

study unit 2 - sources of banking law

Explain the role of English law in South African banking law.

South African banking system displays a strong resemblance to English banking system because of its historical links with English system. However, it acts regulating public-law control of our banking system are not based on an English model. Morris's article "Law of banking in South Africa" describes the significance of English banking law for SA in the following terms:

Law of SA is identical with English law in most matters that belong properly to banking. Where one does not borrow from the other, both are derived from the law merchant.

The remainder of his article, however, clearly shows that there are substantial differences between the two legal systems. A more careful statement is found in Willis Banking in South African law.

mention has already been made of the fact that our banking practice derives from England... It is hardly surprising that where our law is silent on a matter pertaining to banking practice, the decisions of English courts have had strong persuasive authority.

English banking law is readily accessible, whereas South African banking law is still largely unexplored terrain. However, it cannot be taken for granted that the whole or any part of English banking law is also applicable in SA.

Sources of Banking law

* (STATUTES) ①

Banks are regulated by two types of legislation
1) banking legislation 2) other legislation.

Banking law is mostly a creation of statute.

IMPORTANT STATUTE

- ↓ bank act 94 of 1990, as amended ✓
- ↓ National credit Act 34 of 2005 ✓
- ↓ SARB act 90 of 1989, as amended ✓
- ↓ Cooperative banks act 40 of 2007 ✓
- ↓ FICA 38 of 2001 as amended ✓
- ↓ SARB act 90 of 1989 ✓

• large part of banking legislation prescribes ↓ supervision & regulation of banks & ∴ follow ↓ general principles of admin law & criminal law also apply. ✓ S.A admin law is based on english law as a result of adoption of english constitutional law. SA criminal law is based on Roman Dutch common law - in practice - influenced largely by ↓ principles of english law.

* (TERMS OF CONTRACT) ②

Private law relationships is largely det by ↓ contract concluded bet ↓ parties. when bank is party to an agreement, ↓ agreement will be subject to ↓ S A Law of contract

* (LONI)

(3)

• 1 Bill of exchange Act 84 of 1964 main source of LONI

• Aspects of LONI not covered by 1 act are subject to

1 common law (Roman - Dutch) *wisrecht*.

• When interpreting B o E Act, our courts not bound by english case law, but decisions of english courts, regarding

corresponding sections in 1 english act do have strong persuasive value

• 1 english BOE Act also ^{used} model for 1 legislation - Canada - New Zealand & case law of those

countries also have persuasive value.

• 1 BOE Act does not preclude - development of new customary law on negotiable instruments

or B o E cheques.

* (CUSTOMARY LAW (USAGE)) refer, Worksheet 7

* Basis for application of a trade usage is:

• If trade usage known to both parties, their knowledge will indicate that usage should be incorporated in their contract as a term implied from 1 facts (tacit term)

• if one party cannot prove that other knew of 1 trade usage as a term will still be incorporated as an implied

term in 1 contract, if in addition to other requirements 1 party's knowledge in furtherance to be

bound can be presumed.

Separate

* The Relevance of legal sources regarding terms of a contract.

Terms of a contract are

- terms expressly agreed upon
- tacit terms - are terms not expressly agreed upon but which can be inferred from express terms of a contract
- terms, by law to be regarded as part of their contract from (common law / statutory law)
- terms included in a contract as a result of trade usage.

A tendency to draw up standard written contracts regulating possible issues by express terms is also found in current banking practice. Certain banking transactions - few or almost no express terms are agreed upon. Such are \therefore regulated mainly by tacit terms & terms deriving from law / usage.

* Terms deriving from common law

- Naturalia are terms which, according to common law, are included in every contract of a particular type unless excluded by the parties.
- The naturalia of a contract are det. by classifying the contract as 1 of the types of contract known to common law & ascertaining the naturalia applicable to the type of contract.
- Such a classification is made by establishing whether the contract contains the essentialia

of a particular type of contract (material terms)

STUDY UNIT 3

THE BANK - CUSTOMER RELATIONSHIP

• Legal relationship between a bank & customer is

based on contract - based on contract of

mandate - client - mandator / bank - mandatory

usually - relationship doesn't involve any element of

agency & is acting behalf of customer - bank

does not bind customer - usually not correct

to refer to bank as customer's agent.

