

LAW OF CONTRACT A - 2012

1. INTRODUCTION

Overview

The Law of Contract A 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 A 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:

- To provide the students with an understanding of the historical development of the uniquely South African law of contract from its Roman, Roman-Dutch and English roots.
- To provide the students with a thorough understanding of the essential elements of a valid contract in South African law.
- 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 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 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.

2. 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 contract.

Intended Specific Outcomes

The Law of Contract A 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 how the South African law of contract has developed from its Roman, Roman-Dutch and English roots.
- (b) Understand and explain the essential elements of a valid contract, and their various requirements.
- (c) Understand and explain the sorts of legal issues that can affect the existence of the various contractual elements, and how the contractual relationship will be affected as a result.
- (d) Apply the knowledge acquired during the course to solve practical problems with regard to the negotiation and creation of a contract.

3. 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. There is a prescribed textbook for the course. Lectures are compulsory. A student may not miss more than five lectures without excuse. Voluntary supplemental tutorials are offered on a rotational basis in conjunction with the other Legal Theory Three courses. Problem solving will be a focus of these tutorial sessions.

4. COURSE CONTENT

- I An introduction to the development of the South African Law of Contract.
- II The Elements of a Valid Contract:
- Capacity
 - Consensus
 - Offer and Acceptance
 - Absence of consensus: Theories of Contract and the Law of Mistake; Signed Documents & Ticket Cases; Rectification
 - Improperly obtained consensus (Misrepresentation; Duress; Undue Influence; Bribery)
 - Legality
 - General principles of public policy and legality
 - The impact of the constitution on contract law
 - Specific topics on legality (gambling, covenants in restraint of trade)
 - Possibility of performance
 - Formalities
- III Parties to contracts

5. 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 the Course Outline for Students.

As far as textbooks are concerned, there is a prescribed text: Hutchison et al *The Law of Contract in South Africa* (Oxford University Press, 2009).

Other texts that can be consulted are:

Christie *The Law of Contract in South Africa* (2006), 5th edition, Butterworths: Durban.

Sharrock "The Law of Contract" in *LAWSA Vol 5(1)* (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* (2003) 2nd edition, Juta: Cape Town.

De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg 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.

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.

6. 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 how the South African law of contract has developed from its Roman, Roman-Dutch and English roots.	<ul style="list-style-type: none"> - Identify from which system of law a particular rule of contract originates. - Describe how the South African law of contract has absorbed features of these various legal systems. - Discuss why South African law has chosen to adopt a particular rule from a particular system. 	<ul style="list-style-type: none"> - Write a short essay in which the student discusses how South African law has developed from its various sources, and why this is so. - Be able to explain the origin of a rule of contract in a particular context while answering a theory question or solving a legal problem.
To understand and explain the essential elements of a valid contract, and their various requirements.	<ul style="list-style-type: none"> - Define the various essential elements of a contract. - Describe and explain the requirements that have to be satisfied for the various elements to exist. - Analyse and explain the court decisions that have authoritatively determined what the various elements and requirements are. - Demonstrate an understanding 	<ul style="list-style-type: none"> - Write short essays, supported by authority, explaining the requirements that have to be met for one of the various contractual elements to be satisfied. - Write case notes on the leading precedents discussed and examined during the course.

	of key contractual terminology.	
To understand and explain the sorts of legal issues that can affect the existence of the various contractual elements, and how the contractual relationship will be affected as a result.	<ul style="list-style-type: none"> - Identify the sorts of legal issues that can affect the existence of one of the contractual elements. - Describe how and explain why it may be proved that one of the essential elements of the contract does not exist because of one of these issues. - Describe and explain the various remedies available where a legal issue with regard to the creation of the contract is identified and proved to be present. 	<ul style="list-style-type: none"> - Write short essays, supported by authority, explaining the legal reasons why the one of the various contractual elements is not satisfied. - Write case notes discussing a leading precedent on an issue associated with the violation of a contractual element. - Write short essays on the remedies available where a contractual element is not satisfied.
Apply the knowledge acquired during the course to solve practical problems with regard to the negotiation and creation of a contract.	<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 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 mid-way through the course. The test will be out of 20 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% (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% (18 marks) of the class-mark component of the course. The assignment is compulsory.

Examination

One two-hour paper will be written in June. The examination will be out of 70 marks. There will be three 35-mark questions on the paper, of which the student will have to choose two to answer. The questions will be split up: for example, into a 20 and a 15-mark question. 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.

7. EVALUATION

This course is evaluated on a cyclical basis, and is also evaluated as part of the global Legal Theory Three evaluation at the end of the academic year.

1. The notion of a contract

1.1 Definition of a contract

Dale Hutchinson et al *The Law of Contract in South Africa* at p 6 defines a contract as an agreement entered into by two or more persons with the intention of creating a legal obligation or obligations. This means that not all agreements between parties constitute a contract. A contract requires a serious intention on the part of the contractants to create a legally enforceable obligation called *animus contrahendi*. See the categories of agreements noted by Dale Hutchinson at p 4.

- Obligatory agreements
- Absolving agreements
- Real agreements. When does an agreement constitute a contract?

1.1.1 The nature of a contract

- Juristic and bilateral act
- Entails promises or undertakings
- Reciprocal nature of a contract

1.2 The concept of an obligation

Van der Merwe *et al Contract General Principles* describes the law of contract as the collection of legal rules which govern contracts. These rules are, in turn, part of the law of obligations. Farlam and Hathaway *Contract, Cases, Materials and Commentary* Third edition by G J Lubbe and C M Murray p 1 describe a contract as a source of an obligation. The latter is defined as legal relationship comprising rights and duties between legal subjects. Contractual obligations are created by agreement (actual or apparent) of the parties. See further Dale Hutchinson (ed) *the Law of Contract in South Africa* pp 7- 8. This is in sharp contrast to a delictual obligation which arises *ex lege* (by operation of law) when a legal subject has wrongfully and

without justification intentionally or negligently infringed a recognized interest of another to the detriment of that person.

