year of reaching majority. The minor must also prove that the loss was already inherent when the contract was concluded.

2.2.2 The minor over the age of seven years

Limited capacity to act: A minor over the age of seven has restricted capacity to act.

General rule

A guardian must **assist** the minor. How? In one of the following ways:

- by being present and giving assent when a contract is concluded

OR

- by giving permission before the conclusion of a contract

OR

SECTION B: GENERAL PRINCIPLES OF THE LAW OF CONTRACT

- by ratifying a contract (giving approval retrospectively, i.e. after the conclusion of the contract)

ACTIVITY 5.3

How could a valid contract of purchase have come about if Vicky, aged nine, who has only limited capacity to act, walks into a café on her own and buys herself an ice-cream?

FEEDBACK

Vicky's parents either gave her their permission in advance to conclude the contract or they ratified (approved retrospectively) the transaction.

Common-law exception

If a minor over the age of seven concludes a contract without the assistance of his or her guardian and, in terms of the contract, acquires only rights and no duties, the contract will be valid. Examples of such contracts are the following: donations and contracts that release the minor from debt, where the other party has a duty to perform, but the minor does not.

Statutory exceptions

A minor may act without the assistance of his or her guardian in certain instances. Those instances are the following: The Children's Act has a number of provisions regarding the health care of children. In this regard, the Children's Act now makes more detailed provision for children at a lower age to consent to medical treatment or operations. The Children's Act includes provisions regarding HIV tests on children and makes provision for children's rights regarding access to information on various health issues. The Children's Act also provides for children over the age of 12 years to have access to contraceptives in certain circumstances.

If a minor is older than 16, he or she may make deposits at a bank, withdraw from the deposits and cede or burden the investment (the Mutual Banks Act 124 of 1993 and the Banks Act 94 of 1990).

Example: The minor may deposit money in a savings account at a bank. This money earns interest. If the minor wishes to buy something and he or she needs the money, he or she may withdraw the money from the savings account, but he or she must still obtain the guardian's consent to buy the article.

Refer to chapter 5, par 5.2.2.2, of the textbook for more examples of statutory exceptions.

2.2.3 Special situations

(a) *Contracts for which the guardian's assistance is insufficient*

Sometimes the consent of the High Court, or some other specified person, must be obtained in addition to the assistance of the guardian.

Example: The alienation (e.g. sale, long lease [more than ten years]) or mortgaging of a minor’s **immovable** property.

IF THE VALUE IS UNDER R100 000	IF THE VALUE IS OVER R100 000
<ul style="list-style-type: none"> • Consent required of: <ul style="list-style-type: none"> – guardian and – Master of the High Court 	<ul style="list-style-type: none"> • Consent required of: <ul style="list-style-type: none"> – guardian and – judge or judges of the High Court

(b) Tacit emancipation

The guardian allows the minor to lead an economically separate life. The guardian’s consent may be given **expressly**.

Example: “I give you permission to run your own bicycle-repair shop.”

The guardian’s consent may also be given **tacitly (silently)**.

Example: John, who is a minor, passes matric and wishes to move out of the house and find a job. His parents do not forbid him from doing so. His mother helps him to choose a flat and makes curtains for the windows. His father hires a truck to help him move his furniture from his room at home into the flat. Fortunately, he finds a job. His parents come to his flat-warming party. In this case there is no inattentiveness or indifference on the parents’ part; actually, there is co-operation.

Test for tacit emancipation:

- economic independence

AND

- the guardian allows the minor some contractual freedom

Signs (not conclusive proof) of tacit emancipation:

- the minor has a separate dwelling

AND

- the minor carries on his or her own business (conducts his or her own affairs)

THE EMANCIPATED MINOR’S CAPACITY TO ACT

FULL CAPACITY TO ACT	LIMITED CAPACITY TO ACT
<ul style="list-style-type: none"> • Question of fact 	<ul style="list-style-type: none"> • Question of fact
<ul style="list-style-type: none"> • Minor has full capacity to act, except to <ul style="list-style-type: none"> – conclude a marriage – alienate or encumber immovable property 	<ul style="list-style-type: none"> • Minor has capacity to act, but only in respect of <ul style="list-style-type: none"> – his or her business (e.g. photographer) – his or her occupation (e.g. student)
<ul style="list-style-type: none"> • Guardian consents to the minor’s complete freedom to decide about and pursue his or her lifestyle and way of earning a living 	<ul style="list-style-type: none"> • Guardian retains power relating to other areas of the minor’s life

SECTION B: GENERAL PRINCIPLES OF THE LAW OF CONTRACT

(c) *Contracts that the minor concludes without the necessary assistance in spite of a limited capacity to act*

What are the consequences if a minor concludes a contract without the assistance of his or her guardian?

We distinguish the following circumstances:

SITUATION	CONSEQUENCE
<ul style="list-style-type: none"> • The contract is ratified <ul style="list-style-type: none"> – by the guardian during minority – by the “minor” once he or she attains majority 	<ul style="list-style-type: none"> – The contract is valid – both parties are liable to perform. – The contract is valid – both parties are liable to perform.
<ul style="list-style-type: none"> • The contract is not ratified <ul style="list-style-type: none"> – The other party has not yet rendered performance. – The other party has rendered performance. 	<ul style="list-style-type: none"> – The contract is invalid, but has certain consequences. The minor may claim performance without rendering performance, but needs the assistance of the guardian to claim performance. This assistance is ratification by implication. The contract is thus valid. The minor is consequently liable to perform. The other party now has the contractual defence that he or she need not perform until the minor has performed or offered to perform. – There is no contractual liability. <p>Liability on unjustified enrichment:</p> <ul style="list-style-type: none"> – Luxury items: The minor is liable for what remains in his or her possession when a claim is instituted. – Necessities: The guardian is liable.

Note that the above-mentioned defence that one party has when his or her performance is claimed, namely, that he or she need not perform until the other party has performed or offered to perform is available in all contracts and not only in the case of “contracts” with minors.

ACTIVITY 5.4

What are the consent requirements, if any, in the following cases?

- (1) Rachel, aged 6, for a contract for computer lessons
- (2) Amanda, 17, for the sale of a farm to the value of R800 000, which she inherited from her grandfather
- (3) John, 14, for a contract for the purchase of school books
- (4) Francine, 16, for permission to have her leg set after a motor car accident

FEEDBACK

- (1) Because Rachel is under the age of seven, her guardian must conclude the contract on her behalf.

- (2) For the disposal of immovable property to the value of more than R100 000, Amanda has to be assisted by her parents. In addition, she has to obtain the consent of a judge or judges of a High Court.
 - (3) Only one of John's parents may assist him. In this case, either of the parents may act.
 - (4) Because Francine is older than 14 years, she may give permission for the medical treatment.
-

ACTIVITY 5.5

Margaret is 15 years of age and concludes an agreement in terms of which she undertakes to take care of the children of Ismail and Rashid at R15 per hour. Her guardian refuses to ratify the agreement. After Margaret has received her remuneration from Ismail, she fails to come to work. Instead, she goes to Century City Mall and buys the school books she needs, perfume for her best friend and make-up for herself. Has a contract been concluded? Does Ismail have any remedies in this regard?

FEEDBACK

Because Margaret has limited capacity to act and the contract has not been ratified by her parents, the contract is unenforceable. All that Ismail can do is to reclaim his own performance on the ground of unjustified enrichment. Ismail can claim the amount for the school books from Margaret's parents, because these are necessities. The perfume and cosmetics are luxuries and Ismail would be entitled to the value of the part that Margaret has not given away or consumed by the time the claim is made.

(d) *Fraudulent misrepresentation of majority*

A minor who concludes a contract without the assistance of his or her guardian is **normally** not liable under the contract, as explained above. However, there is one exception: when a minor fraudulently poses as a major and another party concludes a contract with the minor on the strength of the misrepresentation, the minor is bound to the contract as if he or she were indeed a major.

Example: In reply to a question about her age, Lize, a minor, lies and says she is 18. If her fraudulent behaviour leads Motu to contract with her, Lize is bound by the contract as though she were a major with the capacity to act.

Note that fraudulent misrepresentation is required and not innocent misrepresentation.

3. MARRIAGE

(Textbook par 5.3)

Our interest in matrimonial law lies mainly in the effect that it has on natural persons' capacity to act. In the case of some types of marriage, the capacity to act of certain of the spouses is or was limited.

Here we must distinguish the following three possibilities:

3.1 Agreements concluded prior to 1 December 1993 in cases where the husband had marital power

Although marital power has been abolished completely, some contracts may still exist in which the husband's consent was required, but not obtained. Such contracts may be ratified by the husband, but if they are not, such contracts are unenforceable and any claim must be based on unjustified enrichment.

3.2 Agreements concluded by a spouse married in community of property

The general rule is that each spouse may act independently of the other. In certain cases, however, a spouse may not take any action at all relating to the joint estate; in other cases, the consent of the other spouse is required in order to conclude contracts affecting the joint estate.

Note that the husband and the wife are subject to the same limitations. In other words, the wife needs the consent of the husband in circumstances in which consent is required, and the husband needs the consent of the wife in circumstances in which consent is required.

The two exceptions to the general rule are the purchase of domestic necessities in cases where the parties live apart but are not divorced, and where the Matrimonial Property Act 88 of 1984 prescribes certain forms of consent by spouses for certain transactions.

ACTIVITY 5.6

What type of consent is required in the following situations if spouses are married in community of property?

- (1) You are the cashier at the bank where Nthabiseng wishes to withdraw money from an account that was opened in the name of her husband, Godfrey.
- (2) You are the estate agent who found a buyer for the house belonging to Nthabiseng and Godfrey
- (3) Godfrey gives the couple's minibus to Frans as a gift.

FEEDBACK

- (1) You will have to insist on written consent from Godfrey. It is also possible that the transaction can be ratified by Godfrey.
- (2) Either Godfrey or Nthabiseng can conclude the contract of sale, but the other one has to give written consent for the transaction and the consent must be given in advance. The transaction may not be ratified by either of them later.
- (3) It is sufficient for Nthabiseng to know about the donation and to not object to it. If, however, she only learns about the donation later, she may consent then. Of course, she could also raise objections to the donation, which would mean that Godfrey did not have capacity to enter into the transaction. If Frans had been unaware that Godfrey lacked the necessary consent, and could

not reasonably have been aware of this, the transaction may be regarded as having been concluded with the necessary consent.

What is the consequence if a spouse acts without the other spouse's consent when it is required? Unless the other party knows, or should know, that consent has not been given, the contract is treated as if consent had indeed been given. Furthermore, if a spouse unreasonably refuses consent, the other spouse may apply to the High Court to dispense with the requirement of consent. What if a spouse acts in such a way that the estate is placed at risk (e.g. by squandering the assets)? The other spouse can apply to the High Court for a suspension of that spouse's powers regarding the joint estate.

3.3 Agreements concluded by a spouse married out of community of property

Remember that if parties to a marriage do not state otherwise, they are automatically married in community of property. Also note that if parties to a marriage conclude an antenuptial contract, the accrual system will automatically apply to their marriage, unless they exclude it expressly. Moreover, an antenuptial contract will be binding on the spouses, even if it is not notarially executed and registered at a deeds office; however, it will not be binding on third parties. You should also know what responsibilities each spouse has regarding household necessities.

4. MENTAL DEFICIENCY (Textbook par 5.4)

Here we refer to persons whose mental condition prevents them from understanding the consequences of their conduct. They have no capacity to conclude contracts. If they do conclude "contracts", those "contracts" are void. No contractual rights or duties result. Everyone is presumed normal until proved mentally deficient. The High Court has jurisdiction to declare someone mentally deficient and to appoint a curator to look after that person's estate and affairs.

Mental deficiency is a question of fact. The test is as follows: Was the person normal or mentally deficient when he or she entered into the contract? Mental illness may come and go: while it is absent, the person (even if declared mentally deficient by the court) has what is called a "lucid moment". During such a lucid interval, he or she may acquire contractual rights and duties.

Once a person has been declared mentally deficient, the burden of proof shifts. In such a case it must be proved that the person indeed had the capacity to act when the contract was concluded, in spite of the declaration, whereas in the case of a person who has not been declared mentally deficient, it must be proved that the person had no capacity to act when the contract was concluded, in spite of the fact that he or she has not been certified as mentally deficient.

5. THE INFLUENCE OF ALCOHOL OR DRUGS

(Textbook par 5.5)

Question of fact: When the person concluded the contract, was he or she so drunk or so drugged that he or she

- could not understand the nature and consequences of his or her actions?

OR

- could understand the nature and consequences of his or her actions but could not control those actions?

If the answer is “yes”, the contract is **void**. The contracting party had no capacity to act. No contractual rights and duties result. If the answer is “no”, the contract is completely valid. The contracting party, though influenced by alcohol or drugs, could still form his or her independent will.

Burden of proof: Everyone is presumed able to act until proved unable to do so. Therefore, a party who alleges that alcohol or drugs prevented a contracting party from forming an independent will must prove this allegation.

6. PRODIGALS

(Textbook par 5.6)

A prodigal is a person who habitually spends his or her money recklessly and extravagantly. This person has the capacity to act until the High Court actually declares him or her a prodigal and appoints a curator to look after his or her estate and affairs. After that, the prodigal has **limited** capacity to act.

General rule: The court forbids the prodigal from performing juristic acts without the curator’s consent. The prodigal must be **assisted** by the curator.

Exception: The prodigal may conclude contracts by which he or she acquires rights, but not duties, without the curator’s assistance.

Return to full capacity: If the court sets aside the order declaring the person a prodigal, the former prodigal will regain complete capacity to act.

7. INSOLVENCY

(Textbook par 5.7)

Certain provisions of the Insolvency Act 24 of 1936 affect an insolvent’s capacity to act after his or her estate has been sequestered. The insolvent may not dispose of any of the assets that were in his or her estate at the time of sequestration.

As far as assets acquired by the insolvent after sequestration are concerned, the insolvent may dispose of these only if they are excluded from the insolvent estate by statute or at common law. The insolvent still has capacity to enter into contracts, provided that they do not dispose of the assets of the estate. The insolvent may, for example, agree to repair someone’s car for remuneration.

ACTIVITY 5.7

You have to enter into contracts with the following persons. How would you ensure that the contracts are valid as regards capacity to perform juristic acts?

- (1) Alison, aged six
- (2) John, 14 years of age
- (3) Richard, married in community of property
- (4) Georgia, who is mentally deficient
- (5) Billy, who is addicted to cocaine
- (6) Lucy, who has been declared a prodigal
- (7) Dale, an unrehabilitated insolvent
- (8) Jane, married out of community of property

FEEDBACK

- (1) Alison has no contractual capacity. Any contract she concludes personally will be void. Contracts with Alison will be valid only if her guardian concludes them on her behalf.
- (2) John has limited capacity to act. Here you need to distinguish between two types of contracts: Contracts in terms of which John obtains rights only and is not required to perform himself will be valid and enforceable, even if John concludes them without assistance. Other contracts will be unenforceable if John personally concludes them, and will be enforceable only if John's guardian assists him in concluding them.
- (3) Richard has full capacity to perform juristic acts. In certain circumstances, however, the law places specific limitations on this juristic capacity. You should therefore look at the type of transaction involved. Richard will have no capacity to bind the joint estate for domestic necessities if he and his wife have separate households and it is his fault that they have separate households. Furthermore, he will need his wife's consent in some or other prescribed form in order to enter into certain transactions relating to their joint estate.
- (4) Of course, someone who is mentally deficient could experience **moments of normality**. To ensure that a contract with Georgia is valid, you must make sure that she grasps the nature and consequences of her actions when you conclude the contract with her; in other words, that she has the capacity to act. The position is similar where she has been certified as mentally deficient by the court. The only difference is that if there should be a dispute about the validity or otherwise of the contract, and she has not been certified as mentally deficient by the court, Georgia will have to prove that she did not have the capacity to perform juristic acts when she entered into the contract. If, however, she has already been certified as mentally deficient, you will have to prove that she nonetheless had the capacity to act when she concluded the contract. If you are uncertain whether Georgia actually understands the nature and consequences of her actions when you want to enter into the contract with her, and a curator has been appointed for her, the curator may act on her behalf.
- (5) Billy has full capacity to act. Nonetheless, at the time of contracting with him, you will need to make sure that he realises the nature and consequences of his actions and can control his actions. If Billy is unable to comply with these requirements because of a befuddled mind, he has no capacity to perform juristic acts and the contract will be void. If Billy meets the requirements, he has the capacity to act, even though he is under the influence of the drug. In other words, it is a difference in degree.

SECTION B: GENERAL PRINCIPLES OF THE LAW OF CONTRACT

- (6) Since Lucy has already been declared a prodigal, she has limited capacity to act. You must distinguish between two types of contracts. Contracts in terms of which Lucy obtains rights only and is not required to deliver any performance will be valid, even if she concludes them without assistance. Other contracts will be valid if her curator assists her, and voidable if he or she does not do so.
 - (7) Because rehabilitation is a process that begins only after sequestration, you may assume that Dale's estate has been sequestered. Once again you will need to distinguish between different types of transactions, in this case, three types. With reference to the disposal of assets in the insolvent estate, Dale has no capacity to act and his curator has to act on his behalf. In relation to other contracts that could have a detrimental effect on Dale's estate, he has limited capacity to act and needs the assistance of his curator. Without the necessary assistance, the contract is unenforceable. As far as other contracts are concerned, namely, those that do not affect his estate, Dale has the capacity to act.
 - (8) Jane has full capacity to perform juristic acts and you may freely conclude a contract with her. It would, however, be advisable to make sure that Jane is really married out of community of property.
-

SELF-ASSESSMENT ACTIVITIES

- (1) Aaron is a mentally deficient, married man. Does his mental deficiency have an influence on his legal capacity?
- (2) Outline the factors that can influence a natural person's capacity to act.
- (3) Describe the different age bands according to which a person's capacity to act is determined.
- (4) Does a minor lose his or her capacity to act once a marriage to which he or she is a party is dissolved by divorce? Explain.
- (5) Advise Mr Tau whether he can consent, as part of his cultural practices, to Mr Bundu marrying his 17-year-old daughter, Buhle, without her consent.
- (6) Explain whether Mary, a 13-year-old girl, can undergo an HIV test without her guardian's consent.
- (7) Can Matu, a 40-year-old businessman who is virtually unconscious after having consumed 12 glasses of whisky, conclude a contract for the sale of his farm?
- (8) Does Mabel, who has been declared a prodigal by the court, have capacity to act?
- (9) Briefly describe the contracts for which a guardian's assistance is insufficient.
- (10) Tapiwa, a minor of 17 years, has just completed a printing course and decides to launch a business that prints business cards as well as birthday and wedding invitations. His father, an estate agent, finds business premises for him in the local shopping centre. His mother buys a computer, a printer-cum-photocopier and furniture for the business. As a minor, Tapiwa requests you to advise him on the concept of tacit emancipation.

8. EXPLANATORY NOTES

Capacity to act: The capacity to perform juristic acts, to participate in legal transactions and to conclude valid contracts.

Insolvent: A debtor whose estate is under sequestration, including a debtor who is unable to meet his or her debts or obligations before the sequestration of his or her estate.

Legal capacity: The capacity or competence to acquire and to bear rights and duties.

Major: Any natural person who has reached the age of 18 years or who is married.

Mental deficiency: The condition where a person is not able to understand or appreciate the nature or consequences of his or her conduct at a level which is sufficient to enable him or her to manage a particular affair and to make *rational* decisions.

Minor: Any natural person who has not yet reached the age of 18 years and who is still unmarried.

Prodigal: A person who habitually squanders his or her money recklessly and extravagantly.

Tacit emancipation: This occurs where the guardian allows the minor to lead an economically separate and independent life. The guardian's consent may be given expressly or tacitly.

9. AFRICANISATION AND COMMERCIAL LAW

In traditional African societies, emphasis was placed on the collective. Thus, the family and the household were usually the parties that had the capacity to act. Natural persons could therefore not independently acquire and bear rights and duties. As such, natural persons could not conclude contracts but through the head of the family or the household. A marriage contract was concluded between families and not necessarily between the married couple. Status factors such as age, sex and the mental state of natural persons were therefore not decisive.

