SA Legal System

This chapter is an introduction to the SA legal system. The system of our law is entrenched on various sources of law (mixed system) and a pyramidal court system (hierarchy of our courts). The courts are there to uphold the rule of law. Different sources of law are categorised into authoritative and persuasive sources of law. Our courts range from lower courts, special courts and high courts to the constitutional court. There are number of principles applicable to our court system to take cognisance of, namely jurisdiction, ratio decidendi, obiter dictum, doctrine of stare decisis, etc.

Science of Law

This topic, Science of Law, introduces us to the meaning of “law” and “right”. It further outlines how real rights are acquired and how personal rights are created (dolus and unjustified enrichment), and the protection of rights. Take cognisance of the application of these actions in the protection of legal rights namely, rei vindicatio, mandament van spolie, actio legio aquilae, actio injuriam et negologium gestio.

For these two topics please be cognisant of the following:

- Sources of SA law
- What are the requirements for the recognition of customs as legal rules?
- Differentiate between persuasive source and authoritative source
- Jurisdiction (inherent jurisdiction (value and matter) and court of first instance)
- Differentiate between ratio decidendi and obiter dictum
- Explain stare decisis principle
- Different categories of legal rights
- Distinction between two methods of acquiring ownership, i.e. original and derivative mode of acquiring ownership
- What is your understanding of servitudes and what is difference between praelial and personal servitude?
- What are the elements of a delict?
- What are the defences to a delict and what are deictical remedies?
- What are the common law actions that one can utilise to protect the following interest?
  - Protection of ownership
  - Protection of possession
  - Compensation for personal losses
  - Compensation for sentimental damage/loss to personality
  - Compensation for actual physical pain, the loss of amenities of life and the loss of life expectancy

NB. Please attempt to answer some of the questions in the past exam papers.

Sources of South African Law

1. The Constitution

The Constitution (Act 108 of 1996) is the supreme source of SA law and as such, the Constitution ranks above all other sources of our law. Any source of law which is inconsistent/contrary to the constitution is invalid. The Constitution also recognises other sources of law, namely legislation, court decisions, customary law, common law and foreign law. Our courts serve as a guardian of our constitution and the rule of law and court decisions also serve as a source of law.

2. Case Law

Decisions of our courts serve as another source of law. This source of law applies subject to the doctrine of stare decisis. Note that, though case law is a source of law, case law applies subject to the area of jurisdiction of a court that delivered the case. Decisions of a court in a particular area may not apply to a jurisdictional area outside of that particular. The doctrine of stare decisis will be elaborated below.

3. Legislations

These are laws passed by parliament, provincial legislatures, municipalities and are commonly known as Acts except in the case of municipalities where we have municipal by-laws. Legislations comprise of national legislation and provincial legislations. National legislations are laws passed by parliament and apply to every corner of our country whereas provincial legislations are passed by provincial legislatures and apply to a particular province. Municipal by-laws are a source of law passed by and are applicable to a particular municipality.

4. Customary Law (who will be bound by customs)

Customary Law is defined as customs or usages traditionally observed by the indigenous African people and form part of the culture of African people. Customary Law is unwritten, meaning it is uncodified and this makes it difficult to easily ascertain or confirm whether certain customs or usages were/were observed by communities.

Recognition of Customary Law as a source of law can be found in legislations such as the Constitution and Recognition of Customary Marriages Act. The Constitution imposes an obligation upon our courts to develop and apply customary law to an extent that the application does not conflict with Constitution. Our courts have introduced some requirements in our recognition and application of a custom or usage as Customary Law that applies and binds a particular community. The requirements that the custom or usage must:

- be reasonable,
- have existed for long time,
- generally recognised and observed by a Community; and?
- be certain and clear.

Further, a custom or usage may also be recognised as law that apply to a commercial transaction and business community. Thus, in a business community a trade usage that is traditionally observed will be recognised as law that customarily applies to a particular business transaction or trade. Thus, a definition of customary law in relation to business/commercial usage would be "a trade usage traditionally observed in a particular business or commercial transaction or trade". Thus, parties entering into a transaction whereby certain customs are traditionally observed would be bound by such practices. The requirements for a recognition of a commercial or business usage are same as that of the customary law above.
5. Specific old authorities

South African common law consists of those laws/legal principles derived primarily from Roman and Roman-Dutch law. Roman-Dutch Law as our common law is made of the Dutch Legislations, Dutch Courts Judgments and writings of some jurists before 1852. However, common law applies only if a particular matter is not governed/regulated by legislation and to an extent that it is not in conflict with our Constitution.

6. International statutes

These are international treaties and convention statutes which our country is a signatory. Thus, once adopted by our country they become a source of our law.

7. Other sources

Foreign law and textbooks - these are only persuasive source of our law.

NB. For exam you may be given a set of facts and be required to give an opinion to your client on whether a particular source of law, e.g. case law/ customary law will indeed apply to a particular circumstances or facts.

Recall Mark as Read

Notable principles under the SA Legal System

Jurisdiction - refers to the competence of a court to hear a particular matter. Jurisdiction has two elements, i.e. jurisdiction with regard to an area and jurisdiction with regard to a matter.

Jurisdiction with regard to the area indicates that a particular court may only hear matters that falls within the designated area(s) of a particular court. For instance, a Gauteng Division of the High Court (Pretoria High Court) may not hear matters falling within the area of competence of the Western Cape Division of High Court, but may only preside over matters that fall within its area of jurisdiction, e.g. Tshwane region.

Jurisdiction with regard to a matter indicates that certain matters, though they may fall within the jurisdictional area of a particular court, may only be heard by a particular court. Jurisdiction of courts on matters are outlined below:

- Constitutional Court (CC) - Only constitutional matters from all corners of the country.
- Supreme Court of Appeal (SCA) - Court of appeal, preside over appeals of the decisions of the High Courts.
- High Court - Can preside over all matters, it has inherent jurisdiction.
- Lower Courts: i.e. regional magistrates' court, district magistrates' court and small claims court. Lower courts can only hear specific matters.

With regard to a High Court, it has inherent jurisdiction, meaning it can preside over any matter that falls within its area of jurisdiction except for matters reserved for Constitutional Court. It must be noted that we have specialist high courts, e.g. Labour Court, Tax Court, Competition Appeal Court, Electoral Court presiding over specific matters.

With regard to the Magistrates Court, it is not only limited to specific matters and area but also in respect to value of a civil matter or sentence to be imposed on a criminal matter.

NB. You may be required to advise a client residing in a particular area, e.g. Cape Town, on the appropriate court to hear the following matters, e.g.:

- to hear divorce proceeding;
- sequestration or liquidation of a company;
- a matter regarding the constitutional validity of a legislation;
- validity of a will; and
- a civil claim of R1200.

NB. The same question could also require you to indicate the appropriate court to hear an appeal or review proceeding with regard to any of the matters above.

Jurisdiction and Court of First Instance - only the High Court and Magistrates' Court are courts of first instance, meaning they can hear a matter for the first time. However, the Constitutional Court may also preside on some constitutional matters for the first time as prescribed by the Constitution. The Supreme Court of Appeal is not a court of first instance and may only hear appeals from the High Courts. The Constitutional Court may only hear constitutional matters. If the matter is not a constitutional matter, it will end at the Supreme Court of Appeal. Thus the Supreme Court of Appeal is the final court for all matters except for constitutional matters.

Authoritative Source of Law - is a source of law and must be adhered to by all legal persons in SA including all organs of state. These sources include the Constitution, legislations (including by-laws), customary law, common law, case law and international statutes (e.g. Rome statutes adopted by our country).

Persuasive Source - a non-binding source of law which the courts are not compelled to apply but may on its discretion apply to a particular matter. The classical case is reference by a court to foreign law and text book in a determination of a particular legal issue not governed by any authoritative source of law. A court may also refer to textbooks and foreign law in its interpretation of a piece of legislation or customary law.

Examples of persuasive sources of law include foreign law, international law, legal books and journal. A decisions of a division of a High Court is persuasive over court presiding in another jurisdictional area.

Stare Decisis - means that a court is bound by its own decisions and decisions of superior/ higher courts. The principle seeks to ensure that a court stands by its own decisions unless the decision was overruled by a superior court. As indicated above, the decision of a High Court is binding (authoritative) on a lower court situated in the jurisdictional area of that particular High Court. The decision of a High Court in another jurisdictional area have persuasive force to lower courts situated in other jurisdictions. It must be noted, however, a court may deviate from the application of its previous decision but under exceptional cases and where the old decision was wrong.

Ratio decidendi - is a reason given in a judgment, a reason for a decision based on finding of law. The decision will then bind a court that took a decision (and a lower court in a jurisdictional area of High Court) subject to the doctrine of stare decisis. The ratio decidendi of a High Court in another jurisdiction is persuasive in respect to courts situated in other jurisdictions. In effect a ratio decidendi then becomes the source of our law in a form of court decisions, i.e. case law. It must be noted, however, a court may deviate from the application of its previous decisions but under exceptional cases where the old decision was wrong.

Obiter dictum - are incidental remarks made by court when passing a judgment. It is an opinion expressed by a judge in passing a judgment, i.e. concurrence remarks irrelevant or not material to the matter at issue. These remarks are not binding but may have persuasive force in that they can influence a decision of a same or another court thus shaping future decisions.
NB. There is a close connection between the authoritative and persuasive sources of law with the doctrine of stare decisis. It is must to understand the doctrine of stare decisis in the context of the hierarchy of our courts.

### Science of Law

#### Legal (Subjective) Rights

NB> On this topic please distinguish amongst the following types of legal rights on pages 12 to 13 of Study Guide?

- Real right
- Personality right
- Personal right
- Intellectual property right

#### Real right

Note that a real right refers to right a person may have over a thing (property) or a right that attaches to a property. A real right can be categorised into a complete real right or a limited real right. Ownership confers upon an owner the most comprehensive real right over a property. This is a most complete right over a property. The owner of a property may deal with property in a number of ways, e.g. sell, mortgage, destroy, donate etc. Limited real right confers upon a person a limited or specific right over a property. This means that a person with a limited real right may only deal with the property of another person for a limited or specific purposes.

#### Limited or Specific real rights are classified as follows:

- A right of way over someone’s property, (praedial servitude), (e.g. a right of way for the benefit of Farm Zandfontein with regard to access to a public road through Farm Maluti).
- A right to use someone’s property, (personal servitude), (e.g. A bequeathed his house to B with C being entitled to stay in the house).
- Real security right over the property another person, (mortgage and pledge).
- A right to retain possession of another person’s property as security for improvements to property or storage of property, (lens).
- A right of security for rent over moveable situated within the leased property or over fruits/ crops produced from the leased property, (landlord tacit hypothec).
- A real right of security for payment of debts, this right is created through a cession of personal right to secure a debt (cession to secure debt).

