


Note regarding New Company Act

- References to the New Companies Act should be read as the current position as the Companies Act, 2008 came into operation on 1 May 2011.



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R1 000 000-00

Contract



SALE OF A PEN



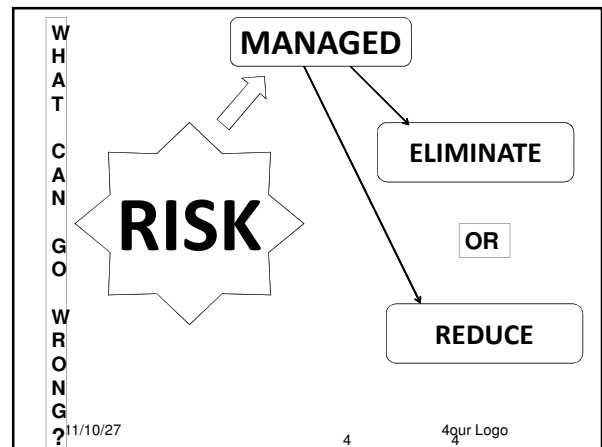
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TERMS OF CONTRACT OF SALE

- PARTIES
 - SELLER
 - BUYER
- THING
- SOLD
- PRICE
- WHAT IF SCENARIOS

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R1 000 000-00

Contract



LEASE OF A PEN



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TERMS OF CONTRACT OF LEASE

- PARTIES
 - LESSOR
 - LESSEE
- THING
- PRICE
- LET FOR A PERIOD
- WHAT IF SCENARIOS






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WHAT IF

- **B** defaulted on rental?
- **B** was from the Camerouns & **A** from SA?
- **Anticipate Problems with litigation**
 - Which remedies are available?
 - Which laws apply?
 - Which Courts will have jurisdiction
 - How will B get A before court
 - Defences



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DEFENCES
WHAT IF B ALLEGES

- That they actually agreed orally to reduce the price to R100
- An oral agreement that he did not have to pay if he could find a better pen to write with?
- That **A** had allowed **B** to pay on the 15th for the first 3 months, so **B** was entitled pay on the 15th every month?



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DEFENCES
WHAT IF B ALLEGES

- That by “pen” they actually meant a Parker Fountain pen while the pen supplied by A was a Papermate Ballpoint pen?
- The rental price was unfair?
- That he was only liable for half the price and C was liable for the other half?
- That part of the contract was not enforceable?



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WHAT IF

- **A** & **B** belonged to the same political party and did not want to embarrass the public image of the party in litigation?

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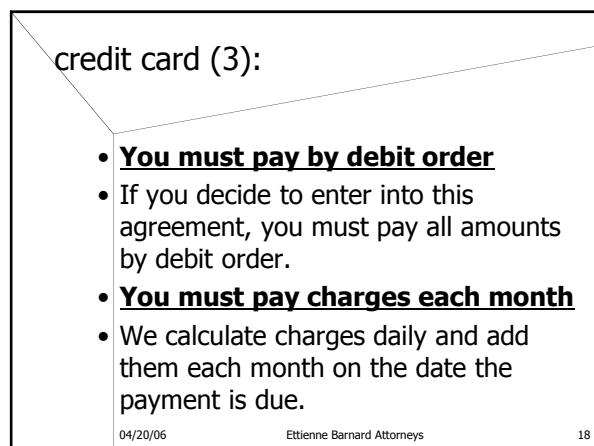
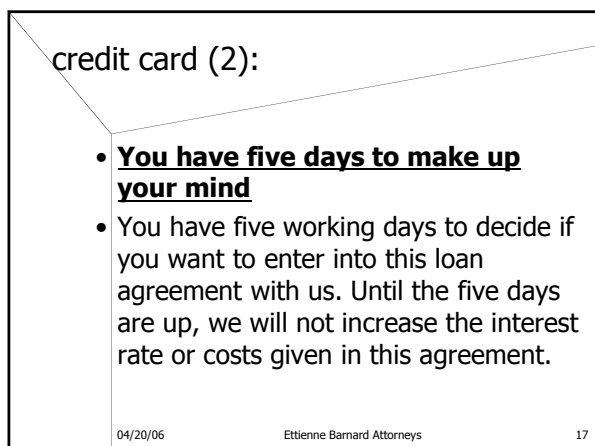
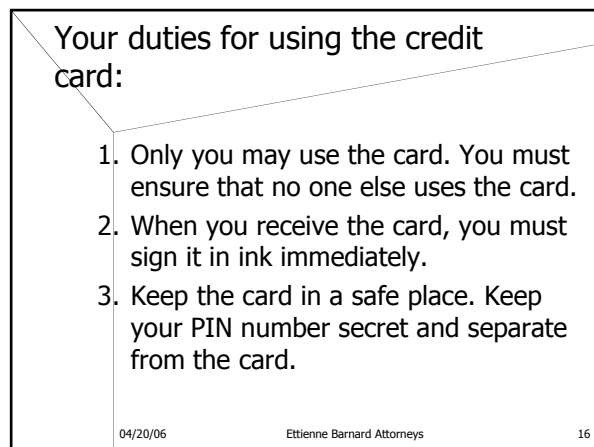
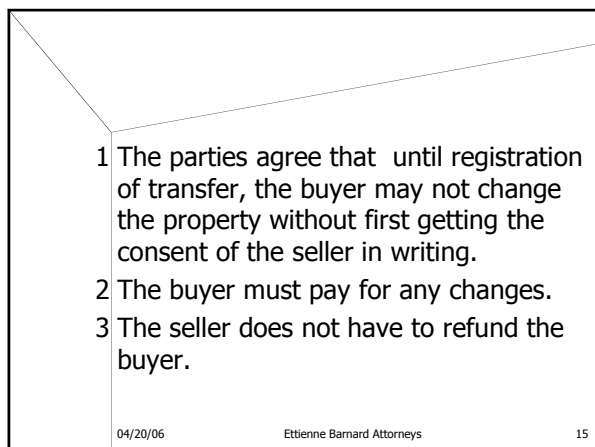
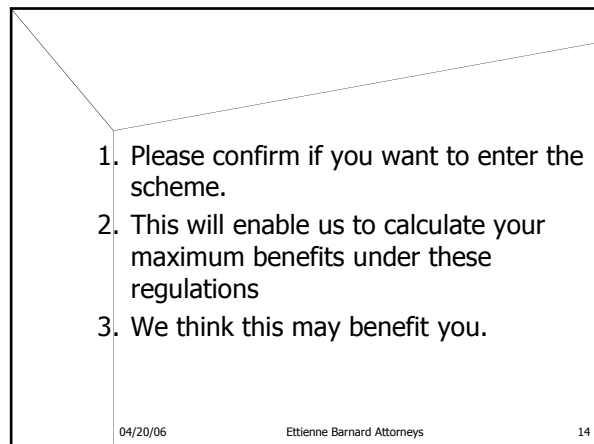
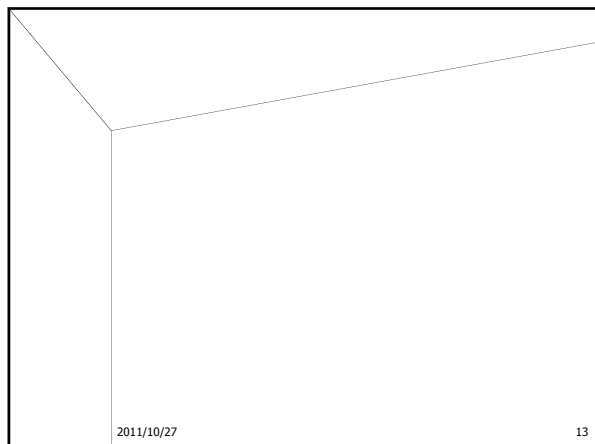


