

# 1. The South African Legal System

Law is a social science.

South African Law is not codified: recorded in one comprehensive piece of legislation.

## **Origin:**

- Indigenous legal systems applied at the southernmost tip of Africa before 1652.
- Jan van Riebeeck arrives in Cape Town in 1652 and the adoption of Roman-Dutch law as a legal system to the Cape.

## 1.1 A SHORT HISTORY OF THE LAW

- Unlike most European continental legal systems, SA law is not codified:
  - It is drawn from various authoritative sources
  - Such as statutes (legislation) and decided cases
  - Occasionally also Roman and Roman-Dutch law.

### **Roman Law**

- 735BC to AD658
- *The Law of the Twelve Tables of 449BC* were the cornerstone of the future development of Roman Law
- Attempts to codify the law led to the *Corpus Iuris Civilis (body or civil law)* which is still the primary authoritative source of Roman Law.

### **Roman-Dutch Law**

- Roman Law was revised in the Netherlands during the 15<sup>th</sup> and 16<sup>th</sup> centuries and became mixed with the existing Dutch customary law.
- Some great Roman-Dutch Jurists:
  - Hugo de Groot "Father of Roman-Dutch Law"
  - Johannes Voet
  - Dionysius Godefridus van der Keesel
  - Johannes van der Linden

### **English Law**

- After 1814, English Law began to seep into the existing Roman-Dutch system:
  - A jury was introduced
  - New legislation e.g. criminal often drew on English law
  - A number of statutes in existence today are squarely based on English legislation e.g. Bills of Exchange Act.

## 1.2 SOURCES OF LAW IN SOUTH AFRICA

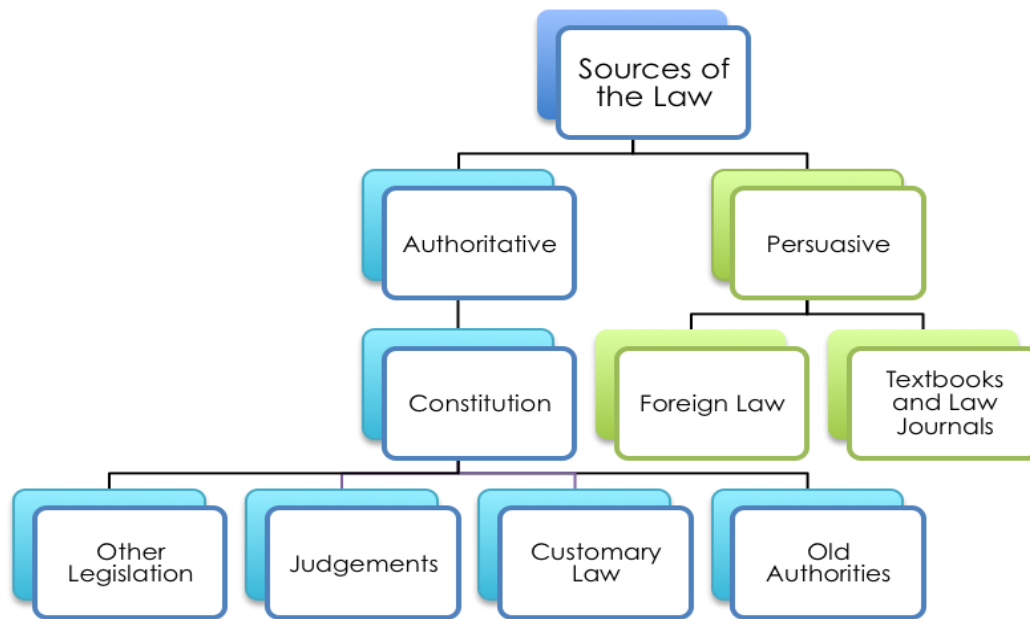
- Some are authoritative: courts are bound by authoritative sources
- Others have merely persuasive authority: serves to convince a court to apply or interpret a rule in a particular way.

**Corpus Iuris Civilis:** codification of Roman law that is a primary authoritative source on which South African courts draw when reverting to Roman Law to solve a legal problem.

### **Statute law or legislation**

- The most important source of law
- Can be explained as the making of law by a competent authority
- To be found in: Statutes, Proclamations, Regulations, By Laws.
- The most important piece of legislation:
  - The Constitution of the Republic of South Africa, Act 108 of 1996.

The order in which SA law is consulted:



### Customary law

- Does not consist of written rules but develops from the *habits of the community* and is carried down from generation to generation
- A customary rule will be recognized as a legal rule when:
  - It must be **reasonable**
  - It must have **existed for a long time**
  - It must be **generally recognized** and observed by the community
  - It must be **certain and clear**

### Judgments of the Courts

- An authoritative source of law known as case law
- Traditionally divided into superior and lower courts
- More important judgments are reported

### The old authorities

- This body of law comprises the common law, i.e. the works of the old writers referred to above.

### Foreign Law

- A judge will to the law of other modern countries if nothing can be found in any of the above sources
- No authoritative but a persuasive only
- Recognized as a source of law in the Constitution

### Textbooks and law journals

- Works written by lawyers, e.g. legal academics, advocates and attorneys
- No inherent authority of their own but may be persuasive

## 1.3 THE COURTS IN THE REPUBLIC

### The Constitutional Court

- Jurisdiction as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of the constitution
- Seat of the court is in JHB, 11 judges with chief justice.

### The Supreme Court of Appeal

- A Court of Appeal for the Higher Courts

- Unlimited appeal jurisdiction:
  - The exception being matters within the exclusive jurisdiction of the Constitutional Court.
- The seat of the court is in Bloemfontein

### **The High Courts**

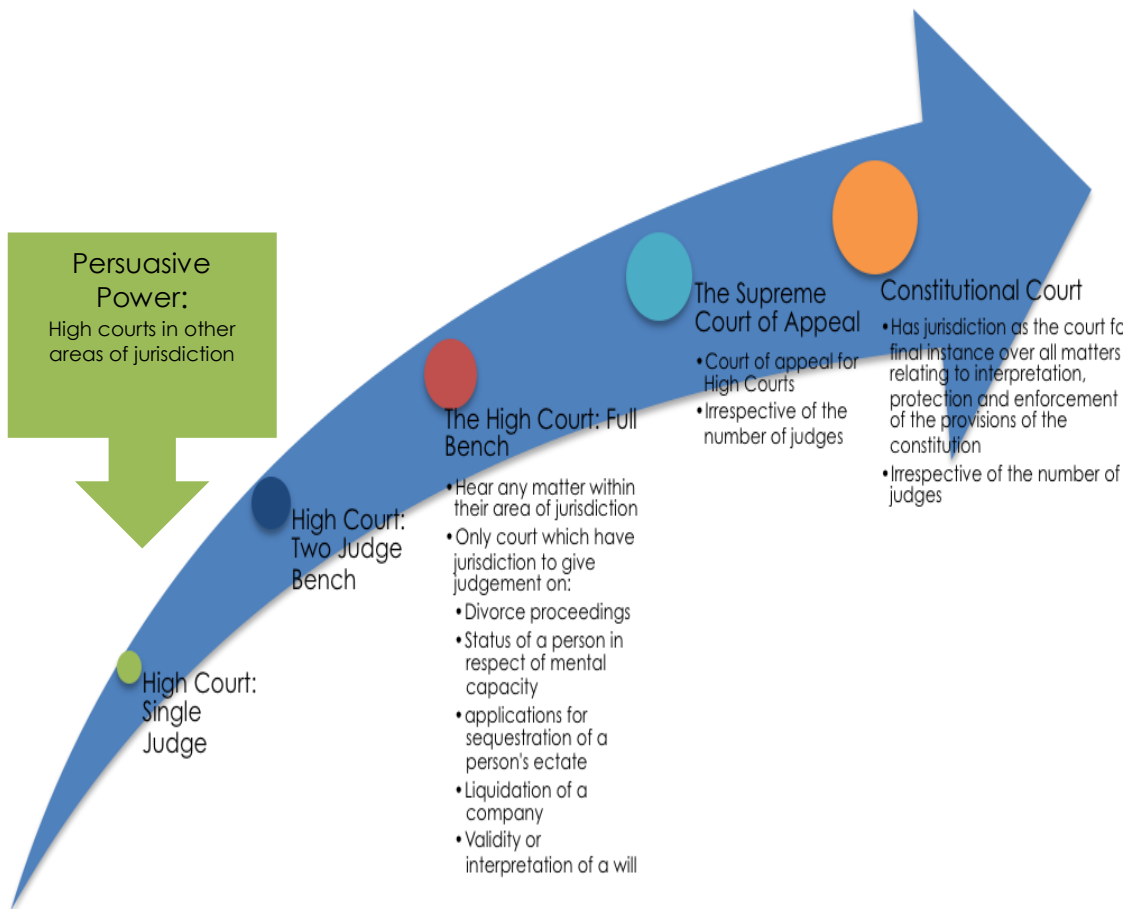
- Consists of a number of divisions with approx. one division per province
- Have original jurisdiction within their area of jurisdiction
- Only courts which can hear:
  - Divorce proceedings
  - Status of a person in respect of mental capacity
  - Applications for sequestration
  - Liquidation of a company
  - Validity or interpretation of a will.

### **Officers of the superior courts**

- Registrars are appointed in each superior court
  - Responsible for the smooth functioning, e.g. issue of process.
- Sherrifs are appointed for each high court
  - Duty to serve, process and execute judgments and orders of the court
- Masters are appointed in some high courts:
  - Administrative and quasi-judicial functions
  - Deceased and insolvent states
  - Liquidation and judicial management of companies
- Legal practitioners are the advocates and attorneys

### **Magistrates Courts**

- Limited jurisdiction by comparison with the high courts



## 1.4 THE DOCTRINE OF STARE DECISIS

The judgments of the superior courts are one of the most important sources of the law.

- The function of a judge is to state, interpret and apply the existing law but not to make a new law. Extensions of common made law lead to **judge-made law**. Nevertheless, the effect of a judicial decision which gives new interpretation to a statutory provision or which abstracts, extends or adapts a common law principle, is in many cases to create law. Law so created is termed '*judge-made law*'. Because a later court does not depart lightly from the decisions of an earlier court, this judge-made law becomes established legal rule.

The court or judge does not purposefully set out to create a law.

### **Application of the Doctrine**

**Stare Decisis:** *The decision stands.*

- A court is bound by its own decisions unless and until they are overturned by a superior court:
  - Unless exceptional circumstances exist such as the previous decision is clearly shown to be wrong.

### **The doctrine of stare Decisis and the hierarchy of courts**

- Every court is bound by the decisions of the superior court within its area of jurisdiction.

- Thus a High Court regardless of the amount of judges is bound by the decisions of the Supreme Court of Appeal; a bench of 2 judges is bound by a decision of the full bench and a single judge by the decisions either of the two just mentioned.
- Every court is bound by the decision of a court of **concurrent status** within its own area of jurisdiction.
- Thus the Supreme Court of Appeal is bound by its previous judgments. A full bench of a High Court is similarly bound by an earlier full bench decision.
- One High Court is not bound to follow the decisions of another High Court since they belong to different jurisdictions but will however serve as a persuasive authority.
- Magistrate's courts are bound by the judgments of the Supreme Court of Appeal and the High Courts. If the judgments of the High Courts are conflicting, a magistrate should follow the decision of the High Court in whose jurisdiction it falls.