• mutuum.

- where customer deposits money or has

a credit balance in his current acc, relationship

involves contract of mutuum (loan for use)

- bank becomes owner of money deposited

& client has claim against bank for

similar amount of money @ a later stage.

- contract of mutuum clearly illustrate why

relationship bet bank & customer is one of

debtor (bank) & creditor (customer)

eg: bank (debtor) owes a certain amount

& amount deposited/collected on cheque on

behalf of customer (creditor)

• where customer has overdraft or mortgage

bank (creditor); client (debtor).

DEPOSIT TAKING - (Particular form of borrowing money) distinguishing characteristics of a bank.

- It is not necessary for purpose of SA law to limit concepts of "bank(er)" "customer" & "bank-customer relationship" artificially to one relationship.

- In principle no reason to apply term "bank-customer relationship" solely to relationship arising from a cheque a/c.

In each case, legal relationship bet bank & customer, det by nature of their contract.

STUDY STANDARD BANK OF SA V ONEANIMATE INV

A BANK'S DUTY OF CONFIDENTIALITY IN RELATION TO ITS CUSTOMERS AFFAIRS

1) Foundation
"Bank confidentiality" refers to all activities performed within context of banking business. purpose is to prevent disclosures bet one entity in a group & another.

View: customers have a right to expect their dealings with bank will be treated as confidential. 3 main reasons support this view

- right to personal privacy
- contractual relationship bet a bank & customer
- statutory provisions governing banking confidentiality

Deposit taking is a distinguishing characteristic of a bank. It is not necessary, for the purposes of SA Law, to limit the concepts of "banker" "customer" to one relationship.

SA Law also includes the term "banker" whether incorporated or not who carry on the business of banking.

2) Common Law

At common law, banks owe a duty of confidentiality to their customers not to disclose details about them or their affairs.

This duty arises by way of an implied obligation & stems from the nature of the bank & customer relationship.

A bank's duty of confidentiality begins at the moment the bank & customer relationship is established & continues after the customer's death, duty is not absolute. Subject to a bank may violate its customer confidentiality if

- mandated by law;
- it is in the public interest to do so;
- it is in the interest of the bank to do so;
- on the express or implied consent of the customer.

Duty of confidentiality may be lifted by statute, agreement or court order.

3) Statutory Law - pursuant to legislation

Bank secrecy recognised in various ways - (a) imposing a duty of confidentiality on certain bank officials (b) imposing a specific duty of disclosure on banks.

Banks are statutorily required to observe the confidentiality of customers. Statutes such as

section 33(1)(a) of the SAR Act of 1989 - prohibits any disclosure about customers by an official of the bank. Info may be disclosed - written

permission of the Minister of Finance & the Governor

of a bank, but only after consulting with customer. Disclosure may then be made only to minister of finance or director-general in course of an official's duties, before a court or under a law.

sec 236(4) of Criminal Procedure Act 51 of 1977 prohibits disclosure of written info in a court, except when a bank is ordered to do so by court. sec 153(2)(b) of statute provides no info about a pending charge may be published.

Banks are forced, in terms of various statutes to disclose info about their customers. In international legislation, focus is on ensuring a bank knows who/what real customer is, so it can take safety measures to prevent criminals from having a bank account. The Prevention of Organised Crime Act 121 of 1998 & FICA overturned any secrecy obligations which banks had pursuant to S.A. law.

(4) LIMITS while measures are in place, in effect, violate bank confidentiality, legal privilege afforded to attorney-customer. Rel. still remains intact. As a result, common-law right to legal professional privilege is not affected by money laundering control legislation in as far as communications are made between an attorney & his client for legal advice purposes, or bet. a 3rd party & attorney for purposes of litigation.

The Bank as owner of monies deposited
- when money is deposited with a bank, it becomes
+ prop of + bank where + account is kept,
while + depositor gains a mere personal claim
against + bank for + same amount.