NB. Security is a chapter bo its own and to be discussed later as per the programme.

#### Distinction between the methods of acquiring ownership:

1. **Original acquisition** - occurs where a person acquires ownership without an assistance or in the absence of the previous owner assistance. This mode of acquiring ownership takes place without previous owners' cooperation. Original acquisition may occur in a number of ways but mostly through:
   - Occupation: occupation of property belonging to no one, with the intention of becoming an owner.
   - Prescription: through acquisitive prescription, i.e. where a person possessed a thing, openly and undisturbed for a period of 30 years, he/she becomes its owner.

2. **Derivative acquisition** – is the acquisition of ownership with the previous owner's cooperation. The elements of derivative acquisition are delivery and transfer. Derivative acquisition will later be considered in the term. Acquisition of ownership through derivative acquisition is constituted through:
   - Delivery: ownership of moveable generally passes through delivery of a thing with an intention to pass ownership. (There are several forms of deliver to be further discussed under the topic: Sale).
   - Registration: ownership of immovable passes through registration at the Registrar of Deeds. Under common law ownership over immovable was transferred through delivery with a long hand, i.e., by pointed out a piece of land to be transferred to the other person.

You should understand different legal actions that may be utilised for the protection or enforcement of legal rights:

- Protection of ownership - rei vindicatio
- Protection of possession - mandament van spoede
- Compensation for patrimonial loss - actio legis aequitie
- Compensation for sentimental damages/injury to personality - actio iniurie
cum
- Compensation for actual bodily pain, the loss of amenities of life and the loss of life expectancy - action for pain and suffering
- Compensation for unjustified enrichment - negatorium gestio

### Law of Delict

Delict is defined as an unlawful and culpable act by a person causing harm to another person. In your understanding what is the significance of the law of delict? What are the elements to be proven and what are available remedies for delictual claim? Can the other party raise any defence(s) to a delictual claim and if so, what are these defences?
Formalities

As a general rule a contract need not be of a particular form (e.g. in writing) to be valid unless if formalities were prescribed by law or parties to a contract. With formalities prescribed by the parties, you must always determine, based on the given facts, whether the parties intended that a contract will only be valid if it complies with the prescribed formalities or whether parties wanted, for instance, to reduce the agreement into writing for other purposes, e.g. record purposes.

NB:

- There are certain contracts where the law prescribed formalities, what are these contracts?
- If a contract must be in writing in terms of law, would that requirement be met if a contract is in the form of a data message?
- If, signature is required for an electronic contract (data message), what type of signature(s) would satisfy this requirement (i.e. requirement for a signature), if a signature is required by law or parties?
Possibility of performance

This requirement demands that whatever has been agreed to be done, delivered, rendered, undertaken, or performed (i.e. performance) in terms of a contract must be possible. For performance to be possible, it must be certain or ascertainable and objectively possible to be performed. If performance is not certain or ascertainable then there will be no contract.

- What happens when performance become impossible before or at the time a contract is concluded, would the contract still be valid? This instance is known as initial impossibility.

- What happens when performance becomes impossible after a contract was concluded, would it contract still continue to be valid? This is known as supervening impossibility.

- What happens if supervening impossibility of performance was culpable created by a party to a contract? There is also a term in contract law that well defines this situation - i.e. breach of a contract known as prevention of performance.

- What happens if performance to be rendered is in part objectively possible or in part objectively impossible?

What is meant by "certain or ascertainable" and "objectively imposable and subjective possible"?

- Performance is certain if it is expressly stated or determinate in a contract. Performance will be ascertainable performance if the parties have agreed on a formula to determine performance or if the parties agree that performance will be determined by third party.

- Objective impossible – the fundamental principle it is illogical and unreasonable to hold a person liable for failing to render performance that is initially impossible. So performance would be impossible if generally no one may be able to render such performance under the circumstances. So it must generally be impossible in the eyes of justice to render such performance. An example of objective impossibility includes selling a non-existing thing, performance of something prohibited by law etc.

- Performance is subjectively impossible for a specific debtor and not for any other person. With subjective impossibility a contract remains valid.
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- Performance is subjectively impossible for a specific debtor and not for any other person. With subjective impossibility a contract remains valid.
Legality as a requirement of a valid contract

Another requirement of a contract is that a contract must be legal. As a general rule a contract is illegal if it is contrary to statutes or common law. In terms of common law any contract which is contrary to common law is void and the effects of contract requested by legislation will be determined by reference to the wording of a relevant legislation. It is possible for a contract to be contrary to a particular legislation but still valid or even voidable.

Freedom to Contract

It is a principle of the law of contract that a person is free to enter into any kind of contract with any person. However this freedom is limited to an extent that a contract must be lawful. Contract which violates public policy or our law are illegal and unenforceable.

What to consider:

- What is meant by void and voidable?
- What are the consequences of entering into an illegal contract, i.e. a contract entered into against/contrary to law, public interest or public policy?
- An example of a contracts which is against public policy but still enforceable?
- An example of a contract which is valid but unenforceable?
- What are the examples of contracts which are contrary to a statute?
- You may have to advise your client on whether a contract is contrary to a statutory? – does a contract infringe on rights enshrined in the Constitution or sale of weapons to an unlicensed person?

Common law legality

A contract will be illegal in terms of common law under the following instances:

- Contract cannot be legally executed - a contract that cannot be legally executed is impossible and therefore void. For instance, there can be no sale of a thing which is incapable of being privately owned, e.g. an ocean.
- Public interest or good morals - a contract against good conduct or community standards of good conduct (community perception of what is good and decent). A contract which promotes sexual immorality and impairs on the stability of the marriage is considered to be against good moral and as such void and unenforceable.
- Agreements which are contrary to public policy -
  - a contract which obstructs or defeat the administration of justice (e.g. contract depriving a person of a right to properly institute legal proceedings to defend himself or a contract prohibiting a person to report crime);
  - an agreement promoting the commission of crime or delicts;
- NL, a contract restraining someone's freedom to participate in legal proceedings or to be economically active is against public policy and therefore illegal. A contract depriving a person to receive an inheritance or depriving a person's freedom of testation is contrary to public policy as it deprives a person to freely participate in legal proceedings. A restraint of trade is an example of a contract depriving a person to partake in economic life. This is one of the agreement which is against public policy, but may still be valid.

Restraint of trade

A restraint of trade is against public policy as is contrary to policy principle or a right to freely partake in economic life. However, it has been held that a restraint is valid and enforceable unless it is shown to be unreasonable. In determining whether a restraint of trade is unreasonable and therefore not enforceable, the courts have to balance two policy considerations. The first consideration is that the public interest requires that parties should comply with their contractual obligations, and secondly that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or professions freely.

The courts have, when determining the unreasonableness of a restraint, considered the following:

- The area and period of a restraint (an agreement restraining a person's right to practice a profession in SA for a ten-year period may probably be unreasonable.
- The nature of a restraint (what is it that a restraint seeks to protect), a restraint which seeks to protect the proprietary interest (technological/confidential information) of the employer may be worth enforcing but a restraint aimed at restricting competition may not be enforceable.
- Where the interests of the party sought to be restrained weigh more than the interest to be protected by the restraint, the restraint is unreasonable and consequently unenforceable.
- A restraint must not unreasonable limit someone to partake in commercial life.
Capacity

1. What is your understanding of capacity as a requirement for a valid contract?
2. What is the distinction between capacity to act and legal capacity?
3. Can age, marital status, mental deficiency, influence of alcohol, prodigal tendencies, insolvency affect one's capacity to act?
4. What is meant by limited and unlimited capacity?
5. Can a minor enter into a contract without assistance, if so, what type of contract(s)?
6. What is the difference between ratification and emancipation?
7. What is the effect of emancipation on the minor's capacity to act?
8. Can a minor apply to court to have a contract entered into on his behalf rescinded, if so, at what age and under what circumstances?

Legal capacity refers to one's ability to be a bearer of rights and duties. All legal subjects (natural or juristic persons) are capable of being bearers of rights and duties, with some restrictions on juristic persons. For instance, a juristic person is incapable of exercising a right to life.

Capacity to act refers to one's ability to perform juristic acts, i.e., ability to participate in legal proceedings or conclude a valid contract. Capacity to act relates to one's ability to understand the nature of a contract as well as duties and obligations which comes with a contract.

All natural persons have capacity to act, whereas all juristic persons have no capacity to act. A company cannot understand the nature of consequences of entering into a contract. Someone must act on behalf of a juristic person in all legal proceedings and transactions. It must be noted that while a person may be so matured to understand the consequences of a legal transaction, his/her capacity to act may be influenced by his/her legal status in society, an example of such person would be an un-rehabilitated insolvent.

A person may therefore have full capacity to act, limited capacity or no capacity to act at all. A person's capacity to act may be categorised as follows:

- Full capacity to act - a person with full capacity to act must, at the time of entering into a contract, be capable of fully understanding the consequences of entering into a contract. Persons will full capacity are:
  - All persons who have attained majority unless if their capacity to act was influenced by other factors, e.g. sequestration and see factors below.
  - An unrehabilitated insolvent may enter into a contract that does not prejudice his/her estate and may also conclude an employment contract. An unrehabilitated insolvent may not hold any position of trust for a certain period, e.g. Director of Company.
  - An emancipated minor will have capacity to conclude certain contracts.

- Limited capacity to act - a person with limited capacity to act may not conclude certain juristic acts without the assistance of another person(s) (e.g. parents, guardian, curator, Court, Master, etc). A minor above 7 years will fall under this category. Instances whereby a minor will enter into a contract without assistance are as follows:
  - A minor above 7 years may conclude a contract in terms of which a minor only receives a benefit (i.e. right) and has no duty (i.e. a minor is not expected or required to discharge any performance). An example of such a contract is a donation, where a minor is a donee.
  - An emancipated minor (above 7 years) will be free to enter into certain contracts (see page 71 - 72 textbook) without assistance.
  - No capacity to act - a person with no capacity to act may not enter into a contract and someone must contract on that person's behalf. A minor below seven has no capacity to act. Further, the following persons' capacity to act is also affected, i.e. an unrehabilitated insolvent, prodigal, intoxicated person, mental ill person, see details below

Minority and emancipation - a minor will have capacity to enter into a contract if he/she is emancipated or liberated to lead an economic life.

