CHAPTER 5

LEGAL CAPACITY: EVERY LEGAL SUBJECT HAS CAPACITY TO BE BEARER OF RIGHTS & DUTIES

NOT EVERY PERSON WITH LEGAL CAPACITY HAS CAPACITY TO ACT

CAPACITY TO ACT: CAPACITY TO PERFORM JURISTIC ACTS, PARTICIPATE IN LEGAL DEALINGS & CONCLUDE VALID CONTRACTS

EXISTENCE / LIMIT CONTRACTUAL CAPACITY DETERMINED BY ABILITY TO FORM & DECLARE A WILL & ABILITY TO JUDGE RIGHTS & DUTIES THAT FLOW FROM ACTS

JURISTIC PERSONS: NEVER CAPABLE OF PERFORMING JURISTIC ACTS

CAPACITY TO PERFORM JURISTIC ACTS
FACTORS:
- Lose Capacity / Limited Capacity
- Age
- Insolvency
- Prodigals
- Influence of Alcohol / Drugs
- Marriage
- Mental Deficiency
AGE

3 MAJOR AGE BANDS:

(1) 0 - 7 YEARS

(2) 7 - 21 YEARS (NOW 7 - 18 YEARS)

(3) 21+ YEARS (NOW 18+ YEARS)

CHILDREN'S ACT 38 OF 2008: 18 = AGE OF MAJORITY

21 = TRADITIONAL AGE OF MAJORITY

ABILITY TO FORM & DECLARE WILL & ABILITY TO APPRECIATE CONSEQUENCES OF CONTRACT - DETERMINED BY LEVEL OF INTELLECTUAL & EMOTIONAL DEVELOPMENT - MOSTLY DETERMINED BY AGE

ADJUSTMENT - BRING AGE OF MAJORITY INTO LINE WITH CONSTITUTION & INTERNATIONAL INSTRUMENTS - DEFINE CHILD AS BEING UNDER 18

3 MAJOR AGE BANDS: (1) 0 - 7 YEARS (NOW 7 - 18 YEARS) (3) 21+ YEARS (NOW 18+ YEARS)
BECOMES MAJOR @ 18

- MAJORITY
- EVERY CHILD (/ANYONE ACTING IN INTEREST OF CHILD) MAY BRING & BE ASSISTED IN BRINGING MATTER TO COURT, PROVIDED MATTER FALLS WITHIN JURISDICTION
- UNLESS INDEPENDENT ABILITY FLAWED (MENTAL DEFICIENCY) WILL HAVE FULL CAPACITY WHEN REACH AGE OF MAJORITY
- MINOR OBTAINS FULL CAPACITY TO ACT UPON MARRIAGE UNLESS MINOR'S Capacity IS FLAWED FOR OTHER REASON THAN AGE
- MINOR RETAINS CAPACITY TO ACT EVEN IF MARRIAGE IS DISSOLVED BEFORE REACHES MAJORITY
MINORITY

MINOR (/CHILD) = ANY NATURAL PERSON NOT YET REACHED AGE OF 18

NO CAPACITY TO ACT / HAVE LIMITED CAPACITY DEPENDING ON AGE
MINORITY

MINOR / CHILD UNDER AGE OF 7 YEARS

SPECIAL SITUATIONS

MINOR / CHILD OVER AGE OF 7 YEARS
MINOR CHILD UNDER AGE OF 7 YEARS

- CHILD < 7 - INSUFFICIENT LEVEL OF DEVELOPMENT TO FORM SOUND JUDGMENT OF CONTRACTUAL OBLIGATIONS
- NO CAPACITY TO ACT
- CANNOT CONCLUDE ANY CONTRACT WHATSOEVER
- NOT EVEN CAPABLE OF CONCLUDING CONTRACT IN TERMS OF WHICH ACQUIRES RIGHTS WITHOUT INCURRING ANY CONCOMITANT OBLIGATIONS
- MAY NOT ACCEPT OFFER OF DONATION
MINOR / CHILD OVER AGE OF SEVEN YEARS