However, today emphasis is placed on the natural person instead of the family and the household. Accordingly, any major person who is mentally sound and who has not been declared a prodigal by the court can enter into binding and enforceable contracts. Minors have no capacity to contract and must obtain their guardians' assistance, just like in common law. However, a minor may conclude a valid contract, provided the guardian gives him or her consent or assistance. This approach is in line with the concept of *ubuntu*, in that people who are not in a position to appreciate the consequences of their actions because of their position of vulnerability are protected from the mighty hand of the law.

STUDY UNIT 6

The Agreement Must be Possible

LEARNING OUTCOMES

After you have worked through this study unit, you should be able to

- determine which contracts and performances are illegal, unenforceable or impossible
- describe the consequences of such contracts
- outline remedies that are available in the various circumstances
- give reasons why agreements that purport to be contracts could be contrary to the common law
- identify contracts that are contrary to the common law and contracts that are contrary to statutory law

Prescribed study material: chapter 6

OVERVIEW

In this study unit we discuss the third and fourth requirements for the conclusion of a valid contract, namely, that the agreement must be legally and physically possible to perform.

Legal impossibility could be the result of either common-law rules or statutory law. There are three reasons why agreements that purport to be contracts could be contrary to the common law: they are impossible to execute, they are contrary to good *morals* or they are contrary to public policy. Six types of contracts contrary to public policy are discussed. Legal impossibility due to statutory law prohibitions occurs when the contract is contrary to legislation promulgated by Parliament or by a provincial legislature, or contrary to a municipal regulation. Note the consequences of legal impossibility.

Physical possibility of performance relates to the performance due in terms of the agreement: performance must be objectively possible, whether the performance is divisible and whether it is determined or ascertainable. Whether or not performance is ascertainable is influenced by whether the performance is indicated in the contract as alternative or generic.

1. LEGAL POSSIBILITY

A performance is legally impossible if it is in conflict with the common law or statutory law. In terms of the common law, a contract may be legally impossible if it cannot be legally executed or if it is contrary to good morals or public policy. Contracts could be contrary to public policy because they abuse or thwart the course of justice, amount to offences or delicts, jeopardise the safety of the state, restrict people's freedom to participate in legal or commercial intercourse or constitute gambling.

(a) *Agreements restraining a person's freedom to participate in legal intercourse*

(Textbook par 6.2.1.3(d))

ACTIVITY 6.1

Indicate whether the following agreements would be valid or not and give reasons for your answers.

- (1) While their father is still alive, two brothers, Onego and Aresha, agree that, on the death of their father, Onego will forgo his inheritance so that it will pass to Aresha.
- (2) Onego and his father agree that the father will leave nothing to Onego so that Aresha will inherit everything.

FEEDBACK

- (1) This agreement is invalid. During the father's lifetime, Onego may not agree to forgo his inheritance one day. It is contrary to the public interest to allow persons to restrict their right to participate in legal intercourse if the restriction infringes the person's freedom excessively.
- (2) This agreement is also invalid. The law does not permit the father to restrict his freedom to decide who will receive legacies and bequests.

As an exception, the law does allow engaged couples to include a clause in their antenuptial contract to the effect that the one spouse makes the other spouse his or her heir. This exception enables the first-dying spouse to provide for the maintenance of the surviving spouse.

(b) *Agreements restraining a person's freedom to participate in trade*

(Textbook par 6.2.1.3(e))

Not all contracts that restrict a person's right to take part in trade are contrary to public policy thereby resulting in such contracts being null and void. You need to be able to determine when such contracts are indeed invalid.

See the example in the textbook concerning the sale of a hair salon. Other **examples** are the following:

- (1) Ali and Ben are partners in a veterinary practice. Ali is afraid that if Ben were to leave their partnership, nearly all the customers would take their sick animals to Ben. He therefore persuades Ben to promise that if he (Ben) were to leave the partnership, he would not practise as a veterinary surgeon in Cape Town for one year.
- (2) Cas Ltd, anxious to protect its trade secrets and to keep its important clients, requires its employee, Don, to agree to a restraint that will prevent him from doing the same work in a specified geographical area (South Africa) for a specified time (ten years).

Here the principle of freedom to work and to participate in trade is in conflict with the principle that contracting parties must uphold their contracts. The second principle

(contractual commitment) is generally preferred, and contracts in restraint of trade are regarded as **valid and enforceable**.

For this reason, Ben and Don would have to prove that the restraints on their freedom to practise and work are **contrary to public policy**. The court may take into consideration whether the restraint is reasonable to both parties at the time it takes effect (i.e. when Ben and Don leave their present places of work and Ali and Cas Ltd seek to enforce the restraints). Ben's restraint is limited: he could start practising immediately somewhere else (even near Cape Town) or, if he wishes to continue practising in Cape Town, he need wait only a year. Thus, because the restraint on his freedom to trade is reasonable and consequently not contrary to public policy, it is valid. However, Don's restraint is **too long and extensive**, and therefore **unreasonable**. The restraint against Don is therefore contrary to public policy and unenforceable. The courts have the discretion to alter the period or the area of the restraint in order to bring the contract within the sphere of reasonableness.

(c) *Gambling contracts*

(Textbook par 6.2.1.3(f))

The purpose of a contract is to ensure that the parties thereto perform in terms of the contract. Problems arise when a party does not perform as he or she has undertaken to do. In the case of a valid contract, the law provides certain remedies for breach of the contract, and a party wishing to enforce his or her rights in terms of the contract can institute action in a court of law against the party in breach. (See **chapters 10 and 11** of the textbook on breach of contract and the remedies the law provides in the textbook). In some cases the law recognises the contract as valid, but does not afford the usual remedies for breach of contract. It is then that we speak of **valid, but unenforceable contracts**.

A typical example of this is the common-law wagering contract. (**Revision:** You have now learnt about **invalid contracts, valid but voidable contracts, valid and enforceable contracts**, as well as **valid but unenforceable contracts**. Can you give examples of each of these contracts? It might be worth attempting to do this without paging back to the relevant chapters in the textbook. See how much you can remember).

In terms of the common law **wagering contracts** are valid but unenforceable, whereas gambling contracts were illegal and therefore invalid. In addition to the common law, there are now **two statutes regulating gambling contracts**, which serve as examples of how public policy changes over time. Both these Acts make provision for certain gambling debts to be enforceable. Gambling contracts and debts not covered by the Acts are still regulated by the common law.

1.1 Consequences of illegality

Most unlawful contracts are **void**. Contracts that conflict with statutory law are void if the law determines that such contracts will be invalid. If the law does not determine what the result of such contracts will be, you must try to ascertain what the legislator's intention was, that is, whether the contract is valid or invalid, and whether the parties are committing an offence.

No contractual rights or duties can arise from a void contract. In the case of unlawful contracts, this fact is expressed by the rule that no action arises from a shameful cause (*ex turpi causa non oritur actio*). Moreover, the parties may not turn to the law on unjustified enrichment in order to obtain performance. This is established by the *par delictum* rule, which has the effect that the person in possession of the performance is in a stronger position.

However, in the past, the courts sometimes relaxed the *par delictum* rule when it was in the public interest to do so, for example, when the contract was in contravention of a statutory prohibition and the contravention was of a technical nature.

Contracts related to the unlawful “contract” may also be void if they have the following consequences:

- if the related contract indirectly enforces the unlawful “contract”

OR

- if not, if it is close enough to the unlawful “contract” to help, promote or encourage it

ACTIVITY 6.2

Read the following scenario and answer the question that follows.

Winnie works at the local traffic department. Winnie sells driver’s licences to the public illegally. Nigel reaches an agreement with Winnie to pay her R500 in cash for a driver’s licence. Nigel pays the money but Winnie refuses to deliver the driver’s licence to Nigel.

Which **ONE** of the following statements is **CORRECT**?

- (1) Nigel can claim delivery of the driver’s licence from Winnie on the basis of the contract that arose between them.
- (2) Nigel can reclaim the amount paid to Winnie on the ground of unjustified enrichment.
- (3) The contract between Winnie and Nigel is void due to legal impossibility.
- (4) Options (2) and (3) above are both correct.

FEEDBACK

- (3) is **CORRECT**. The contract between Winnie and Nigel is unlawful and therefore void owing to legal impossibility.
- (1) is **INCORRECT**. No party may institute an action against another to claim performance on the basis of an unlawful contract. This rule is expressed in the maxim *ex turpi causa non oritur actio* (no action arises from a shameful cause). Even if one of the parties has already rendered performance in terms of the unlawful contract, the court will not recognise the contract. Nigel will therefore not be able to claim delivery of the driver’s licence from Winnie on the basis of the contract which arose between them.
- (2) is **INCORRECT**. The relief of unjustified enrichment is usually not allowed in respect of unlawful contracts as a result of the existence of a legal rule known as the *par delictum* rule. According to this rule, when there is equal guilt the possessor is in the stronger position. Winnie is in possession of the sum of money agreed upon and since Winnie and Nigel are equally

guilty, Winnie is in the stronger position. Therefore, Nigel cannot claim the purchase price from her.

- (4) is INCORRECT. Although option (3) is CORRECT, option (2) is INCORRECT. Option (3) is CORRECT because the contract between Winnie and Nigel is unlawful and therefore void owing to legal impossibility. Option (2) is INCORRECT because the relief of unjustified enrichment is usually not allowed in respect of unlawful contracts as a result of the existence of a legal rule known as the *par delictum* rule. According to this rule, when there is equal guilt the possessor is in the stronger position. Winnie is in possession of the sum of money agreed upon and since Winnie and Nigel are equally guilty, Winnie is in the stronger position. Therefore, Nigel cannot claim the purchase price from her.
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2. POSSIBILITY AND CERTAINTY OF PERFORMANCE (Textbook par 6.3)

2.1 Objective possibility to perform

You should note that impossibility of performance is relevant in three different stages of a contract, namely, at the conclusion thereof (which applies here), where breach of contract in the form of prevention of performance occurs (see par 10.6 of the textbook), or where rights are terminated by the supervening impossibility of performance (see par 12.8 of the textbook). You should make a point of distinguishing between these three situations.

It is only objective physical impossibility of performance that prevents the conclusion of a contract. If the performance is not objectively or absolutely impossible, the contract is valid. In study unit 8 we look at terms that may be included in contracts, such as a condition, which could be relevant here. Note the difference between divisibility in character and divisibility in law. A performance that is divisible in character will not necessarily be divisible in law: that would depend on the subject matter itself and the intention of the parties. A set of chairs is an example of a performance that is physically divisible, but which may not be divisible in a particular contract.

ACTIVITY 6.3

Lerato sells a dining room suite consisting of a table, six chairs and a sideboard to Estelle. The suite actually belongs to Alex, Lerato's previous husband. Answer the following questions and give reasons for each of your answers:

- (1) Is the contract between Lerato and Estelle valid in light of the fact that Lerato does not own the suite?
- (2) Suppose that, on returning home, Lerato finds that her father has burnt the suite to spite Alex, even before Lerato concluded the contract with Estelle. What is the status of the contract now?
- (3) Suppose that Lerato arrives home after her father has only thrown three of the chairs onto the fire. Will the contract between Lerato and Estelle be valid or not?

FEEDBACK

- (1) The contract is not invalid because it is simply subjectively impossible to perform. Objectively, it is still physically possible to perform because Lerato can always buy the suite from Alex in order to meet her contractual obligations. Failing that, she commits breach of contract.
 - (2) In this case, performance would be objectively physically impossible and the contract would be void.
 - (3) The dining room suite is physically divisible into the sideboard, the table and the chairs. This does not, however, necessarily mean that the law views the dining room suite as a divisible performance. If the law does view the performance as divisible, a valid contract comes into being, and the performance is that part of the divisible performance that is still possible. If the law does not view the performance as divisible, the contract is null and void. So, it is necessary to determine whether the dining room suite is a legally divisible performance. One way of determining whether the performance is divisible is to see how the price is expressed. If the price of the suite is R5 500, the performance might not be divisible, but if the price is set at R1 000 for the table, R1 500 for the sideboard and R500 for each of the chairs, the performance might be viewed as divisible.
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2.2 Determined and ascertainable performance

The requirement that performance must be physically possible includes the requirement that the performance must be determined or ascertainable. If performance is neither determined nor ascertainable, the contract is invalid due to vagueness because in that case performance is impossible. A contract will be valid if the performance is determined or ascertainable: either of the two would suffice.

In view of the last statement, you should note the difference between a facultative obligation (which is a specific type of determined performance) and an alternative obligation (which is a type of ascertainable performance). In the case of the facultative obligation, if the determined performance becomes impossible, the debtor is relieved of his or her obligation. In the case of the alternative obligation, the obligation to deliver continues if one of the alternatives becomes impossible, provided the other alternatives still exist. This means that the personal right is not terminated. The performance that arises from a generic obligation and the personal right to it also continues because it is accepted that the genus continues to exist. (The termination of contracts is discussed in **chapter 12 of the textbook**.)

SELF-ASSESSMENT ACTIVITIES

- (1) Molefe and Lebogang are engaged. They include a clause in their antenuptial contract to the effect that Molefe makes Lebogang his heir.
Discuss whether this contract is legally possible or not in terms of common law.
- (2) What do we mean when we say that the contract is contrary to statutory law?
- (3) Tom pays Gwelo R50 000 to burn down the Pretoria city hall. However, Gwelo has second thoughts and refuses to perform as agreed. Is Tom legally entitled to enforce Gwelo's performance or, alternatively, to demand the return of the R50 000?

SECTION B: GENERAL PRINCIPLES OF THE LAW OF CONTRACT

- (4) Sifiso undertakes to deliver his Rally mountain bike to Motha. The contract further provides that Sifiso may, at his sole discretion, deliver another mountain bike of similar quality.

What kind of obligation is applicable in this scenario?

- (5) Draw a distinction between an alternative and a generic obligation.
(6) Explain what objective possibility of performance means.
(7) When is a contract or performance determined and ascertainable?

3. EXPLANATORY NOTES

Ex turpi causa non oritur actio: No action arises from a shameful cause/*immoral* consideration.

Freedom of testation: The power of a person to choose how to have his or her properties distributed upon his or her death.

Genus: The number of beings or objects which agree in certain general properties, common to them all.

Inheritance: The practice of passing on property, titles, debts, rights and obligations upon the death of an individual.

***Par delictum* rule**: When the parties to an unlawful contract are equally at fault, neither can obtain affirmative relief from the court and whoever possesses whatever is in dispute may continue to do so in the absence of a superior claim.

Void: “Void”, in relation to a contract, means not valid or legally binding, or of no legal effect.

Voidable: “Voidable”, in relation to a contract, means valid and binding but may be annulled or rendered unenforceable for a number of legal reasons by a party to the transaction who is legitimately exercising his or her power to avoid the contractual obligations.

4. AFRICANISATION AND COMMERCIAL LAW

It makes legal sense that the requirement that the agreement must be possible was adhered to in African customary law, even though this law was not codified. A practical example is that the traditional court could not regard a sale of stolen cattle as a valid contract of sale. African customary law is very familiar with the concept of *morality*, which is known as *ubuntu* (please see the explanation of “*ubuntu*” in study unit 1, par 9). However, the Constitution of the Republic of South Africa, 1996 remains a reliable indicator of good *morals* since the drafting of it was persuaded by, among other things, morality.

STUDY UNIT 7

Formalities

LEARNING OUTCOMES

After you have worked through study unit 7, you should be able to

- identify the contracts for which formalities are required
- discuss the consequences of non-compliance with the formalities
- explain the effect of the formalities on contracts concluded electronically

Prescribed study material: chapter 7

OVERVIEW

The last requirement for the formation of a valid contract is compliance with required formalities. Please note that very few contracts require formalities in order to be valid. Two types of formalities are required for validity: those required by law and those required by the parties to the contract themselves. Four types of contracts are discussed where the law requires formalities. As far as these contracts and the others not mentioned separately are concerned, you are required to know both the formality required and the consequences of non-compliance.

The most common requirement is that the contract must be in writing and signed; in some cases it also has to be registered with a particular authority. Please note the effect of the Electronic Communications and Transactions Act 25 of 2002 on the writing and signing of contracts concluded electronically. Please also refer to study unit 3 above and chapter 3 of the textbook in this regard.

1. INTRODUCTION

(Textbook par 7.1)

The final requirement that we take into consideration when determining whether a valid contract has come into existence is whether compliance with any formalities is prescribed for the formation of a contract. (See the requirements for the formation of a valid contract in study unit 3 and chapter 3 of the textbook.)

The word “formalities” refers to the external, visible form that the agreement must take in order to be a valid, enforceable contract. Formalities may be required either by law or by the parties themselves. Usually, these formalities entail that the parties must write down their agreement and sign it. If no formalities are expressly required by the law or the parties, a contract arises once the parties who have the capacity to act reach consensus on rights and obligations that are physically and legally possible.

2. THE GENERAL RULE: NO FORMALITIES REQUIRED

(Textbook par 7.2)

As a general rule, no formalities are needed for the formation of a valid contract.

Contracts may be entered into

- through spoken words (orally)
- through written words
- through conduct (tacitly) only

Most contracts are formed orally or by conduct. Parties are normally free to choose the way in which they wish to create a contract, i.e. in writing, orally or tacitly. Think of shopping at a supermarket. In the example concerning a lease given in the textbook, Anna's formal letter or informal note would be a written offer, and her oral offer to Bob may be, "Hello, I'd like to hire this car from you for R2 000 a month."

Bob could accept in a formal letter or an informal note (written words), or, if he is a man of few words, he could merely nod his head or hand over the car keys to Anna (conduct). Some aspects of the contract may be agreed to orally or through conduct, and some may be agreed to in writing. For example, Bob could hand Anna a note about who is to be responsible for maintaining which parts of the car, and then hand Anna the keys of the car.

3. CONTRACTS WHERE FORMALITIES ARE REQUIRED

(Textbook par 7.3)

There are a number of exceptions to the general rule that no formalities are required. These are discussed below.

3.1 Formalities required by law

TYPE OF CONTRACT	PRESCRIBED BY	FORMALITIES REQUIRED	CONSEQUENCE OF NON-COMPLIANCE
Alienation of land (sale, exchange, donation)	Alienation of Land Act 68 of 1981	<ul style="list-style-type: none"> • Contained in a contract of alienation • Signed by parties or their agents • Agents must have written authority 	Invalid, but deemed to be valid if both parties have fully performed, and transfer to the new owner has occurred
Suretyship	General Law Amendment Act 50 of 1956	<ul style="list-style-type: none"> • In writing • Signed by, or on behalf of, the surety (surety may orally authorise agent to sign on his or her behalf) 	Invalid

Contracts of donation in which performance is due in future	General Law Amendment Act 50 of 1956	<ul style="list-style-type: none"> • Contained in a written document • Signed by donor or someone acting on his or her behalf • Donor must give written authorisation to the person to sign on his or her behalf • Authority must be granted in the presence of two witnesses 	Invalid
Antenuptial contracts	Deeds Registries Act 47 of 1937	<ul style="list-style-type: none"> • Must be registered 	Invalid against third parties, but valid between parties to contract

An antenuptial contract concluded in the Republic must be notarially attested and then registered in a deeds registry within three months of its conclusion. A specially qualified attorney called a notary attests the contract (certifies the written contract as valid). An antenuptial contract concluded outside the Republic must be notarially attested and registered in a deeds registry within six months of its execution. In both cases, the registration period may be extended by the court.

In the case of the National Credit Act 34 of 2005, a contract that does not comply with the prescribed formalities is not invalid, but the parties commit an offence. The Consumer Protection Act 68 of 2008 (CPA) requires that a written record of each transaction that falls within its ambit be given to a consumer. The record must set out certain prescribed information.

The CPA provides that franchise agreements must be in writing and signed by, or on behalf of, the franchisee. The CPA also provides that all contracts that fall within its ambit must be drafted in plain and understandable language.

3.2 Formalities required by the parties

No formalities are required in common law, but the legislature laid down certain requirements that must be satisfied when concluding certain types of contracts.

Two situations need to be clearly distinguished here:

- Firstly, the parties may have a clear, common intention that the contract between them should be in writing in order to be valid. The parties require writing as a formality. Therefore, until the contract is written down, there will be no binding contract.
- Secondly, it could be the parties' intention that the oral contract is valid but that they are putting it in writing to facilitate proof of the oral contract.

Which of these two possibilities actually reflects the intention of the parties needs to be ascertained from the contract itself.

ACTIVITY 7.1

Which **ONE** of the options provided below completes the following sentence **CORRECTLY**?

Compliance with formalities is a requirement for the validity of ...

