LEARNING UNIT 3:
THE CONTRACT OF SALE AND OF LEASE

OBJECTIVES:

- Describe the essentials of a valid sale
- Describe the passing of risk under a contract of sale and apply these principles to a given scenario
- Explain the warranty against eviction and the warranty against latent defects
- Explain and apply the “voetstoots” clause
- Explain and apply the remedies available in regards to the different warranties
- Explain the requirements for a valid lease
- Explain the duties of landlord and tenant
- Explain the landlord’s duty to protect against interference in the use of property let
- Describe the remedies in the case of breach of contract in a contract of lease
- Explain the landlord’s tacit hypothec
**INTRODUCTION**

**Contract Of Sale**

- Contract of sale (CoS) embodies the relationship between the seller/provider/supplier of goods/services and the buyer/purchaser/consumer.
- It is a contract where one party (seller) delivers a thing (the *merx*) to another party (buyer) in exchange for payment of the purchase price.

**Contract of Lease**

- Contract of lease (CoL) is where a person (the lessor/landlord) gives another person (the lessee/tenant) temporary use and enjoyment of the property of another, in exchange for the payment of rent.
CONTRACT OF SALE

CoS is concluded by fulfilling the (general) requirements of a valid contract.

PLUS

1. Agreement to deliver
2. Agreement on the merx
3. Agreement on the price

Agreement to deliver

- Ownership is not transferred by conclusion of the contract alone
- CoS merely provides the buyer with a personal right whereby they are able to claim delivery of the merx from the seller
- Seller agrees to provide vacant possession
- (Do not need to be the owner of something in order to sell it)

Agreement on the merx

- There must be an agreement that the object/thing is being SOLD
- Merx need not actually exist at the time of contracting BUT it must then be anticipated that it WILL exist in the future

Agreement on the price

- In money and certain
- Fixed and determinable
PASSING OF RISK

• Risk passes from the seller to the buyer when the contract is perfecta.
• Perfecta = agreement has been reached on the merx as well as the price.

merx is defined or identified –
  definite and ascertainable

purchase price is ascertained or ascertainable via simple calculation

• Normally, the owner of a merx bears the risk of loss or damage.

• Where performance becomes impossible, by accident, after conclusion of the contract, parties are generally released from their obligations.
• BUT someone still suffers a loss (bears the risk).

• Where a contract is perfecta, risk has passed and the buyer bears the loss.
• NOT NECESSARY for merx to have been delivered or for the price to have been paid.

• Eg. Mr Coupland, a farmer, and Mr Adams, a greengrocer, agree that Mr Coupland will sell all the apples from the trees on the eastern side of his farm to Mr Adams once they have been picked at which time he, Mr Coupland would drop the apples off at Mr Adams store. The purchase price on which they agree is R10 per kilogram. The day before the apples are to be picked, a swarm of locusts eats and destroy all the apples on the farm. Who bears the risk?
WARRANTY AGAINST EVICTION

• Implied warranty by the seller

• = guarantee that the buyer’s possession of the merx will not be disturbed by the seller/another person who has a better title to the merx

• Should the buyer be disturbed in their possession of the merx, the seller must come to the assistance of the buyer (and offer a valid defence)

• This warranty may be excluded (since it is implied)
WARRANTY AGAINST LATENT DEFECTS

• The seller impliedly warranties the buyer

• = guarantee by the seller to the buyer that there are no hidden defects in the merx which will render the merx useless or less useful

• “latent” = not evident to an ordinary buyer at the time of delivery

• If the seller is in breach of this warranty, the buyer may make use of special remedies known as **AEDILITION REMEDIES**

  **Action redhibitoria**

  o where the latent defect reduces the value of the merx
  o the buyer keeps the merx and may claim a reduction of the purchase price equal to the difference between the purchase price and the value of the defective merx

  **Action quanti minoris**

  o where a latent defect is material and renders the merx useless for the purpose for which it was sold
  o the buyer may claim a refund of the purchase price with interest and compensation for the expenses incurred in maintaining the merx
  o the buyer must however tender return of the merx

• Warranty may be expressly excluded from the contract by including a “**voetstoots**” clause.

  • “voetstoots” = “as is”
  • Means that the buyer takes the merx “as is” and cannot hold the seller liable for the latent defect


### CONTRACT OF LEASE

“a contract where one party (lessor) agrees to give to the other party (lessee) the temporary use and enjoyment of a thing, wholly or in part, in return for remuneration (payment)”

Differs from CoS...

