



LEARNING UNIT 5

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CHP 13 – THE CONTRACT OF SALE

CHP 14 – THE CONTRACT OF LEASE

CHP.13- CONTRACT OF SALE

- Contract of sale is probably one of the most common contracts concluded
- All contracts must comply with the general requirements for a valid contract but different specific contracts have their own unique essentialia (characteristics/ requirements)
- The classification of a contract determines the naturalia thereof...the rights and duties which flow from **that** contract
- Contract of sale = “a contract in which one party (the seller) undertakes to deliver the object of the sale (*merx*) to another party (buyer/ purchaser) and the buyer in exchange, agrees to pay the seller a certain sum of money (the purchase price)”

THUS!!!!

Consensus

Capacity

Legal possibility

Physical possibility

formalities



Delivery of *merx*

Payment of purchase price

RIGHTS OF THE BUYER AND SELLER

(ito common law)

Seller

- Entitled to **payment** of the purchase price by the buyer
 - Payment is thus the most NB obligation of the buyer and CANNOT be excluded by the parties
- essential part of a contract of sale

Buyer

1. Delivery of the *merx*

- Merely means that the *merx* must be made available and that the buyer is entitled to free and undisturbed possession
 - Not that it has to be literally delivered to the buyers doorstep
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2. Preservation of the *merx* pending delivery

- Damaged – seller will be liable
 - Buyer fails to take delivery (*mora creditoris*) – seller only liable for gross negligence or intentional damage
 - Damaged while the seller is in mora (*mora debitoris*) – bears risk EXCEPT where the *merx* would have been affected anyway, despite timely delivery
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3. Protection by seller against eviction

- It is not an automatic consequence of contract of sale (CoS) transfers ownership of the merx to the buyer!
- A seller merely undertakes that the buyer will NOT BE DISTURBED IN THEIR ENJOYMENT of the merx by a person with a stronger title
- = seller's warranty against eviction
- Where a person with a legal title thus disturbs the buyer in their enjoyment of the merx, the seller has a duty to assist the buyer and offer a proper and competent defence
- Eg. Stolen goods...

4. Merx free from latent defects

- Implied warranty against defective goods is read into every contract of sale unless it is excluded by the parties (see "voetstoots")
- Where merx has latent defects, the buyer is entitled to certain remedies (**read** page 155 regarding what must be proven when making a claim due to latent defect):
 1. Actio redhibitoria (return of purchase price, interest, expenses incurred and reimbursement)
 2. Action quanti minoris (reduction of purchase price)

known as **AEDILITIAN ACTIONS**

What aedilition actions are used for

1. Breach of implied warranty
2. Breach of contractual warranty warranting certain good characteristics of merx
3. Intentional concealment of defect in merx by seller
4. Where seller makes material statements about merx during negotiations which turn out to be untrue

“As is” sales

Warranty against latent defect may be excluded from the contract by the parties

= voetstoots clause / “as is” clause

Seller will only be liable where he knows of the defect and conceals it

5. Actio empti

○ Actio empti is NOT a separate right BUT is a remedy which the buyer can USE TO ENFORCE his rights

○ May be used in 4 instances:

1. Defective performance – where defective merx (not having promised good qualities) is delivered
 2. Misrepresentation – where seller is aware of defects in merx and does not disclose this to the buyer
 3. Manufacturer’s liability – where seller is also the manufacturer and claims to be a specialist dealer and merx is defective
 4. Breach of warranty against eviction
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REQUIREMENTS FOR TRANSFER OF OWNERSHIP

•Ownership is transferred where contract of sale is concluded without any hitches

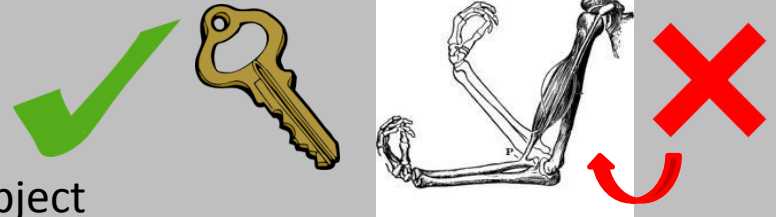
4 requirements:

1. Transferor must deliver the thing to the transferee – movable is delivered and immovable is registered
2. Both parties must have the intention that ownership should pass from the transferor to the transferee
3. Transferor must be in a position to transfer ownership – must be the owner of the thing
4. Purchase price must be paid or security given or credit must have been granted

How is a thing delivered?

