

WESTERN CAPE OFFICE OF THE CONSUMER PROTECTOR

What you should know about **contracts**

The purpose of this guide is to give ordinary South African consumers a very basic guide to contracts and what they mean in our law.

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A UCT LAW STUDENT PROJECT



DEPARTMENT OF ECONOMIC DEVELOPMENT AND TOURISM
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what is a contract?

A contract is an agreement that is intended to create legal rights and duties between the parties.

It can be written down or typed out, it can be verbal, or it may even just exist in the minds of the parties. Many people think of a 'contract' as a piece of paper that you need to sign, but a piece of paper or a signature is not always needed for a contract.

We enter into contracts every day: for example, you enter into a contract whenever you buy or sell something, or when you rent a room in a house, or when you agree to work for someone.



EXAMPLE

When John buys his bread and milk from Jane's shop, they enter into a contract.

Why are contracts different from other agreements?

A contract is different from other agreements, like an agreement to meet someone for lunch. This is because contracts create legal rights and duties.

This means that when you enter into a contract, you cannot decide later that you don't want to do the thing you have agreed to do. That would be a **'breach of contract'**.

EXAMPLE

When John buys his bread and milk from Jane, they have entered into a contract. John cannot decide after Jane gives him the bread and milk that he does not want to pay Jane. Jane cannot decide after John pays her that she does not want to give John the bread and milk.

If one party breaches the contract, there are many actions the other party can take so that they will not lose out under the contract. These are called **'remedies'**.

This is why you must make sure you can actually do what you have agreed to under a contract, *before* you enter it.

how are contracts formed?

Usually a contract is formed once there is an **offer** by one party, and an **acceptance** of that offer by the other party. When the party making the offer comes to know that the other party has accepted his offer, there will be a contract.

In our example above, John offered to buy Jane's bread and milk when he brought it to the counter to pay. When Jane accepted John's money, a contract was formed.

Normally, however, when you make a larger purchase, like a set of furniture, there will be a written contract that you *must* sign. This simply acts as proof of the agreement.

When you buy or sell land or buildings, however, the contract must be in writing.

Capacity: Who can enter a contract?

Usually, anyone over 18 years of age may enter into a contract. But, there are exceptions to this rule. Some of them are explained below:

Young people

Someone who is younger than 18 years is called a '**minor**' in our law. A minor younger than 7 years cannot enter into a binding contract at all.

A minor older than 7 years can only enter into a contract if –

- *They are assisted by their parent or legal guardian, or their parent/guardian gives their permission for the contract later*
- *They later confirm their own consent to the contract, when they turn 18*

If a minor between 7 and 18 years old entered into a contract without the necessary permission or assistance by their parent or guardian, the parent or guardian must decide whether the minor should withdraw from the contract or keep to it.

The other party must follow the decision of the parent or guardian and cannot use the minor's age as an excuse to get out of the contract.

People under the influence of alcohol or drugs

Even if someone enters a contract while under the influence of drugs or alcohol, they may still have to act under that contract.

The effect of the alcohol or drugs will usually have to have been very severe before a court will let that person out of their contract. That person must not have had any idea of what he or she was agreeing to.

other requirements for contracts



Possibility

There can be no contract to do something that is impossible. If the contract only became impossible after the two parties entered into it, then the contract simply falls away.

But, if the contract became impossible due to the fault of one of the parties, that will be a breach of contract, and the other party can claim damages (compensation) in court.

EXAMPLE

John and Jane enter a contract for the sale of furniture. But before John can deliver the furniture to Jane, he carelessly leaves the furniture outside his shop and it is stolen. It is impossible for John to now deliver the furniture to Jane, but the impossibility is his fault. Jane can claim damages from John if she has paid him already.

Certainty

The terms of the contract must be certain so that each party knows what has to be done under the contract. In a contract of sale, for example, there must be certainty about what exactly is being sold and the price to be paid. Contracts that are not certain are **vague**, and a court will not uphold them!

Formalities

In South African law, formalities such as a written contract or the signatures of the parties are not normally necessary except for purchases of land or buildings. What is important is that it is clear to the court what the parties agreed to.

But, even when buying smaller things like furniture and home appliances, the parties might agree that there is no binding contract unless or until their agreement is put in a written document signed by both of them.

Also make sure that any changes to the contract are in writing and signed, because most written contracts have a term that unless this is done the change is not binding on the parties.

If you enter into a contract that requires formalities, make sure to comply with them.