+ meaning of receipt
- + bank is only responsible for + amount it

receives £ must repay this amount to + customer
on demand. Not an agent or factor - but acts in
capacity of debtor with regards to customer who
becomes creditor of + bank. In addition a bank

can act in a different capacity & receive money
as an agent or trustee. eg bank undertakes to sell
bills on behalf of customer. A bank receives money
& uses it as its own & becomes debtor of +

person who has lent + money to + bank.
Receipt for own use & benefit ^{After deposited} _{becomes prop of bank.}

After money is deposited it commingles with
other money & becomes indistinguishable. +
customer: ∴ has a personal claim for repayment
of an amount of money rather than for

repayment of specific notes & coins.
Receipt as reduction of an overdraft.
overdraft - loan by bank ^{generally} repayable on demand

However courts held immediately repayable, unless
otherwise agreed to by + parties. Each overdraft
constitutes a separate debt made to a customer,
while each payment into an overdraft account
by + customer is repayment of + amount

interest included with interest

The nature of a contract between parties is not altered or det by granting of an overdraft by a bank, since such loans merely assist in execution of a mandate already exists between parties.

STUDY UNIT FOUR

THE BANK AS DEPOSITARY

LEGAL PRINCIPLES REGARDING A BANK AS DEPOSITARY

"DEPOSITUM"

is a contract where one person (depositor) delivers an object to another (depository) who keeps it in his custody without using it & with obligation to return the same object to the depositor.

"SAFEKEEPING"

Receipt for ownership of property after money is deposited in a bank. When a person deposits money in a bank, the bank issues a receipt for the amount of money deposited. This receipt is a document of title and is a receipt for the property of the depositor.

Receipt of a reduction of the overdraft - loan by bank. However, courts held immediately responsible, unless otherwise agreed to by parties. Each bank's contract is a contract of deposit. The bank's obligation is to return the money to the depositor when the overdraft is paid.

STUDY UNIT 4 THE BANK AS DEPOSITARY

"Depositum"

- Giving of valuables to a goldsmith for safekeeping resulted in a depositum

- Depositum is a contract where one person (depositor) delivers an object to another (depository) who keeps it in his custody without using it & with an obligation to return it same object to the depositor.

- When a goldsmith obtained a right to use money held for his own purposes, coupled with an obligation to return the same amount to his customer

- The nature of the contract changed from depositum to mutuum (loan for consumption)

"SAFEKEEPING"



Today, a person may still leave valuables with a bank for safe custody on understanding that banks will return the same articles on request. This is a true depositum & the relationship between parties will be governed by a contract of deposit. Nowadays banks rent out small lockers on their premises for the safekeeping of customers' valuables. A bank does not act as a depository & undertakes to safe "custody" of a customer's possessions. A customer deposit valuables & removes them from the locker when required. A bank is not liable as a depository for the safety of such valuables, because the relationship between parties governed by rental agreement.

Deposit taking : is where money is deposited into a bank etc & bank can use this money for its own benefit.

* Mensky v Absa Bank limited

1) Facts of case?

- client & bank concluded written agreement
- plaintiff rented safety deposit locker @ one of bank's branches
- I.T.O agreement - bank had undertaken to exercise reasonable care for security of locker.
- contract specified - client responsible to insure contents of locker
- Client deposited jewellery & foreign currency in locker
- locker misplaced by defendant upon relocation to different premises.

2) Does a bank usually know what's inside a safety deposit box?

- court reasoned $\hat{=}$ provision of safe-deposit locker was not a profitable business for defendant bank.
- pointed out $\hat{=}$ bank provided facility @ a modest fee & was not entitled to know what client placed in locker.

3) What did court find regarding which of parties usually carries risk of loss/damage to content of a safety box?

Staff were negligent

- Client who failed to insure its contents will be unable to hold bank liable unless bank
- If contents of safety box stolen or damaged
- Clients may be requested to insure contents of box
- contents of a safety-deposit box.

a bank would not accept any responsibility for contents of a safety-deposit box.

Banks liability

1. court decided that bank had acted reasonably if clients claim had to be dismissed with costs

bank became obliged to return clients possessions to her but could not until she came to bank which she did not do at once

1. agreement having being terminated would cease unless she took some available action to store clients valuables @ 2nd branch

safety box to new premises as well as 1. agreement of 1. bank had notified client of 1. relocation of 1. without taking into ac 1. effect of 1. exemption clause

- court decided that bank had not breached its obligations
- client had no claim against 1. bank.

