



**RHODES UNIVERSITY**

# **COMMERCIAL LAW 202: PAPER 1**

**SPECIAL CONTRACTS: THE LAW OF SALE, LEASE AND CARRIAGE**

**2016**

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## **Introduction**

### **1. Overview**

This is the Course outline for Commercial Law 202, Paper 1 for 2016. It contains general information on the following three specific areas of law, namely:

- a) Law of Sale;
- b) Law of lease; and
- c) Law of carriage.

This course is of the two Commercial Law courses offered to second year level students registered in the Faculty of Commerce. In general the course is aimed at providing the nature and function of the law of sale, lease and carriage in South Africa.

The purpose of the course is to provide students with:

- insight into the legal principles pertaining to sale, lease and carriage transactions ;
- understanding the definition of sale, lease and carriage contracts;
- the ability to distinguish between the rights and duties of lessee and lessor respectively;
- understanding the influence of the Consumer Protection Act pertaining to law of sale and lease;
- the ability to distinguish between the obligations of the consignor and carrier respectively;
- understanding of the definition of the consignor and carrier in law of carriage;
- the ability to choose appropriate remedies to resolve contractual disputes.

## **2. STUDENTS' RESPONSIBILITY**

In order to successfully complete this course, students need to be able to:

- be able to write and communicate in English;
- have a basic working knowledge of the South African legal system, and legal terminology;
- know how and where to access learning resources such as textbooks, law reports and statutes in the Law Library and on electronic library; and
- work independently.

## **3. OUTCOMES**

### **Critical Outcomes**

On completion of this course, students will be able to:

- (a) identify and solve practical legal problems;
- (b) work in a team and individually;
- (c) collect, analyse and evaluate information from the various sources of law, as well as information conveyed in the classroom environment.
- (d) communicate effectively in class debate and written assignments.
- (e) use modern technology in legal research.
- (f) recognise problem-solving contexts involving the law.

### **Intended Specific Outcomes**

The student should be able to:

- (a) Understand and explain the essential elements of a valid contract of sale, lease and carriage.
- (b) Understand and explain some of the key legal consequences of entering into a contract of sale, lease and carriage.
- (c) Understand and explain the legal duties that are imposed upon parties to the special contracts under review, and the consequences that flow if these duties are breached.

(d) Apply the knowledge acquired during the course to solve practical problems with regard to sale contracts.

## **TEACHING METHODS**

The course will be presented by means of *viva voce* lectures. In lectures, the substantive law will be discussed and leading precedents from the case law may be discussed. Occasionally, students will be expected to consider practical questions in class. Students are expected to assume responsibility for their learning by reading ahead before each lecture, and consolidating afterwards.

## **LEARNING RESOURCES**

The prescribed texts are:

1. CJ Nagel *Commercial Law* (5th ed, Lexus Nexus, 2016)
2. A Govindjee et al *Commercial Law: Fresh Perspectives* Cape Town: Pearson/Prentice Hall, Second Edition, 2014.

Other recommended texts are:

3. Graham Glover *Kerr's The Law of Sale and Lease* (4th edition, LexisNexis, 2014).
4. RH Zulman and G Kairinos: *Norman's Purchase and Sale in South Africa* (5th ed, Butterworths, 2005)
5. Joubert, W (ed): *The Law of South Africa*, vol 24 (2nd ed), section on Sale by Kerr & Glover

***NB: Students will be guided during the lectures when additional reading is required.***

## STUDENT ASSESSMENT

1. The class mark component of COL 202 amount to 30% of the final mark. COL 202 will be examined in November 2016. The marks for Papers 1 and 2 will be added together and reduced to a mark out of 70. The remaining 30 marks will be calculated on the basis of the tests written during the relevant semester.
2. Two two-hour exams will be written in June 2016 and November 2016 i.e. one examination each for Papers 1 and 2.
3. There will be two **compulsory** class tests written for COL 202:  
**NB: Test dates will be confirmed in due course.**
4. The tests will last for 45 minutes. The tests will contain two questions which are both compulsory and each question will be out of 20 marks, therefore a total of 40 marks for the whole test. The subject matter of each test will be equally split between the contents of Paper 1 and Paper 2.