Legality

Like impossibility, there can be no valid contract to do something illegal, like purchasing drugs or stolen goods.

Warranties and Guarantees

We often see products advertised with a 'warranty' or a 'guarantee'. These are simply promises made by a party in a contract about what he/she has agreed to do under that contract. That promise then becomes part of the contract: if it is broken, there is a breach of contract. For example –

EXAMPLE

John sells Jane some furniture and gives Jane a '2 year warranty' or '2 year guarantee' that the furniture will not break. The furniture breaks after 1 year. Because the furniture broke at a time when it was still under the warranty or guarantee, John has broken that 'warranty' or 'guarantee'. He has breached his contract with Jane.

Just like any other term in a contract, a warranty or guarantee does not have to be written down or typed out, like in the example above. It is enough that the parties agree that what is promised under the warranty or guarantee will become part of the contract.

Also, unless the parties agree otherwise, the law provides an automatic guarantee against defects for three years. Read your contract carefully and check with the seller whether this automatic guarantee has been excluded!

Where the seller offers you a sample of what the finished product will look like, this is usually treated as a warranty or guarantee. So if the finished product does *not* look or perform like the sample, this will normally be a breach of contract.

This will be the case unless you and the seller agreed that the final product was not guaranteed to look or perform like the sample.



some contractual terms to look out for

Contracts often contain standard terms that are meant to protect the supplier. These can be unfair to the consumer, however.

Sometimes you may be able to negotiate with a supplier to exclude these terms, but even if you are unable to do so, it will help you to know what they look like and to keep an eye out for them!

REMEMBER: The general rule is that you are bound by what you sign – this is why it is very important that you read your contracts before entering them and, whenever possible, look for assistance in doing so.

'Voetstoots' clauses

A 'voetstoots' or 'as is' clause means that you are buying the goods as they appear. In other words, they exclude the seller's liability for 'latent defects'. These are faults with the goods that existed when the parties entered the contract, and were not visible after a 'reasonable' inspection.

These clauses are perfectly legal, except in 'credit agreements' under the National Credit Act. If you buy something that later turns out to have something wrong with it, and the contract contained a 'voetstoots' clause, you will normally still be bound by that contract.

Only where the seller acted fraudulently – i.e. intended to trick you into buying the faulty goods – will he be liable to you.

This is why it is important to inspect whatever you are buying carefully before you enter into a contract. Perhaps ask a friend who knows a lot about the product to assist you.

'No representation' clauses

A 'no representation' clause protects the supplier or landlord from the consequences of any statement they made before or after entering the contract with you. Often, when a seller or landlord is trying to get you to sign a contract, they may say or do things to try to convince you to enter the agreement.

Sometimes these statements are harmless, but sometimes they may be about an important part of the contract. If they later turn out to be untrue or misleading, the seller or landlord will point to this clause to protect themselves.

EXAMPLE

'No statement or representation made by the seller will constitute a warranty, admission of liability or undertaking.'

If a seller or landlord makes an appealing statement or promise while you are negotiating the contract, ask them if they are willing to make it a term of the contract. If they agree, make sure you comply with any 'non-variation' clauses (see below). It is usually better to be careful and get any such statement or promise in writing and signed by both parties to make sure that the seller or landlord is bound by their promise.

Non-variation clauses

A 'non-variation' clause simply holds the parties to the written contract by stating that any change to the contract that is not in writing is not binding. This type of clause normally causes problems where a seller or a landlord says you may do something that is not actually allowed in the written contract.

EXAMPLE

A contract of lease between Jane and John might say that John is not allowed to rent a room to anyone else while he is renting the property from Jane. The contract contains a non-variation clause. John asks Jane if she can make an exception and allow him to rent a room to his friend Winston. Jane says yes. Later, Jane realises she can get more rent for her property if she rents it to her friend Lindi. She cancels the contract with John, saying that he has breached the contract by renting the room to James.

This is why it is important, if you wish to do something that is not actually allowed under the contract, to make sure that there is no non-variation clause.

If there is one, make sure you comply fully with it and do not simply accept the seller or landlord's verbal permission.

Time-bar clauses

A 'time-bar' clause gives you a limited time to bring any legal action against the supplier or landlord in the event that a dispute arises. These types of clauses are common in insurance contracts.

EXAMPLE

If we reject liability for any claim made under this Policy we will be released from liability unless summons is served . . . within 90 days of repudiation.

If a contract contains a time-bar clause, make sure you remember or write down the time period in which you can bring legal action against the seller or landlord, in case you ever have to go to court to settle a dispute about the contract.