4) In whose favour did 1. court find?

risks of loss/damage, if there could be insured - this amount to an allocation, to 1. client of all

1. client to insure goods in 1. locker - in this case 1. agreement expressly instructed

1. bank can result in substantial liabilities - 1. provision of a locker does not warrant an undertaking

First National Bank of SA Ltd v Rosenblum & another
Facts: contents of 1 safe-deposit box were stolen
owing to 1 negligence of 1 bank's staff.

- Common cause one/more of 1 bank's staff had stolen 1 contents
- Bank staff had acted with gross negligence.

Court Findings:

- 1 bank as an artificial, non human entity was incapable of being negligent itself.
- when 1 bank stipulated \pm it would not be liable "whether 1 loss/damage is due to 1 bank's negligence or not". it included loss/damage due to 1 negligence of its employees.
- 1 court held \pm 1 indemnity also covered acts of gross negligence.

Mutuum

Deposits taken by banks today do not involve depositum as a form of contract. Such deposits now involve ϵ and are treated as a contract of mutuum. Money which is not deposited @ a bank in a traditional manner can be regarded as deposited ϵ and should be treated as a contract of mutuum. ✓

Shirley
love

Transitional local Council of Rantfontein v ABSA

Facts: There was a deposit of money (by T client - T local council to its bank) & a and

separate contract of depositum by T bank to its

client relating to T same money.

Court held & T conduct by T teller constituted

T taking of a deposit by T bank & T ownership

of T money passed to T bank. T court held

& T money had been deposited by T council

with T bank, & T T latter had to reflect

this fact in its books.

Issues of T case

(1) T banks counter-claim - court noted it was

common cause & T parties were engaged in a

contract of deposit.

(2) T court pointed out & T issue of onus of

proof was influenced by T whether claim

was couched in delictual or contractual terms

(3) Delict - T depositor (council) had to plead & prove

& it suffered T loss & T bank (depository) had

lost or destroyed T goods due to fault on T

banks part.

(4) Court accepted & T claim was couched in

delictual terms. T bank had to prove & T

money was lost as a result of T council's

negligence

(5) Court affirmed & T act of deciding whether T

council acted negligently was an objective

test & T act of omissions of T council

had to be weighed against those of a

reasonable person in the same circumstances

Court decided that the depository did not breach its duties under the contract of deposit at the counter - claim of the bank was dismissed with costs.

The bank was ordered to pay the council a sum of £104,788.76 + interest.

Issues of the case

(1) The bank's counter-claim - court held that the common law duty of the bank was to ensure that the money was deposited in the account.

(2) The bank's duty of care - court held that the bank was not liable for the loss of the money as it was not a duty of care.

(3) The bank's duty of care - court held that the bank was not liable for the loss of the money as it was not a duty of care.

(4) The bank's duty of care - court held that the bank was not liable for the loss of the money as it was not a duty of care.

(5) The bank's duty of care - court held that the bank was not liable for the loss of the money as it was not a duty of care.

STUDY UNIT 5

THE BANK AS BORROWER: TAKING OF DEPOSITS

- ① Fixed deposit - loan for consumption (Mutuum)
- investment of a single deposit, for a fixed term @ a guaranteed fixed rate of interest. Used for both short & long term investment purposes.

② Agreement between a bank & holder of a fixed-deposit receipt.

fixed described by courts as a loan to a bank repayable on a certain date, usually bearing interest.

Fixed deposit receipt is merely evidence of a loan

has been received & confirmation of some of the terms of a contract.

③ Repayment of fixed deposits.

- repayable on or after maturity date

- customer obliged to call on bank for repayment

- bank under no obligation to find a customer

on or after maturity date for purposes of making repayment.

④ Repayment before maturity.

Since parties agreed expressly on maturity date, bank will be under an obligation to

repay a fixed deposit on or after maturity only.

- Prior to 1965, a bank could waive its right to

retain a loan until maturity @ its

discretion, could repay a whole or part of

1 amount before maturity. 1 practice was to obtain permission from 1 bank's head office & to require 1 customer to forfeit 1 whole or part of 1 accrued interest. ✓

- ⑤ Advances against fixed deposits
- In cases where a customer needs 1 amount of a fixed deposit before 1 maturity date of 1 deposit, but 1 bank is not prepared to repay 1 deposit earlier, 1 customer may apply for a loan, using 1 fixed deposit as security.
 - It is also possible to obtain a loan from one bank against 1 security of a fixed deposit made @ another bank. 1 Bank is free to decide whether it will grant such a loan. It is under no obligation to do so.

