

CONTRACT B – 2012

INTRODUCTION

The Law of Contract B is a self-standing semester course that counts as a credit in the Faculty of Law in the LLB2, as well as comprising one of the six component courses in the Legal Theory 3 major in the Faculties of Humanities, Science and Commerce. Students who pass the Law of Contract B as part of the Legal Theory major are exempted from the course in the LLB curriculum.

The purpose of the course is to provide insight into the nature and function of the law of contract in South Africa. More particularly, and building upon the work done in Contract A:

- To provide students with an understanding of the contents of contracts, and how contracts are interpreted.
- To provide the students with a thorough understanding of how contractual rights are transferred, terminated and breached, and the remedies available for such breach.
- To assist students in being able to identify and solve authentic legal problems with regard to the negotiation and creation of contracts.
- To familiarise students with legal concepts and terminology commonly encountered in the law of contract.
- To assist students in extracting principles from law reports and other source material.

Credit Value

10 Credits

Assumptions of Prior Learning

When entering this course, students need to be able to:

- Have an understanding of the legal concepts dealt with in Contract A.
- Be capable of writing and communicating in coherent English.
- Know how and where to access resources such as textbooks, law reports and statutes in the Law Library.
- Have a working knowledge of basic legal concepts and terminology.
- Be capable of independent learning.
- Read, analyse and extract principles from law reports and other source material.
- Understand the system of judicial precedent, and the important role precedent plays in private law.
- Have an understanding of legal problem-solving techniques, and how to apply these to solve legal problems.
- Have a working knowledge of legal referencing conventions, and to be able to apply these to their written work.
- Have a basic understanding of constitutional principles and how these principles impact on private law issues.

OUTCOMES

Critical Outcomes

Students will be able to:

- (a) Identify and solve practical legal problems.
- (b) Organise and manage themselves and their work load.
- (c) Collect, analyse and evaluate information from the various sources of law, as well as information conveyed in the classroom environment.
- (d) Communicate effectively in class debate and written assignments.
- (e) Use technology in legal research.
- (f) Recognize problem-solving contexts involving the law of contract.

Intended Specific Outcomes

The Law of Contract B course is designed so that students successfully completing this course should be able to achieve the following outcomes. The student should be able to:

- (a) Understand and explain the contents of a contract, and how a contract is interpreted.
- (b) Understand and explain how contractual rights may be transferred.
- (c) Understand and explain the various ways in which a contractual relationship may be terminated.
- (d) Understand and explain the various ways in which a contract may be breached.
- (e) Understand and explain the various remedies for contractual breach.
- (f) Apply the knowledge acquired during the course to solve practical problems with regard to the operation, interpretation, termination and breach of contract.

TEACHING METHODS

The course will be presented by means of *viva voce* lectures. There is no comprehensive hand-out for the course, and students will be expected to take their own notes during class. In lectures, the substantive law will be discussed, leading precedents from the case law will be analysed, and the views of leading academic commentators will be explained. Occasionally, students will be expected to explain case law and consider practical questions in class. Students are expected to assume responsibility for their learning by reading ahead before each lecture and consolidating afterwards. Lectures are compulsory. The normal Faculty regulations concerning lecture attendance and DP certificates apply. There are voluntary tutorials in this course, offered every three weeks, in conjunction with the overall Legal Theory Three tutorial programme. These tutorials focus on supplemental instruction particularly in so far as applied problem solving is concerned.

COURSE CONTENT

Classification of Terms

Important types of term having an effect on the operation of a contract

Conditions
Modus and *Dies*
Assumptions or Suppositions
Warranties

Interpretation of a Contract

The parol evidence rule
The principles of interpretation
Example of interpretation in action: Exemption clauses

Breach

Positive Malperformance
Repudiation and Anticipatory Breach
Negative Malperformance (*Mora*)

Remedies

Specific Performance
Reciprocity and the *exceptio non adimpleti contractus*
Cancellation
Damages
Penalty Stipulations
Interdict

The transfer of contractual obligations

Out and out cession
Cession in securitatem debiti

The Alteration and Termination of Contractual Obligations

Termination by Performance
Termination by Agreement
Termination by Operation of Law

An example of a special contract: The Contract of Suretyship

RESOURCES

The core reading and study material for this course are the leading judgments on the aspects of the law of contract to be studied. These cases may be found in the law reports, which may be accessed in the Law Library, both in paper and electronic form. For a full list of cases, see below.

As far as textbooks are concerned, although there is a prescribed text: Hutchison et al's *The Law of Contract in South Africa* (OUP, 2009). Other recommended texts, of which there are copies in the Library, are:

Christie *The Law of Contract in South Africa* (2011), 6th edition, Butterworths.

Sharrock "The Law of Contract" in *LAWSA Vol 5(1)* (2nd ed) (2004) Butterworths: Durban.

