

What is a contract?

* A contract is an agreement between two or more people who have the intention of creating legal rights and obligations between them.

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Why are contracts important?

* They govern the relationships, interactions and set expectations; and govern how disputes are handled.

THE LAW OF CONTRACT: CAPACITY

1. FORMATION OF A VALID CONTRACT

When we are starting to think about the law of contract we want to look at what are the requirements for the contract to be binding between the parties that enter into this agreement. In other words what do the parties have to ensure that they do to make sure that there is a contract that can be enforced lawfully.

Should be able to name all 8 requirements in a test

All the requirements must be met, if one is missing then there will not be a valid contract (ie void) and the courts will refuse to enforce it.

Requirements are the following:

1. **The parties must have contractual capacity**
2. The parties must have a serious intention to contract (offer &
3. The parties must communicate their intention to each other) acceptance
4. The parties must be of the same mind, ie no misunderstandings or mistakes
5. The agreement must be lawful
6. Performance of the contractual obligations must be possible
7. The agreement must comply with all the formalities required by law for that particular kind of contract.
8. The agreement must be certain in its terms.

We are going to be looking at each one of these requirements in more detail over the next few weeks.

The first one we will deal with is contractual capacity.

What is capacity? When we are thinking about capacity we want to think about whether the person has the ability to enter into a contract in the first place. The next natural question is why would someone not have the ability to enter into a contract? It is important to remember that the underlying idea in contracting is reaching consensus. We want to know that the parties have come to an agreement. And not everybody has the ability to enter into an agreement – well at least not a legally binding agreement. The categories of persons that cannot enter into an agreement are persons like children, married persons (in some instances), persons that have been declared by a court to be insolvent (they cannot manage their own financial estate, for one or other reason).

Need to distinguish contracts from social arrangements.

What are social arrangements?

* Another name is a gentlemen's agreement.

* Not legally binding agreement.

Examples of contracts:

* Contract of sale

* Contract of lease

* Contract of employment

1.1 Contractual Capacity

General rule is that every legal person has full contractual capacity.

However, there are exceptions. Certain people have limited contractual capacity. The law places restrictions on their capacity to enter into valid and binding legal contracts.

People with limited capacity are:

Minors, married persons, mentally ill, insolvents and intoxicated persons.

(a) MINORS

- Who Is A Minor ?

A minor has limited contractual capacity.

A minor is an unmarried person below the age of 18 (which is the age of majority) - *Children's Act 38 of 2005 which came into effect in June/July 2007.*

Until 2007, age of majority was 21.

Major is a person with full contractual capacity.

There is one way in which a minor can become a major before the age of 18:

Marriage: A minor becomes a major on marriage regardless of his or her age.

So once married you are an adult have full contractual capacity, even if only 16.

If the marriage is dissolved by death or divorce before the person turns 21, they remain a major. (*Marriage Act 25 1961 Section 24(2)*).

As regards all other minors i.e. those who have not been married, they have limited or no contractual capacity.

- Effect Of An Assisted Contract

A duly assisted contract is:

- In the case of an infans, one made on behalf of the minor
- In the case pupillus it is a contract made by the minor with the assistance of the guardian or on the minor's behalf by the guardian.

The effect of these duly assisted contracts is the that the minor is bound and liable in terms of the contract not the guardian.

So it is a fully valid and enforceable contract against the minor. (*even an infans is bound*). So note, the guardian incurs no personal liability at all.

Do simple example, maybe gym membership, 16 year old, and monthly fees.

Marshall v National Wool Industries Ltd 1924 OPD 238 (Sharrock pg 48)

M, a minor (pupillus), bought shares in National Wool Ltd. M signed the application form in the presence of his father and with the full knowledge of his father. M failed to pay the balance of the purchase price for the shares. National Wool Ltd sued M junior for the price. M junior claimed that as he was a minor, he was not liable. So National Wool Ltd sued the father instead. In the second case, the action failed, as the court held that the minor is personally liable on a duly assisted contract and not the guardian.

The only time the minor will not be bound by a duly assisted contract is if the contract was inherently prejudicial. The prejudice however must be substantial and not trivial.