## PART: A

### GENERAL INTRODUCTION (ELEMENTARY OUTLINE OF THE LAW OF CONTRACT)

- **Requirements for a valid contract**
  1. **Consensus:**
    - a) Offer
    - b) Acceptance
  2. **Contractual capacity**
  3. **Lawfulness**
  4. **Physical possibility and certainty**
  5. **Formalities**
- Further Reading: C J Nagel (ed) Commercial Law (5<sup>th</sup> Edition) Ch 3.89 – 3.109, Ch 4.01 – 4.55, Ch 5.01- 5.51, Ch 6.01 – 6.55, Ch 7.01 – 7.17

## **PART: B**

### **DEFINITION OF A CONTRACT OF SALE**

- A Govindjee et al Commercial Law: Chapter 14; pg 151-167
- Glover *Kerr's Law of Sale and Lease* (4<sup>th</sup> Edition) pg 3
- C J Nagel (ed) *Commercial Law* (5<sup>th</sup> Edition) 13.01 – 13.08
- *Treasurer- General v Lippert* 1883 (2) SC 172

### **ESSENTIALS OF THE CONTRACT OF SALE**

- **Agreement (Meeting of minds)**
- **The thing to be sold** ( *res vendita* or the *merx*)
  1. Things that can be sold:
    - a) *res sua*
    - b) unascertained goods
    - c) future goods
      - i) *Emptio rei speratae*
      - ii) *Emptio Spei*
    - d) *Res aliena* (somebody else's thing)
    - e) Things which are the subject of litigation *in rem* (*res litigiosa*)
  2. Things that cannot be sold:
    - a) *Res extra commercium*
    - b) Things which cannot exist (initial impossibility)
    - c) Things which have ceased to exist at the date of sale (supervening impossibility)
    - d) *Pacta de quota litis*
    - e) The sale of a right of inheritance
- **The Price** (*pretium*)
  1. Serious,
  2. Fixed, or capable of ascertainment, an
  3. Must sound in current money

- Readings: CJ Nagel (ed) *Commercial Law* (5<sup>th</sup> Edition) 13.09 – 13.30
- Glover *Kerr's Law of Sale and Lease* (4<sup>th</sup> Edition) pg 3 – 5

**Effect of Consumer Protection Act 68 of 2008 on purchase price**

- CJ Nagel (ed) *Commercial Law* (5<sup>th</sup> Edition) 13.31– 13.70
- Glover *Kerr's Law of Sale and Lease* (4<sup>th</sup> Edition) pg 7 – 15

## 2. LEGAL EFFECTS OF THE CONTRACT OF SALE

- **The passing of ownership**
  - i) Immovable Property
  - ii) Movable Property
- **Payment of the purchase price**
  - i) Cash Sale
  - ii) Credit Sale
- **Delivery of the thing sold**
  - i) Forms of delivery
    - a. Actual delivery;
    - b. Delivery with the short hand;
    - c. *Constitutum possessorium*;
    - d. Attornment;
    - e. Symbolic delivery;
    - f. Delivery through marking; and
    - g. Delivery with a long hand.
- **Object delivered**
  - i) Date of delivery;
  - ii) Place of delivery
- **Effect of Consumer Protection Act 68 of 2008 on delivery**
- **Double Sales**
- **Warranty against eviction**
- **Warranty against latent defects**
  - *Actio empti*
  - *Aedilician Actions*
    - *Actio redhibitoria*
    - *Actio quanti minoris*
  - *Voetstoets sale*

### READINGS:

- CJ Nagel (ed) Commercial Law (5<sup>th</sup> Edition) 14.03– 14.95



- Glover Kerr's Law of Sale and Lease (4th Edition) pg 305 - 322
  
- **THE COMMON LAW OF RISK AND BENEFIT**
  - a) Meaning of Risk and Benefit and circumstances it may occur
  - b) Risk
    - i) Definition
    - ii) Where the Risk Lies (General Rule)
    - iii) Exceptions to the General Rule
      - a) Where the parties have agreed to the contrary (in their contract)
  
      - b) Where specific goods still have to be weighed, measured or counted
      - c) Unascertained goods
      - d) Where there is default by either party
  - c) Benefit
    - i) Definition

- **EFFECT OF CONSUMER PROTECTION ACT 68 OF 2008 ON RISK**

READINGS:

CJ Nagel (ed) *Commercial Law* (5<sup>th</sup> Edition) 14.01– 14.12

### 3. THE DUTIES OF THE SELLER AND THE REMEDIES OF THE BUYER

- Introduction

#### a) **The seller is required to take care of the *res vendita* until the *merx* is made available**

- Explanation of the duty (*Frumer v Maitland* 1954 (3) SA 840 (A) at 845) and its difference to risk
- Qualifications to the rule:
- Mora: (*Wingerin v Ross* 1951 (2) SA 82 (C)).
- Variation by agreement
- The buyer's remedies

#### b) **The seller's duty to make the thing sold available (the duty to deliver)**

- Explanation of the duty
- The buyer's remedies

#### c) **The seller's duty to transfer ownership if he has it, or can obtain it, failing which, to warrant the buyer against eviction**

- Transfer of ownership
- The warranty against eviction

Three basic requirements must be met before the seller will become liable on the buyer's eviction:

(a) Eviction (actual or threatened)

(b) Notice

(c) The buyer is required to put up a determined defence against the claim of the third party

Statutory reinforcement: s 44(1) (d) of the Consumer Protection Act.

