Department of Private Law

law of contract

only study guide for PVL3702

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CONTENTS

GENERAL OVERVIEW

In this study guide, we discuss the general principles of the law of contract, which discussion broadly encompasses the principles underlying the law of contract, the influence of the Constitution of the Republic of South Africa, 1996, the requirements for a valid contract, the contents and interpretation of contracts, breach of contract and the remedies for breach of contract, the transfer of claims, ways in which obligations are terminated, and the Consumer Protection Act 68 of 2008.

PURPOSE OF MODULE

In this module, we cover a wide variety of aspects of general contract law principles. These principles are usually applicable to all contracts, to some degree or another. However, many contracts have their own specific principles and rules which are sometimes particular applications of the general principles and sometimes completely unique to the type of contract in question. Although reference may be made to certain specific contracts in the material for purposes of illustration, the detailed study of specific contracts such as sale, lease or suretyship is not part of this module. Nevertheless, a study of general contract principles is not possible without reference to case studies involving specific types of contracts to which these principles have been applied. The subjects covered in the material are for the most part regulated by the common law, but there are also references to important legislative provisions. This module is essentially aimed at third-year students because of the complexity of the contract law principles involved.

The purpose of this module is to teach you the general principles of the law of contract as they have been developed by the courts and, in certain instances, modified by statutory law. The purpose is furthermore to equip you with the necessary knowledge, skills and competencies to interpret and apply the positive law, as well as the statutory provisions where applicable, and to solve practical problems by applying the general principles of the law of contract.

If you follow the study guide properly in conjunction with the prescribed textbook and tutorial letters, work through all the activities in the study guide and answer all the questions in the assignment, you should acquire the skills that we require of you.

METHOD OF STUDY

There is a prescribed book for this module by Hutchison, D and Pretorius, CJ (eds) entitled *The Law of Contract in South Africa* Cape Town: Oxford University Press (2009). Your study material consists of this study guide, the prescribed textbook and a number of cases which are listed under the heading ''PRESCRIBED STUDY MATERIAL'' in the study guide and in Tutorial Letter 101. All of these judgments, as well as further court decisions, are largely **discussed** in the textbook and this study guide and therefore form part of your prescribed study material. In the course of the year, additional material may be prescribed in further tutorial letters. **We cannot emphasise sufficiently that all the prescribed material is very important. Everything forms an integral part of the module and must be studied intensively for examination purposes.**

The purpose of this study guide is to aid and guide you through the prescribed textbook and to provide additional material for study purposes. In this study guide, we shall provide you with instructions on how to work through the textbook and determine what material is relevant and must be **studied** for examination purposes, and what is background information and need only be **read carefully** or is not required for purposes of this module and may be **left out** altogether.

Examples from the textbook and study guide serve to illustrate the content of the module. Examples are quite often taken from case law and can appear in examination questions in the same or a slightly different form. The same applies to the self-assessment questions in the text and at the end of each study unit. These questions can be used to determine whether you understand the content and whether you can apply it. The feedback that follows the self-assessment questions can be used as a guideline to help you in this assessment process. If you are unable to complete the self-assessment questions, you need to revisit the basic study material and ensure that you understand the content in context.

You could consider creating a study journal in which you write down your answers to the various activities and self-assessment exercises throughout the study guide. The journal will be a valuable tool in assessing your own understanding and skills in respect of the material, as well as your growth in the module. The activities and self-assessment exercises may be reused in the exams, but, in any event, they provide examples of the type of questions you may expect in the exam.

MEANING OF "STUDY", "READ CAREFULLY" AND "READ" IN THIS STUDY GUIDE

In the study guide, we shall indicate to what extent you have to know and understand the material presented in the prescribed textbook. The following instructions have the following meanings:

"Study" means you have to know and understand the indicated material for examination purposes.

"Read carefully" means that you only have to read a section of the material, and do not have to study it for examination purposes. But do not leave the particular section out, because it will help you to understand another section of the work which you do have to know for examination purposes.

"Read" means that you should read the indicated section of the material, but that it will not be asked in the examination.

EXAMINATION

In preparing for your examination, it is important that you have a good grasp and knowledge of the subject matter of this module. You must know the general principles and rules of the law of contract and be able to apply them to practical scenarios. In the examination, you will be asked to deal with three types of questions which will appear either in a multiple-choice or essay-question format:

* straightforward theoretical questions where a systematic discussion of aspects of the material is required
* problem-type questions where a practical scenario is given and you are required to
  - identify the legal issue or question raised
  - discuss the relevant rules that may be applicable to these facts and to apply the rules to the facts
  - provide a solution to the problem
* critical assessment of a theoretical or practical approach, viewpoint and differences of opinion where you are required to
  - recognise the issue
  - summarise the different viewpoints
  - critically evaluate each viewpoint
  - provide your own reasoned viewpoint

SUMMARIES

At the end of each study unit, you will find a reference to a summary of the particular study material in the prescribed textbook. **Note that the summary in the textbook is not sufficient for examination purposes.** The summary should be consulted after you have studied the material to refresh your memory or understanding of a particular section of the work.

NATURE AND BASIS OF CONTRACT

STUDY UNIT 1

THE NATURE OF CONTRACT (INTRODUCTION TO THE LAW OF CONTRACT)

OVERVIEW

In this study unit, we introduce you to the concept of what a contract is, what its characteristic features are and where it fits into the scheme of private law, and, more specifically, the law of obligations. Contracts give rise to enforceable obligations, but so do other sources of obligation, such as delicts and unjustified enrichment. Contracts must therefore be clearly distinguished from other sources of obligation. Although contracts are usually referred to as agreements, not every agreement is a contract: for an agreement to be binding in law, it must comply with certain requirements. So, for example, if you agree to accompany a friend to a social event and cancel the arrangement at the last moment, you will not be liable for breach of contract, because an essential element of a contract is missing, namely the intention to create an enforceable contractual obligation when the agreement was entered into.

The purpose of this study unit is to enable you to

* explain what a contract is and how it differs from other agreements
* explain what the requirements for a valid contract are
* explain the nature or characteristic features of a contract
* explain what an obligation is
* distinguish and discuss contractual liability on the one hand and delictual liability and liability for unjustified enrichment on the other
* explain the relationship between the law of contract and the passing of ownership
* understand the modern notion of contract

LEARNING MATERIAL

Prescribed textbook, chapter 1, sections 1.1—1.6.3.

CONTENT OF THIS STUDY UNIT

1 THE NOTION OF CONTRACT

1.1 Contract as an agreement to create enforceable obligations

Study section 1.1.1 of the textbook. At the outset, it is important to ascertain what a contract is. Among other things, it is the key to understanding the relationship between the law of contract and the law of obligations in general. A contract is essentially an agreement to create enforceable obligations. Note then that, generally, a contract is both an agreement and an obligation, but remember that obligations are also derived from other sources, such as delicts, as will be seen in due course.

1.2 Legally binding agreements that are not contracts

Study section 1.1.2 of the textbook. While some agreements are not contracts because they are not intended to be legally binding, some other agreements, although intended to be legally enforceable, are in fact not contracts. So, contracts must be distinguished from other legally relevant agreements such as real agreements whereby rights are transferred (transfer agreements) and agreements which extinguish obligations (absolving agreements). Bear this distinction in mind when you work through the relationship between the law of contract and the law of property further on. Furthermore, obligationary, absolving and real agreements may overlap to a greater or lesser extent and occur more or less simultaneously. For example, suppose you walk into a shop, put R10 on the counter and point to a packet of sweets. The proprietor takes the money and hands over the sweets. In giving you the sweets, the proprietor

(1) accepts your tacit offer to buy the sweets (in other words, an agreement creating obligations comes into existence)
(2) performs and thereby extinguishes the obligation in terms of which he or she is obliged to deliver the sweets to you (that is an agreement extinguishing obligations)
(3) transfers the ownership of the sweets to you (that is a real agreement)

Here, the act of delivery therefore had three effects: it created obligations, extinguished an obligation and transferred a right.

1.3 Legally binding agreements that are more than just contracts

Carefully read section 1.1.3 of the textbook. Some legally binding agreements are more than just contracts because they contain elements which give them a specific character, the most obvious of which is marriage. Although these agreements fall outside the scope of this module, you should read through this section carefully so that you understand that some contracts are highly specialised and often comprise much more than just agreements to create obligations.

1.4 Definition of a contract

Study section 1.1.4 of the textbook. To constitute an enforceable contract, an agreement must be one which the law recognises as binding on the parties, and, to this end, the agreement will have to comply with further requirements set for an enforceable contract. Take note, therefore, that an agreement does not necessarily constitute a contract, and, as we have seen, that there is a clear distinction between an agreement to create enforceable obligations (ie a contract) and other types of legally relevant agreements (ie absolving and real agreements).

2 REQUIREMENTS FOR A VALID CONTRACT

Study section 1.2 of the textbook. The requirements for a binding contract are absolute, in the sense that they must all be complied with for the creation of a valid contract. These requirements will be dealt with separately and in detail in due course and make up the bulk of this module. Try at the outset, however, to memorise the requirements for a valid contract: this will not only provide you with an idea of what you are dealing with as you work through the material, but also of what is to come and how the pieces of the puzzle ultimately fit together.

Bear in mind, however, that the fact that the contract is valid when it is concluded does not mean that it cannot be challenged subsequently. The contract, or rather its operation, may, for example, be terminated because the performance has become impossible or unlawful after formation of the contract; or one of the contracting parties may cancel because of the other's breach of contract; or one of the parties may cancel the contract because of the other's misrepresentation, duress, undue influence or commercial bribery. However, all these cases presuppose the existence of a valid contract. In brief, impossibility of performance at the time the contract is entered into prevents the creation of a valid contract, because one of the basic requirements is lacking; supervening impossibility of performance, however, can only prevent the continued existence of an existing contract, since all the basic requirements were met at the time of conclusion of the contract. So, too, a material and reasonable mistake will have the result that a contract is void (ie no contract comes into existence), since it excludes the basic requirement for the existence of a contract, namely consent. Misrepresentation, duress, undue influence or commercial bribery, however, can only render a contract voidable (ie a contract comes into existence but it may be terminated), because, in such a case, there is consensus, so that the contract cannot be void, but the consent has been obtained in an improper manner, rendering the contract assailable. The factors that influence the existence of a valid contract, or its continued existence, will be thoroughly dealt with in due course, so do not be concerned if these concepts seem confusing at present. The important thing is merely to understand the difference between void and voidable contracts.

3 THE NATURE OF CONTRACT

Study section 1.3 of the textbook. The concept of a contract covers a vast array of transactions in terms of which two or more parties make promises or undertakings to each other to render specific performances. Importantly, however, while some contracts (especially large commercial transactions) may be extensively negotiated, formalised in writing and signed, most contracts are concluded informally and even tacitly (ie without the parties expressing their agreement orally or in writing). So, interestingly, the filling of a car's petrol tank is no less a contract than buying a car or letting a house. This should give you an idea of the multitude of contracts concluded on a daily basis and of the general importance of the law of contract.

4 CONTRACT AND THE LAW OF OBLIGATIONS

4.1 The concept of obligation

Study section 1.4.1 of the textbook. The nature of an obligation as a juristic (legal) bond or enforceable legal relationship between two or more legal subjects forms the essence of this section. Pay careful attention to the fact that obligations give rise to personal rights as opposed to real rights. These rights are very different in nature and effect. This distinction is not only relevant to the law of contract, but also the law of obligations in general, as well as the law of property. Another important aspect of contractual obligations is that parties usually fill the roles of both creditor and debtor, since, as a matter of course, they have both a right to performance (creditor) as well as a duty to perform (debtor) in terms of the contract. Carefully study the ''Pause for reflection'' box in this section in this regard.

4.2 Contract and delict

Study section 1.4.2 of the textbook. Traditionally, the difference between a contract on the one hand, and a delict and unjustified enrichment on the other, is that, in the former instance, the parties usually voluntarily assume their obligations, whereas, in the latter instances, the obligations are imposed by law irrespective of the will of the parties. Note, however, that breach of contract and a delict are very similar, in that they both constitute civil wrongs and, in appropriate circumstances, give rise to a duty to pay damages. Also pay careful attention to the fact that, sometimes, concurrent contractual and delictual liability can arise, so that the plaintiff can sue on either basis. Table 1.1 provides a useful comparison of contract, delict and enrichment which will help you to grasp the distinction between these different forms of obligation at a glance.

4.3 Contract and enrichment

Study section 1.4.3 of the textbook. The useful key to distinguishing contractual from enrichment liability lies in the question of whether or not a transfer of wealth from one estate to another occurred pursuant to a valid legal cause, such as a contract. Where such a ground is present in the form of a contract, one is purely dealing with a contractual obligation; whereas, if it is absent, one is dealing with an enrichment obligation. Refer again to table 1.1 in this regard.

4.4 Contract and the law of property

Carefully read section 1.5 of the textbook. Carefully read section 1.5 as background. However, the most important aspect of contracts and property law relates to the passing of ownership in the case of void and voidable contracts. Study this section of the study guide carefully.

Sometimes it is argued that a void contract can have no consequences whatsoever, so that ownership can never pass to the other contracting party on the strength of it, while a voidable contract can have consequences and can therefore lead to the transfer of ownership. Thus where A delivers a thing to B in terms of an invalid contract, it is argued that B does not become the owner; hence A remains the owner and may consequently claim the thing with the *rei vindicatio* from a third party, C, to whom B may have transferred it. If the contract is merely voidable, on the other hand, B becomes the owner on delivery and A will not be able to recover the thing from C with his or her *rei vindicatio* if it has been delivered to him or her.

This argument will not bear up under scrutiny, however. A contract gives rise to obligations, not to the transfer of ownership. Transfer of ownership is effected, as we have seen, by a real agreement, for example by delivery or registration. The real agreement may be entered into to discharge a contractual obligation, but this is not necessarily the case. The mere fact that a void contract does not give rise to an obligation does not mean that it cannot lead to the transfer of ownership through a valid real agreement. Whether ownership passes depends on whether all the requirements for the transfer of ownership have been complied with. One of those requirements is that there should be a *iusta causa traditionis*, and it is important to determine what this requirement means. This is a question belonging, strictly speaking, to the law of property.

What is required for transfer of ownership, therefore, is not a valid contract followed by delivery, but the intention to transfer ownership on the part of the transferor and the intention to acquire ownership on the part of the transferee at the time of delivery. Such an intention may be apparent even from a void contract, for example where A delivers a car to B in terms of a contract of sale which is void for some reason. A contract that is void may, therefore, lead to the passing of ownership, and with that the distinction between void and voidable agreements falls away as far as transfer of ownership is concerned. In this regard, it is said that South African law follows an abstract system of transfer.

4.5 The development of the modern notion of contract

Carefully read section 1.6 of the textbook. Carefully read the entire section 1.6. It will provide you with insight into how the modern notion of contract law developed from Roman and Roman-Dutch law, and was further influenced by English law. This section indicates that the development of the modern law of contract was part of a historical process which culminated in or about the 19th century. Of course, developments in contract law are ongoing and especially the impact of the Constitution and other statutory law is of tremendous importance in modern South Africa. These developments will be dealt with in due course.

ACTIVITY

1 Describe the following concepts:

Contract

Juristic act

Personal and real rights

Obligation

Civil and natural obligations

Agreements creating obligations

Absolving agreements

Real agreements

2 List and very briefly explain the requirements for a valid contract.

3 Write a short note on contract obligations and the passing of ownership.

4 Briefly distinguish contracts from delicts and unjustified enrichment.

FEEDBACK

1 It is important that you know and understand each of these concepts from the outset. Without this knowledge, you will find it difficult to study the rest of this module.

2 Although the requirements for a valid contract seem straightforward enough when reading through them, it is far more difficult to memorise and explain them to another person. Remember that these requirements will be dealt with in detail further on, but a bird's-eye view should provide you with some perspective on what constitutes a valid contract at this stage.

3 It is essential to note that South African law follows an abstract system of passing of ownership, so that, even if an agreement is invalid, ownership in property may still be passed.

SUMMARY

Consult points 1–14 of ''This chapter in essence'' at the end of chapter 1 of the textbook. Note that points 12–14 need only be read.

STUDY UNIT 2

THE BASIS OF CONTRACT

OVERVIEW

In this study unit, we address one of the most important and difficult questions of the law of contract, namely: what is the reason that underlies the enforcement of contracts by the courts? In other words, why do certain agreements bind the parties and carry the weight of the law behind them? Historically, in terms of Roman-Dutch law received in 1652, contracts were binding simply because the parties agreed to them. This is referred to as a subjective approach to the determination of contractual liability. However, when the courts were called upon to determine whether a party was bound by an agreement, they adopted an objective approach under influence of English law. In the ensuing years, the courts proceeded to fluctuate between subjective and objective approaches to contractual liability. The issues discussed in this study unit are fairly complex, so don't be surprised if, initially, they are difficult to grasp. Furthermore, most of the development around the theories that underpin contractual liability occurred within the context of mistake, so we suggest that you study study unit 10 in conjunction with this study unit. You will find that these two study units overlap to a large extent.

The purpose of this study unit is to enable you to

* explain what is meant by the basis of contractual liability
* explain what is meant by actual subjective agreement (consensus)
* explain what is meant by apparent or objective agreement
* explain the theories of contract that have influenced the South African law of contract
* explain whether the approach to contractual liability is subjective or objective
* explain the dual basis of contract in modern law

LEARNING MATERIAL

Prescribed textbook, chapter 1, sections 1.7—1.7.7.

Smith v Hughes (1871) LR 6 QB 597.

Pieters & Co v Salomon 1911 AD 121.

South African Railways & Harbours v National Bank of South Africa Ltd 1924 AD 704.

Saambou-Nasionale Bouvereniging v Friedman 1979 (3) SA 978 (A).

Steyn v LSA Motors Ltd 1994 (1) SA 49 (A).

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

Study section 1.7.1 of the textbook. This section merely reiterates the fundamental question whether our law follows a subjective or objective approach to the formation of contracts. The ensuing sections explore exactly what is meant by these approaches to contract.

2 ACTUAL SUBJECTIVE AGREEMENT

Study section 1.7.2 of the textbook. Actual subjective agreement (*consensus ad idem*) means that the parties are in complete agreement regarding the important aspects of their contract; intend their agreement to be binding in law; and are aware of each other's intention in this regard. These elements of consensus are very important not only for present purposes, but also for determining whether one (or more) of the parties has laboured under a material mistake. A material mistake excludes one of the elements of consensus and has the effect that a contract based on actual agreement cannot arise. However, even if a material mistake has occurred, the parties may yet be liable on the basis of, for instance, the reliance theory. These concepts are further explored in study unit 10, but it is essential for you already at this stage to note the effect of a mistake on subjective agreement. Material mistakes are, however, the exception and not the norm: in most instances, a party's actions are an accurate reflection of what they intend, and so most contracts are concluded on the basis of actual agreement between the parties.

3 APPARENT OR OBJECTIVE AGREEMENT

Study section 1.7.3 of the textbook. Apparent or objective agreement implies that, although the parties are not actually in agreement regarding the conclusion of a contract (ie there is *dissensus* or a material mistake), the outward manifestations of their intention (conduct) indicate that agreement has been reached. For example, a party might sign a contractual document without properly reading it and be confused as to its contents, or say one thing and mean another, or one party might deliberately mislead the other into believing that he or she has agreed to a contract with the former, while actually not intending to be contractually bound. In these instances, there is no actual agreement to speak of, but, outwardly, it appears as if the parties reached consensus. We shall see that, sometimes, the law holds a party bound to a contract, despite the lack of actual agreement, on objective grounds. So, crucially, at this stage you must understand that, while most contracts are based on agreement, in the absence of true agreement, sometimes contracts are still found to exist on an objective basis.

4 THEORIES OF CONTRACT

Study section 1.7.4 of the textbook. In this section, three theories of contract, namely the will theory (subjective approach), the declaration theory (objective approach), and the reliance theory (considered to contain a mixture of subjective and objective elements) are critically dealt with. There is evidence of all three theories, in some form or another, in the South African law of contract. How these theories have been applied in practice is dealt with in study unit 10 on the doctrine of mistake, but it is very important for you at this stage to be able to distinguish between these approaches to contractual liability from a theoretical perspective. Look carefully at table 1.2, for it provides a summary at a glance of what these theories entail.

5 APPROACH TO CONTRACT: SUBJECTIVE OR OBJECTIVE?

Study section 1.7.5 of the textbook. As previously mentioned, there is evidence of South African law subscribing to a subjective approach (will theory), an objective approach (type of declaration theory), and the reliance theory (a compromise objective approach). The law has fluctuated between these subjective and objective approaches over the years, but, more recently, the courts seem to have preferred the will theory as the primary basis of contractual liability, but which is corrected in exceptional instances (where actual agreement is lacking) by the reliance theory (secondary basis of contractual liability). This section briefly traces the development of contract theory in positive law. Take note of the discussion of the prescribed cases and the theory, or theories, of contractual liability which they tend to reflect (*Smith v Hughes* (1871) LR 6 QB 597; *Pieters & Co v Salomon* 1911 AD 121; *South African Railways & Harbours v National Bank of South Africa Ltd* 1924 AD 704; *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A); *Steyn v LSA Motors Ltd* 1994 (1) SA 49 (A)).

6 DUAL BASIS OF CONTRACT IN MODERN LAW

Study section 1.7.6 of the textbook. This section confirms the preferred approach to contractual liability in modern law: the will theory as supplemented by the reliance theory. It is also important to note that the reliance theory has risen to prominence because it tends to be more acceptable as a compromise between a wholly subjective approach (only the will theory) and a wholly objective approach (only the declaration theory). So, while the courts accept that most contracts are based on actual agreement, there are instances where, despite a lack of subjective agreement, a contract can nevertheless be found to have arisen on the basis of reasonable reliance. For details, refer to study unit 10.

7 PROVING THE EXISTENCE OF A CONTRACT

Study section 1.7.7 of the textbook. Here, you essentially have to know that the onus of proving a contract rests on the party who alleges that it exists. This is done by adducing (objective) evidence of either actual consensus (primary basis) or reasonable reliance (secondary basis).

ACTIVITY

1 Distinguish between the will theory (subjective approach), declaration theory (objective approach) and reliance theory (compromise approach containing subjective and objective elements).

2 Which theory, or theories, of contractual liability does South African law follow?

FEEDBACK

1 At this stage, you should be able to describe briefly what each of these theories entails, as well as how they differ from one another.

2 Although it may seem fairly straightforward, this issue is still fairly controversial. Here, you must remember that the courts have in fact fluctuated between subjective and objective approaches to contractual liability. In all probability, the reasons for this phenomenon are historical: Roman-Dutch law subscribed to a consensual approach, while English law probably generally adopted an objective approach. The reliance theory, as a compromise between these two approaches, was also received from English law (see *Smith v Hughes* (1871) LR 6 QB 597; *Pieters & Co v Salomon* 1911 AD 121) and has exerted great influence on the question of contractual liability. The general consensus of opinion in modern law is to accept that contracts are primarily based on actual agreement, but that, further, where actual agreement is lacking, a contract may nevertheless be grounded in reasonable reliance (*Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A)). Thus there seems to be less emphasis on the declaration theory in recent times (see *Steyn v LSA Motors Ltd* 1994 (1) SA 49 (A)), but remember that traces of a type of declaration theory do exist in case law (see *South African Railways & Harbours v National Bank of South Africa Ltd* 1924 AD 704).

SUMMARY

Consult points 15–21 of ''This chapter in essence'' at the end of chapter 1 of the textbook.

STUDY UNIT 3
CORNERSTONES OF CONTRACT

OVERVIEW

In this study unit, we address fundamental ideals and values that influence and shape the law of contract, and the goals of contract law. The principles of freedom of contract, sanctity of contract, good faith and privity of contract are underlying values that inform contract law. These concepts sometimes tend to come into conflict with one another, producing tension that runs throughout the body of contract law. So, for instance, while a person may freely choose to enter into a contract (freedom of contract), the principles of good faith and equity may require that the contract be undone if the terms thereof are particularly onerous or unfair and consequently in conflict with public policy. On the other hand, the goals of contract law relate to its aims and function in society. Contract law strives to ensure that people keep their promises (contractual undertakings) and to promote legal certainty by providing a framework within which they can transact with one another. But, it also aims to promote fairness and reasonableness in contractual dealings. One can see how the underlying values of contract law are also reflected in its goals. The cornerstones and goals of the law of contract are important aspects of this module, and we shall see how they have shaped, and continue to shape, the principles and rules (contract law doctrine) of this body of law.

The purpose of this study unit is to enable you to

* identify the cornerstones of contract
* explain the goals of contract
* explain what is meant by competing values in the law of contract
* explain the concepts of freedom of contract and sanctity of contract
* explain the concepts of good faith and equity in contract law

LEARNING MATERIAL

Prescribed textbook, chapter 1, sections 1.8–1.8.4.

Printing & Numerical Registering Co v Sampson (1875) LR 19 Eq 462.

Barkhuizen v Napier 2007 (5) SA 323 (CC).

Bank of Lisbon & South Africa Ltd v De Ornelas 1988 (3) SA 580 (A).

Sasfin v Beukes 1989 (1) SA 1 (A).

Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman 1997 (4) SA 302 (SCA).

Brisley v Drotsky 2002 (4) SA 1 (SCA).

Bredenkamp v Standard Bank of South Africa 2010 (4) SA 468 (SCA).

Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC).

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION: CORNERSTONES OF CONTRACT

Study the introduction to section 1.8 of the textbook. This section provides a brief account of what the cornerstones or underlying values of the law of contract are. These concepts are discussed in greater detail in the study material that follows. Here, you should merely concentrate on identifying these underlying values.

2 THE GOALS OF CONTRACT LAW

Study section 1.8.1 of the textbook. You will find useful summaries of the aims of contract law in the ''Pause for reflection'' box and in the second paragraph of section 1.8.1. You merely need to understand and briefly describe the goals of contract law for purposes of this module.

3 COMPETING VALUES IN THE LAW OF CONTRACT

Study section 1.8.2 of the textbook. Freedom and sanctity of contract are values that promote free choice in entering into contractual relations, as well as certainty and the strict enforcement of contractual arrangements. However, even if voluntarily entered into, a contract can sometimes have very harsh and even unintended consequences for the individual. The values of fairness and good faith provide a counterbalance to freedom and sanctity of contract and emphasise reasonableness and fairness in contracting. Although freedom and sanctity of contract are primary values in contract law, there are several ways in which the courts temper these concepts to effect contractual justice in appropriate circumstances. So, we see that the values of contract law tend to be in a constant state of tension with one another, and it is the task of a court to find a balance between the competing goals of certainty and fairness in a given instance.

4 FREEDOM AND SANCTITY OF CONTRACT

Study section 1.8.3 of the textbook. Here, we examine in greater detail what the concepts of freedom and sanctity of contract entail, and the emphasis placed on them in what is commonly referred to as classical contract law. Note carefully the features of classical contract law, for they still have relevance in modern contract law. The main features of classical doctrine are that parties have the utmost freedom in engaging in contractual relations with others (freedom of contract), but, once freely entered into and if not contrary to public policy, a contract should be enforced by a court of law to the hilt, irrespective of patent unfairness to one of the parties. See, in this regard, the famous quotation from the English case of *Printing & Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465. The idea was that the exchange was inherently fair, since it was the product of negotiation between parties with equal bargaining power. In modern law, it has become increasingly obvious that the assumed fairness of the exchange and the equality of the parties are simply mythical, and that absolute freedom of contract simply does not exist. Perhaps, where large corporate entities contract with each other, the classical notions apply, but far less so when private individuals are involved. Consumers, for instance, often have very little leverage when entering into contracts: a person can usually bargain for a better price at a retail store but not when entering into contracts for essential services, such as electricity or water provision. So, although still relevant in modern law, freedom of contract is not an absolute value. Note that you do not have to study the references to English law near the end of section 1.8.3, but we do suggest that you at least read through them. Also note what the Constitutional Court said in *Barkhuizen v Napier* 2007 (5) SA 323 (CC), discussed in the ''Pause for reflection'' box.

5 GOOD FAITH AND EQUITY IN CONTRACT

Study section 1.8.4 of the textbook. Carefully observe how the concepts of good faith and equity are applied in the modern law of contract. While acknowledging the relevance of these concepts, the Supreme Court of Appeal has frequently emphasised that a contract will not be struck down merely because it is unfair or contrary to good faith. There have to be more tangible indications of harm to public interest before a contract freely entered into will not be enforced. But, while this court has generally tended to adopt a more limited view of equitable doctrines, in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) the Constitutional Court seems to have made the concepts of reasonableness and fairness the focus of an enquiry into what public policy requires within the circumstances of a case, thus suggesting a more expansive role for these values in modern contract law.

Carefully study the decisions of the Supreme Court of Appeal in *Bank of Lisbon & South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A), *Sasfin v Beukes* 1989 (1) SA 1 (A), *Brisley v Drotsky* 2002 (4) SA 1 (SCA) and *Bredenkamp v Standard Bank of South Africa* 2010 (4) SA 468 (SCA), and contrast with the minority judgment of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 (SCA), as well as the approach of the Constitutional Court in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) and *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC). These aspects are further discussed in study unit 17 dealing with legality.

ACTIVITY

1 Briefly identify and discuss the cornerstones and goals of contract law.

2 What is meant by competing values in contract law?

3 Discuss, with reference to case law, the role and importance of the values of freedom and sanctity of contract on the one hand, and good faith and equity on the other, in modern contract law.

FEEDBACK

1 At this stage, you should be able to briefly identify and describe what each of these concepts entails, as well as the interrelationship between them.

2 The important thing to remember is that contract law is not influenced by only one set of values, but

reflects continuing tension between conflicting values which shape the way this body of law develops, as well as how the courts approach contractual issues.

3 One must compare the stricter, more traditional approach which the Supreme Court of Appeal has emphasised regarding the enforcement of transactions freely entered into (irrespective of unfairness) and the more expansive approach suggested by the Constitutional Court (according reasonableness and fairness a greater role in the concept of public policy). The question as to which direction case law will develop is still uncertain, but, in *Barkhuizen v Napier* 2007 (5) SA 323 (CC), the Constitutional Court seems to have made the concepts of reasonableness and fairness the focus of the enquiry into what public policy requires within the circumstances of a case, at least suggesting a more expansive role for these concepts in modern law.