Kerr *The Principles of the Law of Contract* (2002) 6th edition, Butterworths: Durban.

Van der Merwe, Van Huyssteen, Reinecke and Lubbe *Contract: General Principles* (2008) 3rd edition, Juta: Cape Town.

De Wet and Van Wyk *Die Suid-Afrikaanse Kontrakereg en Handelsreg* (1992) 5th edition, Butterworths: Durban.

Joubert *Contract: General Principles of the Law of Contract* (1987) Juta: Cape Town.

Lubbe and Murray *Farlam and Hathaway: Contract – Cases, Materials and Commentary* (1988) Juta: Cape Town.

Kahn *Contract and Mercantile Law: A Sourcebook* (1988) 2nd edition, Juta: Cape Town.

Hawthorne and Lotz *Contract Law Casebook* (1994), Juta: Cape Town.

Occasionally, students will be referred to pertinent Journal articles on aspects of the course content. These may also be found in the Library.

Students are strongly advised to utilise these resources in the course of their studies.

Students are also encouraged to browse through the shelves in the library, and familiarise themselves with the Faculty's holdings. This will stand them in good stead when research is undertaken for assignments.

STUDENT ASSESSMENT

Specific Outcomes (On completion of this course, the student should be able to:)	Assessment Criteria (What evidence must the student provide to show that they are competent? The student must be able to:)	Assessment Tasks (The evidence will be gathered in the following way. The student may be expected to:)
Understand and explain the contents of a contract, and how a contract is interpreted.	<ul style="list-style-type: none"> - Identify, discuss and explain the various common forms of contractual term found in contracts, and problems associated with these. - Discuss and explain how contracts are interpreted. - Critically analyse the process of contractual interpretation. 	<ul style="list-style-type: none"> - Write short essays, supported by authority, explaining the various forms of contractual term. - Write case notes on the leading precedents discussed and examined on the various forms of contractual term. - Write an essay, supported by authority, explaining and critically analysing the process of contractual interpretation
Understand and explain how contractual rights may be transferred.	<ul style="list-style-type: none"> - Discuss and explain the concepts of compromise, delegation and cession. 	<ul style="list-style-type: none"> - Write short essays, supported by authority, explaining the requirements that have to be met for either compromise, delegation or cession. - Write case notes on the leading precedents discussed and examined on these topics. - Write an essay comparing and contrasting the different ways in which contractual rights may be transferred.
Understand and explain the various ways in which a contractual relationship may be terminated.	<ul style="list-style-type: none"> - Describe and explain the various ways in which a contract may be terminated, either by law or by an act of the parties. 	<ul style="list-style-type: none"> - Write short essays, supported by authority, explaining the various ways in which a contract may be terminated. - Write case notes discussing a leading precedent on one of the forms of termination. - Write an essay comparing and contrasting the different ways in which a contract may be terminated.
Understand and explain the various ways in which a contract may be breached.	<ul style="list-style-type: none"> - Describe and explain the various ways in which a contract may be breached. 	<ul style="list-style-type: none"> - Write short essays, supported by authority, explaining the various forms of breach. - Write case notes discussing a leading precedent on one of the forms of breach. - Write an essay comparing and contrasting the different types of breach.

Understand and explain the various remedies for contractual breach.	- Describe and explain the nature and scope of the various remedies available in law where a contract has been breached.	- Write short essays, supported by authority, explaining the various forms of remedy. - Write case notes discussing a leading precedent on one of the remedies. - Write an essay comparing and contrasting the remedies.
Apply the knowledge acquired during the course to solve practical problems with regard to the operation, interpretation, termination and breach of a contract.	- Identify the relevant legal problem or issue. - State the relevant law, and discuss the relevant legal precedents with regard to that issue. - Apply the law to the facts in order to come to a reasoned conclusion about the problem, and the legal remedies that might flow from the finding.	- Write judgments or opinions in which a practical problem is analysed and solved on the basis of the relevant law and precedents.

Assessment Strategy

The final mark for the course is comprised of the following components:

Examination: out of 70 marks
Class work: out of 30 marks
Total: 100 marks

Tests

There is one test for this course, which is written early in the second term. The test will be out of 25 marks, and students have 5 minutes reading time, and 40 minutes in which to complete the test. The test will contain questions equivalent to that which may be found in the June examination, and will require the students to apply their knowledge to solve a legal problem. The test counts 40%, or 12 marks, of the class-mark component of the course. The test is compulsory.

Assignments

There is one major assignment for this course, which is submitted towards the end of the second term. The assignment is an authentic one, and will require the students to write a mock judgment: the student must imagine that he or she is a judge who has to resolve a contractual dispute brought before his or her court. The assignment should be approximately 2500 words in length, and will have to be thoroughly researched, and correctly referenced and presented. The assignment counts 60%, or 18 marks, of the class-mark component of the course. The assignment is compulsory.