USE PLAIN LANGUAGE

- Section 64 NCA
- Section 22 CPA
- Client that does not understand
 - duties; or
 - rights
- A very tired judge at midnight!!!

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credit card (3):

- **If you do not pay or if you pay late**
- You must pay extra charges if we do not receive your payment on time. You are responsible for all costs, including legal costs, of collecting any late payments

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R2 000 000-00

Contract
SALE OF **LAND**



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CLOSE CORPORATIONS (ACT 1984)

S46 FOR

- DISPOSAL MORE THAN HALF OF ASSETS, OR
- ACQUISITION OR DISPOSAL LAND

CONSENT IN WRITING
BY MEMBERS HOLDING 75% MEMBERSHIP INT.
unless association agreement Says otherwise



SAFEGUARD: GET ALL MEMBERS TO SIGN
• (WHAT IF IMPOSSIBLE TO GET OTHER MEMBER CO-OP eg Left RSA?)

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CLOSE CORPORATIONS (ACT 1984) S36 FOR

- APPROACH COURT TO END MEMBERSHIP OF A MEMBER IN CASE OF:
 - PERMANENT INCAPABILITY TO PERFORM HIS PART IN...
 - GUILTY OF CONDUCT WHICH IS LIKELY TO HAVE A PREJUDICIAL EFFECT ON...
 - CONDUCT MAKING IT REASONABLY IMPRACTICAL FOR OTHER MEMBERS TO ASSOCIATE WITH HIM IN ...

THE CARRYING ON OF THE BUSINESS


- IT BEING JUST & EQUITABLE THAT HE SHOULD CEASE TO BE A MEMBER



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SUGGESTED PRACTICAL STEPS INITIAL STEPS


- Take **instructions**
- Re **seller** remember to ask for:
 - Close corporation documents:
 - founding statement &
 - association agreement;
 - Resolution at least by Grant and Peter;
 - ID doc of Member to sign sale agreement;
 - Details re history, possible applications and explain cost and other implications.



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SUGGESTED PRACTICAL STEPS INITIAL STEPS (2)


- Re **purchaser** remember to ask for:
 - Company documents:
 - 1973 Company Act:
 - » certificate of incorporation;
 - » memorandum and articles of association;
 - 2008 Co Act: **MOI (Memo of Incorporation)**
 - Directors resolution that the Co is buying;
 - ID document of Member who will sign;
- Take deposit for fees



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SUGGESTED PRACTICAL STEPS INITIAL STEPS (3)


- Ascertain the law
 - Requirements for valid sale of land
 - Requirements where CC sells land
 - Section 46 CC Act of 1984 : 75% of the members must consent in writing unless the association agreement stipulates otherwise
 - Grant and Peter have a combined membership interest of only 65%
 - Need to deal with that hurdle
 - eg. by applying S36 of CC Act to remove member
 - Indemnity for costs?



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SUGGESTED PRACTICAL STEPS COURT APPLICATIONS

- **substituted service/edictal citation**
 - Appoint tracing agent
 - Draft
 - Notice of Motion for service/citation application
 - Notice of Motion for S36 application
 - Affidavit for S36 application
 - Affidavit service/citation application
 - Court order for service/citation application
 - Issue application at clerk of the court
 - Appear at court
 - Comply with manner of service ito court order





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SUGGESTED PRACTICAL STEPS
INITIAL STEPS (2)

- Papers should deal with:
 - Ending of membership of Julian Roberts
 - determine how the member's interest of Julian Roberts should be dealt with
 - Eg. Divided pro-rata between Grant and Peter
 - Or bought back by CC
 - Payment for such interest [see s36(2)]



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SUGGESTED PRACTICAL STEPS
CIPC (Comp & Intell. Prop Commission)

- Draft the **CK2 Amended Founding Statement**
- **Get payment** consideration for the Interest of Julian as ordered by court
- **Deal with the payment** as ordered by court (eg. pay into conveyancers trust account)
- **Submit to the Registrar of CCs** at CIPC in Pretoria with court order
- **NB Pay transfer duty/VAT** on transfer of Members Interest (ONLY if majority asset in CC & for residential purposes)



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SUGGESTED PRACTICAL STEPS
FINALIZE CC ACT FORMALITIES

- Written consent by members (Grant and Peter, who should as a result of the court order have 100% or at least 75% of combined membership interest) that:
 - The land and factory on it be sold
 - Grant or Peter may sign the deed of sale and transfer documents on behalf of Olive Oil CC.
- Representatives of Parties sign