Note the contract is valid and the minor still needs a court order to get out of it.

Wood v Davies 1934 CPD 250 Just do eg on similar modern terms.

The father of Wood bought a house on Wood's behalf from Davies.

The price was £1750, payable in instalments. On reaching majority, Wood sued Davies for cancellation of the sale and return of the instalments paid. The court found that the contract was substantially prejudicial to Wood for the following reasons:

1. *Price was excessive, it exceeded the true value by £200*
2. *It was unnecessary as Wood did not need a house*
3. *Contract contained onerous clauses*

Court held that Wood was entitled to cancellation and the parties must restore to each other what had been given under the contract (restitution).

This is known as cancellation and restitutio in integrum (each give back to other what received under the contract and both parties are restored to the position they were in before the contract.

- **Effect Of An Unassisted Contract – Common Law**

If an infans contracts without assistance, the contract is void – never existed, etc

If a pupillus contract without assistance, the contract is said to be a limping contract .

On the minor's side he has no contractual obligations. On the adult's side, he has contractual obligations.

It does not matter if the contract is to the minor's benefit, he will still not be bound under the law of contract.

What the limping contract means in practical terms, is that the minor can choose (with the assistance of the guardian) whether to enforce the contract ratification or not to enforce the contract (repudiation).

The choice lies solely with the minor. The other party (adult) is bound by the minor's

decision.

If the minor (assisted by guardian) chooses not to enforce the contract (repudiation) he will not be bound, and neither will the other party (adult)

The effect is as if the contract never existed.

Note: never use the term cancelled here. This is incorrect, you cannot cancel a contract that is invalid, there is nothing to cancel, it never existed. Remember, as far as the minor is concerned, there never was a valid contract. So the contract is repudiated (not cancelled) and the effect is that it never existed.

The minor is entitled to recover whatever he has given under the contract.

The other party to the contract can also claim back what they have performed under the law of unjustified enrichment (*general action- see later*). Note that as the contract never existed, there was no legal obligation for the adult to perform, so whatever he gave under the contract is now unjustified enrichment.

Minor buys 2nd hand motorbike from John unassisted. No ratification as hiding it from parents - crashes bike - Value by which enriched at time of being sued- Other party gives back the full cash.

If the minor chooses to enforce the contract with assistance of guardian, this is called ratification.

The other party is bound by the contract and has no choice but to perform and so is the minor.

Ratification can be express or implied - explain

The effect of ratification is that the contract is deemed to be valid from the time it was originally entered into.

Example – Motorbike – parents see him using it and says bought it from John. In other words, if a minor entered into contract unassisted on 3 March, and it is ratified on the 3 August, the contract will be deemed to have been valid from 3 March.

Stuttaford v Oberholzer 1921 CPD 855

O, a few months before turning 21, bought a motorbike. In terms of the agreement, the purchase price was payable in instalments. The contract was entered into without the consent of his guardian. After O turned 21, he continued to use the bike. O, however failed to pay the balance of the purchase price which was outstanding. The seller the sued him for the amount owing. O claimed that he was not liable on the contract because he was not assisted.

The court held that by using the motorbike after he had turned 21, O had ratified the contract. He was therefore liable to on the contract and had to pay the outstanding purchase price.

Again, in this situation where the contract has been ratified the effect is as though the contract was valid from the time it was originally entered into.

(b) MARRIED PERSONS

In South Africa, there are three types of property regime that can govern your marriage:

The way you are married affects your contractual capacity and your property rights.

Property Regimes

1. In community of property (ICOP)
2. Out of community of property (OCOP)
3. Out of community of property with the accrual (accrual)

In order to be married OCOP or with the accrual, the parties must enter into an antenuptial contract (ANC). This is signed before a notary public and two witnesses.

If there is no ANC, the marriage will automatically be in community. This applies regardless of whether the marriage is a civil one or customary one. (since Recog of Customary Marriages Act, but can in that case be OCP etc if have ANC.)

- **MARRIAGES IN COMMUNITY OF PROPERTY (ICP)**

(a) Effect of a marriage ICP

1. The assets belonging to each spouse before the marriage are merged into a single estate upon marriage and they become joint owners of each other's assets. Example

Similarly, the liabilities of each spouse before the marriage become joint liabilities.