SUMMARY

Consult points 22–23 of ''This chapter in essence'' at the end of chapter 1 of the textbook.

STUDY UNIT 4
THE CONSUMER PROTECTION ACT

OVERVIEW

This study unit briefly deals with the Consumer Protection Act 68 of 2008, the primary purpose of which is to afford protection to consumers from exploitation in the marketplace, and to promote their economic and social welfare. The Act recognises a number of fundamental consumer rights to give effect to its aims, and, amongst other things, either prohibits or limits certain terms in consumer contracts. In consequence, the Act will play an enormous role in policing consumer contracts in South Africa and in ensuring that consumers get a fairer deal than they have received thus far.

The purpose of this study unit is to enable you to

* explain the purpose and aims of the Act
* set out the fundamental consumer rights recognised by the Act, as well as how they are to be protected and enforced
* explain the scope of the Act
* explain which contractual terms are prohibited in terms of the Act, and the effect thereof
* explain the effect of the concepts of reasonableness and fairness on consumer contractual terms in terms of the Act

LEARNING MATERIAL

Prescribed textbook, chapter 1, section 1.9.

CONTENT OF THIS STUDY UNIT

Study section 1.9 of the textbook. The Consumer Protection Act 68 of 2008 is intended to effect greater reasonableness and fairness in specifically consumer contracting. Its scope, however, is very wide and it applies not only to natural persons, but also to a franchisee and a juristic person with an asset value or annual turnover below a threshold of R3 million. Section 1.9 contains a summary of the aims of the Act and how it seeks to achieve them, as well as when it applies, what terms it prohibits, and the effect of the concepts of reasonableness and fairness on consumer contract terms. You would do well to study section 1.9 diligently. The Act will no doubt have a tremendous impact on consumer transactions. You will find further details on, and references to, the Act in the rest of the study material, where appropriate. You must note, however, that the Act did not come into operation in October 2010 as originally intended, but on 31 March 2011. Further note that the monetary threshold applicable to a juristic person affected by the Act is R3 million.

ACTIVITY

Write a short essay on the Consumer Protection Act 68 of 2008, explaining its purpose and aims, the fundamental consumer rights it recognises, the scope of the Act, which contractual terms it prohibits, and the effect of the concepts of reasonableness and fairness on consumer contractual terms in terms of the Act.

FEEDBACK

Remember that the discussion in this study unit merely entails a brief introduction to the Act. Further details will be discussed within the context of the general principles of contract law. You will see how the Act amends and supplements the general principles of the law of contract.

SUMMARY

Consult point 24 of "This chapter in essence" at the end of chapter 1 of the textbook.

STUDY UNIT 5

THE IMPACT OF THE CONSTITUTION

OVERVIEW

This study unit examines the impact of the Constitution of the Republic of South Africa, 1996, on the law of contract. Although the matter has yet to be finally settled, it appears that the Constitution generally applies indirectly to contractual relationships. You should refer to study unit 3 on the cornerstones of contract again when working through this study unit. Constitutional issues are raised in that study unit as well, especially in regard to the concepts of freedom and sanctity of contract, and equity in contract law.

The purpose of this study unit is to enable you to

* explain the effect of the Constitution of the Republic of South Africa, 1996, on contract law

LEARNING MATERIAL

Prescribed textbook, chapter 1, section 1.10.

Barkhuizen v Napier 2007 (5) SA 323 (CC).

Bredenkamp v Standard Bank of South Africa 2010 (4) SA 468 (SCA).

CONTENT OF THIS STUDY UNIT

Study section 1.10 of the textbook as well as the content of this study unit.

Although the interim Constitution, 1993, has been repealed, we suggest that you nevertheless study the comments in the textbook in this regard. You will probably come across a contract law case dealing with the interim Constitution at some time or another, and such Constitution still provides a point of reference for the Constitution itself. The crucial question is whether the Constitution applies directly (ie whether the constitutionality of a contractual term can be tested directly against a provision of the Constitution) or indirectly to contractual relations (ie whether a contractual term offends public policy as informed by the fundamental values enshrined in the Constitution). In *Barkhuizen v Napier* 2007 (5) SA 323 (CC), the Constitutional Court preferred the latter approach, which seems to be entirely appropriate.

Constitutional values may primarily impact on a contract by rendering some of its provisions, or the entire contract, contrary to public policy (for being in conflict with the Constitution), and thus invalid or unenforceable. But the Constitution may also impact on contractual relations in other ways. One such way is by possibly rendering invalid the exercise of a contractual power, such as the right to cancel a contract. Note the important case of *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA). It may also be possible for a party to be compelled to contract with another where refusal to enter into the contract amounted to unfair discrimination (compare *Hoffmann v South African Airways* 2000 (11) BCLR 1211 (CC)).

It is apparent, though, that the full impact of the Constitution on the law of contract has not been settled. Refer also to the diagram in figure 1.1.

ACTIVITY

Write a short essay explaining the effect of the Constitution of the Republic of South Africa, 1996, on contract law.

FEEDBACK

Your discussion of the effect of the Constitution on contract law should also include aspects discussed in study unit 3 on the cornerstones of contract, since many of the concepts discussed there are relevant here. The most important aspect, however, relates to the fact that it seems as if the Constitutional Court prefers an indirect application of the Constitution to contractual relations. Also remember to explain how the Constitution can be drawn into a contractual dispute, and cite some examples from case law.

SUMMARY

Consult points 25–27 of ''This chapter in essence'' at the end of chapter 1 of the textbook.

FORMATION OF CONTRACT

STUDY UNIT 6

OFFER AND ACCEPTANCE: THE OFFER

OVERVIEW

This and the next study unit deal with the legal constructs of offer and acceptance. These are useful tools that are used to explain and analyse the process by which parties reach consensus, assuming that most agreements are based on consensus (see, once again, study unit 2 in this regard). Contractual parties may obviously express their intentions in any discernible manner, depending of course on the nature of the contract in question. However, the courts often use the concepts of offer and acceptance to give some concrete meaning to the conduct of the parties, and to determine when and if agreement has been reached. Sometimes, however, there may be no real offer and acceptance to speak of (a contract may, for instance, simply be based on reasonable reliance), so the facts of each case should not always be forced to fit into an offer-and-acceptance mould.

The purpose of this study unit is to enable you to

* explain the general relevance of the rules of offer and acceptance in the law of contract
* explain what is meant by an offer, and what the legal effect of an offer is
* set out and briefly explain the requirements for a valid offer
* explain the impact of the Consumer Protection Act 68 of 2008 on offers to which it applies
* set out and explain the various categories of offers to the public
* explain the circumstances in which an offer terminates
* apply the relevant principles to practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 2, sections 2.1–2.2.4.6.

Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256.

Crawley v Rex 1909 TS 1105.

Bloom v American Swiss Watch Co 1915 AD 100.

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

Study section 2.1 of the textbook regarding the general meaning and relevance of the rules of offer and acceptance for the law of contract. Note also the overview in figure 2.1.

2 THE OFFER

Study sections 2.2–2.2.2.3 of the textbook. In this part of the work, you must be able to describe briefly what an offer and its legal effect are, as well as what the general requirements for an offer are.

3 THE CONSUMER PROTECTION ACT

Study section 2.2.2.4 of the textbook. The Consumer Protection Act introduces further requirements regarding contracts to which it applies. You should briefly be able to explain what they are.

4 OFFERS TO THE PUBLIC

Study sections 2.2.3–2.2.3.4. of the textbook. Offers are usually addressed to a specific person, but that is most definitely not always the case. Offers may also be directed to the public at large or to a segment of the public, and a contract may be concluded with someone who responds to the offer. It may be difficult, however, to determine whether a contract has arisen where a dispute exists between the parties. Refer, here, to the example provided by the famous English case of *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.

Advertisements can be especially problematic: consider, for instance, whether an advertisement is merely a marketing ploy to attract business or an actual offer to contract. To effect a measure of certainty, the courts have held that, generally, an advertisement merely constitutes an invitation to do business rather than an offer. See the discussion of *Crawley v Rex* 1909 TS 1105. On the other hand, a promise of reward can constitute an offer to the general public. See the discussion of *Bloom v American Swiss Watch Co* 1915 AD 100.

Auctions can also be rather tricky, and here you must study the differences between simple auctions and auctions subject to conditions. Note also the implications of the Consumer Protection Act in this regard.

5 TERMINATION OF AN OFFER

Study sections 2.2.4–2.2.4.6 of the textbook. Here, you must be able to state and briefly explain the circumstances in which an offer terminates.

ACTIVITY

1 John offers to sell his only car to Jane. Does a valid contract of sale arise in the following circumstances?

  (a) Where Jane accepts the offer, but the parties agree to determine the price at a later date.

  (b) Where the price is determined, but the offer is jointly accepted by Jane and Fred.

  (c) Where the price is determined and Jane accepts the offer, but requires that John install a new compact disc player in the car.

2 Distinguish between a simple auction and an auction subject to conditions.

1 (a) No valid contract will arise because the offer is not definite and complete. The price is an essential element of a contract of sale and must be determined or determinable upon conclusion of the contract.

(b) No valid contract will arise because the offer is not jointly addressed to Jane and Fred, but to Jane only, and therefore only Jane may accept it.

(c) No valid contract will arise because Jane's "acceptance" amounts to a conditional acceptance, and that is tantamount to the offer being rejected and a counteroffer being made.

2 In the case of a simple auction, it is the bidder who makes an offer which the auctioneer may accept or reject, while, in the case of an auction subject to conditions, it is the auctioneer who makes the offer as regards the conditions to which the auction and the envisaged contract of sale are subject, and the bidder who then makes an offer in regard to purchasing the particular article. The bidder's offer in the last-mentioned instance also serves as an acceptance of the auctioneer's offer regarding the auction conditions. Remember that the Consumer Protection Act also applies to auctions that are subject to the Act.

SUMMARY

Consult points 1–9 of ''This chapter in essence'' at the end of chapter 2 of the textbook.

STUDY UNIT 7

OFFER AND ACCEPTANCE: THE ACCEPTANCE

OVERVIEW

The acceptance constitutes the other half of the mechanics of consensus and entails the declaration of the offeree's intention to be bound by the terms contained in the offer. In other words, the offeree's acceptance is the mirror image of the offeror's offer. However, as mentioned in study unit 6, bear in mind that the rules of offer and acceptance are not written in stone, and not every factual situation giving rise to a contract can be forced to fit such a construction.

The purpose of this study unit is to enable you to

* explain what is meant by an acceptance, and what the legal effect of an acceptance is
* set out and briefly explain the requirements for a valid acceptance
* set out and explain the principles and rules applicable as to when and where acceptance takes effect
* explain briefly that, generally, negotiations may be broken off by a contractual party without incurring liability
* apply the relevant principles to practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 2, sections 2.3–2.4.

Bird v Sumerville 1961 (3) SA 194 (A).

Bloom v American Swiss Watch Co 1915 AD 100.

Cape Explosives Works Ltd v South African Oil and Fat Industries Ltd; Cape Explosives Works Ltd v Lever Brothers (South Africa) Ltd 1921 CPD 244.

Smeiman v Volkersz 1954 (4) SA 170 (C).

Pillay v Shaik 2009 (4) 74 (SCA).

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

Study section 2.3 of the textbook. In many cases, an acceptance will be clear and in as many words, but remember that it may also be tacit, such as when items are purchased at a retail store without a word being spoken.

2 REQUIREMENTS FOR VALID ACCEPTANCE

Study sections 2.3.1–2.3.1.4 of the textbook. As in the case of offers, here you must be able to describe briefly what an acceptance and its legal effect are, as well as what the general requirements for an acceptance are. Familiarise yourself with the discussion of *Bird v Sumerville* 1961 (3) SA 194 (A) and *Bloom v American Swiss Watch Co* 1915 AD 100.

3 WHEN AND WHERE ACCEPTANCE TAKES EFFECT

Study sections 2.3.2–2.3.2.5 of the textbook. Since actual agreement is usually considered to be the prime basis for contractual liability, it follows from the elements of consensus (refer again to study unit 2) that the offeror must learn of the offeree's acceptance before a contract arises, and so that is usually the moment when and the place where the contract arises. This represents the information theory, which is considered to be the general rule. However, in the case of postal contracts (and contracts by telegram), the courts adopted the expedition theory, which provides that the contract comes into being when and where the offeree posts the letter of acceptance. This theory was adopted from English law in *Cape Explosives Works Ltd v South African Oil and Fat Industries Ltd; Cape Explosives Works Ltd v Lever Brothers (South Africa) Ltd* 1921 CPD 244 and has been severely criticised, probably because it flies in the face of the will theory. Note that the expedition theory applies only in certain circumstances, notably where the offer is made by post (contrast *Smeiman v Volkersz* 1954 (4) SA 170 (C)).

You must also take careful note of the effect of the Electronic Communications and Transactions Act 25 of 2002, which provides that contracts concluded by e-mail and other means of electronic communication are concluded at the time when and place where acceptance of the offer is received by the offeror (the reception theory).

4 BREAKING OFF NEGOTIATIONS

Study section 2.4 of the textbook. Although parties are generally free to break off negotiations without legal consequences, bear in mind that, if a party has brought the other party under the reasonable impression that consensus has been reached, he or she may still be held contractually liable in terms of the reliance theory (consult study unit 2 again).

ACTIVITY

1 Discuss the requirements for a valid acceptance.

2 Distinguish between the declaration theory, the expedition theory, the reception theory and the information theory. Also indicate why the information theory is generally considered to be the most appropriate. See if you can find practical examples of the application of each.

3 Thandi writes a letter to John offering him R35 000 for his speedboat, which letter she arranges to be delivered to John. John decides to accept the offer and posts a letter of acceptance to Thandi. Before the letter reaches Thandi, however, Jan offers John R37 000 for his speedboat. John accepts Jan's offer and immediately telephones Thandi and tells her to ignore his letter. Thandi institutes action against John for breach of contract. Did a valid contract arise between Thandi and John?

FEEDBACK

1 You should be able to name and discuss each of the different requirements. Always remember that the acceptance must meet certain requirements before it can give rise to the formation of a contract between offeror and offeree.

2 In terms of the declaration theory, the agreement is concluded once the offeree has expressed his or her acceptance, that is, when he or she has written his or her letter; in terms of the expedition theory, the agreement is concluded as soon as the offeree has posted his or her letter of acceptance; another theory holds that the agreement comes into being when the offeror receives the offeree's letter of acceptance (the reception theory); and, finally, in terms of the general principle embodied in the information theory, the agreement is concluded only when the offeror has been informed of the acceptance – in other words, when he or she has read the offeree's letter. The information theory is derived from and reinforces the will theory, which is generally considered to be the primary basis for contractual liability. But, while the information theory is regarded as the general rule, the controversial expedition theory applies to postal contracts (and contracts by telegram), and the reception theory applies to transactions governed by the Electronic Communications and Transactions Act 25 of 2002. The declaration theory could, for instance, come into play where the parties have reduced their agreement to writing and the document provides that the contract will arise when and where the offeree signs the document; in other words, the offeror has dispensed with being notified of acceptance.

3 A valid contract did not arise. Although Thandi expressed her offer by way of a letter, she did not expressly or tacitly waive her right to be notified of possible acceptance. If she had posted the letter, it would mean that the expedition theory would have applied and a contract would have been concluded once John had mailed his letter of acceptance, but, since she did not, the general rule, namely the information theory, will apply. A contract would therefore only have been concluded the moment that Thandi had been notified of John's acceptance. Since she had as yet not received and read his letter, John was entitled to revoke his acceptance, with the result that there was no acceptance of Thandi's offer, and thus no valid contract arose.

SUMMARY

Consult points 10–16 of "This chapter in essence" at the end of chapter 2 of the textbook.

STUDY UNIT 8

PACTA DE CONTRAHENDO: OPTIONS AND RIGHTS OF PREFERENCE

OVERVIEW

A *pactum de contrahendo* is a contract aimed at the conclusion of another contract. Although this concept encompasses more, South African law essentially recognises two species or types of *pacta de contrahendo*, namely the option contract, which is an agreement restricting an offeror's right to revoke his or her offer, and the contract of preference, which creates a preferential right to conclude a specific contract should the grantor decide to conclude such a contract.

The purpose of this study unit is to enable you to

* discuss option contracts with reference to the following: description and requirements; consequences; juristic nature; termination; formalities and cession of options
* discuss rights of preference with reference to the following: description and requirements; legal nature and consequences of a right of pre-emption; and formalities concerning rights of pre-emption
* apply the relevant principles to practical problems

LEARNING MATERIAL

This study unit replaces chapter 2, section 2.5 of the prescribed textbook. We do suggest, however, that you read section 2.5 of the prescribed textbook.

Brandt v Spies 1960 (4) SA 14 (E).

Hirschowitz v Moolman 1985 (3) SA 729 (A). Owsianick v African Consolidated Theatres (Pty) Ltd 1967 (3) SA 310 (A).

Associated SA Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd 1982 (3) SA 893 (A).

CONTENT OF THIS STUDY UNIT

1 OPTION CONTRACTS

1.1 Description and requirements

Contracting parties may enter into an agreement in terms of which the offeror undertakes not to revoke his or her offer. In such a case, it is said that one party grants the other an option. In essence, in the case of an option, we are dealing with an offer which forms the subject matter of an agreement not to revoke a substantive offer. The parties agree that the offeror will not revoke the offer, either expressly or by implication, for example by offering the same thing to a third party. It therefore amounts to the person granting the option, undertaking to do nothing to prevent the coming into existence, through acceptance of the offer by the grantee, of a contract capable of being performed (substantive contract). The option contract must, however, comply with the requirements set for contracts in general.

1.2 Definition

We could, therefore, define an option as an offer (substantive offer) reinforced by an agreement (option contract) in terms of which the offeror (grantor) undertakes as against the offeree (grantee) to keep open his or her offer (usually for a specific period) to the offeree, or, to put it differently, in terms of which the offeree acquires the power to consider and accept the offer (usually within a specified time period). Options may be granted in regard to a variety of contracts. It may be an option to buy, to hire, to do work, and so on.

Where A offers B an option, for instance to buy his or her farm, we are actually dealing with two offers which can grow into two contracts on acceptance of the various offers, that is

(1) an offer by A that B can purchase his or her farm for R300 000, subject to the terms expressed in the offer
(2) an offer by A that the above-mentioned offer will remain open to B for a certain period (A may stipulate a remuneration for this right, for example R2 000.)

If B now accepts the second offer, an option contract is created forthwith, on the one hand entitling A to the R2 000 and, on the other, binding him or her to keep the offer to sell, open to B for the stipulated period.

1.3 Consequences of an option

If B accepts the first offer (offer (1) above) by exercising the option, a contract of sale is created immediately. Nothing more is required of the grantor for the formation of the contract of sale. Thus it was decided in *Scott v Artus* 1964 (3) SA 384 (E) that a *pactum de retrovendendo*, that is, an agreement whereby the seller can repurchase the *merx* (thing sold) within a certain period, also involves an option, since

> ... it embodies the two essential characteristics of what is commonly called an option to purchase – an offer to sell the property back to the

> plaintiff, coupled with a binding agreement to keep that offer open for a stipulated period of time. A contract of resale comes into being only if the plaintiff accepts the offer before it lapses.

De Wet and Van Wyk (33–34) state that an offer is made irrevocable by agreement (ie by the conclusion of an option contract). This means that an attempted revocation of the substantive offer would have no legal effect. Van der Merwe et al (3.3.2) state the following in this regard:

> An offer can be made irrevocable only by means of an option contract. [A] unilateral declaration by an offeror that the offer is irrevocable is generally regarded as ineffective in our law.

Our courts also regard an offer supported by a *pactum de contrahendo* as irrevocable (see *Thompson v Van der Vyver* 1954 (2) SA 192 (C)). There is, however, the viewpoint that an option does not render the substantive offer irrevocable, but that revocation (or denial) of the substantive offer will constitute breach of the option contract, which should give rise to the normal remedies available in the case of breach of contract. As it is possible, however, to commit breach of contract, the fact that the offeror will be committing breach of contract should he or she unilaterally revoke his or her substantive offer, should not mean that he or she cannot revoke it, and, once he or she has revoked it, there will no longer be an offer for the offeree to accept (cf Lotz 1988 *THRHR* 237). In general, however, the opinion of writers and the courts is that an option renders the substantive offer irrevocable.

Nevertheless, it should also be mentioned that, in *University of the North v Franks* [2002] 8 BLLR 701 (LAC) at 720, it was stated that

> [w]here an offer is (either expressly or tacitly) stated to be irrevocable for a given period and communicated to the offeree it becomes irrevocable upon receipt unless the offeree rejects the irrevocability. To require a mental acceptance would be meaningless in practice as that cannot be evidenced. Such requirement would merely pander to theory. To require notification of acceptance of the irrevocability would set a standard which in normal business practice will not be followed and will be regarded as rather foolish.

Whether such an approach will become generally accepted law, is uncertain at this stage. In *Oos-Vrystaat Kaap Bedryf Bpk v Van Aswegen* 2005 (4) SA 417 (O), the concept of an irrevocable offer was rejected, but without reference to the *Franks* case.

1.4 Remedies for breach of an option

Breach of an option contract and the consequences thereof are governed by the general principles of the law of contract. An attempted revocation of the substantive offer does not prevent the exercise of the option, and the option holder may enforce the contract specifically by means of an interdict against the grantor of the option. The option holder may also claim damages, if suffered, to place him or her in the position that he or she would have been in if the option had been exercised (see study unit 34 regarding damages for breach of contract, and you may also consult figure 2.3 in section 2.5.1.8 of the prescribed textbook).

1.5 Juristic nature of an option

In *Hersch v Nel* 1948 (3) SA 686 (A), Davis JA stated:

An option has been analysed into an offer to sell together with an agreement to keep that offer open for a certain time but perhaps a better way is to look at it simply as an agreement between the giver and holder of the option by which the giver has bound himself to sell a certain thing to the holder at a certain price if the holder shall require him to do so within the time fixed by the option; by this agreement the giver grants and the holder acquires a right to buy.

To regard an option, however, as a ''right to buy'' with a corresponding ''duty to sell'' is to create the impression that the person granting the option is contractually obliged to make the true offer to sell only at the stage when the holder of the option wants to exercise the option, and that is not the case. Moreover, the term ''right to buy'' is open to criticism from a legally scientific point of view, as is the description ''the grantee acquires the right to accept the offer to sell'' (*Brandt v Spies* 1960 (4) SA 14 (E)). The grantee has only a power to accept the offer and not a subjective personal right to acceptance.

The option contract does give the grantee a personal right, but it is not so much a ''right to buy'' as a right to claim that the offer be kept intact as against him or her, the grantee, with a corresponding duty on the grantor to keep the offer open to the grantee. The object of the right, the performance, is the maintenance of the option as against the grantee for the duration of the option. The content of the right is the power of the grantee to claim that the grantor shall do nothing to prevent the coming into existence, through acceptance of the offer, of a contract capable of being performed. It is this personal right which, as it were, ensconces or entrenches the offer. The offer is the basis of the right and, as such, offer and claim share each other's fate as regards cession, termination, and so on. The option as such is simply an election; an election to accept or not to accept the entrenched offer.

The offer to sell and the offer not to revoke the offer to sell will normally occur simultaneously, but there is no reason why this should necessarily be the case. It may happen, for example, that the offer to sell is made first and that the option contract is concluded later. However, confusion often arises where the transactions are combined, and, where this happens, the word ''option'' serves only as a name for this complex of juristic acts: an offer ensconced or backed by an agreement from which at least one right arises, that is, the right to maintenance of the offer (for a discussion of the nature of an option see *Venter v Birchholtz* 1972 (1) 276 (A)).

1.6 Termination of options

1.6.1 Passage of time

Where the option contract fixes a time limit for the acceptance of the substantive offer, the option lapses if it is not exercised within the prescribed period. What the position is where no such time limit is fixed, has not yet been decided. It is submitted that it must then be accepted that the parties intended the substantive offer to be kept open for a reasonable time.

1.6.2 Death of the grantor or grantee

In general, it is accepted that an option is actively and passively transmissible upon the death of the offeror or offeree. This means that, in principle, the option does not automatically terminate upon the death of either the grantor or the holder of the option. Unless the parties intended otherwise, the obligation to keep the option open does not lapse with the death of the grantor (*Beyers v Beyers* 1933 CPD 31; *Major's Estate v De Jager* 1944 TPD 96). Whether the death of the grantee terminates the option depends on whether the option is transferable. If it is not, it lapses; if it is, it devolves on the grantee's heirs. On the question whether an option is transferable, see below regarding the cession of an option.

1.6.3 Refusal

By his or her decision not to exercise the option, communicated to the grantor, the grantee waives his or her right. The option therefore lapses on rejection.

1.6.4 Lapse of the right

The option will also lose its efficacy or terminate in any manner in which claims are normally terminated.

1.7 Formalities concerning options

As we have already seen, two contracts come into play in the case of an option: the option contract and the substantive contract created when the option is exercised. Both must comply with the usual requirements for the formation of contracts in general. Where, in terms of a particular statute, the substantive agreement must comply with certain formalities, the question arises whether the option contract must likewise comply with the formalities in question.

In particular, the question arises whether an option to alienate land must be in writing and signed. Section 2(1) of the Alienation of Land Act 68 of 1981 provides as follows:

> No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.

In *Brandt v Spies* (above), the defendant orally granted an option to the plaintiff to purchase his farm. Disregarding the option, he sold the farm to a third party. The plaintiff, who had exercised the option in writing, then claimed damages for breach of contract, but an exception to his claim was upheld. The court stated as follows:

> If the offer is not in writing there is nothing which the offeree can accept so as to create a *vinculum iuris* between himself and the offeror. An undertaking to keep open an offer which is incapable of forming the basis of a valid contract can itself confer no right upon the grantee for in law there is nothing to keep open.

This judgment, it is submitted, is correct in the case where the offer to sell and the offer to keep the first offer open are made simultaneously and orally. As regards the contract of sale, both offer and acceptance must be in writing in accordance with the above-mentioned legislation, and the offer has been made orally in such a case. However, what of the case where the offer to sell is made in writing on one occasion and is later followed by an oral offer to keep the offer to sell open? The Act provides that no alienation of land will be valid unless it is reduced to writing. The option contract which comes into question with the acceptance of the oral offer is not an alienation of land and, consequently, one can conclude that it need not be in writing. What must be in writing is the offer to sell.

In *Hirschowitz v Moolman* 1985 (3) SA 729 (A), the court, however, held that, as a general rule, *pacta de contrahendo* must conform to any formalities prescribed for the substantive contract, including option contracts relating to the purchase of land. This case dealt with a right of pre-emption and therefore the statement of the court must be regarded as *obiter*as far as options are concerned. As stated above, there seems to be no compelling reason why options relating to such contracts must comply with section 2(1) of the Act in question.

Since the exercise of the option is nothing but an acceptance of the substantive offer to sell, it is obvious that it must also be in writing before a contract of sale, in writing, is created. Subject to the usual exceptions, this acceptance is binding only when it has been communicated to the offeror (grantor of the option). The communication of acceptance need not, however, be in writing (*Hersch v Nel* above).

1.8 Cession of options

As a rule, claims may be freely ceded. The claim arising from the option contract in this case, however, is so closely related to the substantive offer that the question whether it may be ceded must be rendered dependent on the intention of the grantor: if it was his or her intention that the option would be open to the grantee alone, then the option cannot be ceded; if it is immaterial to him or her who exercises the option, the grantee or a third person, it may in fact be ceded. The intention must be established in the usual manner (in this regard, see study unit 3), and an important consideration will naturally be whether the identity of the person who will be obliged to render the counterperformance if the option is exercised is of any importance to the grantor. Thus the following was alleged in *Hersch v Nel* (above):

> ... an option to obtain a loan would obviously stand on an entirely different footing from an option to buy for cash. And for the same reason an option to buy on credit also stands on a different footing I come to the conclusion that where there is nothing in the option to show the intentions of the party, an option to purchase for cash is ordinarily capable of being ceded.

(See further *Dettman v Goldfain* 1975 (3) SA 385 (A).)

Normally, the cession of an option need not be in writing. Section 1 of Act 68 of 1957 provided, however, that a cession in respect of land or any interest in land had to be in writing and signed. An option in regard to land, being an offer to which a claim is attached, surely represents an interest in land and it could therefore be argued that such option could only be ceded in writing. The words ''or cession'' appearing in section 1 of Act 68 of 1957 have, however, been omitted from section 1(1) of Act 71 of 1969 and from section 2(1) of Act 68 of 1981; consequently, it is clear now that the cession of an option in respect of land need not be in writing.

Thus far, options granted by the prospective seller have been discussed. The prospective purchaser acquires a personal right to have the offer kept open. The decision whether a contract of sale will be created or not rests with the purchaser.

An option may, of course, also be granted by the prospective purchaser. This is the converse of the above. Here, it is the prospective purchaser who makes the offer to purchase and supports it with an undertaking to keep it open to the prospective seller. The decision whether a contract of sale will be created rests exclusively with the seller. He or she is entirely free to disregard the option and sell the thing to a third party; that is, the prospective seller acquires a right (ie that the person granting the option may not revoke his or her offer, for example), but the prospective purchaser does not also acquire a right as a matter of course. The prospective purchaser acquires a right only if he or she specifically stipulates such a right, for example a right of preference of some kind or other, as discussed below.

2 RIGHTS OF PREFERENCE

2.1 Description and requirements

A right of preference is another type of *pactum de contrahendo*, in terms of which one of the prospective contractants is granted a preferential right to conclude a contract with the other prospective contractant. The rules governing rights of preference are well illustrated by the rules relating to rights of pre-emption, and it is the latter contract which will be discussed in this regard. A right of pre-emption occurs when a prospective seller undertakes as against a prospective purchaser to give him or her (the purchaser) preference if he or she should decide to sell. The prospective purchaser thus acquires, in terms of an agreement, the right to be granted the first opportunity to buy the thing should the prospective seller decide to sell it. It is formulated as follows in *Van Pletsen v Henning* 1913 AD 82:

> The grant of a right of pre-emption does not compel the grantor to sell; it only compels him to give the grantee the preference in case he sells at all. And consequently it too (like an option granted by him) prevents him from selling to third parties during the existence of the right.

