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THE LAW OF SALE & LEASE IN SOUTH AFRICA



2013

Lecturer: Professor R B Mqeke

LAW OF SALE AND LEASE – 2013

The Law of Sale and Lease is a final year LLB credit. The two subjects divide the course in two, with Sale being offered in term 1, and Lease in term 2. For the purposes of coherence, each component of the course is discussed separately below, in order to explain more specifically the nature of each component. Both parts of the course will be lectured by the same lecturer in 2013.

A SALE

INTRODUCTION

Overview

The purpose of the sale portion of the course is to provide insight into the nature and function of the law of sale in South Africa. More particularly:

- To provide the students with a thorough understanding of the essential elements of a contract of sale, and how the sale contract differs from other forms of contract.
- To provide the students with a thorough understanding of the legal effects of a contract of sale.
- To ensure that the students are aware of the legal duties imposed upon buyers and sellers, and the consequences that may flow if these duties are breached.
- To make the students aware of the special requirements that attach to certain special forms of sale, or sales regulated by statute.
- To assist students in being able to identify and solve authentic legal problems with regard to sale contracts.
- To familiarise students with legal concepts and terminology commonly encountered in the law of sale.

Credit Value

5 Credits.

Assumptions of Prior Learning

In order successfully to complete this portion of the course, students need to be able to:

- 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 the general principles of the law of contract.
- 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 a developed understanding of legal problem-solving techniques.

OUTCOMES

Critical Outcomes

Students will be able to:

- identify and solve practical legal problems.
- organise and manage themselves and their work load.
- collect, analyse and evaluate information from the various sources of law, as well as information conveyed in the classroom environment.
- communicate effectively in class debate and written assignments.
- use technology in legal research.
- recognise problem-solving contexts involving the law of sale.

Intended Specific Outcomes for Sale

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

- Understand and explain the essential elements of a valid contract of sale.
- Understand and explain some of the key legal consequences of entering into a contract of sale.
- Understand and explain the legal duties that are imposed upon buyers and sellers, and the consequences that flow if these duties are breached.
- Understand and explain the features of certain special types of sale contracts, and sales regulated by statutes.
- Apply the knowledge acquired during the course to solve practical problems with regard to sale contracts.

TEACHING METHODS

The course will be presented by means of *viva voce* lectures. There is a relatively thorough handout for the course, which the students receive on the first day, and which provides the basic structure of the lectured course. The handout is not comprehensive, though: some topics will be covered orally in class only, and students will be expected to take their own notes in lectures to supplement the handout. In lectures, the substantive law (both common law and statute 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 no tutorials in this portion of the course.

COURSE CONTENT

Section 1 – The definition and essentials of the contract

- Definition
- Comparison with other contracts
- Essentials: the thing sold (*merx*) and the price (*pretium*)

Section 2 – The legal effect of the contract

- The passing of ownership
- Risk and benefit
- Conditional sales

Section 3 – Seller's legal duties and buyer's remedies

- Care of the thing sold
- Making the thing sold available
- Warranty against eviction
- Duty to deliver the *merx* free from defects
 - patent and latent defects and remedies
 - exclusion of liability for defects
 - aedilician actions in cases of *dicta et promissa*

Section 4 – Buyer's duties and seller's remedies

- Payment of the purchase price
- Taking delivery of the *merx*
- Reimbursement of the seller's necessary expenses
- Remedies

Section 5 – Special sales

- Auctions

Section 6 – Common sales regulated by statute

- The Consumer Protection Act 68 of 2008 (focus topic for 2011).

RESOURCES

The core reading and study material for this course are the leading judgments on the aspects of the law of sale 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 the course handout.

