

CONTRACT LAW *¹

1 GENERAL PRINCIPLES

Nature of Contracts

- 1.1 Generally a contract is a conscious agreement between two or more persons and the parties must communicate their intentions to each other. A contract must comply with additional essentials, namely: (a) the contract must be lawful, (b) the contracting parties must act within the limits of their contractual capacity, (c) the agreement must not be vague, (d) the parties must agree on the subject matter of the agreement and, (e) performance of the agreement must be possible. A conscious agreement is normally reached when one party accepts the offer made by the other party and the acceptance is conveyed to the offeror.
- 1.2 Contracts may be written, oral or be evidenced by the conduct of the parties and written contracts may even be evidenced by counterparts of the written document.
- 1.3 Most types of contracts do not have to be written, signed or witnessed.

Legal Validity of a Contract

- 1.4 Generally the validity of a contract is unaffected by unilateral mistake on the part of one party.
- 1.5 A mistake common to both parties generally results in the failure of the contract having legal validity.

Legislation

- 1.6 Various pieces of legislation have a material influence on contracts and regard must be had to all applicable legislation when drafting and enforcing a contract.
- 1.7 Two of the most recent notable pieces of legislation are the National Credit Act [34 of 2005] ("NCA") and the Consumer Protection Act [68 of 2008] ("CPA").
- 1.8 The NCA applies only to credit agreements as defined in the NCA. A credit agreement concluded in breach of the requirements of the NCA may be unenforceable, for example the lending by a bank of money to a customer,

*¹ **DISCLAIMER:** this text contains generalisations, is not exhaustive of all the relevant criteria or issues and there may be exceptions to that stated and does not constitute legal advice to the reader. The reader is strongly advised to consult an admitted attorney and not to rely on this text as being sufficient for the reader's purposes.

commonly referred to as "reckless lending". A lender is guilty of reckless lending if it fails to conduct a proper assessment of the consumers understanding and appreciation of the risks and costs of the credit, his rights and obligations in the credit agreement, his debt repayment history as a consumer under credit agreements and his existing financial means. The court may set aside the consumers obligation to pay the lender (in whole or in part) on the ground of reckless lending.

- 1.9 The CPA applies to all contracts in which the consumer is a natural person (including residential leases) and it regulates the activities of suppliers (both in respect of products and services) and creates rights for consumers.
- 1.10 Further examples of legislation affecting contracts are:
 - 1.10.1 the Alienation of Land Act, 68 of 1981, which states: "No alienation of land ... shall, ..., be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto ..."
 - 1.10.2 the General Law Amendment Act, 50 of 1956, which states: "No contract of suretyship ... shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety..."
 - 1.10.3 the Copyright Act, 98 of 1978, states that: "No assignment of copyright ... shall have effect unless it is in writing signed by or on behalf of the assignor...";
 - 1.10.4 section Labour Relations Act, 66 of 1995, states that: "If a transfer of a business takes place, ... the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment...";
 - 1.10.5 the Will's Act, 7 of 1953 as amended by the Law of Succession Amendment Act, 43 of 1992 prescribes certain formalities to give a will legal efficacy, for example, the will must be signed at the end thereof by the testator/testatrix in the presence of two or more competent witnesses and the witnesses must attest and sign the will in the presence of the testator/testatrix.

Remedies for Breach of Contract

- 1.11 A party to a contract, who is in breach, may be compelled by the other party to comply and give effect to the agreement and this may be enforced by an order of court, but the court has discretion, for example where performance is impossible the court will not order specific performance.
- 1.12 An innocent party may cancel a contract due to the breach or repudiation of the agreement by the other party, but the right to cancel must be exercised within a reasonable time after the innocent party becomes aware of the breach. Generally, cancellation of the contract terminates the obligations between the

parties with retroactive effect in that whatever was delivered in terms of that obligation must be returned.

- 1.13 An innocent party may apply to court for an interdict order to prevent a breach or threatened breach of a contract. Interdicts are commonly applied to prevent a breach of a restraint of trade obligation.
- 1.14 Whether the innocent party chooses to keep the contract alive or to cancel it, he is always entitled to claim from the party in breach whatever pecuniary [financial] damages he has suffered as a result of the breach. This means the innocent party has the right to be put in the position in which he would have been had there been no breach.

2 **TYPES OF CONTRACTS**

- 2.1 The types of contracts are virtually limitless. The more common types of contracts are mentioned, briefly, below, but they are by no means exhaustive.