2. Property acquired by the spouses during the marriage becomes jointly owned.

Liabilities incurred during the marriage become joint liabilities.

3. Upon dissolution of the marriage by death or divorce the estate is divided and each is entitled to half. Briefly explain deceased estates.
4. Insolvency

i. Contractual capacity of spouses

This is all in terms of the Matrimonial Property Act 1984.

General rule: both spouses have full capacity to contract with regard to the joint estate, without the consent of the other spouse.

But there are certain acts for which consent is required:

Before we look at this, let's first define certain terms:

Alienate:	sell, mortgage, lease out, give away
Cede:	manner of alienating usually used for incorporeal assets
Pledge:	give something as security (example) watch for cash

Let's look at the incidents of consent, each in turn:

Formal consent

Formal consent is a written consent given for each separate act and witnessed by two witnesses.

In terms of the NCA (National Credit Act), formal consent is required for the following:

1. Alienate or mortgage immovable
2. Enter into as a credit receiver, a credit agreement in terms of the National Credit Act 2005, eg bank/ student loan, pharmacy account, Woolies card, credit card etc
3. Bind him/herself as surety for the types of loans set out above.

In point 2 above consent can be given by ratification – which means that the consent can be given after the contract has already been entered. But it must still be in writing before two witnesses.

Consent is not required for 2 and 3 if the act is done in the ordinary course of that spouse's trade or business or occupation.

- Written consent

This is consent in writing. Do not need two witnesses and can be given as a general consent.

1. Alienate cede or pledge any shares, stock, insurance policies, fixed deposits, or any investments in a financial institution. These are investment assets.

This can be a general consent, so if you own 1000 shares and want to sell 100 shares to 10 different people, you only need one general written consent, not a separate consent for each sale.

Two main exceptions to rule that need consent to alienate investment assets:

- Don't need consent to sell securities (ie shares) listed on JSE (all listed companies are public, but not all public companies are listed)
 - Don't need consent to deal with a deposit held in one's own name at a bank or building society.
2. Alienate or pledge jewellery, coins, paintings etc ie items held as capital assets.
 3. Withdraw money held in the name of the other spouse at bank, building society or post office.

Consent for all can be given by ratification but then still in writing.

Consent for point 1 above is not required if this is done in line with or in connection (ordinary course of) with the spouse's trade or business. For example if the spouse has property development company and constantly buys land to develop it – then it would not be necessary for the spouse to get consent.

- Informal consent

This is a verbal consent and can be given as a general consent.

1. Alienating or pledging household furniture and effects
2. Receiving money due to the other spouse as a result of:
 - their trade, bus or occupation or salary or pension
 - inheritance, donation , bursary or prize
 (*this is very summarised, see act and Sharrock*)
3. Large donations from joint estate

Example also explain where overlap then need more strict consents referred to above

Consent can be given by ratification.

REMEMBER IF A CERTAIN ACT IS NOT LISTED ABOVE THEN NO CONSENT IS NEEDED FOR THAT ACT.

- Transactions made without consent.

General rule: if a spouse enters a contract without the **required** consent, the contract is null and void.

However, there is an exception:

If the third party does not know or could not reasonably have known that the required consent had not been given, then the contract is valid.

This is to protect innocent third parties.

If the contracting spouse knew that he or she would not get consent and the estate has suffered a loss, then an adjustment will be made in favour of the other spouse upon

dissolution.

Example: Jill and John are married ICOP. John sells some jewellery, that Jill bought. That keep it as a capital asset. He did not have Jill's consent and he knew that she would never consent. He provides the buyer a written consent signed by Jill, but he has forged her signature.

The true value of the jewellery was R1000, but John sold it for R500. Upon dissolution Jill will be entitled to R250, this is the amount by which she has been prejudiced.

She should have got her half share ie R500, but instead only got R250, so suffered a loss of R250. So upon dissolution she will get an additional R250.

Last point on ICOP – if the other spouse unreasonably withholds consent, or of consent cannot be obtained, eg, spouse in a comma, then the court can order that no consent is required.