5 FORMS OF DELIVERY

1. **Actual delivery** – physical handing over of the object
2. **Symbolic delivery** – something is delivered to the buyer which enables him to obtain control of the merx
3. **Delivery with the long hand** – entails the pointing out of the merx which is too large or heavy to handle, and it then being made available to the buyer
4. Delivery with the short hand – buyer is already in possession of the merx but does not hold it as owner
5. **Constitutum possessorium** – (opposite of short hand) seller retains possession of the merx but does so on behalf of the buyer





PASSING OF RISK – PERFECTA

• Risk of accidental damage/ loss of the merx AND any potential benefit/ profit accruing from the merx passes to the buyer AS SOON AS the contract is *perfecta* (even before the buyer becomes the owner)

CoS is *perfecta* when:

1. Merx is defined or identified – definite and ascertainable
2. Purchase price is ascertained or ascertainable via simple calculation
3. Where a contract contains a suspensive condition, this condition must have already been met

STATUTORY PROTECTION OF THE BUYER

Forms part of the protection measures which have been incorporated into law in order to protect against the exploitation of consumers

5 Acts which protect buyers

1. The Alienation of Land Act of 1981

Restriction on the receipt of consideration

Buyer's right to claim transfer

Buyer's right to revocation or termination

Consequences of void or terminated deeds of alienation

2. Sectional Titles Act of 1986

3. The Share Blocks Act of 1980

The form and content of the contract

Restriction on the receipt of consideration

Protection during existence of share block scheme

Consequences of void or cancelled contracts

4. Property Time- Sharing Control Act of 1983

The form and contents of the contract

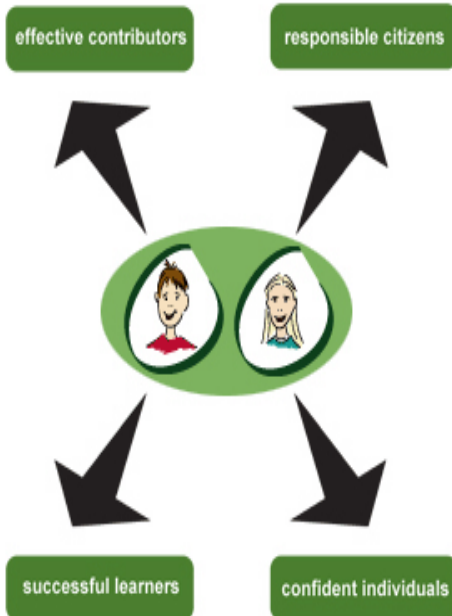
Restrictions on the receipt of consideration

Buyers right to terminate the contract

Consequences of void or cancelled contracts

5. National Credit Act of 2005

Instalment agreements



“In the long run, we shape our lives, and we shape ourselves. The process never ends until we die. And the choices we make are ultimately our own responsibility.”

~ Eleanor Roosevelt

SELF STUDY: Pages 160 -167

1. Read these pages
2. Follow the blocks above as headings
3. Summarise in NO MORE THAN 3 SENTENCES what this is/ means

CHP.14- CONTRACT OF LEASE

1. Letting and hiring of a movable/ immovable thing
 2. Letting and hiring of services
 3. Letting and hiring of work to be done
- Lease contracts in SA

Contract for the letting and hiring (lease) of a thing = “a reciprocal contract in terms of which one party (the lessor/ landlord) undertakes to make temporarily available to another party (the lessee/ tenant) the use of and enjoyment of a thing, wholly or in part, in return for the payment of a sum of money, or a share in the fruits of a property”

ESSENTIAL ELEMENTS OF A LEASE CONTRACT

1. An undertaking by the lessor to give the lessee the use and enjoyment of something (object of the lease)
2. Agreement between the lessor and the lessee that the lessee's right to use and enjoyment is to be temporary
3. An undertaking to pay rent (payment of sum of money or sharing the fruits of the property) in return of their use and enjoyment of the property

What does this mean?