General exemption clauses

A general exemption clause excludes or limits a supplier's liability for many situations. These are often meant to protect the supplier from the consequences of their employees' dangerous or careless conduct.

EXAMPLE

The supplier accepts no liability whatsoever for any damage or loss suffered by the customer as a consequence of any of its employee's fraudulent, negligent or innocent conduct.

EXAMPLE

Jane is admitted to hospital. John, the hospital administrator, gets Jane to sign a contract that contains an exemption clause before she can receive treatment. One of the hospital nurses gives Jane the wrong medication and she becomes even sicker, staying in hospital for an extra month. When she tries to get the hospital to take responsibility for the nurse's conduct, they argue that the exemption clause protects them from any claim by Jane.

latent & patent defects

A '**patent defect**' is a problem with goods bought that was visible or obvious when the parties entered the contract; for example, a broken windscreen on a car.

A '**latent defect**' is a problem with goods bought that existed when the parties entered the contract, which was not visible after a 'reasonable' inspection.

Always inspect the product before you buy it: if you do not, it will be much more difficult for you to claim that there was a latent defect that the seller must now compensate you for!

Currently, the law protects consumers from latent defects, unless the seller has included a 'voetstoots' clause in the contract. However, if the seller acts fraudulently, he may still be liable despite such a clause.

Remember that a latent defect must have existed at the time you entered the contract. If there was no defect when you purchased the product, the seller cannot be held liable.

However, if a product that you have purchased had a patent defect, it is assumed that you knew about the problem when you purchased it. Unfortunately the law does not protect consumers from patent defects.

What is a 'defect'?

A 'defect' is an unusual feature that makes a product less useful, or not useful at all, for the purpose that you purchased it for.

EXAMPLE

If John sells Jane an old car, it will not be unusual for the car to have some rust. So, unless the car is very rusty, some rust will not be considered a 'defect'.

But, if John sells Jane a new car, any rust will be unusual and would probably be a defect.

The seller will always be liable if the defect makes the product unfit for its normal purpose.

If you purchased the product for some special purpose, other than its normal purpose, you must tell the seller when you enter the contract. If you relied on the seller's special knowledge of the product regarding that special purpose, the seller will then still be liable if the product is not fit for that special purpose.



EXAMPLE

John buys a water pump from Jane and tells Jane that he needs it to be strong enough for the special purpose of pumping water up a steep hill. He knows that Jane has sold other pumps for that very purpose. But when John installs the pump, it is not strong enough to pump water up the hill. This would qualify as a latent defect for which Jane could be liable.

False statements by the seller

A seller is allowed to praise his own product and talk about it in a way that encourages you to buy it. But sometimes sellers make statements that go beyond 'sales talk'. These statements are about some important quality of the product, for example its strength or value, but they are not actually included in the contract. In other words, they are not warranties or guarantees (see above).

If such a statement turns out to be false, the law may protect you in the same way as if there had been a latent defect.

What are you entitled to for latent defects or false statements by the seller?

For a latent defect, or a false statement that goes beyond 'sales talk', you are normally entitled to either –

- **A price reduction:** *the difference between the price you paid and the true value of the product; or*
- **A full refund of the price** + any interest + any cost of receiving the product + any maintenance costs

If you receive the full refund however, you will have to return to the seller everything that you gained under the contract.

Exchange contracts

'Exchange contracts' are contracts where the thing sold is paid for with another thing, or another thing and some money.

If there is a latent defect in or a false statement about any of the things in such an agreement, the innocent party will also be entitled to a price reduction or refund.

EXAMPLE

Jane sells John her car in exchange for John's furniture and R10 000. If there is a latent defect in the car or the furniture, Jane or John could be entitled to a price reduction or refund.

Can I ever get more than just a price reduction or a refund?

If the defect or false statement has caused you harm worth more than just the value of the product, you might be able to claim this from the seller.

If the defect or false statement has not only caused you to pay too much for the product, but has also caused you further harm, you might be able to claim compensation for this further harm from the seller.

EXAMPLE

John buys a car. There is a latent defect in the car: the brakes do not work properly and he crashes into his gate. John might be able to claim compensation from the seller for any money lost as a result of the crash (for example, his medical bills if he was injured).

Trader's liability

A 'trader' – a seller that actually trades in and earns his living from the goods he sells – is held to a higher standard than an ordinary seller, like John or Jane in our examples. If a trader publicly claims to have expert skill or knowledge in the product sold, you will be able more than just a price reduction or refund. You will be able to claim *all* losses resulting from any latent defect in the product.