The agreement which gives rise to the preferential right may, of course, differ from case to case. For example:

(1) The right of pre-emption may be coupled with an option granted by the

purchaser. If this happens, the prospective purchaser is compelled to keep open his or her offer to buy, for the agreed period, and the prospective seller is obliged, if he or she decides to sell, to exercise the option granted to him or her and in so doing to accept the offer. This will differ from the case where the purchaser only grants an option to the seller, because, in this instance, the seller may exercise the option and accept the purchaser's offer or he or she may decide to sell to a third party. The seller is thus not obliged to sell to the purchaser should he or she decide to sell.

(2) The prospective seller may bind himself or herself as against the prospective purchaser to offer the thing for sale to the latter at the first acceptable price or at the highest price which may be offered to him or her by a third party. If the prospective seller receives an offer from a third party, he or she may not accept it before he or she has given the holder of the right the opportunity to decide whether he or she wants to buy the thing at that price. The holder of the right is not obliged to buy.

(3) The seller may bind himself or herself as against the prospective purchaser to offer the thing for sale to the latter on the occurrence of a future event, for example when it is decided no longer to use the land as a racetrack. Here, too, the holder of the right is not obliged to buy.

(4) The prospective seller may bind himself or herself as against the prospective purchaser to sell a thing to a third party only if the prospective purchaser is unwilling to buy the thing. The matter is described as follows in *Hartswater Boerderye (Edms) Bpk v Van Niekerk* 1964 (3) SA 702 (T):

> Should the plaintiff not offer to purchase properly, the defendant is free, should he so wish, to sell to a third party; should the plaintiff offer properly the defendant has the choice to either accept the offer and clinch the sale or to refuse the offer and so lose his right to sell to a third party (our translation).

A contract in terms of which a right of pre-emption is granted must comply with all the requirements for contracts in general. The existence of a substantive offer is not an essential requirement for a contract of pre-emption (see *Hirschowitz v Moolman* above). The determination of the price and other terms to the contract may be left to the grantor.

2.2 Legal nature and consequences of a right of pre-emption

The contract of pre-emption does not place a duty on the grantor to sell the subject matter of the right; the grantee merely acquires the preferential right to buy should the grantor decide to sell. The prospective seller's capacity to alienate the thing in question is thus restricted.

The prospective purchaser therefore also acquires a right, but, whereas the performance to which the grantor of an option is bound is the maintenance of an offer, the obligation in the case of the right of pre-emption is a negative one, that is, that the thing may not be alienated to a third party except under the conditions prescribed in the agreement creating that right (*Owsianick v African Consolidated Theatres (Pty) Ltd* 1967 (3) SA 310 (A) at 321). Furthermore, this situation differs from an option, in that it is now the seller and not the buyer (although, as indicated, the purchaser may also be the one to grant the option) who makes the critical decision whether a contract of sale is to be concluded or not (see, generally, *Wissekerke v Wissekerke* 1970 (2) SA 550 (A)).

A certain amount of uncertainty regarding the precise construction of the contract of preference has also resulted in some uncertainty regarding the position of the holder of the right, upon breach of contract by the grantor. In *Owsianick v African Consolidated Theatres (Pty) Ltd* 1967 (3) SA 310 (A), the Appellate Division held that a right of pre-emption entails a restriction on alienation and that the holder was entitled to an interdict to prevent the grantor from alienating the thing to a third party. Furthermore, it held that the only other remedy available to the holder was a claim for damages. The court decided that the holder of the right could not enforce his right positively; in other words, he could not claim to actually purchase and claim delivery of the thing (ie a claim for specific performance). In certain subsequent decisions, it has been assumed that a right of pre-emption may be enforced positively (see, for instance, *Hirschowitz v Moolman* above). The position in this regard is therefore not entirely certain.

In *Associated SA Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A), the court also doubted whether the holder could claim specific performance by means of an order directing the grantor to make him an offer, but adopted another approach which was set out as follows: if a seller concludes a contract of sale with a third party contrary to a pre-emptive right, the purchaser can step into the shoes of the third party by a unilateral declaration of intent. A contract of sale will then be deemed to have been concluded between the seller and the holder of the pre-emptive right. Should delivery already have taken place, the holder of the right would not be able to pursue the *merx* in the hands of the third party with his or her personal right, unless the latter was aware of the existence of the pre-emptive right.

This remedy was also referred to in *Hirschowitz v Moolman* (above) and entitles the holder of the right to delivery without the need for an order of specific performance. However, its nature, basis and limitations are uncertain (see further on).

2.3 Formalities concerning rights of pre-emption

If the object of the envisaged sale is land, both the offer to buy (or sell) and the acceptance thereof must be in writing. The contract from which the right of pre-emption arises also has to be in writing (*Hirschowitz v Moolman* 1985 (3) SA 739 (A)).

ACTIVITY

Distinguish between an option and a right of pre-emption with specific reference to the following:

(a) requirements

(b) consequences and juristic nature

(c) remedies for breach

(d) formalities

(a) Remember that both options and rights of pre-emption are contracts and must therefore comply with the requirements set for contracts in general.

(b) The holder of an option has a personal right that the grantor keeps the substantive offer open. The holder (grantee) of the option has an election to accept the substantive offer by exercising the option. On the other hand, the holder of the right of pre-emption has two personal rights, in that the grantor does not sell, lease, et cetera, to a third party before making an offer to the holder, and, secondly, if the grantor wishes to sell, lease, et cetera, the grantee should make an offer to the holder first.

(c) Both may be enforced specifically by way of an interdict, but a right of pre-emption cannot be positively enforced by means of a court order to make an offer. Particular attention should be paid to the approach of the court in the *Associated SA Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A) case. It seems that damages are claimable in both instances.

(d) In so far as immovable property is concerned, there seems to be no reason why an option contract must comply with the provisions of the Alienation of Land Act 68 of 1981. An *obiter* statement in *Hirschowitz v Moolman* 1985 (3) SA 729 (A), however, indicates the contrary. A pre-emption contract must, in terms of this decision, be in writing in accordance with the Act if the contract relates to the sale of immovable property.

See also figure 2.1 in section 2.5.2.2 of the prescribed textbook for a comparison of options and pre-emption agreements.

SUMMARY

Consult points 17–24 of ''This chapter in essence'' at the end of chapter 2 of the textbook. You may also consult figure 2.5 in the prescribed textbook for an overview of the formation of a contract (comprising study units 6–8).

STUDY UNIT 9
CONFLICTING RIGHTS

OVERVIEW

This study unit explains different aspects of conflicting rights.

The purpose of this study unit is to enable you to

* explain what is meant by conflicting rights
* explain the principles to determine which right enjoy preference above the other
* apply these to practical problems

LEARNING MATERIAL

This study unit.

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

This study unit deals with the legal position where A

(1) sells a thing to B or
(2) grants B an option or
(3) grants B a right of pre-emption and subsequently sells the same thing to C

In all these cases, B has a personal right against A, as we have already seen, even if B has not yet exercised the option, and even if the event required for the operation of the right of pre-emption has not yet taken place. Now, two questions arise:

(1) What protection does B's right enjoy before delivery of the thing to C?
(2) What protection does B's right enjoy after delivery of the thing to C?

2 POSITION BEFORE DELIVERY TO C

Before delivery, both B and C have only personal rights. There has been, and still is, considerable controversy in our law about whether the adage *qui prior est tempore potior est iure* (what is first in time, is first in law) applies to the situation under discussion. The most generally accepted view is that it does: the prior vested right, that of B, enjoys preference regardless of whether or not C had knowledge thereof when he or she acquired his or her (C's) right. The person whose personal right vested first enjoys preference, provided that there are no other circumstances present which make it equitable that the holder of the second right should enjoy preference. What these equities are, however, is not indicated with certainty. It amounts to this, therefore, that B, in our example, is entitled to an interdict in terms of which A is prohibited from delivering or transferring the thing to C. C can then, at most, institute an action for damages for breach of contract against A. On this point, see *Botes v Botes* 1964 (1) SA 623 (O); *BP Southern Africa (Pty) Ltd v Desden Properties (Pty) Ltd* 1964 (2) SA 21 (SR); *Campbell v First Consolidated Holdings* 1977 (3) SA 924 (W); *Barnard v Thelander* 1977 (3) SA 932 (C).

3 POSITION AFTER DELIVERY TO C

3.1 Where C has no knowledge of the existence of the prior vested interest of B

Delivery to C renders C the owner. C, therefore, has a real right, and B only a personal right. In the event of a conflict between real and personal rights, real rights, in accordance with the traditional view, are preferred. B, therefore, has only an action for damages for breach of contract against A. He or she cannot claim the thing from C, the new owner.

3.2 Where C does know of B's prior vested right at the moment of delivery

Delivery (albeit in bad faith) once again makes C the owner. However, C does have knowledge of the right, and, by virtue of the doctrine of notice (*kennisleer*), B is now entitled to apply for an order in terms of which the delivery to C is cancelled and the thing may be transferred to B. B can uphold his or her claim against a third party who has knowledge of it.

For cases and criticism on the doctrine of notice, consult: Van der Merwe 1962 *THRHR* 155; *Manganese Corp Ltd v SA Manganese Ltd* 1964 (2) SA 185 (W); *Reynders v Rand Bank Bpk* 1978 (2) SA 630 (T).

ACTIVITY

Briefly summarise the remedies available to B in the various situations referred to above, indicating in each case what the remedy is, on what it is based, and against whom it may be instituted.

FEEDBACK

The particular remedy, or remedies, available to B will depend on the specific facts at hand. Since there exists primarily a contractual relationship between A and B, B will have an action for damages against A. Whether B may, however, claim specific performance from A or claim the thing in question from C once delivery has occurred, will depend on the facts of the case and on whether B's right enjoys preference over C's right in the eyes of the law.

SUMMARY

Before delivery, both B and C have only personal rights. The most generally accepted view is that the prior vested right, that of B, enjoys preference regardless of whether or not C had knowledge thereof when he or she acquired his or her (C's) right. The person whose personal right vested first enjoys preference, provided that there are no other circumstances present which make it equitable that the holder of the second right should enjoy preference. Where C has no knowledge of the existence of the prior vested interest of B, delivery to C renders C the owner. C, therefore, has a real right which enjoys preference, and B has only an action for damages for breach of contract against A. Where C does know of B's prior vested right, delivery once again makes C the owner. However, C does have knowledge of the right, and, by virtue of the doctrine of notice (*kennisleer*), B is now entitled to apply for an order in terms of which the delivery to C is cancelled and the thing may be transferred to B. B can uphold his or her claim against a third party who has knowledge of it.

STUDY UNIT 10

MISTAKE/ABSENCE OF CONSENSUS

OVERVIEW

This study unit deals with one of the more complex areas of the law of contract, and that is how the courts address problems relating to material mistake or lack of agreement (*dissensus*) between the parties. As previously mentioned, this study unit and study unit 2 dealing with the basis of contractual liability go hand in hand. In study unit 2, we said that actual agreement, or consensus, is considered to be the primary basis of contractual liability. However, when true agreement is lacking, the reliance theory acts as a supplementary theory to determine if liability should lie despite an absence of agreement. The issue of mistake, then, is merely the converse to the question of agreement, and so it is hardly surprising that most of the developments in contract theory in our law have developed around the question of mistake.

However, the courts have not always only worked with consensus supplemented by reliance. As we shall see, they have fluctuated between a subjective approach supplemented by estoppel and direct reliance, and an objective approach corrected by an indirect version of reliance known as the *iustus error* approach. Today, however, it seems as if the courts favour the subjective approach (as corrected by the reliance theory), although the objective approach (as corrected by the *iustus error* doctrine) still remains as well. This study unit therefore examines developments in positive law around these approaches. You will find many examples from case law in this study unit. Pay careful attention to these cases, for they will help you to understand how theories of contract have been applied by the courts.

The purpose of this study unit is to enable you to

* explain what is meant by the concept of mistake
* distinguish between unilateral, mutual and common mistake
* explain what is meant by irrelevant and relevant mistake
* explain what is meant by material and non-material mistake
* explain the traditional classification of material and non-material mistake
* distinguish between mistake of law and mistake of fact
* explain the limitations of the will theory and the rise of reliance-based correctives
* explain the subjective approach as qualified by estoppel and the reliance theory
* explain the objective approach as qualified by the *iustus error* doctrine
* explain what is meant by the reconciliation of the subjective and objective approaches
* explain the dual basis of contract in modern law
* explain what is meant by common mistake
* explain what is meant by rectification
* apply the relevant principles to practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 3.

Khan v Naidoo 1989 (3) SA 724 (N).

Mondorp Eiendomsagentskap (Edms) Bpk v Kemp en De Beer 1979 (4) SA 74 (A).

Allen v Sixteen Stirling Investments (Pty) Ltd 1974 (4) SA 164 (D).

Diedericks v Minister of Lands 1964 (1) SA 49 (N).

Maresky v Morkel 1994 (1) SA 249 (C).

Kok v Osborne 1993 (4) SA 788 (SE).

Trollip v Jordaan 1961 (1) SA 238 (A).

Smith v Hughes (1871) LR 6 QB 597.

Van Ryn Wine & Spirit Co v Chandos Bar 1928 TPD 417.

Pieters & Co v Salomon 1911 AD 121.

Hodgson Bros v South African Railways 1928 CPD 257.

Ridon v Van der Spuy and Partners (Wes-Kaap) Inc 2002 (2) SA 121 (C).

South African Railways & Harbours v National Bank of South Africa Ltd 1924 AD 704.

George v Fairmead (Pty) Ltd 1958 (2) SA 465 (A).

Hartog v Colin & Shields [1939] 3 All ER 566.

Prins v Absa Bank Ltd 1998 (3) SA 904 (C).

Du Toit v Atkinson's Motors Bpk 1985 (2) SA 893 (A).

Brink v Humphries & Jewell (Pty) Ltd 2005 (2) SA 419 (SCA).

Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis 1992 (3) SA 234 (A).

Dickinson Motors (Pty) Ltd v Oberholzer 1952 (1) SA 443 (A).

Spenmac (Pty) Ltd v Tatrim CC 2015 (3) SA 46 (SCA)

Steyn v LSA Motors Ltd 1994 (1) SA 49 (A).

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

Study section 3.1 of the textbook. Note that the notion of ''mistake'' has a far more restricted meaning in contract law than in general terms and specifically denotes a lack of agreement (*dissensus*) between the parties where one, or both, of the parties is unaware of the situation.

2 CLASSIFICATION OF MISTAKE

Study sections 3.2–3.2.5 of the textbook. In the law of contract, there are several classifications of mistake which are explained with reference to examples in the prescribed textbook. You would do well to remember these classifications; they are all still often referred to in case law, and are crucial for determining whether a particular case scenario deals with a contract in terms of the will theory, or whether the reliance theory comes into play as a secondary possibility for contractual liability. The most important distinction is that between material and non-material mistake (section 3.2.3), because that is generally the key to whether a problem deals on the one hand with *dissensus* caused by a material mistake, or, on the other, with consensus in spite of a non-material mistake. It is only in the case of material mistake that the reliance theory as a secondary source of contractual liability comes into play. Pay careful attention to the examples from case law provided of material mistake (section 3.2.3.1) and non-material mistake (section 3.2.3.2) (*Khan v Naidoo* 1989 (3) SA 724 (N); *Mondorp Eiendomsagentskap (Edms) Bpk v Kemp en De Beer* 1979 (4) SA 74 (A); *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D); *Diedericks v Minister of Lands* 1964 (1) SA 49 (N); *Maresky v Morkel* 1994 (1) SA 249 (C); *Kok v Osborne* 1993 (4) SA 788 (SE); *Trollip v Jordaan* 1961 (1) SA 238 (A)).

When studying the traditional classification of material and non-material mistake (section 3.2.4), bear in mind that this classification is but a guideline; the important question remains whether the mistake is material or not. A convenient rule of thumb is first to determine whether a mistake in question is non-material, since, generally, such a mistake will relate merely to motive. The only really tricky form of mistake is *error in persona*, since it is usually material, but may also not be material. In most instances of *error in persona*, though, the identity of a contracting party will be regarded as material (compare *Kok v Osborne* for an apt example).

Students sometimes have trouble in determining whether the error is one of *error in substantia*or *error in negotio* where performance consists in the delivery of a thing and the one party thinks that the thing has (or hasn't) a certain characteristic. **A useful question to ask is: Did both parties have delivery of the same thing in mind? If so, there is no mistake which excludes consensus. If not, there is a material mistake.**

This test has been formulated using the analysis of the Appellate Division in *Trollip v Jordaan* 1961 (1) SA 238 (A) 253–254 to determine whether the error in that case was material. If the Supreme Court of Appeal used the same method to analyse the error in *Spenmac (Pty) Ltd v Tatrim CC* 2015 (3) SA 46 (SCA) it would have come to a different conclusion regarding the materiality of the relevant error.

In the *Spenmac* case a sectional title unit, unit 1, was sold. There were two units in the sectional title scheme and the scheme rules provided that the owner of unit 2 could only subdivide unit 2 with the consent of the owner of unit 1. The owner of unit 1 had in fact given consent to subdivision a few years prior to selling unit 1, but subsequently forgot about it. The seller made an innocent misrepresentation to the purchaser that there were only two units in the sectional title scheme and that the owner of unit 1 could veto the subdivision of unit 2. The Supreme Court of Appeal held (54) that the mistake of the purchaser was a mistake as to the true nature of the thing sold and that the parties failed to reach consensus as to the subject matter of the sale. The court nearly followed verbatim the High Court's conclusion in *Tatrim CC v Spenmac (Pty) Ltd* Case Number 1622.2011 31 January 2013 (ECD) par 43 in this regard without any discussion or analysis.

The High Court described the error of the purchaser as an error with regard to the existence of a veto right and to the fact that unit 2 was not subdivided (par 43). The court then held, without any discussion, that this was a mistake as to the true nature of the *merx* (the thing sold) and that the parties failed to reach consensus as to the *merx* (par 43).

If we apply the analysis of the *Trollip* case, it is clear that the parties wanted to buy and sell the same thing, unit 1. The number of units in the sectional title scheme and the existence of a veto right are at the most characteristics of unit 1. There was thus an error with regard to the characteristics of the performance (an *error in substantia*) which was not material.

It is uncertain whether the Supreme Court of Appeal decision in the *Spenmac* case will lead to a different approach to *error in substantia* in which a characteristic of the performance is so important to the party who is operating under an error that it amounts to an *error in corpore*. The reason for this uncertainty lies in the failure of the court to analyse the error properly and to discuss the approach of the *Trollip* case.

3 LIMITATIONS OF THE WILL THEORY

Study section 3.3 of the textbook. This section exposes some of the more obvious limitations of the will theory and explains why this theory in itself will not suffice to determine the existence of contractual liability. Refer again to study unit 2, section 4. Also pay close attention to figure 3.2, for it provides a very simple but effective bird's-eye view of how the law pertaining to mistake functions, and you should refer back to it as you proceed with the ensuing sections.

4 RELIANCE-BASED CORRECTIVES

Study section 3.4 of the textbook. This section explains how reliance has (directly and indirectly) been the point of intersection or compromise between the subjective theory of contract (will theory) and an objective theory of contract (declaration theory), and sets the stage for the discussion that follows (refer again to study unit 2, sections 4, 5 and 6).

5 THE SUBJECTIVE APPROACH AS QUALIFIED BY ESTOPPEL AND QUASI-MUTUAL ASSENT

Study sections 3.5–3.5.2 of the textbook. Here, it is important to note that the courts have accepted that the will theory may be corrected by either the doctrine of estoppel or the direct reliance theory (doctrine of quasi-mutual assent). Both these correctives are reliance-based and thus have strong similarities, but estoppel is rarely used within the context of *dissensus* because of its limitations, especially the fact that this doctrine only gives rise to the fiction of a contract between the parties as opposed to an actual contract (see section 3.5.1). See also the discussion of *Van Ryn Wine & Spirit Co v Chandos Bar* 1928 TPD 417 in regard to estoppel and the conclusion of a contract. On the other hand, the reliance theory has proven itself to be a flexible doctrine for determining contractual liability in the absence of consensus and is probably the theory preferred in latter-day South Africa (for examples of this theory in practice, see *Pieters & Co v Salomon* 1911 AD 121; *Hodgson Bros v South African Railways* 1928 CPD 257; *Ridon v Van der Spuy and Partners (Wes-Kaap) Inc* 2002 (2) SA 121 (C)). The reliance theory does give rise to an actual contract. Pay close attention to its core elements of a **misrepresentation of intention** by the contract denier that leads the contract assertor to **reasonably believe** that agreement has been reached (despite *dissensus*), as well as how they are applied in the examples provided in the textbook.

6 THE OBJECTIVE APPROACH AS QUALIFIED BY THE *IUSTUS ERROR* DOCTRINE

Study sections 3.6–3.6.2 of the textbook.

The declaration theory, as an objective theory of contractual liability (refer again to study unit 2, section 4), implies that contracts are based on the concurring manifestations of the parties' intentions (see the reference to *South African Railways & Harbours v National Bank of South Africa Ltd* 1924 AD 704, section 3.6.1). In other words, if, objectively speaking, it seems as if the parties are in agreement, a contract arises even if there is no actual consensus to speak of. Compare, for instance, the facts of *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A), where, for all outward purposes, it seems as if the parties had by way of offer and acceptance reached agreement, only to discover that no actual meeting of the minds of the parties had taken place.

This objective approach has, however, never been applied without qualification and has been corrected by the *iustus error* doctrine; the question being whether the material mistake of the contract denier is reasonable from an objective perspective. Usually, it is reasonable if caused by the misrepresentation of the other party, but, if the contract denier is to blame for his or her own mistake, then contractual liability will, despite an absence of true agreement, lie (see the references to *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) and *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A)). Consider carefully the instances when a material mistake will be regarded as reasonable, discussed in section 3.6.2 of the textbook (*Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D); *Hartog v Colin & Shields* [1939] 3 All ER 566; *Prins v Absa Bank Ltd* 1998 (3) SA 904 (C); *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A); *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA)).

7 RECONCILIATION OF THE SUBJECTIVE AND OBJECTIVE APPROACHES

Study sections 3.7–3.7.2 of the textbook. In *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A), the Appellate Division provided much-needed guidance as to a possible reconciliation between the subjective and objective approaches to contractual liability referred to above: first, by confirming that the *iustus error* approach was indeed an application of the reliance theory (more specifically, an indirect application), and, secondly, by affirming that, in cases of *dissensus*, the reliance theory should be applied. Note carefully the court's formulation of the reliance theory, emphasising the elements referred to above, and its application in the circumstances (in section 3.7.1). A complete reconciliation of the reliance theory and the *iustus error* doctrine occurs when the circumstances that render the contract assertor's reliance reasonable are the very same ones that render the contract denier's mistake unreasonable (and vice versa). For example, if the contract denier misleads the contract assertor into believing that he or she (the contract denier) has agreed to a contract (eg by signing a document that contains contractual terms, but without reading it), and the contract assertor does not suspect or cause the possibility of a mistake on the part of the contract denier, then a contract exists either because the contract assertor's belief is reasonable (successful application of reliance theory) or, conversely, because the contract denier's mistake is unreasonable (failure of *iustus error* doctrine). Refer to figure 3.3 in section 3.7.2 of the textbook for a useful map of how reliance provides a compromise between the subjective and objective approaches.

Although both the direct and indirect versions of reliance protection apply in our law, in recent times the reliance theory has proved more popular, and that is why the general consensus of opinion seems to be that, today, the preferred approach to contractual liability is the will theory as supplemented by the reliance theory (refer again to study unit 2, section 6). Also note that, while the reliance theory can be applied to virtually any conceivable instance of material mistake, the *iustus error* approach can only be applied where there is prima facie a concurrence of the external manifestations of the parties' intentions; in other words, an apparent agreement between the parties (see the ''Pause for reflection'' box in section 3.7.2).

8 COMMON MISTAKE

Study section 3.8 of the textbook. A common mistake differs fundamentally from unilateral or mutual (material) mistake in that it does not cause *dissensus*. Consequently, the principles discussed above do not apply: the parties are in complete agreement and each knows the intention of the other and accepts it. However, both are mistaken about some underlying fact in that they have a mistaken assumption about a present or past fact, causing the contract to be void. The most probable explanation for this legal phenomenon is the ''implied term'' theory, in terms of which the particular circumstances may justify the inference that the parties implicitly (tacitly) agreed to make the existence of their contract dependent on the truth of a material fact, or rather a supposition. If the fact is incorrect, the contract falls away (compare *Dickinson Motors (Pty) Ltd v Oberholzer* 1952 (1) SA 443 (A)).

9 RECTIFICATION

Study section 3.9 of the textbook. Where parties record their agreement in writing, it may happen that the document does not accurately reflect their common intention. In these cases, the parties are in full agreement and so, much like in the case of common error, they are not instances of actual mistake or *dissensus*. Usually, the parties will correct the document themselves, but, if one of the parties is unwilling to do this, the other party may apply to court for rectification of the document to reflect properly the common intention of the parties. What is rectified, though, is not the contract itself, but the document which does not reflect the intention of the parties.

ACTIVITY

1 How does one determine whether a mistake is material or not? Discuss briefly with reference to examples from case law.

2 Explain what is meant by the subjective approach (as corrected) to contractual liability. Discuss with reference to examples from case law.

3 Explain what is meant by the objective approach (as corrected). Discuss with reference to examples from case law.

4 What, if any, is the distinction between the direct reliance approach and the *iustus error* approach, and how does one determine whether one or the other should be applied?

5 Apply both the direct reliance and *iustus error* doctrine to examples provided from case law. Do you come up with the same answer?

6 Consider the following facts from the decision in *Steyn v LSA Motors Ltd* 1994 (1) SA 49 (A): Steyn, an amateur golfer, participated in a golf tournament that was open to both amateurs and professionals. At the 17th green, there was on display a new car and a board that stated: "Hole-in-one prize sponsored by LSA Motors". Steyn managed to score a hole in one at this very hole, but, when he claimed the car, the sponsor refused to give it to him on the grounds that the prize had been extended only to professional golfers, a fact which had been announced repeatedly prior to the commencement of play, but which Steyn said he had not heard. Furthermore, it was clear from the rules of golf that amateur players, such as Steyn, did not qualify for prizes in excess of R600, and the car was worth R50 000. Steyn countered that the words on the board constituted an offer which he had accepted, thus giving rise to a contract. Apply both the reliance theory and *iustus error* approaches to the facts. Do you arrive at the same conclusion in both instances?

7 How does common error differ from unilateral and mutual error, and what are its consequences? Discuss with reference to case law.

8 What is meant by rectification?

FEEDBACK

1 In determining whether a mistake is material or not, one must ascertain whether it affects one or more of the elements of consensus. Should a mistake relate to the obligations arising from the contract or the intention to create juristic consequences, it would exclude consensus and be material. It must be remembered that categorising mistakes into certain types is merely a useful aid in determining the materiality or not of a mistake and should not be employed as the sole test. For case law, see section 2 above.

2 The (corrected) subjective approach entails the will theory as corrected by either the doctrine of estoppel or the reliance theory in cases of material mistake (*dissensus*). For case law, see section 5 above.

3 The (corrected) objective approach entails the declaration theory as corrected by the *iustus error* doctrine. For case law, see section 6 above.

4 The direct reliance approach bases contractual liability in instances of *dissensus* on a reasonable reliance on consensus, while the *iustus error* approach relieves a mistaken party from an apparent contract if his or her mistake is both material and reasonable. Remember that, if the factors that make the contract assertor's reliance reasonable are the very same as the ones that render the contract denier's mistake unreasonable, we have a complete reconciliation between the reliance theory and the *iustus error* doctrine (and the subjective and objective approaches) within the circumstances.

5 Provided that there is ostensible or apparent agreement between the parties (without which the *iustus error* approach cannot be applied), it matters not which approach is used the answer should be the same.

6 In *Steyn v LSA Motors Ltd*, the court applied the reliance theory and came to the conclusion that, even though it could be accepted that Steyn had not heard that the prize was intended only for professional golfers, a reasonable person in Steyn's position would have realised that the offer was open only to professionals and, accordingly, that he or she had no contractual claim to the car. The court did not apply the *iustus error* approach, and we submit that this doctrine cannot be applied to the facts, because no apparent or ostensible contract existed between the parties. Remember that, before the *iustus error* approach can apply, there must be a clear, objective agreement between the parties, such as when the parties have signed a contractual document. Steyn had one interpretation of the facts and the sponsor another, but, clearly, the offer had been intended only for professional golfers and was not open to Steyn to accept. Consequently, there was no clear, apparent contract and the *iustus error* approach cannot be applied. So, this case was suitable only for an application of the reliance theory: ultimately, there was no actual agreement between the parties, and Steyn's reliance on the existence of consensus was unreasonable. Hence no contract arose.

7 Common error does not deal with *dissensus*: the parties actually are in agreement, but they have made a mistake about the existence or correctness of some underlying fact on which the contract is based, resulting in the contract being void. For case law, see section 8 above.

8 Much like common error, rectification does not deal with material mistake, but provides that, where the parties have committed their agreement to writing and the document does not correctly reflect their intention, a party may apply to court for rectification or correction of the document to reflect properly the common intention of the parties.

SUMMARY

Consult points 1–14 of ''This chapter in essence'' at the end of chapter 3 of the textbook.

STUDY UNIT 11

IMPROPERLY OBTAINED CONSENSUS: INTRODUCTION

OVERVIEW

Where a person is induced into entering into a contract by way of misrepresentation, duress, undue influence or commercial bribery, the contract is valid (provided that the other elements necessary to constitute a contract have been complied with), because consensus does exist. There is no material mistake; the parties know with whom and on what terms they are contracting. But, since the consensus of the innocent party is flawed in that it has been obtained by improper means, the contract may be set aside at the instance of the innocent party and each party must restore to the other party any benefit that he or she may have received under the contract. This study unit explains in greater detail the concept of improperly obtained consensus. In the ensuing four study units, we shall look more closely at the specific forms of improperly obtained consensus mentioned above.