As far as textbooks are concerned, although there is no prescribed text, the one book that is highly recommended is Kerr's *The Law of Sale and Lease* (3rd edition, Butterworths, 2004). Other recommended texts are:

Zulman, RH and Kairinos, G: *Norman's Purchase and Sale in South Africa* (5th ed, Butterworths, 2005)

De Wet and Van Wyk: *Die Suid-Afrikaanse Kontraktereg en Handelsreg* (5th ed, Butterworths, 1992)

Hackwill, G: *Mackeurtan's Sale of Goods in South Africa* (5th ed, Juta, 1984) (Mackeurtan)

Joubert, W (ed): *The Law of South Africa*, vol 24, section on Sale by Kerr

Kahn (ed): *Contract and Mercantile Law through the Cases, Vol II* (Juta, 1985), especially the chapter by Zeffert "Purchase and Sale" 3-249

Bradfield & Lehmann: *Principles of the Law of Sale and Lease* (2 ed, Juta, 2010) 346.072 B

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.

STUDENT ASSESSMENT

Specific Outcomes (On completion of this course, the student should be able to:)	Assessment Criteria (What <i>evidence</i> must the student provide to show that they are competent? The student must be able to:)	Assessment Tasks (The evidence will be <i>gathered</i> in the following way. The student may be expected to:)
Understand and explain the essential elements of a valid contract of sale.	<ul style="list-style-type: none"> - Define the two essential elements of a contract of sale. - Describe and explain the requirements that have to be satisfied for these elements to exist. - Demonstrate an understanding of the court decisions that have authoritatively determined what the various elements and requirements are. 	<ul style="list-style-type: none"> - Write short essays, supported by authority, explaining the requirements that have to be met for one of the elements to be satisfied. - Write case notes on the leading precedents discussed and examined during the course.
Understand and explain some of the key legal consequences of entering into a contract of sale.	<ul style="list-style-type: none"> - Discuss some of the important consequences of entering into a contract of sale, and the legal problems that can be associated with these issues. - Demonstrate an understanding of the court decisions that have authoritatively determined what the law is with regard to these legal consequences. 	<ul style="list-style-type: none"> - Write short essays, supported by authority, explaining one or another of the legal consequences of entering into a sale contract. - Write case notes on the leading precedents discussed and examined during the course.
Understand and explain the legal duties that are imposed upon buyers and sellers, and the consequences that flow if these duties are breached.	<ul style="list-style-type: none"> - Define the various legal duties. - Describe and explain how these duties impact upon buyers and sellers respectively. - Demonstrate an understanding of the court decisions that have authoritatively determined what these legal duties are. - Describe and explain the remedies that may flow if these duties are breached. 	<ul style="list-style-type: none"> - Write short essays, supported by authority, explaining the various legal duties imposed upon buyers and sellers respectively, and the remedies available where such duties are breached.
Understand and explain the features of certain special types of sale contracts, and sales regulated by statutes.	<ul style="list-style-type: none"> - Discuss the important or unique features of special sale contracts such as auction sales. - Discuss the legal requirements that attach to certain common sales regulated by statutory enactments, such as property sales, sales of moveable property on credit, and internet sales. 	<ul style="list-style-type: none"> - Write short essays, supported by authority, explaining the legal features of special forms of sale contract or contracts regulated by statute.

Apply the knowledge acquired during the course to solve practical problems with regard to sale contracts.	<ul style="list-style-type: none"> - 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. 	<ul style="list-style-type: none"> - Write judgments or opinions in which a practical problem is analysed and solved on the basis of the relevant law and precedents.
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Assessment Strategy

The final mark for the Sale module is comprised of the following components:

Examination: 30 marks out of a 60 mark examination.

Class work: 15 marks out of a class mark of 30.

These totals will be added to the results in the Lease module and converted into a percentage (see the comment on the examination below).

Sale Test

There is one test for the Sale module, which is written late in the first term. The test will be out of 15 marks, and students have 5 minutes reading time, and 40 minutes in which to complete the test. The test is written in a class period. 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 is compulsory.

Examination

One two-hour paper will be written in June. The examination will be out of 60 marks, converted to a final mark out of 70 for calculation purposes. In the Law of Sale, the students will have to answer 2 15-mark questions out of a choice of 3. The questions will require students both to be able to explain legal rules and principles in a theoretical sense 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 as part of the global evaluation of LLB courses conducted at the end of each semester.