**Ratio Decidendi:** *The reason for the decision* – which is binding and which is the subject of the doctrine of stare Decisis.

The ratio decidendi is binding on subsequent courts. Any statement, which falls outside the ratio decidendi, is known as the: **Obiter Dictum** or *incidental remark*

## **1.5 THE DOCTRINE OF STARE DECISIS**

### **The relationship between stare decisis and interpretation of statutes**

- Theoretically parliament make the laws and the judiciary apply them
- In practice courts interpret the statute and a lower court will therefore apply the higher courts interpretation of the statute.

### **The influence of the constitution**

- Any statute which conflicts with the constitution can be replaced
- Courts are instructed to look outside the words of a specific statute to interpret a meaning
- A court is required to interpret legislation to promote the spirit, purport and objects of the Bill or Rights.

### **General Principles**

- Two of the most important principles are:
  - The meaning of a provision must be determined by its language and its context in the legislation read as a whole.
  - Any reasonable interpretation of a provision consistent with the purpose and scope of the legislation must be preferred over any alternative interpretation that is inconsistent with its purpose and scope.

## **1.6 COURT JUDGEMENTS**

### **Ratio Decidendi**

- Latin for **“the reason for the decision”**
- The portion of the case which is binding and therefore the subject of stare decisis
- First the material facts of the particular case are considered before deciding where a previous ratio decidendi is binding or not

### **Obiter Dictum**

- An incidental remark “by the way”
  - i.e. any remark which falls outside of the ratio
  - e.g. a hypothetical situation is posed and discussed
  - includes reasons given in minority judgment
- Not binding but may have strong persuasive authority.

## **Distinguishing judgments**

- Occurs when a judge decides that the ratio of a previous decision is not binding on the present decision
  - E.g. the principle applied was too broad and therefore does not fit the present facts.

## **Typical aspects of a judgment**

- **V** refers to versus
- **Headnote**: summary of the gist of the judgment
- **Semle**: means that this appears to be the case according to the judgment although no point has been settled.
- **Generally** sets out whether the decision followed or departed from previous decisions.
- **Reversed** means that an appeal (in the same matter) was successful
- **Confirmed** means that the lower court decision was followed.
- **Cur adv vult** means the court wishes to consider its decision
- **Postea** means afterwards and refers to the date on which judgments were actually delivered
- The order appears at the end of the judgment.

# **2 The Science of Law**

## **2.1.1 THE TERM LAW**

- Any society has need for rules to govern relationships between people
- “Law” refers to system rules, which apply in a community.
- “Right” means any right which a legal subject has regarding a specific legal object and which is protected by law.

## **2.1.2 THE MEANING OF LAW**

### **Public Law**

- Legal rules which control the relationship between state and citizens.
- Divided into:
  - International
  - Constitutional
  - Criminal
  - Administrative
  - The law of procedure

### **Private Law**

- Legal rules which control relationships between citizens
- Divided into:
  - The law of persons
  - Family law
  - The law of personality
  - Patrimonial law

### **Commercial Law**

- Is set out as a further category which relates to business activities.

- Insolvency law
- Company law
- Law of agency
- Security
- Insurance law
- Labour law
- Tax law

### **The Meaning of “Right”**

- Refers to any right which a legal subject has over a specific legal object and which is protected by law. Referred to as subjective law, determined by objective law.

### **Legal object**

- Refers to an entity which can be the object of a legal subject's claim to a right.
- It can be property, intellectual property, aspects of personality, performance

### **Legal Subjects:**

- Every human being is a legal subject. Comes into existence at birth and is terminated by death
- Two types of persons:
  - Natural persons – a human being, can have rights and duties as a legal subject.
  - Juristic persons – Artificial, created by statute which do not have all rights of a natural person, e.g. close corporations, companies, universities.

### **Subjective Right**

- Refers to the relationship between a *legal subject and a legal object* as well as between a *legal subject and other legal subjects*.
- **Real Right** – i.e. right which a legal subject has to property
  - **Ownership** – This is the most comprehensive real right
  - **Servitudes**
    - *Praedial servitudes* – Confer a limited right over property of another in capacity as the owner of an adjacent property, e.g. for grazing
    - *Personal servitudes* – Confer the right of use and enjoyment to another person's property, e.g. a usufruct
    - **Mortgage and pledge** – this is a right of security in respect of property mortgaged or pledged. The property can be sold if debtor fails to pay.
- **Intellectual property** – a right to intellectual property, e.g. patents, trademarks, copyright
- **Personality right** – rights relating to aspects of personality, e.g. a right to physical integrity.
- **Personal right** - A right in which performance can be demanded from another person, either in the form of refraining from doing something.

## **2.2 PRIVATE LAW**

### **The law of persons**

- This refers to private law which regulates:
  - The conception
  - The existence
  - The termination of natural persons as a subject.
- It determines:
  - Who are legal subject
  - How one become a legal subject
  - Classes of legal subjects

- What is the status of each class of legal subject
- Every human being can be a bearer of rights
- Legal personality comes into existence at birth
- The rights of unborn children are also protected to some extent
- Juristic personality is terminated by death (law protects the body)
- Minors may not have the same rights as adults (majors)
- Status is determined by law
- Factors which determine a persons status are:
  - Age, sex, marital status, sanity, capacity to vote, etc.

#### **Family Law:**

- Law of family comprises two subdivisions:
  - The law of husband and wife
  - The law of parent and child (parental authority)
- Law of family has nothing to do with relations between relatives

### **2.3 LAW OF PERSONALITY**

- A person has rights in respect of their physical being, dignity, reputation and privacy.
- Right not to be unlawfully assaulted – criminal law: assault is a crime; civil law: sue perpetrator for damages in delict.
- Also have the right not be insulted or defamed, subject to limitations.

### **2.4 PATRIMONIAL LAW**

- Persons right and duties which is valued in money

#### **The Law of Property**

- The relationship of persons towards material objects
- The nature and extent of the legal power enjoyed depends on the real right held:
  - Right of ownership is a real right and the most comprehensive right
- More than one real right can subsist in the same property.

#### **The right of ownership**

- This confers the most complete power over property: use, enjoy, destroy, sell, etc.
- This does not mean unlimited control: the restrictions of public law: sanitary, building regulations, prevention of division of land etc.
- Ownership is always restricted in the interests of the community

#### **Ownership and possession**

- *Ownership*: right of ownership
- *Possession*: Has physical control over property and at the same time has the required intention of possessing – need not be direct and immediate control.

#### **The acquisition of ownership**

- Ways in which ownership is acquired
  - Original methods
    - Occupation
    - Prescription
  - Derivative methods
    - Delivery (movables)
    - Registration (immovable)

#### **Original methods of acquiring ownership**

##### **Occupation**



- If one seizes property belonging to no-one, with the intention of becoming its owner, one acquires the right of ownership over the property
- However, if the property did belong to someone prior to you taking possession, you require them to renounce right of ownership before you acquire the right of ownership
- Establish an *original right* of ownership

### **Prescription**

- A person can become owner of a property by means of prescription if possessed it openly as if she were the owner for an uninterrupted period of **thirty years**
- Create the impression that the possessor is actually the owner
- Establish an *original right* of ownership after owner has lost ownership

## **Derivative methods of acquiring ownership**

### **Movable Property**

- Delivery of property: Seller must deliver movable property to the buyer or beneficiary and it must be *the intention of both the transferor and transferee* that the right be transferred and acquired
- If either party lacks this intention, ownership does not pass

### **Immovable property**

- The right of ownership over immovable property is acquired by the registration of the transfer at the deeds office.

### **The protection of ownership and of possession**

- The law protects ownership and possession
- Ownership is protected primarily by granting the owner the remedy known as the **rei vindicatio**.
- An owner may claim property from a person who is wrongfully in possession of it.
- The remedy with which possession is restored is called the **mandament van spolie**.

### **Servitudes**

- A right of servitude is a limited real right over the property of another,
  - Praedial or
  - Personal

#### **Praedial servitudes**

- The owner of a piece of land that has certain powers in regard to the adjacent land belonging to another
  - *Dominant tenement*: The owner who is the holder of the servitude
  - *Servient tenement*: the owner who has to permit the exercise of the powers conferred by the servitude
- Most common method of acquiring servitude is by **registration at a Deeds Office** against the title deeds of the dominant and servient properties: both owners normally agree on the granting of the servitude
- May also be obtained by **prescription**

#### **Personal servitudes**

- *Usufruct or life-interest*
- Usufructuary has the power to use and enjoy the property of another
- The property, however, may not be destroyed or substantially altered
- The usufruct may not be transferred to another by selling
- Usufruct is granted for the lifetime of the Usufructuary. Usufruct is obtained by **registration**, usually in terms of a testamentary deposition (gift of property under the terms of a will)

## **Mortgage and Pledge**

- Both constitute ways of securing debt
- Mortgage
  - Limited real right over immovable property on which another has ownership
  - Obtained by registration
- Pledge
  - Movable property
  - Acquired through agreement and **delivery** of property.

## **The Law of Succession**

- When a person dies, he leaves behind what is known as a deceased estate which consists of all his assets and liabilities
- The estate is administered by the executors under letter of executorship granted by the Master
- After payment of all debts, the remaining balance is distributed amongst the heirs and beneficiaries
- If there is no will, the rules of **Intestate Succession** will apply
- If there is a will, the rules of **Testate Succession** will apply

## **The Law of Intellectual Property**

- These are incorporeal (cannot see or touch) immaterial rights that have economic value.
- The law protects the bond between creator and creation.
- The most important rights are copyrights, patents, trademarks, goodwill, and models.
- Governed by legislation

## **The law of obligations**

- Refers to the situation when personal right come into existence between legal subjects, the bond or legal relationship between legal subjects is an obligation.
- If two parties conclude a contract, an obligation arises in terms of which one party has the right to demand performance and the other an obligation to perform as agreed.
- Parties are *obligee* (right to demand) and *obligor* (obligation to perform).
- The most common ways in which obligations arise are:
  - Delict
  - Contract
  - Unjustified enrichment.

## **Introduction to Law of Delict**

- An action to recover damaged or loss suffered at the instance of another
- Compensation for damages suffered by a person can be recovered from another person only if there are legally recognized.
- The law of delict lays down the requirements for acts causing damage to qualify as a delict and what remedies are available.

## **Definition of Delict**

- A delict is any unlawful culpable act whereby a person "*the wrongdoer*" causes the other party "*the person prejudiced*" damage or injury to personality whereby the prejudiced person can claim damages or compensation.
- The elements of delict are:
  - a) An act
  - b) Unlawful
  - c) Fault
  - d) Causation
  - e) Damage or injury to personality

## A) **An Act**

- Any voluntary human conduct
- Need not be willful
- Only human beings
- Any human conduct which at the time of relevant activity was capable of being exercised under control of the will is an act.