- Emanicipation occurs in instances where a minor is allowed to lead an independent economic life. Emanicipation can be expressly or tacitly provided by parents but in most cases it is given tacitly. The test to determine whether a child has been emancipated is whether a minor is economically independent and whether a minor has contractual freedom.
- To determine whether emancipation has been granted in respect of all contracts, one must consider the facts of each case. It must be noted that there are certain transactions, e.g. sale of property and marriage, where consent of parents, guardian and or high court is required despite emancipation. It must also be noted that emancipation does not terminate minority.

What are the factors which may influence a person's capacity to act?

- Minority as indicated above.
- Married persons and subject to marital regime. Spouses married in community of property may require the consent of each other to enter into certain contracts.
- Mental illness may affect one's capacity to understand the nature and consequences of entering into a contract. The question is whether a person can understand and appreciate the nature and consequences of a contract, if not, the person lacks contractual capacity. The rule is that a person has full capacity to act unless declared mental ill by court.
- Intoxication/ Influence of alcohol may affect one's capacity to act. The question is whether a person is so intoxicated that he/she is unable to understand the nature and consequences of his/her actions.
- A person whose estate has been sequestrated can as a general rule only contract through their trustees and may not hold certain positions, such as Director. An insolvent person may, however, be able to enter into some contracts without assistance of the trustee, e.g. employment contract.
- A prodigal - a person declared by court to be incapable of managing his affairs has no contractual capacity to act. A person with prodigal tendencies does have capacity to act. The principle is that a person must have been declared a prodigal by court to lack capacity to act.

Ratification (contracts entered into by a minor without assistance)

Any contract which a minor enters into without assistance is not necessarily invalid. Parents or a guardian may subsequently approve that contract or a minor may approve that contract after attaining majority. This process is called ratification. It is providing necessary assistance or approval, by parents or minor who has since attained majority, for contracts which were concluded without the required assistance. Then, if parents do not ratify a contract entered into without assistance, then that contract becomes partially effective, meaning it is not enforceable against the minor but enforceable against the other party. There are instances where the other party may have some recourse against a minor who entered into a contract without assistance (read pages 74 -75 textbook).
**1. Consensus**

**by L. MANGANYE - 5 Sep 2018 @ 20:13**

**Concurrence - how is concurrence reached? - Offer and Acceptance**

Parties must be aware of each other's intent and thus have a common understanding on the legal transaction they are entering into; one party must make an offer and the other party must accept the offer.

*What is an offer and what is acceptance?*

An offer is a declaration of a will, the communication of an intention to create legal obligations, with clear and certain terms, addressed to a particular person, an acceptance of the terms will then create a binding contract. An acceptance is a declaration of will, the intention to create obligations by accepting the terms contained in the offer and compliance with the requirements of an offer.

*What to consider with regard to an offer and acceptance*

1. The requirements for a valid offer and acceptance?
   - NB. Who makes an offer with regard to auctions, tenders, newspapers and internet advertisement or displayed goods, statement of intent.
   - You may receive a set of facts which require you to provide advice on whether goods displayed in shops or Internet would constitute an offer by the shop owner or whether the person who is interested in buying the goods is the one making an offer.

2. Where and when contract is created? You should understand the applicable principles that govern the time and place a contract was concluded. E.g. if the offer was posted in Post Office or electronically to the offers who opened it/looked at accepted the offer in Cape Town, then what will be the time and place of conclusion of the contract?

**Concurrence: what are the factors that can influence concurrence?**

Can a misunderstanding between the parties or unclear influence or misrepresentation influence the validity of the parties’ concurrence?

**Reply Collapse Mark as Read**

**Re: 2. Consensus**

**by A. MCCARTHY - 1 Nov 2018 @ 15:38**

Good afternoon, I have been going through some practice questions and I don’t understand question 4 -

**Question 4**

Yulu and Mpho arrange telephonically to meet at Jumbo Restaurant. At the restaurant Yulu offers to buy Mpho's car for R35 000 which Mpho accepts without hesitation. A week later, Mpho calls Yulu to tell him how happy he is doing business with him. The delivery of the car and the payment of the purchase price takes place two days after the call, at the Marilyn Shopping Mall.

1. When and where did the contract come into being?
2. The moment Mpho accepted the offer at Jumbo Restaurant.
3. The moment Mpho telephoned Yulu to tell him how happy he was doing business with him.
4. The moment Yulu and Mpho arranged telephonically to meet at Jumbo Restaurant.

the answer that they gave is number 4, why is the correct answer not number 1, when the agreement was made?

**Reply Collapse Mark as Read**

**Re: 2. Consensus**

**by L. MANGANYE - 2 Nov 2018 @ 20:50**

Good day Which question paper is this and where can we find the answers? Is the practice question and answers in the textbook, guide or tutorial letters? Regard,

**Reply Collapse Mark as Read**

**Re: 2. Consensus**

**by A. MCCARTHY - 4 Nov 2018 @ 8:44**

It is from 2000 these questions that I found on the internet not from the official unisa resources [https://pimenotes.co.za/cla1503-commercial-law-icl/CLA1503-revision-questions-and-memo, Bongi 1](https://pimenotes.co.za/cla1503-commercial-law-icl/CLA1503-revision-questions-and-memo, Bongi 1)

Is it reliable or are there other revision questions that I can use?

**Reply Collapse Mark as Read**

**Re: 2. Consensus**

**by L. MANGANYE - 6 Nov 2018 @ 20:03**

The only official materials prescribed for this module is as indicated on tutorial letter 101. Please check out for previous papers on official study material on the main site of CLA1503 forum.

**Reply Collapse Mark as Read**
Introduction to Law of Contract & Consensus

In the previous chapter you were introduced to how legal rights are created. This topic focuses on how legal obligations are created, i.e. through contracts. It will be required of you to determine whether a particular agreement creates legal obligations and whether there are factors that may influence the validity of a contract.

In this chapter we will focus on the following: our understanding:

1. Definition of a contract.
2. Requirements for a valid contract.
3. How, where and when contractual rights and duties (obligations) are created.
4. Factors that may affect creation and validity of a contract.
5. The capacity to be the bearer of contractual rights and duties.
7. Nature or type of performance expected to be delivered in terms of a contract.
8. Formalities to be observed when entering into a contract.

What is a Contract

A contract can be defined as an agreement between two or more legal subjects with an intention of creating legal enforceable obligation(s). A contract must be entered into by legal persons with necessary capacity, be legal and comply with the prescribed formalities and performance to be rendered thereof must be possible.

A contract must be distinguished from an agreement. A contract creates legally enforceable obligations but not all agreements create legally enforceable obligations. An agreement to meet with a friend at a restaurant may not give rise to legally enforceable obligations.

NB. What is the difference between an agreement and a contract? Distinguish between a contract and social arrangement in relation to obligations?

Consensus (animus contrahendi)

This can be described as a common/unanimous intention by legal subjects (parties to a contract) to creating legal enforceable obligations (animus contrahendi). Parties enter into a contract with an intention of creating legal obligations, i.e. rights and duties. This should be considered the most significant requirement for a valid contract. Parties must be aware of each other's intent and thus have a common understanding of the legal transaction they are entering into. How is consensus created? It is created through a declaration of will to enter into a contract by one party and acceptance thereof by the other party.

What is an offer and an acceptance?

An offer is a declaration of will, i.e. a communication by an offeror of clear and certain terms to an offeree, with an intention to create legal obligations, an acceptance of which will create a binding contract. An acceptance is a declaration of will, i.e. a communication of an acceptance of terms contained in an offer.

Requirements for a valid and acceptance offer

- Both must be made with an intention of creating legal enforceable obligations.
- An offer must be complete, i.e. it must contain all contractual terms and conditions.
- Both must be clear, certain and unambiguous terms.
- An offer must be addressed and communicated to a particular person, or general public or to whoever accepts. An acceptance must be addressed and communicated to an offeror. Can a person accept an offer or make an offer on behalf of another legal person?
- Both must comply with the prescribed formalities (if any) e.g. Sale of immovable property must be in writing.

Would the following instances constitute an offer and who will be regarded as an offeror?

- Advertisements
- Reward
- Auctions
- Tenders

An option

An option is a contract that keeps an offer open for a particular period. An option divests a party's right to revoke/cancel an offer addressed to a particular person for a particular period. During this period the offeror may not conclude a contract concerning the same subject matter with another person.

Termination of an offer

- Lapse of time stated in the offer.

- Revocation/cancellation of an offer by the offeror.
- Rejection of an offer by offeree.
- Counter offer by an offeree.
- Death of either party before delivery/acceptance of an offer.
- Does loss of capacity to act has any effect of an offer?

Re: 1. Introduction by L. MANGANYE - 14 Sep 2018 20:00

What are the factors that may influence consensus?

Mark entire discussion as read
Terms and Conditions

A contract must have certain provisions either as terms or conditions. Parties to a contract would normally make certain provisions, statements or assumptions (terms and conditions) before or at the time the contract was entered into. Further, note that there are some terms though not expressly agreed to between the parties, but will be incorporated into a particular contract (e.g. sale) by law. This topic requires you to understand whether and how certain provisions, statements or assumptions (terms and conditions) will form part of a particular contract. It must be noted that some terms (i.e. conditions) may affect obligations created in terms of a contract. Some conditions may affect the operation and/or consequences of a contract depending on the occurrence or non-occurrence of an uncertain future event which will occur or not.

NB:

- Understand the meaning of the words term and condition.
- Understand different terms and classification of terms of contract.
- Understand whether how parties will be bound by different classes irrespective of whether the term was agreed to or contained in a contract.
- Understand the effect of different types of conditions on a contract.
- Differentiate between amongst conditions, prepositions, modus and time clause.

Incorporation of terms in a contract

- **Expressed terms** - these are terms specially agreed to by the parties. Direct evidence (e.g. written contract) will prove whether parties have agreed to a particular term.
- **Tacit terms** - these are terms that both parties would have agreed to had they thought about them. A tacit term is inferred to have been agreed by the parties by considering the circumstances leading to the conclusion of a contract. In particular, tacit terms are necessary or incidental to give a contract efficacy. Tacit terms are normally terms generally observed and used in a particular trade. Tacit terms are deduced from the facts surrounding a particular contract, including the conduct of the parties after the contract.