DUTIES OF THE LESSOR AND LESSEE

Lessor

1. Duty to deliver the object of lease to the lessee

- Lessor must put the use and occupation of the object at the disposal of the lessee
- Eg. Property is not occupied by another person (in the case of lease of immovable property such as a house)

2. Duty to maintain the object of lease in proper condition

- Property must be delivered in condition which is reasonably fit for the purpose for which it will be used AND it must be maintained in that state
- Eg. Plumbing and electrical

3. The duty to ensure the lessee's undisturbed use and enjoyment

- = means that lessor must ensure that no person with a stronger, legal title interrupts the lessee in his enjoyment of the property let
- Lessor has no such duty where the lessee is disturbed by a person with no legal right, eg. A nuisance
- Similar to the sellers duty of warranty against eviction in the case of CoS

Lessee

1. The lessee's duty to pay the rent

- = essential element of the contract of lease (CoL) and cannot be excluded by the parties. Not even by agreement
- May however make the "rules" regarding payment by agreement, eg. Time of payment
- Sum of money OR fruits of the property let

2. The lessee's duty of proper use and care of the object of the lease

- Lessee may not use the object of the lease improperly or unreasonably
- Object must be maintained and where the purpose of the lease has been stipulated, it may only be used for such purposes
- Eg. Rent a dress as a ball gown and then use it as a tent to go camping with

3. The lessee's duty to return the property undamaged on termination of the lease

- On termination, the lessee must either return the object or vacate the premises
- Due to the temporary nature of the CoL
- Returned in the same condition in which it was received (except for deterioration caused by reasonable wear and tear)
- Eg. When you hire a car 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

RIGHTS OF THE LESSOR AND LESSEE

Lessor

1. Non- payment of rent (by the lessee)

- CoL usually contain a “forfeiture clause” which stipulates that in the case of non-payment the lessor may vacate the lessee and cancel the lease
- Similar to the *lex commissoria* (CoS)
 - Lessors tacit hypothec for unpaid rent: lessor has a hypothec over all the movables situated on the property as soon as the lessee does not pay rent for immovable property. This serves as security but only lasts as long as rent is not paid. Eg. All the cars, furniture etc. held on the property let
 - Automatic rent interdict by Magistrates’ Court: stops the lessee from removing any movable property from the property let

where there is no forfeiture clause...



2. Misuse (by the lessee) of the object of lease

- Where the lessee misuses the object of lease, the lessor may use contractual remedies
 - Misuse material → cancel and claim damages
 - Not material → damages
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3. Failure (of lessee) to return the property

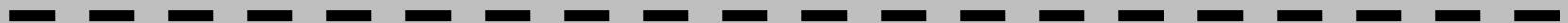
- Lessor has normal contractual remedies:
- Specific performance → to repair where the object has been damaged
—————→ To return where the object has not been returned at all
- Claim for damages → where the lessor has suffered loss due to failure to return
- NOT cancellation because this right only becomes enforceable after termination of CoL



Lessee

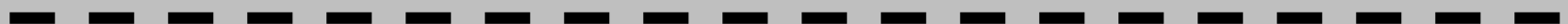
1. Failure (of lessor) to deliver

- = material
- Lessee may then:
 1. Regard contract as cancelled and claim damages; OR
 2. Claim specific performance and damages



2. Failure (of lessor) to maintain the property

- Lessee may cancel the lease and give up occupation
- May also claim specific performance and also damages



3. Breach of warranty against interference

- Where the lessor or another person who has a right over the property interferes with the lessee's use and enjoyment, the lessee may:
 1. Claim damages
 2. Cancellation (where interference is sufficiently material)
 3. Obtain an interdict to protect their rights

4. Subletting

- Lessee may sublet an object of lease to another person without the consent of the lessor **UNLESS** CoL prohibits this
- The sublessee may not be a person to whom the original lessor would object
- Eg. A convicted arsonist

5. Cession

- Lessee may cede their rights to any other person
 - In case of rural tenement, cession may only take place with written consent of lessor
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6. Assignment

- Assignment = cession of rights + delegation
- iow a completely new lessee is substituted for the old one



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7. Lessee's relationship with successors of lessor and "*huur gaat voor koop*"

- Lease remains in force on the death of the lessor (lessor's estate is then the lessor)
- Where the lessor (as owner) sells the property let, the buyer of the property is bound by the lease and cannot evict the lessee ito "*haar gaat voor koop*"