## B) **Unlawfulness**

- Not all acts that are harmful to others are delicts
- Before an act is deemed a delict it must be unlawful
- Acts are unlawful if:
  - The rights of another are infringed
  - Wrongdoer has a duty to take care and breaches that duty
- The following *grounds of justification* exist
  - **Necessity**
    - When a person is, through external forces, placed in such a position that the persons legitimate interest can only be protected through reasonable infringement of the rights of another.
    - The purpose of an act of necessity is to protect the interest of the perpetrator or of a third party against dangerous situations
  - **Self-defence**
    - When a person, in a reasonable way, defends himself against actual or imminent unlawful attack by another.
  - **Consent**
    - A person legally capable of expressing his will freely gives consent to injury or the risk of injury and the act is morally correct and with the consenting party being aware of the nature and seriousness of possible consequences.
    - Consent can be given expressly or tacitly
    - Consent not given freely is invalid
  - **Statutory authority**
    - A person does not act unlawfully if he performs an act while exercising a statutory authority: the statute must authorize the infringement of the right concerned and the conduct must not exceed the bounds of authority conferred by the statute
  - **Provocation**
    - The provocative conduct itself must be of such a nature that a reaction is reasonable and therefore excusable
    - The conduct of the provoked person must constitute an immediate and reasonable retaliation against the body of the other person

## **Fault**

- An unlawful act must also be the wrong-doers fault
- A wrong-doer is at fault when he has acted intentionally or negligently
- The wrong-doer must have reached a sufficient level of mental development
- The law lays down that insane persons and children under the age of 7 are not capable of having a blame-worthy state of mind
- If the wrong-doer and the injured are both at fault, both are 50% negligent and the damage is divided in proportion to the respective degree of negligence

## **Causation**

- A wrong-doer can only be held liable for consequences that he has legally caused
- Two causes
  - Factual causation

- If there is a factual link between the wrong-doer and the damage.
- Determined by the condition sine qua non test (the act is an indispensable condition for the damage to arise)
  - Legal causation
- Where there is a sufficiently close relationship between conduct and consequences.

### **Damage or injury to personality**

- To incur delictual liability, a person must have caused another patrimonial damage or impairment of her personality
- A person suffers damage if, as a result of another's act, his estate becomes smaller than it otherwise would have been.
- The person's estate must be then restored to the position it was before the occurrence of the delict
- Impairment of personality does not amount to patrimonial damage and is difficult to assess the extent of the harm suffered: the court grants compensation calculated on what is fair and just.

### **Remedies**

- In the case of delict, apply to the court for an *interdict*, which compels the other person to discontinue his activities.
- If a person has already caused harm by his unlawful and culpable conduct, a *claim for compensation* exists and payment of damages for proved *patrimonial loss* (damage to estate), sentimental damages and compensation for pain and suffering.
- The *actio legis Aquiliae* (delictual action) is aimed at recovering patrimonial damage - economic loss or loss, which can be assessed in terms of money.
- The *actio iniuriarum* is aimed at recovering compensation for injury to personality or non-patrimonial (sentimental/emotional)

### **The law of unjustified enrichment**

- It is a principle of that nobody should be enriched at the expense of another
- There is no *valid legal* ground for the person who has obtained the benefit to do so.
- The claim is limited to the amount of the actual enrichment
- If it was contractual, the parties must be contractually liable

### **The obligation imposed upon the enriched person is:**

- **Restitution:**
  - A person who has delivered or transferred money or property which is not due to another person, may recover that money or property from the other person because:
    - 1) **Payment in error – paid person by mistake**
      - Payment or delivery was made under a mistake
      - The mistake was reasonable
      - Payment or delivery was not made on condition that it would not be recoverable
      - Payment or delivery was not made by way of a compromise
    - 2) **Payment under Contract which is invalid due to illegality**
      - Payment or delivery under a contract which is invalid owing to illegality
      - A party to an illegal contract, who has delivered property or money to another party, may recover what has been delivered, provided that he is not equally guilty as the person from who the money is being claimed.

- If this is the case, the *par delictum* rule will prevent recovery
- **Compensation:**
- The obligation to compensate the person at the expense of whom one has been unjustly enriched, the following circumstances may arise:
  1. **Partial performance**
    - If part of the performance has been delivered, the amount claimed will amount to the portion that has enlarged the estate of the other party
  2. **Improvements to property**
    - Improvements by a tenant become property of the true owner.
    - The person who did the improvements can claim the improvements
    - The claim will be equal to the lesser of the defendant's enrichment or the claimant's impoverishment
    - Should the true owner not wish to accept the improvement, it must be removed on condition that the removal will not damage the property.
  3. **Negotiorum gestio**
    - Arises when one person, without the permission or knowledge of another person, manages the affairs of the last-mentioned.
    - If the person whose affairs are being managed accepts the negotiorum gestio, he is obliged to compensate the person who has managed his affairs for all the expenses incurred in so doing.

## **3 Law of Contract**

### **3.1 CONTRACTS AS A SOURCE OF LEGAL OBLIGATION**

A contract is an agreement, which is concluded between two or more parties with the serious intention of creating legally enforceable obligations, and which meets the requirements as set by the law for the formation of a contract.

#### **Obligation**

- A conclusion of a contract gives rise to legal obligations
- An obligation is a title given to personal rights parties acquires them to receive performance or oblige them to perform.

#### **Agreement**

- A contract is a type of agreement
- But, not all agreements are contracts, e.g. social appointments
- Where parties have the intention that their agreement will create legally enforceable rights is a contract.

#### **Two or more parties**

- A contract cannot be concluded by oneself
- A contract can be concluded by two or more parties

### **3.2 REQUIREMENTS FOR THE FORMATION OF A VALID CONTRACT**

- a) **Consensus:** All parties must agree on the objectives of the contract
- b) **Capacity to act:** Must be legally capable of performing the act of entering into and concluding the contract
- c) **Juridical possibility:** The agreement must be juridically possible (legally possible)
- d) **Physically possible:** Duties must be physically executable
- e) **Formalities:** if any, must be observed

## Freedom to contract

- Freedom of contract describes the freedom to choose who to contract with and on what terms
- This is a fundamental principle which governs modern law
- The freedom is not absolute and is limited in places
  - Unlawful contracts are prohibited
  - Promotion of equality and unfair discrimination act 4 of 2000
    - Prohibits unfair discrimination
    - May force people to contract with those whom they do not voluntarily choose to do so.

## Contracting electronically

- The Electronic Communications and Transactions Act 25 of 2002 regulates all electronic transactions (e-commerce)

# 4 Consensus

## 4.1 THE CONCEPT OF CONSENSUS

### Consensus can be reached only if:

- Every one of the parties has the **serious intention** to be contractually bound
- The parties have a **common intention**
- Every party makes his **intention known** to every other party by means of a declaration of intention

### The intention to be contractually bound

- Every party must have the serious intention to be contractually bound.
- Excludes:
  - **“gentlemen agreements”** where parties are bound by good faith only
  - **Social agreements**
  - **Puffing** – excessive statements to highlight the good qualities of an object such as “sales talk”

### Common intention

- Both parties must intend to create the **same legal relationship**
- Both parties must have the **same idea in their heads**, and agree on the legally binding rights and duties.

### Making the intention known

- Both parties must be mutually aware of the others intention
- This can be done in **writing, orally, by means of conduct**.
- One party will usually indicate his intention, the other party their assent thereto.

## 4.2 OFFER AND ACCEPTANCE

### The concept of offer and acceptance

- An offer is a **declaration** made by a person (**the offeror**) in which he proposes an intention to be contractually bound by mere acceptance of the offer and in which the person sets out his rights and duties.
- Acceptance is a declaration of the offer by the person to whom the offer was addressed (**offeree**) through which it is indicated he agrees to the terms of the offer as it stands.

### Requirements for the offer and acceptance (six requirements)

1. An offer is made with the intention of being **legally bound** by mere acceptance thereof: Acceptance thereof is made with the intention of being legally bound to the offer exactly as it is
2. The offer must be **complete**
3. Offer and acceptance must be **clear and certain**
4. The offer and acceptance may be required to be made in a **certain manner**
5. An offer addressed to a **particular person** can only be accepted by that person unless it was an offer to all persons.
6. Offer and acceptance are only completed **once communicated**

### **2.3 THE FALLING AWAY OF THE OFFER**

- **Expiry:** an offer limited to a certain time falls away if it has not been accepted
- **Revoked:** the offeror withdraws, revokes or annuls the offer before acceptance
- **Rejection:** if the offeree rejects the offer, the offer falls away and cannot be revived
- **Counter-offer:** if the offeree rejects the offer with a counter offer e.g. the offeror: I offer to sell this dishwasher for R500. The offeree: I will buy it for R450. The initial offer falls away and the offeree becomes the offeror and vice versa.
- **Death:** either the offeror or offeree dies before acceptance.

#### **The continued existence of the offer - *The option***

- It is possible to entrench the continued existence of the offer by means of an option or a safeguard
- The offer cannot be withdrawn while the safeguard exists.
- The safeguard is a separate contract: **an option**
- The option-giver makes an offer to conclude a particular contract (the substantive offer) and in addition makes a further offer to keep the first offer open for a specified period (the option)
- If the offeree accepts the second offer (the option), the option contract comes into being.
- The offeror is bound to keep the substantive offer for the agreed period and can neither revoke the substantive offer nor conclude a contract with another party concerning the same subject.

### **4.4 SPECIAL RULES TO OFFER AND ACCEPTANCE**

#### ***An invitation to make an offer***

- A request or invitation to make an offer or to do business is not a true offer e.g. a butcher advertises bulk chops on his shop window for R49.99. This is not an offer. It is an invitation to do business. E.g. advertising or price of goods in shops
- When a member of the public reacts to this invitation, he or she is making an offer to purchase the displayed or advertised item. When the dealer accepts the offer, consensus is reached and a contract of sale arises.

#### ***Statements of intent***

- **'statement of intent'** - This indicates the party's intention to contract, as opposed to offering to do so. Basis of further negotiation.

#### ***Offers of reward***

- The person that offers a reward or prize makes a public offer that he will give a reward or prize to any member of the public who performs a specific task in a specific

manner. The person who provides the information and does so with the intention of accepting the offer has, by this act, accepted the offer.

- On the basis of the person's acceptance, consensus is reached and a contract arises.

### **Options**

- If an option has been added to a substantive offer, the substantive offer cannot fall away until the time period given on the option has elapsed or the offeree rejects the substantive offer.

### **Calling for tenders**

- Where a tender is called for, the person calling for the tender does not bind himself to accept the lowest or best offer
- Merely a request to for the public to submit offers to be accepted or rejected.

### **Auctions**

- Certain rules relating to the sale are made known prior to the auction by either advertisement or by reading them out to those that are present.
- Every person who makes a bid does so subject to the conditions of the auction.
- These conditions form the basis of the distinction between auctions made subject to or not subject to reservation.
- Auctions are usually held subject to reservation unless stated otherwise.
- Subject to reservation
  - If the auction rules state that the goods will only be sold if predetermined prices are fetched or exceeded.
  - The auctioneer extends an invitation to those present to make an offer.
  - The person bidding makes an offer and becomes the offeror.
  - The auctioneer can either accept this offer or reject it, regardless of whether it is the highest bid.
- Not subject to reservation
  - The auctioneer is making the offer to sell to the highest bidder
  - The person making the highest bid then accepts the offer.

## **The moment and place of formation of a contract**

- A contract arises at the moment when, and at the place where consensus is reached.
- *The exact moment* of consensus is important in order to decide whether the offer can still be revoked, whether the offer has expired as a result of the passage of time and when the contractual duties become enforceable, e.g. when payment of interest must commence, et cetera.
- *The place* of formation is important in determining the court which has jurisdiction to hear a claim in connection with the contract

### **4.5 THE MOMENT AND PLACE OF FORMATION OF A CONTRACT**

- The contract arises the moment and the place where consensus is reached.
- *Moment* is important as
  - The offer may have lapsed
  - The offer may have already been evoked
  - The option may have expired
  - Contractual duties become enforceable
  - Interest may start occurring
- *Place* is important due to the jurisdiction of the court or applicable laws.