- (1) all contracts.
- (2) all written contracts.
- (3) only those contracts where legislation prescribes formalities.
- (4) only those contracts where the formalities are prescribed by legislation or the contracting parties.

FEEDBACK

- (4) is **CORRECT**. Where formalities are prescribed by either legislation or the parties to a contract, they have to be complied with in order for the contract to be valid.
 - (1) is **INCORRECT**. As a general rule, no formalities are needed for the formation of a valid contract.
 - (2) is **INCORRECT**. The fact that a contract is in writing does not mean that formalities are prescribed by the law or the parties as a requirement for its validity.
 - (3) is **INCORRECT**. Where formalities are prescribed by legislation, these have to be complied with in order for the contract to be valid. However, if formalities are prescribed by the parties to a contract, these formalities also have to be complied with in order for the contract to be valid. Both legislation and the parties to the contract can therefore prescribe formalities, and not only legislation.
-

3.3 Writing and signing of electronic transactions

The Electronic Communications and Transactions Act 25 of 2002 (ECT Act) provides that electronic messages are recognised as writing if the document or information is accessible for future use, except in respect of transactions concluded under the following Acts:

- the execution, retention and presentation of a will or codicil in terms of the Wills Act 7 of 1953
- an agreement for alienation of immovable property in terms of the Alienation of Land Act 68 of 1981
- an agreement for a long-term lease of immovable property in terms of the Alienation of Land Act 68 of 1981
- the execution of a bill of exchange in terms of the Bills of Exchange Act 34 of 1964

The ECT Act also provides that, in certain circumstances, an electronic signature may legally fulfil the same function as a traditional handwritten signature.

ACTIVITY 7.2

Which of the following contracts are valid with regard to the formalities required by law for these types of contracts?

- (1) Retha purchases a kitten orally from Thami. They arrange that she will collect the kitten in two weeks' time, when it is mature enough to leave its mother.
- (2) Sam undertakes verbally to stand surety for the study loan of his son, Pieter.
- (3) Britney and Justin enter into a written antenuptial contract, but the attorney neglects to register the contract at a deeds registry.
- (4) Lemmy pays cash for his father's house when his father emigrates. Although their agreement is verbal, they succeed in having the transfer of the property registered in Lemmy's name at the deeds office.
- (5) John, who has relocated to England, leases his house to Jack via the internet for a period of 21 years.

FEEDBACK

- (1) The deed of sale between Retha and Thami is valid. There are no requirements for the sale of movable things.
 - (2) This contract is invalid. Contracts of surety are valid only if they comply with the required formalities. It must be in writing and signed by Sam or by someone acting on his behalf. Sam cannot be held liable for his son's student loan on the basis of this agreement.
 - (3) The antenuptial contract is valid between Britney and Justin, but is not binding on third parties.
 - (4) Since the property has been transferred to Lemmy and both parties have fully performed their obligations, the contract is regarded as valid, even though it does not meet the validity requirements for the alienation of immovable property.
 - (5) The lease agreement between John and Jack is invalid. In terms of the ECT Act, an agreement in terms of which immovable property is leased in excess of 20 years cannot be concluded electronically.
-

SELF-ASSESSMENT ACTIVITIES

- (1) Peter is very excited. He has just heard that he has won a new car. He phones Mpho and tells him the good news. Peter offers to give his old car to Mpho, who gladly accepts the offer. They agree that Peter will deliver the old car to Mpho once he has received his new car.

Discuss the legal status of the agreement between Peter and Mpho.

- (2) Describe the formalities for contracts of donation in terms of which performance is due in the future.
- (3) Can land be sold orally? Give reasons for your answer.
- (4) A contract of suretyship is valid even if it is concluded orally. Is this statement true or false?
- (5) More agreements are concluded electronically than previously. The Electronic Communications and Transactions Act 25 of 2002 provides that data messages (electronic messages) are recognised as writing if the document is accessible for future use, except in respect of specific transactions concluded under specific Acts.

SECTION B: GENERAL PRINCIPLES OF THE LAW OF CONTRACT

Discuss whether or not electronic messages can be recognised as writing under the National Credit Act 34 of 2005.

4. EXPLANATORY NOTES

Advanced electronic signature: A signature that results from a process which has been accredited by the authority provided for in terms of the Electronic Communications and Transactions Act 25 of 2002. The authority referred to is the Department of Communication.

Electronic signature: Anything from the typing of a name at the end of a document and a scanned hand-written signature to the use of complex identification technology, as long as it is intended to be a signature.

Formalities: Those requirements (stipulated either by the law or by the contracting parties themselves) relating to the outward, visible form in which the agreement must be cast to create a valid contract.

5. AFRICANISATION AND COMMERCIAL LAW

In African customary law no formalities were required for the formation of any contract. Land was commonly held – everybody had the right to use it. The chief would give a person permission to occupy land; he allocated land, but not ownership thereof. In most areas no payment was required for such occupation. The occupier would then use the land according to his needs. The concept of private ownership of land is foreign in African customary law. African customary law of property protected the right to use and to occupy land. Therefore, no registration of land was required. In fact, no type of contract in African customary law was required to be in writing.

STUDY UNIT 8

Terms of the Contract

LEARNING OUTCOMES

After you have worked through this study unit, you should be able to

- explain what is meant by a “term” in a contract
- explain the different ways of incorporating terms into a contract
- draw a distinction between the *essentialia*, the *naturalia* and the *incidentalia* of a contract
- differentiate between condition, time clause, supposition, warranty and modus as terms of a contract
- differentiate between a cancellation clause, a penalty clause, a forfeiture clause and a *ronwged* (*ronwkoop*) clause
- apply these terms in contracts

Prescribed study material: chapter 8.

OVERVIEW

Now that you are familiar with the five basic requirements for the conclusion of a valid contract, we introduce you to the terms a contract may contain. The chapter starts off by explaining what the word “term” means and indicates three ways in which terms can be included in a contract. You are then introduced to the three types into which these terms are divided: the *essentialia* (the essential elements a contract must contain in order for it to be a contract of a particular kind, for example, a contract of sale), the *naturalia* (the natural consequences of such a contract, if these have not been excluded from the contract expressly) and the *incidentalia* (the incidental matters for which the parties wish to provide, such as time of performance). The types of terms of a contract are then discussed. You will immediately realise that these terms could be used to alter the *naturalia*, but are most often used as *incidentalia*. In the case of conditions and time clauses, please note the difference between “suspensive” and “resolutive”.

1. INTRODUCTION: THE TERM

(Textbook par 8.1)

It is important to distinguish between terms of a contract and statements made about the contract, which do not form part of it.

TERMS OF A CONTRACT	STATEMENTS MADE ABOUT THE CONTRACT
<ul style="list-style-type: none"> • A term is a provision in a contract. It obliges a party to act in a specific manner, or not to perform a specific act. It may also qualify (limit) the contractual obligations. It has legal consequences that may be claimed and enforced. 	<ul style="list-style-type: none"> • If the statements about the contract are misrepresentations, they do have legal consequences (see chapter 4). But if the statements are merely sales talk intended to attract customers (e.g. the item or product is presented as the best, the cheapest, the prettiest or the funniest), they do not have legal consequences.

There are three ways in which a term can be made part of a contract:

(a) *Express terms*

These are terms that are expressed in words, whether written or spoken. These words must express the essential terms that are relevant to and characterise a particular kind of contract (e.g. a contract of sale: an agreement to buy and sell). In the case of specific contracts, the essential terms must be expressed.

The Consumer Protection Act 68 of 2008 contains provisions that state that a consumer contract may not contain unfair, unjust or unreasonable terms and provisions. The Act also requires that if a consumer contract contains a term or a provision that may affect the consumer's rights, or that could not reasonably be expected in that type of contract, the supplier must draw the consumer's attention to such term or provision.

(b) *Tacit terms*

These are terms that are not expressed in words, but that are based on the parties' true intention, or their intention as imputed by the law. A tacit term is imported into a contract if it is reasonable and necessary for achieving the contract's desired commercial effect.

The test for such an importation is the following: If someone were to ask the parties, "What would happen in such and such a case?", and both contracting parties' answers were essentially the same as that of the alleged tacit term, the term would be imported into the contract.

Example: A breeder of stud cattle acquires a stud bull for breeding purposes. In due course it becomes evident that the bull is infertile. The purchaser brings a claim against the seller on the grounds of the bull's infertility. The court finds that although there is no explicit term in the agreement that the bull must be fertile, there is a tacit term to this effect.

(c) *Implied terms*

These are terms that are not expressed in words, but that are incorporated into the contract by operation of law or trade usage. Implied terms that are included in contracts of a specific type are known as the *naturalia* of that type of contract.

Note that trade usages can be incorporated into a contract as either tacit or implied terms. If both parties are aware of a particular trade usage, the term will be part of the contract as a tacit term. If one party cannot prove that the other was aware of the trade usage, the trade usage could become an implicit term of the contract.

For a trade usage to be implied as a term of a contract, it will need to meet the requirements of being long established, reasonable, uniformly observed and certain. If these requirements are met, it can be presumed that the other party knew about its existence and intended to be bound by it. (See also par 1.2.2 in chapter 1 of the textbook.)

ACTIVITY 8.1

Discuss the correctness or incorrectness of the following statement: In a contract of sale, a guarantee against latent defects is included in the contract by operation of law.

FEEDBACK

The statement is correct. The guarantee against latent defects forms part of every contract of sale, unless the parties specifically alter or exclude it.

2. *ESSENTIALIA, NATURALIA AND INCIDENTALIA* (Textbook par 8.2)

<i>ESSENTIALIA</i>	<i>NATURALIA</i>	<i>INCIDENTALIA</i>
<ul style="list-style-type: none"> These essential terms identify the contract as being a certain kind of contract, for example, a contract of sale. 	<ul style="list-style-type: none"> These terms are auto-matically incorporated into the contract as implied terms, unless they are excluded by the parties to the particular contract. A warranty against latent defects is implied in all contracts of sale that are regulated by the Consumer Protection Act. In terms of the Act, parties may exclude the warranty against latent defects only by means of a <i>voetstoots</i> clause, if certain requirements have been complied with. 	<ul style="list-style-type: none"> These special terms serve two purposes: they allow the parties to add special provisions not provided for by the <i>essentialia</i> and the <i>naturalia</i>, and they allow the parties to exclude or alter the <i>naturalia</i> to suit their particular needs.
<ul style="list-style-type: none"> Once the <i>essentialia</i> identify the particular contract as being a certain type of contract, then the relevant <i>naturalia</i> for that contract follow, unless <i>naturalia</i> are excluded by the parties. 	<ul style="list-style-type: none"> Example: In the contract of sale, the warranty against latent defects forms part of the contract, unless expressly excluded. 	<ul style="list-style-type: none"> Example: The contract contains a clause that specifies that the goods bought must be delivered by train.

ACTIVITY 8.2

Draw a distinction between *essentialia*, *naturalia* and *incidentalia* as terms of a contract.

FEEDBACK

- (1) *Essentialia* are terms that are essential for the classification of a contract as belonging to a particular class or category of contract.
 - (2) *Naturalia* are terms that the law attaches to every contract of a particular class.
 - (3) *Incidentalia* are additional terms that are included in a contract by the parties.
-

3. THE CONDITION

(Textbook par 8.3)

A condition can be described as a contractual term that renders the operation and consequences of the contract dependent on the occurrence, or non-occurrence, of a **specified uncertain future event**.

Example: Andy and Bill agree that Andy will buy Bill's car on condition that Andy's sister gives him the money to pay the price.

This is a valid condition. It makes the purchase dependent on the occurrence of a future event (the sister giving Andy the money to pay the purchase price). The event is specified. The event is also uncertain (no one knows whether Andy's sister will actually give him the money) and the event has yet to happen (it is a **future event**).

3.1 The suspensive condition

The above example of the purchase of a car contains a suspensive condition. The contract of sale already exists: neither Andy nor Bill may withdraw from it. But the **operation** of the contract is suspended until the condition has been fulfilled: until then, neither Andy nor Bill may enforce the contract by demanding delivery or payment. If Andy's sister gives Andy the money to pay the price, the condition will be fulfilled. Then the contract will become enforceable. However, if Andy's sister does not give him the money to pay the price, the condition will stay unfulfilled. Consequently, the contract will not become enforceable and will come to an end.

3.2 The resolutive condition

Example: Carl agrees to let his house to David indefinitely, on a monthly basis, on condition that if Carl ever needs it, it must be returned to him.

The contract of lease of the house exists, is effective and can be enforced. If Carl refuses to allow David to take occupation, David may demand occupation or the payment of damages. It is uncertain whether Carl will ever need the house. If he does, the lease will end. David will then have to vacate the house so that Carl can take occupation again: in this way David will return what he has received under the

contract. But since David, as a tenant, has a continuous duty to pay the rent, he will not get back the rent that he has paid for the completed period.

ACTIVITY 8.3

Dudu agrees with his wife, Tandeka, that he will buy her a car on condition that she obtains a BCom degree. Is this condition suspensive or resolutive?

FEEDBACK

This is a suspensive condition. There is a valid contract, but its operation is suspended until Tandeka obtains the BCom degree.

4. THE TIME CLAUSE

(Textbook par 8.4)

The difference between a **condition** and a **time clause** is the following: a condition depends on an **uncertain future event**, whereas a time clause depends on a **certain future event**, although the specific time at which the event will occur may be uncertain. (For example, although it is certain that Bertie will die, it is uncertain precisely when it will happen.)

Example: On 1 June, Eddy sells his car to Fatima. They agree that delivery and payment will occur on 1 August.

This time clause specifies the time when delivery of the respective performances must take place. According to general human experience, it is certain that 1 August will arrive.

4.1 The suspensive time clause

The above sale of the car contains a suspensive time clause. The contract exists: neither Eddy nor Fatima may withdraw from it. But Eddy must deliver the car to Fatima, and Fatima must pay for it, only when the time (1 August) comes. Until then, both parties' obligations are **unenforceable**.

4.2 The resolutive time clause

Example: Gugu agrees to work for Hassan for three years.

This is a contract of employment, subject to a resolutive time clause. The contract exists: each party may render and claim performance. At the end of three years, the resolutive time clause brings the contract to an end.

ACTIVITY 8.4

Tucker and Abraham agree that Tucker will pay Abraham R1 000 a month until the day that either Tucker or Abraham dies. What type of term is this?

FEEDBACK

This is a resolutive time clause. The contract comes into being immediately and Tucker is liable to Abraham. The contract comes to an end upon the death of either of the two, that is, it is terminated when a certain future event takes place.

5. THE SUPPOSITION

(Textbook par 8.5)

Example: Jabu agrees to buy Kanu's farm, provided that the soil contains gold ore, because (as Jabu tells Kanu) he wishes to mine for gold on the farm. Kanu does not know whether the soil is gold-bearing, so the parties agree that Jabu will buy the farm, provided that the soil contains gold ore.

The sale is based on a supposition. The sale depends on whether or not the soil contains gold ore in the present moment. Either it does or it does not. If the farm does have gold ore, the supposition is fulfilled and the contract's obligations arise and are effective and enforceable. But if the soil does not contain gold ore, the supposition is not fulfilled and the contract's obligations are not created.

As a term of the contract, Jabu has included his reason (motive) for buying the farm: he wishes to mine gold on it. If the farm is unsuitable for his gold-mining plans, he is not bound to buy it. If Jabu had not subjected the operation of the contract to the supposition that the soil is gold-bearing, his motive for buying the farm (mining gold) would not have relieved him of his obligations in terms of the contract and he would have been bound to buy the farm. By making use of the supposition, Jabu can ensure that he will incur no liabilities, unless there is indeed gold ore on the farm.

ACTIVITY 8.5

Themba is a collector of old books. He is missing one volume of a valuable set. At an exhibition he comes across one volume, but is unsure whether it is the volume he needs to complete his set. How would you advise him to formulate the contract of sale?

FEEDBACK

Themba should make the purchase subject to the supposition that this volume is the specific volume that is still missing from his set. In this way he can insert his reason for purchasing the book in the contract. If it turns out that the specific book is not the volume he is seeking, the supposition has not been met and the contract of sale does not come into being. If it is the volume in question, the obligations stemming from the contract arise.

6. THE WARRANTY

(Textbook par 8.6)

Example: Lindi leases her house to Kara. The terms include a warranty that the fence will be high enough so that no dogs will be able to leap over the fence. As the landlord, Lindi has a duty to deliver and to maintain the house in a condition fit for the purpose of the lease. Kara has a right to the performance of this common-law duty. But by giving the warranty, Lindi has assumed an **additional** obligation, namely, to make sure that the fence is high enough so that no dogs will be able to leap over the fence. She must therefore take appropriate steps to make the fence high enough. If dogs do leap over the fence, Lindi will be in breach of contract.

7. THE MODUS

(Textbook par 8.7)

Example: Modise gives Nola a car, subject to the modus that Nola must give up smoking within two months. This is an example of a contract subject to a modus **to refrain from doing** something (to stop smoking within two months). Nola may claim delivery of the car now, before having stopped smoking. But if, after two months, she has not stopped smoking, she will be in breach of contract and Modise will then be contractually entitled to repossess the car.

The **example** in the textbook of Nelson and Podile is an example of a burden **to do something** and the example of the father and son is an example of a burden to perform against a third party.

8. THE CANCELLATION CLAUSE

(Textbook par 8.8)

Example: Olly and Pete incorporate into their lease a clause that if (for whatever reason) Pete is late in paying his rent, Olly will be entitled to cancel the contract. This is a cancellation clause that makes the punctual payment of rent a matter of particular importance as far as this contract is concerned.

Pete pays his rent punctually every month for ten years. Then the following month he pays his rent one day late. (He forgot to pay it because he had to arrange his father's funeral.) Olly would be entitled to cancel the lease summarily without warning Pete of his intention to do so. In such a case, Pete would fail to persuade the court that the breach was so trivial and so understandable that it should be ignored and that it would not be a ground for cancelling the contract if it had not been for the cancellation clause.

The fact remains that the contract does contain such a clause and Pete has breached its provisions. (See par 11.3.1 of the textbook regarding cancellation in general.)

9. THE PENALTY CLAUSE

(Textbook par 8.9)

9.1 General

Example: In *Maiden v David Jones (Pty) Ltd* 1969 (1) SA 59 (D), Maiden worked for David Co as a property salesman on a commission basis. As part of an enforceable restraint clause, Maiden promised that if he were to breach the restraint, he would pay David Co liquidated damages of R200 a month for each month that he was in breach. Maiden later sued David Co for commission due. David Co retaliated by claiming R1 200 (R200 x 6) because Maiden had breached the restraint for six months.

The clause about liquidated damages was a penalty clause and had been included to deter Maiden from breaching the restraint. It fell within the scope of section 1 of the Conventional Penalties Act 15 of 1962. It entitled David Co to claim the damages simply because Maiden had breached the provisions. It established the extent of the penalty before Maiden breached the restraint; David Co did not need to prove its damages.

Maiden tried to persuade the court to exercise its discretion and to reduce the penalty to what it considered reasonable, but he failed: the court was not convinced that the liquidated damages claimed by David Co were disproportionate to the prejudice that David Co had suffered as a result of Maiden's breach of contract.

ACTIVITY 8.6

Nelson is a racing driver. His next race is on 28 March. He is paid R10 000 for each race in which he participates. He and George agree that George will replace the engine of his car and that the work will be completed on 26 March. In terms of a penalty clause in the contract, George will have to pay Nelson R500 for every day that the work is late. George breaches the contract and only delivers the car on 3 April. This prevents Nelson from participating in the race and, consequently, he loses R10 000. Advise Nelson about whether he may claim damages to the value of R10 000 from George.

FEEDBACK

Sometimes a contract contains a clause that offers the creditor the choice of claiming damages in the case of breach of contract or of relying on the agreed penalty clause. It is not indicated whether this contract contains such a clause. If the contract does contain such a clause, Nelson could demand damages, in this case the R10 000. If, however, there is no such clause in the contract, Nelson would be restricted to the terms of the penalty clause: he would be able to claim only R500 for each day that George is late, in other words, R500 x 7 days = R3 500. The Conventional Penalties Act 15 of 1962 prevents Nelson from claiming both.