NB: How will these terms form part of a contract? A tacit term will be read into a contract if both parties overlooked or failed to anticipate the event. In order to infer the existence of a tacit term to a particular contract, courts have used the innocent bystander test and it says: "a term will be incorporated into the contract if the term is necessary, in business sense, to give efficacy to the contract, if it is such a term that you can be confident that if at the time the contract was being negotiated someone has said to the parties: what will happen in such a case?, the parties would have replied of course, so and so, we did not trouble to say that it is too clear. This means that a term is so obvious that the parties need not express it. A tacit term will be inferred if it is reasonable and it makes business sense for the proper functioning of a contract.

- **Implied terms** - these are terms incorporated by law. Implied terms may be regarded as a natural terms attaching to a contract of a particular kind. A term may also be implied by trade usage if it is so universal and well-known that a party’s knowledge and intention to be bound by it will always be presumed.

Different classifications or types of terms

- **Essential terms** – this is a term that distinguishes a contract to be of a particular kind. For instance, the essentiality of a contract of sale are max and price and with a lease being an agreement on an object of lease, right to use and enjoyment of the property, rent and payment of rent.
- **Natura** - a term that attaches to every contract of a particular kind by operation of law. For instance, the natura are the duties of the lessor and lessee in a contract of lease or a warranty against latent defect in respect of the object of sale. It is permissible, to the extent provided by law, that the parties may exclude terms imposed by law (natura).
- **Incidental** - a term agreed between the parties, normally to facilitate performance between the parties. An incidental term caters for special needs of parties not provided or catered for by the natura and essentialia. For instance, a term in a lease which provides that rent must be paid by depositing the amount into the lessor’s bank account, or a term in a sale which specify that the seller must deliver the max on 31 December.

Conditions

What is a condition and what are the different types of conditions?

- **Suspensive Condition** - this is a term which suspends the operation of all or some of the obligations flowing from a contract until the occurrence of an uncertain future event. A valid contract is concluded, but enforcement of obligations or performance is suspended until the occurrence of an uncertain future event. For instance: A sold his house to B in terms of a contract signed by both parties on 1 September. But the contract had a condition that B obtains a home loan from a financial institution by 15 September. A valid contract created on 1 September, but it cannot be enforced until B gets a loan. If B is unable to obtain a loan on the said date, the sale will fall away, as if there was no sale. If the condition is fulfilled the contract becomes enforceable.
- **Resolutive Condition** – this is a term which terminates a contract (or obligations flowing from a contract) upon the occurrence of an uncertain future event. A valid contract is concluded and enforceable upon the parties satisfying the requirements of a valid contract. Obligations becomes operative when a contract is created, however a contract will be dissolved upon the fulfilment of a condition. For instance: A sells his painting to B (in terms of an instalment agreement) on condition that the contract shall immediately terminate upon B failing to honour any monthly payment. If the condition is fulfilled a contract terminates.

Other different terms other conditions?

- **Time clause** – this is a term which suspends the enforcement of obligations or terminates a contract upon the occurrence of certain future event or upon arrival of time. A time clause determines a specific time or period within which a contract will be operative or dissolved. It is always certain that an event shall take place or moment shall arrive. Time clause may be suspensive or resolutive. In case of a resolutive time clause a contract is terminated when a certain event occurs/time arrives and in case of a suspensive time clause the enforcement of an obligation is suspended until the moment has taken place/time arrive.
• Supposition – a supposition is a state of affair that currently exists or existed but the parties were uncertain whether the state of affairs actually exists or existed. For instance: A wants to buy a painting from B, only if the painting is a work of Tirus. A and B may be unaware that the painting is a work of Tirus but, before concluding a sale the parties can easily determine if the painting is that of Tirus or not. If the parties enter into such a contract and it transpires that the work is not that of Tirus, there is no contract.

• Warranty – this is an express or implied term that requires a party to a contract to assume absolute or strict liability for proper performance, e.g. a party warrants an absence of defects or quality and quantity of performance. A party who gives a warranty may not rely on “no fault” (i.e. he/she was not at fault) to escape liability. In some cases, warranties are implied by law, e.g. a warranty against latent defect or warranty against eviction in a contract of sale.

• Modus – this is a burden on a party’s right to performance. This can be a restriction on how to use performance. Performance is coupled with an obligation to do something or to refrain from doing something. Failure to comply with a modus is a breach of contract entitling the other party to remedies.
Transfer and termination of personal rights

Getting out of that contract, how? These two topics introduce two ways to get out of a contract. Firstly, through transfer of personal rights, i.e. cession. So you should understand how personal rights can be transferred as well as the consequences of transfer of personal rights. Lastly a person can run away from a contract through termination of a contract. So you must be familiar with different ways to terminate a contract.

Reply
Mark as Read
Forum: V. Breach of Contract
Introduction and discussion

Mark entire discussion as read

BY L. MANGANYE - 17 SEP 2018 @ 17:13

Breach of a contract

On entering into a contract, parties are required to adhere to the terms and conditions of a contract. The parties must comply with all obligations as per a contract, i.e. do the don't and do not do the don't. Failure to adhere to contractual terms (breach) may entitle another party (innocent party) to contractual remedies. This topic introduces different types of breach as well as remedies available to an innocent party prejudiced by a breach of contract.

In this topic you must understand the following:

- What is a breach of a contract?
- What is meant by a debtor and creditor, and the types of breach a debtor or creditor can commit?
- Different types of breach of a contract?
- Remedies available for breach of a contract?

Re: Introduction and discussion

BY L. MANGANYE - 20 SEP 2018 @ 17:20

What is a breach of Contract?

A breach of contract occurs when a party to a contract fails to honour any of the obligations created in terms of a contract. Failure to honour an obligation may take different forms, e.g:

- failure to render due performance; (e.g. A's failure to deliver books bought by B)
- failure to deliver proper performance; (e.g. A delivering 20 books to B instead of 100 or A painting B's house with green paint instead of lime green)
- behaviour or conduct depicting that performance may not be rendered when due (e.g. A's action or conduct indicates that he is not going to deliver fruits on due date)
- conduct which renders performance impossible, (e.g A burns a painting bought by B)

NB: Difference between a creditor vs debtor

A contract must have a debtor and creditor. A debtor is a party who has to perform a specific obligation and a creditor is a party who is entitled to performance. Also note that you may have as many creditors and debtors in one contract and that some forms of breach may only be committed by the debtor or creditor but not both parties.

It must also be noted that a party may be a creditor and a debtor in one contract. This means that, in terms of that particular contract, a party must perform and is also entitled to performance. An example of such a contract is a Sale. Seller must deliver the property and is entitled to price and a buyer must pay a price and must receive the mer it.

Re: Introduction and discussion

BY L. MANGANYE - 25 SEP 2018 @ 19:46

Different forms of breach of contract

1. Mora debitoris (i.e. default by a debtor)

This is a breach of contract committed by a debtor, i.e. a person who must perform in terms of a contract. Mora debitoris is committed when a debtor fails (due to his/her fault) to render performance at an agreed time. The critical element of this breach is fault on the side of the debtor. There can be no more debitoris without debtor's fault that resulted into the delayed or untimely performance. However, as an exception, a debtor commits mora debitoris without fault on his/her side, if she/he provided a warranty that an agreed performance will be rendered at a particular time but failed to do so.

When does a debtor commits mora debitoris? A date upon which performance must be rendered is critical in answering this question and the following principles should be utilised to answer such question:

- If parties have agreed that performance must take place on a specific date, a debtor is deemed to be in mora if he/she fails to perform on an agreed date. This is known as mora ex re, i.e. breach of contract due to a debtor's failure to perform on a specific agreed date.
- If there is no agreed date upon which performance must be rendered, a debtor must first be placed in mora by a creditor. A creditor places a debtor in mora by a notice to debtor demanding a debtor to perform at a date specified as per a notice. The date specified in a notice must be reasonable under the circumstances. If a debtor fails to perform on a date specified in a notice, a debtor will be deemed to be in mora ex persona.

2. Mora creditoris or negative malperformance:

This is a form of breach of contract committed by a creditor, i.e. a person entitled to performance. Mora creditoris is committed where a debtor's failure to perform is due to a conduct of a creditor, i.e. a creditor causes a delay in performance by a debtor. A creditor fails to co-operate with a debtor to enable a debtor to perform. A contract creates a duty upon a creditor to cooperate with a debtor, to enable a debtor to discharge his/her obligations. This breach shall be complete only if a debtor has tendered performance and a creditor through his/her conduct failed, or is failing, to cooperate with a debtor to successfully render his performance. For instance, in construction contracts, an owner of land, where a house/building must be erected, has a duty to provide a construction company with access to land.

NB: Distinguish mora creditors with prevention of performance by a debtor, with more debitoris performance by the debtor must be possible to be performed.

3. Positive malperformance

This is a breach committed by a debtor in that he/she rendered defective or improper performance or did something prohibited in terms of a contract. At what point will one commit this breach? This breach takes place after performance has been rendered or immediately when someone does something that is prohibited in terms of a contract.

4. Prevention of performance

This breach can be committed by both parties, in that both parties can prevent performance. A debtor commits this breach when he culpable renders his or her performance impossible. This takes place before performance has been rendered. A creditor commits this breach when he culpable renders a debtor’s performance impossible.

5. Repudiation

This form of breach can be committed by both parties. Repudiation is committed when a party conducts him/herself in such a manner that his/her conduct, fairly interpreted, exhibits a deliberate and unequivocal intent to no longer adhere and be bound by a contract. This is known as an anticipatory breach, i.e. it occurs in advance before performance is due. Repudiation may occur before any performance is rendered, may occur simultaneously with positive nonperformance. In respect of positive nonperformance, the conduct of the party exhibits his or her intention not to render the remainder of the performance or not to make any defective performance perfect.

Re: Introduction and discussion by L. MANGESE - 07 Sep 2018 @ 16:46

Different remedies for a breach of a contract

- Execution of a contract - this is another for specific performance and may be granted under the following instances:
  - Specific Performance
    A party in breach is ordered to render performance he/she undertook to perform in terms of a contract. This is an order to enforce delivery of performance as agreed by the parties in terms of a contract. An order for specific performance may be refused under the following circumstances:
    - if performance will be impossible to be rendered (impossibility of performance);
    - when enforcement of contract will cause undue hardship or injustice, or
    - it will be inequitable under the circumstances to make an order for specific performance.