### **Where the offeror and offeree are in each other's presence**

- It is usually easy to determine the time and place of the formation of the contract.
- The contract comes into being when the acceptance is communicated and at the place where the parties happen to be at that point in time, even if it were done telephonically. Offeror hears of acceptance at the same time that the acceptance is made.
- This is known as the **information** or **ascertainment theory**, according to which the contract comes into being when and where the offeror learns of the acceptance of his offer.

### **Where the parties are not in each other's presence**

- When the offeror and offeree are not in each other's presence when the offer is accepted, the acceptance is not communicated directly to the offeror, but via another medium.
- When the contract is concluded by post, there is no instant communication and the rules are different
- In these cases the **dispatch** or **expedition theory** applies.
- The contract comes into being at the place where and the time when the letter of acceptance is posted, unless the parties stipulate otherwise.
- The dispatch theory is aimed at protecting the offeree.
- If the offeree tries to withdraw his acceptance by means of a speedier method of communication e.g. faxing or telephoning to reject his acceptance, his original acceptance will be ignored, as long as it has not reached the offeror already.
- If the offeror states that the acceptance must come to his or her attention, then the dispatch rule does not apply and the contract is concluded at the point of when the letter has reached the offeror.

### **Electronic agreements**

- The particular circumstances of the case will determine which theory will apply, and with it time and place that the contract was concluded.

## **4.6 CONSENSUS AND DEFECTS IN WILL**

- If consensus is absent because of a material mistake, no valid agreement arises and the proposed contract is *void*.
- If consensus was obtained in an improper manner, e.g. by misrepresentation or undue influence or duress, a valid contract arises but it is *voidable*.

### **Absence of consensus - Mistake**

Misunderstanding by one or more of the parties to a contract about some aspect of the proposed contract e.g. a fact that is material to the contract or a legal rule

- Must meet the requirements before mistake will render a contract void
  - **The mistake must relate to a fact** e.g. thinking that you are purchasing a dishwasher and the item is a washing machine, legal rule e.g. paying someone R200 under the mistaken belief that it is owed to them, or principle
  - It is not enough that the mistake relates to fact, legal rule or principle. **The mistake must concern a material (essential) fact**, legal rule or principle.
  - *The mistake must be reasonable*

**a) A mistake is material if:**

- i. There is a misunderstanding in respect of the *identity of the person* with whom the agreement is reached e.g. because of a misdialled telephone number, an employer offers a job to the offeree intended

- ii. A mistake concerning the *content of the intended contract*. This may relate to time when performance must be rendered, or the place and method of delivery, or the performance itself that is due.
- iii. Mistake about the *interpretation of the law* e.g. thinking that you are acquiring ownership by paying a monthly amount but the law interprets it as a lease contract.
  - A mistake is **immaterial** if:
    - A mistake about the persons attributes e.g. his full name or character
    - Mistake about the attributes of the object of performance e.g. the bus leased is red instead of green unless the attribute is a condition of the contract
    - Mistake in the motive or the underlying reason for concluding the contract e.g. purchasing a bicycle while under the mistaken impression that our old bicycle is stolen.
  - The mistake in fact or law must be **reasonable**:
    - Mistake will be justifiable or excusable if the reasonable person in the same situation would make the same mistake.
    - If the mistake is unreasonable, the contract does exist, even though consensus is absent.
    - However material the mistake, the mistaken party will not be able to escape from the contract if his mistake is due to his own fault.

### **Improperly obtained consensus**

- Consensus can be obtained in an improper manner through either:
  - Misrepresentation
  - Duress
  - Undue influence

### **Misrepresentation**

- An *untrue statement* concerning an existing fact or condition must exist
- *Concealment of the facts* may also constitute misrepresentation, but only if a duty to disclose relevant facts exist
- The *statement must be false or untrue* and relate to facts of either the past or present
- One contracting party must make misrepresentation to the other contracting party or someone acting in the service of or on the authority of the other contracting party.
- Made before or at the time when the contract is entered into
- Has the *aim of inducing or influencing* the offeree to enter into the contract
- Where it not for the misrepresentation, the contracting party would have either not concluded the contract at all or would not have concluded it on the same terms.

### **The effect of misrepresentation**

- Misrepresentation does not exclude consensus between the parties and the contract is therefore not void
- Misrepresentation causes the contract to be voidable since it is improper and unlawful to obtain consensus in this manner
- A claim for damages depends on the type of misrepresentation.

### **Intentional misrepresentation**

- Occurs if a false statement of a material fact is made with the intention of *inducing a contract*, and the statement was made with the awareness that it was false, or recklessly without regard for the truth or falseness of the statement.
- The victim may claim damages irrespective of his choice to uphold or rescind the contract on the **basis of delictual conduct**.
- The deceived party must be placed in a position he would have been in if the misrepresentation had not been made

### **Negligent misrepresentation**

- A false statement of a material fact which is made negligently and with the aim of inducing a contract
- Negligence will be assumed if a person makes a statement he believes to be true without taking the steps a reasonable person would take in order to establish the truth
- The misrepresenter is at fault
- The victim may claim damages irrespective of his choice to uphold or rescind the contract on the **basis of delictual principles**
- The deceived party must be placed in a position he would have been in if the misrepresentation had not been made

### **Innocent misrepresentation**

- If a false statement is made with the intention of inducing a contract, but the party is neither fraudulent nor negligent, the statement is referred to as innocent misrepresentation e.g. going to an art expert to establish the authenticity of a painting
- The misrepresenter has no fault and there is no room for a claim
- The victim retains the choice of upholding or rescinding the contract

### **Duress**

- Duress or intimidation is an unlawful threat of harm or injury
- Consensus exists but the contract is voidable
- The requirements are:
  - There must be **actual violence or damage** or a threat of violence or damage directed at the life, limb or freedom of the threatened person, his family or his property, which causes a reasonable fear that the threat may be executed.
  - If duress is caused by a threat, it must be imminent (about to occur) or inevitable (the victim cannot escape)
  - The duress must be unlawful.
  - A party to the contract or someone acting on his behalf must be responsible for the duress
  - The duress must cause the victim to conclude the contract.
  - The victim may claim damages irrespective of his choice to uphold or rescind the contract on the **basis of delict**
  - The deceived party must be placed in a position he would have been in if the misrepresentation had not been made

### **Undue influence**

- Improper or unfair conduct by one contracting party that persuades the other contracting party to conclude the contract against the latter's free will
- There does not need to be a threat
- Occurs mainly where a special relationship exists e.g. doctor and patient
- *Requirements for undue influence:*
  - The contracting party who allegedly exercised the undue influence must have **acquired an influence over the victim**
  - The contracting party must have used this influence to weaken his victims ability to resist, so the victims will become easily influenced
  - 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 which the victim would not have concluded of his own normal free will and which was to the victims disadvantage
  - The victim retains the choice of upholding or rescinding the contract

## **5 Capacity to Perform Juristic Acts**

A further requirement for the validity of a contract is that the parties must have the capacity to perform juristic acts. Only a natural person has this capacity but it is limited.

- “Capacity to Act” is not “legal capacity” which describes the capacity to bear rights and duties.
- Both juristic and natural persons have capacity to act.
- It is possible that a natural person will not have or will have limited capacity to act.
- The factors limiting capacity are discussed below.

### **5.2 AGE**

A persons capacity is determined by age category, each category has a distinct capacity to act.

- 1 – 7 years
- 7 – 18 years
- 18 years and older

#### **Majority**

- A person attains full capacity to perform juristic acts when he or she reaches the age of majority, 18 or by marrying before turning 18.
- Major status will be maintained even when divorced.

#### **Minority**

- A minor child who has not turned 18 and is still unmarried
- Minors are under the guardianship of their parents or certain other guardians
- Minors have no capacity (0-7) or limited capacity (7-18)

### **Minor under the age of 7**

- Has no capacity to act
- May not conclude contracts, even on terms that are to their advantage
- A guardian must act for the minor and must have the capacity to act
- Both parents can exercise guardianship independently except:
  - Consent to marry
  - Application for passport
  - Departure from the republic
  - Alienation or encumbrance (mortgage) over immovable property
- If one parent dies, the other becomes sole guardian
- If a minor suffers loss as a result of a contract that was concluded on their behalf, the minor may apply to the High Court for restitution (an order cancelling the terms of the contract and for return of everything that has been performed in terms of the contract)
  - The minor must apply within a year of reaching majority
  - Must prove that loss was already inherent when the contract was concluded

### **Minor over the age of 7**

- Limited contractual capacity to act
- The parent or guardian must assist or represent the child in administrative, contractual and other legal matters.
- The guardian must assist the minor for their benefit by:
  - Prior authorization to contract
  - Consenting at the time of contracting
  - Ratification after contracting
- Although the guardian assists, the contract is only enforceable against the minor
- A minor can contract exclusively for his own benefit without assistance if the contract allows for the acquisition of rights and no duties
- Statutory exceptions:
  - Life insurance policy: over 18 years
  - Medical treatments: over 14 years
  - Make deposits and withdrawals: over 16 years
- The children's Act provides for HIV test on children only when it is in their best interests.

### **Special situations**

#### ***Contracts for which the guardians assistance is insufficient***

- The alienation - sale or long lease (more than 10 years) or mortgaging of a minors immovable property.
- If the value is under R100, 000: the consent is required of the guardian and the Master of the High Court
- If the value is over R100, 000: consent is required of the guardian and the judge of the High Court

#### ***Tacit emancipation***

- The guardian allows the minor to lead an economically independent existence
- The consent may be given expressly or tacitly
- The consent must, however, appear from some act which shows the guardians consent
- Inattentiveness or indifference does not amount to consent

#### ***Test for tacit emancipation:***

- Is the minor economically independent *and*
- Is the guardian allowing the minor some contractual freedom

- Indicated by:
  - Separate residence
  - Own business or employment
  - These two factors are not conclusive
- Once emancipated the consent of the guardian is no longer needed for certain contracts
- Tacit Emancipation can be limited to only business or employment contracts
- Tacit Emancipation can be complete in that it relates to all contracts business and personal
- Tacit Emancipation does not terminate minority, the minor will need permission to marry, get passport and alienate immovable property.

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

- The contract is not enforceable against the minor, not even after the minor has obtained majority
- The minor may claim performance without rendering own performance
- If the major has not yet performed in terms of the contract and the minor wants to claim payment, the minor may initiate proceedings against the major only with the assistance of the guardian
- The guardians assistance would then be regarded as ratification and the minors performance becomes enforceable
- If the major has delivered, and the minor either refuses to deliver or reclaims performance as though he has already performed, the major will not have a contractual remedy at his disposal.
- The major's only redress is to institute a claim against the minor based on unjustified enrichment.
- The minor is only liable for the return of only so much of the money remains in his possession when the action is instituted:
  - If the minor recklessly squandered the full amount, he cannot be sued on grounds of unjustified enrichment because there is nothing left and the minor is no longer enriched
  - If the minor purchased a luxury item, he is obliged to surrender the item or its value
  - If the minor used the money to provide necessities or essentials for which the guardian would normally would have to pay, the minor or guardian will have to repay that part of money that brought about a saving of the expenditure

***Fraudulent misrepresentation of majority***

- 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 she had indeed been a major.