- The buyer's remedies

#### d) **The duty to deliver the *res vendita* free from defects**

READINGS:

- CJ Nagel (ed) *Commercial Law* (5<sup>th</sup> Edition) Chapter 14
- Glover *Kerr's Law of Sale and Lease* (4<sup>th</sup> Edition) Chapter 7 and 8

**4. THE DUTIES OF THE BUYER AND THE SELLER'S REMEDIES**

a) **Payment of the purchase price**

- Cash sales: (*Breytenbach v Van Wyk* 1923 AD 541 at 546)
- Credit sales

b) **Receipt of the thing sold**

Consequences if the buyer fails to remove or receive the thing timeously

c) **Miscellaneous duties**

- a. Costs and transfer duty
- b. Occupational rent
- c. All benefits accrued to the thing before the contract became *perfecta*

d) **Pre-emptive right and option**

READINGS:

- CJ Nagel (ed) *Commercial Law* (5<sup>th</sup> Edition) Chapter 15.01 – 15.15
- Glover *Kerr's Law of Sale and Lease* (4<sup>th</sup> Edition) Chapter 9

**PART: C: THE LAW OF LEASE**

READING MATERIAL: CJ Nagel (ed) *Commercial Law* (5<sup>th</sup> Edition) Chapter 16

**1. Introduction**

Chpt: 16.01-16.10

**2. Definition of law of lease**

Chpt: 16.11-16.13

### **3. General requirements for conclusion of lease agreement**

Chpt: 16.14-16.30

1. General
2. Consensus
3. Contractual capacity
4. Formalities

### **4. Essentials of lease agreement**

Chpt: 16.031-16.44

- a) General
- b) Leased property or subject matter of the contract
- c) Temporary confinement of power of use and enjoyment
- d) Rental to be paid
  - i) Certain and ascertainable
  - ii) Amount of Rent

### **5. Duration of lease**

- The impact of Consumer Protection Act (s14)

### **6. Duties of lessor and remedies of lessee**

- a) Delivery of the leased property
- b) Maintenance of the leased property
- c) Ensure undisturbed use and enjoyment
- d) Compensation for attachments and improvements
- e) Pay Rates and Taxes
- f) Remedies available to the Lessee:
  - i. Specific performance, rescission and damages
  - ii. Reduction of rent
  - iii. Lessee himself undertakes repairs
  - iv. Specific remedies under Consumer Protection Act

READING: Chpt: 17.03-17.29

## **7. Duties of lessee and remedies of lessor**

- a) Payment of the rent
- b) Proper use of the leased property
- c) Return of Property on termination of the lease in same good order/ condition
- d) Remedies available to the Lessor:
  - i. Specific performance, rescission and damages
  - ii. Tacit hypothec

READING: Chpt: 17.42-17.70

- e) Rights and Duties Imposed by the Rental Housing Act 50 of 1999  
Chpt: 17.71-17.77

## **8. Rights and powers of the tenant / lessee**

- a) Subletting
- b) Cession
- c) Assignment  
Chpt: 18.01-18.08
- d) *Huur gaat Voor Koop*  
Chpt: 17:30-17:37

## **9. The effect of the Rental Housing Act**

- a) Introduction
- b) The Scope of the Act
- c) Prevention of Discrimination
- d) Formalities for Leases subject to the Act

## **10. The termination of the lease agreement**

- a) Introduction
- b) Effluxion of Time
- c) Termination by Notice
- d) Termination by Death
- e) Termination by Insolvency

- f) Leases under the Consumer Protection Act
- g) Miscellaneous Issues

Chpt: 18.09-18.28

### **11. Renewal of the lease**

- a) Express Renewal
- b) Tacit Renewal

READINGS: Chpt: 18.29-18.35

## **PART: D**

### **THE LAW OF CARRIAGE**

#### **1. Introduction**

- a) Purpose and scope
- b) Mediums of carriage
- c) Nature of contract

#### **2. The common law of contract of carriage**

- a) Definition
- b) The Parties to a Contract of Carriage
- c) Duties of the Parties
- d) The Contract of Carriage
- e) Formalities

#### **3. The obligations of the consignor**

- a) The obligation to deliver the goods to the carrier
- b) The obligation to accept delivery at the destination
- c) The obligation to pay the agreed or freight

#### **4. The obligations of the carrier**

- a) Main duty

**5. Liability**

- a) Public carrier
- b) Private carrier
- c) *Edict de nautis, cauponibus et stabularis*
- d) Remedies

**6. Types of carriage and the effect of statute**

- a) Carriage by sea
  - b) Carriage by road and rail
  - c) Carriage by air
- READINGS. A Govindjee et al Commercial Law: Fresh Perspectives Cape Town: Pearson/Prentice Hall, 2<sup>ND</sup> Edition, 2014. Chapter 28 pg. 411- 419

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