ROMAN LAW

753 BC - AD 568

CORPUS IURIS CIVILIS: PRIMARY AUTHORITATIVE SOURCE WHEN REVERTING TO ROMAN LAW

CODIFICATION: CORPUS IURIS CIVILIS (16TH CENTURY)
ROMAN-DUTCH LAW

15TH & 16TH CENTURIES

1652 JAN VAN RIEBEEK - CAPE

SOURCE OF PRESENT-DAY SA LAW
1814: RECEPTION OF ENGLISH LAW
1826: CODE OF CRIMINAL PROCEDURE INTRODUCED
1830: ENGLISH LAW OF EVIDENCE INTRODUCED
1843: ENGLISH SYSTEM OF ADMIN OF ESTATES
1910

- Establishment of Union Parliament
- Privy Council: Abolished as highest court of appeal (Act 16 of 1950)
- Establishment of Appellate Division
- Uniform system of statute law
SOURCES OF LAW (ORDER CONSULTED)

- Statute Law / Legislation
- Customary Law
- Textbooks & Journals
- Foreign Law
- Old Authorities
- Judgments of the Courts
STATUTE LAW

LEGISLATION = MAKING OF LAW BY COMPETENT AUTHORITY

MOST IMPORTANT SOURCE OF LAW TODAY

CONSTITUTION

PRE-1652 LEGISLATION = DUTCH STATUTE STILL APPLY

1658 DUTCH LAW IMMOVABLE PROPERTY STILL APPLIES

DUTCH LAW (1652-1806): DOES NOT APPLY IF NOT RATIFIED & ACCEPTED BY SA LAW
CONSTITUTION OF RSA 1996

MOST IMPORTANT SOURCE OF LAW IN SA

PREVIOUSLY: SUPREME PARLIAMENT

HEAL DIVISIONS OF PAST: DEMOCRATIC VALUES, SOCIAL JUSTICE, HUMAN RIGHTS

DEMOCRATIC & OPEN SOCIETY: GOVERNMENT BASED ON WILL OF SOCIETY, EVERYONE EQUALLY PROTECTED BY LAW

IMPROVE QUALITY OF LIFE & FREE POTENTIAL OF ALL

UNITED & DEMOCRATIC SA - SOVEREIGN STATE FAMILY OF NATIONS

BILL OF RIGHTS
BILL OF RIGHTS
(CHapter 2 of Constitution)

CORNERSTONE OF DEMOCRACY

HUMAN DIGNITY, EQUITY, FREEDOM

BINDS 3 BRANCHES OF GOVERNMENT: LEGISLATURE, EXECUTIVE, JUDICIARY & ALL ORGANS OF STATE

REGULATES GOVERNMENT

CAN BE LIMITED IN SPECIAL CIRCUMSTANCES

1ST-GENERATION RIGHTS - NEGATIVE - DO NOT TORTURE / DISCRIMINATE (EQUALITY, HUMAN DIGNITY, LIFE, RELIGION, EXPRESSION, MOVEMENT, TRADE)

2ND-GENERATION RIGHTS - POSITIVE - BASIC NECESSITIES (HOUSING, HEALTHCARE, FOOD, WATER, SOCIAL SECURITY, EDUCATION)
SPECIAL CIRCUMSTANCES LIMITING RIGHTS

TAKE ALL FACTORS INTO ACCOUNT (NATURE OF RIGHT, IMPORTANCE OF RIGHT, IMPORTANCE OF PURPOSE OF LIMITATION, RELATION BETWEEN LIMITATION & PURPOSE, LESS RESTRICTIVE WAYS?)

REASONABLE & JUSTIFIABLE IN DEMOCRATIC SOCIETY BASED ON HUMAN DIGNITY, EQUALITY & FREEDOM

LAW OF GENERAL APPLICATION
HOW CONSTITUTION REGULATES GOVERNMENT

NATIONAL, PROVINCIAL, LOCAL GOVERNMENT

COURTS & ADMIN OF JUSTICE

PUBLIC ADMIN

SECURITY SERVICES

TRADITIONAL LEADERS

FINANCIAL MATTERS OF STATE
CUSTOMARY LAW (TRADE USAGES) DOES NOT CONSIST OF WRITTEN RULES

1. REQUIREMENT 1: MUST BE REASONABLE
2. REQUIREMENT 2: EXISTED FOR A LONG TIME
3. REQUIREMENT 3: GENERALLY RECOGNISED & OBSERVED BY COMMUNITY
4. REQUIREMENT 4: CONTENTS MUST BE CERTAIN & CLEAR
5. DEVELOPS FROM HABITS OF COMMUNITY
LOWER COURTS

- LIMITED JURISDICTION
- MAGISTRATES' COURTS
- DIFFERENT COURTS OF BLACK CHIEFS & HEADMEN
- SMALL CLAIMS COURTS

REQUIRED TO KEEP RECORD OF PROCEEDINGS
OLD AUTHORITIES (COMMON LAW)