**5.3 MARRIAGE**

- Marital regime – marriage can either be:
  - a) Out of Community Of Property (OCOP)
  - b) In Community Of Property (ICOP)
- In order to determine whether a specific spouse has capacity to act in a given situation, a distinction must be drawn between:
  - a) Agreements concluded prior to 1 December 1993 where husband still had marital power
  - b) Agreements concluded by spouse married ICOP

c) Agreements concluded by spouse married OCOP

**Agreements concluded prior to 1 December 1993 where the husband still had marital power**

- The wife only had the *full capacity* to act in the case of a marriage *out of community of property*
- The effect of marital power was that the married woman had limited capacity to act, could not conclude a contract without husband's consent.
- Contracts concluded without the ratification of the husband were unenforceable and any claim must be based on unjustified enrichment
- *The wife had full capacity to act in limited instances:*
  - Purchase of household necessities
  - If she was a public trader
  - If the court consented
  - If one of the statutory exceptions applied e.g. investing or withdrawal of monies from the post office, a bank or building society
  - In respect of contracts where the estate acquired rights and not liabilities

**Agreements concluded by a spouse married in community of property**

- The separate assets and liabilities are consolidated and there is a joint estate which is only divided when the marriage is dissolved
- Only certain assets can be excluded e.g. an asset bequeathed in terms of a will with the express condition that it is to be excluded from the joint estate
- The joint estate acquires the profits and bears the losses which arise during the marriage
- Each spouse has full capacity to act with regard to the joint estate, dispose of assets and incur debts without the consent of the other
- Written consent is required if:
  - Immovable property and investments (financial or otherwise) are alienated or otherwise burdened
  - Where the spouse binds him- or herself as surety
  - Acts as purchaser in certain transactions
  - Wishes to withdraw money held in the name of the other spouse in a bank or similar institution
- Some of these transactions may even require written consent which must be attested by two competent witnesses
- Agreements concluded by a spouse married out of community of property
- Antenuptial contract must be concluded prior to marriage and is binding on outsiders if notarially executed and registered in a Deeds Office within a specified time after such notarially execution
- Each spouse retains his or her separate estate and each one has the full capacity to act only in respect of their own estate

**Agreements concluded by a spouse married out of community of property (OCOP)**

- An antenuptial (before marriage) contract is needed for OCOP
- Concluded prior to marriage, registered at deeds office within a specified time after being notarially executed.
- Each spouse keeps a separate estate, full capacity to act in respect thereof
- Spouse are liable jointly and severally to third parties for all debts in respect of household necessities
- Subject to the accrual system unless expressly excluded by the antenuptial contract

- Accrual refers to the amount by which the net value of a spouse's estate at the dissolution of the marriage, either by divorce or the death of the spouses, exceeds net value of his or her estate at the start of the marriage.

## **5.4 MENTAL DEFICIENCY**

- 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**.
- Everyone is presumed normal unless proved mentally deficient
- The High Court has the 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: 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 the person has been certified as mentally deficient the burden of proof shifts. It must be proved that the person had the capacity to act, in spite of the certification.
- In the case of where the person is not certified it must be proved that the person had no capacity to act, in spite of the fact that he or she has not been certified as mentally deficient

### **The influence of alcohol or drugs**

- Could the person understand the nature and consequences of his actions or could understand but could not control those actions?
- If 'yes' the contract is **void**. The contracting party has no capacity to act. No contractual rights and duties result.
- If 'no' the contract is completely valid.
- Test = At the moment of contract – did the person have the capacity to act.
- **Burden of proof:** Everyone is presumed able to act till proven unable to do so. Therefore, the contracting party that alleges that alcohol or drugs prevented a contracting party from forming an independent will must prove this allegation.

### **Prodigals**

- A prodigal is a person who habitually spends his money recklessly and extravagantly.
- This person still has the capacity to act until the High Court actually declares him a prodigal and appoints a curator to look after his estate. After this, the prodigal has a limited capacity to act.
- *General rule:* The court forbids the prodigal to perform juristic acts without the curators consent.
- *Exception:* The prodigal may conclude contracts by which he acquires rights but no duties, without the curators assistance
- *Return to full capacity:* If the court sets aside the order declaring the person a prodigal, the former prodigal will regain the full capacity to act.
- Mere prodigal tendencies have no effect on a person's capacity to act. It is only when the court declares the person a prodigal, that the person has limited capacity

### **Insolvency**

- A persons capacity to act is not influenced merely by insolvency
- If a person's estate has been sequestered, a persons capacity to act will be influenced by certain provisions of the Insolvency Act 24 of 1936



- The insolvent may not dispose of assets that were in his estate at the time of sequestration
- The insolvent may dispose of assets acquired after the sequestration of only if they are excluded from the insolvent estate by statute or common law.
- The insolvent has capacity to enter into contracts, provided that they do not dispose of the assets of the estate
- They may for example agree to repair someone's car for remuneration
- The insolvent may not however be employed by or do business as a general dealer without consent of the curator.

## **6 The Agreement must be Possible**

Performance must be **physically possible** and the contracts that are concluded must be **legally possible** if they are to be valid.

### **6.2 LEGAL POSSIBILITY**

An agreement can be contrary to common law because it is legally impossible to execute, or because it is against good morals or against public policy

#### **Legally impossible**

- You cannot buy or sell something that cannot be privately owned e.g. the sea or the moon
- The rights and duties in terms of the contract cannot be performed in accordance with general legal principles
- A contract is unlawful when:
  - Its conclusion
  - Performance to be rendered
  - Reason or object thereof

Is **prohibited** by **common** or **statutory** law

#### **Contracts which cannot be legally executed**

- Legal principles in the common law prohibit the performance of certain rights and duties:
  - If a contract is for the performance of these rights and duties
  - The most common example is the sale of something which cannot be owned, e.g. sea or river etc.

#### **Agreements Contrary to good morals**

- Good morals are determined by the community at large and change over time.
- If the purpose or the rights and duties agreed upon are contrary to the communities perception of what is proper and decent
- If an agreement is for:
  - An immoral act
  - Immoral rights and duties
  - Immoral goal – then it will be prohibited
- Agreeing on a brothel partnership is contrary to good morals and is thus illegal

#### **Agreements Contrary to public policy**

- If the contracts conclusion is harmful to the interests of the community at large
- Harm should be substantially incontestable and not merely an infringement of an individuals sense of propriety and fairness
- Conviction of the public change over time
- Common examples of agreements contrary to public policy include:

### 1) **Agreements involving the administration of justice**

- An agreement not to report another person's crime to the police
- Agreements misusing or preventing access to administration of justice
- Bribing public officials or police
- A contract prevents a person from instituting legal action
- Agreement not to report a crime.

### 2) **Agreements involving crimes or delicts**

- An agreement to commit a crime is contrary to public policy and therefore legally unenforceable

### 3) **Agreements affecting the safety of the state**

- An agreement between a person and a subject of an enemy state is unlawful and invalid

- Agreements that could adversely affect the safety of the state

### 4) **Agreements restraining a person's freedom to participate in legal transactions**

- An agreement which restricts the freedom of a person to take part in legal transactions is contrary to the public interest
- A person is not permitted to undertake that he will refuse to accept an inheritance upon the future death of the testator
- Neither may a person be deprived of the freedom of testation (draw up a will) by an agreement stipulating that his possessions will be bequeathed in a certain manner
- Such agreements must be distinguished from valid donations between the living.
- Antenuptial contracts are exceptions to the rule: Here, parties may agree to the appointment of the other spouse as heir and thereby providing maintenance of the survivor.

### 5) **Agreements restraining a person's freedom to participate in trade**

- Contracts in restraint of trade are valid and enforceable unless the terms are unreasonable
- There are 2 types:
  - Restraint of trade on the sale of or dissolution of a business restricting the one party from trading within the **geographical area** within a **specified time**
  - Restraint of trade in respect of an employee in order to protect the interest of the company (trade secrets or commercial contracts) for a specified time within a specified geographical area.
- These contracts are not *prima facie* contrary to public policy
- It is possible that these agreements go too far, i.e. they are unreasonable and the freedom to contract and trade are in conflict
- The reasonableness of a contract will be determined by reference to:
  - Nature of restraint
  - Geographical size of restraint area
  - Time period
  - Compensation (if any paid – usually for a business)

### 6) **Gambling contracts**

- Common-law wagering of gambling contracts are valid but unenforceable contracts as they are contrary to public policy.
- The law will not enforce the obligation despite recognizing its existence
- Only gambling contracts covered by the National Gambling Act are valid and enforceable such as:
  - Lotteries (Lotteries act)
  - Gambling/gaming/wagering (national gambling act)

- Sport pools (Lotteries Act)
- All contracts and debts not covered by the Act are still regulated by common law, i.e. unregulated gambling debts.

### **Consequences of illegality**

- Most unlawful contracts are generally **void**
- Statutory illegality can have the consequence of:
  - Contracts being void
  - Penalty
- No contractual rights or duties can arise from a void contract
- In the case of unlawful contracts, 'no action arises from a shameful cause': **ex turpi causa non oritur action** i.e. action cannot be instituted against another to claim performance from an unlawful contract. Principle is never relaxed.
- The parties may not turn to the law on unjustified enrichment in order to obtain performance. **The par delictum rule**, which has the effect that the person that has the possession of the performance is in a stronger position.
- The par delictum rule can be relaxed by the court where it is required by public policy.
- Indirect enforcement of an illegal contract is also not permitted

## **3 PHYSICAL POSSIBILITY**

- It must be physically possible to perform at the time of conclusion of the contract for a contract to be enforceable.

### **Objective possibility to perform**

- Performance will be impossible if, at the moment of concluding the contract, it is *objectively (absolutely) impossible* to render performance e.g. the cow that which Thandi sells to Paul has already died.
- It is only objective impossibility of performance that causes the contract to be **void**.
- Objective or absolute impossibility infers that it must be totally impossible for anybody to perform
- If it is impossible for a particular person to perform, but not necessarily impossible, the impossibility is merely subjective.
- If the performance is inconvenient or difficult, the performance is also not objectively impossible e.g. when the cow which Thandi sells actually belongs to Charl or if Paul is unable to secure a loan at the bank for the purchase price, performance is not impossible
- The contract will still be valid unless an agreement to the contrary was reached
- If the parties fail to perform, it amounts to breach of contract

### **Divisibility of performance**

- When determining the possibility of performance, it is important to distinguish between divisibility or indivisibility of performance
- If an indivisible performance is objectively impossible, no valid contract arises.

- If only a part of a divisible performance is objectively impossible, a valid contract will arise in respect of the separable part which can still be performed
- If an indivisible performance is objectively impossible, no valid contract arises.
- If only a part of a divisible performance is objectively impossible, a valid contract will arise in respect of the separable part which can still be performed
- Whether a performance is divisible or indivisible depends on the nature of the performance and the intention of the parties
- The performance will be indivisible if it can be rendered only in one manner, namely in its entirety e.g. a house or a motor vehicle.
- The performance will be divisible if it is physically possible to render in separate units e.g. 2 horses and if it is the parties intention that the performance should be regarded as divisible
- Divisibility is a legal concept. The law cannot convert a physically indivisible performance into a divisible one.
- The law can do the opposite e.g. a set of encyclopedias as the books must be delivered as a set.