- ⑥ 1 transferability of fixed deposits
- If 1 depositor's rights may indeed be ceded, 1 delivery of 1 deposit receipt is not a requirement for 1 cession of 1 depositor's rights against 1 bank.

Botha v Fick 1 legal position was explained as follows

- mere agreement bet cedent & cessionary to transfer & receive 1 right is sufficient to cede a personal right.

- If 1 right is evidenced by a document, delivery of 1 document is not required for 1 cession of 1 right.

- Only if 1 right is of such a nature 1 it cannot exist independently of 1 document in which it is embodied in 1 case of Neg. Ins. delivery of 1 doc is a requirement for cession of 1 right. ✓

Savings Deposits - Position under 1 Bank Act 1940 of 1 banks act 94 of 1990 as amended contains 1990 no definitions or restrictions with respect to savings accounts or transmission accounts

Characteristics of Savings Accounts

• Deposits & withdrawals can be made @ any time

no notice period for withdrawals. Deposits of

cheque, bank collects cheques for credit of 1

customers - a/c. Deposits earn interest

• Customer can instruct 1 bank to make

payments to 3rd parties. eg. Dr orders / stop orders

• Account is conducted by means of a

traditional savings passbook or a teller card.

2 contracts come into existence bet 1 bank & 1

savings a/c holder

• A contract of loan for consumption - bank borrows

1st deposit & undertakes to borrow all further

deposits from customer

• Contract of mandate - bank undertakes to collect cheques deposits in form of cheques for 1 customer.

Deposits in Current Accounts

Operation of a cheque a/c

- ordinary cheque a/c most common current a/c

- A current a/c is usually any a/c kept by 2 parties

in which either of their individual debts to

each other are made, resulting in a balance ±

has to be paid by one of them. ✓

READ!

ENERGY MEASUREMENTS v FN B

court held \pm a collecting banker does have an obligation when opening a new account for a client to ascertain \pm identity of \pm client & to obtain some info to establish \pm bona fides of \pm client.

RELATIONSHIP BET \pm BANK & A CHQ ACC HOLDER

At present SA Law, novation takes place only if \pm has clearly been \pm intention of \pm parties. Novation theory unacceptable in SA law & \pm legal effects of entries on Current a/c are confined to \pm consequences resulting from set-off v CRPSO

when a chq a/c is opened with CR bal agreement is made up of more than one contract

- These are:
- Contract of loan (Bank borrows 1st deposit & undertakes to borrow further amounts \pm will be deposited)
 - A contract of mandate (bank undertakes to carry out payment instructions given by chq)
 - A contract of mandate (bank undertakes to collect cheques on behalf of \pm customer)

Deposits on chq a/c are repayable on demand without prior notice.

DEPOSITS & WITHDRAWALS BY MEANS OF AUTOMATED

THE RISK OF UNAUTHORIZED WITHDRAWALS

EG: (UNAUTHORIZED PERSON GAINS ACCESS TO A

CUSTOMER'S CARD & PIN) IS WHETHER CUSTOMER MAY BE DEBITED WITH AN AMOUNT OF AN UNAUTHORIZED WITHDRAWAL. ✓

• RISK WILL NOT ARISE AS MOST FINANCIAL INST

INCLUDE EXPRESS CONTRACT WITH CUSTOMERS

IN THIS REGARD. AGREEMENT PROVIDES F.