The purpose of this study unit is to enable you to

* explain what is meant by the concept of improperly obtained consensus
* explain what is meant by the concept of *restitutio in integrum*
* explain the role of a delictual claim for damages within the context of improperly obtained consensus
* explain whether improperly obtained consensus constitutes a general ground for the rescission of a contract
* apply the relevant principles to practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 4, sections 4.1–4.1.3.

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

Study section 4.1 of the textbook. This section explains the notion of improperly obtained consensus. It is, however, very important to understand this concept from the outset, because it relates to the next four study units.

2 *RESTITUTIO IN INTEGRUM*

Study section 4.1.1 of the textbook. The remedy of rescission coupled with restitution is known as *restitutio in integrum* and it is aimed at restoring the parties to the positions they were in before contracting. This remedy is governed by essentially the same principles that apply to rescission for breach of contract, so refer to study unit 33 as well in this regard. An important aspect that we wish to point out is that, although, generally, the innocent party's right to claim restitution is dependent on his or her own willingness and ability to return what he or she received under the contract, as in the case of rescission for breach of contract, a court may relax this principle on the basis of equitable considerations.

3 DELICTUAL DAMAGES

Study section 4.1.2 of the textbook. This section is important in that it explains that the conduct of the party who induced the contract by improper means will often constitute a delict, and this enables the innocent party to recover delictual damages, irrespective of whether he or she rescinds the contract or not. Remember, however, that the courts do not generally treat *restitutio in integrum* as a delict, but, if damages are claimed, then the elements for delictual liability must in addition be complied with.

4 A GENERAL GROUND FOR RESCISSION?

Study sections 4.1.3 and 4.6 of the textbook. The crux of the discussion in this section is that the notion of consent improperly obtained seems to underlie the specific grounds for *restitutio in integrum*. As of yet, the courts have not recognised one overarching ground for rescinding a contract and claiming restitution, but further grounds for applying this remedy will no doubt be recognised by the courts in future.

ACTIVITY

Explain the concept of *restitutio in integrum* and how it relates to delictual liability.

FEEDBACK

In answering this question, you should bear three things in mind: first, it is essential to note that *restitutio in integrum* arises only once a contract has been found to exist (ie there is consensus), but consensus has been obtained by improper means (misrepresentation, duress, undue influence or commercial bribery); secondly, this remedy encompasses both rescission of a contract and restitution of any performances received as a result of the contract; thirdly, although the conduct of the party who induced the contract by improper means will often constitute a delict, this is not necessarily the case where, however, this is the case, the innocent party will be entitled to claim delictual damages, irrespective of whether he or she sets aside the contract or not.

SUMMARY

Consult points 1–5 of ''This chapter in essence'' at the end of chapter 4 of the textbook.

STUDY UNIT 12
MISREPRESENTATION

OVERVIEW

Of the specific forms of conduct constituting improper behaviour in obtaining consensus, misrepresentation is the most important and the most frequently encountered. Misrepresentation generally manifests itself in two forms: culpable misrepresentation and non-culpable misrepresentation. From this, it is apparent that the former has close ties with delictual liability, while the latter does not. In this study unit, we examine the concept of misrepresentation, its forms and the remedies therefor.

The purpose of this study unit is to enable you to

* explain what is meant by the concept of misrepresentation
* distinguish misrepresentation from other precontractual misstatements
* distinguish misrepresentation from mistake
* explain the remedies for misrepresentation
* explain what is meant by misrepresentation by silence
* apply the relevant principles to practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 4, sections 4.2—4.2.4.

Trotman v Edwick 1951 (1) SA 443 (A).

Bayer South Africa (Pty) Ltd v Frost 1991 (4) SA 559 (A).

Phame (Pty) Ltd v Paizes 1973 (3) SA 397 (A).

Wells v SA Alumenite Co 1927 AD 69.

Absa Bank Ltd v Fouche 2003 (1) SA 176 (SCA).

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

Study section 4.2 of the textbook. A misrepresentation is generally a false statement of past or present fact (not law or opinion) made by a contractual party to another prior to the conclusion of a contract and regarding some matter or circumstance relating to the contract. Here, you must take note not only of the description of a misrepresentation, but also the forms that a misrepresentation can assume, and that a misrepresentation can be accompanied by fault or be made completely innocently.

2 MISREPRESENTATION DISTINGUISHED FROM OTHER PRECONTRACTUAL STATEMENTS

Study sections 4.2.1–4.2.2 of the textbook. This section of the material is very important for understanding what constitutes an actionable misrepresentation. It comprises a detailed discussion of what does not generally constitute an actionable misrepresentation. We suggest that you make brief summaries of the concepts discussed in section 4.2.1.1 so as to be able to differentiate them. However, take careful note of the construction of a *dictum et promissum* (section 4.2.1.4), because, as will be seen, this form of misrepresentation does carry legal consequences.

3 MISREPRESENTATION AND MISTAKE

Study section 4.2.2 of the textbook. The distinction between misrepresentation as an independent cause of action and the doctrine of mistake is crucially important for your understanding of the law of contract, and especially also for examination purposes. This distinction has been alluded to before (refer to study unit 10, section 2 and section 3.2.3.2 of the prescribed textbook). Similarly, figure 4.2 once again provides a useful overview of the relationship between the doctrines of mistake and misrepresentation (refer also to figure 3.2 in section 3.3 of the prescribed textbook). A rule of thumb that will stand you in good stead when you approach any problem that contains some or other form of misrepresentation is to determine whether the misrepresentation causes a material mistake, in which case the problem relates to mistake proper, or whether the misrepresentation causes a non-material mistake, in which case the problem relates to actionable misrepresentation. Remember, however, that the elements of whatever remedy is called for in the circumstances must be complied with for the remedy to be successful.

4 REMEDIES FOR MISREPRESENTATION

Study sections 4.2.3-4.2.3.3 of the textbook. You would do well to study the remedies for misrepresentation very carefully; they are not only important from a theoretical perspective, but also frequently appear in examination questions. In a nutshell, one can distinguish between the remedy of rescission and restitution (*restitutio in integrum*) on the one hand, and damages on the other. There are different requirements for *restitutio in integrum* than for a claim for damages, but the two may overlap: a party may claim rescission and restitution, as well as damages in a given instance. Pay careful attention to the requirements for *restitutio in integrum*. We suggest that you make brief summaries of each for study purposes. Note that fault is not a requirement for the rescission of a contract, and so a contract may be set aside on the basis of mere innocent misrepresentation (provided that the other requirements have been met).

The question of damages for misrepresentation is slightly more intricate than *restitutio in integrum*. Traditionally, only damages for fraudulent misrepresentation, a form of delict, were recognised, and, accordingly, damages are assessed according to the delictual measure: the victim of fraudulent misrepresentation is to be put in the financial position he or she would have been in had the misrepresentation not been made. In regard to the difference between the delictual and contractual measure of damages, see the reference to *Trotman v Edwick* 1951 (1) SA 443 (A). You should also pay close attention to the distinction between *dolus dans* and *dolus incidens* in calculating the quantum of damages. These concepts are sufficiently explained in the text, but we wish to draw your attention to the following: *dolus dans* and *dolus incidens* apply only within the context of damages for fraudulent and negligent misrepresentation. They do not apply to innocent misrepresentation or *dicta et promissa*, and they most certainly do not apply to damages for breach of contract (which will be dealt with later).

Note that, historically, a claim for damages for negligent misrepresentation was impermissible, but, in *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A), the Appellate Division placed negligent misrepresentation on the same footing as fraudulent misrepresentation. Consequently, either will suffice for a claim for delictual damages for misrepresentation, and it follows that the measure of damages in either case will be delictual. You may **read carefully** the historical section relating to negligent misrepresentation, but you must study the discussion on *Bayer South Africa (Pty) Ltd v Frost*, which represents the law at present.

The question of damages for innocent misrepresentation has caused a fair amount of consternation over the years. It is clear that delictual damages can be claimed only if the necessary requirements have been met, and, within the present context, if fault is of course lacking. Remember that *restitutio in integrum* may be claimed even for innocent misrepresentation, but the real question has been whether the contract could be upheld and the financial equivalent of rescission and restitution claimed. This is usually referred to as restitutional damages (as opposed to true, delictual damages). The position in our law was uncertain until the decision in *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A), where the Appellate Division held that a purchaser who entered into a contract on the basis of the seller's *dictum et promissum* may invoke the aedilitian remedies: cancellation with the *actio redhibitoria*, or, more importantly, to abide by the contract and claim a reduction of the purchase price with the *actio quanti minoris*. A *dictum et promissum* is essentially a misrepresentation as to the quality of the *merx* (article purchased), and the purchaser is in effect afforded a remedy for restitutional damages for innocent misrepresentation. Pay careful attention to the definition of a *dictum et promissum* as formulated in *Phame*, namely a material statement made by the seller to the buyer during the negotiations, bearing on the quality of the *res vendita* (*merx*) and going beyond mere praise and commendation. Note, however, that the aedilitian remedies apply only to the contract of sale and perhaps exchange. The definition of a *dictum et promissum* is wide enough to cover fraudulent, negligent and innocent misrepresentations, but, in the case of culpable (ie fraudulent and negligent) misrepresentations, the aedilitian remedies are superfluous, since the innocent party can claim even consequential damages with a delictual action. The important section on innocent misrepresentation concerns the *Phame*case and its implications regarding *dicta et promissa* and the aedilitian remedies. You may concentrate on this aspect in the prescribed textbook, but we suggest that you **read carefully** the historical section which precedes it.

Note that contracts often contain clauses that either limit or exclude the remedies available to either or all the contracting parties. A very common such clause is one excluding liability for misrepresentation. The remedies for negligent and innocent misrepresentation can be excluded by agreement between the parties, but not the remedies for intentional misrepresentation (*Wells v SA Alumenite Co* 1927 AD 69). For a further discussion of exclusion clauses, see study unit 23.

5 MISREPRESENTATION BY SILENCE: NON-DISCLOSURE

Study section 4.2.4 of the textbook. Usually, there is no liability for mere silence or omission, unless there is a duty to speak in the circumstances. If a party is under a duty to speak and fails to discharge this duty, he or she may be liable on the basis of misrepresentation. We suggest that you summarise briefly the exceptional case where the law imposes a duty to speak discussed in section 4.2.4, and study the general test for liability adopted in *Absa Bank Ltd v Fouche* 2003 (1) SA 176 (SCA).

ACTIVITY

PLEASE NOTE:

THIS ACTIVITY RELATES TO STUDY UNITS 10, 11 AND 12.

ONLY APPLY THE COMMON LAW TO THIS ACTIVITY. DO NOT APPLY THE CONSUMER PROTECTION ACT 68 OF 2008 TO THESE QUESTIONS.

See study unit 16 for a discussion of the Consumer Protection Act.

1 Draw a comparison between the requirements and remedies for culpable misrepresentation and non-culpable misrepresentation respectively.

2 Ahmed asks his neighbour, Oliver, over the fence one day, what Oliver regards as a sound short-term investment. Oliver assures Ahmed that the best investment is to purchase shares in a certain company. Ahmed does this, but it transpires that the company has huge debts that it is unable to meet and it goes into liquidation. Ahmed loses R20 000. May he claim his loss from Oliver on the basis of misrepresentation?

3 Josh sells his truck to Wasim for R100 000. During the negotiations, Josh, in order to get a better price, tells Wasim that the truck is capable of carrying a 20-ton load. Josh knows that the truck is only capable of carrying a 10-ton load. The market value of the truck is R90 000. Had Wasim known that the truck was only capable of carrying 10 tons, he would still have purchased it, but would only have been prepared to pay R80 000.

   (a) What type of misrepresentation is present here, and how would damages be calculated in this instance?

   (b) Does Josh's statement amount to a *dictum et promissum?*

4 Assume that the facts are the same as in question 3, but that Wasim furthermore loses a lucrative contract to transport certain goods because the truck's capacity is too small to carry them. Wasim would have made a profit of R10 000 if the contract had not been cancelled.

   (a) What type of loss has Wasim suffered?

   (b) Will Wasim successfully be able to claim his loss of profit, and, if so, with what action?

(c) Would Wasim be able to claim the loss which is considered in question 4(a), with the aedilitian remedies?

5 V, a wholesale dealer in jewellery, places the following advertisement in the newspaper:

"Swatch watches manufactured by X company are now available in South Africa at V wholesaler! Stocks limited."

K, a dealer in watches, reads the advertisement. K rushes off to V and signs a contract of sale for 1 000 of the watches without reading the contract. V notices that K does not read the contract, but says nothing. When V delivers the watches, K notices that the watches were manufactured by Y company and that they are of an inferior quality.

(a) Did a valid contract of sale come into being?

(b) Does K have any remedy available, and what would the basis of his claim be?

(c) Would your answer to question (b) be different if the contract of sale contained a clause excluding liability for any misrepresentation and K read the contract before signing it?

(d) Would your answer to question (a) be different if K and V both honestly believed that the watches were real Swatch watches and were aware of each other's belief?

(e) Would your answer to question (a) be different if K wrongly believed, when he signed the contract without reading it, that V warranted that the watches were real Swatch watches?

(f) Would your answer to question (a) be different if V in good faith brought K under the impression that such a warranty was a term of the contract of sale?

(g) Is K bound by a term excluding V's liability for any misrepresentation if the contract of sale contained such a clause and K signed the contract without reading it?

FEEDBACK

1 It is important to note that culpable misrepresentation, in the context of contract or otherwise, is a delict and must therefore comply with the requirements set for delicts in general. An innocent misrepresentation, whether a *dictum et promissum* or not, is not a delict and therefore has different requirements. Remember to distinguish between an innocent misrepresentation per se and a *dictum et promissum*, because they are not the same thing.

2 Oliver expressed an opinion which cannot in the circumstances be regarded as wrongful for the purposes of actionable misrepresentation. A mere opinion asked and given during casual conversation will not, on the whole, amount to wrongful conduct. The matter might have been different if Oliver had been Ahmed's financial advisor and had advised Ahmed without taking steps to ascertain the accuracy of his advice.

3 (a) This is a fraudulent misrepresentation, since Josh knew what the capabilities of the truck were.

(b) This is a case of *dolus incidens*, since Wasim would still have purchased the truck, although he would have done so on different terms. Wasim's damages would thus be calculated by deducting the putative price (R80 000) from the purchase price (R100 000), which comes to R20 000. Remember that Wasim must prove that the parties would have agreed on the putative price of R80 000 if there had been no misrepresentation.

4 (a) Consequential loss.

(b) Wasim will be able to claim his consequential loss of R10 000 with a delictual action.

(c) Consequential loss cannot be claimed with the aedilitian remedies. The type of damages claimable with the aedilitian remedies is restricted to restitutional damages.

5 Students often find it difficult to determine whether a problem-type question relates to misrepresentation or mistake. Question 5 deals with both, as well as with common error. Where the misrepresentation causes a material mistake, we are dealing with mistake, but where it only causes a non-material mistake, we are dealing with a misrepresentation.

(a) Please note that you are asked whether a **valid** contract came into being. From this, you should be able to deduce that this question deals with the requirements for a valid contract. If you look at the facts of the question, you should realise that this question deals with mistake, as the facts are silent as to the other requirements. You must further remember that a valid contract arises in the case of misrepresentation, but no contract arises where consensus and a reasonable reliance are absent. You must determine from two facts whether there is an absence of either an agreement (consensus) or an ostensible agreement. These two facts are: the statement that the watches are Swatch watches and K's signing of the contract without reading it.

Step 1: Is the error material?
For a mistake to be material/operative/essential, it must relate to one or more of the following:

(1) the intention to be legally bound
(2) the persons between whom the obligations are to be created, and
(3) the performance(s) to be delivered in terms of the contract

The misrepresentation regarding the fact that the watches were Swatch watches led to a mistake on K's part relating to a characteristic of the performance (*error in substantia*). The reason is that the parties were in agreement to buy and sell 1 000 watches, but K was mistaken in that he thought they were Swatch watches. The position seems to be that the mistake relating to a characteristic of the performance is not material. This seems to be the position in the positive law (*Trollip v Jordaan*). However, see the discussion of *Spenmac (Pty) Ltd v Tatrim CC* 2015 (3) SA 46 (SCA) in paragraph 2 (CLASSIFICATION OF MISTAKE) of study unit 10 above.
It can be argued that there is no indication in the given facts of this problem that K's intention differed from the written contract of sale which he signed without reading it. It therefore seems as if K did not act under a material mistake. On the other hand, it can also be argued that K is mistaken as to the obligations which the contract of sale created, as he did not read the contract before signing it. In such a case, the mistake is material. To determine whether the contract denier is bound to the contract, either the direct reliance approach or the *iustus error* approach may be applied.

Step 2: Which approach of the courts can be applied to the facts of the problem?
An ostensible contract (a written contract signed by both parties) exists and, consequently, either of the approaches can be applied. In the examination, you could be expected to apply both the approaches.

Step 3: Apply both approaches to the facts of the problem.
A material mistake is seen to be reasonable in the *iustus error* approach where the mistake is induced by the other party's positive misrepresentation (positive) or failure to remove an incorrect impression. The latter situation is applicable where the contract assertor had a duty to speak which arose: (1) because he or she knew, or ought reasonably to have known, that the contract denier was labouring under a false impression, or (2) because, before the conclusion of the agreement, the contract assertor created an impression which is in direct conflict with the agreement he or she seeks to enforce. In this problem, the contract denier's (K's) mistake was not caused by any misrepresentation by V, nor did a duty to speak rest on V. K's mistake is unreasonable and he cannot therefore rely on his mistake. He is bound by the contract of sale.

The *caveat subscriptor* rule thus applies.

The threefold enquiry in *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* is: (1) was there a misrepresentation as to one party's intention (2) who made the misrepresentation, and (3) was the other party misled thereby, and, if so, would a reasonable person also have been misled thereby. In our problem, K, a party to the contract, made a misrepresentation of his intention by signing the contract. By signing, he indicated that he wished to be bound by it. V was misled thereby, and a reasonable person would also have been, because a reasonable person would assume that someone who signs a contract without reading it wishes to be bound by it. The *caveat subscriptor* rule therefore applies. K has thus created a reasonable reliance in V's mind that they have reached agreement.

We can thus conclude that a valid contract of sale did arise.

(b) The statement in the advertisement that the watches are Swatch watches is not mere puffing and amounts either to culpable (intentional or negligent) misrepresentation or a *dictum et promissum*. It is not clear whether V intentionally, negligently or innocently made this false statement, and it should furthermore be remembered that some culpable misrepresentations amount to *dicta et promissa*. You should therefore discuss all these possibilities.

You should briefly discuss the elements of the delict, misrepresentation, and apply your discussion to the facts. It is not clear that V acted intentionally, but it is at least certain that a reasonable person would not have made such a statement without checking the truth of it. This false statement induced K to buy the watches. This also proves the wrongfulness of V's false statement in the form of a commission. K's remedies are rescission or upholding the contract. In both cases, damages may be claimed. When discussing damages, please note that it is uncertain whether this is a case of *dolus dans* or *dolus incidens*. You should therefore discuss both.

This statement also amounts to a *dictum et promissum*, as it is a material statement of fact made during the negotiations which relates to the quality of the things sold and which goes beyond mere praise and commendation. The aedilitian remedies are available to K.

(c) The answer to question (b) would be different. V would now only be liable for fraudulent misrepresentation. Liability for negligent as well as innocent misrepresentation may be contractually excluded, but not liability for fraudulent misrepresentation (*Wells v SA Alumenite Co*).

(d) The answer to question (a) would now be different, as no valid contract came into being. There is a common error. In the case of common error, both parties have exactly the same incorrect perception regarding an important aspect of their contract (ie that the watches are Swatch watches). The parties are in complete agreement, but the contract is void. An explanation for this voidness is that the parties had tacitly made the validity of their contract dependent on the existence of a past or present fact (that the watches are indeed Swatch watches). When the fact proves to be non-existent, no contract comes into existence. This is the position in our problem. The watches are not Swatch watches, and thus the contract of sale is invalid.

(e) The answer to question (a) would now still be the same. The only difference is that it is now certain that K's mistake is material. A mistake which relates to a term of the contract (such as a warranty) is material, because it relates to performance. The application of the two approaches is exactly the same as in question (a). A valid contract thus arose.

(f) The answer to question (a) would now be different, as no valid contract arises. K's mistake is still material. The application of the two approaches to the facts is now different. When we apply the *iustus error* approach to the facts, K's mistake is now reasonable, because V induced it by an innocent misrepresentation. K may therefore rely on his mistake to void the contract. When we apply the direct reliance approach, we find the following: K misrepresented his intention by signing the contract without reading it. This did not mislead V (nor should he have been misled) because he caused K to believe that the contract of sale contained a warranty. The contract is therefore void.

Please note that V's creation of the impression that the warranty is a term of the contract does not amount to a *dictum et promissum*, because it does not relate to the quality of the thing sold, but to the existence of a term of the contract.

(g) The answer to this question is similar to the answer to question (f). K is not bound by such a term. K's mistake as to the presence of the exclusionary term is material, because it relates to an aspect of performance. The facts of this problem are similar to the facts in *Du Toit v Atkinson Motors*. V's misrepresentation is, however, different from V's misrepresentation in question (f). V's failure to draw K's attention to the existence of the clause excluding liability for any misrepresentation amounts to a misrepresentation of the terms of the contract of sale by an omission. If, in an advertisement, certain characteristics are attributed to a thing offered for sale (ie that the watches are Swatch watches) and the purchaser later signs a contract without reading it, the seller's silence as to the presence of the clause excluding liability for misrepresentation also amounts to a misrepresentation (ie that the written contract of sale does not differ from the advertisement).

When we apply the *iustus error* approach to the facts, K's mistake is reasonable, because V induced it by a misrepresentation. K may therefore rely on his mistake to void the contract. When we apply the direct reliance approach, we find the following: K misrepresented his intention to be bound by the term excluding liability for misrepresentation by signing the contract without reading it. This did not mislead V (nor should he have been misled) because he caused K to believe that the contract of sale did not contain a clause excluding liability for any misrepresentation. The contract is therefore void.

SUMMARY

Consult point 6 of "This chapter in essence" at the end of chapter 4 of the textbook.

STUDY UNIT 13
DURESS

OVERVIEW

Duress (also known as *metus*) boils down to intimidating a person into entering into a contract to which they otherwise would not have assented. In this study unit, we examine this concept and the remedies therefor.

The purpose of this study unit is to enable you to

* explain what is meant by the concept of duress and to distinguish it from misrepresentation
* explain the elements of duress
* explain the remedies for duress
* explain the effect of duress by a third party
* apply the relevant principles to practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 4, sections 4.3–4.3.7.

Broodryk v Smuts 1942 TPD 47.

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

Study section 4.3 of the textbook.

Duress occurs where a prospective contractant is forced or compelled by the other contractant, or someone for whose acts he or she may be held liable, to enter into a contract. The decision on the part of the innocent party to enter into the contract has been influenced by the improper conduct of the other party. Thus, in the same way that a misrepresentation that does not vitiate consent to the contract renders the contract voidable (rescindable), so consensus that has been obtained by way of duress renders the contract rescindable. Consensus is present, but it has been obtained in an improper (wrongful) manner. This improper conduct on the part of one contractant renders the contract voidable at the instance of the other party.

Here are some examples of duress: someone who has stolen from his or her employer may be compelled by threat of prosecution to agree to an acknowledgement of debt (*Illanga Wholesalers v Ebrahim* 1974 (2) SA 292 (D)); a person who has committed adultery with his partner's wife may be persuaded to transfer his share of the partnership property to the other partner for fear of an action for damages (*Salter v Haskins* 1914 TPD 264); a wife may sign a power of attorney in favour of her husband because he threatens to abandon her if she does not (*Savvides v Savvides* 1986 (2) SA 325 (T)); or a shipowner may conclude a contract for increased wages under threat of his or her ship not being off-loaded (*Malilang v MV Houda Pearl* 1986 (2) SA 714 (A)).

2 REQUIREMENTS

Study sections 4.3–4.3.6 of the textbook. Study the requirements for duress as formulated by Sir John Wessels and adopted in the leading case of *Broodryk v Smuts* 1942 TPD 47. You must be able to state these requirements and expand on them as indicated in section 4.3 and its subsections. Note that the courts have at times required financial loss even for *restitutio in integrum*. The more correct view seems to be that the mere conclusion of a contract as a result of duress should suffice to satisfy the requirement of ''damage'' (see, further, section 4.3.6). However, like fraud, duress is considered to be a delict, and, if actual damage is suffered, the victim of duress may claim damages in delict. Note, specifically, also that, in the case of duress of goods (threat to property), the courts have required unequivocal protest by the innocent party as proof of the involuntary nature of the agreement (see section 4.3.3).

3 REMEDIES

Study sections 4.3–4.3.6 of the textbook. Once again, as in the case of misrepresentation, although consensus exists and a valid contract arises, the consent has been obtained through improper means and the law affords the innocent party an election to rescind the contract and claim restitution (*restitutio in integrum*). In addition, if the requisite delictual element of actual damage is present, the victim of duress may claim damages.

4 DURESS BY A THIRD PARTY

Study section 4.3.7 of the textbook. Summarise section 4.3.7 very briefly. Note that the question of duress by an independent third party has not as yet been before our courts.

ACTIVITY

1 Distinguish between misrepresentation and duress.
2 Discuss the requirements and remedies for duress as traditionally expressed by the courts.

FEEDBACK

1 Although both misrepresentation and duress are forms of a delict, their requirements differ from each other and from the general requirements for a delict. The essential difference between the two lies in the type of act in question. In the case of misrepresentation, a contract is concluded as a result of a false representation, whereas, in the case of duress, a contract is concluded as a result of force or pressure that is brought to bear on one of the contracting parties.

2 Refer to the formulation of Wessels, which was adopted in the leading case of *Broodryk v Smuts*. It seems, however, that the mere entering into a contract as a result of duress constitutes "damage" for purposes of affording the victim the remedy of rescission and restitution. But, if a claim for delictual damages is instituted, actual, patrimonial loss is required.

SUMMARY

Consult point 7 of ''This chapter in essence'' at the end of chapter 4 of the textbook.

STUDY UNIT 14
UNDUE INFLUENCE

OVERVIEW

Undue influence is a form of improper pressure used to induce a party to conclude a contract, but, as opposed to duress, the pressure is more subtle, involving the wearing down of the victim's ability to exercise a free and independent will rather than threats or intimidation. In this study unit, we examine this concept, its origin and the remedies therefor.

The purpose of this study unit is to enable you to

* explain what is meant by the concept of undue influence, and to distinguish it from misrepresentation and duress
* briefly explain the origins of undue influence
* explain the elements of undue influence
* explain the remedies for undue influence
* explain what is meant by abuse of circumstances
* apply the relevant principles to practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 4, sections 4.4—4.4.3.

Preller v Jordaan 1956 (1) SA 483 (A).

Blackburn v Mitchell (1897) 14 SC 338.

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

Study section 4.4 of the textbook. Note that, in most cases of undue influence, there is a close relationship between the parties (eg as between a doctor and patient or parent and child) which enables the one party to misuse his or her superior position to influence the weaker party to assent to the contract in question.

2 REQUIREMENTS

Study sections 4.4.1–4.4.2 of the textbook. Study the requirements for undue influence as formulated in *Preller v Jordaan* 1956 (1) SA 483 (A) and adopted in *Patel v Grobbelaar* 1974 (1) SA 532 (A). You must also be able to discuss briefly the origins of the doctrine.

In *Gerolomou Constructions (Pty) Ltd v Van Wyk* 2011 (4) SA 500 (GNP) Van Wyk subcontracted with Gerolomou Constructions to do certain construction work for the latter. Gerolomou Constructions falsely alleged that certain aspects of the work and materials were defective and deliberately delayed payment of the outstanding amount for a considerable time. Van Wyk was experiencing financial difficulties at that stage and was desperate to receive the money to pay his workers. Gerelomou Constructions knew about these difficulties. After the delay, Gerolomou Constructions offered to pay Van Wyk less than half the money owed to Van Wyk in full settlement and informed Van Wyk that if he refuses to sign the settlement he will receive nothing. This occurred at the building site while Van Wyk's workers were waiting outside. Van Wyk signed the settlement after protesting that it was unfair. Van Wyk claimed the balance of the amount owed to him and succeeded. The court found *inter alia* that, even if a valid compromise agreement was concluded, Van Wyk acted under undue influence and could cancel the agreement because it was voidable.

The court applied the requirements as formulated in *Patel v Grobbelaar* 1974 (1) SA 532 (A) and found they were all present (505–507). Gerolomou Constructions gained influence over Van Wyk. It knew that Van Wyk was in financial difficulties, that he needed the money to pay his workers, and that he could not afford a protracted dispute. The bargaining power of the parties was unequal. Gerelomou Constructions took advantage of Van Wyk's situation to induce him to conclude the agreement which was to his disadvantage and which Van Wyk regarded as unfair. Gerolomou Constructions also acted unconscionably. The court held in this regard (507–508):

> I have no doubt that it is entirely permissible for one party to exploit the economic weakness of the other when a genuine settlement of a disputed indebtedness is involved, but it is quite another thing when an economically powerful party withholds what is admittedly owing to an economically weaker party, in order to seek commercial advantage. Pacta sunt servanda is a prescription that is intimately connected with the constitutionally protected values of freedom and human dignity. It follows that to use the threat of breaching a contract to induce an economically less powerful contractual counterpart to act to his disadvantage in relation to an accrued contractual right, the enforcement of which is not contrary to public policy, is subversive of freedom and human dignity. In the present case the defendant's conduct further trenched upon the plaintiff's constitutional right to have his dispute with the defendant adjudicated by fair legal or other process. In my view, the plaintiff has established the element of unconscionability required.

