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NEC Forum 2 - 2026

NEC training sponsored by



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POINT

FREE

**Tuesday, 10th March
4 pm - 6 pm**

**Topic: Contract Law and NEC4
Presented by Seyuran Arran
Contract Law Associate**

ECS Associates



Engineering smarter project and contract outcomes through digital innovation



● VISION

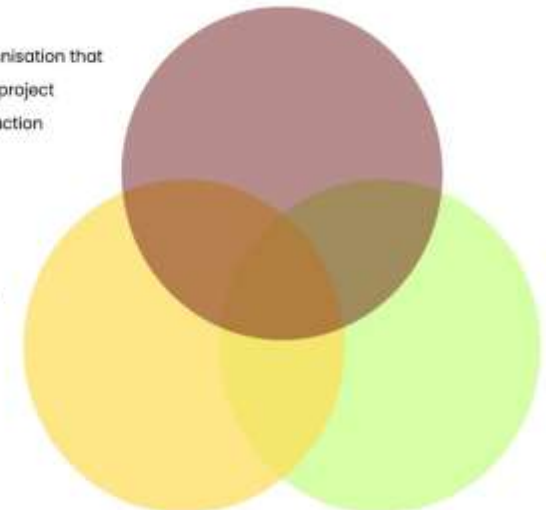
To be recognised as a leading, fully-empowered organisation that delivers the most effective professional contract and project management services in the engineering and construction environment.

● MISSION

We bring solutions to our clients through a combination of expert knowledge, hands on experience and best practice by being responsive to their needs through collaboration in their business endeavours and challenges.

● VALUES

- Integrity
- Professionalism
- Collaboration
- Courage



Objectives of NEC Jam Session 2

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Attendees should leave with:

- An understanding of the NEC philosophy, its associated culture
- A basic understanding of key Concepts of Contract law
- Pertinent legal mechanism and how they manifest in the NEC4 suite of contracts
- Important NEC4 incorporation of legal theory
- Note the balance between Legal, technical and commercial aspects of Project Management and Contract Management

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- NEC4 Philosophy
- Basic Contract Law Tenants

2. The 7 Requirements of a Valid Contract

- Mistakes
- Breaches
- Interpretation


3. Legal Concepts and how they Appear in NEC4

- Good faith/ Mutual Trust
- Notifications and communication
- Entire Contract
- Liquidated Damages
- General Drafting
- Dispute Resolution

1. Introduction

Main reasons leading to claims/disputes in projects ≈ General Project Failure

Causes of claim and/or dispute	% projects
Change in scope	36,90%
Design was incorrect	21,50%
Design information was issued late	21,30%
Design was incomplete	19,80%
Contract management and/or administration failure	18,00%
Poor management of sub-contractor/supplier and/or their interfaces	17,90%
Contract interpretation issues	17,80%
Workmanship deficiencies	17,70%



All 'problems' can be traced back or attributed to contractual misunderstandings, poor administration and/or on-site, practical work issues.

BUT OFTEN, THE ROOT CAUSE OF A NUMBER OF THESE SYMPTOMATIC ISSUES IS A LACK OF LEGAL APPRECIATION.

1. Introduction

The NEC:

- **Historical Context:** The NEC origins date back to **1986**. In the UK, there was a clear need stimulate better project management and specifically to reduce the "gamesmanship" prevalent in traditional construction contracts as a direct answer to the **Latham report**
- **Philosophy and Objectives:** Designed as "**evolution not revolution**," NEC4 aims to provide a greater stimulus to good management and support collaborative partnering
- The NEC has evolved to align to legal principles [Legal principles have not changed]
- **Purposed to be both a Project Management manual and tool + a living Contract with enforceable legal consequences**

1. Introduction

“The paramount importance of upholding the sanctity of contracts, without which all trade would be impossible ...”

— Basson v Chilwan and Others 1993 (3) SA 742 (A)

“This principle follows from the notion that contracts, freely and voluntarily entered into, should be honoured.”

— Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust 2020 (5) SA 247 (CC).