Restraint of Trade Agreements

- 2.2 Restraint of trade agreements fall into two main categories, firstly where the seller of a business (including its goodwill) undertakes not to carry on a similar business in competition with the purchaser, secondly where the employee agrees with his employer not to compete against him.
- 2.3 The general principle is that a restraint of trade agreement may be enforced if it is reasonably necessary to protect the interests of the parties, is reasonable both in area and time and is not against public policy.
- 2.4 An employer may with a restraint protect its proprietary interests in trade connections, customer contacts and trade secrets. In general there is a duty on the employee to honour restraint of trade clause contained in employment contracts after termination of employment and the freedom of individuals to conclude contracts and to agree to restraints of trade is not excluded by the Constitution but the enforceability of such contractual restraints will depend upon whether or not they are in the public interest and consistent with the Constitution for not unfairly eroding the employees right to choose a profession.
- 2.5 A purchaser of a business may restrain the seller not to carry on a similar business in competition with the purchaser, or have the seller agree not to "solicit or canvass" any customers of the business for a certain period. In the absence of such an agreement or after a restraint has expired, the seller is generally free to open up a new business in competition of the buyer; he may even do so with his former customers who, out of their own will, come to the sellers new business.
- 2.6 However, the seller is not permitted in law to take back the goodwill he has sold in an improper manner. This will be the case if he directly infringes the

purchasers goodwill, that is, where he avails himself of his special knowledge of his former customers and directly solicits or appeals to them, for example by invitations. The duty of the seller is not to deprive the buyer of the goodwill which he has paid for.

Sale of Land

- 2.7 As mentioned above, sale of land is subject to the Alienation of Land Act, 68 of 1981 and the sale must be embodied in a written document and be signed by the parties thereto.
- 2.8 The Deeds Registries Act, 47 of 1937 and its regulations are the primary sources by which land is transferred from one person to another.
- 2.9 The sale agreement must accurately describe the property being sold and list all latent defects to the property known to the seller, notwithstanding the inclusion of a voetstoots clause.
- 2.10 In respect of improved property the sale agreement must – in terms of the Occupational Health and Safety Act, 85 of 1993 - require the seller to provide the purchaser with an Electrical Installations Certificate of Compliance and if an electrical fence was installed on the property after 1 October 2012 or an addition or alteration was made to the electrical fence after 1 October 2012 it will also require a certificate of compliance.
- 2.11 The purchaser is liable for transfer duty, but where the property is purchased as a going concern – as defined in the Value-Added Tax Act, ... - the transaction may, if the necessary requirements are met, be exempt from transfer duty and value-added tax.

Sale of Business or other Moveable Asset

- 2.12 A contract of purchase and sale is an agreement in terms of which the seller undertakes to deliver possession of the thing sold to the purchaser in return for the purchasers undertaking to pay the agreed price. The object of the sale may be corporeal or incorporeal.
- 2.13 Even if the thing is still to come into existence in the future it may be sold, but it must exist or be capable of existence in the future.
- 2.14 A person may not buy his own thing.
- 2.15 The price must be in money, if not it is not a purchase and sale agreement.
- 2.16 The sale price must be fixed or ascertainable, but if no price is fixed, it may often be clear from the surrounding circumstances that it is the parties' intention that the price which is current or usual for a thing is to be paid.

- 2.17 Until the thing is delivered, the seller has the obligation to take care of it like a reasonable man.
- 2.18 There is no obligation on the seller to transfer ownership of the thing, but it is an implied term that the seller guarantees the purchaser against eviction of the thing sold.
- 2.19 If the seller has guaranteed the absence of defects in a thing sold and then delivers a defective thing, he is guilty of a breach of contract and liable accordingly. Similarly, if the Seller has intentionally concealed from the buyer the presence of defects known to him, he is guilty of fraudulent misrepresentation and liable accordingly and notwithstanding a voetstoets clause. In both instances, the seller will have to pay the purchaser consequential damages.
- 2.20 Where a defective thing is delivered but the seller has not given any warranties or made any representations, the buyer is normally not entitled to consequential damages. The foregoing is without prejudice to the purchaser's other legal or contractual rights.
- 2.21 The seller of a business should in the sale agreement provide the purchaser – in addition to a restraint of trade undertaking - with various warranties, such as – but not limited to – the seller's warranty that as at the effective date of the sale all statutory payments will have been made in full to SARS and that the seller's financial statements are true and correct. The agreement must cater for legislative requirements or matters such as, but not limited to, value-added tax, the transfer of the seller's employees to the purchaser in terms of section 197 of the Labour Relations Act, 66 of 1995. Applicable conditions precedent must be included, such as, but not limited to, the directors of the parties approving the agreement, the purchaser's approval of the seller's financial statements [normally the agreement includes a due diligence clause to afford the purchaser an opportunity to inspect the seller's books of account], the transfer of suppliers' agreements and, if applicable, Competition Board approval.
- 2.22 A sale of shares agreement will deal with many of the aspects referred to in regard to the sale of a business [in paragraph 2.21] albeit other legal considerations are of application as the sale relates to shares and the cession of the seller's loan account to the purchaser.