TERMINATION OF LEASE

CoL may be terminated by performance (most usual way)




But also by:

1. **Effluxion of time** – when time of lease has passed
2. **Notice** – lessor or lessee may terminate by notice where lease has been signed for indefinite time and is paid periodically (eg. monthly)
3. **Extinction of the lessor's title** – only where the parties intent that it should
4. **Death** – where it is so provided in the CoL or the will of the deceased person
5. **Insolvency**

contrary to what we said previously

Lessee's right to compensation for improvements

 improvements (useful / luxurious / essential) may be made BUT if the lessor does not accept the improvements they must be removed from the property let/ object of lease



CONTRACT OF LEASE MUST CONTAIN...

1. Names of the parties and their addresses
2. A description of the subject of the lease
3. The amount of the rental
4. The frequency of the rental payments
5. The amount of the deposit (if applicable)
6. The lease period
7. The obligations of both the tenant and the landlord
8. Any additional cost related to the rental

STATUTORY PROTECTION OF TENANTS

Constitution

Section 26

- a) everyone has the right to access to adequate housing and
- b) the State must take reasonable legislative steps to achieve the realisation of this right and
- c) no person may be evicted from their home or have their home demolished without a court order to that effect

Rental Housing Act of 1999

What information should be included in a CoL?

SELF STUDY: page 185



PROTECTION AGAINST EVICTION

1. The Extension of Security of Tenure Act of 1997
2. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act of 1998

SELF STUDY: page 187 - 188

How do these Acts strengthen section 26 of the Constitution?

CLASS TEST 5

29/8/2012

1. List the 5 rights of a buyer in terms of a contract of sale. (5 x ½: **2½**)
2. What is the English name for a *voetstoots* contract? (½)
3. List the 5 forms of delivery? (5 x ½: **2 ½**)
4. List any 2 of the three requirements for a contract of sale to be *perfecta*. (3 x ½: **1½**)
5. List and discuss the 3 essential elements of a contract of lease. (**3**)
6. List the 3 duties of a lessor in terms of a contract of lease. (**3**)
7. List and discuss 5 ways of terminating a contract of lease. (8 x ½ and 1 x1: **5**)
8. What does this mean? (2)
 - a) *Vis major*
 - b) *Huur gaat voor koop*

TOTAL: 20

MEMO

1. Preservation of the *merx* pending delivery ($\frac{1}{2}$); delivery of the *merx* ($\frac{1}{2}$); *merx* free from latent defects ($\frac{1}{2}$); protection by seller against eviction ($\frac{1}{2}$) and *actio empti* ($\frac{1}{2}$).
2. An “as is” contract ($\frac{1}{2}$)
3. Actual delivery ($\frac{1}{2}$); symbolic delivery ($\frac{1}{2}$); delivery with the long hand ($\frac{1}{2}$); delivery with the short hand ($\frac{1}{2}$) and *constitutio in rem* ($\frac{1}{2}$).
4. *Merx* is defined or identified ($\frac{1}{2}$) and/or purchase price is ascertained or ascertainable via simple calculation ($\frac{1}{2}$) and/or where a contract contains a suspensive condition, this condition must have already been met ($\frac{1}{2}$).
5. - An undertaking by the lessor to give the lessee the use and enjoyment of something (1)
 - Agreement between the lessor and the lessee that the lessee’s right to use and enjoyment is to be temporary (1)
 - An undertaking to pay rent (1)
6. The duty to ensure the lessee’s undisturbed use and enjoyment (1); duty to maintain the object of lease in proper condition (1) and duty to deliver the object of lease to the lessee (1).
7. - **Effluxion of time** ($\frac{1}{2}$) – when time of lease has passed ($\frac{1}{2}$)
 - **Notice** ($\frac{1}{2}$) – lessor or lessee may terminate by notice where lease has been entered for indefinite time and is paid periodically (eg. monthly) ($\frac{1}{2}$)
 - **Extinction of the lessor’s title** ($\frac{1}{2}$) – only where the parties intend that it should ($\frac{1}{2}$)
 - **Death** ($\frac{1}{2}$) – where it is so provided in the CoL or the will of the deceased person ($\frac{1}{2}$)
 - **Insolvency** (1)
- 8.a “an act of God” (1)
 - b “hire takes precedence over sale” (1)