By freedom of contract is meant that the parties are free to decide: whether or not to contract; with whom to contract; and on what terms to contract. The creation of a contract is the result of a free choice, without external interference, and in the process of contracting the parties are sovereign. Accordingly, once a court is satisfied that the contract was freely entered into and that its terms are not immoral, illegal or contrary to the public interest, it should uphold and if necessary enforce the contract: *pacta sunt servanda*. In the famous words of an English judge\(^1\), which have often been quoted with approval by the South African courts:\(^2\)

“If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by courts of justice.”

The concept of good faith, or *bona fides*, has deep roots in our legal system. It played a significant role in the development of the Roman law of contract and helped breathe an equitable spirit into the body of the civil law throughout the course of the ensuing centuries. In recent times, there has been much debate about the role it might play in the modern law of contract, as a counterweight to the dominant idea of freedom of contract, and as a means of developing a doctrine of unconscionability to ensure greater fairness in contractual relations.

Provided the other requirements for validity are met, a contract is formed when the parties reach agreement on all the material terms of the contract. The process of reaching agreement may be brief or drawn out, depending on the amount of haggling that takes place. It involves mutual declarations of intention by the parties. These declarations are usually analysed in terms of the rules of *offer and acceptance*. Thus: A makes an offer to B by proposing certain terms on which she is prepared to contract with B. B either accepts these terms or rejects them. If B proposes some modification to the terms, he makes a counter-offer, which A must accept or reject. This process of bargaining continues until consensus is reached by one party unequivocally accepting the terms proposed by the other.

As a general rule, the parties may express their intentions in any form whatsoever: in writing, orally, or by conduct (for
example, by a nod of the head or by raising a hand at an auction). Even silence can signify agreement, but only in highly exceptional circumstances (for example, where previous dealings between the parties make it reasonable to interpret a failure to respond as the acceptance of an offer). Thus a contract may be formed tacitly, without any words being used by either party (for example, buying groceries in a supermarket), or, more commonly, the offer may be in writing, and the acceptance tacit (for example, driving into a parking garage that has a prominent sign outside declaring parking to be at the owner’s risk).

South African courts have recognised that the principle of good faith applies to precontractual negotiations, but the implications of this have still to be worked out. No doubt, parties are still free to break off negotiations for any reason whatsoever. Generally they will not incur delictual liability for doing so since a party who incurs expenditure, relying upon a representation that a contract will be concluded, usually takes a calculated business risk. Nevertheless, it is not too difficult to envisage situations where such reliance might in fact be reasonable, in which case withdrawal from the negotiations might come at a considerable cost in damages.

1. A material mistake will usually be reasonable if caused by a misrepresentation on the part of the contract asserter (or someone for whose acts he or she may be legally liable). For a representation to render a mistake reasonable, it must be unacceptable in the eyes of the law. In this regard, it is sometimes said that the representation must be wrongful or contra bonos mores. A misrepresentation could be either positive or negative. A material mistake induced by a positive misrepresentation (that is, where one party has stated something that is false) is almost invariably regarded as iustus. For instance, in Allen v Sixteen Stirling Investments (Pty) Ltd, the plaintiff’s error as to the property he was purchasing was caused by the misrepresentation of the defendant's agent. The agent misled the plaintiff by pointing out to him a different property to that stipulated in the deed of sale that the plaintiff signed. The court found that the plaintiff's mistake had been reasonable because it was caused by the misrepresentation of the defendant's agent in pointing out the wrong property.

Where a party has entered into a contract after a misrepresentation has been made to him or her, such a party is entitled to rescission and restitution (restitutio in integrum) provided that the following four factors are present:

1. misrepresentation by the other party;
2. inducement;
3. intention to induce; and
4. materiality.
Whether the representee chooses to cancel or to abide by the contract, he or she may in addition be entitled to recover damages in respect of any patrimonial loss caused by the misrepresentation, depending on the state of mind with which the representation was made. In this regard, the distinction between fraudulent, negligent and innocent misrepresentation is relevant.

1. **Fraudulent misrepresentation.** Deliberate deception that causes another financial harm is a delict in our law, corresponding to the English tort of deceit, and is actionable under the *actio legis Aquiliae*. Thus a representee who has been tricked into concluding a prejudicial contract is entitled in principle to damages sounding in delict.