MINOR > 7 YEARS - INDEPENDENT INTELLECT - CAN EXERCISE INDEPENDENT WILL, ASSUMED DOES NOT POSSESS MATURE & SOUND JUDGMENT

LIMITED CAPACITY TO ACT

CHILDREN BORN IN MARRIAGE - PARENTS EQUAL RIGHTS

MAY PERFORM JURISTIC ACTS ONLY WITH ASSISTANCE OF GUARDIAN

GUARDIAN - MORE THAN 1 GUARDIAN - CONSENT OF ALL - MARRIAGE, APPLICATION FOR PASSPORT, DEPARTURE FROM REPUBLIC, ALIENATION / ENCUMBRANCE OF IMMOVABLE PROPERTY, UNLESS COURT ORDERS OTHERWISE

GUARDIAN GENERALLY ACQUIRES NO PERSONAL LIABILITIES / RIGHTS

IF CONTRACT TO DETRIMENT OF MINOR, MAY APPLY TO HIGH COURT FOR CANCELLATION & RESTITUTION OF EVERYTHING PERFORMED IN TERMS THEREOF WITHIN 1 YEAR OF REACHING MAJORITY
MINOR / CHILD OVER AGE OF SEVEN YEARS - CONTINUED...

- MAY CONCLUDE CONTRACTS WITHOUT ASSISTANCE IF EXCLUSIVELY TO BENEFIT (RIGHTS BUT NO DUTIES ACQUIRED)
- FEMALE MINOR, IRRESPECTIVE OF AGE - MAY CONCENT TO TERMINATION OF PREGNANCY WITHOUT CONSENT OF PARENTS (CHOICE ON TERMINATION OF PREGNANCY ACT 92 OF 1996)
- MINOR > 16 YEARS MAY MAKE VALID WILL (WILLS ACT 7 OF 1953)
- MINOR > 7 YEARS ALLOWED TO WITHDRAW MONIES DEPOSITED IN HIS ACCOUNT (POST OFFICE ACT 44 OF 1958)
- MINOR > 16 MAY MAKE DEPOSITS WITH & WITHDRAWALS FROM BANK (WITHOUT ASSITANCE) & CEDE / BURDEN INVESTMENT (MUTUAL BANKS ACT 1244 OF 1993)
- MINOR 17+ MAY OBTAIN LEARNER'S DRIVER'S LICENCE (NATIONAL ROAD TRAFFIC ACT 93 OF 1996)
MINOR / CHILD OVER AGE OF SEVEN YEARS - CONTINUED...

GIRLS < 15 & BOYS < 18 MAY NOT BE GIVEN OUT TO MARRIAGE / ENGAGEMENT BY GUARDIANS AS PART OF SOCIAL, RELIGIOUS / CULTURAL PRACTICES

GIRLS > 15 & BOYS > 18 MAY NOT BE GIVEN OUT TO MARRIAGE / ENGAGEMENT WITHOUT CHILD'S CONSENT

CHILDREN UNDER THESE MINIMUM AGES MAY IN EXCEPTIONAL CIRCUMSTANCES GET MARRIED - ONLY WHEN MINISTER OF HOME AFFAIRS GIVEN CONSENT

DIVORCE: COURT GRANTING DIVORCE ORDER WILL PROVIDE FOR GUARDIANSHIP - BEST INTERESTS OF CHILD

GUARDIANSHIP ACT 192 OF 1993 PROVIDES FOR PARENTAL RIGHTS OF UNMARRIED FATHERS IN CERTAIN CIRCUMSTANCES

CHILD BORN OUT OF WEDLOCK = MOTHER = GUARDIAN

BOTH PARENTS DIE - COURT APPOINT ANOTHER PERSON WITH CAPACITY TO ACT AS GUARDIAN

5 PARENT DIES, SURVIVING PARENT = GUARDIAN
MINOR / CHILD OVER AGE OF SEVEN YEARS - CONTINUED...

ANY PERSON INTEREST IN CARE, WELL-BEING & DEVELOPMENT OF CHILD MAY APPLY TO HIGH COURT FOR GUARDIANSHIP

CHILD > 12 YEARS - SUFFICIENT MATURITY & MENTAL CAPACITY TO UNDERSTAND BENEFITS, RISKS, SOCIAL & OTHER IMPLICATIONS OF MEDICAL TREATMENT