In terms of the principle of reciprocity a party may only claim performance if he/she has performed in full or is ready to perform. The principle attaches to all contracts in terms of which performance must be rendered in exchange, i.e. where both parties must perform. The principle of reciprocity dictates that where performance must be rendered in exchange, the party claiming performance must have performed in full or should be able to perform after the other party has performed. Thus, if a party has not rendered any performance or rendered defective or incomplete performance and is claiming performance from the other party, the other party who received the defective performance or incomplete performance can refuse to perform in terms of a contract. The refusal is raised through a defence known as an exceptio non adimplit contractus (the exceptio). The exceptio allows a party to withhold his performance until the other party has performed in full. This defence can only succeed if the following requirements are met:

  - a contract is reciprocal;
  - both parties must perform at the same time or the party raising the defence must perform after the other party; and
  - the person claiming performance is not willing to perform, or has not performed, or rendered defective performance or incomplete performance.

For instance: if A was to deliver 300 books to B, and B had to pay R3000 upon delivery, if A delivered 250 books to B, B can raise the exceptio above against A’s claim for payment and withhold payment of R3000 until A has delivered the remaining 50 books. Would this be fair? In order to ensure justice between the parties, a party raising an exceptio (B above) may be compelled to at least render a reduced performance. An order for reduced performance may only be granted under the following circumstances:

  - one party (A) has rendered defective or incomplete performance;
  - the other party (B) is using defective performance;
  - that, in the circumstances, it will be fair that a reduced performance be granted.

NB. What is a reciprocal contract? A contract creating exchangeable obligations is known as a reciprocal contract. A contract is reciprocal when both parties have right(s) and duty(s) in terms of a contract, and the obligations of one party depends on the other party (party 2) complying with his/her (party 2) obligations. What is a prohibitory interdict?

Re: Re: Introduction and discussion by L. MANGESE - 30 Sep 2018 @ 20:10

Different remedies for a breach of a contract (continues...)

- Cancellation of a contract

(Under what circumstances would a party be entitled to cancel a contract?)

A contract may be cancelled in the following instances:

  - an agreement between the parties,
  - a cancellation clause (lex commissoria), and
  - material breach of a contract.

A party will be entitled to cancel a contract if there is a clause in a contract that specifies that should a specific breach of contract transpire the innocent party will be entitled to cancel a contract. A cancellation clause outlines a party’s right to cancel a contract if the other party to a contract fails to comply with a particular provision of a contract. So if there was such a cancellation clause an innocent party will be entitled to cancel a contract irrespective of the seriousness of breach of a contract.

  - Material breach of a contract

In the absence of an agreement and a cancellation clause (lex commissoria), the innocent party will be entitled to cancel a contract if a material breach of contract is committed by the other party.

What would amount to a material breach of a contract?

In determining whether a breach is material, one will have to consider the type of breach committed:

  - Mora debitoris, the creditor claims cancellation

To determine whether this breach is material one would have to consider whether or not the time of performance was stipulated in a contract. (Remember mora ex re and mora personae).

  - With an agreed time upon which performance must be rendered, a creditor will be entitled to cancel a contract if “time is of essence”, i.e. time of performance is so fundamental that no delays in performance shall be acceptable. If performance must be rendered or delivered immediately, it would be
unreasonable to expect a creditor to accept performance at a later stage. A creditor would be entitled to cancel a contract if delayed performance would defeat the intended purpose. Certain deliverables are expected to be delivered at an agreed time or immediately, e.g., perishable goods or items marketable within a short period of time or items subject to price fluctuations.

- When there is no specific time/date upon which a debtor must perform, a creditor must place a debtor in mora. This is done by providing a debtor with a notice calling on a debtor to perform on a specified date and the period specified must be reasonable. The notice must expressly state that should a debtor fail to perform within the stated period, a creditor will have no option but to cancel a contract. Please note that if there is no agreement, a short notice, an hour or day notice may be reasonable. This will be more so in relation to perishable goods or items marketable within a short period of time or items subject to price fluctuations.

- Mora creditor - the debtor claims cancellation

An approach or principle discussed in relation to cancellation due to mora debitoris, applies with the necessary contextual adjustments to cancellation due to mora creditor. Remember that with mora creditor a creditor prevents a debtor from discharging his or her responsibilities. Thus, a debtor must, in the absence of an agreement on when performance must take place, place a creditor in mora. How is a creditor placed in mora?

- Positive malperformance

One must determine whether the nature of performance is so seriously defective that a creditor cannot reasonably be expected to abide by a contract. If so, then an innocent party would be entitled to cancel a contract.

- Repudiation

A party will be entitled to cancellation if the anticipated non-performance (or delay in performance) will justify cancellation or if facts indicate that the other party is not going to perform at all.

- Prevention of performance

A creditor is entitled to cancel a contract if a debtor prevents performance. A debtor may choose to claim specific performance or cancel a contract in the case of prevention of performance by creditor.

Contractual damages for breach of a contract

- What damage(s) would a party be entitled to as a result of breach of a contract by the other party?
- Under what circumstances would a party be entitled to damages?
- What is the nature or type of loss a person must have suffered to justify an entitlement to contractual damages?
- What is a distinction between patrimonial loss and non-patrimonial loss in so far as contractual damages are concerned? Can a party claim for both patrimonial and non-patrimonial losses incurred as a result of breach of a contract?
- NB. Damages are calculated using two principles (positions), what are these principles and which of these positions is applicable for measuring damages as a result of a breach of a contract? What is the difference between a creditor’s negative and positive interest? What is your understanding of these two concepts?
- Damages are calculated by comparing two financial positions of an innocent party and an amount to be paid would be determined by an innocent party’s interest in the enforcement of a contract.

A party will be entitled to damages for “patrimonial loss” reasonable foreseeable and resulting from a breach of contract subject to the principle of mitigation of losses. Contract law imposes a duty on an innocent party to limit/mitigate losses which he/she may suffer as a result of a breach. If it is proven that an innocent party could have mitigated his/her loss, the extent of damages to be awarded may be affected or reduced.
Contract of Sale

What to consider with regard to a contract of sale:

- What are the essential elements of a contract of sale? Remember essential elements are special characteristics which distinguish a contract to be of a specific type.
- What distinguishes a sale from an exchange agreement or lease?
- NB: Price, what amount to a price?
- How do you determine whether a price is definite or ascertainable?
- Can the parties agree that the other party to a contract will determine the price?
- What are the obligations of the sellers?
- If a merx is damaged before delivery, who will be liable for any intentional or negligent damage cause to such to a thing sold? What do you understand by the concept Perfectas?
- What are the remedies available to a buyer for defective merx?
- What action(s) can a buyer utilise to claim damages resulting from material defect, immaterial defect (in that a buyer could still have bought the merx despite a defect), seller’s breach of a warranty not to render defective performance and breach of a warrant against eviction?

Essential elements of a contract of sale

What differentiates a contract of sale from a lease or any other contract? The essential elements of a contract of sale differentiate sale from any other contract. The essential elements of a contract of sale are price (premiun) and thing sold (merx). A contract of sale is entered into when the parties agree that one will give or exchange a thing with the other in return of the payment of a price.

Merx and price

The subject matter (thing) of a sale must have been agreed by the parties either by being defined or capable of being ascertained. A merx will be ascertained if it can be determined by examining existing facts. When one examines a contract or facts surrounding a contract, one should be able to ascertain the subject matter of the sale (i.e. a thing being sold). Also note that anything which is incapable of being privately owned cannot be a subject matter of a sale.

A price to be paid must be an amount of money and must also be definite or ascertainable. A price will be ascertained if it can be determined by means of an agreed formula or a determined by a third party. Unilateral determination of a price by one party is prohibited, i.e. parties may not agree that a thing to be sold will be sold at a price to be determined by the other party to a contract.

Duties of the seller

- Duty to take care of the merx until delivery
  One of the seller’s responsibilities is to care of a thing/merx sold from the date of sale until the merx is delivered. In the event of any damage or loss caused by fraudulent, negligent or Intentional conduct of the seller, the seller will be held liable for such damage or loss.
- Duty to deliver the merx
  The seller is obliged to put or place the merx at the disposal of the purchaser to enable the purchaser to take free and undisturbed possession of the merx.
  Note that the parties need not to agree as time of delivery of the merx and payment of purchase price. It is a natural term of a sale that payment must take place simultaneously with delivery. An agreement regarding when and how delivery and payment must take place is an example of an incidental term of a contract.
- Duty to warrant the buyer against eviction
  The seller must ensure that the buyer has free and undisturbed possession. A sale is coupled with a natural undertaking by the seller to the buyer that no one will in future claim title to the thing sold and in the event of such incident occurring, the seller has a duty to assist the buyer to protect and defend the buyer’s possession.
- Duty to deliver the merx free from latent defects
  This is a natural implied term of a contract of sale. The seller is required to deliver the merx free from any latent defect. A latent defect is a defect which destroys or substantially impairs the utility or effectiveness of a merx for the purpose for which it was sold or commonly used. A warrant against latent defect may be excluded through a voetstoots. A voetstoots is a clause in a contract which excludes an implied warranty against latent defects and if there is a voetstoots the thing sold will be bought in its condition.

Remedies available to the for latent defect

- actio redditionis: in the event of a latent defect, the buyer is entitled to institute an action against the seller for a return of purchase price, interests and incidental costs incurred in preserving the merx or improvements thereof. This action may only succeed if the defect is so material that the purchaser would not have bought the merx, i.e. if the purchaser knew that the defect or the latent defect would render the merx useless.
- actio quasi minores – this action entitles the buyer to claim a reduction in the purchase price. This action may only succeed if the defect does not render the merx completely useless in that the purchaser would have bought the merx in anyway.
- actio empti - is an action available to the buyer to claim damages against the seller under the following circumstances:
  - defective performance;
  - seller guaranteed absence of defects but delivered a defective merx;
  - misrepresentation - the seller misrepresented the defects by concealing the defects; and
  - the seller was the manufacturer or had an expert knowledge of the defects goods.
Can an actio emptii can also be used form of breach of a warranty?

Can an actio redhibitoria and an actio quanti minoris be utilised for any other remedy other than for a breach of warranty against latent defect, and if so, under what circumstances?

Benefit and Risks

Who shall be entitled to the fruits or benefits from the merx and who shall be liable for damages or risk of loss before transfer or delivery of ownership?