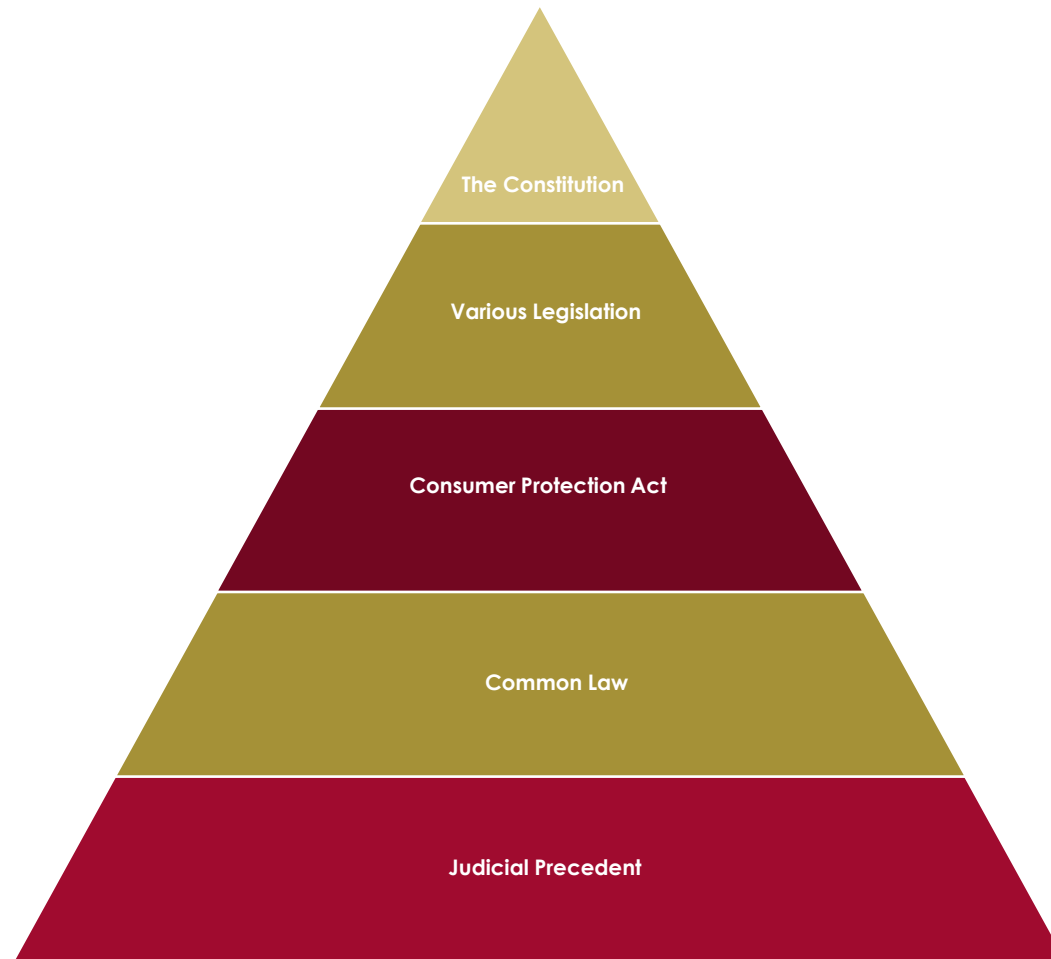
1. Introduction

Contract Law Basic Tenants

- **Contract definition:** A contract is a binding agreement between two or more parties that confers legal rights and establishes reciprocal obligations/duties
- **Core Functions:** It identifies the parties, regulates their ongoing relationship, and requires "doing something in exchange for something" (the principle of reciprocity)
- **South Africa Operates on a non-codified (common law) system of contract law**
- **Sources of Contract law:** Constitution of the Republic of South Africa, 1996; Legislation; Common Law; Judicial Precedent

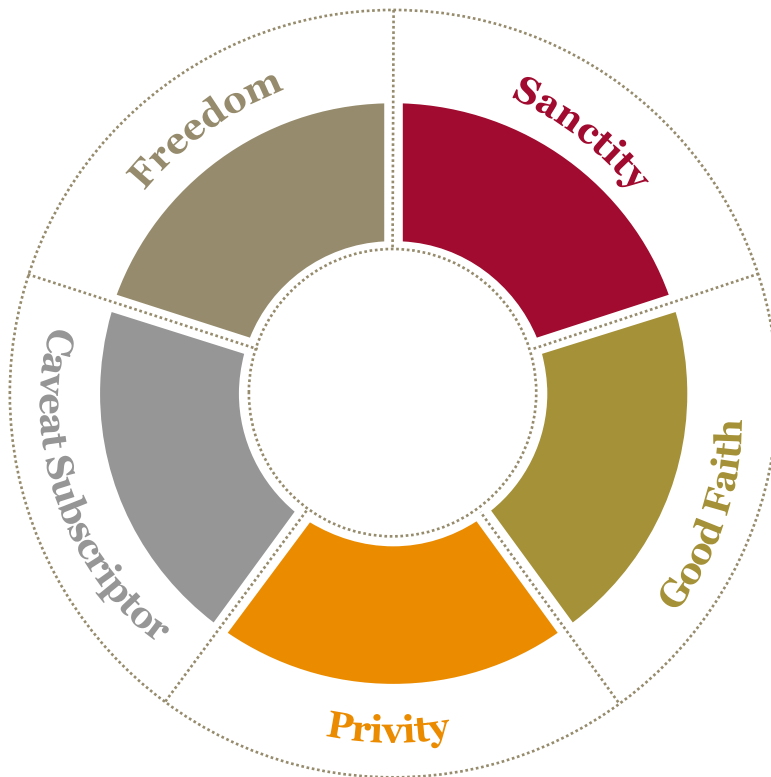
1. Introduction

Contract Law Basic Tenants



1. Introduction

Contract Law Basic Tenants



- **Freedom of Contract:** Party Autonomy (with whom, terms and conditions)
- **Sanctity:** Contracts entered must be honoured (pacta sunt servanda)
- **Good faith:** The idea that parties should behave fairly and honestly
- **Privity:** Rights and duties are only for those party to the agreement, no one else
- **Caveat Subscriptor:** Assumptions about awareness and understanding once signing