### **Determined and ascertainable performance**

- The requirement that performance must be physically possible includes that performance must be determined or ascertainable.
- If the performance required is vague, the contract is invalid due to performance being impossible.

#### **The determined performance**

- Where parties expressly mention the purchase and identity of the performance in their agreement
- Facultative obligation:
  - allows debtor to deliver alternate performance if he/she so wishes, this is also regarded as determined
  - NB, it is only the debtor that has a choice, impossibility of performing the primary obligation relieves the debtor of duty to perform.

#### **The ascertainable performance**

- Where parties agree on
  - A certain formula to identify the performance
  - If they agree a specified person will determine the performance
- Both price and subject matter can be ascertainable
- In this instance *generic or alternate obligations* are ascertainable performance examples

#### **a) The alternative option**

- Where a party may select one or more performance alternatives
- The objects from which selection is made must be set aside and established at the time of contracting
- Performance is determined once selecting party has chosen performance
- Impossibility of performing one of the alternatives does not relieve the debtor from the duty to perform

#### **b) The generic obligation**

- Performance determined by describing a kind (genus) of commodity in terms of:
  - Number
  - Mass
  - Measure

- Performance is selected from a specific genus
- Contracts must contain an indication of the following:
  - Kind of commodity
  - Method of selection indicated above
  - Party responsible for making selection
- Upon separation the generic obligation is converted from ascertainable to determined
- A party who is liable in terms of a generic obligation is never relieved due to impossibility.

## **7 Formalities**

- Deals mainly whether a contract must be in writing or not, whether it must be witnessed and whether it must be signed by both parties
- These requirements are stipulated by law or by the parties themselves
- A contract which requires formalities is only enforceable once these are satisfied.

**The General Rule:** No formalities required

Contracts may be entered into:

- Through spoken words – orally
- Through written words
- Through conduct – tacitly – only

Most contracts are formed orally or by conduct

### **Contracts where formalities are required by law**

The most common requirements is that certain contracts have to be reduced to writing and should be signed in order to render it valid.

- The aim is the prevention of fraud and reducing uncertainties and evidential problems.
- The most common requirement is contracts should be in writing and signed.
- A few examples include:

#### **a) Alienation of Land** – sale, exchange, donation

- Contained in a contract of alienation and signed by parties or their agents who are acting on their written instructions.
- Will be deemed valid if both parties have performed fully and the land has been transferred to the new owner.

#### **b) Suretyship**

- Only valid if it is in writing and signed by or on behalf of the surety

#### **c) Contracts of donation where performance is due in the future**

- Contained in a written document
- Signed by a donor or someone who has written authorization to sign on their behalf
- Authority must be granted in the presence of two witnesses
- A donation completed by delivery falls outside this requirement

#### **d) Antenuptial contracts**

- Must be notarially attested and then registered in a deeds registry within three months of its conclusion

- If it is not registered at the deeds office, it is mutually valid between the parties but not binding on third parties

### **Formalities required by the parties**

- The parties may have a clear common intention that the contract between them should be in writing in order to be valid. The contract will not be valid until it is in writing.
- It may be the party's intention that the oral contract be valid but that they are putting it in writing to
  - facilitate proof of the oral contract and
  - a requirement of validity
- If reducing to writing is a requirement for validity, the agreement is valid only when it is reduced to writing.

### **Writing and signing electronic transactions**

The ECT act of 25 of 2002 provides that electronic messages are recognized as writing if the document or information is accessible for future use, except in respect of transactions concluded under the following acts:

- The Wills Act 7 of 1953
- Alienation of Land Act 68 of 1981: including an agreement for alienation of immovable property and an agreement for a long-term lease of immovable property in excess of 20 years
- Bills of Exchange Act 34 of 1964
- The Stamp Duties Act 77 of 1968
- The ECT Act also provides that in certain circumstances an electronic signature can legally fulfill the same function as a traditional handwritten signature
- An electronic signature can be:
  - A typing of a name at the end of the document
  - A scanned handwritten signature
  - The use of complex identification technology as long as it is intended to be a signature
- Where a signature is required by law, only the use of an *advanced electronic signature* will comply, according to the ECT Act.
- This is defined as a signature which results from an accredited process allowing the recipient as well as a third party certification authority to verify the source of the communication: the identity of the signatory and that the communication has not been altered.
- Where law does not require a signature, other methods may be used.

## **8 Terms of the Contract**

- **"TERMS"** is the word used to describe provisions in a contract
- A term imposes one or more contractual duties on one or more of the contracting parties
- A term defines the contractual obligations to which parties bind themselves
- A term can be incorporated expressly, tacitly or by implication.

### **The Term**

A 'term' in a contract is a provision which imposes on a contracting party one or more contractual obligations to act in a specific manner or to refrain from performing a specific act.

- It may also qualify (limit) the contractual obligations.
- It has legal consequences that may be claimed and enforced.

- It defines the contractual obligations to which parties bind themselves and which they can enforce against each other, or it stipulates the time when or the circumstances in which the obligations either become enforceable or are terminated.

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

- **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 characterize a particular kind of contract e.g. a contract of sale: an agreement to buy and sell.

- **Tacit terms**

- These are terms that are not expressed,
- based on parties true intention, or the intention that the law regards them as having – it is so self-evident.
- Such a term is imported into a contract if it is reasonable.
- An example is a breeder of stud cattle brings a claim against the person he purchases from on the grounds that the bull is infertile. 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.

- **Implied terms**

- These are terms not expressed in words but incorporated into the contract by operation of the 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
- Terms can also be implied by trade usage if it is so universal and notorious that a party's knowledge and intention to be bound by it can be presumed

## **8.2 ESSENTIALIA, NATURALIA AND INCIDENTALIA**

### **Essentialia**

- These essential terms identify the contract as being a certain kind of contract, particular type, class category, for example a contract of sale
- Once the essentialia identify the particular contract, then the relevant naturalia for that contract follow unless excluded by the parties

### **Naturalia**

- These are terms that naturally attach to a contract of a particular class in terms of the common law (consequence)
- These help determine the rights and duties of the parties to the contract
- These mostly arise from Roman Law
- These terms can generally be excluded from a contract.

### **Incidentalia**

- These special terms serve two purposes:
  - They allow the parties to add special provisions not provided for by the essentialia and naturalia
  - They allow parties to exclude or alter the naturalia to suit their particular needs
- E.g. a clause that specifies that the goods bought must be delivered by train

## **5.3 THE CONDITION**

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

- The event must be specified: there must be no doubt which event will render the obligations operative or terminate them.
- The event must also be uncertain: it must be uncertain whether the event will indeed occur
- The condition must refer to a future event
- Condition can be suspensive or resolutive

#### **The suspensive condition**

- The operation of the contractual obligations in terms of the contract are suspended until the condition has been fulfilled
- Although conditional, the rights and duties exist.
- Rights and duties exist immediately and can be ceded or transferred.
- If this future event does not take place, the condition is not fulfilled and the contractual obligations do not become operative and are terminated
- The operation of the contract is only enforceable if the uncertain future events occurs.
- E.g. Andy and Bill agree that Andy will buy Bills car on condition that Andy's sister gives him the money to pay the price.

#### **The resolutive condition**

- This renders the continued existence of the contract dependent on the occurrence or non-occurrence of a specified uncertain future event.
- If an agreement contains a resolutive condition, a binding contract comes into existence immediately upon the conclusion of the contract and the contractual rights and duties become operative and are immediately enforceable.
- If the condition is fulfilled, the contract is dissolved and the contractual rights and duties cease to exist
- E.g. Carl agrees to let his house to David indefinitely, on a monthly basis, on condition that if Carl gets married, it must be returned to Carl. When Carl gets married, the house must be returned to Carl, but the money that David paid in rental for the completed period will not get repaid to David.

### **5.4 THE TIME CLAUSE**

- Unlike a condition where a contract comes into operation or is dissolved upon the occurrence or non-occurrence of a specified **uncertain** future event, the time clause is brought into operation by the reaching of a **certain** and determined or ascertained time which has been agreed upon.
- The contract will commence or either terminate
- No uncertainty exists as the lapse of time is certain

#### **The suspensive time clause**

- The duty to perform has been postponed until a determined or ascertainable moment had arrived.
- The contract comes into being when it is concluded.
- Rights and duties can be ceded or transferred
- E.g. On 1 June 2006 Eddy sells his car to Sara. They agree that delivery and payment will occur on 1 August 2006.
- The time clause specifies the time when delivery of the performances is due.



- E.g. Marty undertakes that he will buy Erna a car after Roberts's death.
- It is certain that Robert will die although it is uncertain when it will occur.

### **The resolutive time clause**

- The operation of the contract only have effect until the expiry of a certain time period
- The obligations are immediately operative and enforceable
- When time expires the obligations are extinguished
- E.g. Gugu agrees to work for Thandi for 3 years. The contract exists. Each party may render and claim performance. At the end of the 3 years, the resolutive time clause brings the contract to an end.

### **The Supposition...on condition that...**

- The existence of the contract depends on an event that has taken place in the past, a state of affairs which existed or exists at the time of concluding the contract
- A supposition is included when the contracting parties are uncertain whether a specific situation exists or existed and they only wish to contract if it in fact exists or existed.
- Contractual obligations come into being only if what is supposed indeed exists or existed.
- E.g. Mano is the owner of a plot in a coastal town. Peter wants to purchase the plot only if it has a sea view. Mano does not know whether this is the case and is not willing to give a guarantee in this regard. They agree that Peter will purchase the plot provided that it has a sea view.

### **The warranty**

- An additional obligation that is undertaken as an express term of a contract.
- A term whereby a party accepts absolute responsibility for proper performance relating to:
  - The absence of defects in the warrantors products or service
  - The possibility that the warrantor is able to render the service
  - The quality or standard of the warrantors product or service
  - The quality of performance
- A breach of warranty is a breach of contract
- E.g. Lindi lets a house to Kara. The terms include a warranty that the fence will be high enough so that dogs will not be able to leap over the fence. Kara is a breeder of champion cats.
- As the landlord, Lindi has a duty to deliver the house in a condition fit for the purpose of the lease. Kara has a right to the performance of this common-law duty. By giving the warranty, Lindi has assumed an additional obligation, namely to make sure that the fence is high enough. If dogs do leap over the fence, Lindi is in breach of contract.

### **The Modus**

- A burden to perform towards a party's right to claim performance made to him/her to the contract. It relates to a future event
- E.g. Mo gives Nora a car subject to the modus that Nora must give up smoking within 2 months. Nora may claim delivery of the car now but if, after 2 months has not stopped smoking, will be in breach of contract and Mo will hen be contractually entitled to repossess the car.

- E.g. Nelson gives Sara a house, subject to the modus that she uses part of it as a nursery school. If she fails to execute the charge she is in breach.

### **The Cancellation Clause**

- The cancellation clause entitles a contracting party to cancel the contract summarily if the other party is in breach of contract.
- It is unnecessary to send a letter of demand or a notice warning the other party of the intended cancellation of the contract.