Breach of contract

Latent defects: If the contract guaranteed a certain quality and a latent defect means the product does not have that quality, then you will be able to claim compensation for *all* resulting loss as damages for breach of contract.

False statements: If a statement made by the seller actually became a term of the contract, then you will also be able to claim damages for breach of contract.

Misrepresentation

If the seller acted fraudulently, or knew that the latent defect or the false statement might cause you further damage, you would be entitled to more than just a price reduction or refund if you suffered additional losses.

breach of contract

When someone does not do what they have agreed to do under a contract, they are breaching that contract, and the other party will normally be entitled to compensation or to get out of the contract. But, not just any breach will do:

The general rule is that a breach must be 'material' before the other party can get out of the contract.

There is no rule for telling when a breach is 'material' – it will almost always depend on the facts of your case. A 'material' breach is a 'serious' breach: a failure in an important part of the agreement.

However, there are different types of breach, and finding out what type of breach we are dealing with can also help us tell whether a breach is 'material' or not. These types of breach are discussed below:

Types of breach

- I. Late performance
- II. Incomplete or unsatisfactory performance
- III. Improperly refusing to comply with the contract
- IV. Preventing performance

I. Late performance

This type of breach happens when someone does not do what they agreed to do under the contract, within the time agreed to. It must be their fault.

EXAMPLE

Jane pays John to fix her wall on Monday at 10h00 but John never arrives because he has agreed to fix Winston's wall at the same time.



If the contract has a time for performance, the party automatically breaches the contract as soon as that time passes.

But, if the contract does not contain a time for performance, the other party must first demand performance within a reasonable time. If the party still does not perform within that reasonable time, *then* they will have breached the contract.



II. Incomplete or unsatisfactory performance

This type of breach happens when someone *does* do what they agreed to do under the contract. But, they either do not do everything that they were supposed to do, or they do not do it properly. It will not normally matter whether or not it was their fault that the performance was incomplete or unsatisfactory.

EXAMPLE

John and Jane agree that John will build Jane a house using only the best bricks. Instead he builds Jane's house using bricks that are only of average quality.

III. Improperly refusing to comply with the contract

This type of breach happens when a party refuses to perform under a contract, without proper legal reasons for doing so. They may try to cancel the contract, or deny that it ever existed, or deny that they must perform some important part of the contract. This type of breach is best explained with an example.

EXAMPLE

Jane pays John to fix her wall, but their contract does not say when John must fix the wall. After a few days, Jane cancels the contract and sues John. But Jane was not allowed to cancel the contract. Remember, if a contract does not have a time for performance, you must first demand performance from the party within a reasonable time (see 'I. LATE PERFORMANCE'). So, Jane has in fact breached the contract herself!

This type of breach often happens when there is a clause in a contract that tells the parties exactly what steps they must take to cancel the contract, and one of the parties tries to cancel the contract without following those steps. This is another reason why you must read your contracts carefully!

IV. Preventing performance

This type of breach happens when one of the parties makes it impossible for him- or herself, or the other party, to do what they have agreed to under the contract.

EXAMPLE

John agrees to sell his car to Jane. Before he gives the car to Jane, he sells it to Winston. John has breached his contract with Jane.

remedies for breach of contract

A 'remedy' is what a party is entitled to if the other party breaches their contract. When there is a breach of contract, you usually have a choice to either uphold the contract, or cancel the contract.

But whether you uphold the contract or cancel it, you will usually also be entitled to '**damages**': compensation that puts you in the position you would have been in if the breach had not happened.

1. UPHOLDING THE CONTRACT

Even though there has been a breach, you might want to 'keep the contract alive'. It might be more important to you that you get what you have actually agreed to than to get out of the contract.

Ordering the other party to perform

You can usually ask a court to order the other party to perform, unless that performance is impossible.

Withholding your performance

In many contracts, one performance will depend on the other.

EXAMPLE

When John sells Jane bread and milk, he will usually only hand it over to Jane if she has paid him for it. Likewise, Jane will only pay John if he hands over the bread and milk.

In contracts like this, you can usually withhold your own performance until the other party has performed. This is a very useful remedy, because you do not have to go to court to rely on it.

Remember, you are not cancelling the contract (see '2. CANCELLING THE CONTRACT'): you are simply not performing under the contract until the other party performs.



