

# Legislation is the making of law law contract essay

Law



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The law is found in statutes enacted by Parliament and provincial legislatures. The obligation of legislation processed must be in line with the country's constitution which is the most important source of law in South Africa. Legislation must provide laws that will protect society from what is unsafe or unacceptable to the majority of citizens. This gave rise to the Bill of Rights which affirms the democratic values of human dignity, equality and freedom. The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state. The courts and judiciary must play their role in South Africa's system of governance and apply the law as it exists. Putting together a good law is a process requiring careful research and evaluation of the issues at hand, determining what a desirable outcome would be and crafting a reasonable and achievable response - keeping in mind the limitations imposed by constitutional and legal environments.

## **Question 2**

2. 1 The jurisdiction of a specific court refers to a courts extent of authority over hearing certain cases and making judgments. 2. 2 The Constitutional Court has jurisdiction in the Republic as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of the Constitution, this includes-any alleged violation or threatened violation of any fundamental right; any dispute over the constitutionality of any executive or administrative act or conduct or threatened executive or administrative act or conduct of any organ of state; any inquiry into the constitutionality of any law, including an Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of the Constitution; any dispute over the

constitutionality of any Bill before Parliament or a provincial legislature; any dispute of a constitutional nature between organs of state at any level of government; the determination of questions whether any matter falls within its jurisdiction; and the determination of any other matters as may be entrusted to it by the Constitution or any other law. A decision of the Constitutional Court shall bind all persons and all legislative, executive and judicial organs of state.

### **Question 3**

Two of the most important principles when interpreting legislation are: The meaning of a provision must be determined by its language and context in the legislation read as a whole. Any reasonable interpretation of a provision that is consistent with the purpose and scope of that legislation must be preferred over any alternative interpretation that is inconsistent with its purpose and scope.

### **Question 4**

4. 1 The doctrine of stare decisis and the hierarchy of courts Stare decisis means 'the decision stands'. When a court makes a decision, the parties involved in the dispute will be bound by that decision. Stare decisis applies in South African law, but in appropriate cases it is possible to depart from the decision of an earlier and even superior court. Every court is bound by the decisions of the superior court within its area of jurisdiction. A High Court, whether it is a full bench consisting of 3 judges, a bench of 2 judges or only 1 judge, is bound by the decisions of the Constitutional Court and the Supreme Court of Appeal. A bench of 2 judges is bound by the decision of a full bench of 3 judges and 1 judge is also bound by the decisions of a bench of 2

judges. Every court is bound by the decision of a court of concurrent status within its own area of jurisdiction, unless the court is convinced that the earlier decision was incorrect. The Supreme Court of Appeal is bound by its previous judgments unless it is persuaded that its earlier judgment was wrong. A full bench of a High Court is bound by an earlier full bench decision. A bench of 2 judges is bound by an earlier decision of a 2 judge bench. One High Court is not bound to follow decisions of another High Court since they belong to different areas of jurisdiction, therefore a judge in one High Court does not have to follow the decision of another High court without good reason. Magistrates Courts are bound by judgments of the Constitutional Court, Supreme Court of Appeal and High Courts. If judgments of High Courts are conflicting, A Magistrate should follow the decision of the High Court in whose jurisdiction it falls. Magistrates do not have to follow each other's judgment.

4. 2Ratio Decidendi – the reason for the decisionRatio Decidendi is the most important part of a judgment. It is binding and it is the subject of the doctrine of stare decisis. It is the conclusion reached by the judge based on material facts and excluding immaterial ones. The actual parties to the case are bound by the decision. If entirely different parties that are involved in a similar set of facts come to court, the courts will follow the stare decisis and its ratio decidendi.

4. 3Obiter Dictum – an incidental remarkObiter Dictum is any statement which falls outside the ratio decidendi. It is encountered when a judge assumes and answers a rhetorical question, raises an analogous case or gives an illustration. Any remark which is irrelevant to the immediate settling of a dispute is obiter (by the way)It is not binding on subsequent courts because it cannot be ascertained whether the point was properly argued.

## Question 5

5. 1 A contract is an agreement concluded by two or more persons with the serious intention of creating legally enforceable obligations. These obligations are legal relationships that exist between parties based on an agreement. Parties acquire personal rights against each other that either entitles them to perform and/or oblige them to perform. Personal rights may come through various events such as contract or crime. The performance may entail an obligation to do or not to do something, or to deliver something.

5. 2 Requirements of a valid contract

The parties must agree on the objectives of the contract, there must be consensus between them. Each party entering the contract must have the serious intention to create rights and duties to which each of them will be legally bound and the parties must make their intention correspond and be known to one another. Each party to the contract must have capacity to act, meaning they must be legally capable of performing the particular act which gives rise to the formation of the contract. The agreement must be legally possible. The agreement, rights and duties that are created must be lawful or legal. The agreement must be physically possible. It must be objectively possible to perform rights and duties arising from the contract and the performance must be certain. If formalities are prescribed for the formation of the contract, they must be observed.