9.2 The National Credit Act 34 of 2005

This Act also governs the enforceability of penalty clauses in credit agreements. A distinction is drawn between three types of contracts:

- those contracts that are governed by the National Credit Act 34 of 2005 and the Conventional Penalties Act 15 of 1962
- those contracts that are governed by the Conventional Penalties Act only
- those contracts that are governed by neither the National Credit Act nor the Conventional Penalties Act

10. THE FORFEITURE CLAUSE

(Textbook par 8.10)

Example: A clause in a contract of sale of land could read as follows: “Should the purchaser fail to comply with the terms and conditions of this agreement and remain in default for a period of seven days after despatch per registered post of written notice requiring such default to be remedied, the seller shall be entitled to cancel this agreement at once and to retain, as a genuine pre-estimate of damages, the moneys paid to date by the purchaser after deduction of estate agent’s commission payable in terms of clause 12 of this agreement.”

This forfeiture clause entitles the seller to cancel and to keep the moneys paid by the buyer. So the buyer who breaches the sale will lose his or her right to claim restitution of these moneys. In terms of section 4 of the Conventional Penalties Act 15 of 1962, this Act is also applicable to forfeiture clauses (remember that a forfeiture clause is a species of penalty clause). Therefore, as in the case of other penalty clauses, the court may be asked to exercise its discretion to reduce the penalty. (See par 11.3.7 of the textbook regarding the consequences of cancellation in general.)

11. THE *ROUWGELD* CLAUSE (*ROUWKOOP* CLAUSE)

(Textbook par 8.11)

Example: Because holiday accommodation is so difficult to find, Malebo concludes a contract in January with Lucy to rent her house at Umhlanga in December. In terms of the *rouwgeld* clause, Malebo pays a deposit, which he will forfeit if he cannot continue with the lease. If Malebo withdraws from the contract, he will not be committing breach of contract. The reason why he pays the amount (the deposit) is to enable him to terminate the contract without his conduct amounting to breach of contract.

12. THE ENTRENCHMENT CLAUSE

(Textbook par 8.12)

Example: A contractual clause reads as follows: “No variation of the terms of this contract shall be of any force or effect if the variation is not in writing and signed by the parties or their duly authorised representatives.”

This entrenchment clause has the effect that all variations of the contract, including a variation of the entrenchment clause itself, must be in writing and signed by the

parties or their agents. So, if the parties are too busy to have the variations written down, the contract is not altered until the changes have been written down and signed.

SELF-ASSESSMENT ACTIVITIES

- (1) Name three ways in which a term can be made part of a contract.
- (2) Can the *incidentalia* of a contract be used to exclude the *naturalia* of the contract?
- (3) Indicate whether the following terms are conditions or not:
 - (3.1) I will give you my bicycle if you pass Commercial Law at the end of the year.
 - (3.2) Transfer of ownership of the house will take place if the bank approves your loan in the next three days.
 - (3.3) I will wash your car for a week if it is true that the Lions beat Western Province in the rugby match last Saturday.
- (4) What is a time clause?
- (5) Describe a *modus* as a term of a contract.
- (6) Draw a distinction between a supposition and a condition as terms of a contract.
- (7) Draw a distinction between a penalty clause and a forfeiture clause.
- (8) Describe a *rouwgeld* clause.

13. EXPLANATORY NOTES

Condition: A term that makes an obligation subject to an uncertain future event.

Express: “Express” means an articulated declaration of intent.

Implied: “Implied” means not expressed in words, incorporated by operation of law.

Tacit: “Tacit” means not expressed in words, but based on the parties’ true intention, or their intention as imputed by the law.

Term: A provision that imposes, on a contracting party, one or more contractual obligations to act or not to act in a specific manner, or which qualifies contractual obligations.

14. AFRICANISATION AND COMMERCIAL LAW

The parties to a contract are free to include any term or clause in a contract as long as the term or clause is not unlawful, illegal, unfair or unreasonable. The Consumer Protection Act 68 of 2008 contains a provision that a consumer contract may not contain unfair, unjust or unreasonable terms and conditions. If a consumer contract contains a term or condition that may affect the consumer’s rights, or that could not reasonably be expected in that type of contract, the supplier must draw the consumer’s attention to such term or condition. In this way the Act aims to protect consumers against unscrupulous suppliers.

STUDY UNIT 9

Interpretation of the Contract

LEARNING OUTCOMES

After you have worked through this study unit, you should be able to

- explain the basic principles of interpreting contracts
- apply the basic principles when you are interpreting a contract
- identify and prevent problems when drafting or evaluating existing contracts
- describe the other rules of interpretation such as those that apply to ticket cases and the *parol evidence* rule
- explain and apply, when necessary, the requirements for the rectification of a written contract

Prescribed study material: chapter 9

OVERVIEW

In this study unit we start off by discussing what the content of a contract is considered to be, based on the format in which it was concluded: orally, in writing or tacitly. You are then introduced to five rules regarding interpretation, which are used to determine the intention of the parties to a contract, and two specific rules are provided for ticket cases. Thereafter, the *parol evidence* rule, which applies to written contracts only, is discussed in detail. Lastly, the rules for the rectification of written contracts are discussed.

1. CONTENT OF THE CONTRACT

(Textbook par 9.1)

The need to interpret a contract arises when there is uncertainty or conflict regarding the exact content of a contract, but also in other circumstances. Not all contracts are equally clear. In order to interpret a contract, the true intention of the parties and the obligations they intended must be established. This is achieved by looking at the content of the contract. The content of a contract consists of the terms included in the contract orally, tacitly or in writing. In the case of agreements concluded orally or tacitly, the content of the contract is established by looking at the words and behaviour of the parties.

In the case of written and signed contracts, the content is established from the document. In such cases, the person who has signed is bound by the ordinary meaning of the words in the contract that he or she signed and by the effect of the contract. The true intention of the parties is taken as being reflected in the written and signed contract. The rule of *caveat subscriptor*, which means “signatory beware”, applies. Take note of the defences available to the signatory.

When the contract is written but not signed, which is often referred to as a “ticket case”, other evidence may be needed to prove that the document reflects the true intention of the parties. Remember that a written contract may consist of more than one document (e.g. an insurance contract, which consists of the completed application form and the policy document(s)). Also remember that a written contract can include “*click-wrapped*” information, that is, information that is available or accessible when an icon is clicked to indicate acceptance of the terms of a contract concluded on the internet.

2. Principles of interpretation

Note that the first set of guidelines applies to written contracts (see par 9.2 of the textbook), but can be applied to oral contracts – unless they are obviously inappropriate – and that the second set of guidelines applies to the “ticket cases”. Also take note of the effect on the contract if the intention of the parties cannot be established at all.

ACTIVITY 9.1

Which **ONE** of the following is **NOT** a guideline for the interpretation of contracts?

- (1) Words that carry a technical meaning will be interpreted in accordance with their specific use.
- (2) Normally all words will have their ordinary grammatical meaning.
- (3) If ambiguity exists, the contract will usually be regarded as invalid.
- (4) Where the parties express themselves on a particular matter but omit some detail, common-law rules will regulate that aspect.

FEEDBACK

- (3) is the **CORRECT** answer. The statement is **INCORRECT**. One presumption in the interpretation of contracts is that the parties intend their agreement to be valid and enforceable. The courts will attempt to interpret the contract in a manner that will not affect its validity. If ambiguity exists, the courts will therefore not interpret the contract as invalid, but the ambiguous clause may be interpreted against the party who was responsible for its drafting.
 - (1) is an **INCORRECT** answer because the statement is **CORRECT**. Words that carry a technical meaning or that are used in a specific manner within a particular branch of business or profession will be interpreted in accordance with that specific usage.
 - (2) is an **INCORRECT** answer because the statement is **CORRECT**. It is accepted that the parties normally use all words in their ordinary grammatical meaning.
 - (4) is an **INCORRECT** answer because the statement is **CORRECT**. An important presumption is that the parties do not intend to alter the common law unless, and only to the extent that this is expressly indicated. Thus, where parties express themselves on a particular matter but omit some detail, the common-law rules will regulate that aspect.
-

2.1 The *parol evidence* or integration rule

The *parol evidence* rule applies to written contracts, irrespective of whether a contract has been negotiated specifically by the parties or whether it is a signed standard-form contract. According to the rule, the written document is the only record of

the contract between the parties and it is this document that has to be interpreted to ascertain the contents of their agreement.

This means that the parties may not submit evidence of agreements reached before or at the same time as the written contract that contradict, alter or add to terms of the written contract. What they may submit, since this falls outside the parameters of the rule, is the following:

- (a) evidence of an agreement reached **after** the written contract (even if it contains terms that vary, contradict, add to or exclude terms from the written contract) (Remember that if the written contract contains an **entrenchment clause**, alterations have to be in writing.)
- (b) evidence of agreements reached at the same time or before the written contract that **do not vary, contradict, add to or exclude** terms from the written contract
- (c) evidence not relating to a term of the contract, but to prove the **existence of the contract** as a whole, for example, that it is void (e.g. because of mistake) or voidable (e.g. because of misrepresentation)
- (d) evidence of a contradiction of **objectively determinable facts**, such as the date on which it was signed

ACTIVITY 9.2

You have just gone through the application of the *parol evidence* or integration rule to written contracts. Now consider the following statements:

The *parol evidence* rule ...

- (A) operates in respect of evidence that aims to prove that a contract is void.
- (B) does not exclude evidence of agreements reached after conclusion of the written contract.
- (C) means that extrinsic evidence cannot be submitted to prove the intention of parties to a written contract.
- (D) operates in the case of all contracts.
- (E) is also called the integration rule because both written and unwritten terms of the contract are integrated when the contract is interpreted.

Which of the above statement/s is/are **CORRECT**?

- (1) only A and C
- (2) only B and D
- (3) only C and E
- (4) only B and C
- (5) only C

FEEDBACK

- (4) is **CORRECT**. B is CORRECT because the rule only operates in respect of agreements reached before or at the time of the conclusion of the contract. C is CORRECT as it states the rule that only the written document may be used to interpret the contract.
- (1) is **INCORRECT**. A is INCORRECT because the rule does not operate with regard to evidence to prove that a contract is null or void, but C is CORRECT.

- C is CORRECT as it states the rule that only the written document can be used to interpret the contract.
- (2) is INCORRECT. B is CORRECT because the rule only operates in respect of agreements reached before or at the time of the conclusion of the contract. D is INCORRECT because the rule operates only in the case of written contracts.
- (3) is INCORRECT. C is CORRECT as it states the rule that only the written document can be used to interpret the contract. E is INCORRECT because in terms of the parole evidence rule (integration rule), unwritten terms are not permitted in the interpretation of a contract.
- (5) is INCORRECT. C is CORRECT but it is not the only CORRECT answer. B is also CORRECT because the rule only operates in respect of agreements reached before or at the time of the conclusion of the contract. C is CORRECT as it states the rule that only the written document can be used to interpret the contract.
-

2.2 Rectification

Example: Alice owns two houses, one on plot 100 and the other on plot 101. Alice sells plot 100 to Barbara. The parties record this sale in writing in accordance with the statutory formality requirements. By mistake, the typist refers to the plot sold as 101. No one spots this typing error before the contract is signed.

The *parol evidence* rule applies to the contract. Thus, Alice and Barbara may not submit evidence conflicting with the contract. But the contract incorrectly reflects their actual agreement to buy and sell plot 100. How should the problem be resolved?

In these circumstances, either one, or both of the parties will be allowed to approach the court for rectification of the contract. The party or parties must prove the following:

- (a) what their true intention is (in this case, that Alice wishes to sell Barbara plot 100)

AND

- (b) that the written document does not reflect their true intention

The person claiming rectification may lead evidence to prove the true intention, even if this evidence conflicts with the terms stated in the document. You may feel puzzled that, on the one hand, the *parol evidence* rule prevents **extrinsic evidence** from being led that varies the terms of the written document, while on the other hand, rectification allows the claimant to lead evidence that **must** be extrinsic because the document, according to the claimant, incorrectly reflects the parties' true intention.

The law solves this conflict by placing the burden of proving the requirements for rectification on the claimant. This burden is heavy. As was decided in one case, the claimant must show the facts entitling him or her to obtain rectification in the clearest and most satisfactory manner.

Furthermore, rectification will not be allowed where the law requires formalities for the conclusion of the contract (e.g. the sale of land) and the parties have not made the effort to comply with these formalities. If, for instance, they have not

filled in the blank spaces and have not bothered to enter a plot number, these shortcomings cannot be corrected by rectification. In other words, rectification cannot be used to supplement defective consensus. Rectification arises only when defective documentation incorrectly represents the true intention of the parties.

ACTIVITY 9.3

Read the following case study and indicate the correct legal position.

In an oral agreement, Dada offers to employ Simba at a salary of R3 000 per month. However, in the subsequent written contract, the salary is given as only R2 500. Simba signs the contract because he thinks that Dada will keep to his verbal offer of R3 000. When the first payment is due, Simba is paid only R2 500.

- (1) Simba is entitled to apply for rectification of the written contract.
- (2) Simba may rely on the oral agreement between Dada and him and may demand that he be paid R3 000.
- (3) Simba cannot rely on the verbal agreement between Dada and him. He is obliged to accept the salary that is paid to him.

FEEDBACK

- (3) is **CORRECT**. In terms of the *parol evidence* or integration rule, the written document is the only record of the agreement once the contract is reduced to writing. The document containing the parties' contract is the only evidence of the terms of the contract. The consequence of the operation of the rule is that Simba is not permitted to give evidence of the earlier verbal agreement that is contradicted by the written contract.
- (1) is **INCORRECT**. Sometimes a written document does not reflect the true intention of the parties because an error was made in the document. In such circumstances, the contract may be rectified in order to represent the parties' true intentions. Simba may not apply for rectification, because no error was made when the contract was put in writing.
- (2) is **INCORRECT**. Simba cannot rely on the oral agreement he concluded with Dada, owing to the operation of the integration rule.

SELF-ASSESSMENT ACTIVITIES

- (1) Explain the basic principles of interpreting contracts.
- (2) Identify any problems that may be encountered when drafting or judging contracts.
- (3) Outline the rules of interpretation such as those that apply to "ticket cases" and the parole evidence rule.
- (4) Discuss the requirements for the rectification of a written contract.

3. EXPLANATORY NOTES

Parol evidence rule: Also known as the "extrinsic evidence rule" or the "integration rule", this means that once a contract is reduced to writing or integrated into a single complete document, the written document is the only record of the agreement, and it is this document that has to be interpreted in order to determine the content of the contract.

SECTION B: GENERAL PRINCIPLES OF THE LAW OF CONTRACT

Rectification: This concept refers to a situation where a written contract may be improved in order to record the parties' true intention, provided the parties can prove their true intention and that the written document does not accurately reflect it.

Ticket cases: This concept refers to the situation where, in the case of unsigned written agreements, other evidence may be necessary to prove that the document is a true reflection of the contractual terms. Examples are unsigned documents often used by bus services, airlines, theatres, sports stadiums and similar entities.

4. AFRICANISATION AND COMMERCIAL LAW

In traditional African societies the use of language is very rich and vibrant. Idioms and proverbs are used in everyday language. Thus, there is a tendency not to take the meaning of words literally. As a result, context plays a very important role in the interpretation of events, including contracts. In modern-day law of contract it is important for parties to put their agreement or contract in clear terms so that the document can reflect exactly what they intend when they conclude the contract. It is also fair that the courts of law should ensure that parties are bound by the terms of their contract as originally intended. Consequently, the *parol evidence* rule is applied and rectification of the contract is allowed in cases where the contract does not reflect the true intention of the parties.

STUDY UNIT 10

Breach of Contract

LEARNING OUTCOMES

After you have worked through this study unit, you should be able to

- distinguish between the different types of breach of contract
- name and describe the requirements for both *mora debitoris* and *mora creditoris*
- describe the consequences of each form of breach of contract
- draw a distinction between prevention of performance by the debtor and the creditor

Prescribed study material: chapter 10

OVERVIEW

Although the objective of a validly concluded contract is that the contractual obligations be fulfilled by due and proper performance, this might not happen and the contract may be breached by one of the parties. The law recognises **five forms of breach of contract**: default by the debtor, default by the creditor, positive malperformance, repudiation and prevention of performance. **Note** that not all forms of breach of contract can be committed by both the debtor and the creditor. The requirements for each form are important as well as the consequences of that type of breach. Prevention of performance is a form of breach of contract, whereas initial impossibility of performance prevents a contract from being concluded validly. Supervening impossibility of performance, discussed in chapter 12 of the textbook, results in the contract being terminated. This distinction is important.

The aim of this study unit is to enable you to determine which actions amount to breach of contract, whether breach of contract has occurred and, if so, in what form and what the consequences are, because this determines the remedies available to the prejudiced party, as discussed in chapter 11 of the textbook.

1. INTRODUCTION

(Textbook par 10.1)

All contracts are intended to be performed properly and on time. Most contracts are performed in this way, but some are not, for example, if the terms of the contract are broken because of the conduct of one of the parties. This is called breach of contract. The table below indicates the different forms of breach of contract and which party may be responsible for a particular kind of breach of contract.

SECTION B: GENERAL PRINCIPLES OF THE LAW OF CONTRACT

TYPE OF BREACH	CAN BE COMMITTED BY DEBTOR	CAN BE COMMITTED BY CREDITOR
Default of the debtor	√	x
Default of the creditor	x	√
Positive malperformance	√	x
Repudiation	√	√
Prevention of performance	√	√

Regarding the concepts of “debtor” and “creditor”, note the following:

You will recall that in study unit 2 above we stated that when a personal right comes into existence between legal subjects, this bond is called an “obligation”. One of the ways in which such a bond comes into existence is by contract. In the law of contract, the word “obligation” indicates not only the legal relationship between the parties, but also each duty that has to be performed in terms of the contract. (This is expressed as follows: there are as many obligations in a contract as there are duties to perform.)

In the law of contract (and therefore also in respect of breach of contract) we refer to the party who has a certain obligation in terms of the contract (that is, the party who has to perform) as the “debtor”, whereas the party who has the corresponding right to receive that performance is referred to as the “creditor”. It is essential not to confuse the legal meanings of “debtor” and “creditor” with the meanings of “debtor” and “creditor” in an accounting context.

In reciprocal contracts (for example, a contract of sale), both parties are simultaneously obliged to perform and entitled to performance, that is, both parties are simultaneously debtor and creditor, but in respect of different performances (as the table below indicates).

Example:

RIGHTS AND DUTIES (OBLIGATIONS) IN A CONTRACT OF SALE

DUTY	RESTS ON	THEREFORE CALLED	RIGHT	HELD BY	THEREFORE CALLED
To pay purchase price	The purchaser	The debtor	To receive the purchase price	The seller	The creditor
To transfer the <i>merx</i>	The seller	The debtor	To receive the <i>merx</i>	The purchaser	The creditor
To preserve the <i>merx</i> until delivery	The seller	The debtor	To receive the <i>merx</i> in same condition	The purchaser	The creditor
To protect the buyer against eviction	The seller	The debtor	Not to be evicted	The purchaser	The creditor

To deliver the <i>merx</i> free from latent defects	The seller	The debtor	To receive the <i>merx</i> free from latent defects	The purchaser	The creditor
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As the table shows, the same transaction between the parties (for example, a sale) may create several (different) rights and duties. In the context of breach of contract, it is always important to start by ascertaining which performance obligation gave rise to a “problem” and then to decide whether it is the debtor or the creditor in respect of that performance who is responsible for the fault (breach of contract).

ACTIVITY 10.1

Which **ONE** of the following is the **CORRECT** example of a breach of contract?

- (1) supervening impossibility of performance
- (2) supervening impossibility of performance where the creditor is in *mora*
- (3) initial impossibility of performance
- (4) prevention of performance

FEEDBACK

The correct option is **4**. Prevention of performance is one of the recognised forms of breach of contract in our law.

2. DEFAULT OF THE DEBTOR

(Textbook par 10.2)

Default of the debtor is committed by the debtor when he or she fails to perform on time and the delay is due to his or her fault.

2.1 Requirements

Two requirements must be met for default of the debtor to occur. The one is that performance must be late and the other is that the delay must be due to the debtor’s fault.

(a) *Performance must be delayed*

Please note the following:

This form of breach of contract relates to the time of performance only, and not to any of the other aspects of the contract (for example, the quality of performance). It occurs when performance does not take place at the time agreed upon in the contract.

Note that the debtor is automatically in *mora* if he or she does not perform by the specified date or time. This situation is called *mora ex re*. If, however, the contract does not specify a particular date or time for performance, the debtor will have to be placed in *mora* by a letter of demand that permits a reasonable time for performance.