SAME APPLIES TO OPERATION ON CHILD. GUARDIANS MUST ASSIST

GUARDIAN GIVE CONSENT TO MEDICAL TREATMENT / OPERATION CHILD < 12 / INSUFFICIENT MATURITY

CHILD TESTED FOR HIV ONLY IN BEST INTERESTS OF CHILD & CONSENT GIVEN

CONSENT: CHILD > 12 / < 12 & OF SUFFICIENT MATURITY TO UNDERSTAND BENEFITS, RISKS & SOCIAL IMPLICATIONS

GUARDIAN MUST GIVE PERMISSION FOR HIV TEST IF CHILD < 12 / INSUFFICIENT MATURITY

CHILD MUST BE PROPERLY COUNCILED BEFORE HIV TEST

CHILD - ACCESS TO INFO ON HEALTH PROMOTION, PREVENTION & TREATMENT OF ILL-HEALTH & DISEASE, SEXUALITY & REPRODUCTION

ACCESS TO INFO OF OWN HEALTH STATUS, CAUSES & TREATMENT

CHILDREN > 12 ACCESS TO CONTRACEPTIVES IN CERTAIN CIRCUMSTANCES
SPECIAL CIRCUMSTANCES

- Contracts for which the guardian's assistance is insufficient
- Tacit emancipation
- Contracts which minor child concludes without necessary assistance in spite of limited capacity to act
- Fraudulent misrepresentation of majority
CONTRACTS FOR WHICH GUARDIAN'S ASSISTANCE IS INSUFFICIENT

CONSENT OF HIGH COURT / SOME SPECIFIED PERSON MUST ALSO BE OBTAINED

GUARDIAN & MASTER OF HIGH COURT MUST CONSENT TO ALIENATION / MORTGAGING OF IMMOVABLE PROPERTY BELONGING TO MINOR IF < R 100K

GUARDIAN & JUDGE OF HIGH COURT MUST CONSENT TO ALIENATION / MORTGAGING OF IMMOVABLE PROPERTY BELONGING TO MINOR IF > R 100K

ADDITIONAL CONSENT ONLY REQUIRED WHERE PROPERTY ALIENATED, NOT ACQUIRED
TACIT EMANCIPATION

EMANCIPATED MINOR - CAPACITY TO CONCLUDE CERTAIN CONTRACTS WITHOUT ASSISTANCE OF GUARDIAN

OCCURS WHERE GUARDIAN ALLOWS MINOR TO LEAD ECONOMICALLY INDEPENDENT EXISTENCE

CONSENT MAY BE GIVEN EXPRESSLY / TACITLY - MUST APPEAR FROM SOME ACT WHICH SHOWS GUARDIAN'S CONSENT

TEST TO DETERMINE: MINOR = ECONOMICALLY INDEPENDENT & GUARDIAN ALLOWS MEASURE OF CONTRACTUAL FREEDOM

INDICATED BY SEPERATE LIVING PLACE & OWN BUSINESS, BUT NOT ALWAYS CONCLUSIVE EVIDENCE

QUESTION OF FACT - MINOR FULL CAPACITY TO ACT AS CONSEQUENCE OF EMANCIPATION / IF CAPACITY TO ACT IS RESTRICTED TO CONCLUSION OF CONTRACTS RELATED TO BUSINESS CONDUCTS, OCCUPATION PRACTICES WITH GUARDIAN

EMANCIPATION CAN PROVIDE CAPACITY TO ACT - DOES NOT TERMINATE MINORITY

STILL NEEDS GUARDIAN'S PERMISSION TO GET MARRIED

REQUIRES CONSENT GUARDIAN & HIGH COURT/MASTER TO AILIENT LAND
CONTRACTS WHICH MINOR / CHILD CONCLUDES WITHOUT NECESSARY ASSISTANCE IN SPITE OF LIMITED CAPACITY TO ACT