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<tr>
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<th>CoS</th>
<th>CoL</th>
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<tbody>
<tr>
<td><strong>Rights</strong></td>
<td>o Parties intend that the seller <strong>parts with every right</strong> he has regarding the merx including the rights to diminish and destroy the merx o = intention to transfer <strong>full ownership</strong></td>
<td>o Parties intend that the lessor will, at most, transfer <strong>only the right to use</strong> the object and gather and use the fruits o <strong>NOT</strong> the right to diminish or destroy the object</td>
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<tr>
<td><strong>Duration</strong></td>
<td>Seller intends that the purchaser will have use and enjoyment of the property <strong>permanently</strong></td>
<td>Lessor merely intends to give the lessee the <strong>temporary</strong> use and enjoyment of the property</td>
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requirements for a contract of lease (CoL)

1. Specified immovable property
   - the landlord and tenant must agree on the property being rented out
   - the landlord gives the tenant the right to use the property and enjoy its fruits
   - in order to lease the property, the landlord need not be the owner of the property

2. Duration of the lease
   - the tenant only receives temporary, and not permanent, use of the property
   - the duration of the lease may be either: for a definite time; until a certain event occurs or from period to period; or may terminate at the will of the landlord or tenant
   - a lease may be expressly or tacitly renewed

3. Specified rent
   - either a specified sum of money or a share in the fruits of the property
   - rent may be fixed or calculated according to a formula to which the parties may agree
DUTIES OF THE LANDLORD (remedies of the tenant)

1. To deliver use and occupation of the property leased at the agreed time

   • Landlord must place the tenant in free and undisturbed possession, occupation and use of the property.

   • Landlord must further deliver all the necessary accessories which are required to use the property for its purpose.

   • Landlord must ensure that the property is in a good condition.

   • Where the landlord is in breach of this duty, the tenant may cancel the CoL and claim damages if this breach was material.

   • The tenant may repair the property and claim a reduction of the rent for the cost of the repairs (with notice to the landlord).
2. To maintain the property let

• The landlord is tasked with maintaining the property in a good condition during the lease so that the property is reasonably fit for the purpose of the let

• Where the landlord fails to maintain the property, the tenant may claim specific performance or cancellation and damages

3. To protect the tenant from any interference in the use of the property

• The landlord guarantees that the tenant’s possession in the property will not be disturbed by the landlord or another party the landlord may only interfere with the tenant’s possession in order to conduct inspections of the property

• The landlord guarantees that no person will disturb the tenant in their use and enjoyment (not even a person with a stronger title and in such a case the landlord must protect the tenant)

• Where the landlord is in breach of this duty, the tenant may
  o refuse to pay rent
  o claim damages
  o obtain an interdict
  o cancel the contract
DUTIES OF THE TENANT (remedies of the landlord)

1. To pay rent

- Rent must be paid in money (unless expressly agreed on that it will be in the form of fruits of the property)
- Unless otherwise agreed on, rent is payable at the end of the rent period and at a reasonable place
- Tenant must ensure that the rent is paid on time and if the tenant fails to pay the rent the landlord may demand payment within a reasonable time
- Where the tenant still fails to pay, the landlord may cancel the contract
- Landlord also has the special remedy known as the "landlord’s hypothec"
  - Automatic security for unpaid rent over the tenant’s movable property on the property let
  - Landlord may obtain an interdict which then prevents the tenant from removing such property from the property
  - Where the tenant’s movables are sold in order to pay his debts, the landlord has a preferential right over the proceeds of the sale
2. To ensure that the property is not misused and is only used for the purpose for which it was let

• Tenant must use the property in a manner which is reasonable and cannot use the property for another purpose than what was agreed on

• Where the tenant uses the property in an unreasonable manner / unauthorised purpose – landlord has ordinary contractual remedies (e.g. cancellation and damages)

3. To return the property undamaged at the end of the lease

• Tenant must use the property with the necessary care of a reasonable person

• Property must be returned in the same condition as it was received in
• Tenant is not liable for ordinary wear and tear
• Eg. When you hire a care you must return it and when you do it should be filled with petrol (like you got it). It cannot be damaged due to a car accident but having more kilometres on it is a reasonable form of wear and tear

• Tenant is NOT responsible for damage caused:
  o By a person not under their control
  o Vis major
  o Accidents beyond the control of the tenant which were not reasonably foreseen

“holding over” = where the tenant does not return the property at the end of the lease
Landlord may obtain a court order for ejectment and may claim damages