SECTION B: GENERAL PRINCIPLES OF THE LAW OF CONTRACT

Only when performance does not occur by this date – as stated in the letter of demand – has the debtor defaulted. This situation is known as *mora ex persona*.

The reasonableness of the time depends on the contract and the circumstances. The court takes factors such as the following into consideration:

- the parties' intention
- the nature of the performance due
- the accompanying difficulties and delays as actually contemplated by the parties at the conclusion of the contract or which would have been contemplated by a reasonable person at the time
- the necessary assumption that the debtor is expected to act promptly, appropriately and carefully; in this regard, the court also takes into consideration the parties' commercial and other interests
- the period specified in the demand for performance; also the period that has already elapsed, because the debtor cannot sit back and do nothing and then assume that when his or her performance is demanded, he or she will still be given the full period that is reasonable for performance

It is advisable, though not essential, for purposes of certainty and proof, to put the demand in writing. It is also important to understand that performance can be late only if it is claimable: performance subject to a suspensive condition or time clause is not claimable. If, for example, Thabo has agreed to buy Mary a car when she gets her BCom degree, his performance is not claimable until she obtains the degree.

(b) *The delay must be due to the debtor's fault*

Unless the debtor has given a warranty that performance will occur at a certain time, he or she does not commit *mora debitoris* if the delay is caused by factors beyond his or her control for which he or she is not intentionally or negligently responsible. If the delay in the debtor's performance is caused by the creditor, we are dealing with *mora creditoris*.

2.2 The consequences of the debtor's default

The creditor is entitled to the remedies that the law grants to an innocent party in the case of breach of contract (see chapter 11 of the textbook). In a contract of sale, the fact that the debtor is in *mora* will influence the passing of the risk (see chapter 13 of the textbook). If performance becomes impossible after the debtor has fallen in *mora*, the consequences are the following: Although supervening impossibility of performance usually releases the debtor from his or her duty to perform (as you will see in chapter 12 of the textbook), this does not happen if the debtor was already in *mora* when impossibility of performance occurs.

This is still *mora debitoris*, and the debtor's duty to perform is not extinguished – since the debtor is no longer able to perform, he or she will be liable for damages (one of the remedies for breach of contract discussed in chapter 11 of the textbook).

ACTIVITY 10.2

Which **ONE** of the options below will **COMPLETE** the following sentence **CORRECTLY**?

A debtor commits breach of contract in the form of default (*mora debitoris*) if he or she ...

- (1) has tendered defective or improper performance.
- (2) has rendered performance impossible.
- (3) has delayed performance.
- (4) has indicated that performance will not take place as arranged.

FEEDBACK

Option **3** is **CORRECT**. One of the requirements for default of the debtor is that the performance must be delayed by the debtor.

3. DEFAULT OF THE CREDITOR

(Textbook par 10.3)

When a creditor, through his or her own fault and without lawful excuse, fails to cooperate in receiving the debtor's due and valid performance, he or she is in default. The creditor's default presupposes a bilateral juristic act, that is, where the creditor's co-operation is required to enable the debtor to perform his or her own obligations.

Example: Thembi, a dressmaker, cannot fulfil her obligations properly (making the final adjustments to the dress) unless Ellen (the creditor) cooperates (by turning up for a fitting session).

3.1 Requirements

There are four requirements that must be met before default of the creditor can occur:

- (a) The debtor's performance must be dischargeable. This means that the performance must be due in terms of a valid and existing contract that is legally and physically possible to perform. Performance is not dischargeable if any related suspensive condition has not been fulfilled.

Example of a suspensive condition that has not yet been fulfilled: Roger sells his business to Paul, on condition that Paul obtains a trading licence. Roger's (the debtor's) performance (the transfer of the business) is not dischargeable until Paul has obtained the licence (fulfilment of the suspensive condition). Performance is furthermore not dischargeable unless the time for performance, as agreed to in the contract, has arrived.

Example: Mary orders snacks from Sylvia for her cocktail party scheduled for Saturday. Until Saturday, this performance by Sylvia is not dischargeable. If Sylvia delivers on Thursday, Mary's refusal to accept the snacks cannot constitute *mora creditoris*, because the performance is not yet dischargeable.

SECTION B: GENERAL PRINCIPLES OF THE LAW OF CONTRACT

- (b) The debtor must tender performance and the performance he or she tenders must be proper performance.

Example: The dressmaker must ask the client to come for a final fitting. If the dressmaker does not try to reach the client, then neither the client nor the dressmaker is guilty of default of the creditor.

- (c) The creditor must delay performance by not cooperating, and performance must still be possible at a later stage.

Example of delay when later performance is possible: The client does not come for the dress fitting, but a later fitting will still enable the dressmaker to perform her obligation, even though it will be later than agreed. Default of the creditor takes place. Pay special attention in this regard to the difference between *mora ex re* and *mora ex persona*.

Examples of delays when later performance is impossible:

- (1) After the conclusion of an employment contract, Shaun tenders his services to his employer, Barney. Barney delays in making use of these services. Shaun's performance for the period of delay is no longer possible. Barney has thus prevented performance for the period in question.
- (2) Sylvia undertakes to deliver the snacks to Mary before five o'clock on Saturday. Mary is not at home to receive the snacks. Sylvia is informed that Mary has gone overseas for two weeks. Time for performance is an integral part of the performance. Sylvia cannot perform later, because the snacks will have been spoilt. Mary has made it impossible for Sylvia to perform in terms of the contract. Mary's action amounts to prevention of performance and not default of the creditor.

- (d) The default must be due to the fault of the creditor.

Example: Ellen, who concluded a contract to have a dress made, deliberately avoids the dressmaker for two weeks. This amounts to default of the creditor (if the other requirements are met).

Without acting negligently in any way, Ellen is run over by a car and hospitalised for two weeks. This delay is not caused through any fault of Ellen and there is no default of the creditor. (See par 10.6 of the textbook.)

3.2 The consequences of the creditor's default

- (a) The debtor's duty of care is diminished if the creditor is in default. The debtor is liable only for intentional loss (for example, after the client fails to arrive for the fitting, the dressmaker decides that she loathes the material that the client bought for the outfit and then burns the outfit) or gross negligence (for example, Ali sells Brian a business and the shop in which it is located; Brian is late in taking occupation; Ali leaves the shop unstaffed and unguarded; the stock is stolen and the premises are vandalised: Ali is grossly negligent in failing to look after the shop and the stock properly).
- (b) In the case of reciprocal agreements, the debtor remains liable to render his or her performance, albeit later than originally intended, and is entitled to the creditor's counter-performance.

Example: Elias and Fred agree that Elias will build a wall on Fred's property on 11 May. Fred commits default of the creditor by failing to acquire the bricks in time. Elias may not use Fred's default to escape his obligation to build the wall, and Elias remains entitled to payment by Fred.

- (c) If the debtor's performance becomes impossible while the creditor is in default, the debtor is set free from performing his or her obligations. However, the creditor must still perform his or her obligations. The supervening impossibility of the debtor's performance must not result from the debtor's intention or gross negligence.

Example: Under a contract of letting and hiring of work, a potter has finished a specially decorated pot for a client, who is late in coming to fetch it, as arranged previously. Lightning strikes the potter's home and, in the ensuing fire, the pot is destroyed. The potter is set free from his or her obligation to deliver the pot, but the creditor must still pay the potter for making the pot.

- (d) If the debtor is already in default, his or her default is ended by the creditor's subsequent default. It is not possible for both the debtor and the creditor to be in default at the same time in respect of the same performance.

Example: Gary sells a car to Herman. They agree that Gary must deliver the car on 16 August. Gary does not perform on 16 August, so he is in *mora*. When Gary tries to deliver the car on 18 August, Herman is late for their appointment and Gary cannot deliver the car. Gary and Herman cannot both be in default at the same time in respect of the same obligation. Herman's default (*mora creditoris*) on 18 August purges (wipes out) Gary's default. From 18 August, only Herman is in default.

Take note of the following two points:

Although the earlier *mora debitoris* is cancelled by the late *mora creditoris*, any liability for damages caused during the time of the debtor's *mora* is not extinguished. Even though Herman's own default (by not being available to accept the car when Gary eventually attempted to deliver it) extinguishes Gary's default (of late delivery), the damages Herman may have suffered as a result of Gary's default are not extinguished and Herman may still claim them from Gary.

In the case of different obligations, *mora debitoris* and *mora creditoris* can exist at the same time. If Herman had to pay when Gary delivered the car, there would have been two obligations: Gary's obligation to deliver the car and Herman's obligation to pay the purchase price. If Herman was not available to accept delivery of the car, he would have been guilty of default by the creditor in respect of Gary's obligation to deliver, and also guilty of default by the debtor in respect of his own obligation to pay the purchase price.

ACTIVITY 10.3

Phoswa and Mothiba conclude a contract of sale for property 30 in Mamelodi Gardens, which belongs to Mothiba. Their contract stipulates that Phoswa must pay an amount of R50 000 as deposit on the purchase price within two days of Mothiba's acceptance of the offer. The money must be paid into Mothiba's bank account and Mothiba must provide Phoswa with the name of his bank, the account

number and the branch code the following day. Five days after Mothiba has accepted Phoswa's offer, Mothiba has still not given Phoswa the information as agreed.

Which **ONE** of the following statements is **CORRECT**?

- (1) Phoswa has committed breach of contract in the form of *mora debitoris*, as he has not paid the deposit.
- (2) Mothiba has committed breach of contract in the form of *mora creditoris*, as he has neglected to give his co-operation to enable Phoswa to fulfil his obligation with regard to the deposit.
- (3) As Phoswa spent the R50 000 before he received the necessary information from Mothiba, supervening impossibility of performance has occurred, and their contract is terminated.
- (4) Mothiba is entitled to cancel the contract if he has given Phoswa notice of intention to cancel the contract and a reasonable time to comply with his obligation to pay the deposit.

FEEDBACK

Option 2 is **CORRECT**. In respect of the obligation to pay the deposit, Phoswa is the debtor and Mothiba the creditor. *Mora creditoris* occurs when the creditor fails to give his co-operation to enable the debtor to perform. In this instance it is the lack of co-operation from the creditor, Mothiba, which prevents the debtor, Phoswa, from performing his obligation. Mothiba has therefore committed *mora creditoris*.

You are required to explain why the other options are incorrect.

4. POSITIVE MALPERFORMANCE

(Textbook par 10.4)

This form of breach of contract occurs when a debtor commits an act that is contrary to the terms of the contract. There are two situations that can be distinguished with regard to positive malperformance:

- (a) The debtor tenders defective or improper performance:

Example: Billy, a building contractor, uses floor tiles of an inferior quality, contrary to the clear specifications in this regard in the building contract.

- (b) The debtor does something that, in terms of the contract, he or she may not do:

Example: Zandile buys Barbara's business. They agree that, for six months, Barbara will not start a similar business within a radius of 25 kilometres. After two months, Barbara starts an identical business across the road from Zandile's business.

5. REPUDIATION

(Textbook par 10.5)

“Repudiation” means that the debtor or the creditor shows either in words communicated to the other party or through conduct that he or she does not intend to perform his or her contractual obligations. A party may repudiate the whole contract or only some of his or her obligations or a part of the contract.

A party repudiates the whole contract by

- denying the existence of the contract

Example: “We did not agree to form a partnership to sell hotdogs as you allege; those discussions between us last month were only negotiations; there was no serious offer and acceptance: I am not your partner in a hotdog business.”

- trying, without a valid reason, to withdraw from the contract

Example: Ulrich decides to rescind the contract because of undue influence. His view that there was undue influence later proves to be incorrect, so his attempt at rescinding the contract is not justified and amounts to repudiation of the contract.

- giving notice that he or she cannot perform any longer

Example: “Unfortunately, I do not have the equipment to build your block of flats as agreed, and I have no way of acquiring the equipment.”

- giving notice that he or she refuses to perform any longer

Example: “I am no longer prepared to work for you; find someone else to type your work. I quit.”

- indicating that he or she will not perform

Example: “I know that I promised last week to make your hat by next month, but I’ve got so much work that I won’t be able to get around to making your hat until the end of the year.”

A party’s repudiation of only some of his or her obligations or a part of the contract could lead to repudiation of the whole contract.

Example: Arnold works hard when he is at work, but refuses to come to work at the agreed time, which he says is far too early for him.

The test for repudiation is the following: Has the alleged repudiator behaved in a way that would lead a reasonable person to conclude that the repudiator does not intend to perform his or her contractual obligations?

Mere failure by the debtor to perform is not repudiation; so, for example, if the debtor forgets that he or she is contractually bound to perform, he or she has not repudiated the contract.

6. PREVENTION OF PERFORMANCE

(Textbook par 10.6)

6.1 Prevention of performance by the debtor

Here the debtor prevents his or her own performance: through his or her own fault (either **intentionally** or **negligently**), the debtor makes his or her own performance impossible. Nevertheless, the debtor's obligation to perform continues.

Example: "A sells something to B and then disables himself from fulfilling the contract by selling and delivering the thing to C, who will not part with it at any price (*Willie's principles of South African law* (1991) 514). A's obligation to perform continues. Because A cannot now deliver the thing to B, A is liable to B for damages.

6.2 Prevention of performance by the creditor

The following table indicates the differences between the creditor's prevention of performance and the creditor's default:

PREVENTION OF PERFORMANCE BY THE CREDITOR	DEFAULT OF THE CREDITOR
<ul style="list-style-type: none"> The creditor makes it permanently impossible for the debtor to perform. 	<ul style="list-style-type: none"> The creditor delays the debtor's performance, but does not make it impossible for the debtor to perform.
<ul style="list-style-type: none"> The debtor can never perform. 	<ul style="list-style-type: none"> The debtor can still perform.
<ul style="list-style-type: none"> Example: Ezak arrives to repair John's stove; since having asked Ezak to repair the stove, John has intentionally destroyed it. It is John's fault that Ezak cannot repair the stove. Therefore, Ezak is regarded as having performed his obligation to repair the stove. Ezak may still demand payment from John, but must deduct from his claim any expenses (for example, the purchase of parts) that he (Ezak) has saved as a result of no longer having to perform. 	<ul style="list-style-type: none"> Example: Thomas sells Ian a painting. They agree that Thomas must deliver it on 31 July by packing it for Ian to collect at Thomas's house on that day. Thomas duly packs the painting, but Ian forgets to collect it on 31 July. On 1 August, Ian is in default.

ACTIVITY 10.4

Read the case study and answer the questions that follow.

On 3 February, the management of Thutong University concludes a contract with Roy Building Contractors in terms of which Roy Building Contractors undertakes to build two hostels, each consisting of 250 single rooms, 100 double rooms, a sitting room, a dining room and a kitchen. The contract stipulates that construction will commence on 1 March and the building will be completed by 15 December. They also agree as follows:

- If the hostels have not been completed by 15 December, Roy Building Contractors will be liable for an amount of R10 000 per day after 15 December.
- Ten per cent of the contract price will be held back until Smith, Thutong's architect, issues a final certificate.

What form of breach of contract, if any, has been committed in each of the following situations?

- (1) Roy Building Contractors only completes the work on 5 January of the following year. The delay is caused by serious floods resulting from an unseasonable cyclone in September.
- (2) Roy Building Contractors only completes the work on 10 January of the following year. The delay is caused by a week-long strike by Roy Building Contractors' employees over the bonuses they received from Roy Building Contractors in that same year.
- (3) On 6 January, Smith issues a final certificate, but owing to a cash flow problem, Thutong University does not pay the outstanding balance on the contract price.
- (4) In order to make a higher profit, Roy Building Contractors uses floor tiles of a poorer quality than was specified in the contract.
- (5) Roy Building Contractors only commences construction on 20 March of the following year and not on 1 March as agreed. The delay is caused by Thutong University's failure to provide the approved building plans to Roy Building Contractors on 15 February as agreed. The plans are only supplied to Roy Building Contractors on 25 February.
- (6) On 20 February, Thutong University informs Roy Building Contractors that the university is "cancelling" the contract because it wishes to erect laboratories on the site instead of hostels.

FEEDBACK

- (1) In this instance there is no breach of contract. The delay is not due to the fault of a contracting party. However, there is temporary impossibility of performance. (See par 12.8.3. of the textbook.)
- (2) This is breach of contract in the form of *mora debitoris*. The delay is due to the actions of Roy Building Contractors.
- (3) This is breach of contract in the form of *mora debitoris*. Thutong University defaults by failing to meet its obligation in time.
- (4) In this instance, Roy Building Contractors commits positive malperformance by acting contrary to the terms of the contract.
- (5) This is a case of *mora creditoris*. The creditor prevents the timely performance of the debtor by withholding his or her co-operation.
- (6) Here Thutong University is guilty of repudiation, since it is clear that the university does not intend to honour the obligations stipulated in the contract. The university is attempting to withdraw from the contract without justification.

SELF-ASSESSMENT ACTIVITIES

- (1) Name different forms of breach of contract.
- (2) Draw a distinction between *mora debitoris* and *mora creditoris*.
- (3) Describe repudiation as a form of breach of contract.
- (4) Draw a distinction between positive malperformance and prevention of performance.
- (5) What are the requirements that should be met before the debtor can be placed in *mora*?
- (6) What are the requirements that should be met before a creditor can be placed in *mora*?

7. EXPLANATORY NOTES

Breach of contract: When one of the parties to the contract fails to perform in terms of the contract (with or without valid reasons).

Creditor: The party who is owed performance or the party who must receive performance (from another party, namely, the debtor) in terms of the contract.

Debtor: The party who has the duty to perform (to another party, namely, the creditor) in terms of the contract.

Mora: A fault or breach committed by a party to the contract.

8. AFRICANISATION AND COMMERCIAL LAW

Parties enter into a contract with the intention of being legally bound by contractual rights and duties that are created by the type of contract they are concluding. Therefore, it is only fair for both parties to perform as agreed. Any other performance that is not what the parties have agreed upon, or failure to perform at all will be contrary to the obligations created by the contract, leading to what is called breach of contract. The law recognises different forms of breach of contract to bring certainty to the law of contract and to protect parties who have serious intentions to be bound by the terms of the contract they have concluded.

STUDY UNIT 11

Remedies for Breach of Contract

LEARNING OUTCOMES

After you have worked through this study unit, you should

- know various remedies for breach of contract
- be able to determine the appropriate remedy or remedies for each type of breach of contract

Prescribed study material: chapter 11

OVERVIEW

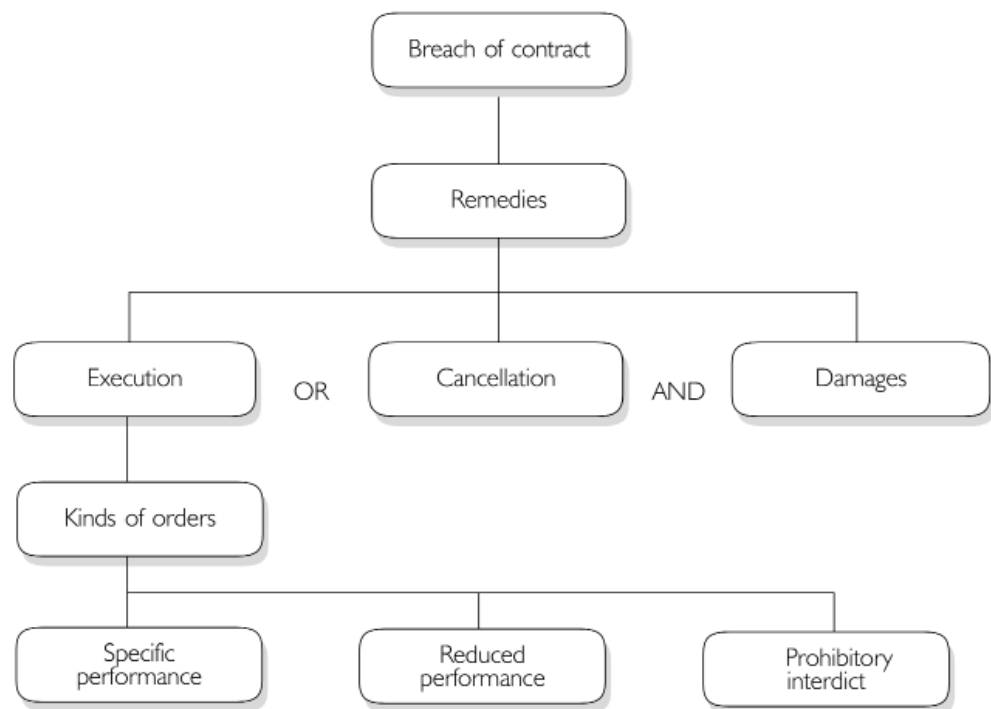
The law provides for three remedies, namely, execution of the contract, cancellation of the contract and damages to protect the innocent party when a contract has been breached. It is important to note that claiming damages is not an alternative remedy, but is available in both the case of execution and cancellation of the contract. You should note the requirements for the remedy of claiming damages. Note also that when a contract is cancelled, it is terminated – whereas if an order for execution is given, proper performance is still required for the contract to come to an end. You should further note the rules for cancellation of each type of breach of contract and the consequences thereof.