We also distinguished between civil and natural obligation. The former refers to an obligation which is enforceable in law either by means of a court order for specific performance or an award of damages. A natural obligation, though legal is not legally enforceable. It is, however, capable of indirect enforcement by means of set off and can even serve as basis of pledge of suretyship.

1.3 Primary sources of obligations

They are contract and delict, unjustified enrichment, negotiorum gestion, family relationship, wills and statutes. The emphasis in this course will be on contract and delict.

1.4 Contract and delict and problem of concurrent liability

Students should read pages 8 and 9 of the Law of Contract in South Africa. This problem is clearly illustrated by the following cases:

Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd 1985 (1) SA 475 (A); and

Trustees Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd 2006 (3) SA 136 (SCA).

1.5 Contract and enrichment

Just read through p 9

1.6 The development of the modern notion of contract

Our law of contract is a modernized version of the Roman Dutch Law of Contract.

Roman – Law had no general law of contract, but law of contracts. This means that there were several contracts each governed by certain general principles and its own peculiar rules.

Roman Dutch Law. The institutional writers completed the process of generalization and discarded the subtle distinction of the Roman Law of contract the fundamental principle that as a matter of good faith, all serious agreements ought to be enforced (pacta sunt servanda). All contracts were consensual and bona fide.

1.7 The basis of contract

The following theories of contract deserve attention: will theory, declaration theory and reliance theory.

1.7.1 The Will theory

- The basis of contract is the will of the parties (meeting of the minds of the parties). If one party is in error as regards one of the vital elements of the agreement there is no real agreement. The result is that neither party is bound and each party may reclaim whatever it has performed. In the light of the unsatisfactory outcome of this approach there were suggestions that this theory be supplemented. As will be shown later the shortcomings of the will theory in the event of dissensus, are corrected by the reliance theory. Please read Dale Hutchinson's comments at pp 15 – 16.

1.7.2 Declaration theory

According to this theory the basis of an agreement is not the underlying will of the parties but the will of the parties as manifested in their actions. This formulation was made by Wessels J A in *South African Railways & Harbours v National Bank of South Africa Ltd* 1924 AD 704 at 715 where the learned judge of appeal stated:

“The law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds. Even therefore it from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look at their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which courts of law can determine the terms of a contract.”

This statement of the law has been criticized by various academic writers. Kerr points out that Wessels JA did not apply this theory to the facts of the case before him. He suggests that it should not be followed in the future [Kerr *The Principles of the law of Contract* 6th ed p 20 – 25]

1.7.3 Reliance theory

According to this theory as it is applied in the context of dissensus, a contract is based on the intention of one party to an agreement and the reasonable impression or reliance on his part that the other party had the same intention.

It is regarded as only supplementary to the will theory: if the two parties do have coinciding intentions there is consensus and no need to enquire whether one of the parties had any particular impression of the other’s intention.

If there is a material mistake by one party or both and therefore no actual consensus, the reliance theory acknowledges that there is a contract if one of the parties, in a reasonable manner, relied on the impression that there was consensus.

The reliance theory has been applied in a number of decisions (see footnote 99 p 35 Van der Merwe *et al.*

Requirements for proving a contract on the reliance theory

One of the parties to the agreement must have created in the mind of the other party the belief or reliance that they had reached a consensus – see the Hodgson Bros v South African Railways 1928 CPD 257 noted at page 36 of Van der Merwe *et al*

The party who wants his reliance upheld must show that the reliance was reasonable in the circumstances

Is it not clear whether fault is a requirement for the operation of the reliance theory

1.7.4 Justus error approach: This approach is fully discussed in Van der Merwe *et al* pp 38-47

According to the Justus error approach a party to an agreement who raises mistake and wishes to escape contractual liability must prove not only that the mistake is material but also that it is reasonable (iustus hence iustus error). The case of Justus error is that of *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A).

See the example of a typical application of Justus error approach at page 40 of Van der Merwe *et al* and the leading case *Trollip v Jordaan* 1961 (1) SA 238 (A) and *Allen v Sixteen Starting Investments (Pty) Ltd* 1974 (4) SA 164 (D). These cases are noted at pages 41-42.

1.8 Approach to contract: subjective or objective? See *The law of contract in South Africa* pp 17-20

1.8.1 Cornerstones of Contract pp 22-32

- Freedom of contract (party autonomy) see also the Law of Contract p 23
- Sanctity of contract. This (finds expression in *pacta sunt servanda*) principle also expresses the goals of contract, namely, that “the function of contract law is thus not merely to ensure that people keep their promises...rather it is to provide a legal framework within which people can transact business and exchange resources secure in the knowledge that...the law will uphold their agreements” Dale Hutchinson “The Law of Contract in South Africa” p 22
- Good faith see pages 27-30

- Public policy. See how the Constitutional Court explained the concept in *Barkhuizen v Napier* 2007 (5) SA (3) 23 (CC). See also a recent comment on this case by Matthew Kruger “The role of public policy in the law of contract, revisited” 2011 SALJ 712.

1.9 Legal requirements of a valid contract

1.10 The Consumer Protection Act 68 of 2008

See the Summary at pages 32 – 34 in the Law of Contract in South Africa.

1.11 The impact of the Constitution