In *Plaaslike Boerdiensle (Edms) Bpk v Chemfos Bpk*, the Appellate Division, upholding the right of a party to set aside a contract induced by the bribery of its agent, held that the basis of the right is not fraud, as in English law, but rather the wrongful and immoral means used to secure the agreement. In *Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd*, the court confirmed that **commercial bribery** is a distinct ground for rescinding a contract, and that it has the following elements:

(i) a reward (ii) paid or promised (iii) by one party, the briber, (iv) to another, the agent (who maybe an agent in the true sense or merely a go-between or facilitator), (v) who is able to exert influence over (vi) a third party, the principal, (vii) with the intention that the agent (viii) should induce the principal (ix) without the latter's knowledge and (x) for the direct or indirect benefit of the briber (xi) to enter into or maintain or alter a contractual relationship (xii) with the briber, his principal, associate or subordinate.

The courts often state that a contract is illegal because it is contrary to good morals (contra bonos mores) on the one hand, or public policy on the other. This distinction has little inherent value because the underlying principles very often overlap. Both instances relate to society's view of morality and, in both cases, the contract is regarded as contrary to public policy. In *Sasfin (Pty) Ltd v Beukes*, the Appellate Division put it as follows:

Agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy not be enforced.
To state in theory that no obligation arises in the case of objective impossibility is a relatively simple matter. But to apply this test in practice can be difficult. Assume the parties enter into an agreement of sale of some plastic ducks, which they believe to be in a container on a freight ship. Unknown to them, the container fell into the sea the previous day. Unlike the case of the destroyed painting above, the subject matter of sale still exists at the time of the conclusion of the contract. Its performance is therefore not factually impossible. Through a major and costly feat of deep-sea exploration, the seller could still retrieve the ducks. But the cost of doing so would be utterly disproportionate to its value. In these circumstances, the law recognises that performance maybe practically or economically impossible, and hence, that no obligation arises. However, the courts will not easily make such a determination.19

Conditions may also be classified as suspensive or resolutive. This classification relates to the effect of the condition on the operation of the obligation (or of the contract as a whole).

The parties may agree that the performance of obligations under the contract will not be enforceable until it is known whether the condition, which must relate to an uncertain future event, has been fulfilled or has failed. If they have done this, they have agreed on a suspensive condition (also known as a condition precedent). For example, A agrees to buy B’s immovable property provided that planning permission is granted by the local authority. Both of the examples mentioned in the previous section are also suspensive conditions. The operation of the obligation to pay your university fees is suspended until you pass all of this year’s examinations, or until the next year’s fees fall due without the relevant party’s having been dismissed. Suspensive conditions can thus be either positive or negative, depending on whether the event in question must happen or not happen.

1. The primary purpose of interpretation of a contract is to ascertain the meaning of the words in which the parties have expressed their agreement.

2. In interpreting the contract, the court is required to consider the following factors, in any order, as part of a unitary process:

   - the language used by the parties, taking into account the ordinary rules of grammar and syntax;

   - the context in which the provision appears, including the contract itself, the factual matrix that surrounded the conclusion of the contract, and the material known to those responsible for its production; and

   - the apparent purpose to which it is directed.
Mora debitoris is the failure of a debtor, without lawful excuse, to make timeous performance of a positive obligation that is due and enforceable and still capable of performance in spite of such failure.\textsuperscript{20}

Since mora consists essentially in an omissio, a failure to perform on time, it can occur only in respect of a positive obligation (obligatio faciendi). A debtor who acts in breach of a negative obligation (obligatio non faciendi) is guilty of positive malperformance.

Mora debitoris gives rise to the usual remedies for breach, including the right to claim damages and, in limited circumstances, to rescind the contract. The right to claim specific performance arises as soon as the debt is due and enforceable, however, and is not dependent on proof of mora.\textsuperscript{21}

One consequence of mora that is not shared by other forms of breach is perpetuatio obligationis (perpetuation of the obligation).

Whether or not he or she eventually performs, the debtor is obliged to compensate the creditor in damages for any losses that the latter suffers in consequence of the delay.\textsuperscript{22} In the case of an obligation to pay a liquidated sum of money,\textsuperscript{23} interest is payable as from the date of mora (\textit{a tempore morae}) apart from any other damage that the creditor might suffer.\textsuperscript{24} The courts do not require a claimant to prove that actual damages were sustained; they act on the assumption that had the payment been made the capital sum would have been productively employed - the mora interest thus represents the damages flowing naturally from the breach. Unless otherwise laid down by agreement, Act of Parliament, trade custom or a court (on the grounds of special circumstances), the rate of interest is the rate prescribed by the Minister of Justice from time to time in terms of s 1 of the Prescribed Rate of Interest Act.\textsuperscript{25}

The fundamental rule in regard to the award of damages for breach of contract, it has often been held, is that the innocent party should be placed in the position he or she would have occupied had the contract been properly performed, so far as this can be done by the payment of money and without undue hardship to the defaulting party.\textsuperscript{26} The aim, in other words, is to place the innocent party in his or her fulfilment position - that is, the position he or she would have occupied had there been no breach.