This decision is open to criticism because the conduct of Geromolou Construction does not seem to amount to undue influence, but rather economic duress (Pretorius and Ismail ''Compromise, undue influence and economic duress. *Gerolomou Constructions (Pty) Ltd v Van Wyk* 2011 (4) SA 500 (GNP)'' 2012 *Obiter* 688–689). Gerolomou Construction did not gain an influence over the mind of Van Wyk by 'insidiously eroding' Van Wyk's 'ability to exercise a free and independent judgment' in deciding whether to sign the agreement or not, but Gerolomou Constructions rather threatened to breach the construction contract by not paying Van Wyk at all if he refused to sign the settlement document. This threat compelled Van Wyk to sign. See study unit 13 for a discussion of duress.

3 REMEDIES

Study sections 4.4.1–4.4.2 of the textbook. Once again, as in the case of misrepresentation and duress, although consensus exists and a valid contract arises, the consent has been obtained through improper means and the law affords the innocent party an election to rescind the contract and claim restitution (*restitutio in integrum*). In *Preller v Jordaan*, the court found that the grounds for *restitutio in integrum* in Roman-Dutch law were wide enough to include what is known today as undue influence. Undue influence renders a contract voidable at the instance of the aggrieved party, but, traditionally, rescission and restitution are the only remedies available on this ground. Whether an action for delictual damages will lie has not yet been entertained by the courts. The courts have not regarded undue influence as a delict, and the fact that it originates in English law also suggests the contrary.

4 ABUSE OF CIRCUMSTANCES

Study section 4.4.3 of the textbook. We suggest that you summarise section 4.4.3 briefly. Similar to undue influence, but also treated as a form of duress, abuse of circumstances occurs where a party unconscionably exploits another party's emergency situation to secure the latter's consent to a contract. Refer, in this regard, to *Blackburn v Mitchell* (1897) 14 SC 338 for an example. Although our common law is unclear, it seems as if the contract is enforceable. There is also authority to the effect that the performance in terms of the contract must be reduced to what is reasonable in the circumstances.

ACTIVITY

1 Explain what is meant by undue influence.

2 State the requirements for undue influence.

3 State the basis for the recognition of this doctrine in our law.

4 Explain briefly what is meant by abuse of circumstances.

FEEDBACK

1 Undue influence, as distinct from misrepresentation and duress, is a ground for rescission of a contract which is available to a contractant who has been persuaded by someone who has influence over him or her to conclude a contract which, with an unfettered will, he or she would not have concluded. Typical of such cases is a close relationship between the parties.

2 Refer, here, to the requirements for undue influence as formulated in *Preller v Jordaan.*

3 Although, in *Preller v Jordaan*, the Appellate Division held that the concept of *dolus is wide enough to serve as the basis for this doctrine, it is highly probable that undue influence is directly derived from English law.*

4 Abuse of circumstances occurs where a party unconscionably exploits another party's emergency situation to secure the latter's consent to a contract. The legal position in this regard is uncertain, but it appears as if the contract will be enforceable subject to reduction of the victim's performance to what is reasonable.

SUMMARY

Consult point 8 of ''This chapter in essence'' at the end of chapter 4 of the textbook.

STUDY UNIT 15
COMMERCIAL BRIBERY

OVERVIEW

Commercial bribery involves the situation where a party bribes the agent or representative of another party to facilitate a contract between the briber and the party whom the agent represents. In this study unit, we examine this concept and the remedies therefor.

The purpose of this study unit is to enable you to

* explain what is meant by commercial bribery
* explain the elements of commercial bribery
* explain the remedies for commercial bribery
* apply the relevant principles to practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 4, section 4.5.

Extel Industrial (Pty) Ltd & another v Crown Mills (Pty) Ltd 1999 (2) SA 719 (SCA).

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

Study section 4.5 of the textbook. In the case of commercial bribery, a contractual party (the briber) bribes the agent or representative (the bribed party) of another party (the principal) to facilitate a contract between the briber and the principal. The wrongful means used to secure the agreement render it voidable at the instance of the principal (*Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk* 1986 (1) SA 819 (A)). In *Extel Industrial (Pty) Ltd & another v Crown Mills (Pty) Ltd* 1999 (2) SA 719 (SCA), the Supreme Court of Appeal placed beyond all doubt the fact that commercial bribery is a distinct ground for rescinding a contract.

2 REQUIREMENTS

Study section 4.5 of the textbook. The requirements for commercial bribery were authoritatively formulated in *Extel Industrial (Pty) Ltd & another v Crown Mills (Pty) Ltd*. You must understand and be able to explain what these requirements are.

3 REMEDIES

Study section 4.5 of the textbook. As in the case of misrepresentation, duress and undue influence, commercial bribery constitutes a distinct ground for setting aside a contract and claiming restitution (*restitutio in integrum*). Furthermore, note that, in *Extel*, the court distinguished between the agreement between the briber and the agent, which is void for being illegal, and the agreement that results from the bribery between the briber and principal, which is voidable owing to the improper obtaining of consensus. An action for delictual damages has not been entertained within this context as yet.

ACTIVITY

Explain what is meant by commercial bribery, and what remedies it gives rise to.

FEEDBACK

Commercial bribery occurs where a contractual party (the briber) bribes the agent or representative (the bribed party) of another party (the principal) to facilitate a contract between the briber and the principal. The wrongful means used to secure the agreement render the agreement voidable at the instance of the principal. Alongside misrepresentation, duress and undue influence, commercial bribery constitutes a distinct fourth ground for the setting aside of a contract and claiming restitution (*restitutio in integrum*).

SUMMARY

Consult point 9 of ''This chapter in essence'' at the end of chapter 4 of the textbook.

STUDY UNIT 16

CONSUMER'S RIGHT TO FAIR AND HONEST DEALING UNDER THE CONSUMER PROTECTION ACT

OVERVIEW

In this study unit, we examine the ways in which the Consumer Protection Act 68 of 2008 addresses improperly obtained consensus.

The purpose of this study unit is to enable you to

* explain the ways in which the Act addresses improperly obtained consensus
* explain the remedies which the Act makes provision for

LEARNING MATERIAL

Prescribed textbook, chapter 4, section 4.7.

Sections 40, 41 and 51 of the Consumer Protection Act 68 of 2008.

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

Study section 4.5 of the textbook. The Consumer Protection Act has several provisions which overlap with the common law and deal with improperly obtained consensus.

2 PROVISIONS OF THE ACT

Study section 4.7 of the textbook, and sections 40 and 41 of the Act.

Section 4.7 contains a summary of sections 40 and 41 of the Act. Study this section carefully. The text of these provisions, which you must take note of, reads as follows:

"**40. Unconscionable conduct**

(1) A supplier or an agent of the supplier must not use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with any –

(a) marketing of any goods or services;
(b) supply of goods or services to a consumer;
(c) negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer;
(d) demand for, or collection of, payment for goods or services by a consumer; or
(e) recovery of goods from a consumer.

(2) In addition to any conduct contemplated in subsection (1), it is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer's own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.
(3) Section 51 applies to any court proceedings concerning this section.''

''**41. False, misleading or deceptive representations**

(1) In relation to the marketing of any goods or services, the supplier must not, by words or conduct –

(a) directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer;
(b) use exaggeration, innuendo or ambiguity as to a material fact, or fail to disclose a material fact if that failure amounts to a deception; or
(c) fail to correct an apparent misapprehension on the part of a consumer, amounting to a false, misleading or deceptive representation, or permit or require any other person to do so on behalf of the supplier.

(2) A person acting on behalf of a supplier of any goods or services must not –

(a) falsely represent that the person has any sponsorship, approval or affiliation; or
(b) engage in any conduct that the supplier is prohibited from engaging in under subsection (1).

(3) Without limiting the generality of subsections (1) and (2), it is a false, misleading or deceptive representation to falsely state or imply, or fail to correct an apparent misapprehension on the part of a consumer to the effect, that –

(a) the supplier of any goods or services has any particular status, affiliation, connection, sponsorship or approval that they do not have;
(b) any goods or services –

(i) have ingredients, performance characteristics, accessories, uses, benefits, qualities, sponsorship or approval that they do not have;
(ii) are of a particular standard, quality, grade, style or model;
(iii) are new or unused, if they are not or if they are reconditioned or reclaimed, subject to subsection (4);
(iv) have been used for a period to an extent or in a manner that is materially different from the facts;
(v) have been supplied in accordance with a previous representation; or
(vi) are available or can be delivered or performed within a specified time;

(c) any land or other immovable property –

(i) has characteristics that it does not have;
(ii) may lawfully be used, or is capable of being used, for a purpose that is in fact unlawful or impracticable; or

(iii) has or is proximate to any facilities, amenities or natural features that it does not have, or that are not available or proximate to it;

(d) the necessary service, maintenance or repair facilities or parts are readily available for or within a reasonable period;
(e) any service, part, replacement, maintenance or repair is needed or advisable;
(f) a specific price advantage exists;
(g) a charge or proposed charge is for a specific purpose;
(h) an employee, salesperson, representative or agent has the necessary authority to negotiate the terms of, or conclude, an agreement;
(i) the transaction affects, or does not affect, any rights, remedies or obligations of a consumer;
(j) a particular solicitation of, or communication with, the consumer is for a particular purpose; or
(k) the consumer will derive a particular benefit if they assist the supplier in obtaining a new or potential customer.

(4) A representation contemplated in subsection (3)(b)(iii) to the effect that any goods are new is not false, misleading or deceptive if those goods have been used only –

(a) by or on behalf of the producer, importer, distributor or retailer; and
(b) for the purposes of reasonable testing, service, preparation or delivery.

(5) Section 51 applies to any court proceedings concerning this section.''

3 REMEDIES

Study section 4.7 of the textbook, and section 51(3) of the Act. Consumers have different procedures to enforce their rights. See section 4.7 in this regard. Note, however, that section 51(3) provides that ''[a] purported transaction or agreement, provision, term or condition of a transaction or agreement, or notice to which a transaction or agreement is purported to be subject, is void to the extent that it contravenes this section''. Section 51 applies to both sections 40 and 41, which means that agreements which arise in the circumstances that these provisions govern are **void** and not merely voidable.

ACTIVITY

Explain how the Consumer Protection Act addresses improperly obtained consensus.

FEEDBACK

Consult section 4.7, and sections 40, 41 and 51 of the Act. Attempt to draft a summary of about one page dealing with the provisions of the Act which relate to improperly obtained consensus.

SUMMARY

Consult section 4.7 of the textbook.

STUDY UNIT 17

LEGALITY: ILLEGAL CONTRACTS THAT ARE VOID

OVERVIEW

In this and the next study unit, we will discuss the requirement that a contract has to be legal, which is one of the six requirements for a valid contract. The other requirements are consensus or ostensible consensus, contractual capacity, formalities, possibility and certainty. This study unit primarily focuses on illegal contracts that are void.

The purpose of this study unit is to enable you to

* explain the two possible consequences of illegality
* explain the role of public interest in determining public policy
* explain when the conclusion, performance and object of the contract are against public policy
* explain when contracts are against good morals
* explain statutory illegality
* explain when unfair contracts are against public policy
* explain when the unfair enforcement of contracts is against public policy
* explain the consequences of illegal contracts that are void
* apply the relevant principles to practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 7.

Barkhuizen v Napier 2007 (5) SA 323 (CC).

Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A).

Klokow v Sullivan 2006 (1) SA 259 (SCA).

Jajbhay v Cassim 1939 AD 537.

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

Study section 7.1 of the textbook. Note, first, that there are two principles that have to be balanced when applying the rules regarding illegality, and, secondly, that there are two possible consequences of illegality.

The Constitution plays a crucial role in determining public policy, and this has become the most important influence of the Constitution on the law of contract.

The distinction between a void contract and an unenforceable contract is simple. A void contract has no legal consequences (obligations) from the beginning, while an unenforceable contract is valid from the beginning, but the obligations cannot be enforced when the agreement is against public policy.

2 ILLEGAL CONTRACTS THAT ARE VOID

Study the introduction to section 7.2 of the textbook. Public policy is informed by many sources.

2.1 Public interest

Study section 7.2.1. of the textbook. This section is crucial and you should see to it that you thoroughly understand how the courts go about determining public policy. The content of **footnotes 9 and 12** should also be studied, as it explains the text.

In practice, case law forms the starting point in determining what the public interest is, but a thorough understanding of constitutional values has become important.

2.2 The conclusion, performance and object of the contract must be lawful

Carefully read section 7.2.2. Illegality can affect the conclusion, performance and object of a contract, and note the different examples of such illegal contracts.

3 SPECIFIC EXAMPLES OF ILLEGAL CONTRACTS THAT ARE VOID

3.1 Contracts against good morals

Carefully read section 7.2.3.1 of the textbook. Note that there is a close relationship between good morals and public policy.

3.2 Statutory illegality

Study section 7.2.3.2 of the textbook. This type of illegality is very important in practice and involves determining the intention of the legislator, which is often a difficult task. You have to know the factors the courts take into account when determining the legislator's implied intention.

Now carefully read the illustration on how this could be done with reference to the National Gambling Act 7 of 2004. You do not have to study this illustration, but you must be able to undertake such an application yourself.

3.3 Unfair contracts

Study section 7.2.3.4 of the textbook. A basic distinction should be made between contracts falling within the provisions of the Consumer Protection Act 68 of 2008 (the CPA) and all other contracts. The CPA has empowered the courts with an equitable jurisdiction. Study the factors the court has to take into account. In all other contracts, unfairness of the contract on its own will not make the contract illegal. There must also be a serious infringement of some or other public interest. Also revisit study unit 3 and section 1.8.4 of the textbook, where the focus is on good faith and equity.

3.4 Unfair enforcement of a contract

Study section 7.2.3.5 of the textbook. This defense has created much excitement among academics, but much uncertainty still surrounds it, even after *Botha v Rich* 2014 (4) SA 124 (CC). In *Botha* the Constitutional Court refused to enforce a cancellation clause because it was unfair to do so without finding it necessary to refer to the infringement of any specific public interest. Unfortunately this judgment does not set out any objective criteria to determine whether or not it is unfair to enforce a term in a contract. This will lead to uncertainty because each judge can decide the issue of unfairness according to his/her own idea of what is unreasonable or unfair.

Also revisit study unit 3 and section 1.8.4 of the textbook where the focus is on good faith and equity.

4 THE CONSEQUENCES OF A CONTRACT THAT IS VOID FOR ILLEGALITY

Study the whole of section 7.2.4–7.2.4.3 with all its subsections. Students often fail to distinguish clearly between the *ex turpi* rule and the *par delictum* rule. The *ex turpi* rule simply means that an illegal contract is void and that no obligations arise out of this contract. There are **NO** exceptions to this rule. If one or both of the parties perform in terms of such a void contract, performance will unjustifiably enrich the other party, as there is no obligation to perform. This means that the party who has performed may claim back his or her performance with an enrichment action. But, here, the *par delictum* rule comes into play and prohibits such a claim on policy considerations in certain circumstances. However, fairness between the parties is also a policy consideration and allows the courts to relax the *par delictum* rule in certain circumstances. Thus, a balancing of policy considerations takes place.

The test for severance of the illegal part of the contract is often important in practice.

ACTIVITY

1 A regulation reads as follows: "Anyone who catches and has in his or her possession crayfish with a length of less than 6 cm is guilty of an offence which is punishable with a maximum fine of R5 000". X, a wholesaler, sells Y 500 crayfish for R10 000. All the crayfish only have a length of 5 cm. X delivers the crayfish, but Y refuses to pay X R10 000, as the contract is illegal. Advise X. The regulation has been enacted under legislation which aims to protect marine life against overfishing.

2 X insures the contents of her house with Y Insurer. The insurance contract contains the following clause:

If we reject liability for any claim made under this policy we will be released from liability unless summons is served within 60 days of repudiation.

X's house is burgled and her TV and hi-fi are stolen. X notifies Y Insurer of the theft, but Y Insurer rejects her claim. X only serves summons on Y Insurer 61 days after rejection of her claim. X was involved during this period in a serious car accident and, as a consequence, she was hospitalised for 30 days. Y Insurer raises the defence that Y Insurer has been released from liability based on the relevant clause. Discuss whether the court will uphold Y Insurer's defence.

FEEDBACK

1 This is a question on the possible statutory illegality of the contract of sale. The regulation does not expressly prohibit trading in undersized crayfish, but only criminalises the possession thereof. You have to apply the factors the courts take into consideration to determine whether the legislator impliedly intended the contract to be void.

The purpose of this regulation does not involve the protection of revenue. The regulation aims to protect our marine resources, and thus aims to protect a public interest. The purpose of the regulation is clearly the protection of crayfish by allowing them to grow and reproduce. This seems to indicate that the legislator had the intention that the contract of sale should be void.

However, there are two factors that militate against such a conclusion. If trading in undersized crayfish is allowed, it will certainly encourage the catching of undersized crayfish, but the prohibition of the possession of such crayfish by both the seller and the purchaser would be adequate to protect the crayfish. In fact, the regulation has a far wider reach as it completely criminalises the possession of undersized crayfish, as the reason for the possession thereof cannot be an excuse. Furthermore, only the possession of crayfish is criminalised and not the selling and buying thereof.

We can thus conclude that the contract of sale should be valid, but that X and Y have committed an offence and are liable to be prosecuted. X may claim the purchase price from Y.

2 The facts of this problem are based on the *Barkhuizen* case. However, the time period for the institution of a claim is far shorter and the insured has a good reason for failing to be in time with the institution of her claim. The first question is whether the clause gives X a fair opportunity to seek legal redress. The period is only two-thirds of the period in the *Barkhuizen* case, and it can be validly argued that the short period in the clause amounts to a denial of the right to seek judicial redress (a public interest informed by the constitutional right in section 34 of the Constitution). It may furthermore be argued that the enforcement of the clause against X is unfair in the circumstances where X was in hospital for 30 days and only had 30 days to institute a claim against Y Insurer, as this could amount to a denial of the right to seek judicial redress. X will have to plead the illegality of the clause or the unfairness of enforcement. The onus will also rest on X to prove illegality and unfairness. X will have to lead evidence on how long it usually takes to institute a claim.

If we assume that the clause is illegal, a further question will arise: Can the clause be severed from the rest of the insurance contract, as X would like to enforce the rest of the contract against Y Insurer. The guidelines which the courts use will have to be applied. First, the clause is grammatically and notionally separate from the rest of the contract, as it forms a separate clause. Secondly, if the clause is severed from the rest of the contract, the contract still stays an insurance contract. The substantive character of the insurance contract remains intact. Thirdly, it could be argued that the insurer's hypothetical intention would still be to enter into the insurance contract, as no insurer can survive without business. Y Insurer would be faced with the possibility that all its insurance contracts with such a clause would be invalid. X would, of course, have entered into the insurance contract. It can be concluded that the clause could be severed from the rest of the contract.

SUMMARY

Consult points 1–9 of ''This chapter in essence'' at the end of chapter 7 of the textbook.

STUDY UNIT 18

LEGALITY: ILLEGAL CONTRACTS THAT ARE VALID BUT UNENFORCEABLE

OVERVIEW

In the previous study unit, we primarily discussed illegal contracts that are void. In this study unit, we will focus on illegal contracts that are valid but not enforceable because they are against public policy. Both these study units deal with the requirement that a contract has to be legal. The other requirements for a valid contract are, needless to say, consensus or ostensible consensus, contractual capacity, formalities, possibility and certainty.

The purpose of this study unit is to enable you to

* explain why the law attaches different consequences to different illegal contracts
* explain briefly the current legal position with regard to wagering and gambling contracts
* explain the principles with regard to agreements in restraint of trade
* apply the relevant principles to practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 7.

Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A).

Basson v Chilwan 1993 (3) SA 742 (A).

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

Study the introduction to section 7.3 of the textbook. Focus on the discussion of the reasons why the law attaches two different consequences to illegal contracts.

2 WAGERING AND GAMBLING CONTRACTS

The wagering and gambling industry plays a major role in the economy. A basic knowledge of the validity of these contracts is essential. **First read the whole of section 7.3.1** as background and then **study points 10 and 11 of "This chapter in essence"** at the end of chapter 7.

3 AGREEMENTS IN RESTRAINT OF TRADE

Study section 7.3.2 of the textbook. A thorough knowledge of agreements in restraint of trade is important, as their use in the economy is very widespread.

ACTIVITY

X, the owner of Tex-Mex Fried Chicken Take-Away in Town A, sells her business as a running business to Y for R900 000. The contract of sale provides that X may not conduct a similar business in Town A and Town B for a period of two years. Six months later, X opens a similar business in Town B. X uses the same recipe she always used when preparing the chicken. Y seeks to enforce this clause in the contract against X with an interdict. It appears that, at the time of conclusion of the sale, the Tex-Mex Fried Chicken Take-Away drew its customers only from Town A and that the Tex-Mex chicken is not prepared according to a secret recipe. Will Y succeed? Discuss.

FEEDBACK

Y will only succeed if the agreement in restraint of trade is reasonable, but the onus of proving that it is unreasonable rests on X (the contract denier). In this regard, the *Basson* test should be applied to the facts of this problem.

The first question is whether Y has a protectable interest. Goodwill definitely exists as part of the running business. There is no right to a trade secret, as the recipe is useful, has an economic value, but is not secret (it is public knowledge).

The second question is whether the goodwill will be threatened by the conduct of Y. The opening of a similar business in Town B directly infringes the restraint.

The third question involves a weighing up of the interests of X and Y. The business only drew its customers from Town A. This shows that the restraint goes further than necessary to protect the goodwill of the business.

The conclusion is thus that the restraint is not reasonable as between the parties. But the enquiry does not end here. The fourth question that should be asked is whether there is any other relevant aspect of public policy which indicates that the restraint should be enforced. In our problem, there is none.

Y will thus not be successful in enforcing the restraint against X.

SUMMARY

Consult points 10–15 of ''This chapter in essence'' at the end of chapter 7 of the textbook.

REQUIREMENTS OF A VALID CONTRACT

STUDY UNIT 19
FORMALITIES

OVERVIEW

In this study unit, we discuss formal requirements for a contract which may be prescribed by law or by the parties. Complying with formalities is one of the six requirements for a valid contract. The other requirements are consensus or ostensible consensus, contractual capacity, legality, possibility and certainty.

The purpose of this study unit is to enable you to

* discuss the formalities prescribed by law
* discuss the formalities agreed to by the parties
* apply the relevant principles to practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 6.

Goldblatt v Freemantle 1920 AD 123.

SA Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren en Andere 1964 (4) SA 760 (A).

Brisley v Drotsky 2002 (4) SA 1 (SCA).

Impala Distributors v Taunus Chemical Manufacturing Co (Pty) Ltd 1975 (3) SA 273 (T).

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

Study section 6.1 of the textbook. Note the two exceptions to the general rule that no formalities are required for a contract to be valid.

2 FORMALITIES PRESCRIBED BY LAW

Study the introduction of section 6.2 of the textbook. Study the introduction of section 6.2 especially the general comments on writing as a formality. Writing is the most common formality prescribed by law.

Read section 6.2.1 of the textbook on the different formalities prescribed by legislation. This will help you understand the summary of this section in **points 2, 3, 5 and 6 of "This chapter in essence"** at the end of chapter 6, which you must study. You will learn more about these formalities when you study specific contracts such as partnership, sale, lease, mandate and employment.

3 FORMALITIES STIPULATED BY THE PARTIES

Study section 6.3.1 of the textbook and remember the important role that the parties' intention plays, but that the law presumes an intention where their intention cannot be determined. The parties often stipulate formalities in important contracts where the law does not require formalities.

Non-variation clauses are extremely important in practice (**study section 6.3.2 of the textbook**). The views of the courts and academics on the legality of such clauses are especially important. Refer back to the discussion of public policy in study unit 17.

Non-cancellation clauses have also become standard clauses in contracts (**study section 6.3.3 of the textbook**).

Study the introduction of section 6.3.4 and section 6.3.4.1 of the textbook. The restrictive interpretation of non-variation clauses is very important in practice. You should know the different exceptions. You only have to read carefully the application of the exceptions to the given example, but make sure that you understand the application of exceptions to the stated problem and are able to do so yourself.

Read sections 6.3.4.2 and 6.3.4.3 of the textbook. All you have to remember is that a non-variation clause will not be enforced when such enforcement is against public policy or where the defence of estoppel can be raised. Note that the first defence has been successfully raised in the case law, but that there is no reported case as yet where the latter defence has been successfully raised.

Study section 6.3.5 of the textbook on non-waiver clauses, as they have become common in contracts.

ACTIVITY

1 X promises Y R1 000 orally because X likes Y. X gives the money to Y, but, when X and Y later quarrel, X wants his money back. Will Y have to give back the R1 000? Discuss.

2 B and S agree orally that B will buy S's Toyota Hilux truck for a purchase price of R100 000. The parties further agree that the contract between them will be reduced to writing. Before this can be done, B informs S that he is no longer interested in buying the truck. The reason is that he has found a similar truck, with fewer kilometres on the clock, at a lower price. S approaches you for advice. S wants to know whether a valid contract of sale was concluded between the parties. Discuss.

3 X lends Y R10 000 in a written contract which is signed by both parties. Y has to pay back R1 000 on the first of every month. The contract contains the following clause: "No variation of any of the terms or conditions of this contract shall be of any force or effect unless it is recorded in writing and signed by the parties thereto". The contract furthermore provides that the full amount of the outstanding instalments will immediately become due if Y fails to comply strictly with her obligations. Y becomes ill and asks X to give her an extension of two weeks to pay the next instalment of R1 000. X gives her permission, but then enforces the acceleration clause and claims the whole outstanding amount.

   (a) May X do so? Discuss.

   (b) Would your answer to question (a) be different if their contract also had a non-waiver clause? Discuss.

4 Do you think that the justification of the courts for the enforcement of non-variation clauses outweighs the unfairness often involved in the enforcement of such clauses? Discuss.

FEEDBACK

1 Although the contract of donation of money was oral (and thus unenforceable), the contract was performed by X and thus became binding. X will thus not be able to claim back the R1 000.

2 In order to ascertain what the intention of B and S was with the further agreement, their agreement has to be construed. The courts assume that the parties intended the formalities to facilitate proof, unless it can be proved that they intended it as a requirement for validity. The question is thus whether there are any indications to the contrary.

The given facts of this problem differ from the facts in the *Goldblatt* case, where the parties agreed on how the reduction to writing had to take place. The one party would set out in a letter the terms of the contract, and sign it. The other party would confirm these terms in a letter. The court found that this was an indication that the parties intended writing as a requirement for validity. The court also referred to authority to show that, where the signatures of both parties are required, the contract only arises when the parties sign the contract.

It is uncertain what the intention of the parties was in our problem, and the assumption will therefore apply. Thus the parties only intended writing to facilitate proof and a valid contract of sale arose.

3 (a) This problem deals with the consequences of a non-variation clause and the application of the *Shifren* principle. It is clear from the wording of the non-variation clause that the whole contract is protected by the clause. However, the parties do not attempt to vary their contract orally, as they do not change the obligation to pay the instalments on the first of every month. We are thus dealing with a waiver of the right to receive payment of one instalment on the first of the month. The non-variation clause thus does not apply; the waiver is valid, Y does not breach the contract and the acceleration clause will not come into operation.

(b) As you have seen, this is a case of waiver and the presence of a non-waiver clause will make a difference, as any waiver will have to be in writing to have effect. Y thus breaches the contract and the acceleration clause will come into operation.

4 The question on whether non-variation clauses should be regarded as valid involves an enquiry into the legality of such clauses. As you noted in study unit 17, determination of public policy often involves the balancing of competing public interests. You should be able to identify the interests involved here and argue how they should be balanced. Note that the constitutional principle of equality also comes into play. You should know not only the black-letter rules of the law of contract, but also the underlying principles that shape these rules.

SUMMARY

Consult the summary of chapter 6, namely ''This chapter in essence'', at the end of chapter 6 of the textbook.

STUDY UNIT 20
POSSIBILITY

OVERVIEW

In this study unit, we discuss the requirement for a valid contract that performance must be possible at the time that the contract was entered into. The other requirements for a valid contract are consensus or ostensible consensus, contractual capacity, legality, formalities and certainty.

The purpose of this study unit is to enable you to

* explain the general rule that impossibility of performance prevents the creation of obligations
* distinguish between the different types of impossibility
* explain the exceptional cases where liability arises despite initial impossibility
* explain the consequences of impossibility
* apply the relevant principles to practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 8.

Wilson v Smith 1956 (1) SA 393 (W).

CONTENT OF THIS STUDY UNIT

1 THE GENERAL RULE THAT IMPOSSIBILITY OF PERFORMANCE PREVENTS THE CREATION OF OBLIGATIONS

Study section 8.1.1 of the textbook. If performance is impossible, the contract is void. You should understand the subtle distinction between error in motive and initial impossibility. **You do not have to study the counterpoint.**

2 DIFFERENT TYPES OF IMPOSSIBILITY

Study section 8.1.2–8.1.2.4 of the textbook.

You should be able to draw all the distinctions made in these sections.

You should notice that, although it is stated that objective impossibility means that the impossibility is so serious that no-one can perform, practical impossibility (where the cost of performing is totally disproportionate to the value of the performance) will also preclude liability from arising.

A difficulty arises where performance is legally impossible. Theoretically speaking, this should be a case of illegality, yet the case law sometimes regards it as initial impossibility. The distinction between initial impossibility and illegality is not only a theoretical issue, but the consequences are also similar (a claim for unjustified enrichment arises) up to a point (the *par delictum* rule only applies to illegality). Refer back to study unit 17 with regard to the consequences of illegality.

The distinction between initial impossibility, supervening impossibility (a form of termination of obligations) and prevention of performance (a form of breach of contract) has practical importance, as their consequences are different.

3 LIABILITY DESPITE IMPOSSIBILITY

Study section 8.1.3–8.1.3.2 of the textbook

There are two exceptions to the general rule where obligations arise despite initial impossibility: where both parties contemplated impossibility of performance, and a warranty of performance.

Notice that the possibility should exist that a claim for delictual damages can be instituted in certain cases.

With regard to tacit warranties, see study unit 23 on tacit terms.