CUSTOMERS A/C MAY BE DEBITED WITH ALL

WITHDRAWALS MADE BY MEANS OF PARTICULAR

CARD & PIN. IF BANK

IF BANK NOTIFIED OF A POSSIBLE UNAUTHORIZED

WITHDRAWAL BUT IT TAKES PLACE, CUSTOMER WILL NOT

HAVE TO ACCEPT A DR. ✓

• AUTOMATED CARDS ARE ALSO ISSUED WITHOUT

SUCH AN EXPRESS PROVISION. A/C

A BANK CAN CHARGE ITS CUSTOMER ONLY IF IT HAS PAID

AN AMOUNT OF MONEY TO A CUSTOMER OR

ACCORDING TO HIS/HER ORDERS. THERE MIGHT BE A

FACT THAT IF A CUSTOMER WOULD CARRY THE RISK OF

AN UNAUTHORIZED WITHDRAWAL. ✓

• CUSTOMER REALIZES WHO OBTAINS A CARD REALIZES

A WHOLE SYSTEM FUNCTION BY MEANS OF A CARD

AGAINST THIS IS REASONABLE TO ASSUME F. A

CUSTOMER CONSENTS TO ACCEPT A DR FOR ANY

WITHDRAWAL MADE BY MEANS OF HIS CARD OR NO

A CUSTOMER WILL RUN THE RISK ONLY UNTIL HE

INFORMS A BANK OF A POSSIBLE UNAUTHORIZED

USE OF A CARD. ✓

L'Union de Banques a Paris v. Rault 1982
court held \pm a bank always carries \pm risk as
long as it is not \pm customer's fault \pm \pm card & No.
fell into \pm wrong hands. ✓

AUTOTELLER DEPOSITS

READ: WHEN A CUSTOMER MAKES A DEPOSIT OVER \pm COUNTER
HE/SHE RECEIVES A DEPOSIT SLIP, WHICH AMOUNTS
TO AN ADMISSION, BY \pm BANK \pm IT HAS
RECEIVED \pm INDICATED AMT IN CASH, OR
CHEQUE FOR SUCH AMT. SHOULD A DISPUTE
ARISE ON WHETHER \pm DEPOSIT WAS IN FACT MADE,
THIS ADMISSION WILL PLACE AN ONUS OF
REBUTTAL ON \pm BANK.

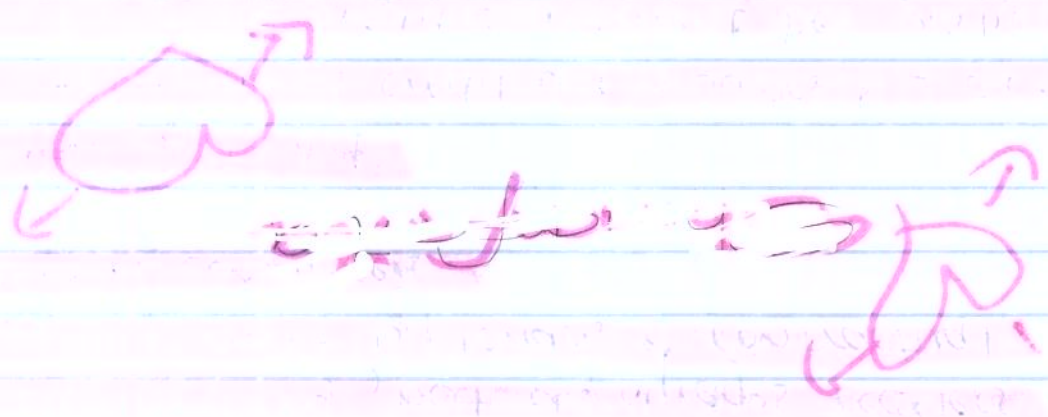
In \pm case of autoteller deposit, \pm customer
does not enjoy this evidential advantage.
 \pm transaction slip supplied by \pm machine
has no evidential value, because it is simply
a record of what \pm customer has keyed into \pm
machine. It does not prove \pm \pm customer
actually inserted \pm alleged amount in cash, or
a chq for \pm amt into \pm machine.

? whether payment takes place when \pm
deposit amt inserted into \pm machine, or
payment occurs only once \pm deposit envelope
is opened & its contents are accepted by \pm bank.

- If deposit by cheque payment occurs only when chq is honoured.
- Cash deposited in ATM - payment occurs only when contents of envelope removed by bank official.

Contract of deposit, a depository, usually a bank, is liable for a loss of property deposited, unless able to prove such loss was not his/her fault.

• should a bank prove the contents of an attachee deposit box were lost through no fault on the bank's part, it would not be liable as a depository toward its customer. Only a contract of deposit exists while the envelope remains in the attachee.