In the absence of an agreement between the parties as to who shall be entitled to benefits and who bears the risk of loss or damage the following principles apply:

- The seller has a duty to take care of the merx until delivery. The seller will therefore be liable for damages due to seller's intentional, negligent and fraudulent conduct that resulted in loss or damage to the merx before delivery.
- However, a different principle applies with regard to liability for accidental damages caused to the merx before delivery. In the absence of an agreement, the perfect contract is applied to determine who will be liable for accidental damages to a merx. In terms of this principle liability will depend on whether a contract is perfect or not. If the contract is perfect the buyer will be liable for loss due to accidental damages or loss. If a contract is not perfect, the seller will be liable for loss due to accidental damages.
- The same principle as aforementioned applies with regard to the entitlement to benefits and fruits, i.e. if the sale is perfect, the buyer will be entitled to the benefits and fruits and if not, the seller will be entitled to the fruits.

How do you determine whether a contract is perfect? A contract is perfect when the merx is defined (i.e. certain), the price is certain or ascertainable through simple calculation and if the sale was subject to any suspensive condition that condition was met or fulfilled. A contract of sale is not perfect when the merx and price are ascertainable unless the price is ascertainable through simple calculation. A price may be ascertainable but not readily or easily calculable. If the merx and price is ascertainable a contract shall be perfect until the merx and price has been defined or ascertain. NB: Distinguish certain and ascertainable in a determination of whether there was an agreement on a price and merx on the formation of the contract of sale and determination on whether the contract of sale is perfect. Certain vs ascertainable by simple calculation?

Transfer of ownership

One of the intention of the parties for buying and selling of things is to effect the change in ownership. What are the requirements for the transfer of ownership? How is ownership of property transferred from one person to the other? Differentiate between various forms of transfer/deliver: actual delivery, symbolic delivery, delivery with a long hand, delivery with short hand and constitutum possessorium?
CONTRACT OF LEASE

What to consider:
- Define a lease agreement?
- What are the essential elements of a lease agreement?
- What are the formalities for a lease agreement?
- Define a long term lease? and what are the formalities for a long term lease formalities?
- What is your understanding of the huur gaat voor koop principle and under what circumstance(s) will a long term lease be binding on its successors in title? what are the two exceptions to the huur gaat voor koop principle?
- What are the obligations or both the lessor and the lessee?
- Cession of lease, is there consent required?
- How is a lease agreement terminated?

What is a lease agreement?

A lease is an agreement, between the lessor and the lessee, in terms of which the lessor binds himself or herself to give the lessee the temporary use and enjoyment of a thing (leased property), wholly or in part, and the lessee binds himself or herself to pay a sum of money as compensation for use and enjoyment of the leased property.

Formalities for a valid Lease

As a general rule no formalities are required for the conclusion of a valid lease contract. This means that a lease may be in writing or may be conducted verbally. However, please note that a lease of immovable property of not less than 10 years or for a lifetime of the lessee or lease renewable at the option of the lessor together with that renewable period is not less than ten years (long term lease) may not be enforced or be binding on the creditors or onerous successors in title of the lessor, unless it was registered against the title deed of the leased land or the creditor or successor in title knew of the lease at the time he/she became creditor or successor in title. This means that a registered long term lease is enforceable against creditors and onerous successors in title of the lessor whether aware or not aware of the lease. However, an unregistered long term lease will be invalid against creditors and onerous successors in title of the lessor who were aware of the lease at the time he/she became creditor or successor in title.

Minister of Agriculture must consent in writing to a long term lease of agricultural land and in terms of section 5(2) of the Rental Housing Act 54 of 1995; a lessee must reduce the agreement to writing if so requested by the lessee.

What is a long term lease?

Essential elements of a lease
- An undertaking by the lessee to give the lessee a temporary use and enjoyment of a leased property; and
- An undertaking by the lessee to pay a sum of money in return for the use and enjoyment of the leased property (i.e. an undertaking to pay rent).

Rent – What is rent?

As a general rule rent must consist of an agreed amount of money. The only exception is in respect of a lease of agricultural land, rent may consist of a definite quantity or an agreed portion of the produce of the leased property. Rent must be certain to determine what is certain or ascertainable, the same principle utilized in a sale agreement must be applied. The lessor and lessee can agree on a method or formula by which rent will be determined or that rent shall be determined by a specified third person.

Duties of the lessor

- To deliver the leased property

The lessor must place the leased property at the disposal of the lessee to enable the lessee to use and enjoy the leased property free from any disturbance. Placing the lease at disposal of the property may include delivering all accessories required to exercise use and enjoyment, e.g. keys to the house.
- To maintain or place the property in a proper condition

Under common law the landlord is obliged to deliver and maintain the property in a proper condition. The lessor is obliged to maintain the leased property and carry out repairs for the duration of the lease. However, parties may or normally agree as to who will be responsible for repairs or maintenance to certain features of the leased property. The parties may agree that external and major features be maintained and repaired by the lessor with internal and minor features being the responsibility of the lessee.
- To ensure an undisturbed enjoyment of the leased property

The lessor is required to assist the lessee in defending any legal action by a third party who disturbs the lessee's free use and enjoyment of the property. This only applies with regard to a disturbance caused by a third party with a form of a legal right to the leased property. The person causing disturbance must be someone with a legal right to the property and not any third party with no legal right to property.

Duties of the lessee

- To pay rent as agreed between the parties.
- Take care of the property and use it only for the purpose for which it was let.
- To restore the property on termination of the lease in the same good order and condition.
Rights of the lessor

1. Payment of rent: Landlord’s tacit hypothec

A lessor of immovable property acquires an automatic security for rent over movables brought inside the leased property including fruits and crops generated from the leased property. This is known as the landlord’s (lessor) tacit hypothec. It’s an automatic hypothec/security over movables situated in the leased immovable property which kicks in immediately when rent is and remains in arrears. The hypothec is of no effect unless it has been perfected (i.e. completed). The hypothec is perfected by obtaining an attachment of movables order from court or by an interdict prohibiting the removal of the goods from the leased premises, as well as by an attachment of movables property in execution of a judgment for payment of arrear rent. Can the lessor attach any items inside the leased property, even if the items belong to a third party?

2. Payment of rent: Automatic rent interdict

Section 31 of the Magistrates Court Act provides that the lessor who issues summons in a magistrate’s court for payment of rent may include in the summons a notice prohibiting any person from removing any furniture or other effects subject to the hypothec until an order has been given on a claim for rent.

3. The effect of Security by Means of Immovable Property Act indicates that the landlord’s tacit hypothec does not affect the rights of a special notarial bondholder (refer to chapter on security to understand full what a notarial bond, movable property subject to a special notarial bond may not be attached under the landlord’s tacit hypothec) unless the landlord’s tacit hypothec was perfected before registration of the bond. The hypothec will rank below any special notarial bond over movables of the lessee. The landlord’s hypothec does not apply to any property which is subject to an installment agreement. The landlord’s hypothec is perfected when the landlord has obtained an automatic rent interdict restraining removal or alienation of movables or a court order for attachment of movables. What is a special notarial bond.

4. The effect of the Insolvency Act is that the landlord acquires a preferential claim with regard to subject matter of hypothec upon insolvency of the lessee. A preferential claim is paid from the proceeds of unsecured assets of the insolvent person, but before all other non-preferential creditors are paid. A person with a preferential claim is known as a preferential creditor. However, the landlord will acquire a preferential claim once the hypothec has been perfected.

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SECURITY

- What is a Suretyship?
- Who are the parties to a Suretyship?
- What are the formalities for a Suretyship?
- What is the extent of a Surety's liability?
  - What are the rights of a Surety? Also distinguish whether the Surety's rights are enforceable against the creditor or principal debtor? Can a Surety be prevented from exercising such rights?
  - How is a Suretyship terminated?
  - What are the differences between a pledge and a notarial bond as well as a pledge and a mortgage bond?
  - What are the differences between a general and special notarial bond?
  - Briefly explain three different types of mortgage bonds?
  - What is the difference between contractual liens and enrichment liens? Is a lien enforceable against third parties?

Suretyship

A suretyship is a contract (an accessory contract) in terms of which a third party (surety/natural or juristic person(s)) undertakes to a creditor of a debtor that should a debtor fails to comply with his/her/its obligations (e.g. repayment of a loan due by the debtor) to creditor, the third party (surety) will comply with the obligations of a debtor.

A suretyship must be in writing and signed by a surety. A suretyship contract must identify a creditor, principal debtor, surety and principal debt. A suretyship is dependent upon the existence of a principal obligation and a surety cannot be liable for anything more than a principal debt. It is an accessory contract as it is follows the principal obligation(s) between a debtor and a creditor. There can be no surety without a principal obligation.

A suretyship is characterised by three parties, namely surety, creditor and debtor. A creditor is a person entitled to receive performance from an debtor and surety. A debtor is a person whose principal debt is being secured by a surety, i.e. a debtor in a principal obligation. Lastly, a surety is a person who undertakes to comply with the obligations of a principal debtor on default by a debtor.

NB/NB> Who are the parties to a suretyship agreement, is a suretyship an agreement between two or three parties, and who are these parties?

Termination of suretyship

- By an agreement between surety and creditor.
- Termination of a principal obligation.
- Creditor's conduct may lead to a surety being released from suretyship. Please identify possible conducts which may lead to a surety being entitled to a release from suretyship?
- Suretyship obligation is discharged.

Liability of a surety

A surety is only liable for an existing principal debt. The obligations of a surety are enforceable only after a principal debtor has defaulted in terms of a principal contract or obligation. A surety may only be held liable for a certain or liquidated due debt. A debt must be due and certain, a suretyship may not be enforced if a creditor's claim against a debtor is uncertain or unliquidated. What is a liquidated debt?

Can a surety escape liability in terms of a suretyship contract and what are the surety's rights?

A surety may rely on a defect relating to the liability of a principal debtor, such as misrepresentation, in order to avoid liability. A surety may not rely on a principal debtor's personal defences (e.g. minority) against a creditor to escape liability.

Surety's rights

- The benefit of division (beneficium divisionis) is available where there are several sureties in respect of an obligation, and the creditor attempts to recover from a single surety the entire debt. A surety may then demand that a creditor equally divides a claim between/amongst several sureties and restrict surety's obligations/liability to a pro rata of a principal debt. This benefit will fall away if the surety has renounced the benefit of division in terms of a suretyship contract and also where a surety has signed a contract of suretyship as "surety and co-principal debtor". A surety that signs a suretyship as a surety and principal debtor is implicitly deemed to have renounced the benefit of division. As such a surety cannot rely on the benefit of division to force a creditor to recover payment from other co-sureties in the above two instances.