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Insolvency Act Advert

- Disposal of a Business Asset
- Advertize in
 - Gov Gazette
 - 2 issues of Eng newspaper
 - 2 issues of Afr newspaper
- Remember limited definition of trader to case law

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Insolvency Act Advert(2)

- **SECTION 34 OF THE INSOLVENCY ACT 1936**
 - WHERE CONTRACT WILL INVOLVE TRANSFER OF
 - A BUSINESS,
 - ITS GOODWILL, OR
 - ANY ASSET OF THE BUSINESS
 - A NOTICE OF INTENDED TRANSFER
 - MUST BE ADVERTISED
 - IN THE GOVERNMENT GAZETTE, AND
 - 2 ISSUES OF AN AFRIKAANS NEWSPAPER, AND
 - 2 ISSUES OF AN ENGLISH NEWSPAPER
 - CIRCULATING IN THE DISTRICT
 - NOT MORE THAN 60 DAYS BEFORE THE DATE OF TRANSFER
 - NOT LESS THAN 30 DAYS BEFORE THE DATE OF TRANSFER

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Insolvency Act Advert(3)

- WHERE NO ADVERT IS PLACED,
 - SALE
 - **VOID AGAINST CREDITORS OF THE SELLER** FOR 6 MONTHS & THEY MAY EXECUTE
 - AND
 - IF SELLER IS SEQUESTERED WITHIN 6 MONTHS, SALE IS **VOID AGAINST THE TRUSTEE OF THE SELLER'S ESTATE**

(THE TRUSTEE CAN SUE WITHIN THE 3 YEARS PRESCRIPTION PERIOD)

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Insolvency Act Advert(4)

- IF Party BEFORE such DISPOSITION
 - Issued summons In HIGH OR MAG COURT OF JURISDICTION Where Business Is, OR
 - Proceeded against Seller, & Buyer knew of proceedings at the time when they were instituted

THE DISPOSITION VOID AGAINST SUCH A CREDITOR

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Insolvency Act Advert(5)

- If S34 advertisement is published, & Creditor demands payment
- every liquidated debt due in future, becomes due
- IN PRACTICE, parties sometimes agree in the deed of sale that no s34 advertisement will be placed.
- THEN clauses can be built in that the seller
 - indemnifies the purchaser for any claims as a result of the sale not being advertised
 - undertakes to settle all liabilities incurred prior to transfer

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Insolvency Act Advert(6)

- UNDERTAKES TO SETTLE OR CONTEST ALL CLAIMS MADE BY CREDITORS AFTER THE ADVERTISEMENT.
- NB ADVISE Buyer: such clauses merely give buyer right to claim damages from the seller, if the seller breaches.
- IF THE SELLER IS IN FINANCIAL TROUBLE, THESE CLAUSES DO NOT HELP


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Insolvency Act Advert(7) No Notice of Transfer


- Beware Insolvency Act s 135(3)(b) criminal contravention if one
 - Does not advertise &
 - Immediately after transfer,
 - Liability exceeds assets.

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SUGGESTED PRACTICAL STEPS CONVEYANCING FORMALITIES (1)




- Receive sale **deposit**
- **Invest Deposit** into contract [Section 78(2A) Or 78(2)(a)]
- Ensure **suspensive conditions fulfilled**
- If no new bond, get **guarantee** for payment of purchase price
- If existing bond over property, **write to bond holder to cancel and provide title deed**




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SUGGESTED PRACTICAL STEPS CONVEYANCING FORMALITIES (2)



- If no existing bond, **obtain title deed** from seller
- Draft **transfer documents**
 - Addendum?
 - POA
 - Deed of Transfer
 - Transfer Duty/VAT declarations
- If new bond, **supply bond attorneys with flysheet** and obtain guarantee re balance purchase price
- Get Seller and Purchaser in to **sign transfer documents** and declarations
- **Get transfer costs**
- Obtain **rates (plumbing & electrical) clearance certificate** from or as required by Local Authority or legislation





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SUGGESTED PRACTICAL STEPS
CONVEYANCING FORMALITIES (3)

- If existing bond, **give necessary undertakings** for cancellation
- **Pay transfer duty** or **apply for exemption**
- When documents signed, rates clearance & transfer duty receipt received, you are ready to **lodge**.
- When all **linked transactions** are ready, **arrange lodgement** in the Deeds Registry
- Do **finances and obtain balance due** if any

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Sale of Land
Transfer Duty: Natural, Trusts & Corporates

- Only if VAT not applicable

| | | | |
|----------------|---|---|--|
| R600 000 0% | R600 001 - R1 000 000 3% on the value above R600 000 | R1 000 001 - R1 500 000 R12 000 plus 5% on the value over R1000000 | R1 500 001 and above R37 000 plus 8% on the value over R1500000 |
|----------------|---|---|--|

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Sale of Land
VAT: If seller is a vendor

- TD will not apply except

| | | |
|------------------------|---------------------------------------|--|
| if Zero Rated 0% | If only Seller is Vendor 14% | If only buyer is Vendor TD applies But buyer may reclaim TD |
|------------------------|---------------------------------------|--|



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SUGGESTED PRACTICAL STEPS
CONVEYANCING FORMALITIES (4)

- When transfer comes up, **arrange finances and simultaneous registration** with linked firms.
- Register
- **Report** registration to Seller, Purchaser and Agent (if any) and supply final statement of finances.
- Pay **commission** and **other undertakings**
- Debit your **fees**.