B LEASE

INTRODUCTION

Overview

The purpose of the lease portion of the course is to provide insight into the nature and function of the law of lease in South Africa. More particularly:

- To provide the students with a thorough understanding of the essential elements of a contract of lease, and how the sale contract differs from other forms of contract.
- To provide the students with a thorough understanding of the legal effects of a contract of lease.
- To ensure that the students are aware of the legal duties imposed upon lessors and lessees, and the consequences that may flow if these duties are breached.
- To make the students aware of the special requirements that attach to certain special forms of lease, or leases regulated by statute.
- To assist students in being able to identify and solve authentic legal problems with regard to lease contracts.
- To familiarise students with legal concepts and terminology commonly encountered in the law of lease.

Credit Value

5 Credits.

Assumptions of Prior Learning

In order successfully to complete this portion of the course, students need to be able to:

- 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 the general principles of the law of contract.
- 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 a developed understanding of legal problem-solving techniques.

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) recognise problem-solving contexts involving the law of lease.

Intended Specific Outcomes for Lease

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

- (a) Understand and explain the essential elements of a valid contract of lease.
- (b) Understand and explain some of the key legal consequences of entering into a contract of lease.
- (c) Understand and explain the legal duties that are imposed upon lessors and lessees, and the consequences that flow if these duties are breached.
- (d) Understand and explain the features of certain special types of lease contracts, and leases regulated by statutes.
- (e) Apply the knowledge acquired during the course to solve practical problems with regard to lease contracts.

TEACHING METHODS

Teaching will be in the form of discussion of the course material in the lectures. Students are provided with a synopsis of the material and a reading list. There is a selection of important cases that should be consulted. Students are expected to read the cases and the relevant chapters on the lecture topics to be covered in the lectures. The lecture will be used as a discussion forum for the material set out in the notes. Lecture attendance is compulsory.

COURSE CONTENT

- 1 The nature of the contract
 - The essentials, formalities and the parties
- 2 Types of leases: Long and short leases and the rule “Huur gaat voor koop”
- 3 The duration of the contract of letting and hiring
 - Fixed period lease
 - Tenancy at will
 - Periodic lease
 - Hybrid
- 4 The legal effect of leases (rights and duties of the parties).
 - The lessor’s obligation to deliver the property to the lessee
 - Free of impediments
 - In a fit condition for the purpose leased
 - Remedies for breach
 - The lessor’s obligation to give unhindered use and enjoyment during the currency of the lease
 - Maintenance and repairs
 - Warranty against eviction by third parties with greater title
 - Remedies for breach
 - The so-called warranty against defects and its remedies
 - The lessor’s obligation to pay rates and taxes
- 5 The lessee’s duty to pay rent
 - Cash or kind
 - Where and how - the danger of using an agent
 - When
 - Lessors tacit hypothec
 - The lessee’s duty to take proper care of the property and remedies
 - The lessee’s duty to restore the property at the end of the lease and Remedies
- 6 The impact of the Constitution and recent legislation such as PIE, ESTA, the Rental Housing Act, the National Credit Act and the Consumer Protection Act
- 7 The legal effect on third parties (subletting, assignment and cession)
- 8 Termination of leases
 - The effect of termination
- 9 The lessee’s right to improvement
- 10 Renewal of a lease.

RESOURCES

The core reading for this course are the textbooks, law reports and specific legislation relating to this branch of the law which may be accessed in the library. The list of cases and relevant legislation is reflected in the course outline. On the lease component of the course there is AJ Kerr *The Law of Sale and Lease* 3rd ed, Lexis Nexis, Butterworths (2004).

Other texts are:

Bradfield & Lehmann: *Principles of the Law of Sale and Lease* (2 ed, Juta, 2010).

Kerr & Glover “Lease” in *LAWSA* Vol 14(2) (2ed, Butterworths, 2008)

WE Cooper *Landlord & Tenant* (2ed, Juta, 1994).