- The benefit of exclusion (beneficium ordinis seu exceptionis) effects a surety a right to compel a creditor to recover as much as possible of due debt from a principal debtor before proceeding against surety. This benefit will fall away if the surety has renounced the benefit of division in terms of a suretyship contract and where a surety has signed a contract of suretyship as "surety and co-principal debtor", as he is implicitly deemed to have renounced the benefit of exclusion. As such a surety cannot rely on the benefit of exclusion to force a creditor to recover payment from other co-sureties in the above two instances.

- The benefit of cessation of action - this is a surety's right to compel a creditor to transfer to the surety any of the creditors action/claim(s) against the principal debtor and co-sureties. Thus, upon discharge by surety of his obligation he is entitled to demand that the creditor transfer all the creditor's rights against a principal debtor.
debtor and co-sureties. A surety will also resolve all securities and any preferences held by a creditor upon the cession of an action. A surety who is also a co-principal debtor is implicitly deemed to have renounced the benefits of accession and of division, but not the benefit of cession of action.

- Right against a principal debtor - a surety has a right to claim any amount paid in discharging the principal obligation from the principal debtor. Under what circumstances will a surety be entitled to compel a principal debtor to personally pay the debt or under what circumstances will a surety be entitled to be released from sureship?

- Right against co-sureties - a surety has a right to recover a portion of an amount paid towards discharging a principal debt. Under what circumstances would a surety be unable to exercise a right against co-sureties?

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2. Mortgage Bond - a mortgage bond is an instrument that secures payment of debt by registration of a real security (bond) over immovable property. It can also secure future or both existing and future debts (covering bond). It can also secure the balance of the purchase price (buying bond). It can also secure an existing debt already secured by another security (collateral bond). More than one mortgage bonds may be registered over a single property, but the first registered bond registered ranks high in preference over subsequent bonds. A mortgage bond must be in writing and registered at Deeds Office to be valid against third parties. An unregistered bond only confers the creditor with personal rights and as such not enforceable against third parties.

3. Pledge - a pledge is a form of security constituted by an agreement between a debtor and a creditor. A debtor (pledger) undertakes to deliver and delivers movable property (actual delivery) to a creditor (pledgee) as security for a debt. A pledgee will be entitled to keep the pledged item until payment of a debt by a debtor. A pledge is valid between the parties without delivery, but the creditor will acquire personal rights not real security over movables not delivered, so if movables were not delivered, the pledgee will have no action against third parties. For a pledge to be valid against third parties all movables must be delivered to the creditor. The pledgee loses security if possession of the pledged object is lost, but will retain personal rights over the pledged item despite loss of possession.

4. Notarial Bond - Same as pledge, in that only movables can be a subject matter of a notarial bond. It can also be covering, collateral or surety notarial bond. However, it differs from a pledge as it must be in writing, attested by a notary public and registered at Deeds Office and that a notarial bond does not require the delivery of movable property hypothecated under a bond. It must be noted that in terms of common law a notarial bondholder does not acquire any real rights of security in respect of movable property under a notarial bond until the property has been delivered/pledged. However, in terms of the Security by Means of Movable Property Act, movable property specified and described in a notarial bond registered in a Deeds Registry is deemed to have been pledged. Thus, on registration of a notarial bond a creditor will acquire real right of security over movable as specified and described in the bond. Depending on which party you represent, a notarial bond is advantageous for a debtor as it enables the debtor to keep and use movables subject to a notarial bond. What is the difference between a general and specific notarial bond?

5. Cession In Securitisation Debit / Cession as security for a debt - A cession as security is a cession of incorporeal assets or personal rights as security for payment of a debt, constituted as an out-and-out cession or a pledge (what is an out-end-out cession or pledge?). You should be able to understand whether the subject matter of a cession as security would form part of the estate of a cessionary or cedent, if security was granted through an out and out cession or pledge? In a cession through a pledge, the pledgor retains the rights as part of his/her estate. In cession through an out-and-out cession, the rights are transferred to the cessionary's estate.

6. Lien / Right of Retention - A lien is a right to retain possession of one's property by a person who has expended money or labour on someone's property. A lien comes into effect or is created automatically by operation of law and not as a result of an agreement between parties. However, for a lien to be perfected or effective a creditor must be in possession of a property which he expended money or labour. A creditor must have expended money or labour on the property in his possession to acquire a right to retain the property as security for any compensation emanating from labour or money expended on that property.
INSURANCE

- What are the essential elements and formalities of an insurance contract?
- What is an insurable interest, provides examples?
- The distinction between an undertaking to pay and the actual payment of the premium, which one of these two is an essential element of an insurance contract?
- What is the difference between indemnity and non-indemnity contract?
- What is subrogation and its effect on a party's right to claim from the insurer or third party?
- Waiver and insurance, what are the differences?
- The duty of good faith, what is the difference between misrepresentation and non-disclosure and its effect on an insurance contract? Does misrepresentation and non-disclosure render a contract void or voidable?
- What are the implications for being insured with different insurers and being over-insured and under-insured?

Essential elements of an insurance contract

- An insurable interest
  
  It is an interest in a non-occurrence of an event that may cause some damage or damages to the insured. The insured has an interest that he/she must guard against a risk of loss or damage of an object or loss of life. The insured must be present at the time of loss (indemnity contract) or conclusion of a contract (non-indemnity contract). How do establish whether the insured has an interest? The following illustrate examples of insurable interests:
  
  - damage to property belonging to the owner, damage to a leased property insured by lessor and professional liability (attorney or accountant's liability for negligence) (these three instances are examples of an insurable interests in an indemnity insurance).
  - death of (life of) a spouse, partner, debtor of creditor, (there are examples of non-indemnity insurable interests).
  
  - An undertaking by the insurer to pay the insured a sum of money or its equivalent

  The insurer undertakes to compensate the insured, i.e. pay certain predetermined amount (non-indemnity insurance) or an ascertainable/determinable amount (indemnity insurance) to the insured in the event of the insured risk materializing. NS, in an indemnity insurance, the insurer will only compensate the insured the actual value of loss suffered at the time of occurrence of the insured event. In the case of an indemnity insurance the insured must be placed in the same financial position had risk not materialized. Thus, the insured may not claim more than the value of his loss or the value of the amount insured against.

  - An undertaking by the insured to pay a premium

  The premium must be sum of money or something else. Something else should have patrimonial/moneyetary value. The actual payment of the premium is not a requirement for the creation of the contract as an undertaking to pay is sufficient. However, in practice payment of a premiums serves as a condition of an insurance contract, mostly suspensive and resolute.

  - An agreement to insure against risk or the insurer's undertaking is subject to an occurrence of a specified future event

  The performance by the insurer is subject to an occurrence of a specified event. In case of an indemnity insurance it must be certain as to whether an event will happen or not happen. With regard to non-indemnity insurance, a mere uncertainty as to when an event may occur is sufficient irrespective of whether it is certain that an event (death) will occur, it is a matter of time that is uncertain. The types of risks insured are normally damages/loss due to fire, theft, accident, natural disaster, death, etc. The risk object must also be identified. House, Car, A's death.

Indemnity vs non-indemnity insurance

In an indemnity insurance an amount that the insured will or can receive from the insurer cannot exceed the actual amount of damages incurred. The insurer undertakes to compensate the insured the equivalent of the loss suffered or less than the loss suffered. In the case of non-indemnity insurance, the amount payable is not equivalent to loss suffered. In non-indemnity insurance the insurer undertakes to pay the insured or the beneficiary a fixed sum of money if the event insured against takes place.

Subrogation

Generally, where a damage/loss caused to the insured's interest by a third party the insured may choose to claim from the insurer in terms of the insurance contract, or from the third party using a delictual action. However, should the insurer pay less than the damages/losses suffered, the insured may still proceed against the third party for the difference between the amount paid by the insurer and the value of damages incurred by the insured.

Subrogation then expresses the insurer's right to be placed in the insured's position so as to be entitled to the advantage of all the insured's rights and remedies against third parties. It must be noted that an action against the third party must be instituted by the insurer in the name of the insured. Subrogation expresses the insurer's right of recourse against a third party and it is only available if the insured has been fully compensated. The insurer will be entitled to claim from the third party the amount paid to the insured.
LAW OF AGENCY

- What is an agency agreement?
- What is the difference between a mandate and an agency?
- What are the different parties to an agency agreement, and the difference between an unnamed principal and undisclosed principal?
- What are the requirements/elements of an agency agreement?
- How is authority provided to an agent? Under what circumstances will representative capacity or agency be implied by law?
- What possible defence may a third party who concluded a contract with an agent raise against the principal who disputes having granted authority to such an agent?
- Can an agent be held personally liable to any third party while acting/purporting to act in representative capacity?
- Can a person ratify an act that was performed on his/her behalf without authority?
- How is agency terminated?

Essential elements of an agency agreement

- The existence of the principal, there can be no agency agreement without a principal;
- An agent must have authority to perform an act on behalf of an agent.
- An agent must act on behalf of a principal

Acquisition of authority

Authority is granted expressly or it may be implied to have been granted by a principal. Authority will be implied if the principal’s attitude or conduct deploids that the agent was authorised to perform an act on behalf of the principal. Authority may also be implied by law. Authority will be implied by law in the following relationships:

- curator and a mental ill person/person incapable of managing his/her affairs;
- director and company;
- a guardian/parent(s) and minor, and;
- a member and close corporation.

A person may also acquire authority through delegation. A principal may, when concluding an agency with an agent, grant the agent the power to further authorise another third party to perform a juristic act on behalf of a principal. This is known as delegation. Delegation may be expressed or implied. Kindly note that an agent is prohibited from delegating any authority provided to him unless by an expressed or implied authorisation by the principal.

What possible defence can a third party, who concluded a contract with an agent, raise against the principal who disputes having granted authority to the agent? C alleges that B gave A authority to conclude a sale on behalf of B with C. B alleges that A had no authority, and C raises an estoppel against A. An estoppel is a counter defence by a third party (C) against the principal (A) who alleges that a person (B) who is alleged to have acted on behalf of the principal (A) had no authority to act. If a counter defence (estoppel) succeeds the principal will be bound by an act which was concluded on his behalf as if he/she had initially given the agent authority to act. In order for an estoppel to succeed, the following requirements must be met:

- Representation by the principal that a person (agent) has authority to act on his behalf.
- Representation by a principal in the form of words or conduct.
- Representation must be of such nature that a third party would reasonably be expected to be misled by it.
- The third party must have acted on the strength of representation.

If a principal fail to enforce performance against a third, can an agent personally enforce performance against a third party?