2. The 7 Requirements for Contract Validity

7 Requirements for a Contract to be Legally Enforceable

1. **Consensus:** A "meeting of the minds" achieved through a clear Offer and Acceptance
2. **Consideration:** The exchange of value (e.g., performance of works for payment; cash; cheques)
3. **Capacity:** The legal standing and mental capacity of the parties to be bound
4. **Formalities:** Compliance with specific forms (e.g., being in writing) when required by law or the contract itself
5. **Legality:** The object must not violate law or public policy (e.g., contracts to run a brothel are void)
6. **Possibility:** Performance must be objectively possible; if it is physically or legally impossible from the start, the contract is void
7. **Certainty:** Terms must be sufficiently clear and precise so that rights and duties can be determined

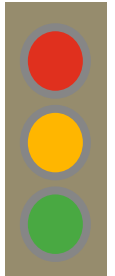
2. The 7 Requirements for Contract Validity

Material vs. Non-Material Mistakes

- **Material Mistakes (Void):** These result in dissensus (no agreement).

Examples include:

- **Error in negotio:** Mistake about the type of contract (e.g., thinking it's a lease when it's a sale)
- **Error in corpore:** Mistake about the subject matter itself



- **Non-Material Mistakes (Voidable):** These relate to motive or non-fundamental qualities. Consensus exists but there are questionable attributes regarding the 7 requirements

Examples include:

- **Error in substantia:** Mistake regarding a characteristic of the object (e.g., design responsibility)

2. The 7 Requirements for Contract Validity

Forms of Breach



- **Mora debitoris:** Late performance by the debtor (the Contractor)
- **Mora creditoris:** Late performance or failure to cooperate by the creditor (the Client)
- **Positive Malperformance:** Incomplete or defective performance that deviates from contract specifications
- **Repudiation:** Conduct or words showing a clear intention to no longer be bound by the contract
- **Prevention of Performance:** When one party makes it impossible for the other to perform (e.g., failing to give site access)

2. The 7 Requirements for Contract Validity

Interpretation of Contracts

- **Common Intention:** The primary goal is to establish the true intent of the parties at the time of contracting
- **Approaches:** Courts favour the ordinary grammatical meaning but will use a purposive/commercial approach to resolve ambiguities in context
- **Contra proferentem:** Ambiguous terms are interpreted against the party that drafted them
- **Parol Evidence Rule:** In written contracts, parties generally cannot use external evidence to contradict or vary the written terms already existing in the contract

3. Important Legal Concepts in NEC4

- **Reciprocity:** Central to all bilateral contracts; honouring the deal means considering the other party's interests, not just self-interest
- **Exceptio non adimpleti contractus:** The right of an innocent party to withhold their performance (e.g., payment) until the other party has performed in full
- **Prevention (Force Majeure):** Clause 19 handles significant, unexpected events that stop the works, treating them as compensation events for both time and cost—a unique NEC

3. Important Legal Concepts in NEC4

Concepts to take note of in NEC4

- **Good Faith:** Explicitly stated in Clause 10.1 & 10.2, requiring parties to act in a "spirit of mutual trust and co-operation"
- **Notifications:** The proactive core of NEC—Early Warnings (Clause 15) and Compensation Events (Section 6) force parties to manage risks and changes in real-time
- **Entire Contract:** NEC forms typically include clauses stating they constitute the whole agreement to ensure the written terms take primacy (Clause 12.4)

3. Important Legal Concepts in NEC4

Concepts to Take Notes of in NEC4

- **Liquidated Damages:** Option X7 (Delay Damages) must be a genuine pre-estimate of loss. Following a 2020 update, these damages now cease upon termination, moving thereafter to general damages
- **Drafting & Signing:** Emphasizes the need for clear party identification, detailed "Scope" (replacing Works Information), and signed formalities for variations
- **Alternative Dispute Resolution (ADR):** A tiered process including mandatory Adjudication and the use of Senior Representatives to resolve issues before reaching the Tribunal (Arbitration or Courts) **OR** DAB (Clause W3)

Project Management Principles and Contract Law

Project Management Principles in the ECC

Problem resolution	Clause 15.3
Change control	Section 6
Risk management	Section 3, clause 15
Programme management	Section 3
Communication protocol	Clause 13
Quality control	Section 4, clause 24, clause 26



5. Conclusions



5. Conclusions

Always
remember
what you
are
playing
against



5. Conclusions



"I'm beginning to wonder if both you guys are lying."

The end of NEC Jam Session 10



Next NEC Jam Session **ice-sa**

14 April 2026

NEC4 Supply Contracts (SC)

Presented by Jacqueline Mthethwa

**Thank you for your
participation**

Feedback is welcome

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