The application of the fundamental rule to a given set of facts entails a comparison between two financial positions of the plaintiff: the actual position in which the plaintiff now finds him or herself subsequent to the breach, and the hypothetical position he or she would have occupied had there been no breach.\textsuperscript{27} This method of quantifying the damage caused by a wrong is known as the difference theory, and applies equally in the law of delict, where one asks: how does the plaintiff’s present financial position compare with the hypothetical position he or she would have occupied had the delict
Cancellation not only extinguishes obligations, it also creates new obligations - namely, the duty on both parties to restore whatever performance has been received by that party (restitution). The remedy is *restitutio in integrum*, which is a remedy in its own right and not an enrichment claim. The purpose of the remedy is to place the other party in the position that it occupied before conclusion of the contract. Interest on money paid runs from the date of payment. Of course, where only the executory part of the contract is terminated, no obligation arises to restore performance received in respect of the part of the contract that is not cancelled.

The custom of inserting such provisions in contracts goes back many centuries. In Roman-Dutch law, penalty stipulations were enforceable, but the court could reduce the amount of the penalty where it was disproportionate to the loss caused by the breach. This was the approach originally followed by our courts. Under the influence of English law, however, a new approach came to be adopted. In terms of this new approach, a distinction was drawn between ‘genuine pre-estimates of loss’, on the one hand, and ‘penalty clauses *in terrorem*’ on the other. The former were fully enforceable without the possibility of reduction by a court, while the latter were not enforceable at all. That remained the position until the enactment of the Conventional Penalties Act in 1962, which by and large restored the Roman-Dutch approach. The position today is thus that penalty stipulations falling within the scope of the Act (and that includes certain forfeiture clauses) are enforceable, but subject to reduction by a court on equitable grounds.

Where a debtor is in breach of a contractual obligation to pay a sum of money by a certain date - that is, is in *mona* - the interest that the creditor would have earned on that sum had it been paid on time, is a loss that flows naturally from the breach. The loss thus constitutes general damages, but in practice it is usually not claimed under the heading of damages, but rather as a separate claim.

For a cession to take legal effect, certain requirements need to be met. These are discussed in more detail below and include the following:

- an entitlement by the cedent to dispose of the personal right;
- the capacity of the personal right to be ceded;
- a transfer agreement;
- formalities;
- legality; and
- the absence of prejudice to the debtor.

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The effect of an ordinary, 'out-and out' cession\(^\text{33}\) is to transfer a personal right from the estate of the cedent to that of the cessionary. A number of consequences flow from this act of transfer.

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Set-off may occur when two parties have claims against each other. When the requirements for set-off are met, both debts are extinguished when they are for the same amount. If they are not for the same amount, the smaller debt is extinguished and the larger debt is reduced by the amount of the smaller debt.

The following four requirements must be met for set-off to operate:

1. The debts must exist \textit{between the same two persons} in the same capacities. Thus, if A owes B R100, and B, as executor of X's estate owes A R100, set-off cannot occur, as B does not owe anything in his personal capacity.

2. The debts must be of the \textit{same kind or nature}. Thus, a money debt cannot be set off against a debt to deliver 50 sheep.

3. Both debts must be \textit{due and enforceable}. The debts must therefore not be subject to suspensive conditions or time clauses, or be subject to the \textit{exceptio non adimpleti contractus}.

4. Both debts must be \textit{liquidated} - that is, be ‘capable of easy and speedy proof’.\(^\text{34}\) A claim for damages is usually not liquidated. If set-off cannot operate because one debt is not liquidated, the creditor may claim it in reconvention, and request that judgment in convention (on the other party's debt) be postponed until judgment in reconvention.\(^\text{35}\)

2. See e.g. Wells v South African Alumenite Co 1927 AD 69 at 73 (Innes CJ).

3. See McWilliams v First Consolidated Holdings (Pty) Ltd 1982 (2) SA 1 (A).

4. Meskin NO v Anglo American Corporation of SA Ltd 1968 (4) SA 793 (W) at 804D; Savage & Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd 1987 (2) SA 149 (W) at 198A-B; and see Neugebauer & Co Ltd v Hermann 1923 AD 564. Cf also Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC).