16 Want of consent, and suspension of powers of spouse

(1) When a spouse withholds the consent required in terms of subsection (2) or (3) of section 15, or section 17, or when that consent can for any other reason not be obtained, a court may on the application of the other spouse give him leave to enter into the transaction without the required consent if it is satisfied, in the case where the consent is withheld, that such withholding is unreasonable or, in any other case, that there is good reason to dispense with the consent.

(2) If a court is satisfied that it is essential for the protection of the interest of a spouse in the joint estate, it may on the application of that spouse suspend for a definite or an indefinite period any power which the other spouse may exercise under this Chapter.

17 Litigation by or against spouses

(1) A spouse married in community of property shall not without the written consent of the other spouse institute legal proceedings against another person or defend legal proceedings instituted by another person, except legal proceedings-

- (a) in respect of his separate property;
- (b) for the recovery of damages, other than damages for patrimonial loss, by reason of the commission of a delict against him;
- (c) in respect of a matter relating to his profession, trade or business.

(2) A party to legal proceedings instituted or defended by a spouse may not challenge the validity of the proceedings on the ground of want of the consent required in terms of subsection (1).

(3) If costs are awarded against a spouse in legal proceedings instituted or defended by him without the consent required in terms of subsection (1), the court may, with due regard to the interest of the other spouse in the joint estate and the reason for the want of consent, order that those costs be recovered from the separate property, if any, of the first-mentioned spouse and, in so far as those costs cannot be so recovered, that they be recovered from the joint estate, in which case the court may order that upon the division of the joint estate an adjustment shall be effected in favour of the other spouse.

(4) (a) An application for the surrender of a joint estate shall be made by both spouses.

(b) An application for the sequestration of a joint estate shall be made against both spouses: Provided that no application for the sequestration of the estate of a debtor shall be dismissed on the ground that such debtor's estate is a joint estate if the applicant satisfies the court that despite reasonable steps taken by him he was unable to establish whether the debtor is married in community of property or the name and address of the spouse of the debtor.

[Sub-s. (4) substituted by [s. 11](#) of [Act 122 of 1993](#).]

(5) Where a debt is recoverable from a joint estate, the spouse who incurred

the debt or both spouses jointly may be sued therefor, and where a debt has been incurred for necessities for the joint household, the spouses may be sued jointly or severally therefor.

CHAPTER IV

GENERAL PROVISIONS (ss 18-38)

18 Certain damages excluded from community and recoverable from other spouse

- Notwithstanding the fact that a spouse is married in community of property-
- (a) any amount recovered by him or her by way of damages, other than damages for patrimonial loss, by reason of a delict committed against him or her, does not fall into the joint estate but becomes his or her separate property; he or she may recover from the other spouse damages in respect of bodily injuries suffered by him or her and attributable either wholly or in part to the fault of that spouse and these damages do not fall into the joint estate but become the separate property of the injured spouse.

[S. 18 substituted by [s. 21](#) of [Act 66 of 2008](#).]

19 Liability for delicts committed by spouses

When a spouse is liable for the payment of damages, including damages for non-patrimonial loss, by reason of a delict committed by him or when a contribution is recoverable from a spouse under the Apportionment of Damages Act, 1956 ([Act 34 of 1956](#)), such damages or contribution and any costs awarded against him are recoverable from the separate property, if any, of that spouse, and only in so far as he has no separate property, from the joint estate: Provided that in so far as such damages, contribution or costs have been recovered from the joint estate, an adjustment shall, upon the division of the joint estate, be effected in favour of the other spouse or his estate, as the case may be.

20 Power of court to order division of joint estate

(1) A court may on the application of a spouse, if it is satisfied that the interest of that spouse in the joint estate is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse, and that other persons will not be prejudiced thereby, order the immediate division of the joint estate in equal shares or on such other basis as the court may deem just.

(2) A court making an order under subsection (1) may order that the community of property be replaced by another matrimonial property system, subject to such conditions as it may deem fit.

• MARRIAGES OUT OF COMMUNITY OF PROPERTY (OCOP)

Its also possible for spouses to get married out of community of property. Where they don't have a joint estate and largely maintain contractual capacity.