- Old Authorities (Common Law)
- Roman Law
- Roman-Dutch Law
- Corpus Iuris Civilis Direct Source of SA Law
- Judgments of SA Courts After 1910
WRITTEN BY LAWYERS, LEGAL ACADEMICS, ADVOCATES, ATTORNEYS & JUDGES

NO AUTHORITY OF THEIR OWN

PERSUASIVE INFLUENCE ON COURTS

TEXTBOOKS & JOURNALS
COURTS IN THE REPUBLIC

- Constitutional Court
- Supreme Court of Appeal
- High Courts
- Other Courts of Importance in SA Context
- Officers of Superior Courts
- Magistrates' Courts
CONSTITUTIONAL COURT

FINAL INSTANCE OVER ALL MATTERS RELATING TO INTERPRETATION, PROTECTION & ENFORCEMENT OF CONSTITUTION

EXAMPLE: RIGHT TO DECIDE IF FUNDAMENTAL RIGHT HAS BEEN VIOLATED

SEATED IN JOHANNESBURG
SUPREME COURT OF APPEAL

COURT OF APPEAL FOR HIGH COURTS

MAY SIT ELSEWHERE IF EXPEDIENT BY REASON OF EXCEPTIONAL CIRCUMSTANCES

SEATED IN BLOEMFONTEIN

UNLIMITED JURISDICTION EXCEPT MATTERS WITHIN JURISDICTION OF CONSTITUTIONAL COURT
HIGH COURTS

- Any matters within area of jurisdiction
- Certain constitutional matters: fundamental right enshrined in constitution was violated
- Only jurisdiction: divorce, mental capacity, sequestration, liquidation, wills
SEATS OF HIGH COURTS

BISHO

BLOEMFONTEIN (MANGAUNG)

CAPE TOWN

DURBAN

GRAHAMSTOWN

JOHANNESBURG

KIMBERLEY

MAFIKENG

PIETERMARITZBURG

PORT ELIZABETH (NELSON MANDELA BAY)

PRETORIA (TSHWANE)

THOHOYANDOU

MMTATA
OFFICERS OF SUPERIOR COURTS

REGISTRAR - SUPERIOR COURTS - ISSUE OF PROCESS (SUMMONS, WARRANTS), ENROLMENT OF CASES, ISSUING OF ORDERS, MAINTENANCE OF RECORDS

SHERIFFS - HIGH COURTS - PROCESS & EXECUTE JUDGMENTS & ORDERS

MASTER - SOME HIGH COURTS - ADMIN & QUASI-JUDICIAL FUNCTIONS - DECEASED & INSOLVENT ESTATED, LIQUIDATION & JUDICIAL MANAGEMENT OF COMPANIES, AFFAIRS OF PERSONS UNDER LEGAL DISABILITY

ADVOCATED - MAINLY SUPERIOR COURTS

ATTORNEY - MAINLY MAGISTRATES' COURTS - DRAW UP CONTRACTS & WILLS, NOTARY (ANTENUPTIAL CONTRACTS, NOTARIAL DEEDS), CONVEYANCER (PREPARE DEEDS OF TRANSFER OF IMMOVABLE PROPERTY, CERTIFICATES OF TITLE, MORTGAGE BONDS, ETC REGISTRATION AT DEEDS OFFICE)
MAGISTRATES' COURTS (MOST IMPORTANT OF LOWER COURTS)

- Found in most towns
- Sheriff (previously messenger) = sheriff
- Clerk = registrar
- Limited jurisdiction
- May not hear matters in jurisdiction of superior courts
DOCTRINE OF STARE DECISES

JUDGE-MADE LAW: EFFECT OF JUDICIAL DECISION WHICH GIVES NEW INTERPRETATION TO STATUTORY PROVISION / ABSTRACTS, EXTENDS / ADAPTS COMMON-LAW PRINCIPLE

COURT IS BOUND BY OWN DECISIONS UNLESS & UNTIL OVERRULED BY SUPERIOR COURT

LATER COURT BOUND BY EARLIER COURT’S DECISION

STARE DECISES = DECISION STANDS
STARE DECISIS & HIERARCHY OF COURTS

(A) EVERY COURT IS BOUND BY DECISIONS OF SUPERIOR COURT WITHIN AREA OF JURISDICTION

HIGH COURT WITH 3/2/1 JUDGE(S) IS BOUND BY CONSTITUTIONAL COURT & SUPREME COURT OF APPEAL. 2 X JUDGES BOUND BY DECISION OF FULL BENCH. 1 JUDGE BOUND BY DECISION OF 2 JUDGES

(B) EVERY COURT BOUND BY DECISION OF COURT OF CONCURRENT STATUS WITHIN OWN AREA OF JURISDICTION

SUPREME COURT OF APPEAL BOUND BY PREVIOUS JUDGMENTS (EVEN BENCH OF 5 JUDGES BY BENCH OF 3)