Ratification in respect of an agency agreement relates to making valid or accepting the conclusion of any act purportedly done on behalf of someone (the alleged principal) without the alleged principal’s consent or authority. The consequence of ratification is that the principal would be bound by the contract as if he/she had initially authorised the agent to act on his/her behalf.

Circumstances under which the agent may be held personally liable:

- An agent agreed (expressed or implied agreement) to incur liability.
- An agent breached a warranty of authority.
- An agent exceeded/acted beyond authority.
- An agent does not disclose that he is acting on behalf of the principal/undisclosed principal.
- An agent concluded a contract on behalf of a non-existing person (remember contracts entered on behalf of companies to be formed)
- An agent acted fraudulently or negligently.

Unnamed principal vs undisclosed principal

The identity of a principal need not be made known to a third party. So, in an instance where a third party knows that an agent is acting on behalf of a principal but does not know who the principal is, that principal is known as an "unnamed principal". But this must be differentiated from a non-existing principal, where there a principal does not exist, in that case there can be no agency as a non-existing principal cannot be represented (is there any exception with regard to juristic persons?). Further note that an agent who does not disclose the identity of a principal to a third party may be held personal liable to a third party. (NB. The circumstances under which the agent can be held personally liable to the third party)
If an agent has failed to disclose his/her representative capacity to a third party, a principal will be known as an undisclosed principal. The doctrine of an undisclosed principal only exists if an agent has been authorised to act on behalf of a principal and an agent intended to act on behalf of a principal but failed to disclose that he/she was acting in a representative capacity. Under what instances would the doctrine of undisclosed principal be inapplicable?
BUSINESS FORMS

This topic introduces different forms of business enterprises. Thus you should be able to give advice on the most suitable form of business enterprise to be utilised for a particular business venture. In rendering such advice, you should be mindful of factors such as the number of creators, persons to run the business, management of the business, liability of the creator for business debts, tax implications, regulatory formalities or compliance, etc. You should differentiate different forms of business enterprises, and more so by names.

FORMS OF BUSINESS ENTERPRISES

1. SOLE PROPRIETORSHIP

A form of business venture created and managed by a natural person, who is solely entitled to profit of a business and also bears the ultimate risk and liability for all the activities of the business. The business is taxable at the hands of the proprietor. On the death of the creator the business is legally terminated, therefore there is no perpetual succession. It may also be difficult for a sole proprietor to raise finance, as its financial success may depend on the creditworthiness of the creator.

2. PARTNERSHIP

An agreement between two or more persons to contribute towards a business in partnership with the intention of making profit for the benefit of the partners. The partners can either be natural or juristic persons. As a general rule, a partnership is not a separate legal person, meaning partners can be held personally liable for debts of a partnership. However, a partnership can be sued and it can sue on its own name.

No formal requirements for a formation of partnership, meaning the contract can be verbal or written. As this is a specific contract, there following are essential elements of a partnership, namely:

- an unconditional contribution or an undertaking to contribute to a partnership by each partner;
- an objective of a partnership must be to make profit for the benefit of partners. Partners must agree or hope or expect to make profit and a partner may not be excluded from sharing in profit of a partnership.

What amount to a contribution?

- Contribution must be an item or thing with commercial value;
- Capital or labour, i.e. money, property, services, knowledge or skill;
- Corporeal or incorporeal (debts book) property, and
- Can be a combination of both capital and labour.

Consequences of a partnership

Unless otherwise agreed:

- all partners can act on behalf of the partnership. A partner has mutual mandate to bind the partnership in respect of any legal act falling within the business of the partnership.
- all partners are equally holders of the partnership assets in proportion to the partner's contribution to the partnership.
- partnership profit must be shared in proportion to respective partner's contribution or in the absence of accurate value of contribution, profit is shared equally amongst partners.
- all partners equally share the partnership losses in the same proportion as their share for a profit.
- on dissolution of a partnership, partners equally share the residue of partnership assets in the same proportion as their share of net profit.

Rights and duties of partners

You should be able to understand the rights and duties of partners as well as legal actions that a partner can utilise to enforce partnership rights. What is an actio procivi and an actio communi dividundo? Under what circumstances can partners utilise these actions? The first action is utilised to ensure compliance with a partnership agreement or termination of partnership and the actio communi dividundo is utilised for division of a partnership assets.

Termination partnership

- By agreement
- Death or resignation of a partner
- Change in membership (if a new partner joins the partnership, the old partnership and a new one is created)
- If objectively impossible for a partnership to achieve or pursue its purpose
- Sequestration of partner and liquidation of partnership
- By court order

3. BUSINESS TRUST

A business trust is a business model in terms of which a trust founder trust upon the trustee(s) to carry on a business for the benefit of the trust beneficiary(ies). The business is carried out through protection and management of the trust assets for business purposes as directed by the trust creator or benefactor (legal and juristic person) through a trust instrument. A business trust is normally utilised for family businesses and is may have some tax benefits.

A business trust is not a separate legal person, meaning that, it cannot perform juristic acts. Trustees must act on behalf of a business trust. However, trustees are not liable for the debts of a trust in their personal capacity, but the debts of a business trust are paid out of the trust assets. An advantage of a business trust is that it is not
subject to stricter regulatory requirements. A business trust can survive beyond trustees or trust founders. The powers of trustees are contained in the trust deed and trustees must exercise their powers in accordance with the trust instrument/deed.

Requirements for creation of business trust

- The founder must have a serious intent to create a trust and to create a legal binding obligations.
- The trust must identify the founder, trustees and beneficiaries.
- The objective of the must be defined with certainty. The main objective of a business trust must be profit making, no profit making objective - no business trust.
- The trust assets must be identified in the trust deed.
- The object of the trust must be lawful.
- The trustees must accept appointment as trustees.

4. CLOSE CORPORATIONS

NB. No new close corporation can be formed and registered in SA but old close corporations created and registered before 1 May 2011 continue to exist as juristic persons. A close corporation can be described as a vehicle of carrying business formed by no more than 10 members and registered with Registrar of Close Corporations, now CIPC. The name of a close corporation end with CC. Members will then hold members' interests. All members' interests may not exceed 100. Members may only receive dividends if a CC is and will be able to pay debts and the assets of the CC exceeds its liabilities.

A member of a CC is entitled to participate and exercise all rights in managing the business of the CC and shall be entitled to act on behalf of a company in a same way as a partner in a partnership. A CC is a separate legal person and as such members are not liable for the debts of a CC unless members carried the affairs of the CC fraudulently, recklessly or with gross negligence.

5. CO-OPERATIVES

A business vehicle formed through voluntary association of persons for economic and social needs of persons. There is no restriction on the number of members of co-operative. It is mostly used for community related objectives and projects. It is often utilised to advance the transformation objectives for the benefit of rural communities. It can issue shares to members and all issued shares rank the same.
CONSUMER PROTECTION ACT (CPA)
For this topic you should understand the following:

- The purpose of CPA.
- Eight consumer rights as contained in the Act.
- The meaning or definition of transaction.
- Know the transactions that the CPA applies to and the specific transactions where the CPA is not applicable.
- Definition of goods, service, supply, supplier, promotions, consumer.
- Formalities for franchise agreement and the applicable cooling off period in terms of the Act.

APPLICATION OF THE CPA
The CPA applies, unless otherwise exempted in terms of the CPA, to:

- All transactions occurring within the Republic of South Africa, including goods or services that are supplied or performed in terms of the above transactions irrespective of whether any of those goods or services are offered or supplied in conjunction with any other goods or services, or separate from any other goods or services.
- The promotion of any goods and services or the promotion of the supplier of any goods and services within the Republic.

EXEMPTIONS TO THE APPLICATION OF THE CPA

- Supply, or promotion of goods or services to the state;
- Credit agreements, in terms of the National Credit Act (NCA), but not goods or services subject to the NCA.
- Transaction in terms of which a consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value (R2 million) determined by the Minister.
- Services to be supplied under an employment contract;
- Collective bargaining agreements; and
- Transactions giving effect to bargaining agreements.

What is a transaction in terms of the CPA?
In respect of a person acting in the ordinary course of business:

- an agreement for the supply or potential supply of any goods or services in exchange for consideration;
- the supply of any goods to or at the direction of a consumer for a consideration;
- the performance of any services for or at the disposal of a consumer for a consideration;
- the supply of goods and services in the ordinary course of business of a club, trade union, association, society, whether for consideration or otherwise, regardless whether there is any membership fee.
- soliciting offers to enter into a franchise agreement;
- an offer by a potential franchise to enter into a franchise agreement with a potential franchisee;
- a franchise agreement or an agreement supplementary to a franchise agreement; and
- the supply of any goods or services to a franchisee in terms of a franchise agreement.

Formalities for a franchise agreement in terms of the Act

- A franchise agreement must be in writing and signed by or on behalf of a franchisee;
- In terms of the CPA, franchise agreements are subject to a 10 day cooling off period in favour of the franchisee.
Introduction and discussion

by L. MANGANESE - 28 Oct 2018 @ 20:27

BANKING LAW - Financial Intelligence Centre Act (FICA)

For this topic, you should understand the following:

- The objectives of FICA
- Accountable Institutions in terms of the FICA
- Obligations (KYC obligations) of accountable institutions in terms of the FICA

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OBJECTIVES OF FICA

- Combat money laundering activities
- Combat the financing of terrorist and related activities
- Identify the proceeds of unlawful activities
- Impose certain duties on institutions which might be used for money laundering and financing of terrorist activities

ACCOUNTABLE INSTITUTIONS

- Practicing Attorneys
- Banks
- An estate agent
- Long-term insurance businesses
- Financial services providers
- A board of executors or a trustee of business trust
- An authorized user of an exchange
- A person who carries on the business of dealing in foreign exchange
- A person who carries on the business of lending money against the security of securities
- A person who carries on the business of a money remitter

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DUTIES OF ACCOUNTABLE INSTITUTIONS

- Keep records of business relationship (keep record of the business transactions and of identity of clients and how you identified your client) - an accountable institution must keep records of the identity of the client; the nature of a business relationship or transaction; in the case of a transaction the amount involved and the parties to that transaction; and any document or copy of a document obtained by an accountable institution in order to verify a person’s identity.
- Records must be kept for five years from the date the relationship was terminated or the date the transaction was concluded.
- Report certain transactions to FICA, i.e., cash transactions above a certain prescribed limit, suspicious and unusual transactions, property associated with terrorist and related activities, and conveyance of cash and electronic transfer of money to or from Republic.
- Implement measures that will assist institutions to comply with FICA including the training of employees and appointment of an officer to ensure compliance with the Act.

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