(a) Effect of a marriage (OCOP)

1. Each party retain as their own separate property what they acquired before the marriage and what they acquire during the marriage.
2. Each party remains liable for debts which they incurred before and during the marriage. They are not liable for each other's debts.
3. Upon dissolution of the marriage, each party retains their own separate assets and neither is liable for the other's debts.

Neither party has any claim against the other party's estate (except maybe maintenance but no capital claim)

(b) Contractual capacity of spouses married OCOP

1. Each party has unrestricted power with regard to their own estate (ie their own assets)
2. Neither party has power with regard to the other party's estate.
3. They are not liable for debts incurred by the other spouse, with one exception:

They are jointly and severally liable for debts incurred by each of them in respect of household necessities.

So if one spouse buys a fridge, and fails to pay, then the other could be liable for the amount as this is a household necessary.

What qualifies as a household necessary depends on the means of the parties, but will always include food, clothing, medical and dentals etc.

(C) INSOLVENTS

An insolvent is somebody whose estate has been sequestrated by the High Court in terms of the Insolvency Act – well the court has declared that their liabilities exceed their assets

If someone has not actually been sequestrated by the court, then he is not really an insolvent in the legal sense and his contractual capacity is not limited. This goes without saying if you think about it. There are many people who have loans and are paying them off over a period of time – they don't have enough assets in their estate to cover all of those liabilities, but they are not legally insolvent.

Once someone is sequestrated by the court, (ie insolvent) his estate (assets and liabilities) is placed in the hands of a trustee. This is known as the insolvent estate. He no longer has ownership of assets. The trustee must deal with them for the benefit of creditors.

General rule is that the insolvent has full contractual capacity and may enter into contracts without the assistance of his trustee.

Three major exceptions:

1. Insolvent may not enter into a contract in terms of which he disposes of assets in the insolvent estate.
Why not? Property does not belong to him anymore.
2. Insolvent may not, without the written consent of the trustee, enter into contract which adversely affects the estate.
3. Insolvent may not, without the trustee's consent be involved in the business of a trader who is a general dealer or manufacturer

A trader includes any business in which goods are bought and sold, exchanged or manufactured. It also includes building operations, or any business involving public entertainment eg hotels or restaurants.

So this includes almost everyone. But the definition is narrowed because the trader must be a general dealer or manufacturer.

A general dealer is someone who trades at a fixed place in all kinds of wares and not just one kind. So for example, a restaurant is not a general dealer because it only deals in food, but the corner shop/cafe is.

*A manufacturer is a trader who operates any kind of fabricating works:
So this would include a tailor, dress designer, or builder.*

Contracts in contravention of the above are **voidable at instance of trustee (not void).**

This means the contract is valid until the trustee chooses to cancel it and he may or may not choose to do so

(D) MENTAL INCAPACITY ARISING FROM MENTAL ILLNESS OR INTOXICATION

Mental Illness

All people are presumed to be sane unless they have been declared mentally ill in by the High Court (in terms of the Mental Health Care Act 2002).

Therefore, if someone has not been declared mentally ill, their contracts are presumed to be valid. The person who wants to get out of the contract must prove mental illness. I.e, it must be proved that at the time of contracting, the person wither could not understand the transaction or was motivated by an insane delusion.

On the other hand, if someone has been declared mentally ill, then the contract will be presumed to be null and void.

The burden is on the party wanting to enforce the contract to prove that the mentally ill person was having a lucidum intervallum (explain) *or that he could understand the nature of the transaction and not motivated by an insane delusion.* Then the contract can be valid.

(E) JURISTIC PERSONS

What is a juristic person? A juristic person is an artificial entity with no physical existence, upon which the law confers legal personality, that is the capacity to acquire rights and incur obligations.

How is the capacity of a juristic person determined?

The capacity of a juristic person is determined by statute as well as certain constitutive documents. The best example of juristic person is a company.

- **Company**

A company has the same legal powers and capacity as a natural person to the extent that can possess such powers. Think about the fact that a company can enter into contract in its own name and does not necessarily bind the “owners” of the company.

More on this later when we talk about business entities.

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