1. INTRODUCTION

(Textbook par 11.1)

Where there is a contract between parties, the one party's breach of contract entitles the other party (the victim or the aggrieved or innocent party) to a contractual remedy or remedies. These remedies are the legal means that are provided for protecting the innocent party's contractual rights. The innocent party may sue the party who is in breach of contract and may enforce these remedies with the assistance of the court.

The following diagram shows the different remedies for breach of contract:



In general, the remedy of **execution** (specific performance) may be claimed in respect of all contracts. It is the “**primary**” remedy for breach of contract since it is aimed at accomplishing the same result as was intended originally by the contracting parties.

By contrast, **cancellation** is a “**supplementary**” remedy since it is aimed at ending the contract. The remedy of cancellation may be used only if there is a right to cancellation. This means that the innocent party may cancel the contract only if breach occurs, if the contract contains a cancellation clause, or if such a right was later stipulated, or if it can be proved that the breach of contract is material.

The innocent party must choose either to continue with the contract (i.e. execution of the contract) or to end it (i.e. cancellation of the contract). He or she may not do both. Further, the innocent party may claim the remedies in the alternative, which is done by claiming, for example

- specific performance of the other party’s contractual obligations

OR/IN THE ALTERNATIVE

- failing which, cancellation of the contract

The above claim means that the innocent party now exercises his or her choice to continue with the contract and claims an order for specific performance. However, if the court, for whatever reason, does not give the order for specific performance, the claimant may still be awarded an order for cancellation of the contract. Therefore the contract continues until

- either the court refuses the order for specific performance and grants an order for cancellation

OR

- the claimant, having been awarded an order for specific performance, later finds that the defendant cannot or will not render the performance, and cancels the contract

Note that in this sequence of events the claimant does not enforce specific performance and cancellation of the contract at the same time. The remedy of damages is an additional remedy at the disposal of the innocent party, regardless of whether the innocent party claims specific performance (execution) of the contract or insists on cancellation. The remedy of damages may also be claimed on its own.

ACTIVITY 11.1

Ally sells her car to Buti, but then refuses to deliver the car on the agreed date. Since Buti needs transport, he, in the meantime, decides to use taxis. After a week, Ally decides to fulfil her contractual obligations and delivers the car to Buti. Buti accepts delivery of the car because he still wants the car. As a result, he no longer needs to claim specific performance because, after all, Ally has tendered performance. Further, Buti does not wish to cancel the contract. Advise Buti on the appropriate remedy in this instance.

FEEDBACK

Ally decided to perform in terms of the contract; therefore, it is not necessary for Buti to claim for specific performance. Further, since Buti is in need of the car, it is not appropriate to cancel the contract. However, Buti can claim the taxi expenses he incurred as a result of Ally's breach of contract by failing to deliver the car on the agreed date.

2. EXECUTION OF THE CONTRACT

(Textbook par 11.2)

The **primary purpose** of the remedy of execution of the contract is to achieve the same result as the parties intended to achieve when they entered into the contract, or, if that result cannot be achieved, a result as close as possible to the one originally intended. Appropriate orders for execution of the contract are an order for specific performance, an order for reduced performance and a prohibitory interdict.

2.1 Orders for specific performance

Generally, every party to a binding agreement who is ready to carry out his or her own obligation in terms of the agreement has the right to demand from the other party, as far as it is possible, a performance of his or her undertaking in terms of the contract.

Exception 1: If a debtor's estate has been sequestrated, specific performance will not be granted because it could prejudice the insolvent's other creditors.

Example: Vusi owns a house that is worth R1 million. It is a valuable asset in Vusi's estate. When he concludes an agreement of partnership with Manu, Vusi promises

to contribute the house to the partnership for use as the partnership's business premises. However, before the house is transferred to the partnership, Vusi is declared insolvent. The duty of Vusi's trustee is to take control of Vusi's assets and to enforce claims against Vusi's debtors so as to amass as large a sum of money as possible from which to pay Vusi's creditors. The house is due to be transferred to one of Vusi's creditors, namely, the partnership. However, if the partnership were allowed to take transfer of the house, Vusi's trustee would be left with a much smaller amount from which to pay Vusi's other creditors. In this way, the partnership would have an unfair advantage over Vusi's other creditors. Instead, the house falls into Vusi's insolvent estate and will be sold for the highest price possible so that the proceeds of the sale may go towards increasing the sum of money available for distribution among Vusi's creditors in terms of the law of insolvency.

Exception 2: If, objectively speaking, the debtor cannot carry out his or her contractual obligation, an order for specific performance will not be granted because that would imply that the law expects the impossible of the debtor.

Example: Callie sells his unique painting to Donna. Before delivery, it is destroyed. The court will not order Callie to deliver the painting to Donna.

In all other cases, the court exercises its discretion in deciding whether to grant or refuse an order for specific performance. It thus seeks to uphold legal and public policy and to prevent unfairness. Therefore, it will refuse an order for specific performance if this remedy would have an unreasonably harsh effect on the defendant and would be unfair in the circumstances. It will, for example, refuse the order if the cost of fulfilment of the contract to the party who has breached the contract would be out of all proportion to the corresponding benefit to the claimant, and if the claimant could be equally well compensated by an award of damages.

There is no rule in our law that says that specific performance will be denied in the case of an obligation to render personal services. The situation will be judged according to the same principles applicable to any other performance, namely, whether ordering specific performance will be equitable to the debtor. The court may order specific performance of one or some of the obligations undertaken by the debtor, while refusing to do so in respect of other obligations or terms.

ACTIVITY 11.2

Which **ONE** of the following is an order for execution of the contract?

- (1) an order for specific performance
- (2) default of the debtor
- (3) cancellation of the contract
- (4) an order for increased performance

FEEDBACK

- (1) is **CORRECT**. An order for specific performance is an order for execution of the contract. It is a court order that orders a contracting party to render the performance he or she has undertaken to render. It therefore attempts to achieve the result that was intended by the parties originally.
- (2) is **INCORRECT**. Default of the debtor is a form of breach of contract. It happens when the debtor does not perform on time and the delay is due to the debtor's fault.

- (3) is INCORRECT. Cancellation of the contract is NOT an order for execution of the contract. The remedy of execution of the contract attempts to achieve the same result as was intended originally by the parties, or a result that is as close to that as possible, while in the case of cancellation of the contract the consequence is that the parties do not accomplish that which they originally agreed upon because the contract comes to an end.
- (4) is INCORRECT, because an order for increased performance is not an order for execution of the contract. In certain circumstances the court will order a contracting party to render a reduced performance and not an increased one. This can happen if the other party has rendered performance, but his or her performance is defective or incomplete.
-

2.2 Orders for reduced performance

Orders for reduced performance apply when the principle of reciprocity is present. Most commercial contracts create rights and duties for both parties. When the one party undertakes to perform certain obligations in return for the other party's undertaking to perform other obligations, the principle of reciprocity applies to the agreement. This principle requires that if the claimant wishes to demand performance from the other party, he or she must either have performed or offered his or her performance to the defendant. The defendant from whom performance is claimed consequently has a defence against such claim until the claimant has rendered or tendered performance, and the defendant may withhold his or her own performance in the meantime. This defence is called the *exceptio non adimpleti contractus*.

This defence may be raised in the case of an unfulfilled contract if

- both parties must perform at the same time

Example: In a cash sale, the seller must usually deliver or transfer the thing sold at the same time that the buyer must pay the price.

OR

- the claimant must perform before the party raising the defence

Example: In general, a landlord must perform before he or she may demand rent. If the landlord tries to claim payment of the rent before performing his or her obligation to deliver the premises to the tenant, or without undertaking to do so, the tenant may raise the *exceptio non adimpleti contractus*. The contracting parties may change the general rule by agreement: thus, the landlord and the tenant may agree that the rent has to be paid at the beginning of the period of lease.

The defence of *exceptio non adimpleti contractus* **cannot** be raised if

- the contract is one to which the principle of reciprocity does not apply

OR

- the claimant does not uphold the contract, but terminates it and claims damages (the claimant cancels the contract and claims damages instead of upholding it)

OR

SECTION B: GENERAL PRINCIPLES OF THE LAW OF CONTRACT

- the claimant has performed or offered to perform

OR

- the claimant need not perform

Example: In a contract of donation, the donor cannot raise the *exceptio non adimpleti contractus* against the donee's claim for performance because the donee need not perform.

The defence **may** be raised where the claimant has not rendered or tendered performance, or where the claimant has indeed rendered performance, but this performance is defective. What happens if the party who rendered defective performance claims performance from the other contracting party (the defendant), who, while using the defective performance, raises the defence of *exceptio non adimpleti contractus* and refuses to render his or her own performance? Here the claimant is the creditor in respect of the performance he or she is now claiming from the debtor, but which is being withheld by the debtor on the basis of the *exceptio non adimpleti contractus*.

Example: Andrew, a building contractor, built a house that does not meet the agreed specifications and now seeks payment from the owner, Simon, for the work done. The construction work is almost complete and Simon is already occupying the house. Andrew, the claimant, will have to persuade the court to exercise its discretion in Andrew's favour, to relax the *exceptio non adimpleti contractus* defence and to order Simon to render a reduced performance of his own (up to now withheld). As Andrew's performance is incomplete or defective, Simon cannot fairly be ordered to make a full counter-performance.

To succeed with a claim for reduced performance, the plaintiff creditor must prove

- (a) that the defendant is using the defective performance

Example: The defendant is living in the half-completed dwelling.

AND

- (b) that in the circumstances it would be fair for the court to exercise its discretion in favour of granting the order

AND

- (c) what the reduced contract price must be, that is, what the cost would be of rectifying his or her own performance, so as to establish by how much the contract price must be reduced

The court therefore does the following calculation:

The reduced contract price = the full contract price minus the cost of finishing or improving the performance to the standard required in the contract.

ACTIVITY 11.3

Floodwaters Local Council contracts with Bessy for the construction of a bridge for R5 million. The bridge must have four lanes: two for vehicle traffic, one for

pedestrians and one for trains. When finished, the bridge has only two lanes for vehicle traffic. The local council finds out that it will cost another R3 million to add the lanes for pedestrians and trains. The local council refuses to pay Bessy any money.

Which **ONE** of the following statements is **CORRECT**?

- (1) Bessy may use the *exceptio non adimpleti contractus* to institute action for payment.
- (2) The *exceptio non adimpleti contractus* does not apply to this case, because the contract is not reciprocal.
- (3) The local council will have to pay Bessy the agreed R5 million if it decides to use the defective bridge.
- (4) The local council could raise the *exceptio non adimpleti contractus* when Bessy claims payment.

FEEDBACK

- (4) is **CORRECT**. The defence *exceptio non adimpleti contractus* is available to the local council if Bessy claims payment, since Bessy has not rendered complete performance.
 - (1) is **INCORRECT**. The *exceptio non adimpleti contractus* is a defence, and therefore can never be used to institute action.
 - (2) is **INCORRECT**. The contract in this instance is reciprocal, because the local council has to pay a specified amount and, in turn, is entitled to construction of the bridge. Bessy, in turn, must construct the bridge and will then be entitled to payment. Both parties thus incur both rights and obligations.
 - (3) is **INCORRECT**. The local council will not necessarily have to pay the full contract price if it decides to use the defective performance, since the party who has suffered damages as a result of the other party's breach of contract (in this instance, positive malperformance) is also entitled to damages as a remedy.
-

2.3 Prohibitory interdicts

One contracting party can apply for a prohibitory interdict to prevent the other contracting party from doing what he or she is not entitled to do in terms of the contract, or to prevent him or her from continuing to do so, or to prevent the other contracting party from doing what he or she is threatening to do and which he or she is not entitled to do in terms of the contract.

Examples of situations in which interdicts are sought include the following:

- double sales

Example: Nic sells the same thing first to Sam and then to Tom. The thing has not been delivered to Sam or to Tom. The rule that the person who is first in time has the stronger right means that Sam may apply for an interdict preventing Nic from transferring the thing to Tom and claim specific performance, thus leaving Tom to claim damages from Nic.

- restraint of trade agreements

Example: Harry has agreed not to compete against Dick in Pretoria for a year after their contract ends. The contract ends and Harry immediately opens a rival business. Dick may apply for an interdict enforcing the negative obligation not to compete against Dick in Pretoria for a year after their contract has ended. Here the interdict preventing Harry from continuing the rival business amounts to the specific performance of the negative obligation. Harry is still entitled to do business that does not compete with Dick's. If interdicted from competing with Dick, Harry must obey the court's interdict, otherwise he will be in contempt of court and may be liable to punishment.

3. CANCELLATION OF THE CONTRACT

(Textbook par 11.3)

The contract is ended by cancellation. Since parties should, in principle, uphold their contracts, cancellation may be used only

- if the parties have agreed to the remedy of cancellation (by including a cancellation clause in the contract)

OR

- if the breach of contract is material (where the contract does not have a cancellation clause)

3.1 Cancellation and default of the debtor

The parties may agree orally or in writing that one or both will have the right to cancel the contract if the other party commits breach of contract. This clause is called a cancellation clause (see chapter 8 of the textbook).

Example: Omar and Pat incorporate into their lease contract a clause that if Pat is late in paying rent, Omar is entitled to cancel the contract. This gives Omar the right to cancel the contract even if Pat pays a few minutes late.

In the absence of a cancellation clause, the creditor may cancel in the following two circumstances:

- If there is a specific date for performance and a tacit term that time is of the essence.** Here the debtor is in default (*mora ex re*) once the time or date for performance has passed and the absence of punctual performance is such a serious breach that the creditor has the right to cancel the contract. Time is of the essence, for example, if the contract is one in which the price varies continuously (e.g. a sale of shares quoted on the Johannesburg Securities Exchange, or JSE), or if the contract is a commercial contract (e.g. a sale of goods by a wholesaler to a retailer, or by a shopkeeper to a customer).
- By sending the debtor a notice of intention to cancel.** This can occur where

EITHER

- a date for performance has indeed been set, but there is no tacit term that time is of the essence

OR

- no date for performance has been set

In the first of the two circumstances under (b) above, the debtor is automatically in default because the date for performance has passed: he or she is in *mora ex re*. To acquire the right to cancel the contract, the creditor must give the debtor notice of his or her intention to cancel the contract on the grounds of the debtor's default.

By giving this notice of intention to cancel, the creditor changes the importance of the promptness of performance: before the notice, time was not of the essence, but by means of the notice, promptness of performance becomes an essential aspect of the contract – thus, after notice has been given, time is of the essence.

ACTIVITY 11.4

Zolo sells his house to Bongiwe. They agree that Zolo must transfer the house on or before 3 June. On 3 June, Zolo has not yet transferred the house, so he is automatically in *mora ex re*. Advise Bongiwe on what to do if he wishes to cancel the contract.

FEEDBACK

If Bongiwe wishes to cancel the contract because of Zolo's default, he must give Zolo notice of his intention to cancel unless Zolo transfers the house within a reasonable time (e.g. two months) from the date of receiving the notice. By giving notice of intention to cancel, Bongiwe has changed the importance of promptness of performance, hence time is now of the essence.

In the second of the two circumstances under (b) above, the debtor is not yet in default, so he or she is not in breach of contract. Before the creditor may cancel the contract, the creditor must place the debtor in default (*mora ex persona*) by means of a demand for performance. The creditor must also give notice of intention to cancel: having given this notice, he or she has the right to cancel the contract.

Example: John agrees to build a wall for Len. John and Len do not set the date by which John must finish building the wall. If Len wishes to cancel the contract, he must first place John in default (*mora ex persona*) by demanding that John perform by building the wall within a certain time (say, two days) or by a certain date (say, 6 June). Len must also then give John notice of his intention to cancel the contract if John does not build the wall within the set time or by the set date. Thereafter, if John has not built the wall by 6 June, Len may cancel the contract.

The demand for performance must give the debtor a reasonable time within which to perform (see par 10.2.1(b)(ii) of the textbook). The notice of intention to cancel must also give the debtor a reasonable time in which to perform and must clearly state that the creditor will be entitled to cancel the contract if the debtor does not perform by the date set. These reasonable periods may be made to overlap – the creditor may conveniently give the debtor one notice that demands performance and, at the same time, states the intention to cancel; it sets one reasonable period during which the debtor must perform and states that if the debtor does not perform by then, the creditor may cancel the contract.

Example: In the above example of the contract to build the wall, Len's demand for performance must set a reasonable time for John to finish the wall. The reasonableness of the time will depend on the particular facts.

Len's notice of intention to cancel the contract must also set a reasonable time for John to finish the wall; if John does not finish the wall by the end of that time, Len will cancel the contract. Len may include these two different communications (the demand for performance and the notice of intention to cancel the contract) in one notice to John, and the same reasonable period set in this notice may be common to both communications (the demand for performance and the notice of intention to cancel the contract).

3.2 Cancellation and default of the creditor

In the absence of a cancellation clause the debtor may cancel the contract in circumstances similar to those entitling the creditor to cancel, namely:

- (a) **If there is a specific date for performance and a tacit term that time is of the essence.** In respect of default of the creditor, the creditor fails to co-operate to enable the debtor to perform. Here the creditor is in default (*mora ex re*) once the time or date for co-operation (to allow proper performance) has passed and the absence of punctual co-operation is such a serious breach that the debtor has the right to cancel the contract. Time is of the essence, for example, if the contract is one in which the price varies continuously (e.g. a sale of shares on the JSE), or if the contract is a commercial contract (e.g. a sale of goods by a wholesaler to a retailer, or by a shopkeeper to a customer).
- (b) **By sending the creditor a notice of intention to cancel.** This can occur where

EITHER

- a date for co-operation has indeed been set, but there is no tacit term that time is of the essence

OR

- no date for co-operation has been set

In the first of the two circumstances under (b) above, the creditor is automatically in default because the date for co-operation has passed, so he or she is in *mora ex re*. To acquire the right to cancel the contract, the debtor must give the creditor notice of the debtor's intention to cancel the contract on the grounds of the creditor's default.

By giving this notice of intention to cancel, the debtor changes the importance of promptness of co-operation: before the notice, time was not of the essence, but by means of the notice, promptness of co-operation becomes an essential aspect of the contract – thus, after notice has been given, time is of the essence.

ACTIVITY 11.5

Under a contract of letting and hiring of work, Epsom has to paint a picture for Fikile. Epsom and Fikile agree that the painting will be handed over on 24 May.

Epsom has the painting ready on 24 May, but the creditor in terms of receiving the delivery (Fikile) does not collect it on that day. On 25 May, Fikile is automatically in *mora ex re*. Epsom wants to cancel the contract and sell the painting to Gina. Advise Epsom on what to do if he wishes to cancel the contract.

FEEDBACK

If Epsom wishes to cancel the contract so that he can sell the painting to Gina, Epsom must give Fikile notice of his intention to cancel their contract because of Fikile's default. He must set a reasonable time within which Fikile must collect the painting from Epsom.

In the second of the two circumstances under (b) above, the creditor is not yet in default, so he or she is not in breach of contract. Before the debtor may cancel the contract, the debtor must place the creditor in default (*mora ex persona*) by means of a demand for co-operation. The debtor must also give notice of intention to cancel; having given this notice, he or she has the right to cancel the contract.

Take care not to confuse the two separate communications: the **demand for co-operation** and the **notice of intention to cancel the contract**. The two communications serve different purposes.

Example: Koos agrees to varnish Lulu's table. Lulu agrees to buy the varnish. No date is set for the performance of the contract. When Koos is ready to start varnishing, Lulu has not yet bought the varnish. If Koos wishes to cancel the contract, Koos must first place Lulu in default (*mora ex persona*) by demanding that Lulu co-operate by obtaining the varnish within a certain time (say, one week) or by a certain date (say, 6 June). Koos must also then give Lulu notice of his intention to cancel the contract if Lulu does not obtain the varnish within a set time or by a set date.