STUDY UNIT 8

CREDIT AGREEMENTS

1 national credit Act 34 of 2005 → an agreement will be a credit agreement for 1 purposes of 1 act provided 1 2 elements are present ✓

- some deferral of repayment or prepayment ✓
- a fee, charge, or interest imposed with respect to a deferred payment or a discount given when prepayments are made. ✓ ← important requirement for an agreement to be a credit Agreement

1 National credit act enables 1 consumer to obtain goods or services immediately, while delaying payment or spacing payment over a period of time ✓

1 national credit act promotes & encourages responsible borrowing, but discourages reckless granting of credit by lenders & contractual default by consumers. ✓

Application of 1 Act

sec 4 of 1 National credit act provides 1 1 act applies to every credit agreement bet parties who deal @ arm's length & is made within, or has an effect within, SA. ✓

Key concepts in determining 1 app of 1 Act

- "credit agreement"
- "parties" (ie. 1 credit provider (eg a money lender) & 1 consumer (eg 1 money borrower)
- dealing @ arm's length.

FTG

Credit Agreement

An agreement will qualify as a credit agreement if it is: for purposes of Act if it is

- (a) a credit facility (a credit card)
- (b) a credit transaction (an installment agreement mortgage agreement)
- (c) a credit guarantee (eg suretyship)
- (d) any combination (a)-(c)

An agreement will not be a credit agreement if

- (a) an insurance policy
- (b) a lease of immovable prop
- (c) a transaction bet a stakeholder one or more of its members.

Credit facility: an agreement in terms of which a credit provider undertakes to supply goods or services or to pay an amount or amounts, as det by consumer from time to time, to consumer or on behalf of, or @ direction, of consumer; & either to defer consumer obligation to pay any part of goods or services, or to repay to credit provider any part of any amt, or bill consumer periodically for any part of costs of goods or services

FAIS

1 Financial Advisory & Intermediary Services Act 37 of 2002

Pertains to 1 business of rendering financial advice to clients about financial products. Under 1 FAIS financial advice means any recommendations, guidance, or proposal of a financial nature that relates to 1 purchase or variation of investment in a financial product.

The definition of financial product as provided by 1 FAIS includes among other things any deposit as defined by 1 banks Act which is for a period of more than 12 months. Deposits made for period less than 12 months are regulated by 1 Deposit Code.

~~Mensky v Absa Bank Ltd t/a Trust Bank~~
~~Diners Club SA (Pty) Ltd v Singh & Another~~

Facts 2 marks

In terms of a written contract between 1 plaintiff & defendants, 1 plaintiff had issued each of 1 defendants with a credit card. Clause 7.3 of 1 contract stated ± 1 cardholders will be liable for any withdrawals irrespective of who used 1 pin. In an action by 1 plaintiff against 1 defendants for payments of amounts allegedly withdrawn by use of 1 credit card. The defendants denied ± they had withdrawn 1 amounts & 1 amounts must have been withdrawn by an unknown persons using 1 defendants Pin. It was suggested ± amounts must have been withdrawn by an insider in 1 plaintiffs org. Plaintiff averred ± nonetheless defendants were liable in terms of clause 7.3. Defendants averred that 1 clause was contra bonos mores.

Court held * there was no basis for holding ± clause 7.3 was against public policy
* ± a clause of this nature was intended to protect 1 plaintiff since after 1 issue of 1 cards to 1 cardholders 1 plaintiff had no control over what 1 customer did with his card, since 1 card could be used around 1 world

* court further held ± 1 defendants accepted their cards knowing they would be contractually bound & they were not under any compulsion or obliged to apply for pins & when they ought to have known 1 terms applicable to 1 use

May June 2010 Q2 (a)
(1) T Bank - customer relationship
a, b, c first then 2

In STO Bank of SA Ltd v Ouedat Investments

T court held that T law treated T relationship bet a bank & its customer as a contractual one of debtor & creditor, aspects of which were regulated by law of agency, as bet a bank & its customer a payment by cheque was governed by T law of agency, whether or not T customer c/a was in credit
T court further held T contractual nature of T relationship bet T bank & its customer was open to T partner to vary there agreement & enter into special arrangements for specific dealings