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COMPANY DISPOSALS
... POSITION Before 2006

- S228 CO ACT 61, 1973
- IF CONTRACT DISPOSED OF MORE THAN HALF OF COMPANY ASSETS
 - TRANSACTION HAD TO BE **APPROVED**
 - BY **ORDINARY SHAREHOLDERS RESOLUTION**
 - AT A **GENERAL MEETING**
 - **AUTHORIZING** OR **RATIFYING** THE **SPECIFIC TRANSACTION**
 - THE HALF = HALF IN **MARKET VALUE**

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COMPANY DISPOSALS

...POSITION from 2006 to 30 APRIL 2011



- S228 CO ACT 61, 1973 AMENDED
- IF CONTRACT THEN DISPOSED OF
 - MORE THAN HALF of COMPANY ASSETS or
 - MORE THAN HALF of COMPANY UNDERTAKING
- TRANSACTION HAD TO BE **APPROVED**
- BY **SPECIAL SHAREHOLDERS RESOLUTION**
- MUST **AUTHORIZE** OR **RATIFY** THE **SPECIFIC** TRANSACTION
- (S228(2) AND (5) DEALT WITH HOLDING & SUBS. COS)

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COMPANY DISPOSALS

...CURRENT POSITION SINCE 1 MAY 2011(1)



- S112 as read with S115 New Co. Act.
- S112: Must approve by special resolution i/o s115.
- S115 requires:
 - 25% of all voting rights as a quorum for meeting,
 - 75% of those must vote for. AND
 - Court approval where certain circumstances exist

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COMPANY DISPOSALS

...CURRENT POSITION SINCE 1 MAY 2011(3)



- Court approval necessary where:
 - At least 15% of the shares that were voted, voted against the resolution... s115(5)
 - Where there was a 75% majority vote, any **shareholder who voted against has the right to apply to court for review** of the resolution...s115(3)(b)

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COMPANY DISPOSALS

...CURRENT POSITION SINCE 1 MAY 2011(4)



- Court may only set aside if vote was tainted by:
 - Conflict of interest
 - Inadequate disclosure
 - Failure to comply with
 - the Act,
 - Memo of Incorporation or
 - any applicable rules of the co
 - Other significant and material procedural irregularity

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COMPANY DISPOSALS PRACTICAL DISCUSSION



- XYZ (PTY)LTD WITH WANTS TO BUY A LARGE DELIVERY VEHICLE FLEET FROM PQR(PTY)LTD. THEY PLAN TO FINANCE THIS WITH A 100% MORTGAGE LOAN WITH A MORTGAGE BOND AS SECURITY OVER THE ONLY ASSET OF XYZ(PTY)LTD, A FACTORY PREMISES WORTH R10MILLION.
- Can XYZ pass the mortgage bond in favour of Investec Bank with only a directors resolution?

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...DID s228 APPLY TO MORTGAGE LOANS?



- IF THE LAND TO BE DISPOSED OF WAS
 - WHOLE or
 - GREATER PART OF THE ASSETS
 - OF A COMPANY
 A SPECIAL RESOLUTION WAS REQUIRED
- WHAT IF THE LAND WAS NOT SOLD BUT WAS MORTGAGED
- IS/WAS MORTGAGE A DISPOSAL ITO THE COMPANY ACTS?

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... S228/1973 & S112/2008 ACTS & MORTGAGE LOANS(2)



- NEITHER THE 1973 Nor 2008 COMPANIES ACT CONTAIN A DEFINITION OF DISPOSAL
- VAN DER MERWE, SAKEREG
- GROTIUS 2 48 4,5 & 6
- Estate of Foley, alias Melville v Natal Bank (1883) 4 NLR 26
- EX PARTE DE JAGER (1926) 47 NDP 413
- EX PARTE MATHER NO & ANORS 1971 (3) SA 381 (D)

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... S228/1973 & S112/2008 ACTS & MORTGAGE LOANS(3)



- BRITZ V SNEGOCKI AND OTHERS 1989 (4) SA 372
- DAVIES AND OTHERS v MINISTER OF LANDS 1997 (1) SA 228 (ZS)
- INSOLVENCY ACT 24 OF 1936 DEFINITION
- 2006 DEEDS REGISTRIES CONFERENCE
- HENOCHSBERG

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... S228/1973 & S112/2008 ACTS & MORTGAGE LOANS(4)



- SEED CO (EDMS) BPK v MARROCK PLASE (EDMS) BPK 1974 (4) SA 127 (NC)
- CULLINAN PROPERTIES LTD v TRANSVAAL BOARD FOR PERI-URBAN AREAS 1978 (1) SA 282 (T)
- ORDINARY DEBT v SECURED DEBT
- STD BANK SA v HUNKY DORY INVESTMENT 188 PTY LTD & OTHERS(15427/08) [2009] ZAWCHC 81 (1 June 2009)

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... S228/1973 & S112/2008 ACTS & MORTGAGE LOANS(4)



- STD BANK SA v HUNKY DORY INVESTMENT 188 PTY LTD & OTHERS(15427/08) [2009] ZAWCHC 81 (1 June 2009)
- It dealt with the pre 2006 position where ordinary resolution was required
- Court analyses pre 1973 COMPANY legislation developments & concludes that Mortgage was not regarded as a disposal
- STD Bank/Hunky D is 1973 Act. (2008?similar?)

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...S228/1973 & S112/2008 ACTS & MORTGAGE LOANS (5)




- UNANIMOUS ASSENT v SPECIAL RESOLUTION
 - QUADRANGLE INVESTMENTS (PTY) LTD v WITIND HOLDINGS LTD 1975 (1) SA 572 (A)
- CONSENT v RISK OF INVALIDITY
 - FARREN v SUN SERVICE SA PHOTO TRIP MANAGEMENT (PTY)LTD 2004 (2) SA 146 (C)
- TURQUAND RULE DOES NOT SAVE IT
 - BEVRAY INVESTMENTS (EDMS)BPK v BOLAND BANK BEPERK 1993 (3) SA 597 (A)

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COOLING OFF PERIOD (1)
s29A Alienation of Land Act 68, 1981

- Buyer may cancel within 5 days on:
 - Written notice
 - Of revocation
 - Signed by buyer (or authorized agent)
 - ID the offer or deed of alienation
 - Must be unconditional
 - Delivered to the seller
 - Must be signed s29A(1)-(3)

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COOLING OFF PERIOD (2)
s29A Alienation of Land Act 68, 1981

Does not apply if:

- Price exceeds **R250 000** or such higher amount as the Minister may determine.
- Buyer is a **trust** or not a natural person
- The land was bought at **Public Auction**
- Parties had a **previous** similar **contract**
- The buyer may **nominate** another person as buyer
- Purchase is exercise of **option** (which was open for 5 days) s29A(5)(a)-(f)