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 essential elements of a valid contract of lease.	<ul style="list-style-type: none"> - Define the essential elements of a contract of lease. - Describe and explain the requirements that have to be satisfied for these elements to exist. - Demonstrate an understanding of the court decisions that have authoritatively determined what the various elements and requirements are. 	<ul style="list-style-type: none"> - Write short essays, supported by authority, explaining the requirements that have to be met for one of the elements to be satisfied. - Write case notes on the leading precedents discussed and examined during the course.
Understand and explain some of the key legal consequences of entering into a contract of lease.	<ul style="list-style-type: none"> - Discuss some of the important consequences of entering into a contract of lease, and the legal problems that can be associated with these issues. - Demonstrate an understanding of the court decisions that have authoritatively determined what the law is with regard to these legal consequences. 	<ul style="list-style-type: none"> - Write short essays, supported by authority, explaining one or another of the legal consequences of entering into a lease contract. - Write case notes on the leading precedents discussed and examined during the course.
Understand and explain the legal duties that are imposed upon buyers and sellers, and the consequences that flow if these duties are breached.	<ul style="list-style-type: none"> - Define the various legal duties. - Describe and explain how these duties impact upon lessors and lessees respectively. 	<ul style="list-style-type: none"> - Write short essays, supported by authority, explaining the various legal duties imposed upon lessors and lessees respectively, and

	<ul style="list-style-type: none"> - Demonstrate an understanding of the court decisions that have authoritatively determined what these legal duties are. - Describe and explain the remedies that may flow if these duties are breached. 	the remedies available where such duties are breached.
Understand and explain the features of certain special types of lease contracts, and sales regulated by statutes.	<ul style="list-style-type: none"> - Discuss the important or unique features of special leases. - Discuss the legal requirements that attach to certain common forms of lease regulated by statutory enactments and constitutional principles. 	<ul style="list-style-type: none"> - Write short essays, supported by authority, explaining the legal features of special forms of lease contract or leases regulated by statute.
Apply the knowledge acquired during the course to solve practical problems with regard to sale contracts.	<ul style="list-style-type: none"> - 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. 	<ul style="list-style-type: none"> - 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 Lease module is comprised of the following components:

Examination: 30 marks out of a 60 mark examination.

Class work: 15 marks out of a class mark of 30.

These totals will be added to the results in the Sale module and converted into a percentage (see the comment on the examination below).

Lease Test

There is one test for the Lease module, which is written late in the second term. The test will be out of 15 marks, and students have 40 minutes in which to complete the test. The test is written in a class period. 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 is compulsory.

Examination

One two-hour paper will be written in June. The examination will be out of 60 marks, converted to a final mark out of 70 for calculation purposes. In the Law of Lease, the students will have to answer 2 15-mark questions out of a choice of 3. The questions will require students both to be able to explain legal rules and principles in a theoretical sense 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 as part of the global evaluation of LLB courses conducted at the end of each semester.

Lecture Distribution

Week One

Definition

In Wille's Principles of South African Law, 9th Edition at 889 purchase and sale (emptio venditio) is described as a contract whereby one person agrees to deliver to another the free possession of a thing in return for a price in money? See also Kleyhans Bros v Wessels' Trustee 1927 AD 271

Agreement of the parties

Animus emendi (agreement to buy) animus vendendi (agreement to sell) are essential for the validity of the contract: McAdams v Flander's Trustee 1919 AD 2007

- Serves to distinguish a sale from other contracts and simulated transactions
- The maxim plus valet quod agitur quam quod simulate conscribitur (literally what is done is more important than what seems to have been done) applied in Zandberg v Van Zyl 1910 AD 309 and Vasco Dry Cleaners v TwyCross 1979 (1) SA 603 (A)
- Disguised transactions
- Comparison with other contracts: Pledge, donation, exchange, letting and hiring (locatio conductio)
- Formation of the contract
- Agreement concursus animorum
- Offer and acceptance. In some special contracts governed by statute there can be formalities to be complied with.