- **Only liable if minor ratifies when major**
- **Guardian’s assistance obtained - contract ratified & minor’s performance becomes enforceable**
- **If major not performed Ito contract, minor initiate proceedings with assistance of guardian**
- **Minor able to enforce rights only by rendering / tendering promised performance**
- **If concluded, not enforceable against minor, even when minor becomes major**
- **At least partially effective**
- **Minor does not incur liabilities, other party incurs liabilities towards minor**
- **Minor only liable in so far as unjustified enrichment continued to exist up to moment of being sued**
- **Major claim unjustified enrichment**
- **If major performed Ito contract, major will have no contractual remedy**
- **Minor only liable for return of items in possession when sued**
- **Contract not necessarily void & without effect**
- **Binding if guardian confirms before minor = major**
- **Binding if minor ratifies when major**
- **Minor able to enforce rights only by rendering / tendering promised performance**
3 POSSIBILITIES WHEN SUE FOR UNJUSTIFIED ENRICHMENT

IF MINOR RECKLESSLY SQUANDERED FULL AMOUNT, CANNOT BE SUED ON GROUND OF UNJUSTIFIED ENRICHMENT, BECAUSE NOTHING LEFT & MINOR THEREFORE NO LONGER ENRICHED

IF MINOR BOUGHT LUXURY ITEM SUCH AS RADIO - OBLIGED TO SURRENDER RADIO / VALUE

IF MINOR USED MONEY TO PROVIDE NECESSITIES / ESSENTIALS FOR WHICH GUARDIAN NORMALLY PAY, MINOR / GUARDIAN WILL BE LIABLE TO REPAY PART OF MONEY BROUGHT ABOUT SAVING OF EXPENDITURE
MINOR HELD LIABLE ON CONTRACT AS THOUGH MAJOR & CAPACITY TO ACT

FRAUDULENT MISREPRESENTATION OF MAJORITY

THIS RULE IS EXCEPTION TO GENERAL RULE THAT MINOR IS NOT BOUND BY CONTRACT WHICH WAS CONCLUDED WITHOUT NECESSARY ASSISTANCE

FRAUDULENT MINOR WOULD BE LIABLE IN DELICT
MARRIAGE (MATRIMONIAL PROPERTY ACT 88 OF 1984)

MARITAL REGIME = MARRIAGES IN & OUT OF COMMUNITY OF PROPERTY

(A) AGREEMENTS CONCLUDED PRIOR TO 1 DEC 1993 - HUSBAND MARITAL POWER

(C) AGREEMENTS CONCLUDED BY SPOUSE MARRIED OUT OF COMMUNITY OF PROPERTY

(B) AGREEMENTS CONCLUDED BY SPOUSE MARRIED IN COMMUNITY OF PROPERTY
AGREEMENTS CONCLUDED PRIOR TO 1 DEC 1993 & HUSBAND HAD MARITAL POWER

MATRIMONIAL AFFAIRS ACT 37 OF 1953 - MARRIED WOMAN COULD BE SUBJECT TO MARITAL POWER OF HUSBAND

WOMAN - LIMITED CAPACITY TO ACT

CONSENT REQUIRED BUT NOT OBTAINED BEFORE 1 DEC 1993, AGREEMENT VOIDABLE @ HUSBAND'S OPTION

HUSBAND RATIFIES - 3RD PARTY CLAIM BASED ON UNJUSTIFIED ENRICHMENT AS AGREEMENT WOULD REMAIN INVALID

COULD NOT CONCLUDE CONTRACTS WHICH IMPOSED LIABILITIES / DUTIES ON COMMON ESTATE

ABOLISHMENT 1 NOV 1984 - TAKE NECESSARY STEPS IN CERTAIN PRESCRIBED PERIOD TO MAKE NEW REGIME APPLICABLE

ABOLITION 1 DEC 1993

MARITAL POWER COMPLETELY ABOLISHED 1 DEC 1993
CONSEQUENCES - MARRIAGE IN COMMUNITY OF PROPERTY:

(1) SEPARATE ASSETS & LIABILITIES OF HUSBAND & WIFE - CONSOLIDATED - COMMON ESTATE

EXAMPLE: BEQUEATHED INTO WILL WITH EXPRESS CONDITION TO EXCLUDE FROM JOINT ESTATE

EXCEPTIONAL CASES - POSSIBLE FOR SPOUSE TO RETAIN SPECIFIC SEPARATE PROPERTY

(2) JOINT ESTATE ACQUIRES PROFITS & BEARS LOSSES WHICH ARISE DURING MARRIAGE

RIGHTS & DUTIES FLOWING FROM CONTRACTS BINDING ON JOINT ESTATE BECOME COMMON RIGHTS & DUTIES OF SPOUSES

AGREEMENTS CONCLUDED BY EACH SPOUSE OF ESTATE - DIVIDED BY DIVORCE / DEATH

MARRIED IN COMMUNITY OF PROPERTY: UNLESS AGREE TO CONTRARY

Marriage in community of property unless contrary agreement is made.
MARRIED IN COMMUNITY OF PROPERTY

COURT MAY INDEFINITELY SUSPEND POWERS OF SPOUSE

SEPARATED - NO JOINT HOUSEHOLD

WHO'S MISCONDUCT - FAULTY PARTY - CAPACITY TO BIND JOINT ESTATE CEASES

MUTUAL CONSENT - ADEQUATE ALLOWANCE - DEPRIVES CAPACITY OVER & ABOVE CERTAIN AMOUNT

OBTAIN CONSENT FOR TRANSACTIONS, UNLESS INTENDED TRANSACTION = CARRIED OUT IN ORDINARY COURSE OF PROFESSION / TRADE - REQUIREMENT WAIVED - CERTAIN CIRCUMSTANCES

WRITTEN CONSENT - IMMOVABLE PROPERTY & INVESTMENTS (EXCL. STOCK EXCHANGE) BINDS HIMSELF AS SURETY, WITHDRAW MONEY IN OTHER SPOUSE NAME, CERTAIN LEGAL PROCEEDINGS

CERTAIN INSTANCES OF PRIOR - NEED 2 X WITNESSES

OTHER ITEMS CONSENT - VERBALLY / TACITLY

IF SPOUSE CONCLUDES CONTRACTS, DOES NOT FOLLOW CONDITIONS, OTHER PERSON DOES NOT KNOW - DEEMED WITH REQUIRED CONSENT

IF WITHHOLDS CONSENT UNREASONABLY - HIGH COURT MAY PERMIT TRANSACTION

SUED JOINTLY / SEPARATELY

OTHER ITEMS CONSENT - VERBALLY / TACITLY

IF SPOUSE CONCLUDES CONTRACTS, DOES NOT FOLLOW CONDITIONS, OTHER PERSON DOES NOT KNOW - DEEMED WITH REQUIRED CONSENT

COURT MAY INDEFINITELY SUSPEND POWERS OF SPOUSE

MARRIED IN COMMUNITY OF PROPERTY
MUST BE CONCLUDED PRIOR TO MARRIAGE

AGREEMENTS CONCLUDED BY SPOUSE MARRIED OUT OF COMMUNITY OF PROPERTY

ONLY BINDING ON OUTSIDERS IF NOTARILY EXECUTED & REGISTERED IN DEEDS OFFICE WITHIN SPECIFIED TIME AFTER NOTARIAL EXECUTION

ACCRUAL = AMOUNT BY WHICH NET VALUE OF SPOUSE'S ESTATE AT DISSOLUTION OF MARRIAGE EXCEEDS NET VALUE OF ESTATE AT COMMENCEMENT OF MARRIAGE

SPOUSES JOINTLY & SEVERALLY LIABLE TO 3RD PARTIES FOR DEBTS INCURRED BY EITHER SPOUSE FOR NECESSITIES FOR COMMON HOUSEHOLD