Letting and Hiring

- 2.23 A contract of letting and hiring of property is one whereby the lessor undertakes to grant the lessee the temporary use or enjoyment of a thing for payment of rent.
- 2.24 The thing forming the subject matter of the hire must be agreed and so must the amount of the rent and the date of payment thereof. The rent must be generally in money. The amount of the rent must be fixed or ascertainable.

- 2.25 No formalities are required for the formation of a lease, save that a long lease [i.e. a lease which is not less than ten years in duration] must be registered against the title deeds of the leased land to be effective against the lessor's creditors.
- 2.26 Subject to the terms of the lease agreement, the Lessor has the following duties:
 - 2.26.1 he must deliver the thing let to the lessee and allow him free possession and use of the thing;
 - 2.26.2 the lessor has the duty to repair the thing let and to keep it in a state of repair, reasonable wear and tear excluded;
 - 2.26.3 the lessor must ensure that the lessee has possession and undisturbed use of the thing let;
 - 2.26.4 when the lease terminates, the lessor is under no obligation to compensate the lessee for certain improvements effected to the thing let.
- 2.27 The lessee has the obligation:
 - 2.27.1 to pay the rent on due date;
 - 2.27.2 to look after the thing let and to return it on the termination of the lease in the same condition, reasonable wear and tear excepted;
 - 2.27.3 to return the thing let to the lessor at the end of the lease for the exclusive use and enjoyment of the lessor.
- 2.28 Unless the lease agreement precludes it, the lessee may sublet the thing let.
- 2.29 The CPA has a significant impact on residential leases , particularly affecting the rights of the landlord, and should one provision in the lease be unlawful, it may render the entire lease agreement invalid.
- 2.30 Failure to comply with the CPA may result in an administrative fine for the landlord up to the greater of 10% of the landlord's annual turnover or R1 million.

Employment Agreements

- 2.31 An employee must in the contract be distinguished from an independent contractor so as to avoid confusion when applying applicable statutory provisions.
- 2.32 The individual employment relationship between an employer and an employee is not determined only by common law principles, such as the doctrine of vicarious liability of an employer for the conduct of an employee is of

application, but by reference to various statutory enactments, resulting in restrictions being imposed on the contractual freedom of the Parties.

- 2.33 An employment agreement should contain the following essential elements:
 - 2.33.1 the intention of the Parties to conclude a contract of employment;
 - 2.33.2 the existence of a relationship of authority;
 - 2.33.3 the remuneration of the employee;
 - 2.33.4 the period of the contract of employment; and
 - 2.33.5 the rendering of personal services by the employee.
- 2.34 The Copyright Act 98 of 1978, provides as one of four exceptions dealing with copyright that the copyright work made in the course and scope of the author's [employee's] employment vests in the employer. However, it is useful to remember that where the copyright vests, say in a consultant or another person, he or she will be the owner of the copyright and the relevant consultant agreement or the applicable agreement must cater for an actual assignment of the copyright to the person paying the consultant or other person for their services.
- 2.35 The employer's most important duty is to treat the employee fairly and to compensate the employee for his services. If the employer does not perform these and various other duties towards his employee, he is guilty of a breach of contract and in certain circumstances of an unfair labour practice. The prejudiced employee will be entitled to certain remedies, the foremost being cancellation of the contract of employment and a claim for compensation, or reinstatement in the event of an unfair dismissal.
- 2.36 The employer and the employee may agree that, apart from a basic salary or wage, an employer may also be entitled to fringe benefits such as subsistence, travel and pension allowances and that an employee may be paid a bonus if the employee achieves certain product activity targets. An employee will be entitled to over-time pay if the employee works more than the prescribed number of hours.
- 2.37 Unless the contract of employment permits the employer to alter the employees status and the employer, for example appoints an employee as a mechanic to repair motor vehicles and after three months the employer instructs the employee to operate the petrol pumps for four weeks the employer may be guilty of a breach of contract as the employer's action clearly was not in accordance with the intention of the parties when the contract was concluded, therefore no consensus exists in this circumstance.
- 2.38 In general, an employer is entitled to dismiss an employee:

- 2.38.1 if it is just and fair to dismiss the employee by virtue of serious misconduct, incapacity or incompetence; or
 - 2.38.2 if the employees conduct constitutes a material breach of the employment contract; and
 - 2.38.3 the prescribed procedural requirements have been complied with.
- 2.39 In general:
- 2.39.1 there is a duty on the employee to honour a restraint of trade clause contained in employment contract after termination of employment and the freedom of individuals to conclude contracts and to agree to restraints of trade is not excluded by the Constitution but the enforceability of such contractual restraints will depend upon whether or not they are in the public interest and consistent with the Constitution for not unfairly eroding the employees right to choose a profession;
 - 2.39.2 an employer is not entitled to benefit from a contract of employment which is unfairly terminated by him and which contains a restraint of trade clause. In these circumstances, an employer may not be entitled to rely on the existence of a restraint of trade clause contained in the contract and to enforce it against the employee.
- 2.40 No person may employ or provide any work to any child under the age of 15 years as this is precluded under the Child Care Act 74 of 1983.
- 2.41 Where a person is engaged for his specific skills or a particular project then the parties should execute a consultancy agreement or a fixed term agreement, as the case may be.

Non-Disclosure Agreement (“NDA”)

- 2.42 Generally an NDA is described as a “Confidentiality and Non-Disclosure Agreement”.
- 2.43 An NDA is particularly required by the seller of a business, the seller of shares or the seller/licensor of software to protect its confidential information/business secrets regarding the thing being sold or licensed – as the case may be - but this list is not exhaustive of the situations which require an NDA. An NDA is imperative if a prospective purchaser of a business or product/software wishes to conduct a due diligence thereof.
- 2.44 The general elements of an NDA are:
 - 2.44.1 the identity of the parties;
 - 2.44.2 the NDA must specify the type of confidential information a party will disclose to the other and the purpose for which such confidential information will be

used and confirmation that each party retains its own copyright to its own confidential information, precluding the other party from using such confidential information for any other purpose;

- 2.44.3 the circumstances under which the receiving party may disclose the disclosing party's confidential information to identified persons;
- 2.44.4 the penalty or sanction for the receiving party's breach of its confidentiality obligations owed to the disclosing party;
- 2.44.5 the duration of the NDA and the circumstances under which the NDA may be terminated by either party.

Information Technology and Copyright Agreements

- 2.45 The Copyright Act states that no copyright may subsist otherwise than by virtue of the Copyright Act but the Copyright Act does not contain a comprehensive definition of the term "copyright".
- 2.46 In all information technology agreements ("IT"), including licensing of software and support agreements of paramount importance is the protection of the licensor's copyright in the software and the support services.
- 2.47 The ownership of copyright vests in the qualified author or co-author of an original work as recognised by the Copyright Act, which enables the author or co-author, as the case may be, to prevent unauthorised copying of the work in question, but there are certain anomalies, for example:
 - 2.47.1 in the case of cinematograph film or sound recording, the author is the person who made the arrangement for the making of the work;
 - 2.47.2 in the case of a computer program (software) the author is the person who exercises control over the making of the program;
 - 2.47.3 in the case of a photograph the author is the person who is responsible for the composition of the photograph;
 - 2.47.4 in respect of a broadcast, the author is the first broadcaster and in respect of a program – carrying signal, the author is the first person emitting the signal to at satellite.
- 2.48 There are four exceptions regarding ownership of copyright being vested in the author or co-author, as the case may be, of the work, namely:
 - 2.48.1 where the copyright is initially owned by the State;
 - 2.48.2 where a literary or artistic work is made by an author in the course of his or her employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship;

- 2.48.3 where a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a cinematograph film, the making of a sound recording and who pays or agrees to pay for it in money or money's worth;
- 2.48.4 here a person in the course of his employment by another person under a contract of service or apprenticeship produces copyright work [see paragraph 2.34].