5. 3 The requirements for a valid and enforceable contract have not been met because the agreement is not legally possible. It is unlawful to steal and purchase stolen goods. The contract between Mary and Steven is null and void because under the common law, it is an agreement involving crime and delict. Mary and Steven do not acquire any enforceable rights and duties from the contract. When an agreement is void due to illegality, no

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party may institute an action against the other to claim a promised performance on the grounds of the unlawful agreement. This rule is expressed in the maxim called *ex turpi causa non oritur action* (no action arises from a shameful cause). Even if Steven has already rendered performance (delivered the car to Mary), the court will not recognize that contract. The unlawfulness has a further consequence in that a party who has suffered a loss is not able to rely on the contract to claim damages. Steven can therefore not claim the car or the money. Steven may also not reclaim his performance on the ground of unjustified enrichment. A legal rule called *par delictum* is contained in the maxim in *(pari delicto potior est conditio possidentis)*. When there is equal guilt the possessor is in the stronger position. Mary is in possession of the car as agreed, and since Mary and Steven are equally guilty, Mary is in the stronger position. In conclusion, Steven cannot reclaim the purchase price from Mary.

## Question 6

In a case like this, Cindy must understand that she cannot enforce the advertised price. By law, an advertisement of goods, whether it was received by post, appeared in a newspaper or catalogue or if it was displayed in a shop window does not constitute an offer. The advertisement she received is considered to only be an invitation to do business. The advert allows an opportunity for negotiation and is therefore not contractually binding. If Cindy is a reasonable person, she would be able to know that the printing on the advert was an error and would not make sense since cellphones are normally not that cheap. When Cindy reacted by going to bargain stores, she can only negotiate with Gary and make him an offer with regards to

purchasing the cellphones. Gary can explain that the printing on the advert was an error. Gary could, out of a gesture of goodwill negotiate a discount with Cindy and take the cellphones off the shelves to prevent further confusion with customers that will follow. If Gary and Cindy can agree on the price, consensus will be reached and a contract of sale will arise.

### **Question 7**

The type of breach of contract is default of the debtor (*mora debitoris*). Paul is the debtor because he did not perform (build a pool) at the agreed time and the delay is due to his fault. Peter is the creditor because he is entitled to performance. Two requirements have to be met when a debtor commits breach of contract. Performance must be delayed. The terms of the contract between Peter and Paul stipulated a specific date (20 February) for performance of the obligation of building a pool to have been complete. Since the creditor failed to perform on or before the appointed time, he is in *mora*. Because there was no exact date specified for performance, Peter determined a date by demanding that Paul perform before or on a certain date. It is required that when fixing a date, the creditor must allow a reasonable time within which to perform. The debtor is in *mora ex persona* because he failed to perform on the determined date. The delay must be due to the debtor's fault. There can be breach of contract only if a party to a contract intentionally or negligently does not honour his or her obligation. Paul culpably did not honour his obligation. If the debtor has warranted performance at a particular time, late performance will constitute breach of contract even if the delay was not caused by the debtor's fault. The debtor gave the guarantee; therefore he assumes the risk of a delay.

## Question 8

8. 1 Rosina will suffer the damages. The contract of sale was concluded on a cash basis; therefore, Rosina became the new car owner after she paid the purchase price. When property is destroyed, it is normally the owner who bears the loss or suffers damages. Because there are no suspensive conditions that need to be fulfilled, one of the consequences of a contract of sale is that the risk of accidental damage to or loss of the merx (the object of sale), as well as the right to any potential benefit or profit accruing to it, passes from the seller to the purchaser as soon as the contract is perfecta. This is even before the purchaser has become the owner. 8. 2 A contract will be perfecta: - The merx must be definite or identified. This can happen once individualization of what the merx is. The purchase price must be ascertainable through simple easy calculation. The correct price and quantity must be known to establish the sale price. If the contract contains a suspensive condition, it must already have been fulfilled. Once the condition or requirement has been met, the contract will be perfecta.

## Question 9

Indemnity Insurance - A contract that is intended to compensate the insured for patrimonial loss (e. g.; money awarded to a party by their car insurance company for the physical damage to the insured party's car after an accident). The insurer undertakes to make good the damage which the insured may suffer through the occurrence of the event insured against.

Non-indemnity insurance - A contract intended to compensate the insured for non-patrimonial loss (e. g.; damages for loss of life or shortened life expectancy being awarded monetarily by a Life Insurance provider to a



nominated beneficiary) resulting from the impairment of an abstract interest. The insurer undertakes to pay the insured or the beneficiary a fixed sum of money if the event insured against takes place. The occurrence of the event causes non-patrimonial harm and creates an abstract need which requires consolation or satisfaction.

### **Question 10**

10. 1 The lease of contract is a contract for letting and hiring, or lease of a thing. It is a reciprocal contract in terms of which one party (the lessor, or landlord) undertakes to make temporarily available to another party (the lessee, or tenant) the use and enjoyment of a thing, wholly or in part, in return for the payment of a sum of money or a share in the fruits of the property. 10. 2The 3 essential elements of a contract of leaseAn undertaking by the lessor to give the lessee the use and enjoyment of somethingAn agreement between the lessor and the lessee that the lessee's right of use and enjoyment is to be temporaryAn undertaking by the lessee to pay rent by way of a sum of money, or a share in the fruits of the property , in return for the use and enjoyment which he or she will receive.

### **Question 11**

The 5 rights of partners in a partnership: Partners are entitled to claim delivery of the contribution promised by a partner. Each partner is entitled to share in the profits of the partnership. When compensation has been agreed upon, it may be claimed. Partnership assets may be used by a partner as co-owner, provided that they are used to further the aims of the partnership. Partners are entitled to access the accounting records of the partnershipEach

partner is entitled to participate in the management of the partnership and to perform management functions on its behalf.

## **References**

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