### **The Penalty Clause**

- Where a person finds common law remedies insufficient
- These are built in remedies in the event of a breach
- The penalty clause usually involves a sum of money
- The penalty clause serves as a deterrence for non-compliance
- E.g. In most building contracts the owner and the building contractor agree that the work must be completed on or before a certain date. A penalty clause is added to the contract in terms of which the building contractor must pay the owner a certain sum of money for each day that construction exceed the date of completion
- A penalty clause is a calculation of damages in advance.
- At the same time it serves to deter non-compliance with the obligations agreed upon.
- Benefits of penalty clauses include:
  - Recoverability on mere ground of breach
  - Extent is predetermined
- The court has the discretion to reduce a penalty if it considers the penalty to be unreasonable.
- It will be unreasonable if out of proportion to the prejudice suffered.

### **The National Credit Act 34 of 2005**

- This act governs the enforceability of penalty clauses
- A distinction is made between 3 types of contract:
  - Those contracts that are governed by the National Credit Act as well as the Conventional Penalties Act: the National Credit act prevails
  - Those contracts that are governed by the Conventional Penalties Act only
  - Those contracts, which are governed by neither: validity and enforceability of the penalty clause will be determined by common law.
- Should there be a conflict, the national credit act applies

### **The Forfeiture Clause**

- A party who is entitled to cancel or rescind a contract in certain specified circumstances will normally be entitled to restitution as well.
- The right to restitution entitles the party who cancels or rescinds to claim the return of everything he has already performed in terms of the contract.
- A forfeiture clause makes provision for a party who is in breach of contract to lose the right to restitution.
- The party that is in breach therefore forfeits all performances already rendered in terms of the contract.

- E.g. a contract of sale can provide for a purchaser who commits breach of contract to forfeit all installments, which have already been paid.

### **The Rouwgeld Clause (Rouwkoop clause)**

- The contract contains a term to the effect that a person may withdraw from the contract upon the payment of a certain sum of money.
- The person is therefore not in breach.
- If the clause relates to a contract of sale it is called a Rouwkoop clause
- The amount payable is called Rouwgeld money or Rouwkoop money.
- E.g. Mary concludes a contract to rent Lucy's house at Umhlanga in December. In terms of the Rouwgeld clause Mary pays a deposit, which she will forfeit if she cannot continue with the lease. When Mary withdraws from the contract she is not in breach.

### **The Entrenchment Clause**

- The agreement may be altered only by means of written amendment and signed by the parties or their agents.
- The contract is not altered orally but only until the changes are written down and signed.

## **9 Interpretation of the Contract**

### **9.1 CONTENT OF THE CONTRACT**

- Terms are incorporated into the contract by the parties
- Terms can be incorporated orally, tacitly or in writing
- Where a contract is written and signed, the contract party is bound. The rule of **caveat subscriptor** applies: signatory beware.
- Where the agreement is signed, the ordinary meaning and effect of words, which appear over his signature, usually bind the signatory.
- The only defenses available to a signatory of a document would be mistake, misrepresentation, duress, illegality, undue influence or fraud.
- 
- A party will not be bound if contract is induced by fraud, misrepresentation, illegality, duress, undue influence or mistake
- Unsigned written agreements arise in 'ticket; and 'notice' cases

### **9.2 PRINCIPLES OF INTERPRETATION**

- The same principles of interpretation apply to all contracts whether written, tacit or oral.
- Purpose of interpretation is to determine the intention of the parties
- Guidelines are as follows
  - Ordinary grammatical meaning
  - Context
  - Interpret against party drafting in event ambiguity

- Presumptions
  - Validity
  - Incorporate common law
- When in writing Parole Evidence Rule is Used
- Ticket Cases rules: supplier entitled to assume assent where
  - Customer read and understood terms through conduct accepted
  - Reasonable steps were taken to alert the customer to the terms
- Where a contract cannot be interpreted as above it is void for vagueness

### **The parole evidence or integration 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 the agreement
- Earlier oral agreements and negotiations are not relevant
- They may submit 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. If the written contract has an entrenchment clause, the alterations would have to be in writing and signed by all the parties.
  - 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
  - Evidence not relating to a term of the contract but to prove the existence of the contract as a whole, e.g. that it is void because of mistake or voidable because of misrepresentation
  - Contradiction of objectively determinable facts, such as the date on which it was signed

### **Rectification**

- Sometimes a written document does not truly reflect the true intentions of the parties to the contract because an error slipped in when the agreement was put into writing.
- As a result of the parole evidence rule, the parties will not be able to submit extrinsic evidence which is in conflict with the terms of the written contract
- The law recognizes that, in appropriate circumstances, a written contract may be improved to record the party's true intention.
- Rectification is permissible if the parties who apply can prove:
  - The parties true intention
  - That the written document does not accurately reflect it

## 10 Breach of Contract

- Where one of the parties is at fault in performing his/her obligations
- There are 5 different forms of breach:
  - **Debtor:** The party who has to perform
  - **Creditor:** the party who has the corresponding right to receive the performance
  - Positive mal-performance
  - Repudiation
  - Prevention of performance
- In reciprocal contracts both parties are simultaneously obliged to perform and entitled to performance.
- Both parties are simultaneously debtor and creditor

### 10.2 DEFAULT OF THE DEBTOR

- **Mora Debitors** – The debtor fails to perform at the agreed time
- The debtor is said to be in **mora** or default.
- Requirements
  - Must still be possible to perform at a later stage
  - Performance must already be claimable i.e. not suspensive
  - Specific date or time (express or implied)
    - Automatic mora after date expires
    - Date and time must be certain
    - Mora ex re
  - No exact date for performance
    - Can issue an oral or written demand to perform
    - Time given must be reasonable
    - Mora ex persona
- The delay must be due to the debtors fault
  - Party must be culpable (intentional or negligent)
  - Where warrants delivery need not be culpable
- Consequence
  - The debtor is in breach
  - Supervening impossibility of performance is no longer an excuse

### 10.3 DEFAULT OF THE CREDITOR

- **Mora creditoris** – the creditor causes debtors performance to be delayed
- The creditor is said to be in **mora** or default
- Default of the creditor is the creditors failure through his fault and without lawful excuse, to cooperate in receiving the debtors due and valid performance
- **Four requirements must be met before default of creditor can occur:**
  - The debtors performance must be due in terms of a valid and existing contract
  - The debtor must tender performance and the performance he tenders must be proper performance e.g. Anne must deliver snacks of the quality agreed upon. If it is not, there is no default by the creditor
  - The creditor must delay performance by not cooperating, and performance must still be possible at a later stage
    - Performance possible: client does not come in for dress fitting. A later dress fitting will still enable dressmaker to perform her obligation

- Performance not possible: Anne undertakes to deliver snacks to Sibbs before 5pm on Saturday. Sibbs is not home to receive the snacks. Anne is informed that Sibbs has gone overseas for 2 weeks. Anne cannot perform later. Sibbs has made it impossible for Anne to perform in terms of the contract. Sibbs's action amounts to prevention of performance and not default of creditor.
- The default must be due to the fault of the creditor if the other requirements are met.

### **The consequences of the creditors default**

- The debtor's duty of care is diminished if the creditor is in default. The debtor is only liable for intentional loss or gross negligence
- In the case of reciprocal agreements, the debtor remains liable to render his performance, now later than originally planned and is entitled to the creditors counter-performance
- If the debtor's performance becomes impossible while the creditor is in default, the debtor is set free from performing his obligations. The creditor must still deliver his performance. This must not, however, result from gross negligence or intention.
- If the debtor is already in default, his default is ended by the creditor's subsequent default. It is not possible for the debtor and creditor to be in default at the same time in respect of the same performance.
  - Although the earlier mora debitoris is cancelled by the later mora creditoris, any liability for damages caused during the time of the debtors mora, is not extinguished and the creditor may still claim damages from the debtor.
  - In the case of different obligations, mora debitoris and mora creditoris can exist at the same time.
  - E.g. if Peter had to pay Harry for a car on delivery of the car and he was not available, he would have been in mora creditoris for Harry's obligation to deliver and mora debitoris for his obligation to pay the purchase price.

## **10.4 POSITIVE MALPERFORMANCE**

- Debtor commits an act which is contrary to the terms of the contract
- Two situations
  - Defective or improper performance
  - The debtor fails to refrain from doing something

## **10.5 REPUDIATION**

Means that either in words communicated to the other party or through conduct, the debtor or the creditor shows that he does not intend to perform his contractual obligations

- A party can repudiate the whole contract by:
  - Denying its existence
  - Trying, with a valid reason, to withdraw from the contract
  - Giving notice that he cannot perform
  - Giving notice that he refuses to perform
  - Indicating that he will not perform

## **10.6 PREVENTION OF PERFORMANCE**

### **Prevention of performance by the debtor**

- Here the debtor prevents his own performance:

- Through his own fault – either intentionally or negligently – the debtor makes his performance impossible
- The debtor's obligation to perform continues or liable for damages

### **Prevention of performance by the creditor**

- The creditor makes it permanently impossible for the debtor to perform: the debtor can never perform
- Debtor is entitled to creditor's performance less any expenses he has saved.

## **11 Remedies for Breach of Contract**

- Describes the redress for a breach committed
- Legal remedies include:
  - Execution of the contract
  - Cancellation of the contract
  - Damages
- The remedies available depends on the nature and seriousness of the breach and terms of the contract
- Execution of contract and cancellation are mutually exclusive
- Damage can be claimed irrespective of cancellation or execution

In general, the remedy of **execution** may be claimed in respect of all contracts. It is the '*primary*' remedy for breach of contract since it is aimed at accomplishing the execution of the contract.

In contrast to this, cancellation is a '*supplementary*' remedy since it is aimed at ending the contract.

The remedy of **cancellation** may only be used if there is a right to cancellation. This means that an innocent party may only cancel due to breach of contract if the contract contains a cancellation clause, if such a right is stipulated or if it can be proved that the breach of contract is material.

The remedy of damages is an additional remedy at the disposal of the innocent party, regardless of whether the innocent party claims specific performance of the contract or insists on cancellation. The remedy of damages may also be claimed on its own.

### **11.2 EXECUTION OF CONTRACT**

**Purpose:** to achieve the same result as the party's intended to achieve when they entered into the contract, or, if that result cannot be achieved, then a result as close as possible to the one originally intended.

## Orders for specific performance

Every party to a bidding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract

- Requires party to render promised performances
- Cannot be made against sequestrated estate
- Cannot be granted where impossible
- Decision of court must be in accordance with public policy

### The exceptions to this are:

1. Where the debtor's estate has been sequestrated specific performance will not be granted, for it could prejudice the insolvent's other creditors.
2. If, objectively speaking, the debtor cannot carry out his contractual obligation, an order for specific performance will not be granted, because that would imply that the law expects the impossible from the debtor.

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

## Orders for reduced performance

### The principle of reciprocity:

Most commercial contracts create rights and duties for both parties. When the one party undertakes certain obligations in return for the other party's undertaking certain 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 must either have performed or offered his performance to the defendant.*

Until the claimant has rendered or tendered performance, therefore, the defendant who is being asked to perform has a defense to such a claim and may withhold his own performance.

### The defense of **exceptio non adimpleti contractus**:

When performance is defective or incomplete, the party can refuse to perform until the other party has performed their reciprocal obligation in full.