Examination

One two-hour paper will be written in November. The examination will be out of 70 marks. All questions will be compulsory. The questions will require students both to be able to explain legal rules and principles in a theoretical sense, to write case notes on leading precedents, as well as to apply their knowledge to solving practical problems in authentic contexts. The examination is compulsory. An external examiner assesses the quality of both the examination paper and the students' answers.

Evaluation

This course is evaluated in line with Faculty policies.

Obligation and Terms

See generally chapter 10 of the prescribed textbook and your note on the concept of an obligation in Law of Contract A.

Classification of obligations

- Civil, natural and moral obligation
- Reciprocal obligations

A leading case on reciprocal obligations in BK Tooling (Edms) Bpkv Precision Scope Engineering (Edms) Bpk 1979 1 SA 391 (A)

- Exceptio non adimpleti contractus
- Simple, alternative, generic or facultative obligations. Each of these is explained at page 233.

Divisible or indivisible performances and contracts. Refer to chapter 9 page 218 par 9.2.1

Terms

What are terms?

In the Law of Contract in South Africa p 234 terms are referred to as stipulations that the parties include in their contract and secondly they include provisions that by operation of law are incorporated in contracts.

Classification of terms into essentialia, naturalia and incidentalialia

- Essentialia are not the essentials but are distinctive terms that identify a contract as one of the specific contracts recognized by our common law, for example, a sale or lease
- Naturalia are terms that are automatically included in a contract unless excluded by the parties. They exist by operation of law
- Incidentalialia are terms that the parties include in the contract over and above naturalia, for example, in a contract of sale the parties may make special arrangements with regard to delivery.
- Express terms. Just read through pages 237-238
- Tacit terms. See pages 240-241. See Corbett JA in Standard Bank of South Africa Ltd v Ocean Commodities Inc 1983 (1) SA 276 (A). See also pages 245-246
- Implied terms. Implied ex lege
- Implied from the facts (tacit terms) – the bystander test

Terms and Conditions

In R v Katz 1959 3 SA 408 © De Villiers AJ stated:

“The word ‘condition’ in relation to a contract, is sometimes used in wide sense as meaning a provision of the contract i.e. an accepted stipulation, as for example, in the phrase ‘conditions of sale’. In this sense the word includes ordinary arrangements as to time and manner of delivery and payments of the purchase price etc. in other words the so-called accidentalialia of the contract. In the sense of a true suspensive or resolutive condition, however, the word has a much more limited meaning, viz, of a qualification which renders the operation and consequences of the whole contract dependent upon an uncertain event...”

Classification of conditions

- Positive and negative conditions. See the following cases: Mac Duff & Co Ltd v Johannesburg Consolidated Investment Co Ltd 1924 AD 573 and Tuckers Land and Development Corporation (Pty) Ltd v Strydom 1984 1 SA 1 (A)
- Suspensive and resolutive conditions. See page 247. See Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd 1982 (1) SA 398 (A)
- Postative, casual and mixed conditions see page 248.
- Fictional fulfillment of conditions. See MacDuff & Co Ltd (in liquidation) v Johannesburg Consolidated Investment Co Ltd 1924 AD 573

Time Clauses

A time clause (dies) is contractual term that makes the existence of an obligation dependent on an event or time that is certain to arise in the future. See the case of Jurgens Eiendomsagente v Share 1990 (4) SA 664 (A)

Suppositions or assumptions

There is a supposition when the parties make the working of their agreement dependent upon the presence or absence of some fact of the past or the present. See the case of *Fourie v CDMO Homes (Pty) Ltd* 1982 1 SA 21 (A)

Modal Clauses

A modal clause is a term that burdens the recipient of a performance with a duty to do something in the future - a donation of land subject to a modus.

Warranties.

Refer to chapter 4 where a misrepresentation is distinguished from other pre-contractual misstatements – a warranty is a term of the contract something to which a man must be taken to bind himself.

Interpretation of a Contract

- Parol evidence rule-see your notes on the leading case of *Johnston v Lead* 1980 (3) SA 927 (A)

Interpretation of the Contract

- The principles of interpretation
- Ordinary grammatical meaning. *Total South Africa (Pty) Ltd v Bekker* 1992 1 SA 617 (A)
- The Context
- The wider context, background evidence.
- Extrinsic evidence

Rules of interpretation

- (a) Equitable interpretation
- (b) Avoidance of inconvenience
- (c) *Ut res magis valeat quam pereat*
- (d) Presumption against tautology
- (e) *Eiusdem generis, noscitur a sociis*
- (f) *Generalia specialibus non derogant*
- (g) *Expressio unius est exclusio alterius*
- (h) *Construction contra proferentem or er contra stipulatorem*