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COOLING OFF PERIOD (4)
s29A Alienation of Land Act 68, 1981

- If revoked, sale is ended and buyer **MUST** be refunded s29A(4)
- No commission or payment for any agent s29A(6)
- S29A cannot be waived s29A(7)

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Exemption Clauses Practical

- 1 Hotel staff steal the jewellery of a client while they are residing at the hotel for a conference. An Exemption clause reads as follows:
- 2 *"Management will in no circumstances be liable for any loss of or damage to the property of any person who enters these premises."*
- 3 Prepare Heads re the constitutionality of this clause in the conditions of stay at the hotel on behalf of the
 - 3.1 Client
 - 3.2 Hotel

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CLIENT HEADS

- Contracts are enforced
- UNLESS they violate Public Property
- The Bill of rights is a very clear expression of Public Policy
- The Exemption Clause violates the public policy stated in section 34 and ??? of the bill of rights

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- This violation is not Reasonable and Justifiable in our open and democratic society for the following reasons
 - 1
 - 2
- Therefore the Court should not enforce It.

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HOTEL HEADS

- Contracts are enforced
- UNLESS they violate Public Property
- The Bill of rights is a very clear expression of Public Policy
- The Exemption Clause does not violate the constitution in any way???

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- If it does, there is a need for it in the open and democratic society for the following reasons
 - 1
 - 2
 - 3
 - 4
- Therefor it should be given its ordinary ,meaning

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Pre Consitution Era (1)

- Freedom of contract
- Sanctity of Contract
- Public Policy
 - Contracts must be enforced
 - Public *mores*
- Beware who signs
- Fairness?

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Pre Consitution Era (2)

- Exemption of liability for Fraud
 - Void (against public policy)
- ...for Negligence
 - Valid & not against Public Policy

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Post Constitution

- Core values of the constitution.
- Section 8-Horizontal application
- Section 9-Equality
- Section 34-Access to courts &

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Post Constitution(2)

- Section 36-Justifiable Limitation
- Section 39-Common Law must be developed to reflect the spirit of the constitution

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POST CPA

- Preamble:...protects the interests of all consumers.....
- S3(1)(a)...fair consumer market
- S40 Unconscionable Conduct
 - "unfair tactics"
 - "Knowingly take advantage of ...illiteracy"
- S48(c)(1)supplier may not require consumer to "waive any rights unfairly, unreasonably or unjustly"

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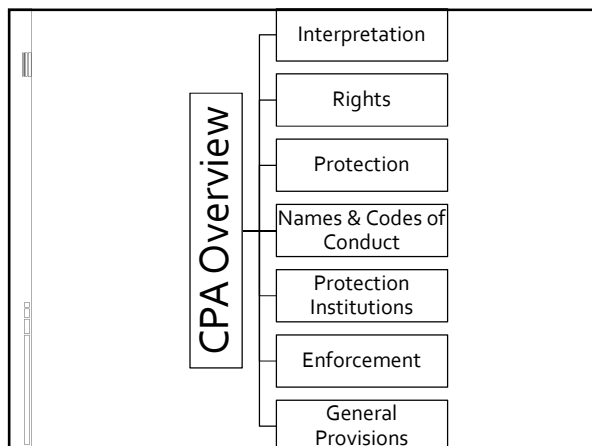
POST CPA(2)

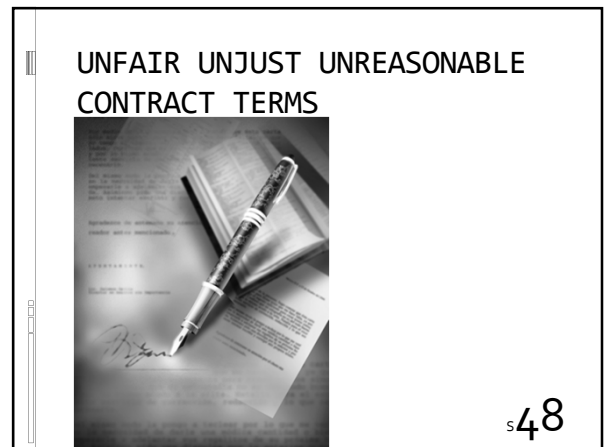
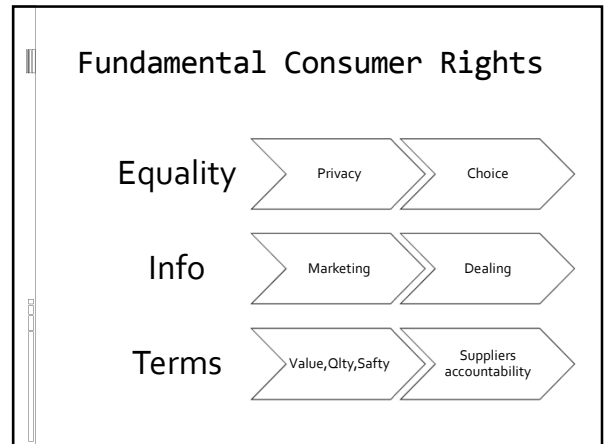
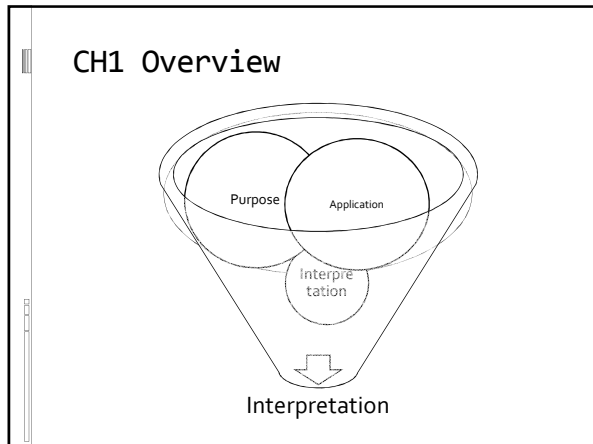
- S49(1) Waiver must be drawn to consumer attention
- S49(3)in plain language
- S51(1)Cannot contract out of CPA
- S52 Powers of court
 - Restoration,compensation,declare void the clause,or the whole agreement (depending on severability),make a just and reasonable order.