EACH SPOUSE LIABLE ONLY FOR DEBTS INCURRED BY SPOUSE IN RESPECT OF OWN ESTATE, EXCEPT IN CASE OF HOUSEHOLD NECESSITIES

MATRIMONIAL PROPERTY ACT 88 OF 1984 SPOUSES OBLIGED TO MAKE PRO RATA CONTRIBUTIONS IN ACCORDANCE WITH FINANCIAL MEANS IN RESPECT OF NECESSITIES FOR COMMON HOUSEHOLD
MENTAL DEFICIENCY

- COMPLETELY CONTRACTUALLY INCAPABLE
- CONTRACT = VOID
- CONTRACT = WITHOUT CONSEQUENCE
- CAN BE HELD LIABLE IF CONTRACT WAS CONCLUDED DURING MOMENT OF NORMALITY
- CURATOR APPOINTED TO ADMINISTER ESTATE & MANAGE AFFAIRS
- MENTAL HEALTH CARE ACT 17 OF 2001
- ALSO APPLIES TO CONTRACT WHERE MENTALLY DEFICIENT ACQUIRES RIGHTS WITHOUT INCURRING OBLIGATION
Influence of Alcohol/Drugs

Person - Such state of intoxication caused by drugs or alcohol that does not appreciate nature & consequences of actions / unable to control actions = incapable of forming a will

Agreement = void & unenforceable

If able to form will in spite of intoxication - will have capacity to act, despite fact that judgment affected to some extent

Incapable of performing juristic acts

If able to form will in spite of intoxication - will have capacity to act, despite fact that judgment affected to some extent

Influence of Alcohol/Drugs
HIGH COURT MAY ON APPLICATION DECLARE PERSON PRODIGAL IF INCAPABLE OF MANAGING OWN AFFAIRS COMPETENTLY

PRODIGAL TENDENCIES - NO EFFECT ON PERSON'S CAPACITY TO ACT

LIMITATION ON CAPACITY TERMINATED - ORDER BY COURT

UNASSISTED CONTRACTS CAN BE RATIFIED BY CURATOR

UNASSISTED CONTRACTS = VOIDABLE (NOT VOID)

AGREEMENTS TO PRODIGAL'S ADVANTAGE MAY BE CONCLUDED WITHOUT ASSISTANCE FROM CURATOR

PRODIGAL'S CAPACITY TO ACT = LIMITED

ONLY WHEN COURT DECLARES PERSON = PRODIGAL & APPOINTS CURATOR WILL PERSON BE FORBIDDEN TO PERFORM JURISTIC ACTS WITHOUT CONSENT OF CURATOR

LIMITATION ON CAPACITY TERMINATED - ORDER BY COURT
INSOLVENCY

CAPACITY TO ACT NOT INFLUENCED MERELY BY INSOLVENCY

SEQUESTRATION - CAPACITY TO ACT INFLUENCED CERTAIN PROVISIONS OF INSOLVENCY ACT 24 OF 1936

AFTER SEQUESTRATION INSOLVENT LOSES CAPACITY TO ACT WRT ASSETS OF INSOLVENT ESTATE

AGREEMENT ATTEMPTING TO DISPOSE OF ASSETS = INVALID

LIMITATION - NO EFFECT ON ASSETS EXCL FROM INSOLVENT'S ESTATE

INSOLVENT - NOT CONCLUDE AGREEMENTS MAY PROBABLY HAVE DETRIMENTAL EFFECT ON INSOLVENT ESTATE WITHOUT PERMISSION OF TRUSTEE

THUS, INSOLVENT'S CAPACITY = LIMITED TO DACT

CONTRACT NOT VOID - CAN BE RATIFIED BY TRUSTEE

CONTRACT = VOIDABLE @ OPTION OF TRUSTEE

OTHER SPHERES OF INSOLVENT'S LIFE NOT INFLUENCED BY SEQUESTRATION

EXAMPLE: INSOLVENT MAY ACCEPT ANY POSITION AS EMPLOYEE WITHOUT PERMISSION FROM TRUSTEE

EXAMPLE: INSOLVENT MAY NOT BE EMPLOYED BY / DO BUSINESS AS GENERAL DEALER / MANUFACTURER / HAVE INTEREST IN SUCH BUSINESS WITHOUT CONSENT OF TRUSTEE