The demand for co-operation must give the creditor a reasonable time in which to co-operate (see par 10.2.1(b)(ii) of the textbook). The notice of intention to cancel the contract must also give the creditor a reasonable time in which to co-operate and must clearly state that the debtor will be entitled to cancel the contract if the creditor does not co-operate by the stipulated date.

These reasonable periods may be made to overlap – the debtor may conveniently give the creditor one notice that demands co-operation and, at the same time, states the intention to cancel; it sets one reasonable period during which the creditor must co-operate and states that if the creditor does not co-operate by then, the debtor will cancel the contract.

3.3 Cancellation and defective performance (positive malperformance)

If the contract contains a cancellation clause, the creditor has the right to cancel the contract even though the defect may be trivial. However, if the contract does not contain a cancellation clause, the creditor has the right to cancel it if the debtor's performance is so seriously defective that the creditor cannot be expected to abide by the contract.

Example: Lorraine orders a long-sleeved, buttoned shirt from Rina; Rina delivers a shirt that lacks one sleeve and two buttonholes and has a poorly sewn collar. The shirt is obviously so defective that Lorraine may cancel the contract.

However, if the defect is trivial, such as when one of the buttons has not been sewn on properly, the creditor does not have the right to cancel the contract unless the contract contains a cancellation clause.

3.4 Cancellation and repudiation of the contract

If the contract contains a cancellation clause, the innocent party has the right to cancel the contract, even though the obligation that has been repudiated is unimportant. However, if the contract does not contain a cancellation clause, the innocent party has the right to cancel if the repudiator repudiates a material obligation.

You should note that the innocent party is not obliged to cancel the contract in these circumstances and may elect to enforce performance.

Example: Stan and Yusuf conclude a lease, but Stan (the landlord) then refuses to place the use and occupation of the let premises at Yusuf's disposal. Yusuf may cancel the contract or elect to enforce performance (i.e. placing the use and occupation of the let premises at Yusuf's disposal).

However, if the repudiator of the contract repudiates an unimportant obligation, the innocent party does not have the right to cancel the contract unless the contract contains a cancellation clause.

Example: Doug rents a furnished and equipped flat from Zack. Zack subsequently denies that the toaster is included in their agreement and threatens to remove it. Zack will not be able to cancel the contract unless the contract contains a cancellation clause.

3.5 Cancellation and prevention of performance

If the debtor prevents performance, the creditor is entitled to cancel the contract because it can no longer be executed. Further, if the creditor has prevented the performance of the debtor, the debtor has two options; As he or she is regarded as having performed, he or she is entitled to claim the creditor's performance or to cancel the contract.

ACTIVITY 11.6

Moses agrees to repair Simon's stove for R100. Let's consider the following two possibilities under activities 11.6.1 and 11.6.2:

ACTIVITY 11.6.1

Moses deliberately causes a short circuit while working on the stove and it is completely destroyed. Describe the type of breach of contract and whether Simon can cancel the contract.

FEEDBACK

This is an example of prevention of performance by the debtor (Moses, who undertook to fix the stove, but deliberately destroyed it). Simon (the creditor) can now cancel the contract. The contract can no longer be executed (i.e. the stove can no longer be repaired).

ACTIVITY 11.6.2

The second possibility is that Simon deliberately destroys the stove before Moses arrives to repair it. Describe the type of breach of contract and advise what Moses could do in this instance.

FEEDBACK

This is an example of prevention of performance by the creditor (Simon, to whom performance was owed). Moses (the debtor) now has two options: As he is regarded as having performed, he can claim Simon's performance (payment of R100) or he can cancel the contract.

3.6 The act of cancellation

Please note that a contracting party who has the right to cancel the contract cannot be forced to do so. Furthermore, the right to cancel must be exercised within a reasonable time. The innocent party exercises the right of cancellation by notifying the other party of the cancellation. The notice can be in any form (oral or written), as long as it is clear and unequivocal. It is sufficient if the innocent party's decision to cancel, or the conduct that indicates this choice, is reported to the guilty party by a third person acting independently. A mere threat to cancel is not yet a notice of cancellation.

3.7 The consequences of cancellation

The basic rule in respect of cancellation is that what has been performed must be returned. However, if it is impossible to return a performance, the duty to return it is influenced by the party's role in the cancellation of the contract. If the innocent party, that is, the one who cancelled the contract because of the other's breach of contract, cannot return the performance received, he or she is relieved of the duty to return the performance, unless the impossibility is due to his or her own fault; however, the party who committed the breach of contract still has to return the performance he or she received.

If the party whose breach of contract caused the cancellation cannot return the performance that he or she received, the innocent party need not return the performance that he or she has received.

Further, note the difference in the parties' obligations in the case of a divisible contract and in the case of an indivisible contract. The sale of a lamp is an example of

an indivisible contract and the lease of a house is an example of a divisible contract, which continues from one period of the lease to the next period (say, from month to month). If restitution is possible in an indivisible contract, it takes place. Thus, the seller repays the price, and the buyer returns the thing sold. By contrast, if a continuing contract such as a lease is cancelled, the tenant restores the property let (e.g. the house), but the landlord is not obliged to repay all the tenant's payments dating from the conclusion of the lease. The landlord need return only the rent for the period for which the tenant has not been afforded the use and occupation of the premises let.

4. DAMAGES

(Textbook par 11.4)

Generally, a contract is entered into with the intention to have obligations fulfilled. The innocent party's patrimony should not be allowed to be diminished by the defendant's breach of contract. Therefore, the innocent party is entitled to claim damages in order to place him or her in the position he or she would have been in had the contract been carried out.

4.1 Patrimonial loss

It should be noted that breach of contract does not necessarily cause the innocent party to suffer loss. After cancellation of the contract, the innocent party may, for example, conclude a contract on better terms than the cancelled contract and actually even save money.

The law of contract provides a legal remedy called "contractual" damages. Contractual damages may be claimed for patrimonial loss only. Compensation for non-patrimonial loss or damage, such as hurt feelings, disappointment and irritation, cannot be claimed on the basis of contract, but could possibly be claimed on the basis of delict, which was discussed in chapter 2 of the textbook.

How are damages calculated? The following two financial positions are compared:

- the financial position in which the plaintiff would have been had proper performance of the contract taken place

AND

- the plaintiff's actual financial position

ACTIVITY 11.7

Barry sells his car to Clay for R60 000. He then refuses to deliver it. Car prices rise. Clay cannot buy the same make of car for less than R65 000, and buys one from Amos. Clay would have paid R60 000 if Barry had delivered the car; instead, Clay had to pay R5 000 more (R65 000) because Barry repudiated the sale. Advise Clay of the appropriate remedy against Barry.

FEEDBACK

Clay may claim damages from Barry for repudiation, Since Clay is worse off by R5 000, this sum represents the damages that he may claim from Barry. In addition, if the injured/innocent party (Clay in this instance) could have made a profit out of the contract, the lost profit may also be claimed. However, in this instance Clay wouldn't have made any profit.

Example: Clay wants to use the car he bought from Barry as a taxi and Barry knows this. Damages will then not only include the higher price of R5 000, as explained above, but also the loss of profit Clay would have made with the taxi if this could be quantified.

4.2 Causal connection between breach of contract and loss

The breach of contract must cause the patrimonial loss. The guilty party is liable for all damages, even when the breach is merely one factor that contributed to the loss. The court will not adjust the damages to reflect the extent to which the loss was caused by the breach of contract. Therefore, the Apportionment of Damages Act 34 of 1956 does not apply to claims based on contract.

ACTIVITY 11.8

Tebogo agrees to service Jake's car on Saturday morning. Tebogo doesn't turn up as agreed, so he is in breach of contract. On Saturday afternoon Jake goes for a drive and his car breaks down. Thereafter, Jake's car is towed and repaired. Advise Jake whether Tebogo is liable for damages he has suffered.

FEEDBACK

If his car breaks down because of a fault Tebogo would have repaired had he serviced the car that morning, there is a causal connection between the breach of contract and the damage relating to having the car towed to the garage and repaired. Therefore, Tebogo would be liable for damages suffered by Jake.

4.3 Foreseeable loss

As is shown in the example of the defective watch in the textbook, breach of contract may lead to a series of events that culminate in disasters that seem very far removed from the breach of contract. The main task is to decide which events may fairly be blamed on the person who breached the contract.

In a contract, the defendant is liable for

- (1) such loss as naturally and generally flows from the kind of breach in question

OR

- (2) (a) such loss as was actually foreseen by the contracting parties when they concluded the contract

OR

- (b) such loss (though not actually foreseen by the parties) as may reasonably be supposed to have been contemplated by them as a probable consequence of breach of contract

An **example** of foreseeable loss (2)(a) is the example of Clay, Barry and the taxi. The loss of profit in this example was foreseeable, as Barry was aware of Clay's intention of operating a taxi business. An example of (2)(b) may be the following: Gary sells Herb shares in a company listed on the JSE. If Gary does not transfer those shares to Herb, and Herb must buy other shares at a higher price per share from Lizzy, Gary is liable to pay Herb damages. It is widely known that such shares tend to vary in price. Even if Gary and Herb did not actually contemplate that these share prices would vary, the likelihood of such variation is so widely known that the parties are deemed to have foreseen it.

4.4 The duty to mitigate damages

If the innocent party suffers loss because the guilty party has breached the contract, the innocent party is not entitled to recover those damages that the innocent party could have prevented or reduced by his or her own conduct. In other words, the innocent party is not entitled to blame the guilty party for losses that the innocent party could reasonably have avoided.

Example: If Lydia and Cynthia agree that Lydia will rent Cynthia's flat for one year and Lydia commits breach of contract by vacating the flat after six months, Cynthia cannot refuse to let the flat and claim the rent for the remaining period of six months from Lydia. She has a duty to mitigate her loss by advertising the flat for rent and trying to find a new tenant for the remaining period or a portion thereof. Only if Cynthia fails to find a tenant can she claim the rent for the remaining period from Lydia.

The burden of proving that the claimant has not mitigated his or her losses rests on the person who alleges this failure to mitigate (i.e. the party in breach of contract).

4.5 The proof of loss and the calculation of damages

Examples of the yardsticks mentioned in the textbook are the following:

- (a) Frans, a meat wholesaler, fails to deliver the regular meat order to Thabo, a butcher in Polokwane. Thabo's damages amount to the difference between the contract price (which he would have had to pay to Frans) and the value of the meat in Polokwane on that day.
- (b) We must distinguish between *mora ex re* and *mora ex persona*. If the buyer does not pay the price on or before the date set in the contract, he or she is liable to pay interest on that sum from the next day. But if the contract does not set a date for payment, the buyer must first be placed in *mora ex persona*. If the buyer still does not pay the price on or before the date set in the demand for performance, he or she is liable to pay interest on that sum from that date onwards.

- (c) Arthur builds a swimming pool for Ben who, on completion of the work, pays the agreed price. A month later, cracks appear in the swimming pool. Arthur refuses to come and see what the problem is, so Ben approaches Tukishi to repair the swimming pool. Ben may recover the R2 000 in repairs caused by Arthur's mediocre work from Arthur.

SELF-ASSESSMENT ACTIVITIES

- (1) Name the contractual remedies that are available to an innocent party in the case of breach of contract.
- (2) Name three possible orders the court can give with regard to the remedy of execution of the contract.
- (3) Under which circumstances will the court refuse an order for specific performance?
- (4) What is the defence called the *exceptio non adimpleti contractus* all about?
- (5) What factors must the plaintiff prove for the court to grant him or her an order for reduced performance?
- (6) Describe a prohibitory interdict.
- (7) Why is cancellation of a contract an abnormal remedy for breach of contract?
- (8) Under which circumstances will the creditor have the remedy of cancellation of the contract in the event of *mora debitoris*?
- (9) Under which circumstances will the innocent party have the remedy of cancellation of the contract in the event of *mora creditoris*?
- (10) Describe the consequences of cancellation of a contract.
- (11) Explain damages as a remedy for breach of contract.
- (12) What does it mean to say there must be causal connection between breach of contract and loss?
- (13) Explain the duty to mitigate damages.

5. EXPLANATORY NOTES

Execution of the contract: A remedy for breach of contract that is intended to achieve the same result as was intended originally by the parties to a contract.

Order for specific performance: A court order that orders a contracting party to render performance he or she has undertaken to render.

Damages: The sum of money that is awarded to compensate someone who has suffered a loss or injury.

6. AFRICANISATION AND COMMERCIAL LAW

The concept of *ubuntu* has been described as a concept that advocates fairness and reasonableness in the administration of justice. This concept plays a major role, in that principles that emanate from this concept are applied by the courts in resolving disputes relating to the law of contract. These principles are encapsulated in the remedies for breach of contract, which aim to put the party who has suffered loss or damage in the position in which he or she would have been had the breach of contract not occurred.

STUDY UNIT 12

Transfer and Termination of Personal Rights

LEARNING OUTCOMES

After you have worked through this study unit, you should be able to

- identify and apply principles relating to the transfer of personal rights
- identify and apply principles relating to the termination of personal rights
- distinguish between cession and delegation

Prescribed study material: chapter 12

OVERVIEW

Once a contract has been concluded, it brings about obligations that must be fulfilled by the parties to the contract. These obligations are rights and duties, which are also referred to as performance (see study unit 3 above). Of importance for the purpose of this study unit are rights to which a party to a contract is entitled (the right to claim performance – see also the references to a holder of a right in study unit 3 above). These rights are also referred to as personal rights that flow from a contract.

So, in this study unit you are introduced to the concept of cession. Cession is the only way in which personal rights can be transferred from one person to another.

It should be borne in mind that contracts are entered into in order to be complied with by the parties. However, there are different ways in which contract or personal rights can be terminated. In this study unit you are introduced to eight ways in which personal rights can be terminated. Contractual obligations are terminated when they are discharged, which is the primary purpose in creating obligations. In addition to discharge, contracts may be terminated by cancellation, agreement, merger, set-off, supervening impossibility of performance (which has certain requirements and exceptions), prescription (where the prescription periods are important), and sequestration and subsequent rehabilitation.

1. INTRODUCTION

(Textbook par 12.1)

Personal rights can be transferred in one way only, namely, by way of cession and can be terminated in various ways. We will first look at cession and then at the ways in which personal rights can be terminated.

2. CESSION

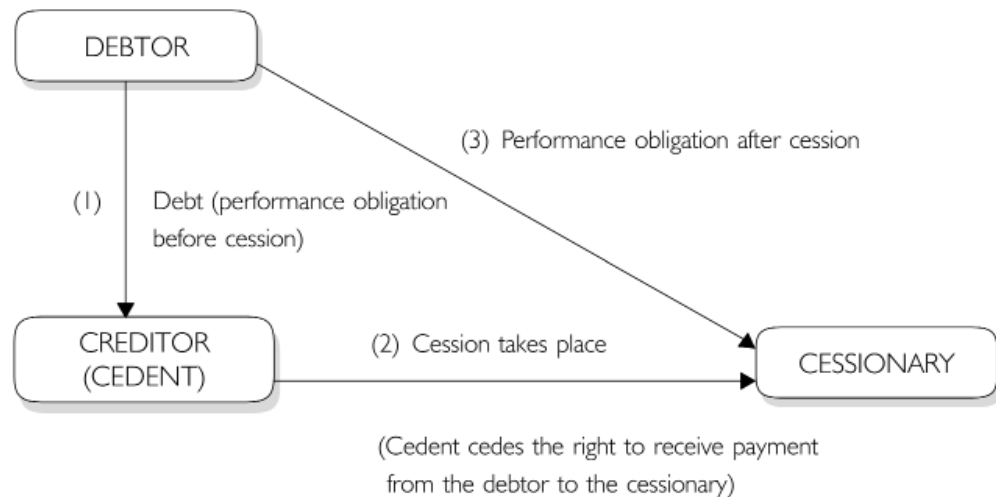
(Textbook par 12.2)

Rights that flow from a contract are referred to as personal rights. Personal rights are rights to claim performance from the other party to the contract (see par 2.1.2.3 of the textbook). These personal rights may be transferred by the holder of such personal rights in one way only, namely, by way of cession.

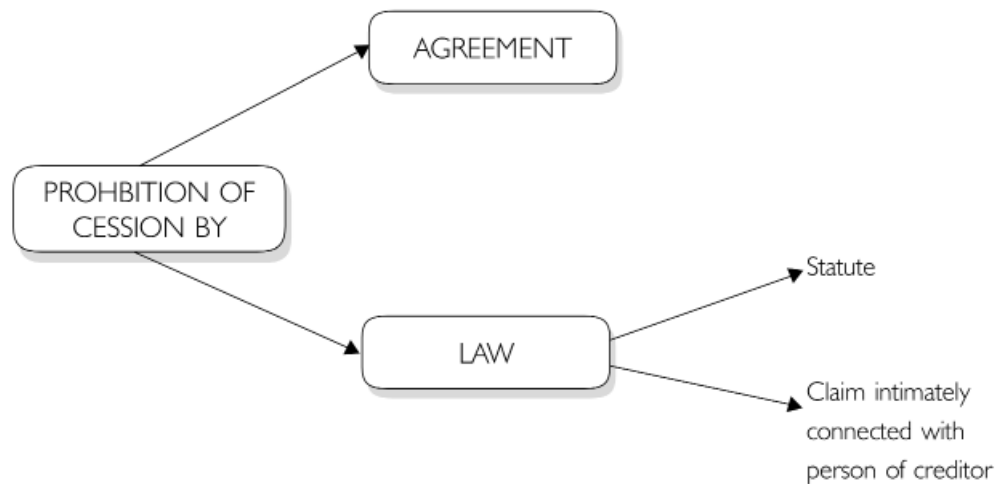
Cession may be defined better by way of an **example**: Alfred (debtor) owes Brian (creditor) R500. Brian (creditor) in turn owes David (third party) R500. Brian (**cedent**) and David (**cessionary**) agree that Brian will transfer his right to claim performance from Alfred to David. Eventually, Alfred must render performance to David. This agreement of transferring personal rights is known as cession (see par 12.2 of the textbook).

It must be noted that cession does not terminate an obligation between the creditor and the debtor. Cession only changes the party to whom the performance must be rendered. In the above example, performance is no longer rendered to Brian, but to Alfred.

Schematically, cession can be illustrated as follows:



Remember that cession does not create any new obligations, since the debtor's obligation is still to pay his or her original debt; payment must now be made to the cessionary and not to the cedent. Rights may normally be ceded freely. However, as the following scheme indicates, cession of a particular right may be prohibited by agreement or by operation of law (in terms of a statute, or where the claim is intimately connected with the person of the creditor):



A debtor may not be prejudiced by cession. For this reason a right may be ceded only in its entirety, unless the debtor agrees to the splitting of a right. However, the debtor's loss of his or her right to set-off (discussed below) is not regarded as prejudice.

The following is an **example** of the circumstances in which a debtor will lose his or her right to set-off: Henry owes Ron R500, which is payable immediately. Ron, however, owes Henry R200, but this amount is only payable at the end of the month. These two debts can be set off against each other, in other words, Henry can deduct the amount Ron owes him from the amount he pays Ron (R500 minus R200 = R300). However, if Ron cedes his right to payment of the R500 to Mervyn, Henry loses the advantage of set-off, which he had before. He will have to pay Mervyn the R500 immediately and will be entitled to the R200 from Ron only at the end of the month. This is not considered to be prejudicial, unless the cedent and the cessionary acted in bad faith to deprive the debtor of this right. In such a case, the debtor can use the defence that he would have had against the cedent, namely, that he, the debtor, had a counter-claim against the cessionary.

2.1 The consequences of cession

Cession of personal rights has several consequences, namely:

- (a) The right forms part of the patrimony of the cessionary.
- (b) Only the cessionary has the right to collect the ceded debt.
- (c) Once the right has been ceded, the cedent can no longer cede the right further. However, the cessionary may cede the right further.
- (d) The debtor can no longer perform validly to the cedent.
- (e) The claim is transferred in its entirety together with all benefits and privileges.
- (f) The cessionary receives the right with all the disadvantages attached to it.

ACTIVITY 12.1

At a golf day Chuck wins a free holiday of three days at Sun City, which is sponsored by Sun International. Chuck is not interested in the prize and cedes the right to it to Natalie. Who is the debtor, who is the cedent and who is the cessionary in this set of facts?