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Commercial Contracts and the

CONSUMER PROTECTION ACT





F, J & R Terms & Conditions

Terms

s48(1)

Waiver or Assume Obligations

M
A
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T
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A
T
I
O
N

Administer
Enter into
Negotiation

Unfair Unjust Unreasonable

EXCESSIVELY ONE-SIDED

s48(2)(a)

Unfair Unjust Unreasonable
if

CONSUMER ADVERSE CONTRACT

§48(2)(b)

Unfair Unjust Unreasonable
if

REPRESENTATION

STATEMENT OF OPINION

§48(2)(c)

Unfair Unjust Unreasonable
if

WARNING
FISH CONTAMINATED
DO NOT EAT

§48(2)(d)(ii)

RIGHT TO DISCLOSURE & INFO

PLAIN LANGUAGE

PRICE LABEL/DESCRIPTION OR RECONDITIONED GREY

SALES RECORDS INTERMEDIARIES ID OF...

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Your Logo

Arranging the Sale:
Immovable Property (2)

- Constitutional developments on the right to housing changed the process
- JAPHTA v SCHOEMAN...2005(2) SA 140 (CC)
 - failure in s66(1)(a) to provide judicial oversight was declared unconstitutional & invalid.
 - the words “a court, after consideration of all relevant circumstances, may order execution” had to be read into the section

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Arranging the Sale: Immovable Property (3)

- Application (ito r55) setting out
 - all the relevant circumstances
 - Requesting court consent to sell
 must be brought before execution against immovable property may proceed.
- Sale in execution where homes were sold without judicial oversight are retrospectively invalid
 - Menqa & another v Markom 2008(2) SA 120 SCA.
 - Gundwana v Steko Development CC and others Case CCT 44/10 [2011] ZACC 14 on 11/4/2011

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Arranging the Sale: Immovable Property (4)

- Standard Bank of SA Ltd v Saunderson & others 2006(2) SA 264 (SCA)
 - Claims for arrear bond payments
 - Held clerk/registrar may grant the warrant of execution for immovable goods without an application to court
- Gundwana v Steko Development CC and others Case CCT 44/10 [2011] ZACC 14 on 11/4/2011 held SCA was wrong

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Arranging the Sale: Immovable Property (5)

- Standard Bank of SA Ltd v Saunderson also held that the summons must
 - Contain a prayer declaring the mortgaged properties executable
 - Inform defendants that the order to execute might infringe their right of access to adequate housing
- Gundwana v Steko Development CC and others Case CCT 44/10 [2011] ZACC 14 on 11/4/2011 held SCA confirmed the latter safeguard

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Arranging the Sale: Immovable Property (6)

- This constitutional warning is built into new rules.
- Such summons must state
 - “The defendant’s attention is drawn to section 26(1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing. Should the defendant claim that the order for eviction will infringe that right it is incumbent on the defendant to place information supporting that claim before the Court”. [r5(10)]


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COMPANY DISPOSALS

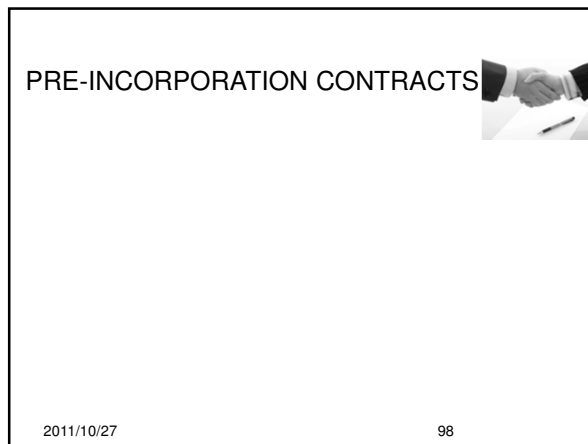


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PRE-INCORPORATION CONTRACTS

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PRE-INCORPORATION CONTRACTS

...PRE-2006 AMENDMENT POSITION

- S35 CO ACT 61, 1973
- PRE-INCORPORATION CONTRACTS COULD BE ADOPTED BY THE COMPANY
 - AFTER INCORPORATION
 - IF MEMORANDUM OF ASSOCIATION MADE THE ADOPTION OF THE CONTRACT ONE OF THE OBJECTS OF THE COMPANY and
 - 2 COPIES OF THE CONTRACT (ONE CERTIFIED BY A NOTARY) LODGED WITH THE REGISTRAR OF COMPANIES TOGETHER WITH THE MEMORANDUM AND ARTICLES BEFORE INCORPORATION
- Common Law Contract for the benefit of a third was possible

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PRE-INCORPORATION CONTRACTS

...FOMER POSITION (Before 1 May 2011)

- S35 PRE-INCORPORATION CONTRACTS COULD BE ADOPTED BY THE COMPANY
 - AFTER INCORPORATION
 - IF MEMORANDUM OF ASSOCIATION MADE THE ADOPTION OF THE RIGHTS AND ONLIGATIONS ITO THE CONTRACT ONE OF THE OBJECTS OF THE COMPANY and
 - **THE CONTRACT** IS LODGED WITH THE REGISTRAR WITH THE MEMORANDUM AND ARTICLES FOR INCORPORATION
- Common Law Contract for the benefit of a third was possible

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PRE-INCORPORATION CONTRACTS

...CURRENT POSITION

- S21 new COMPANIES ACT 2008 APPLIES
- A PERSON MAY ENTER A WRITTEN PRE-INC. CONTRACT [S21(1)]
- THE BOARD OF THAT COMPANY MAY RATIFY OR REJECT
 - THE WHOLE AGREEMENT
 - PARTS OF IT or
 - ON CERTAIN CONDITIONS
 WITHIN 3 MONTHS AFTER INCORPORATION [S21(4)]

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PRE-INCORPORATION CONTRACTS

...FUTURE POSITION (2)