4 THE CONSEQUENCES OF IMPOSSIBILITY

Study section 8.1.4 of the textbook. Where performance is impossible, no obligation will arise, and, if there is a reciprocal obligation, that reciprocal obligation will also be void. See study unit 32 on the *exceptio non adimpleti contractus* for a discussion of reciprocal contracts. Any performance in terms of a void contract can be reclaimed on the basis of unjustified enrichment.

The test of divisibility of performances can play a role here. See study unit 23 in this regard.

ACTIVITY

1 Indicate whether the impossibility in the following cases is a case of initial impossibility which makes the contract void:

(a) X undertakes to paint Y's house for R30 000. The house is destroyed by lightning a day after the conclusion of the contract.

(b) X undertakes to paint Y's house for R30 000. Unknown to both parties, the house was destroyed by lightning the day before.

(c) X undertakes to paint Y's house for R30 000. Unknown to both parties, the price of paint tripled the day before. The paint would now cost X R15 000.

(d) X undertakes to paint Y's house for R30 000. Y deliberately destroys his house a day after the conclusion of the contract.

(e) X buys paint from Y to paint his (X's) house for R10 000. X did not know that his house was destroyed by lightning the day before the conclusion of the contract.

(f) X sells a house to Y for R800 000. The house is registered in the name of X and Z. The contract complies with the required formalities. Z refuses to allow registration in Y's name to take place.

2 Mr Greedy is a businessman who sells his wares through a number of street vendors. Poor Boy is his nephew, who cannot find work and is interested in working for his uncle as a street vendor. Mr Greedy and Poor Boy conclude a written contract of service. Poor Boy has to pay Mr Greedy the lawyer's fee

of R500 for the drafting of the contract. Mr Greedy undertakes to employ Poor Boy for a year and to pay him R3 000 per month. Poor Boy undertakes to run Mr Greedy's street stall on the pavement of Pearce Street in Mega City. Both parties are unaware that street vending in Pearce Street is prohibited by regulation. One day, a traffic officer arrives and tickets Poor Boy for selling the wares on Pearce Street.

(a) Poor Boy is desperate and asks you for legal advice. He wants to know whether he is bound by the contract of service, and if he has any claim against Mr Greedy.

(b) Would your advice be the same as in question (a) if the regulation only prohibited street vending without a licence? All applications for licences are accepted. Discuss.

FEEDBACK

1 (a) No. Although the impossibility is absolute, X's performance was still possible when the contract was concluded. This is a case of supervening impossibility of performance.

(b) Yes. X's performance was absolutely impossible when the contract was concluded, as no-one would have been able to paint a burnt-out house.

(c) Probably not. Performance seems to be factually and objectively possible. It is doubtful, however, whether this would be regarded as a case of economic or practical impossibility that would make the obligation void.

(d) No. Although X's performance was still possible when the contract was concluded, performance became absolutely impossible after Y's deliberate act. Y breached the contract (prevention of performance).

(e) No. Neither payment of the price nor the performance of delivering the paint was impossible at the conclusion of the contract. The contract of sale is valid, because X only acted under an error of motive, which is not a material error. The parties thus had consensus.

(f) No. Performance by X is not objectively impossible, because the house still exists. It is only subjectively impossible for X to perform.

2 (a) Performance by Poor Boy is legally impossible. This problem is either a case of absolute impossibility of performance (all street vending is prohibited) at the time of conclusion of the contract or illegality. In both instances, the contract is void and Poor Boy has no contractual remedy. Performance by both parties amounts to unjustified enrichment and restitution of the performances must occur. Restitution of Poor Boy's labour is, however, not possible.

(b) No. The contract is now valid and enforceable. Performance by Poor Boy is now not illegal, as performance can legally be carried out with a licence. Performance is only subjectively impossible for Poor Boy, as street vendors with licences may freely sell their wares. Poor Boy will have to apply for a licence.

SUMMARY

Consult points 1–7 of "This chapter in essence" at the end of chapter 8 of the textbook.

STUDY UNIT 21

CERTAINTY

OVERVIEW

In this study unit, we discuss the requirement for a valid contract that the contents of the obligations must be certain or capable of being made certain through a mechanism set out in the contract. The other requirements for a valid contract are consensus or ostensible consensus, contractual capacity, legality, formalities and possibility.

The purpose of this study unit is to enable you to

* explain the general requirement for a valid contract that the content of the obligations must be certain or capable of being made certain through a mechanism set out in the contract
* explain the application of the certainty requirement to some practical examples
* explain the consequences of not meeting the certainty requirement
* apply the relevant principles to practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 8.

NBS Boland Ltd v One Berg River Drive CC 1999 (4) SA 928 (SCA).

CONTENT OF THIS STUDY UNIT

1 THE GENERAL RULE THAT UNCERTAINTY ABOUT WHAT HAS TO BE PERFORMED PREVENTS THE CREATION OF OBLIGATIONS

Study section 8.2.1 of the textbook. Certainty is one of the requirements for a valid contract. This means either that the contents of the obligations are certain or that they are capable of being made certain through a mechanism set out in the contract. **You only have to read the "Pause for reflection" box in this section.** You should understand that consensus and certainty are distinct, but that it is sometimes difficult to determine whether a contract is void because of lack of consensus or because of uncertainty.

2 THE APPLICATION OF THE CERTAINTY REQUIREMENT: SOME PRACTICAL EXAMPLES

Study section 8.2.2–8.2.2.4 of the textbook.

All the examples are important.

The mechanisms which can be validly used to obtain certainty are very important when drafting contracts. Also note how vague language is addressed in the rules of interpretation, and of how gaps are filled by terms read into the contract with terms implied by law.

3 CONSEQUENCES OF NOT MEETING THE CERTAINTY REQUIREMENT

Study section 8.2.3 of the textbook. The uncertainty of an obligation can make the contract void, unless the uncertain obligation can be severed from the rest of the contract. See study unit 32 on the *exceptio non adimpleti contractus* for a discussion of reciprocal contracts. And note, again, the importance of the test of divisibility of performance. See study unit 23 in this regard.

ACTIVITY

Are the following terms certain?

1. X will pay Y the price of R10 000 when her financial position allows her to.
2. X has an option to buy Y's farm for a price to be determined by agreement between X and Y when X exercises the option.
3. X has an option to buy Y's farm for a price to be determined by agreement between X and Y. X and Y undertake to negotiate the price in good faith when X exercises the option.
4. X undertakes to pay a substantial amount of the purchase price of R600 000 for a house each month until the price is paid off.
5. X leases Y's house for R7 000 per month. The parties do not agree on how long the lease will remain in force.
6. X, the seller of a car to Y, will determine the purchase price of his car.
7. Z will determine the purchase price of the car in the contract of sale between X and Y.
8. Y will pay X a reasonable fee for the installation of Y's stove.

FEEDBACK

1. Yes. The term is not vague, as the financial position of X and her ability to pay are a question of fact.
2. No. This is an invalid agreement to agree (*pactum de contrahendo*). There is no deadlock-breaking mechanism.
3. No. This is an invalid agreement to agree (*pactum de contrahendo*). The undertaking to negotiate in good faith is not a deadlock-breaking mechanism.
4. No. A "substantial amount" is vague.
5. Yes. The parties have agreed on a lease and therefore intend that the contract will not be of an indefinite duration. The courts will probably interpret this contract to mean that either party may terminate the lease by giving notice of a month.
6. No. One of the parties may not validly determine the price in a contract of sale.
7. Yes. Here, a mechanism is created for the determination of the purchase price: a third party (Z) will do so.

8 Yes. An agreement to perform a service at a price to be determined by one of the parties, X, is valid, but X has to exercise his discretion in a reasonable manner.

SUMMARY

Consult points 8–13 of ''This chapter in essence'' at the end of chapter 8 of the textbook.

CONTENTS AND OPERATON OF A CONTRACT

STUDY UNIT 22
PARTIES TO CONTRACTS

OVERVIEW

In this and the next two study units, we will discuss the contents and operation of a contract. As you will remember, a contract is an agreement which creates, or is intended to create, obligations. An obligation is a juristic relationship between legal subjects which entails a right to performance for one party to the agreement, and, consequently, a duty to perform for the other. In this study unit, we are going to examine the parties to the agreement. In study unit 23, we will discuss the obligations which are created by contracts, and the terms that determine or qualify the obligations. In study unit 24, we will examine the interpretation of contracts.

The purpose of this study unit is to enable you to

* distinguish between simple joint liability, joint and several liability, and collective joint liability
* explain the principle of privacy of contract
* explain briefly what representation is
* explain the stipulation for the benefit of a third party
* apply the relevant principles to practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 9 and the contents of this study unit.

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

Study section 9.1 of the textbook. Consensus presupposes at least two parties, or at least one person in two capacities.

2 MULTIPLICITY OF PARTIES

Study section 9.2–9.2.4 of the textbook. A sound knowledge of the different forms of liability (and entitlement) is required when drafting contracts. You have to be able to distinguish between the three forms of liability (and entitlement). You should also know when the different forms of liability (and entitlement) apply. The intention of the parties, presumptions, divisibility of performance, and the law all play a role in this regard. See the next study unit on the test for divisibility of performance.

3 THIRD PARTIES

As we have already seen, a contract creates at least one obligation between the parties to the contract, or, in other words, at least one claim or right to performance arises. There rests a duty on the debtor to perform, and it is obvious that the debtor may not interfere with the creditor's claim. The debtor must refrain from any interference with it, whether in the form of faulty performance (positive and negative) or in the form of repudiation or prevention of performance. The debtor also has a duty to perform, but the creditor's claim does not enjoy protection against the debtor only.

Third parties (ie all legal subjects not party to the contract) must also refrain from any action which may amount to culpable interference with the claim. (See your lectures on the law of delict.) In this sense, the contract between A and B places on third parties a general (negative) obligation to refrain from interference. However, it is also possible that, by their contract, A and B may impose specific (positive) duties on third parties and also stipulate rights for them, and this brings us to the field of representation and the stipulation in favour of a third party.

Study section 9.3.1. You have to know that privacy of contract is one of the principles of the law of contract, and you have to know what it involves in order to understand representation and stipulations for the benefit of third parties.

3.1 Representation

In contracting with B, A may be acting not in his or her own name, but as the representative of some third person, C. In other words, A is concluding the agreement with B in the name of and on behalf of the principal, C. The intention of A and B is clearly to forge an immediate juristic bond between B and C, so that A falls completely out of the picture as soon as the agreement itself has been completed. A may derive his or her representative authority either from some express authorisation by C or by reason of some office he or she holds (eg a guardian who acts for a minor), in which case he or she derives his or her authority directly from the law itself.

4 THE CONTRACT FOR THE BENEFIT OF A THIRD PARTY

Study section 9.3.3. You have to know the law as stated by the courts. The different theoretical constructions of the *stipulatio alteri* are important, as they could make a difference in practice.

ACTIVITY

1 X and Y sell any two horses to Z for R4 000. The horses are delivered to Z, but Z does not pay. X sends a letter of demand to Z for payment of R4 000. Advise Z.

2 X and Y sell a specific team of two horses to Z for R4 000. The two horses are a team trained to pull a horse buggy. X and Y are co-owners of the horses. The horses are delivered to Z, but the purchase price is not paid. X sends a letter of demand to Z for payment of R4 000. Advise Z.

3 X and Y sell a specific team of two horses to Z for R4 000. The two horses are a team trained to pull a horse buggy. X and Y are co-owners of the horses. Z pays the purchase price, but the horses are not delivered to Z. Advise Z.

4 X sells his car to Y for R50 000. In their contract, the parties agree that Y undertakes to first offer the car for sale to X's son, Z, if she (Y) wants to sell the car. Y sells and delivers the car to A. Advise Z.

FEEDBACK

1 The obligation to pay R4 000 is divisible, and the parties have not expressly or by implication agreed on what the entitlement of X and Y would be. The presumption is thus that this is a case of simple joint entitlement and that the share of X and Y is equal. X is entitled to payment of R2 000 from Z and not R4 000.

2 This question also deals with the obligation to pay R4 000. This remains a case of joint entitlement and the advice is the same as in question 1.

3 Here, the obligation to deliver the two horses is indivisible, as the intention of the parties is to sell the horses as a pair. The parties have not expressly agreed on what the liability of X and Y would be, but they have agreed by implication that it would be a case of collective joint liability. X and Y are also co-owners of the horses. Z will thus only be able to claim delivery of the horses from both X and Y.

4 If a binding obligation arises between Y and Z, it would be a right of pre-emption. See the discussion of a right of pre-emption in study unit 8. X and Y intend to create an enforceable obligation in favour of Z. There is thus a stipulation for the benefit of a third party (Z) in the agreement between X and Y, but Z never accepted the benefit. No obligation between Y and Z consequently arises, and Z has no remedy. Y has, however, breached her contract with X.

SUMMARY

Consult points 1-3 of ''This chapter in essence'' at the end of chapter 9 of the textbook.

STUDY UNIT 23
OBLIGATIONS AND TERMS

OVERVIEW

We are in the middle of the discussion of the contents and operation of a contract. In this discussion, we focus on various aspects of the obligations which are created by contracts. In the previous study unit, we investigated the parties to a contract, and, in the next study unit, we will look at the interpretation of contracts. In this study unit, we are going to discuss the different kinds of obligations, and the terms that determine or qualify the obligations.

The purpose of this study unit is to enable you to

* define an obligation
* explain who the debtor and who the creditor is with regard to a contract
* distinguish between civil, natural and moral obligations
* distinguish between simple, alternative, generic and facultative obligations
* explain when a performance is divisible and when indivisible
* explain a term of a contract
* distinguish between the *essentialia, naturalia* and *incidentalia* of a contract
* distinguish between express terms, terms implied by law and tacit terms
* explain what a standard-form contract is
* explain what incorporation by reference is
* explain the threefold test which our courts apply in the ticket cases and in respect of notices
* explain briefly the requirement of the Consumer Protection Act that the attention of consumers should be drawn to certain clauses and notices
* explain the conclusion of a contract by conduct and the two tests used by the courts in this regard
* explain briefly where terms implied by law come from
* explain how the courts establish tacit terms
* distinguish between terms and conditions
* distinguish between conditions and time clauses
* explain suppositions, modal clauses and exemption clauses
* apply the relevant principles to practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 10.

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

Study section 10.1 of the textbook.

2 OBLIGATIONS

Study the introduction to section 10.2, and section 10.2.1 of the textbook. You should know the definition of an obligation and understand that an obligation only creates a personal right.

Study section 10.2.3 with regard to whom the debtor and creditor are in a contract.

Carefully read section 10.2.2 with regard to civil, natural and moral obligations. **Then study point 2.1 of "This chapter in essence" at the end of chapter 10.**

Also study section 10.2.4 with regard to simple, alternative, generic and facultative obligations. This distinction plays an important role when drafting and interpreting contracts, as the consequences of the different obligations are not the same. Make certain that you also understand the examples that are given in illustration of the different types of obligations.

This distinction is also important in the case of supervening impossibility of performance. As a general rule, a simple obligation will be extinguished in such instances. Before the performance has been fixed in the case of a generic obligation, the doctrine of supervening impossibility can hardly play a part, since the rule is *genus non perit* (a genus does not perish). After performance has been fixed, however, all the rules applicable to simple obligations take effect. In the case of an alternative obligation, the right of selection is limited by our common law to the remaining alternative performances, and, if there is only one left, then that alternative has to be delivered. If delivery of the first performance (the cow, Annabel) in a facultative obligation becomes impossible through supervening impossibility of performance, the obligation is terminated.

As we have seen, the divisibility of a performance can play an important role with regard to possibility of performance (study unit 20), certainty (study unit 21) and multiplicity of parties (study unit 22). **Study section 10.2.5** with regard to divisibility of performance. You should know the test of divisibility and understand the examples that are given in illustration.

3 TERMS

Terms can be classified with regard to their nature and effect.

3.1 *Essentialia, naturalia and incidentalia*

Study section 10.3. This distinction will play a very important role when you study any of the specific contracts.

The classification of a particular contract as a specific type of contract is important, as this classification will determine the *naturalia* that the law attaches to the particular contract. Knowing what the *essentialia* and *naturalia* of a specific contract are is thus important when you draft or interpret a contract. You simply cannot change the *naturalia* without knowing what they are.

However, note that legislation often prohibits such exclusion or exemption clauses altering *naturalia* in order to protect the weaker party. Such clauses are also strictly interpreted.

3.2 Express terms, terms implied by law and tacit terms

The distinction between these three types of terms is important.

3.2.1 Express terms

Study the introduction to section 10.3.2, as well as sections 10.3.2.2, 10.3.2.3, 10.3.2.4, 10.3.2.5 and 10.3.2.8. Standard-form contracts have become commonplace in commerce and have caused many problems. The courts and legislator have attempted to address these problems.

The terms of a contract sometimes do not appear in the contract itself, but are incorporated into the contract by reference. This is often done on tickets. You must know the threefold test that the courts apply to tickets and notices in order to determine if the other party is bound to the terms. Note that the three questions can be replaced with the ordinary rules regarding consensus and reasonable reliance. Here, no document has been signed by the contracting parties.

You must know the two competing tests (the one subjective and the other more objective) used by the courts to determine if a contract has been concluded by the conduct of the parties. Note that these tests are particularly problematic, because both have been approved by the highest court in civil matters.

Carefully read section 10.3.2.6 with regard to the provisions of the Consumer Protection Act, and then **study point 3.3 of "This chapter in essence" at the end of chapter 10 of the textbook**.

3.2.2 Terms implied by law

Study the introduction to section 10.3.3, as well as section 10.3.3.1. You must know what terms implied *ex lege* are. Please note that these terms are not based on the consensus of the parties. Terms implied by law are also called *naturalia* and may arise from either the common law or legislation. Note that the courts may create new *naturalia.* **You should only have an overview of the** *naturalia* created by legislation.

3.2.3 Tacit terms

Study section 10.3.3.2. You should know what tacit terms are, how the courts determine the existence thereof, that the tests are at present objective, and the role trade usage plays with regard to tacit terms.

3.3 Conditions and time clauses

The word "condition" is, however, sometimes also used as a synonym for "term". This use often causes confusion, because the word "condition" usually means a condition precedent, a true condition on which the continued existence or operation of the contract depends. The word "term", however, always means a stipulation in the contract, while "condition" sometimes means a condition precedent and sometimes a term.

Study sections 10.3.5 (with all its subsections) and 10.3.6. You must be able to distinguish between conditions and time clauses, and their respective legal consequences. Take note that, when the taking place of the future event is uncertain, we are dealing with a condition (eg if it will rain next week), but that when the future event is certain to take place, although it is uncertain when it will occur (eg when I die), we have a time clause.

Study section 10.3.7 with all its subsections. You should be able to distinguish between a supposition, condition and error in motive, and also between a modal clause and a stipulation in favour of a third party (see the previous study unit). You should know what the limits are of exclusion clauses. See, in this regard, also study unit 12.

ACTIVITY

1. On 11 September 2010, Sipho enters into a written contract for articles of clerkship with a law firm. The contract contains a clause which stipulates that Sipho will be employed from 3 January 2011, but that he will only continue to be employed if he graduates in March 2011. What type of clause is this? Discuss.
2. X gives her son, Y, R50 000 to buy a car. Indicate what type of clause the donation is subject to.
3. In a divorce settlement agreement, a husband undertakes to pay R5 000 in maintenance to his daughter who has already reached majority and is studying at Unisa. What type of clause is this undertaking? Discuss.
4. X gives a cheque to Y which is payable when X becomes 30 years old. X is at present 28 years old. What type of clause is the cheque subject to? Discuss.
5. Y buys a new Toyota Yaris from XYZ Garage for R150 000. Identify the obligation of XYZ Garage to deliver a Toyota Yaris to Y.
6. X leases a flat from Y for R3 000 per month. Who is the debtor and who is the creditor?
7. X, Y and Z take part as a team in a deep-sea angling competition. X, Y and Z sign the entry form for the competition. They undertake in the entry form to be bound by the set of rules which is available on the internet at a certain internet address. According to these rules, all the members of the winning team will be entitled to the prize, but it will be paid out to the captain of the winning team. X, Y and Z agree that X will be the captain and that he will provide the boat and equipment and pay the entry fee. Y

undertakes to buy the fuel and bait. Both X and Y have taken part in many competitions before, but Z has never fished in his life and is only going along for the fun. Z catches a huge blue marlin and, to their surprise, they win the competition. The organiser pays out the prize to X. Although X, Y and Z did not agree on how to share the prize if they should win, a trade usage exists among the angling fraternity that the prize is to be shared equally among the members of the team after deduction of the costs. X wants to share the prize with Y only after deduction of the costs. Advise Z.

8 X slips on the wet floor of her local shopping mall, falls and hurts her back. She incurs R40 000 in medical expenses. At the entrance to the mall there is a huge notice which one cannot help but see when entering. X, however, did not see the notice. The notice excludes all liability on the part of the owner of the building for the injury or death of anyone entering the shopping mall. Her fall has been caused by the negligence of the owner of the building.

FEEDBACK

1 The clause in the employment contract is in fact a suspensive time clause (employment will commence on a future date: 3 January 2011) and a resolutive condition (employment will only continue if Sipho graduates). The contract thus comes into existence on 11 September 2010, but its full operation is suspended till 3 January 2011. The condition is a negative condition, as it will only be fulfilled if Sipho does not graduate. It is also a mixed condition, because it depends partially on Sipho and partially on events beyond the control of both parties. Sipho has till March to graduate. But this date does not change the resolutive condition into a time clause. Remember that it is uncertain if Sipho will graduate.

2 This is a modal clause. Y receives a performance (R50 000) to do something with in future (to buy a car).

3 This question relates to what you learnt in the previous study unit. It is a stipulation for the benefit of a third party. The divorce settlement agreement is between the parents, and the daughter is not a party to this contract. The clause places a duty on the husband to confer a benefit on a third party, his daughter.

4 This is a suspensive condition, as it is uncertain whether X will become 30 years old, and the cheque is only payable if X does. The condition is positive because it is dependent on the happening of the uncertain event. The event is beyond the control of the parties and the condition is thus casual.

5 This is a generic obligation, as the specific Toyota Yaris has not yet been identified from the genus, Toyota Yaris cars. XYZ Garage may decide which Yaris has to be delivered, as the parties have not agreed on who may do so. As soon as the garage does so, the obligation becomes a simple obligation, as the performance is exactly specified.

6 It depends on what obligation we are looking at. Besides the two express obligations, there are the *naturalia* of a contract of lease. Both the lessor and lessee have duties and rights. For instance, X is the debtor and Y is the creditor with regard to the payment of the rent, but Y is the debtor and X the creditor with regard to the delivery and use of the flat.

7 When X, Y and Z enter the competition, they conclude a contract with the organiser of the competition and undertake to comply with the rules of the competition. These rules are incorporated by reference into their contract. The organiser undertakes to pay out a prize to the captain of the team that catches the biggest fish. Here, we have multiple parties (X, Y and Z) who are entitled to the prize, but the

parties have agreed that this duty of the organiser will be discharged by payment thereof to the captain. Z thus has no remedy against the organiser.

The second question is whether Z has a remedy against X. This depends on the agreement between X, Y and Z about the sharing of the prize. The parties have not expressly come to an agreement in this regard. Although X and Y most probably knew of the custom regarding the sharing (they have participated in many competitions), Z cannot be held bound to the custom, because he was unaware of the custom. However, all the parties (including Z) would have most probably answered that the prize should be divided as it is usually done if the officious bystander had asked them how they would share the prize if they should win. Such a term will not be against the express agreement between X, Y and Z on their participation, as they have only agreed on each party's contribution to the costs and who the captain would be. Such a term is also necessary to give business efficacy to their agreement on their participation in the competition. Z is thus entitled to an equal share after deduction of the costs.

8 The question is whether X is bound by the notice at the entrance. The notice contains an exclusion clause attempting to exclude all liability for injury or death. It cannot exclude liability for the intentional conduct of the owner of the mall, but it will exclude liability for negligence. The threefold test of the ticket cases has to be applied to this notice. Although X did not know of the existence of the notice, reasonable steps have been taken to bring it to her notice. The owner of the mall is thus not liable, as he was only negligent.

SUMMARY

Consult ''This chapter in essence'' at the end of chapter 10 of the textbook.

STUDY UNIT 24

INTERPRETATION OF CONTRACTS

OVERVIEW

We are busy discussing the contents and operation of a contract. In the previous two study units, we looked at the parties to the agreement and at the obligations and terms of contracts. In this study unit, we will examine the interpretation of contracts.

The purpose of this study unit is to enable you to

* understand the textual approach to the interpretation of contracts
* explain the contextual approach to the interpretation of contracts
* explain what the parol evidence rule is
* explain the rules of interpretation of contracts

LEARNING MATERIAL

Prescribed textbook, chapter 11.

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

The courts are seldom called upon to interpret oral contracts, because the process of proving the terms of the contract usually simultaneously clarifies the meaning of the terms (Christie and Bradfield *Contract* 199). A party's testimony on the wording of their oral contract usually reflects his/her understanding of meaning of the words and not a mere recollection the wording itself. In contrast, the court often has to construe the actual wording of a written contract (Christie and Bradfield *Contract* 199).

Interpretation is an objective process and involves determining what the language used in the contract means. The testimony of the parties as to what either of them had in mind at the time of conclusion of their contract is thus irrelevant (*Shakawa Hunting & Game Lodge (Pty) Ltd v Askari Adventures CC* (44/2014) [2015] ZASCA 62 (17 April 2015) par 12).

In recent years we have seen the courts move from a textual to a contextual approach to the interpretation of contracts.

2 THE TEXTUAL APPROACH

Initially the courts followed a textual approach to contractual interpretation. **Read section 11.2 to the introduction of section 11.5 of the textbook** in this regard. Note that the textual approach involves a step by step approach. The ordinary or grammatical meaning of the words is first determined. The next step is to consider the textual context of the contract as a whole. Only if the intention of the parties cannot thus be determined, is the extended context considered.

Study section 11.5.1–11.5.1.2 of the textbook. Note the role of the parol evidence rule in determining admissible evidence and the distinction which was made between background and surrounding circumstances.

3 THE CONTEXTUAL APPROACH

Read section 11.5.1.3–11.5.1.4 of the textbook as background. The first step the courts took in the change to a contextual approach was to jettison the distinction between background and surrounding circumstances, because it has proved to be a difficult and confusing distinction (*KPMG Chartered Accountants (SA) Securefin Ltd* 2009 (4) SA 399 (SCA) 409–410 as confirmed by later SCA cases). The parol evidence rule, however, remains part of our law (*KPMG Chartered Accountants (SA) Securefin Ltd* 2009 (4) SA 399 (SCA) 409). Now **study paragraph 11.5.2 of the textbook** on the circumventing of the parol evidence rule.

The next step was to jettison the three step approach (textual approach) and to adopt a unitary contextual approach to interpretation. The reason for this new approach has been explained in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) 609:

> Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is a unhelpful exercise.

The integration aspect of the parol evidence rule determines that the starting point is the language of the document in the light of the ordinary rules of grammar and syntax. The words should, however, be read from the beginning in the context of the document as a whole and in the light of all the relevant circumstances surrounding the conclusion of the contract (factual matrix).

Three possible scenarios have been identified in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA):

1 The first scenario is (609):

> Sometimes the language of the provision, when read in its particular context, seems clear and admits of little if any ambiguity.

2 The second scenario is (609):

> At the other extreme, where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to glaring absurdity, the court will ascribe a meaning to the language that avoids the absurdity.

This interpretation involves (609–610):

> ... a restriction or extension of the language used by the adoption of a narrow or broad meaning of the words, the selection of a less

immediately apparent meaning or sometimes the correction of an apparent error in the language in order to avoid the identified absurdity.

3 The third scenario is (610):

> In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. ... . In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation.

When the text lends itself to more than one meaning each possibility must be weighed in the light of all the factors of the factual matrix. These factors are *inter alia*: the apparent purpose of the provision under consideration, the purpose of the contract, background to the preparation and production of the document in question (circumstances in which the document came into being), the correspondence which passed between the parties leading up to the conclusion of their agreement and the way the parties carried out their agreement (*Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) 603–604; *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* 2013 (6) SA 520 (SCA) 526; *Unica Iron and Steel (Pty) Ltd v Michandani* 2016 (2) SA 307 (SCA); *Hangar v Robertson* (211/2015) [2016] ZASCA 102 (10 June 2016) par 10).

An important consideration in determining which meaning should be given to a provision is that it must be a commercially sensible meaning. It should not lead to impractical, unbusinesslike or oppressive consequences, or stultify the broader operation of the contract (*Ekurhaleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA) 501; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) 610).

4 RULES OF INTERPRETATION

Study section 11.6.1–11.7 of the textbook. You only have to **read carefully the "Counterpoint" in section 11.6.2** for an example of the application of the *contra proferentem* rule.

It is uncertain what role these rules of interpretation are going to play in the new contextual approach to interpretation. The courts were able to sensibly interpret the relevant agreements without resorting to the rules of interpretation where the courts applied the contextual approach.

5 INTERPRETATION OF DISCLAIMERS, INDEMNITIES AND EXEMPTION CLAUSES

Study point 15 of "This chapter in essence" at the end of chapter 11.

ACTIVITY

1 Discuss the contextual approach to interpretation of contracts.

2 Briefly discuss the parol evidence rule.

3 Discuss the rules of interpretation of contracts.

FEEDBACK

It is very difficult to formulate short problem-type questions on this section of the work. You can therefore expect direct questions on the interpretation of contracts.

BREACH OF CONTRACT AND REMEDIES

STUDY UNIT 25

BREACH OF CONTRACT: INTRODUCTION

OVERVIEW

A contract is normally terminated by performance. However, matters do not always proceed exactly according to plan. The debtor or creditor may have miscalculated as regards his or her expectations or arrangements to such an extent that he or she cannot render or accept the promised performance at the given time. This, then, leads to breach of contract.

In this study unit, you will be merely introduced to the different forms of breach of contract, and, in the following five study units, we will look closely at the different forms of breach of contract.

The purpose of this study unit is to enable you to

* distinguish briefly between the different forms of breach of contract
* understand that our law recognises a unitary concept of breach of contract
* understand that the various forms of breach may overlap
* explain briefly the remedies for breach of contract
* apply the relevant principles to simple practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 12.