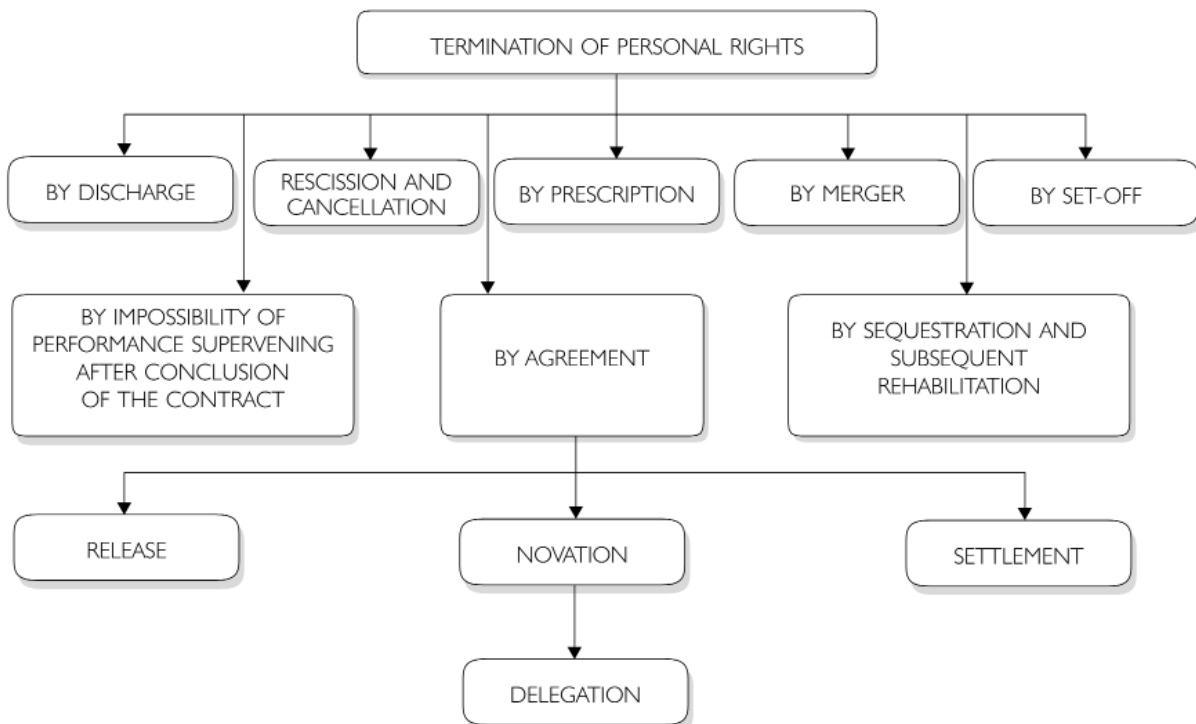
FEEDBACK

The debtor is Sun International, the cedent is Chuck and the cessionary is Natalie.

Termination of personal rights

Personal rights arising from obligations may be **terminated** in various ways. Some of these ways occur by operation of law, which is virtually automatic. There are also various ways in which personal rights can be terminated by agreement between the parties.

The following diagram shows eight ways in which personal rights may be terminated:



3. DISCHARGE

(Textbook par 12.3)

A contract is entered into with the intention to fulfil the obligations that arise from it – hence the vast majority of contracts are performed properly by the parties. Performance of the obligation is called “discharge”. Discharge is the natural way in which a contractual relationship is terminated. Where the co-operation of the creditor is required to fulfil the obligation, discharge entails a bilateral juristic act, and where the co-operation of the creditor is not required, discharge entails a unilateral juristic act.

Usually discharge will take place, even if performance is not rendered by the debtor personally. Except in cases where performance is identified with the person of the debtor, proper performance can, for example, also take place by the debtor’s agent and through surety. Nonetheless, performance will still have to comply with the terms of the contract in respect of the performance itself, and the time and place of performance.

SECTION B: GENERAL PRINCIPLES OF THE LAW OF CONTRACT

Please note the following rules that apply if a debtor owes the creditor money in respect of several debts, and makes a payment:

- The contract between them may regulate how payment should be allocated.

OR

- The debtor has the right to stipulate towards which debts the money should be allocated.

AND

- In the absence of one of the above alternatives, the rules listed in par 12.3(a)–(d) of the textbook apply.

AND

- If none of the rules point to a certain debt (i.e. only capital is owed, all the debts are due at the same time, all of them are onerous debts and all were concluded on the same day), then the payment is split between them.

4. RESCISSION AND CANCELLATION

(Textbook par 12.4)

You should note the difference between rescission and cancellation. Rescission from a contract refers to the act of withdrawing from a contract due to reasons not relating to breach of contract, while cancellation refers to withdrawal from a contract due to breach of contract by the other party to the contract.

In the case of **voidable** contracts, the innocent party has the right to uphold or rescind the contract. If he or she decides to rescind the contract, the contract and its obligations are thereby terminated. Cancellation is one of the **remedies for breach of contract**. Once the innocent party exercises the right of cancellation, the contract is terminated.

ACTIVITY 12.2

In what circumstances can a contract be terminated by rescission and cancellation?

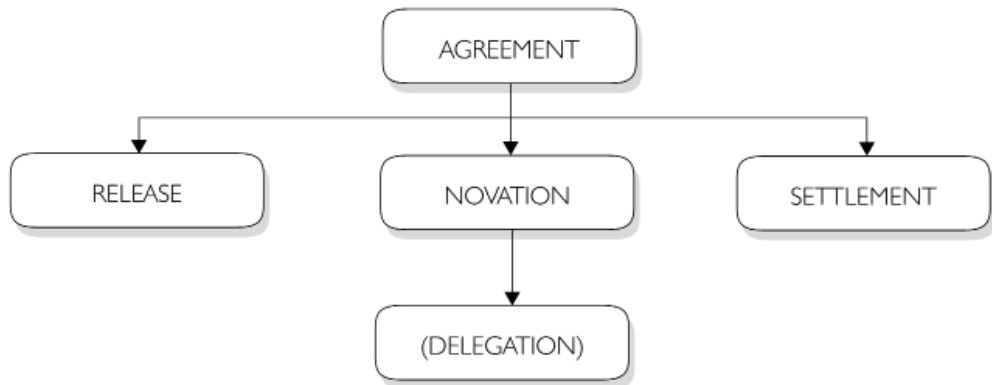
FEEDBACK

Rescission and restitution occur in cases where the contract is voidable (e.g. as a result of misrepresentation, undue influence or duress), whereas cancellation and restitution occur in cases where there has been breach of contract (and a right to cancel exists and is exercised), or where the parties reach consensus to cancel the contract (by concluding a cancellation agreement)

5. AGREEMENT

(Textbook par 12.5)

Obligations may be terminated by means of agreements between the parties to a contract whereby they agree to end the contractual relationship between them. Such agreements are release, novation and settlement.



The parties to a contract may agree in advance about the manner in which the contract may be terminated. A term to this effect, which could be express or tacit, is often included in contracts involving continuous obligations and with an unspecified duration. The exercise of such a contractual right of termination has the same consequences as cancellation following breach of contract.

If formalities for termination have been prescribed in the original contract, these formalities must be complied with. For example: The parties to a contract of sale may agree that the contract may be terminated only by written notice to the other party at a specified address.

5.1 Release

This type of agreement occurs when a creditor releases a debtor from his or her contractual obligations. Release or waiver may be concluded expressly or tacitly.

Example: John loans Ben an amount of R500. They agree that Ben will repay the full amount at the end of June. On 1 June, John and Ben agree that Ben no longer has to repay the amount. In this example, release was concluded expressly.

Note: John and Ben **agree** about the release. Release is an agreement. A mere offer of release does not constitute a release, since there is not yet consensus between the parties. Therefore, if John has decided that he does not want the R500 back, but he has not yet told Ben about his decision, Ben's obligation still exists. Also, if Ben insists on paying back the amount in accordance with their agreement (i.e. he does not accept the offer of release), John's personal right will still exist.

The following is an example of tacit release: John lent Ben an amount of R500. John and Ben agree that John will collect the money from Ben's home at the end of June. John decides to donate the money to Ben, so he does not go to collect the money at the end of the month.

Ben notices that John is no longer interested in the money and decides not to approach him about it either.

5.2 Novation

Novation is an agreement between the creditor and the debtor in terms of which an existing obligation is extinguished and a new obligation is created in its place. In this instance, an existing obligation is replaced with a new obligation, thereby extinguishing the existing obligation.

Example: John loans Ben an amount of R500. They agree that Ben will repay the full amount at the end of June. Subsequently they agree that Ben need not pay the R500, and that he will let John use his bicycle for a period of six months instead.

There must be a valid initial obligation before a valid novation may occur. Novation extinguishes this original obligation, as well as obligations that are accessory (related) to it.

Example: If, in the above-mentioned example, John and Ben had agreed that Ben would pay fifteen per cent interest on the R500 until the date of payment, the obligation to pay interest would also be terminated by their agreement on the use of the bicycle. As a result, no interest would be payable by Ben.

However, if the novation is void, the initial obligation remains in force, unless the parties have agreed to abandon it.

Example: If, in our example, Ben's bicycle **had already been stolen** when they agreed that he would let John use it for six months, the novation agreement would be void because of initial impossibility of performance. Ben would then still have to pay John the R500 and interest at the end of June, as agreed – unless the parties agree to abandon the initial obligation that Ben should pay John R500.

5.2.1 Delegation

Delegation is a specific form of novation and entails the transfer of a debtor's obligation(s). It occurs when a **new party** is introduced **as the debtor** in the place of the initial debtor. A legally valid delegation may take place only with the permission of the creditor.

Example: Thandi owes Anne R200. They agree that Thandi no longer has to pay Anne the R200 and that it will be paid by Thandi's friend, Betty, instead.

Delegation is illustrated in the following diagram:



It is important at this stage to note the difference between cession, novation and delegation. Cession pertains to the transfer of personal rights (see par 2 of this study unit and par 12.2 of the textbook). In this instance, a creditor is replaced, and performance is now due to a new creditor. In respect of novation, a new obligation replaces the existing obligation between the same parties, thereby extinguishing the existing obligation. In respect of delegation, an existing obligation by the initial debtor is replaced with a new obligation by a new debtor. The new debtor has to perform a new obligation that replaces the obligation of the existing debtor.

5.3 Settlement (*transactio*)

Settlement is also known by its Latin name, *transactio*. It is an agreement by which parties settle a dispute between them concerning an actual or supposed obligation.

Study the example in par 12.5.3 of the textbook. **Note** that the parties to the settlement do not agree about the existence of the debt. No valid debt is required for settlement to take place. In the example, Carla and Nell disagree about the amount that is owed. Settlement could also have occurred had Carla denied that she owed any amount at all.

Settlement terminates the original obligation (if indeed there was one). If the debtor does not perform according to the terms of the settlement, the original obligation may not be relied on – unless this was specifically provided for in the settlement.

If the debtor makes an offer in full and final settlement, it will be regarded as an offer of settlement only if it is clear that the debtor (offeror) disputes the existence or extent of the indebtedness. It will, however, not be regarded as an offer of settlement if it appears that he or she is making the offer because he or she admits liability for that amount (of the offer).

ACTIVITY 12.3

Chalkie lends David a sum of money and they agree that David will pay back the amount, plus ten per cent interest per month on the outstanding balance, over two years. David faithfully pays off the amount for a period of 18 months, but then falls into arrears. Chalkie calculates that the outstanding balance is R15 000, but David maintains that the outstanding balance can be no more than R7 000. After negotiating, they agree that David will pay back R10 000 immediately. The second agreement is an example of which type of termination of personal rights?

FEEDBACK

Settlement occurred. It would also be settlement if Chalkie and David agreed that David would pay the R10 000, even if David denied that he owed Chalkie any amount at all.

6. MERGER (*CONFUSIO*)

(Textbook par 12.6)

Merger, or *confusio*, as it is known in Latin, takes place when one person becomes both the debtor and the creditor in respect of an obligation.

Example: Steve rents a flat and pays the rental to the owner. He subsequently buys the flat. Once the flat is registered in Steve's name, his obligation to pay the rent is extinguished, because he is now the owner. A person cannot simultaneously be both lessor and lessee of the same property. Further, a person cannot contract with him- or herself (see study unit 3 above).

7. SET-OFF

(Textbook par 12.7)

Set-off takes place when debts that are owed reciprocally by two parties are extinguished. The debts must meet four **requirements** before they can be set off:

They must be

- (a) similar in nature
- (b) liquidated (monetary value is certain or can be ascertained)
- (c) claimable
- (d) between the same persons

Set-off automatically terminates the obligations by operation of law.

Example: Tshepo owes Linda an amount of R1 000 for the TV set she bought from her, and is payable at the end of May. In turn, Linda owes Tshepo an amount of R800, which she borrowed to pay her child's school fees; this amount is also payable at the end of May. Tshepo and Linda agree that Tshepo will pay Linda only R200. In this example, an amount of R800 is set off; as a result, a debt is extinguished partially by set-off.

8. IMPOSSIBILITY OF PERFORMANCE SUPERVENING AFTER CONCLUSION OF THE CONTRACT

(Textbook par 12.8)

Objective supervening impossibility of performance occurs when, **after** conclusion of the contract, performance becomes impossible as a result of an **external** factor beyond the control of the contracting parties.

Example: Rashid and Norman agree that Rashid will hire Norman's horse for a week. Even before the object of lease (the horse) can be delivered to Rashid, the horse is struck by lightning and dies. The contract of lease is terminated when the horse dies.

The supervening impossibility of performance also cancels any reciprocal obligations that may exist. Therefore, in the above example, Norman is released from the obligation to make his horse available to Rashid, and Rashid is released from his obligation to pay Norman for the lease of the horse.

Note the difference between the **initial** impossibility of performance (which relates to the forming of the contract), **prevention** of performance (a form of breach of contract) and **supervening** impossibility of performance (which arises after the conclusion of the contract).

8.1 The consequences of supervening impossibility of performance

Normally, supervening impossibility of performance, which was not the fault of either of the parties to the contract, extinguishes the obligations of the contract. Therefore, both the debtor and the creditor are relieved of their respective obligations.

Note, however, that the obligation is not terminated in the following instances:

- In contracts where the risk of supervening impossibility attaches to one of the parties. This may happen by operation of law or by agreement.
- Where supervening impossibility of performance occurs after the debtor has fallen in *mora* (see chapter 10 of the textbook).

8.2 Objective and subjective impossibility of performance

Subjective impossibility of performance concerns a specific debtor's inability to perform and does not relieve the debtor of his or her liability to the contract.

Example: Claudia concluded a contract to purchase a painting. When she wanted to pay, she discovered that the R1 000 with which she wanted to pay for the painting had been stolen from her purse. She can now no longer afford the painting. This is an example of subjective impossibility of performance, since it is only Claudia who is unable to perform. If, however, the painting had been destroyed in a fire, the performance (delivery of the painting) would have become objectively impossible, since nobody would have been able to deliver the specific painting.

Note that the subjective impossibility of performance does not terminate the obligation. Claudia is therefore not released from her obligations in terms of the contract. This must be distinguished from objective impossibility of performance that is not the fault of the debtor, which does not only terminate the obligation of the debtor, but also other counter-obligations in respect of reciprocal obligations.

8.3 Temporary and partial impossibility of performance

Where a divisible performance becomes partially impossible, the whole obligation is not terminated. The debtor is released only proportionately. Further, any counter-obligation in respect of reciprocal obligations is also reduced proportionately.

Example: Joseph and Roger agree that Joseph will use three of Roger's horses for a period of one month. One of the horses is subsequently killed by lightning. Roger is still obliged to make his other two horses available to Joseph and Joseph must pay for the use of the two horses for the month as well as for the use of the horse that was killed, for the time that he had enjoyed such use. The same principles apply where performance has become temporarily impossible in the case of a continuing obligation.

ACTIVITY 12.4

On 10 February Tom and Bayeza agree in London that Bayeza will design a wedding ring for Nosipho, Tom's fiancée. Tom pays the purchase price and they agree that the ring will be delivered to Tom in South Africa on 20 April for the wedding on 24 April. On 18 April a volcano erupts in Iceland and the volcanic ash covers the whole of Europe. Passenger and cargo planes are grounded for seven days. Tom purchases a ring at Joburg Glitters (Pty) Ltd in Sandton Square on the morning of the wedding. The ring designed by Bayeza is delivered to Tom on 26 April.

Discuss the consequences of the delay caused by the natural disaster.

FEEDBACK

Supervening impossibility of performance occurred: Performance (delivery of the ring) became impossible as a result of a natural disaster, and not as a result of the fault of any of the parties. Supervening impossibility of performance occurs when the performance in terms of the contract becomes impossible after the conclusion of the contract. In this set of facts, performance was possible at the time of the conclusion of the contract. The volcanic eruption was a natural disaster for which neither Bayeza nor Tom was responsible. The obligations of both parties terminated when the supervening impossibility of performance occurred.

9. PRESCRIPTION

(Textbook par 12.9)

9.1 The nature of prescription

Prescription has to do with the passage of time. It is possible to acquire rights through the passage of time, which is known as **acquisitive prescription**. However, here we are concerned with **extinctive prescription**, which is the release from obligations through the passage of time. Prescription starts running as soon as the claim becomes **enforceable**. If the parties have agreed that payment in respect of a debt will be due on a certain date, prescription will start running on that date. Further, a debt is claimable if the creditor has knowledge of the identity of the debtor and the facts that brought about the debt. A creditor is deemed to have such knowledge if such knowledge could have been acquired by exercising reasonable care.

The **Prescription Act 68 of 1969** provides that completion of prescription may be delayed in cases where the creditor is, for some reason, temporarily unable to enforce his or her rights (see par 12.9.1(a–e) of the textbook).

9.2 Prescription periods

The prescription periods are set out in par 12.9.2 of the textbook. These are periods within which a creditor is supposed to enforce his or her claim. Failure to enforce the claim will result in the claim lapsing and the debt being extinguished.

10. SEQUESTRATION AND SUBSEQUENT REHABILITATION

(Textbook par 12.10)

As a rule, sequestration does not terminate contracts concluded by the insolvent before he or she became insolvent, but certain contracts are terminated. A contract of mandate, for example, is terminated when the estate of the mandator is sequestrated. Once the insolvent has been rehabilitated, all obligations arising from those contracts that continued after sequestration are extinguished, unless they arose from fraud on the part of the insolvent.

 SELF-ASSESSMENT ACTIVITIES

- (1) Distinguish between cession, novation and delegation.
- (2) Draw a distinction between rescission and cancellation as forms of termination of personal rights.
- (3) Explain the difference between discharge and settlement.
- (4) What are the consequences of supervening impossibility?
- (5) Subjective impossibility of performance does relieve the debtor of his or her liability to the contract. True or false?
- (6) Describe release as a form of termination of personal rights.
- (7) What is "set-off"?
- (8) Draw a distinction between merger and set-off.
- (9) Name four requirements for set-off.
- (10) What is the underlying idea of prescription?
- (11) Under which circumstances will completion of prescription be delayed?

11. EXPLANATORY NOTES

Cedent: The person who transfers a personal right to another.

Cession: The transfer of a personal right from one party to another.

Cessionary: The person to whom a personal right is transferred.

Counter-claim: A valid claim that a debtor may use to oppose a creditor's claim.

Delegation: A specific form of novation that terminates the debtor's obligation(s) because a new debtor is now responsible to the creditor for performance. **NB:** Delegation can occur only with the creditor's approval.

Discharge: The performance of an obligation.

Mala fide: In bad faith.

Novation: An agreement between a creditor and a debtor in terms of which the old obligation between them is extinguished and a new obligation is created in its place.

Prescription: The acquisition of rights or release from obligations through the passage of time.

Set-off: The extinguishing of debts owed reciprocally by two parties.

12. AFRICANISATION AND COMMERCIAL LAW

After parties to a contract have performed (i.e. discharged all their duties) in terms of the contract, they are released from the contract, as their obligations in terms of the contract will have been extinguished. The law provides parties to a contract with different ways in which their personal rights can either be (lawfully) transferred or terminated. In the spirit of *ubuntu* it is fair if parties are able to settle disputes emanating from contracts they have concluded. Resolving disputes according to the principles of *ubuntu* saves parties to a contract money and time. Further, it promotes and protects the parties' rights to equality and human dignity in their contractual dealings with one another.