- IF BOARD DOES NOT RATIFY OR REJECT WITHIN 3 MONTHS
 - CONTRACT IS DEEMED TO BE RATIFIED
 - S21(5)
- IF RATIFIED OR DEEMED TO BE
 - ENFORCEABLE AGAINST THE CO.
 - RETROSPECTIVELY and
 - LIABILITY OF PROMOTER DISCHARGED
 - S21(6)

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PRE-INCORPORATION CONTRACTS 

...FUTURE POSITION(3)

- IF
 - ANY PART OF CONTRACT IS REJECTED, or
 - CO. IS NOT INCORPORATED
 - PROMOTER AND "OTHER SUCH PERSON" ARE JOINTLY & SEVERALLY LIABLE FOR CONTRACT
 - S21(2)
- BUT IF CO. BENEFITS, A PROMOTER HELD LIABLE MAY CLAIM AGAINST THE CO.
 - S21(7)
- "OTHER SUCH PERSON" ? PERHAPS DIRECTORS INVOLVED IN PRE-INC TRANSACTION

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PRE-INCORPORATION CONTRACTS 


...FUTURE POSITION(4)

- S21 DOES NOT EXCLUDE COMMON LAW ALTERNATIVES SUCH AS
 - CONTRACT FOR BENEFIT OF A THIRD PARTY
 - TRUST
 - CESSION AND DELEGATION ?
 - (SEE DELPORT 2009 THE NEW COMPANIES ACT MANUAL at 14)
 - WORDING NB AS PROMOTER NOT AUTOMATICALLY LIABLE ITO COMMON LAW

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PRE-INCORPORATION CONTRACTS 


...CCs CURRENT & FUTURE (5)

- **S53: IN PRE-INC. CONTRACTS FOR A CC**
 - ALL MEMBERS MUST CONSENT IN WRITING
 - WITHIN TIME SPECIFIED IN CONTRACT, OR
 - IF NO TIME SPECIFIED, WITHIN A REASONABLE TIME
 - AFTER INCORPORATION
- **CCs MAY NOW NO LONGER BE CREATED. (SO ACADEMIC)**
- **S53 HAS NOT BEEN AMENDED**
- Common Law Contract for the benefit of a third is possible
 - *Build-A-Brick BK en 'n Ander v Eskom 1996 (1) SA 115 (O) at 125*

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SALE OF BUSINESS 

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SALE OF BUSINESS AS A GOING CONCERN



- VAT ZERO RATING
- S34 INSOLVENCY ACT-NOTICE
- S197 LRA
- RESTRAINT OF TRADE

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SALE OF BUSINESS EFFECT ON LABOUR

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SALE OF BUSINESS EFFECT ON LABOUR (2)

– LABOUR LAW IMPLICATIONS

- OLDER CONTRACTS USED THE PRACTICE OF THE SELLER TERMINATING THE EMPLOYMENT OF ALL EMPLOYEES IMMEDIATELY BEFORE TAKE OVER.
- THE PURCHASER WOULD THEN APPOINT “NEW” EMPLOYEES (BUT ONLY THOSE THE PURCHASER WISHED OR WAS ADVISED TO APPOINT)

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SALE OF BUSINESS EFFECT ON LABOUR (3)

- BEWARE OF OLD PRECEDENTS IN THIS REGARD
- S 197(2)(a) LABOUR RELATIONS ACT 66/1995 NOW PREVENTS THIS BY STATING THAT WHERE SOLD **AS A GOING CONCERN** THE TRANSFEROR/EMPLOYEE RELATIONSHIP CONTINUES AS THE TRANSFEREE/EMPLOYEE RELATIONSHIP
 - ALL OBLIGATIONS AND RIGHTS ENFORCEABLE AGAINST THE PURCHASER

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SALE OF BUSINESS EFFECT ON LABOUR (4)

- SECT 197(2)(b) deals with **sale as a going concern** as a result of
 - INSOLVENCY, OR
 - COMPROMISE MADE TO AVOID SEQUESTRATION
- THIS STATES THAT **UNLESS OTHERWISE AGREED**, CONTRACTS OF ALL EMPLOYEES TRANSFER AUTOMATICALLY TO THE TRANSFEREE
- SECT 197(3) AN AGREEMENT REFERRED TO IN SECTION 197(2) MUST BE CONCLUDED WITH “THE APPROPRIATE PERSON OR BODY”

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SALE OF BUSINESS EFFECT ON LABOUR (5)

– THIS “PERSON OR BODY” IS EITHER THE

- RELEVANT TRADE UNION;
- A WORKPLACE FORUM; OR
- THE EMPLOYEES OF THE BUSINESS

– THE AGREEMENT IN OTHER WORDS MUST BE TRIPARTITE, BETWEEN

- SELLER
- PURCHASER, AND
- “APPROPRIATE PERSON OR BODY”

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SALE OF SHARES

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Due Diligence

- Financial position
- Registration
- Debts
- Pending and potential lawsuits,
- Leases,
- Warranties,
- Long-term customer agreements,



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Due Diligence

- Employment contracts,
- Labour disputes/unrest
- Distribution agreements,
- Compensation arrangements,
- Suretyships
- Consignment stock?
- Suppliers' equipment eg. Fridges


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FINANCIAL ASSISTANCE

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...FORMER POSITION



- S38 CO ACT 61, 1973
- PROHIBITED FINANCIAL ASSISTANCE BY CO. FOR PURCHASE OF ITS SHARES
- THE OBJECT WAS TO PROTECT CREDITORS BY MAINTAINING CAPITAL OF THE COMPANY
 - See *Lewis v Oneate (Pty)Ltd and Another 1992 (4) SA 811 (A) at 818D* and
 - *Peters & Others NNO v Schoeman & Others 2001(1) SA 872 (SCA) at 881[9]*.