CONTENT OF THIS STUDY UNIT

Study section 12.1 of the textbook. In this study unit, you are introduced to the different forms of breach of contract. It is very important that you realise that, although we distinguish different forms of breach, they not only can overlap but that our law also recognises a unitary concept of breach. They are nevertheless important, because the consequences depend on the type of breach involved.

Ensure that you know the brief definitions of the various forms of breach. The illustrations in the "Pause for reflection" box are very helpful in understanding the definitions. **Study table 12.1** carefully. It provides you with a useful summary and overview of the different forms of breach. Return to this table from time to time to maintain this overview. It will also be very handy when preparing for your examination. But remember that it is only a summary and that the rules are more detailed and intricate.

You will notice that the different remedies for each form of breach of contract are briefly discussed. These remedies are later discussed in more detail. It would make sense for you to revise the different forms of breach after you have studied the remedies.

ACTIVITY

X sells a cow which is in milk to Y for R10 000. The parties agree that delivery is to take place on 1 February at Y's farm. Identify the type of breach in the following circumstances:

(a) X delivers a cow which is dry to Y.

(b) When X delivers the cow to Y, Y refuses to accept it. He also fails to pay X R10 000. He tells X that he does not want to continue with the sale.

(c) X delivers the cow on 2 February.

(d) Y kills the cow on 29 January to save him from paying X R10 000.

FEEDBACK

(a) Positive malperformance.

(b) Y is the creditor with regard to the obligation to deliver the cow, but the debtor with regard to payment of the price. Y's refusal to accept delivery amounts to *mora creditoris*, but his failure to pay to *mora debitoris*. Y's statement is repudiation, because he indicates that he does not want to honour the contract.

(c) X fails in his duty to perform timeously; hence *mora debitoris*.

(d) Y as creditor prevents performance by killing the cow.

SUMMARY

Consult points 1–4 of ''This chapter in essence'' at the end of chapter 12 of the textbook.

STUDY UNIT 26
MORA DEBITORIS

OVERVIEW

In the previous study unit, you were introduced to the different forms of breach of contract. When the debtor fails to perform timeously, we speak of *mora debitoris*. In this study unit, we examine this form of breach, its requirements, remedies and consequences.

The purpose of this study unit is to enable you to

* explain what is meant by the concept of *mora debitoris*
* distinguish *mora debitoris* from other forms of breach
* explain the requirements for *mora debitoris*
* explain the remedies for *mora debitoris*
* explain the further consequences of *mora debitoris* aside from remedies for breach of contract
* apply the relevant principles to practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 12, section 12.2.

CONTENT OF THIS STUDY UNIT

Study the definition of *mora debitoris* in the introduction to section 12.2 of the textbook.

1 DISTINGUISHED FROM OTHER FORMS OF BREACH

Study section 12.2.1 of the textbook. These distinctions are very important. You should return to this discussion after you have studied the other forms of breach, as the distinctions will make more sense then.

2 REQUIREMENTS

Study section 12.2.2–12.2.2.3 of the textbook. **Study** the requirements for *mora debitoris*. The distinction between *mora ex re* and *mora ex persona* is very important. Know the role demand plays to place the debtor into *mora* in this regard. **Study the ''Counterpoint''** in section 12.2.2.2 of the textbook.

Note the discussion in section 12.2.2.3 of the textbook on fault as a requirement for *mora debitoris.* However, in *Scoin Trading (Pty) Ltd v Bernstein* 2011 (2) SA 118 (SCA) 122–3 the Supreme Court of Appeal held that fault is no requirement: ''As correctly submitted by counsel for the appellant, contractual damages do not depend on fault. All that the creditor is required to prove is that the debtor is in *mora*. It is not necessary to prove any fault on the part of the debtor.''

Although fault may not be a direct requirement for *mora*, it seems that it is an indirect requirement because the debtor's *mora* is excused if he/she can prove that performance is temporarily impossible and not due to the fault of the debtor.

3 REMEDIES

Study sections 12.2.3.2-12.2.3.3 of the textbook. *Mora debitoris* has a number of consequences. Focus, first, on the usual remedies for breach of contract: damages and cancellation of the contract. Specific performance is not relevant here, as performance may be claimed as soon as it becomes due and enforceable. Cancellation is an extraordinary remedy. You should ensure that you know when rescission may be claimed.

Note that, in the case of *mora ex persona*, the creditor sometimes has to take three steps before the contract is cancelled. First, the debtor only falls into *mora* after a demand has been sent to the debtor. Secondly, where there is no express or tacit *lex commissoria*, a notice of rescission has to be sent to the debtor. Only then can the creditor elect to rescind the contract. All three steps may, of course, be combined into one.

You should furthermore take note of the role a reasonable period of time plays with regard to the demand and the notice of rescission.

4 FURTHER CONSEQUENCES OF *MORA DEBITORIS*

Study section 12.2.3.1 of the textbook. If the performance becomes impossible after the debtor has fallen into *mora*, the debt is not discharged unless the debtor can prove that the thing would have suffered the same fate in the hands of the creditor.

ACTIVITY

X contracts with a dress designer, Y, for the making of her wedding dress. No date for delivery is stipulated, as X has not finalised the date of the wedding. After months of fittings, she casually remarks that the wedding will be held in a week's time and that she hopes it doesn't rain. Y is shocked and protests that maybe he won't be finished by then. Advise X.

FEEDBACK

The question is whether Y will commit breach of contract if the dress is not finished for the wedding. Y is the debtor and the question is thus whether *mora debitoris* will occur. A date for performance has seemingly been set (before X's wedding), but it is neither certain to arrive, nor certain as to when. This is thus a case of *mora ex persona*. A demand is thus required to place Y in *mora*. X's remarks can be construed as a demand. The fact that it is oral is acceptable, but it is debatable whether the period of time is reasonable. The time at which its reasonableness should be judged (the time of conclusion of the contract or the time of the demand) could make a difference in this regard.

SUMMARY

Consult points 5–9 of ''This chapter in essence'' at the end of chapter 12 of the textbook.

STUDY UNIT 27
MORA CREDITORIS

OVERVIEW

It is not only a debtor who can commit breach of contract, but also a creditor who can act wrongfully. Where the cooperation of the creditor is necessary for the fulfilment of the obligation of the debtor, the creditor is guilty of breach of contract if he or she culpably (ie due to his or her own fault) fails to cooperate timeously and performance remains possible. We then speak of *mora creditoris*. In this study unit, we examine this form of contractual breach, its requirements and remedies.

The purpose of this study unit is to enable you to

* explain what is meant by the concept of *mora creditoris*
* explain briefly how *mora creditoris* differs from *mora debitoris*
* explain the requirements for *mora creditoris*
* explain the remedies for *mora creditoris*
* explain the further consequences of *mora creditoris* aside from remedies for breach of contract
* apply the relevant principles to practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 12, section 12.3.

Martin Harris & Seuns OVS (Edms) Bpk v Qwa Qwa Regeringsdiens 2000 (3) SA 339 (SCA).

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

Study the introduction to section 12.3 of the textbook. The failure of the creditor to cooperate, with performance remaining possible, occurs when he or she fails to accept the proper performance tendered by the debtor or when he or she fails to perform an act which is necessary to enable the debtor to perform (eg where the purchaser (creditor) is obliged to accept delivery of the thing at the seller's (debtor's) shop and fails to do so, or where an artist (debtor) agrees to paint a person's (creditor's) portrait and the person fails to arrive to sit for the artist). Note that, in these cases, the creditor fails to cooperate in his or her capacity as creditor, while failure to perform in the capacity of a debtor amounts to *mora debitoris*. A person could very well be guilty of both forms of *mora* (see the discussion and example at the end of section 12.3).

2 REQUIREMENTS

Study section 12.3.1–12.3.1.5 of the textbook. Study the requirements for *mora creditoris*. How do the requirements for *mora creditoris* and *mora debitoris* differ? Note also that, in *Martin Harris & Seuns OVS (Edms) Bpk v Qwa Qwa Regeringsdiens* 2000 (3) SA 339 (SCA), the court held that, for *mora creditoris* to exist, it is necessary for the debtor to call upon or demand from the creditor the required cooperation. However, such action on the part of the debtor is not necessary where either the agreement or the creditor has prescribed a time for performance by the debtor and thus (by implication) a time for cooperation by the creditor.

3 REMEDIES

Study section 12.3.2.1–12.3.2.4 of the textbook. *Mora creditoris* has a number of consequences. Focus, first, on the usual remedies for breach of contract: cancellation of the contract; specific performance; and damages. Note the further possibility that, in appropriate circumstances, the debtor may sue the creditor for counterperformance. In respect of counterperformance, the creditor becomes a debtor and, if he or she fails to perform in that regard, he or she will be guilty of both *mora debitoris* (by not counterperforming) and *mora creditoris* (by not cooperating with the other party's attempted performance).

4 FURTHER CONSEQUENCES OF *MORA CREDITORIS*

Study sections 12.3.2.5–12.3.2.7 of the textbook. Aside from the usual remedies for breach of contract, there are other consequences that *mora creditoris* has. These consequences are: a diminishment of the debtor's duty to take care of an article; the creditor bears the risk of supervening impossibility of performance; sureties are released; the obligation toward the creditor remains unfulfilled; and possible discharge by consignation (**study the "Pause for reflection" box in section 12.3.2.7**). In our common law, the debtor was able to free himself or herself of his or her debt by means of consignation, that is, by payment into court (or to another authority) of the proceeds of the thing promised, or by delivery of the thing itself. Consignation, as a general form of discharging a debt, has, however, fallen into disuse. Whether the debtor can free himself or herself by means of abandonment is also doubtful.

Remember, also, that a creditor and debtor cannot, in respect of the same obligation, be in *mora creditoris* and *mora debitoris* respectively at the same time. Therefore, if a debtor who is in *mora* validly tenders performance, he or she is thereby no longer in *mora*, so that he or she will incur no further liability for it (but the creditor remains in *mora*). There is some justification to be found in our common law for the view that the debtor should be able to compel the creditor to accept the performance tendered.

ACTIVITY

1 How do *mora creditoris* and *mora debitoris* differ from each other?

2 X buys a lounge suite from a big department store, to be delivered on a specific Friday afternoon. The store sends its van, but X cannot take delivery of the suite because she is at the hairdresser having her hair done. The store approaches you for advice.

FEEDBACK

1 Remember that, in the case of *mora creditoris*, it is the creditor who fails to cooperate in his or her capacity as creditor to enable the debtor to perform, but, in the case of *mora debitoris*, it is the debtor who fails to perform in his or her capacity as debtor. Note, further, that a creditor and debtor cannot, in respect of the same obligation, be in *mora creditoris* and *mora debitoris* respectively at the same time. Therefore, if a debtor who is in *mora* validly tenders performance, he or she thereby purges his or her *mora*, so that he or she will incur no further liability for it (but the creditor remains *in mora*).

2 X's cooperation is necessary to facilitate the delivery of a lounge suite by acceptance thereof. X's refusal to accept the suite amounts to breach of contract. The form of breach is *mora creditoris*. The store's remedy is to cancel the contract, and, if it can prove that it has suffered loss, it can institute a claim for damages. Note that the store's duty to take care of the lounge suite while the contract is alive diminishes.

SUMMARY

Consult point 10 of ''This chapter in essence'' at the end of chapter 12 of the textbook.

STUDY UNIT 28

POSITIVE MALPERFORMANCE

OVERVIEW

In the previous three study units, you gained an overview of the various forms of breach of contract and you studied *mora creditoris* and *mora debitoris*. In this study unit, you will study positive malperformance. Here, the breach relates to the contents of the performance.

The purpose of this study unit is to enable you to

* explain what is meant by the concept of positive malperformance
* explain the distinction between two forms of positive malperformance
* explain whether fault is a requirement for positive malperformance
* explain the remedies for positive malperformance
* apply the relevant principles to practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 12, section 12.4.

CONTENT OF THIS STUDY UNIT

Study the introduction to section 12.4 of the textbook. Positive malperformance takes place where a contracting party does not comply with the terms of the contract either by performing something in a manner which does not comply with the terms of the contract, or by doing something which he or she undertook not to do.

1 FAULT

Study section 12.4.1 of the textbook. Although this discussion is somewhat theoretical, it will facilitate your understanding of exactly when positive malperformance can occur.

2 REMEDIES

Study section 12.4.2–12.4.2.2 of the textbook. The remedies are the usual ones. As you have realised by now, cancellation is an unusual remedy. The malperformance has to be sufficiently serious. Students very often fail to realise this.

You should realise that only in exceptional circumstances should the debtor be given a chance to remedy defective performance before the contract is cancelled.

ACTIVITY

X hires, from a rental shop, a machine to sand the floors of the house she is renovating. The rental shop undertakes to deliver the machine on Friday afternoon at 16:00. At the time agreed upon, the machine is delivered. However, when X tries to use the machine on Friday evening, she finds that the sandpaper does not rotate as it should, and, as a result, she is unable to sand the floors.

(a) X approaches you for legal advice.

(b) What would your answer have been if the shop had failed to deliver the machine?

FEEDBACK

(a) Should this breach be treated as *mora debitoris* or positive malperformance? See section 12.2.1 of the prescribed textbook. It is a case of positive malperformance. X may reject the defective performance and claim proper performance within a reasonable time. Failure to comply will place the debtor in *mora*.

(b) Where the shop fails to deliver the machine, it breaches the contract in the form of *mora debitoris*, as performance is still possible. It is not prevention of performance or repudiation (see, again, section 12.2.1 of the prescribed textbook). X has the following alternative remedies:

   (i) X may enforce the contract, as the debt is due and enforceable. X may also claim damages if she has suffered any damage.

   (ii) A day for performance was set, so this is an example of *mora ex re*. No provision was made for a right to resile, and this is not a case of a tacit *lex commissoria*. So X will first have to obtain a right to resile by sending a notice of rescission to the shop to such effect. X may also claim damages if she suffered any damage.

   (iii) X may uphold the contract and claim damages.

SUMMARY

Consult point 11 of ''This chapter in essence'' at the end of chapter 12 of the textbook.

STUDY UNIT 29

REPUDIATION

OVERVIEW

After gaining an overview of all the different forms of breach and after studying *mora creditoris*, *mora debitoris* and positive malperformance in the previous four study units, you will now focus on repudiation in this study unit. Here, the conduct of the guilty party indicates a refusal to perform the agreed upon performance or honour the contract.

The purpose of this study unit is to enable you to

* explain what is meant by the concept of repudiation
* state the test to be applied in cases of repudiation
* explain when repudiation may occur
* explain the two approaches to the nature of repudiation
* discuss the different remedies available in a case of repudiation by one of the contracting parties
* apply the relevant principles to practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 12, section 12.5.

CONTENT OF THIS STUDY UNIT

Study the introduction to section 12.5. Study the definition of repudiation. The test is very important, so ensure that you know the instances the courts have considered to be repudiation. Repudiation may occur before, on or after the due date for performance. Note that repudiation is a continuing form of breach. Both the debtor and creditor can commit repudiation.

1 CONFLICTING APPROACHES TO REPUDIATION

Carefully read section 12.5.1 as background to **section 12.5.2, which you must study**. Both these constructions are being used at present by the courts. You should know both constructions, as the consequences of repudiation are determined by the specific construction. The construction that repudiation is a breach of contract is to be preferred.

2 EFFECT OF REPUDIATION

Study section 12.5.3–12.5.3.2 of the textbook. There is some uncertainty about the effect of repudiation that is caused by the two possible constructions. **You do not have to study the ''Pause for reflection'' box in section 12.5.3.2.**

ACTIVITY

1 Critically discuss the two constructions of repudiation.

2 Charles orders a steak in a restaurant. He waits one hour for his food and then walks out, since he has not as yet received it. Does Charles or the restaurant owner commit breach of contract? If so, what kind of breach? Explain your answer.

FEEDBACK

1 A critical assessment of the two constructions required you to

(i) recognise the issue

(ii) summarise the different viewpoints

(iii) critically evaluate each viewpoint

(iv) provide your own reasoned viewpoint

2 No time for performance was specified, so, until Charles issued a demand for his food and allowed a reasonable period in which the steak could be delivered, the restaurant owner had not committed *mora debitoris*. See study unit 26 in this regard. By leaving the restaurant, Charles commits breach of contract in the form of repudiation. His walking out would cause a reasonable person to conclude that he was not going to pay and was not going to accept delivery of the steak. There is a bona fide obligation on the client not to repudiate.

SUMMARY

Consult point 12 of ''This chapter in essence'' at the end of chapter 12 of the textbook.

STUDY UNIT 30

PREVENTION OF PERFORMANCE

OVERVIEW

You are now coming to the end of your study of breach of contract. In this study unit, you will study prevention of performance. The other forms of breach are *mora creditoris*, *mora debitoris*, positive malperformance and repudiation. Prevention of performance takes place where performance is made impossible by a contracting party after conclusion of the contract.

The purpose of this study unit is to enable you to

* explain what is meant by the concept of prevention of performance
* explain the difference between initial impossibility of performance, supervening impossibility of performance and prevention of performance
* explain the type of impossibility that is required for prevention of performance
* distinguish between prevention of performance and certain other forms of breach
* explain when prevention of performance may occur
* explain whether fault is a requirement for prevention of performance
* explain the remedies for prevention of performance
* explain the effect of partial impossibility
* explain the effect of temporary impossibility
* apply the relevant principles to practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 12, section 12.6.

CONTENT OF THIS STUDY UNIT

Study the introduction to section 12.6. You should know the definition of prevention of performance. Subjective impossibility seems to be sufficient, but note that some writers argue that it would only amount to repudiation. Understand the distinction between initial impossibility of performance (see study unit 20), supervening impossibility of performance (see study unit 39) and prevention of performance. The distinction between prevention of performance, repudiation and *mora creditoris* is important. Prevention of performance may occur before, on or after the due date for performance. Both the debtor and creditor can commit prevention of performance.

1 FAULT

Study section 12.6.1. Although this discussion is somewhat theoretical, it will facilitate your understanding of exactly when prevention of performance can occur.

2 REMEDIES

Study section 12.6.2 of the textbook. Note that specific performance is excluded, as it will not be ordered. Note, also, that the discussion only deals with the case where the entire performance becomes impossible.

3 PARTIAL IMPOSSIBILITY

Study section 12.6.3 of the textbook. Know the importance of materiality for rescission. The divisibility of performance again pops up as important. See study unit 27 for the test of divisibility of performances.

4 TEMPORARY IMPOSSIBILITY

Study section 12.6.4 of the textbook. Study the different situations.

ACTIVITY

X, an antique dealer, sells an apparently worthless Chinese vase to Y for R50. They agree that Y will take delivery of the vase as soon as she has arranged for the transport. Before delivery, X discovers to his horror that the vase is worth R100 000, as it dates from the Ming dynasty. In a fit of anger, X smashes the vase in preference to allowing Y the pleasure of possessing something so valuable.

(a) Advise Y.

(b) Would your answer to (a) be different if X sold and delivered the vase to Z for R80 000? Explain your answer.

FEEDBACK

(a) This is a case where the debtor commits the prevention of performance. Performance has become absolutely impossible through the act of X. Y cannot thus claim specific performance, as this will not be ordered. Y may uphold the contract or cancel the contract (the breach is material). Y may claim damages in both cases. In the first case, Y may claim the value of the vase (R100 000) minus the price she had to pay (R50). In the second case, Y may claim the value of the vase (R100 000). See study unit 34 on the calculation of damages.

(b) It seems that the advice will stay the same. It seems as if subjective impossibility of performance is sufficient, but take note of the view that subjective impossibility amounts to repudiation.

SUMMARY

Consult point 13 of ''This chapter in essence'' at the end of chapter 12 of the textbook.

STUDY UNIT 31

REMEDIES FOR BREACH OF CONTRACT: INTRODUCTION, AND CHOICES, ALTERNATIVES AND CONCURRENT REMEDIES

OVERVIEW

In the previous study units, you became acquainted with the different forms of breach of contract. A breach of the contract is an unintended event in the life of the contract. The breach of the contract causes a break in the intended execution (performance) of the contract, and, very often, also causes a breakdown in the relationship between the contractual parties. In this and the next four study units, you will study the different consequences of a breach of contract. In this study unit, we will introduce you to the different remedies.

The purpose of this study unit is to enable you to

* distinguish between the different remedies following a breach of contract
* identify the contractual provisions that are designed to regulate the consequences of a breach of contract
* make a choice between the various remedies that are available to the non-breaching party in the event of a breach of contract
* describe which remedies are mutually exclusive and which are cumulative
* distinguish between contractual and delictual claims and remedies in the context of contract law
* discuss whether a delictual claim can be lodged as an alternative to a contractual claim based on the breach of the contract by one of the parties
* apply the relevant principles to practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 13, sections 13.1–13.2.

Lilicrap, Wassenaar and Partners v Pilkington Bros (Pty) Ltd 1985 (1) SA 475 (A).

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

Study section 13.1 of the textbook.

A contract is naturally aimed at fulfilment, but it often happens that one of the parties does not comply with its obligations under the contract, that is, the contract is breached. When a contract has been breached, the non-breaching party has a number of different choices, depending on the nature, consequences and seriousness of the breach. You must ensure that you obtain an overview of the different types of remedies and their objectives.

Also pay attention to the different contractual provisions that are designed to regulate the consequences of a breach of contract. They are important in practice when drafting contracts.

Study figure 1.3. It provides you with a graphic overview of the different types of remedies. Ensure that you return to this figure from time to time to maintain this overview. It will help you to distinguish between the different types of remedies, and to apply them to practical situations.

2 CHOICES, ALTERNATIVES AND CONCURRENT REMEDIES

Study section 13.2 of the textbook. The remedies for a breach of contract can be divided into two big groups, namely those remedies aimed at keeping the contract intact whilst compensating the non-breaching party for any damages that it may have suffered as a result of the breach, and those remedies aimed at terminating the contract, untangling the relationship between the parties and compensating the non-breaching party for any damage that it may have suffered. You will see that a contract may only be terminated or cancelled in the event of a breach that is serious enough in the circumstances. You must ensure that you gain a clear understanding of which remedies will be appropriate in particular circumstances, as some of the remedies are mutually exclusive. You can claim either specific performance (a remedy aimed at keeping the contract intact) or cancellation (a remedy aimed at terminating the contract). Some of the remedies are cumulative, because they can be used in conjunction with the other remedies. The most important of these cumulative remedies is the claim for damages.

Make sure that you understand the fact that certain remedies are mutually exclusive, whereas other remedies such as interest and damages are cumulative to the remedies such as specific performance and cancellation.

You dealt with the difference between claims founded upon contract and delict in earlier study units. In this section, we briefly deal with the consequences of this distinction for the remedies that are available to a party. Make sure that you can describe the differences and apply them to practical examples. In this context, the decision in *Lilicrap, Wassenaar and Partners v Pilkington Bros (Pty) Ltd* 1985 (1) SA 475 (A) is of particular importance.

ACTIVITY

X goes to Y, a plastic surgeon, to have her breasts enlarged. Y's fees are R50 000. Through Y's negligence, the surgery fails and it would cost R60 000 to rectify. Identify the possible claims X has against Y.

FEEDBACK

Only a simplified answer is possible at this stage of your studies. X will have a choice between contractual and delictual remedies, as her loss flows from an injury to her body. Y has breached the contract, as she has performed, but the performance is defective (positive malperformance). X has most probably lost her confidence in Y and would not like Y to correct her performance. A claim for specific performance would not be instituted. X would most likely like to claim damages (R60 000) to have another plastic surgeon rectify the surgery. X also has an alternative claim based on delict for her medical expenses (R60 000).

SUMMARY

Consult points 1–4 of ''This chapter in essence'' at the end of chapter 13 of the textbook.

STUDY UNIT 32

REMEDIES FOR BREACH OF CONTRACT AIMED AT KEEPING THE CONTRACT ALIVE: *EXCEPTIO NON ADIMPLETI CONTRACTUS* AND SPECIFIC PERFORMANCE

OVERVIEW

In the previous study unit, you were introduced to the different remedies for breach of contract. In this study unit, we will introduce you to the remedies aimed at keeping the contract alive, namely specific performance and the *exceptio non adimpleti contractus*. We refer to the Latin name for this remedy, as it is the term commonly used in textbooks and case law. The *exceptio* is a temporary remedy in terms of which the non-breaching party withholds its performance until such time as the other party has performed in full. The remedy of specific performance is aimed at forcing the other party to comply with its obligations.

The purpose of this study unit is to enable you to

* explain what the defence of the *exceptio non adimpleti contractus* is
* explain the requirements relating to the *exceptio*
* explain the factors affecting the application of the *exceptio*
* explain the court's equitable discretion to allow a claim for reduced contract price
* explain the scope of the *exceptio*
* explain what the order of specific performance is
* explain the scope of specific performance
* explain the requirements for specific performance
* explain the discretion of the courts to refuse an order of specific performance
* explain the execution of orders for specific performance
* apply the relevant principles to practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 13, section 13.3.

BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391 (A).

Haynes v Kingwilliamstown Municipality 1951 (2) SA 371 (A).

Santos Professional Football Club (Pty) Ltd v Igesund 2003 (5) SA 73 (C).

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

Study the introduction to section 13.3. Do not study the "Counterpoint".

2 *EXCEPTIO NON ADIMPLETI CONTRACTUS*

Study section 13.3.1–13.3.1.4 of the textbook. This is the first remedy aimed at keeping the contract intact and forcing the other party to comply with its obligations. The concept of reciprocity is a requisite for this remedy. It is a difficult concept to understand and apply in practice. You must make sure that you can distinguish between reciprocal and non-reciprocal obligations.

Note that there are important common law rules that provide certain presumptions about the sequence in which performances has to take place, unless the contract determines otherwise.

There are a number of factors that may affect the application of the *exceptio*. You must be able to recognise these factors and apply them to practical examples. The *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* (1979 (1) SA 391 (A)) case is of particular importance in discussing these factors. Make sure that you understand the difference between the situation where a party cancels a partially-performed contract and that where a party keeps the partially-performed contract intact, as happened in the *BK Tooling* case. Also take note of the equitable discretion that a court has in the latter instance.

3 SPECIFIC PERFORMANCE

Study section 13.3.2–13.3.2.4 of the textbook. Specific performance is regarded as the point of departure in the case of a breach of contract, based on the principle that parties must comply with their contractual obligations (*pacta servanda sunt*). The non-breaching party is, in principle, entitled to specific performance, except in certain exceptional circumstances. In this part of the study unit, you will become acquainted with the legal nature of specific performance, its scope, and the different forms in which it appears. Make sure that you know the three requirements that need to be satisfied to obtain an order for specific performance.

Under the influence of English law, our courts have developed a number of exceptions to the general rule that a party is always entitled to specific performance. You must be able to discuss the types of situations where a court will exercise this equitable discretion in favour of the breaching party and refuse specific performance.

ACTIVITY

1 A has contracted with B to build a garden wall for R20 000. In terms of the contract, the wall has to be completed by 15 February. After B has built the wall to half its height, his workers go on strike. A is anxious to get the wall finished for security reasons. On 10 February, she employs X to finish the wall at a cost of R14 000. The wall is eventually completed by 25 February. B now sues A for payment of the wall, claiming that A prevented him from finishing the wall by employing X. Advise A on any possible remedies or defences at her disposal. Also advise A on any possible claims that may arise against her from the above facts.

2 A has contracted with B to build a garden wall for R20 000. In terms of the contract, the wall has to be completed by 15 February. After B has built the wall to half its height, his workers go on strike. A is anxious to get the wall finished for security reasons. On 10 February, she gives notice to B that, if B does

not resume building the wall on 11 February, she will get an urgent interdict against B to finish the wall. Advise B on any defences he may raise against this claim for specific performance.

FEEDBACK

1 In considering A's remedies and defences, you should think about the following issues:

(i) Will A be entitled to rely on the *exceptio non adimpleti contractus*? What are the requirements for this defence? Was this a reciprocal contract and did B fail to complete his part of the contract? The contract between A and B is a contract of work. This contract is a reciprocal contract where B has to complete his performance (building the wall) before A has to perform (paying R20 000). B clearly cannot complete the wall, as it is already complete. A will thus be able to raise the *exceptio* if B tries to enforce the contract (payment of R20 000).

(ii) In these circumstances, it would be unfair for A to utilise B's performance without paying for it, even if it was just part performance. Did A accept B's performance and is she liable to pay at least half of the contract price? If so, on what basis? A court has a discretion to allow a claim for a reduced performance. A is utilising B's partial performance (part of the wall) by her getting a third party to complete the wall. B will be able to claim a reduced performance from A, and he will have to prove the amount by which the price should be reduced. The cost to complete the wall is the amount by which the price will have to be reduced.

(iii) Does A breach the contract by getting a third party to complete the wall? What form of breach are we dealing with? What are B's remedies? By getting a third party to complete the wall, A is in fact repudiating the contract as well as preventing performance. A's conduct by getting a third party to complete the wall clearly shows that she does not intend to allow B to complete his performance. After the third party has completed the wall, B cannot perform. Refer to study units 29 and 30 for B's possible remedies.

2 In considering B's defences, you should think about the following issues:

(i) Courts are sometimes reluctant to order specific performance where the obligation or performance consists of personal services. Is this such a case? This is not a case of personal services.

(ii) Courts will also not order specific performance where performance has become impossible. Is performance impossible (subjectively and objectively) in these circumstances or is it merely inconvenient or costly for B? It can perhaps be argued that performance by B has become subjectively impossible, but this will depend on the question whether B is able to get other labour (even if it is more expensive) in such a short space of time.

(iii) Should the court use its equitable discretion in B's favour? What remedies are available to A if the court should refuse specific performance? A will have a number of remedies available on 15 February. If B fails to complete the wall on time, his conduct will amount to positive malperformance, as he has performed, but his performance is incomplete (see, in this regard, section 12.2.1 of the textbook). A will only be able to cancel the contract if she tenders restitution of the monetary value of B's performance, as his performance itself cannot be returned, and if the breach is material. If A decides not to cancel the contract, she still will have a claim for damages against B.