Week 2

Essentials of the contract

- Agreement on the thing to be sold (merx)
- Defined or ascertainable thing
- Principal thing includes accessories or appurtenances
- Method of delivering the subject matter
- Things not yet in existence

Restriction on the sale of certain things

- Sale of fiduciary property
- Sale of property burdened with fideicommissum
- Sale of pledged property, minor's property, sale of res litigiosa
- Sale of res aliena

Agreement on the price

- Price in money or partly in money and partly in goods
- Difficulties when a trade-in turns out to be defective

MountBatten Investments (Pty) Ltd v Mahomed 1989 1 SA 172 (D) Wastie v Security Motors (Pty) Ltd 1972 (2) 129 ©, Janse van Rensburg v Grieve Trust CC 2000 1 SA 315 ©

Week 3

Formalities

- Specific legislation governing formalities in certain agreements of sale: Property Time Sharing Control Act 75 of 1983 (sale of time shares); Share Blocks Control Act 59 of 1980 (Sale of shareblocks); Housing Consumers Protection Measures Act 95 of 1998 (Contract to be in writing); National Credit Act 34 of 2005 in respect instalment sale agreements and credit agreements (pre agreement disclosures); Alienation of Land Act 68 of 1981 (Section 2(1), 29 (A) introduced by the Alienation of Land Amendment Act 103 of 1998; 2 A of the same Act; instalment sale of residential land.

The Legal effect of the Contract

- Passing of ownership, see the rule in Kleyhans Bros v Wessels' Trustees 1927 AD 271 applied in ABSA Bank Ltd v Myburgh 2001 (2) SA 462 (W); see also Lendalese Finance (Pty) Ltd v Corporacion De Mercedes Agricola and Others 1976 (41) SA 464 (A)
- Transfer follows the rules of the law of property in respect of both movable and immovable property

The Passing of risk and benefit

- The general rule that the risk and benefit pass to the purchaser as soon as the contract is perfecta. On the common law rule that the sale be perfecta see Glover "The end of the road for the Roman rule of risk in sale?" Tydskrif Vir Die Suid-Afrikaanse Reg 2012-4 p 650 and Norman's Law of Purchase and Sale in South Africa fifth Edition Chapter 10

Meaning and variation

- The legal position when sale is subject to a suspensive condition
- Specific things sold by number, measure or weight
- When goods are sold by quantity ad mensuram and when a sale is per aversionem – subject to a resolutive condition
- Effects of Mora on risk
- The profit of the things sold

Week 4

Conditional Sale

- Sale subject to a suspensive or resolutive condition
- Sale subject to pacts (pacta adiecta)
- Sale or return or subject to approval

Obligation of the parties

- Seller's obligations

Duty to deliver the merx (res vendita) and to effect transfer in the relevant deeds office and to give the purchaser occupation of the property: York & Co (Pty) Ltd v Brnic & Another 1962 (2) SA 56 (SR) and Sweet v Rangerguhara No & Others 1978 (1) SA 131 (D)

- Duty to take care of the res vendita: Frumer v Maitland 1954 (3) SA 840 (A)
- Warranty against eviction: Kleyhans Bros v Wessels' Trustee

Week 5

Remedies: Aedilitian remedies (false pre-contractual statements by a seller bearing on the quality of res vendita and latently defective property.

- Actio redhibitoria and actio quanti minoris
- Damages for latent defects. See also the following cases: Van der Merwe v Meados 1991 (2) SA 1 (A); Glanston House (Pty) Ltd v Inag (Pty) Ltd 1977 (2) SA 846 (A) and Kroonstad Westelike Boere – Ko – operatiewe Vereniging Bpk v Botha & Another 1964 (3) SA 561 (A)
- Actio ex empto: fraud or breach of warranty, sales by sample and by description

Purchaser's obligations

- Pay the purchase price
- Take delivery of the res vendita

The seller's remedies

Week 6

Special Sales

- Voetstoets sale and the Consumer Protection Act 68 of 2008
- Auction sale and the Consumer Protection Act
- Instalment sale and the National Credit 34 of 2005
- Consumer sales
- Special trade or delivery terms: sales Cif; Sales FOB