(C) 1 HIGH COURT IS NOT BOUND TO FOLLOW DECISIONS OF OTHER HIGH COURT - DIFFERENT AREAS OF JURISDICTION

(D) MAGISTRATES' COURTS ARE BOUND BY DECISIONS OF SUPERIOR COURTS

1 X MAGISTRATE DOES NOT FOLLOW JUDGMENTS OF OTHER - JUDGMENTS OF MAGISTRATES' NOT REPORTED

IF JUDGMENTS OF HIGH COURTS ARE CONFLICTING, FOLLOW HIGH COURT IN JURISDICTION

1 X MAGISTRATE DOES NOT FOLLOW JUDGMENTS OF OTHER - JUDGMENTS OF MAGISTRATES' NOT REPORTED
PARLIAMENT MAKES LAW WHILE JUDICIARY APPLIES THEM

BEFORE CONSTITUTION: INTERPRETATION ACT 33 OF 1957 & RULES & PRINCIPLES FROM COMMON LAW

SECTION 233 OF CONSTITUTION: WHEN INTERPRETING ANY LEGISLATION, EVERY COURT MUST PREFER ANY REASONABLE INTERPRETATION THAT IS CONSISTENT WITH INTERNATIONAL LAW OVER ANY ALTERNATIVE & INCONSISTENT INTERPRETATION

SECTION 39(1) OF CONSTITUTION: WHEN INTERPRETING BILL OF RIGHTS, COURT MUST PROMOTE VALUES - OPEN DEMOCRATIC SOCIETY BASED ON HUMAN DIGNITY, EQUALITY & FREEDOM, MUST CONSIDER INTERNATIONAL LAW, MAY CONSIDER FOREIGN LAW

SECTION 39(2) OF CONSTITUTION: WHEN INTERPRETING ANY LEGISLATION, COURT MUST PROMOTE SPIRIT, PURPORT & OBJETS OF BILL OF RIGHTS

INTERPRETATION OF STATUTES
2 MOST IMPORTANT OTHER PRINCIPLES WHEN INTERPRETING LEGISLATION

MEANING OF PROVISION MUST BE DETERMINED BY ITS LANGUAGE & ITS CONTEXT IN LEGISLATION READ AS A WHOLE

ANY REASONABLE INTERPRETATION OF A PROVISION THAT IS CONSISTENT WITH PURPOSE & SCOPE OF THAT LEGISLATION MUST BE PREFERRED OVER ANY ALTERNATIVE INTERPRETATION THAT IS INCONSISTENT WITH PURPOSE & SCOPE
INTERPRETATION ACT 33 OF 1957

- Applies to interpretation of every law
- General definitions of frequently used terms in legislation
- Rules about gender (masculine includes feminine)
- Numbering
- Calculation of time
- Measurement of distance
- Commencement & repeal of legislation
MOST IMPORTANT PART OF JUDGMENT

"REASON FOR THE DECISION"

BINDING ON SUBSEQUENT COURTS

RATIO DECIDENDI = CONCLUSION REACHED BY JUDGE BASED ON MATERIAL FACTS

1ST STEP IS TO DETERMINE MATERIAL FACTS ON WHICH JUDGE BASED DECISION

SIMILAR FACTS - WILL FOLLOW PREVIOUS DECISION & RATIO DECIDENDI

SUBJECT OF DOCTRINE OF STARE DECISIS

BINDING

RATIO DECIDENDI
OBITER DICTUM

ANY STATEMENT WHICH FALL OUTSIDE RATIO DECIDENDI

OBITER DICTUM = INCIDENTAL REMARK

ENCOUNTERED WHEN: PRINCIPLE OF CASE FORMULATED MORE BROADLY BY JUDGE; JUDGE MAKES INCIDENTAL REMARK, POSTULATES & ANSWERS HYPOTHETICAL QUESTION, RAISES ANALOGOUS CASE / GIVES ILLUSTRATION

ANY REMARK IRRELEVANT TO IMMEDIATE SETTLING OF DISPUTE = OBITER (BY THE WAY)

MAY HAVE STRONG PERSUASIVE AUTHORITY

NOT BINDING
DISTINGUISHING

- Technique used by judge to avoid binding force of earlier ratio decidendi
- Earlier court formulated principle to broadly
- Earlier court did not take sufficient account of fact
- Consequences are unacceptable
- May encounter a material fact, not present in earlier case
TYPICAL ASPECTS OF JUDGMENT

APPLICANT, CLAIMANT / APPELLANT - 1ST MENTION

V = VERSUS = AGAINST

DEFENDENT / RESPONDENT AFTER V

2006 (6) = 6TH PART OF 2006 LAW REPORTS

SA = SA LAW REPORTS

208 = PAGE NUMBER ON WHICH CASE REPORTED

POSTEA = AFTERWARDS

CUR ADV VULT = CURIA ADVISARI VULT = COURT WISHES TO CONSIDER ITS DECISION

ALITER = OTHERWISE

SEMBLE = APPEAR TO BE ACCORDING TO JUDGMENT

SC = SENIOR CONSULTUS = SENIOR COUNSEL

SCA = SUPREME COURT OF APPEAL

2006 (6) = 6TH PART OF 2006 LAW REPORTS