SUMMARY

Consult points 5–6 of ''This chapter in essence'' at the end of chapter 13 of the textbook.

STUDY UNIT 33
CANCELLATION

OVERVIEW

You are in the middle of a study of the remedies for breach of contract. In the previous two study units, you briefly became acquainted with the different remedies for a breach of contract and you studied the remedies aimed at keeping the contract alive, namely specific performance and the *exceptio non adimpleti contractus*. In this study unit, you will look at cancellation as a remedy aimed at terminating the agreement. You will see that it is an extraordinary remedy that may only be employed in cases of a serious breach. You will also become acquainted with the principles that determine when a breach is serious enough to cancel the contract.

The purpose of this study unit is to enable you to

* explain what cancellation of the contract is
* explain when a party will be entitled to cancel the agreement following a breach of contract
* explain materiality of the breach as a requirement for the cancellation of a contract
* explain the importance of a *lex commissoria*
* explain when the right to cancel is lost
* explain the legal consequences of cancellation
* explain the duty of restitution
* apply the relevant principles to practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 13, section 13.4.

CONTENT OF THIS STUDY UNIT

Study section 13.4–13.4.6 of the textbook. You need not study the ''Pause for reflection'' box in section 13.4.6.

Whereas specific performance is regarded as the usual remedy for breach of contract, cancellation or termination of the agreement is regarded as an exceptional remedy that is only available in specific circumstances. In this study unit, you will encounter the requirements that need to be met in order for a party to cancel the agreement. It is a remedy that should be exercised with care, because, if a party is not entitled to cancel the contract, the purported cancellation in itself may be a breach of contract, namely repudiation. You must therefore make sure that you have a clear understanding of the requirements for cancellation. There are also certain circumstances where a party may lose the right to cancel the contract, even if it existed. Where a party becomes entitled to cancel the contract, it must make a decision to cancel or to enforce the contract. Once that choice has been made, the party is stuck with that choice. If the party elects to insist on specific performance, it will be deemed to have waived its right to cancellation. You must also make sure that you gain a clear understanding of when the right is lost and how it may be revived.

One of the requirements for cancelling the contract is that the breach must be material or sufficiently serious. The requirements for materiality are not dealt with in this part of your textbook and you will have to **revise sections 12.2.3.3 and 12.4.2.1** of the textbook (see study units 26 and 28) again to obtain a proper understanding of cancellation as a remedy.

You should know the consequences of termination. The contractual relationship is ended, but any performance that has been made needs to be returned to the other party. You will encounter the requirements for restitution and how restitution should be made.

ACTIVITY

A has contracted with B to build a garden wall for R20 000. In terms of the contract, the wall has to be completed by 15 February. After B has built the wall to half its height, his workers go on strike. A is anxious to get the wall finished for security reasons. On 10 February she gives notice to B that, if B does not resume building the wall by 12 February she will cancel the contract and get X to complete the wall. Advise B on his legal position.

FEEDBACK

In considering B's legal position, you should think about the following issues:

(i) Is A entitled to cancel the contract where B is going to be merely late in his performance? In considering this issue, you should revise the legal rules as set out in section 12.4.2.1 of your textbook, where this issue is discussed more fully.

(ii) Would it make any difference if the contract contained a *lex commissoria*? And, if so, why?

(iii) Can the notice that A sent to B be regarded as a valid demand entitling her to cancel the contract, taking into account the time allowed for performance?

SUMMARY

Consult point 7 of ''This chapter in essence'' at the end of chapter 13 of the textbook.

STUDY UNIT 34

DAMAGES

OVERVIEW

In the previous three study units, you gained an overview of the different remedies for breach of contract and you studied the remedies of specific performance, the *exceptio non adimpleti contractus* and cancellation.

In this study unit, you will deal with the most important of the corrective remedies, namely damages. Damages are the remedy that is most often employed in practice to compensate the non-breaching party for the losses or damages suffered by that party.

You will also become acquainted with the rules that deal with contractual penalties which may be claimed instead of damages. Contractual penalties are now governed by statute, namely the Conventional Penalties Act 15 of 1962. You will learn how penalty clauses and claims for damages interact under the influence of the Act.

Although the claim for interest is in part a claim for damages, it is usually dealt with as a separate claim in practice. Where a party is in default (*mora debitoris*), the non-breaching party becomes entitled to the payment of interest.

The purpose of this study unit is to enable you to

* distinguish between contractual and delictual damages, positive or expectation interest and negative or reliance interest, and critically discuss the importance of this distinction
* explain the requirements for a damages claim
* distinguish between patrimonial and non-patrimonial loss, and discuss the importance of this distinction
* distinguish between the difference theory and the concrete approach to the quantification of damages
* describe the different methods that may be employed to determine the extent of damages
* distinguish between factual and legal causation, and general and special damages
* describe the mitigation rule and apply it to practical examples
* describe what a penalty clause is, what its objects are and how its enforceability has been changed by legislation
* discuss the nature of claims for interest, and how interest rates are determined
* discuss the importance of the Prescribed Rate of Interest Act for contractual claims
* apply the relevant principles to practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 13, sections 13.5 and 13.6.

Thoroughbred Breeders Association v Price Waterhouse 2001 (4) SA 551 (SCA)

CONTENT OF THIS STUDY UNIT

1 DAMAGES

Study section 13.5 of the textbook. Damages are a cumulative remedy that may be claimed in conjunction with any of the other remedies, provided that there has been a breach of contract and that the non-breaching party has suffered patrimonial damages. You must carefully study damages, as the rules concerned are sometimes intricate and difficult to apply.

One of the most difficult issues in respect of damages is the quantification of a damages claim. In this section, you will become acquainted with the requirements for a damages claim, with the different types of damages, and with the calculation of damages. **Study figure 13.3** carefully – it provides you with an overview of the different aspects relating to damages in the law of contract. It will assist you in obtaining a proper perspective on this difficult part of the law.

You should be able to describe the object of a contractual damages claim. You should also be able to discuss the differences, if any, between contractual and delictual damages, that is, the difference between positive or expectation interest and negative or reliance interest. **Figures 13.4 and 13.5** should assist your understanding of these alleged differences and how they are applied in practice.

The first requirement for a damages claim is proof that the non-breaching party suffered actual pecuniary or financial loss. In this section, you will see that the courts often take a practical approach to the determination of a damages claim rather than a highly theoretical approach. Despite this approach, the underlying theoretical foundations are important for a consistent approach to damages claims. You need to understand clearly these theoretical approaches and their practical consequences. In this discussion, the focus will first be on the difference rule compared with the concrete approach. Both approaches should lead to the same result, but, often, the concrete approach is easier to apply because it focuses on the specific part of a person's patrimony that has been diminished rather than his or her patrimony as a whole. Make sure that you have a clear understanding of the different methods that may be employed to quantify damages. None of these methods is better or worse, but it will depend on the particular circumstances as to which method will be the most suitable to come to a correct assessment.

The second requirement for damages is that there must be a causal link between the breach and the damages suffered. As in the law of delict, a court will enquire into factual and legal causation. In the law of contract, the enquiry into legal causation has evolved somewhat differently from that in the law of delict. In this context, the courts prefer to make a distinction between general and special damages. Make sure that you understand the difference between general damages, which can always be claimed, and special damages, which may only be claimed in exceptional circumstances because they are generally considered to be too remote.

The test for general damages is that the damage should be foreseeable as a probable consequence of the breach of contract. In *Thoroughbred Breeders Association v Price Waterhouse* 2001 (4) SA 551 (SCA) the defendant, a firm of auditors, contracted with the plaintiff to audit a certain year's financial statements. The Supreme Court of Appeal held that the defendant breached the contract by failing to appreciate the significance of the unusual features and discrepancies in the plaintiff's books and failing to pursue them. M, the financial manager of the plaintiff, had at that stage stolen some money from his employer and continued to do so after the audit. The plaintiff thus suffered loss as a consequence of the later thefts after the audit which could not be redeemed from M. The court found that dishonesty was one of three conceivable and predictable reasons why the discrepancies had occurred in the books of the plaintiff. The other two being, an innocent explanation and neglect. The court held that the loss suffered was a realistic possibility and thus general damages (582)

The extent of a party's liability for damages may be influenced by the mitigation rule. In terms of this rule, the non-breaching party is expected to take reasonable steps to mitigate its damages. It cannot simply sit back and let the damages run their course. Make sure that you know how to apply this rule.

Quite often parties will include a penalty clause or liquidated damages clause in their contract. The object of this clause is to bypass all of the uncertainties and difficulties associated with the calculation of damages and provide a quick and easy mechanism for the non-breaching party to claim damages. This area of the law is now regulated by the Conventional Penalties Act 15 of 1962. Ensure that you understand the impact of the Act on penalty clauses.

2 INTEREST

Carefully read section 13.6, and then study point 10 of "This chapter in essence" at the end of chapter 13 of the textbook. A claim for interest compensates the non-breaching party for the loss of the use of money or funds for the period that the amount remains unpaid. The common law rules relating to the payment of interest have been modified by the Prescribed Rate of Interest Act 55 of 1975.

ACTIVITY

A has contracted with B to build a garden wall for R20 000. In terms of the contract, the wall has to be completed by 15 February. After B has built the wall to half its height, his workers go on strike. A is anxious to get the wall finished for security reasons. Despite a demand on B, B has failed to complete the wall by 15 February. A has cancelled the agreement in terms of the *lex commissoria* contained in the contract. A has now contracted with X, her brother, to complete the wall, but X will only do it against payment of R16 000. As a result of the wall not having been completed in time, A has suffered a burglary during which goods worth R15 000 have been stolen. A has now lodged a claim against B for damages for an amount of R55 000. A has made no payments to B. In the summons, the amount of damages is made up as follows: (a) R16 000 for the amount to be paid to X; (b) R15 000 for the goods stolen; and (c) R19 000 for the inconvenience suffered owing to the breach of contract. Advise B on any defences he may raise against this claim, as well as of any counterclaims that he may have. B has provided evidence that the R16 000 paid to X was excessive, and that most other builders in town would have completed the job for no more than R12 000.

In your answer, you should apply all of the principles in respect of the determination and quantification of damages claims that you have studied so far. In respect of each of the individual claims, you should consider the following:

(i) In terms of the contract, A was entitled to obtain a wall worth R20 000 against payment of R20 000. The amount of R16 000 to be paid to X cannot be claimed as a whole, because part of that claim includes an amount of R10 000 which A would have had to pay in any case (to B if B had completed the contract). A has only paid R16 000 so far, namely the price paid to X. B may have a claim for the half of the wall he did complete of R10 000, which will mean that A may be liable to pay R26 000 for the wall. In that event, she would have suffered damages of R6 000. B may, however, prove that the R16 000 paid to X was excessive, as other builders would have done the job for no more than R12 000. In terms of the mitigation rule, it could be argued that A failed to mitigate her damages, and that her claim should be limited to the R2 000 which she would have paid in excess of the R20 000 originally contracted for.

(ii) B may have a claim for the R10 000 based on his part performance. Although his claim or counterclaim may be resisted with the *exceptio non adimpleti contractus, there is a good prospect that a court will allow his claim for a reduced amount for the work actually done, especially since A has accepted and utilised that performance. A's damages claim of R2 000 will, of course, be offset against B's claim for a diminished amount, that is R10 000 – R2 000 = R8 000.*

(iii) The claim for R15 000 for the stolen goods is a claim for special damages rather than general damages. You must apply the principles associated with the convention principle to determine whether A should be entitled to these damages.

(iv) The claim of R19 000 for the inconvenience suffered cannot be sustained, because those damages are not patrimonial damages. They cannot be claimed for a breach of contract.

SUMMARY

Consult points 8–10 of ''This chapter in essence'' at the end of chapter 13 of the textbook.

STUDY UNIT 35

INTERDICT AND DECLARATION OF RIGHTS

OVERVIEW

In the previous study units, you were initially introduced to contractual remedies and you then focused on specific performance, the *exceptio non adimpleti contractus*, cancellation, damages and interest. In this study unit, some additional remedies that may be used in the case of a breach of contract, or to prevent a breach of contract, are looked at. Interdicts are employed to enforce negative obligations such as restraints of trade or threatened breaches, whereas declarations of rights are used to obtain legal certainty in circumstances where the parties are in disagreement about the meaning of their contract or the scope of their respective obligations.

The purpose of this study unit is to enable you to

* distinguish between interdicts and declarations of rights
* explain briefly the objectives of an interdict, and its requirements

LEARNING MATERIAL

Prescribed textbook, chapter 13, section 13.7.

CONTENT OF THIS STUDY UNIT

Carefully read section 13.7, and then study point 11 of "This chapter in essence" at the end of chapter 13 of the textbook. Although all of the remedies discussed so far follow on a breach of contract, there are also some remedies which may be exercised to prevent a breach of contract or to determine the rights of the parties in the case of uncertainty. In this section, we briefly discuss the requirements for an interdict and a declaration of rights. You should be able to distinguish between an interdict and a declaratory order and describe when these remedies should be used by a party.

ACTIVITY

1 Distinguish between interdicts and declarations of rights.

2 Briefly explain the objectives of an interdict, and its requirements.

FEEDBACK

See point 11 of "This chapter in essence" at the end of chapter 13 of the textbook.

SUMMARY

Consult point 11 of ''This chapter in essence'' at the end of chapter 13 of the textbook.

TRANSFER AND TERMINATION OF RIGHTS AND OBLIGATIONS

STUDY UNIT 36
CESSION

OVERVIEW

In this study unit, we discuss the transfer of claims by way of cession.

The purpose of this study unit is to enable you to

* explain what cession is
* distinguish between obligationary and transfer agreements
* distinguish between cession and the transfer of movable property
* distinguish cession from delegation and assignment
* explain what may be ceded
* explain the requirements for a valid cession
* explain the consequences of cession
* explain security cession
* apply the relevant principles to practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 14.

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

Study sections 14.1 and 14.2 of the textbook. This introduction involves a number of distinctions that are difficult to understand. Study the examples and figures that are given as illustration and make sure that you understand the distinctions that are discussed.

Cession is an act of transfer of a claim. You should be able to distinguish between the obligationary agreement that precedes the cession and a transfer agreement (of which cession is an example). The obligationary agreement is often the *causa* of the cession. You should also be able to distinguish between the transfer of movables and the cession of claims.

You do not have to study the "Pause for reflection" box in section 14.2.

2 THE SUBJECT MATTER OF CESSION

Read section 14.3. All you should remember is that personal rights or claims can be ceded. A personal right is the right to performance that arises out of an obligation.

3 THE REQUIREMENTS FOR A VALID CESSION

Study the whole of section 14.4–14.4.7.2. You do not have to study the "Pause for reflection" box in section 14.4.3.2 and the "Counterpoint" in 14.4.3.5. Note, furthermore, the similarities between the requirements for a valid contract and those for a valid cession. They are, of course, both agreements.

4 THE CONSEQUENCES OF CESSION

Study section 14.5–14.5.5. You do not have to study the "Counterpoint" in section 14.5.5. In section 14.5.5 it is stated that the Supreme Court of Appeal has not yet decided the issue whether the good faith approach or the estoppel approach should be followed. However, in *Momentum Group Ltd v Van Staden* 2010 (2) SA 135 (SCA) 140 the court merely applied the good faith approach without even referring to the estoppel approach. This case cannot be construed as settling the question which approach should be followed.

5 SECURITY CESSION

Study the introduction to section 14.6 – 14.6.2, as well as all its subsections. You do not have to study the "Pause for reflection" box in section 14.6.2. If you have already done Property Law, refresh your memory with regard to pledge as a form of security.

ACTIVITY

1 X sells her claim of R10 000 against Z to Y for R7 000. X cedes the right to Y and Y pays the purchase price. X discovers that the contract of sale is void. Advise X.

2 The following clause appears in a contract of lease:

The lessee may not cede his or her rights under this lease, except with the written permission of the lessor. Such permission may not be unreasonably withheld by the lessor.

The lessee cedes her rights under the lease to Z without obtaining the lessor's permission. Z takes occupation of the leased property. May the lessor evict Z? Discuss.

3 X cedes R4 000 of her claim against D for the payment of R10 000, to Y. Is the cession valid? Discuss.

4 X works for Y as a domestic servant. Y cedes her right to X's labour to her mother, Z, and informs X that she will be working for Z in future, but that she (Y) will still pay her (X's) salary. X does not wish to work for Z, because Z always finds fault with everything X does. Does X have to work for Z? Discuss. Do not consider labour law in your answer.

5 X cedes her claim of R10 000 that she has against Z, to Y. Z is never notified of the cession, but he hears from a very unreliable source that the claim has been ceded to Y. Z phones X, a family friend, and enquires whether this is so, but X denies it. Z pays X the R10 000 when it becomes due. Y claims payment of R10 000 from Z. Advise Z.

6 X cedes her claim of R10 000 that she has against Z, to Y. The claim arose from a contract of sale between X and Z. Y notifies Z of the cession, but, when he enforces the claim against Z on the due date, Z raises the defence that she (Z) concluded the contract under the undue influence of X. Advise Y.

7 X cedes her claim which she has against Z to Y as security for a loan from Y. There is no indication in the loan agreement between X and Y what form their security cession will take. X repays the loan to Y, but Y is immediately afterwards declared insolvent. Advise X.

FEEDBACK

1 The contract of sale is the *causa* of the cession. A valid *causa* is not a requirement for a valid cession. The cession is thus valid, but X will be able to claim re-cession of the claim, as Y has been enriched. X will, of course, have to return the purchase price, because the contract of sale is invalid and X has been enriched.

2 The clause in the lease is a *pactum de non cedendo*, which is only valid if the lessor (the debtor with regard to delivery of the leased property) has a legitimate interest in the restriction. The lessor has such an interest, because the identity of the occupier of the leased property is important to the lessor. The lessee will not be able to cede her rights under the lease and the lessor will be able to evict Z.

3 X's cession to Y amounts to a splitting of the claim, which would prejudice D. The cession is thus invalid.

4 The obligation to work is of such a personal nature that it would make a reasonable and substantial difference to X whether Y or her mother enforces the right. Y's mother is a far more difficult creditor, as she always finds fault with X's work. The right to X's work thus cannot be ceded.

5 The normal rule is that Z has to pay the new creditor, Y, in order to be released from the duty to perform. Even after the recent decision of the Supreme Court of Appeal, both approaches should be applied. Although Z was not notified of the cession, Z knew of the cession. It could be argued that payment to X was nevertheless in good faith, because X denied that cession had taken place. X furthermore created the impression that no cession has taken place.

6 X cannot transfer more rights to Y than those which she (X) has. Z may raise the same defences that she has against X, against Y.

7 The courts will interpret a security cession as a pledge, unless the parties have clearly indicated that they wish to create a fiduciary security cession. In a pledge, the ownership of the claim remains with X. Only possession of the claim passes to Y. When X paid back the loan (the principal debt), the claim automatically reverted to X. The claim will thus not fall in the insolvent estate of Y.

SUMMARY

Consult "This chapter in essence" at the end of chapter 14 of the textbook.

STUDY UNIT 37

INTRODUCTION TO TERMINATION OF OBLIGATIONS AND TERMINATION BY PERFORMANCE

OVERVIEW

In this and the next two study units, we will discuss the various ways in which an obligation may be terminated. These ways include termination by performance, by agreement and by operation of law. Other ways of terminating an obligation (which will not be discussed) arise when an aggrieved party exercises a right of termination in the context of voidable contracts (see study unit 11) or after an aggrieved party terminates an obligation resulting from a breach of contract that is sufficiently serious to justify cancellation of the contract (see study units 26, 28 and 30). In this study unit, we focus on performance.

The purpose of this study unit is to enable you to

* give a short explanation of the ways in which an obligation is terminated
* explain termination of an obligation by performance
* apply the relevant principles to practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 15.

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

Study the introduction to section 15.1 of the textbook and identify the different ways in which an obligation may be terminated.

2 TERMINATION BY PERFORMANCE

Study section 15.2 for an introduction to the situation where an obligation and an accessory obligation terminate by performance.

2.1 Required performance

Study section 15.2.1 of the textbook. Only full and proper performance by the debtor will generally terminate the obligation. Make sure that you understand the exceptions to this rule. Also make certain that you are able to distinguish between facultative obligations (see study unit 23) and *datio in solutum*.

2.2 Performance by a third party

Read section 15.2.2 of the textbook. All you have to know is that a third party may in certain circumstances terminate an obligation on behalf of the debtor.

2.3 The person to whom performance must be made

Read section 15.2.3 of the textbook. All you have to understand is that the debtor's performance should ordinarily be made to the creditor, but that there are instances when it may be validly made to a third party. Sometimes, a third party may be authorised to receive performance, without also being authorised to claim performance. You must know the difference between the case where a third party has been authorised to receive performance and where the third party has the right to performance after cession (see study unit 36 with regard to cession).

2.4 Place of performance

Study section 15.2.4 of the textbook. You must know the circumstances which the courts use to determine the place of performance in the absence of a specific agreement relating to this issue.

2.5 Time of performance

Study section 15.2.5. Know that, in the absence of an agreement as to the time of performance, the ordinary rules relating to *mora debitoris* (see study unit 26) will apply.

2.6 Performance as a bilateral act

Study section 15.2.6 and the "Counterpoint". A debt-extinguishing agreement is not always required to explain performance.

ACTIVITY

Tanya enters into a contract with a famous fashion designer, Edgar Ahlers, in terms of which he will design and make a wedding dress for her. A week before the wedding, when the dress is complete, Tanya finds out that the dress was in fact sewn by Ahlers' friend, Susan. Ahlers, however, designed the dress. Tanya says that Ahlers has breached their contract. Ahlers says that Susan's performance is perfectly satisfactory. Discuss.

FEEDBACK

The question deals with performance by a third party. Normally, the creditor cannot refuse the performance from a third party (acting on behalf of the debtor) if the creditor would not be prejudiced and performance is effective. However, a creditor may refuse performance by a third party where the performance agreed upon requires the personal skill and attributes of the debtor. In this question, it can be argued that the designing of a wedding dress was personal in nature, as the personal touch of the debtor was crucial, but that the sewing can be performed by any good seamstress. Hence it appears that Tanya may not refuse the contributing performance of Susan and that Ahlers has not breached the contract.

SUMMARY

Consult point 1 of ''This chapter in essence'' at the end of chapter 15 of the textbook, as well as figure 15.2.

STUDY UNIT 38

TERMINATION OF OBLIGATIONS BY AGREEMENT

OVERVIEW

In the previous study unit, we discussed performance as a way of terminating an obligation. In this study unit, we will discuss the various ways in which an obligation may be terminated by agreement, and, in the next study unit, the different ways in which an obligation may be terminated by operation of law.

The purpose of this study unit is to enable you to

* explain release and waiver
* explain novation
* explain compromise
* distinguish between novation and compromise
* explain briefly effluxion of time
* explain notice briefly
* apply the relevant principles to practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 15.

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

Study the introduction to section 15.3 and note that an obligation may be terminated in various ways by agreement.

It is important to know that the rules on the termination of obligations are applicable to all obligations from whatever source they may have arisen. It does not matter whether the obligation arises from contract, delict, unjustified enrichment or whatever source.

2 RELEASE AND WAIVER

Study section 15.3.1 of the textbook. You must know that different consequences may apply for a complete release from all contractual obligations than to a partial release in the context of complying with prescribed formalities (for formalities relating to variation of a contract, see study unit 19). You must understand that release is normally bilateral in nature, in that it entails an agreement between the debtor and the creditor, but that waiver has, in certain circumstances, been construed to be enforceable following a unilateral act by one of the parties who abandons a right or remedy that formed part of the contract for her or his sole benefit. **Study carefully the conclusion of section 15.3.1** on whether a party has actually abandoned a right.

3 NOVATION

Study section 15.3.2 of the textbook. Study the nature and consequences of a novation. You must also know what delegation is. You must understand what the effect of a judgment and acknowledgement of debt is on a debt.

4 COMPROMISE

Study section 15.3.3 of the textbook. Study the nature of a compromise, and its consequences. You should understand how it is interpreted whether or not an agreement of compromise exists in the context of payments made ''in full and final settlement''. Furthermore, you must be able to make the important distinction between novation and compromise, in that, with the former, there must already have been an existing obligation, whilst there need not be an existing obligation between the contracting parties for the latter to be concluded. **Table 15.1, in section 15.3.3,** relating to a comparison between true novation and compromise is **very useful and important**.

5 EFFLUXION OF TIME

Read section 15.3.4 on when a contract terminates. You only have to **study point 2.4 of ''This chapter in essence'' at the end of chapter 15**.

6 NOTICE

Read section 15.3.5, and then study point 2.5 of ''This chapter in essence'' at the end of chapter 15.

ACTIVITY

Sarah goes to a new attorney, Naomi, for legal advice. Sarah has a one-hour consultation with Naomi. Three weeks later, Sarah receives an account from Naomi for R2 500. Sarah is furious, as her previous attorney (who is now living overseas) used to charge her R1 000 per hour. Subsequently, Sarah has several discussions with Naomi wherein she (Sarah) disputes the amount Naomi claims. Sarah sends a cheque for R1 500 to Naomi, which includes a note that reads: "This cheque is sent in full and final settlement of my account in order to avoid litigation and bring finality to our dispute. Once you deposit this cheque, you will have no further claim against me." Naomi then deposits the cheque and advises Sarah in writing that she rejects Sarah's offer in full and final settlement and that, instead, she (Naomi) accepts Sarah's cheque as partial payment towards the account. Naomi then sues Sarah for R1 000. Advise Sarah if she will be successful in defending Naomi's claim.

The question deals with the issue of an agreement of compromise. For such an agreement to exist, there must be a valid offer and a valid acceptance. In this question, a valid offer of compromise can be inferred, as Sarah clearly put the amount (R2 500) in dispute and made an offer of R1 500 (in full and final settlement) to bring finality to the dispute. There is also a valid acceptance by Naomi, even though she advised Sarah in writing that she rejected the offer, the reason being that Sarah as offeror can prescribe the mode of acceptance, with which Noaomi complied. As she (Sarah) prescribed the mode of acceptance to be the depositing of the cheque by Naomi, the latter accepted the offer when she deposited the cheque.

SUMMARY

Consult point 2 of ''This chapter in essence'' at the end of chapter 15 of the textbook, as well as figure 15.2.

STUDY UNIT 39

TERMINATION OF OBLIGATIONS BY OPERATION OF LAW

OVERVIEW

In the previous two study units, we discussed performance and agreement as ways in which an obligation may be terminated. In this study unit, we will focus on the various ways in which an obligation can be terminated by operation of law.

The purpose of this study unit is to enable you to

* explain set-off
* explain merger
* explain supervening impossibility of performance
* explain prescription
* explain briefly the effect of insolvency on obligations
* explain briefly the effect of death on obligations
* apply the relevant principles to practical problems

LEARNING MATERIAL

Prescribed textbook, chapter 15.

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

Read the introduction to section 15.4 and note the various ways in which an obligation may be terminated by operation of law.

2 SET-OFF

Study section 15.4.1 of the textbook. See to it that you understand the concept of set-off and the requirements for set-off to operate. Only take note that some academics disagree with the position under South African law that, normally, set-off need not be invoked by one of the contracting parties, as it operates automatically when the requirements are met.

3 MERGER

Study section 15.4.2 on merger.

4 SUPERVENING IMPOSSIBILITY OF PERFORMANCE

Study the introduction to section 15.4.3 and see to it that you know the nature and consequences of supervening impossibility of performance. You should be able to distinguish between initial, objective impossibility of performance at the time the contract is concluded (see study unit 20), objective impossibility of performance after concluding the contract (ie supervening impossibility of performance) and prevention of performance (see study unit 30).

Study section 15.4.3.1, but not the "Counterpoint" in this section. You should be familiar with the two requirements that must exist before supervening impossibility of performance will lead to the termination of a contract. Regarding the first requirement, see study unit 20 for a discussion on objective impossibility as well. Regarding the second requirement, remember that supervening impossibility of performance does not arise only from unforeseeable acts, but that it could also arise from foreseeable acts . On the other hand, there could also be situations where foreseeable acts at the time of contracting may lead to the inference that the debtor assumed the risk of the impossibility occurring, which means that supervening impossibility of performance would not be applicable in such cases.

Study section 15.4.3.2 and know the effect that supervening impossibility of performance has for the debtor or the creditor (or both parties), in the three different contexts discussed therein, relating to their contractual obligations. **Study the mind map in figure 15.1, as it is very helpful.**

5 PRESCRIPTION

Study section 15.4.4 – 15.4.4.5. Do not study the "Pause for reflection" box in section 15.4.4.2. Extinctive prescription is a very useful special plea in practice, and the prescriptive periods should always be kept in mind.

6 INSOLVENCY

Read section 15.4.5 of the textbook.

7 DEATH

Read section 15.4.6 and study point 3.5 of "This chapter in essence" at the end of chapter 15.

ACTIVITY

Arnold is an artist, with a unique style, who lives in a shack situated on the banks of the Diepsloot River, which is prone to flooding. Andile agrees to pay Arnold R2 500 for a particular painting of his wife. As Andile cannot pay the full amount immediately, the parties agree that he will pay a deposit of R500 and that the remainder will be paid on delivery of the painting. Following heavy rain, the river bursts its banks and sweeps away Arnold's shack and all his possessions, including the painting for Andile. Briefly discuss the liability, if any, of the parties.

The question deals with the issue of supervening impossibility of performance. For supervening impossibility of performance to exist, two requirements must be established. In this question, the first requirement is easily established, because the performance is objectively impossible, as the painting has been destroyed by the floods. It also seems that the second requirement (that the impossibility must be unavoidable by a reasonable person) can also be established, the reason being that, even though it is foreseeable for flooding to take place at Arnold's shack (as the area is prone to flooding), it seems that no reasonable person could have avoided the damage, and neither Arnold nor Andile foresaw the occasion for impossibility when the contract was concluded. The existence of supervening impossibility of performance means that both parties' obligations become extinct, and Andile can recover his R500 deposit from Arnold through an enrichment action.

SUMMARY

Consult point 3 of ''This chapter in essence'' at the end of chapter 15 of the textbook, as well as figure 15.2.

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