This defense relating to an unfulfilled contract may be raised if:

1. Both parties must perform at the same time
2. The claimant must perform before the party raising the defense.

### The defense of **exceptio non adimpleti contractus** cannot be raised if:

1. The contract is not one to which the principle of reciprocity applies or
2. The claimant is not continuing the contract but terminating (i.e. cancelling the contract) and claiming damages or
3. The claimant has performed or offered to perform or
4. The claimant need not perform

To succeed in claiming a reduced performance, the plaintiff creditor must prove:

1. That the defendant is using the *defective performance* and
2. That in the circumstances it would be *fair for the court to exercise its discretion* in favour of granting the order and



3. What the *reduced contract price must be*: that is, what the cost would be of rectifying his own performance, so as to establish by how much the contract price must be reduced or

#### **Prohibitory Interdicts**

- Where a party acts or threatens to act in a manner which he has agreed not to do in the contract
- Can apply for an interdict restraining the other party

### **11.3 CANCELLATION OF CONTRACT**

The contract is ended by cancellation and not continued.

- Not necessarily available for every breach.

This may only be used:

- If the parties have agreed to the remedy of cancellation or
- If the breach of contract is serious

#### **Cancellation and default of debtor**

- Specific date for performance
  - Time must be of the essence (tacit term)
  - Not all contracts in which time is specified are of the essence
  - Time may be of the essence where it is a commercial contract or subject to price fluctuations
- Notice of intention to cancel
  - Can send a letter of notice of intention to cancel where a party is in mora
  - Creditor then acquires right to cancel
  - Must provide the creditor with a reasonable time
  - Must make it clear in notice that cancellation will follow in the event of non-performance
  - Can combine with a mora ex persona notice
- Cancellation clause
  - Can cancel even if breach is immaterial

#### **Cancellation and default of the creditor**

- Specific date for performance
  - Where creditor does not allow timely performance of debtor
  - Time must be of the essence (tacit term)
  - Not all contracts in which time is specified are of the essence
  - Time may be of the essence where it is a commercial contract or subject to price fluctuations
- Notice of intention to cancel
  - Notice that the debtor will cancel the contract if the creditor fails to co-operate
- Cancellation clause
  - Can cancel even if breach is immaterial

#### **Cancellation and defective performance**

If the contract contains a cancellation clause, the creditor has the right to cancel even if the defect may be trivial.

- However, if the contract does not contain a cancellation clause, the creditor has the right to cancel if the debtor's performance is so seriously defective that the creditor cannot be expected to abide by the contract.
- If the defect is trivial, the creditor does not have the right to cancel

### **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.
  - The innocent party is not obliged to cancel the contract in these circumstances
- If the obligation repudiated is unimportant, the innocent party does not have the right to cancel

### **Cancellation and prevention of performance**

- If the debtor prevented the performance, the creditor is entitled to cancel the contract because it can no longer be executed
- If the creditor prevents the debtor from performing, the debtor has 2 options:
  1. As he is regarded as having performed, he is entitled to claim the creditor's performance
  2. He is also entitled to cancel the contract

### **The act of cancellation**

A contracting party that has a right to cancel 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 his conduct indicating this election, is reported to the guilty party by a third person acting independently
- A mere threat to cancel is not yet a cancellation
- Can give a conditional opportunity of rectification

### **The consequences of cancellation**

The major consequence of cancellation is the termination of the obligations.

- If neither of the parties has performed, both of them are relieved of their obligations to perform.
- If either one or both parties have performed whatever has been performed by the other party must be returned to them (restitution)
- If restitution has become impossible, the party who is cancelling the contract is relieved of the duty to return performance, which has been received, as long as the impossibility is due to his fault.
- Where restitution has become partially impossible, the party has to return what is left.
- If it is impossible for the guilty party to return the innocent party's performance the innocent party need also not return the guilty party's performance
- Where the contract involving continuing obligations is cancelled, the rights that have accrued prior to cancellation are not affected.

## **11.4 DAMAGES**

- The innocent party should be placed in a position as if the contract had been performed,
- Can be claimed for a loss suffered
- Can be claimed regardless of cancellation or enforcement of the contract

### **Patrimonial Loss**

- Breach of contract does not necessarily cause the innocent party to suffer loss.
- Compensation for pain and suffering or emotional harm cannot be claimed in contract
- Can get the following losses:
  - Financial position as if contract had been performed
  - Actual financial position
  - Positive vs negative interest

### **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.

### **Foreseeable loss**

A 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.
  - The guilty party must have foreseen the loss at the time of contract
  - Liability therefore limited usually to the kinds of losses that could be foreseen as a result of such a breach
  - To determine what the parties contemplated regard must be had to the circumstances of each case

### **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 arising after the breach of contract that the innocent party could have prevented or reduced by his own conduct.

### **The proof of loss and the calculation of damages**

Proof of loss suffered is, almost without exception, one of the most critical aspects of the litigation between plaintiff and defendant. In a civil case the onus of proving the loss which he suffered rests on the party who claims damages:

- Typical methods used in practice are:
  - Difference between contract price and market value at time and place of delivery (mora)
  - Interest
  - Amount to repair defect or cost to have work performed by someone else.

## **12 Transfer and Termination of Personal Rights**

Although personal right can be terminated in various ways, they can be transferred in one way only, namely by way of cession

### **12.1 INTRODUCTION**

- Personal rights can be terminated in various ways
- They can be transferred only by cession
- **Cession:** the transfer of a personal right from one party to another
- **Cedent:** the person who transfers the personal right to another
- **Cessionary:** the person to whom the personal right is being transferred

### **12.2 CESSION**

The person who transfers the right is the cedent and the person to who it is transferred to is the cessionary.

Cession is not a means of termination an obligation, since the original obligation continues to exist. Neither does it create new obligations. The debtor merely has to perform to a new creditor

- Contract give rise to personal rights
- Personal rights can be transferred
- Cession is an agreement by which personal rights are transferred
- The following may not be ceded
  - Personal nature contracts
  - Pensions
  - Maintenance
- Debtor cannot prejudiced cession
  - Cannot cede part of a claim (splitting)
  - *Mala fide* prevention is set off

### **The consequences of cession**

- The right forms part of the patrimony of the cessionary not of the cedent
- The cessionary alone has the right to collect the debt
- Once ceded ,only the cessionary can cede it to another person
- The debtor can no longer perform validly against the cedent
- The claim is transmitted to the cessionary together with all benefits and privileges
- The cessionary also receives the all the disadvantages attached with it.

### **TERMINATION OF PERSONAL RIGHTS**

Personal rights arising from obligations may be terminated in the following ways:

- Discharge

- Recession and cancellation
- Agreement
  - Release
  - Novation
  - Settlement
- Merger
- Set-off
- Impossibility of performance after conclusion of contract.
- Prescription
- Sequestration and subsequent rehabilitation

### **12.3 DISCHARGE**

- Performance of the obligation is called 'discharge'
- Discharge terminates contractual relationships
- Can be bilateral or unilateral
- Bilateral is only discharged when both parties have performed their obligations.
- Performance must be to a person authorized by the creditor.
- Creditor can reject piecemeal performance
- Money obligations must be extinguished in cash
- Payment can be withheld if creditor refuses to supply a receipt
- The following rules apply if a debtor owes a creditor money in respect of several debts:
  - The contract b/w them may regulate how payments should be allocated
  - The debtor has the right to determine which debts the money should go to
  - In the absence of one of the above alt., these apply:
    - Interest is paid before capital
    - Due debts are paid before debts which have not yet fallen due
    - Onerous debts (e.g. secured by mortgage bond) have preference over non-onerous debts)
    - Old debts have preference over new debts
    - If not conclusive, paid proportionately
    - If none of the rules point to a certain debt, then the payment is split b/w them

### **12.4 RESCISSION AND CANCELLATION**

- Rescission: the act of withdrawing from a contract due to reasons other than breach of contract.
- Cancellation: withdrawal from contract due to breach of contract.
- In case of a voidable contract the innocent party has the right to rescind or cancel.

### **12.5 AGREEMENT**

When parties can agree to end a contractual relationship, it can be done in three ways: release, novation, settlement

- **Release**

- when a creditor releases the debtor from his/her obligation
- Can be donation of reciprocity
- Must be offer and acceptance
- **Novation**
- When an existing obligation b/w the debtor and creditor is extinguished and a new obligation is created in its place.
- Both parties must have the intention to novate
- If new obligation is void, the old one remains in place
- *Delegation* – is a specific form of novation
  - It is 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.
  - Change of debtors is agreed upon
  - Here consent of the debtor is required unlike cession
- **Settlement (*transactio*)**
- An agreement in which parties settle a dispute b/w them concerning an actual or supposed obligation.
  - It need not be a valid debt which is extinguished
  - Parties need not agree on validity of existing debt
  - If settlement agreement is not complied with creditor, the parties cannot fall back on original debt.

## **12.6 MERGER (CONFUSIO)**

- Takes place when one person becomes both the debtor and creditor (e.g. if I buy this flat that I was renting)

## **12.7 SET-OFF**

- Takes place when debts which are owed reciprocally by 2 parties are extinguished.

The debts must meet 4 requirements:

- Debt must be similar in nature
- Debts must be liquidated
- Debts must be claimable
- Debts must be between the same persons

Example: Linda owes John R600 but John owes Linda R550. Linda can pay John R50. R550 was set-off.

## **12.8 IMPOSSIBILITY OF PERFORMANCE SUPERVISING AFTER CONCLUSION OF THE CONTRACT**

Occurs when performance becomes impossible due to an external factor that is beyond the parties control

- The **consequences** of supervising impossibility of performance:
  - Contract is terminated
  - Debtor and creditor relieved of obligations
  - Does not apply to contracts where risk is assumed
  - Does not apply where debtor is in mora
- The **objective** and subjective impossibility of performance

- Concerns a specific debtor's inability to perform
- Difficulty or expense on behalf of the debtor is not an excuse
- Only objective impossibility relieves both parties
- **Temporary and partial** impossibility of performance
- Where a divisible performance becomes partially impossible, the whole obligation is terminated. The debtor is released only proportionally.
- If counter performance is indivisible the consequence of impossibility described above apply
- Temporary impossibility results either in partial performance or impossibility

## **12.9 PRESCRIPTION**

- The acquisition or release from obligations through the passage of time
- The acquisition of rights (acquisition prescription) through passage of time
- Released from obligations (extinctive prescriptions) through passage of time
- Prescription begins from the moment in time where creditor is aware of the debtor and the facts giving rise to the claim (reasonable person)
- Prescription Act 68 of 1969 delays prescription where:
  - Debtor is outside RSA
  - Debtor and creditor are married
  - Debtor is a minor, insane or under curatorship
  - Creditor and debtor are partners and debt arose outside partnership
  - Debtor is member of governing body of juristic person creditor
- Act delays the running of prescription and provides at least a year to bring the claim
- Other delays in the running of prescription include:
  - Service of process
  - Acknowledgment of liability

### **Prescription periods**

- Normally 3 years but there are others:
  - 30 years:
    - Mortgage bond debts
    - Judgments debts
    - Taxation debts
    - State royalties and profits in regard of mining rights
  - 15 years
    - State loans, lease and sale debts
  - 6 years
    - Bills of exchange
    - Notarial contracts

## **12.10 SEQUESTRATION AND SUBSEQUENT REHABILITATION**

- Sequestration does not terminate a contract concluded by an insolvent before he/she became insolvent.
- Where a debtor is unable to pay debts

- Apply to court to have an estate sequestrated
- Trustee appointed to sell property and pay portion of debts
- Most of debtors obligations are terminated
- Not all contract are terminated
- Rehabilitation describes the situation where a debtor is no longer deemed to have the status of insolvent.