5. Cf Murray v McLean 1970 (1) SA 133 (R).

6. See A Hutchison ‘Liability for breaking off contractual negotiations?’ (2012) 129(1) SALJ 104. Generally, if a material mistake is caused by the fraud of an independent third party, it will not negate contractual liability, provided that the requirements for the reliance theory have been met: see Slip Knot Investments 777 (Pty) Ltd v Du Toit 2011 (4) SA 72 (SCA).


9. Supra. See the discussion of this case at § 3.2.3.1 above.

10. At 169C-F

11. See generally Karroo and Eastern Board of Executors and Trust Co v Farr 1921 AD 413 at 415; Trust Bank of Africa Ltd v Fryschi 1977 (3) SA 562 (A) at 588; Novick v Comair Holdings Ltd 1979 (2) SA 116 (W) at 149-150; Orville Investments (Pty) Ltd v Sandfontein Motors 2000 (2) SA 886 (T) at 914-5. But see clause 15 in § 16.12 below for an example of a waiver of these remedies.


13. The scope of the Aquilian action is now so broad that it has subsumed the original actio doli.


15. 1999 (2) SA 719 (SCA).

16. See e.g. De Jager v Absa Bank Bpk 2001 (3) SA 537 (SCA) at 543; Maseko v Maseko 1992 (3) SA 190 (W) at 196.

17. Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) at 8.

18. Ibid.


21. Joss v Barclays Western Bank Ltd 1990 (1) SA 575 (T); Nel v Cloete supra at 159.

22. Linton v Corser 1952 (3) SA 685 (A); Nel v Cloete supra at 160C.

23. This includes a contractual obligation to pay interest; a debtor who is in mora in regard to such an obligation is liable for the payment of mora interest on the unpaid interest, calculated at the prescribed rate: Land and Agricultural Development Bank of SA v Ryton Estates (Pty) Ltd 2013 (6) SA 319 (SA).

24. Linton v Corser supra at 695; West Rand Estates Ltd v New Zealand Insurance Co Ltd supra at 192; Bellairs v Hodnett 1978 (1) SA 1109 (A) at 1145; Mokala Beleggings v Minister of Rural Development and Land Reform 2012 (4) SA 22 (SCA).

25. 55 of 1975. See Katzenellenbogen Ltd v Mullin 1977 (4) SA 855 (A) at 884-5.

26. See e.g. Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd 1915 AD at 22; Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 (3) SA 670 (A) at 687.

27. ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd 1981 (4) SA 1 (A) at 8; Culverwell v Brown 1990 (1) SA 7 (A) at 25.


29. See MEC for Economic Affairs, Environment and Tourism v Kruisenga 2008 (6) SA 264 (Ck) for a valuable discussion of this remedy.

30. Vilvanathan v Louw NO 2010 (5) SA 17 (WCC).

31. See Pearl Assurance Co v Union Government 1934 AD 560.

32. 15 of 1962.

33. LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd 1974 (1) SA 747 (A). Whether this judgment has any further consequences is somewhat uncertain; see Van Huyssteen et al at 458-9.

34. Treasurer-General v Van Vuren 1905 TPD 582 at 589. See also clauses 7.3, 7.7, 9.3 and 9.4 in § 16.12 below.

35. See Rule 22(4) of the Uniform Rules and Rule 20 of the Magistrates’ Courts Rules.

Referring Principles:

- I.1.1 - Good faith and fair dealing in international trade
- III.1 - Set-off
III.2 - Assignment of claim
IV.1.1 - Freedom of contract
IV.2.1 - Contractual consent
IV.5.1 - Intentions of the parties
IV.5.2 - Context-oriented interpretation
IV.6.10 - Conditions
IV.7.1 - Invalidity of contract that violates good morals ("<em>boni mores</em>"
IV.7.2 - Invalidity of contract due to bribery
IV.7.3 - Right to avoid the contract for mistake in fact or law
IV.7.4 - Right to avoid the contract for fraudulent misrepresentation
IV.8.1 - Principle of pre-contractual liability
VI.1 - Termination of contract in case of fundamental non-performance
VII.1 - Damages in case of non-performance
VIII.1 - Definition
VII.6 - Duty to pay interest
IX.1 - Basic rule