2. CANCELLING THE CONTRACT

This is a very serious remedy. Remember the general rule: a breach must be 'material' before the other party can get out of the contract.

But, whether a party can cancel a contract will also depend on the type of breach. Below are the requirements for cancellation under the types of breach we have just discussed:

i. Late performance

To cancel a contract for late performance, the time for performance must have been important to both parties. The time for performance is important if both parties agreed or understood that if either did not perform by the date agreed to, the other would be allowed to cancel the contract.

If the time for performance was not important at first, one of the parties can make it important. They can do this by sending the other party a demand for performance, and setting a reasonable date for performance. They must then warn the other party in advance that they will cancel if performance is not made before the set date.

If there was not even a time or date for performance in the contract to begin with, the party demanding performance must first set a time or date for performance, which must be reasonable. They can then make that time for performance important demanding performance by that time or date, or some later time or date.

Remember, if you cancel a contract when you are not allowed to, you breach the contract yourself!

ii. Incomplete or unsatisfactory performance

If there is a clause in the contract that entitles one or both parties to cancel for incomplete or unsatisfactory performance, then it will not matter how serious the breach is: the other party may still cancel the contract.

If there is no such clause, then whether or not the party may cancel the contract *will* depend on how serious the incomplete or unsatisfactory performance was.

iii. Improperly refusing to comply with the contract

When a party has improperly cancelled the contract, the other party can then cancel the contract *properly* by simply informing the other party that he accepts their improper refusal to comply under the contract. He can then claim whatever damages (see '3. DAMAGES') may have resulted from the party's conduct.

But the other party does not have to accept the improper refusal: they may ignore or reject it, and the party will then still be bound under the contract. The other party could, for example, ask a court to order the party to perform under the contract (see '1. UPHOLDING THE CONTRACT').

iv. Preventing performance

If a party has made it impossible for him- or herself, or the other party, to perform, then the other party can cancel the contract and claim damages (see '3. DAMAGES').

Effect of cancelling the contract

If you have properly cancelled a contract after a breach by the other party, you may recover any performance, such as payments, that you have made under the contract so far.

3. DAMAGES

Remember that whether you uphold the contract or cancel it, you will usually also be entitled to '**damages**'. This is compensation that puts you in the position you would have been in (in terms of money) if the breach had not happened.

But, there are some rules for claiming damages:

- (i) Damages for breach of contract are for actual financial loss

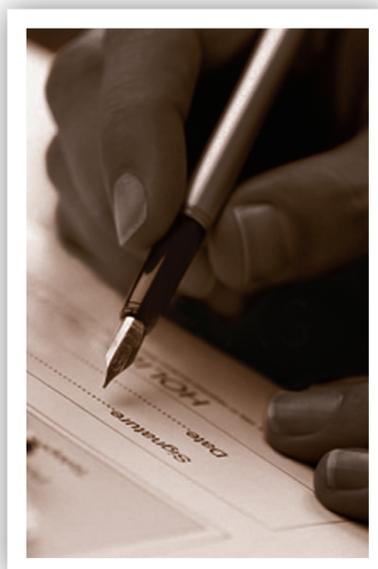
You cannot claim damages for losses that you might have suffered, but in fact did not suffer.

You also cannot get damages for harm that cannot be measured in money, for example disappointment, inconvenience or emotional stress.

- (ii) You must have tried to minimise your damages

EXAMPLE

Jane's contract of employment with John was improperly cancelled by John. She must still make a reasonable effort to find another job.



WESTERN CAPE OFFICE OF THE CONSUMER PROTECTOR

Toll free number: 0800 007 081

What can you do if you have a consumer complaint about a product or service you have purchased?

Even careful buyers sometimes encounter problems with goods they have purchased or a service they have utilised. If you do have a consumer related query and your attempts to settle the complaint yourself have failed, contact the Office of the Consumer Protector.

How the Western Cape Office of the Consumer Protector can assist you

The Office of the Consumer Protector (OCP) is a directorate established in the Western Cape Department of Economic Development and Tourism and is responsible for:

- Investigating complaints lodged by consumers in the Western Cape Province.
- Creating awareness amongst consumers about consumer related matters and the various forms of consumer protection available to consumers.

Where to find the OCP



- Call the toll free number: 0800 007 081
- Fax: 021 483 5872
- e-mail: consumer@pgwc.gov.za
- Visit the OCP on the ground floor, Waldorf Arcade, St George's Mall, Cape Town.
- Visit any of the 27 Advice Offices in the Western Cape.

ISSUED BY:

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