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...Pre 1 May 2011




- IN 2004 DTI PUBLISHED GUIDELINES FOR CORPORATE LAW REFORM
- PART OF THE MISSION:
 - COMPANIES LAW SHIFT
 - FROM A **CAPITAL MAINTENANCE REGIME** BASED ON PAR VALUE, TO ONE BASED ON
 - **SOLVENCY AND LIQUIDITY.**
- S38(2A) EXCEPTION INTRODUCED

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...Pre 1 May 2011 (2) 


- LOAN MAY BE GRANTED IF:
 - The terms of the assistance is sanctioned by Special Shareholders' Resolution
 - The Company's Board is satisfied that:
 - Subsequent to the transaction, the company will be solvent
 - Subsequent to the assistance, and for duration of the transaction, the company will be commercially solvent

2011/10/27 (ie. Able to pay its debt) 121

...New Company Act POSITION 


- S44 as read with S4 new COMPANIES ACT
- ASSISTANCE MAY GIVEN IF
 - IT IS PART OF AN EMPLOYEE SHARE SCHEME UNDER SECTION 97, or
 - IT HAS BEEN APPROVED BY SPECIAL SHAREHOLDERS' RESOLUTION WITHIN PREVIOUS 2 YEARS.
- And

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...New Company Act POSITION (2) 

- And..
- BOARD OF THAT COMPANY IS SATISFIED THAT
 - IMMEDIATELY AFTER THE FIN. ASSISTANCE THE COMPANY WOULD SATISFY THE SOLVENCY and LIQUIDITY TEST
 - THE TERMS UNDER WHICH ASSISTANCE IS GIVEN, ARE FAIR and REASONABLE TO THE COMPANY S44(3)

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...New Company Act POSITION (3) 

- A company satisfies the SOLVENCY and LIQUIDITY test if
 - ITS TOTAL ASSETS EQUAL OR EXCEED ITS LIABILITIES
 - And
 - IT APPEARS THAT CO WILL BE ABLE TO PAY ITS DEBT AS THEY BECOME DUE FOR 12 MONTHS AFTER THE DATE OF THE TEST

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A R1 000 000-00
B & C
R100 000 pm instalment plus 20% Interest



Contract

SALE OF A PEN ON CREDIT

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TERMS OF CREDIT AGREEMENT


- PARTIES
 - Credit Provider
 - Credit Consumer
- THING & OWNERSHIP RETAINED
- PRICE & INSTALMENT
- PERIOD
- WHAT IF SCENARIOS

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Credit Agreements

National Credit Act




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- Important Rates
- Repo 5.30 2011-09-20
- Prime 9.00 2011-09-20




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Overview of the NCA




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Overview of the NCA

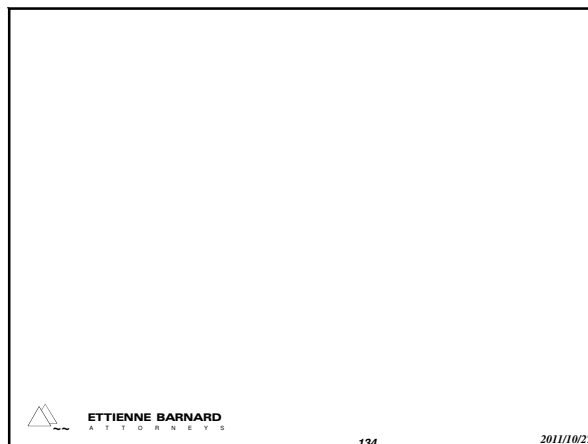
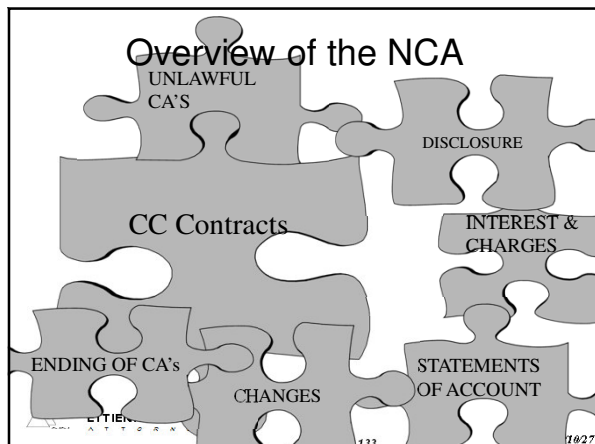


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Overview of the NCA



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Introduction to types of CAs

- Why relevant?
 - Usury Act repealed
 - The Maximum Interest Rates depend on the type of CA
 - Certain parts of act apply only to certain types of CA's
 - (eg s5 limits application iro Incidental CAs)

Introduction (Act Definition)

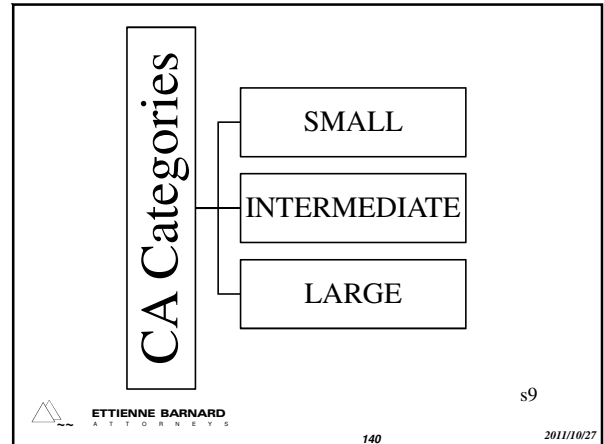
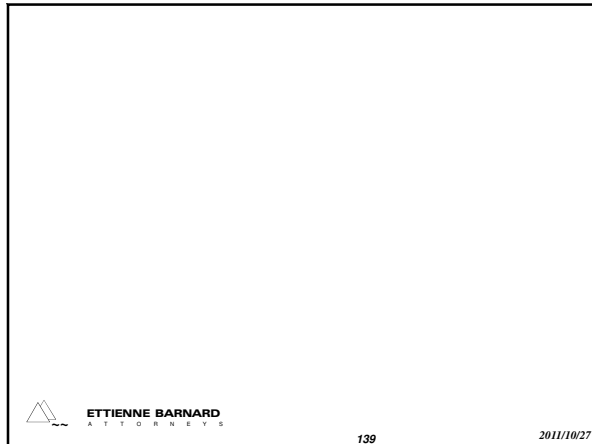
- Is a CA if it is a:
 - Credit Facility eg.
 - Credit Card & Overdraft
 - Credit Transaction eg.
 - Pawn contract, discount contract (ie. contract where lower price is paid when paid earlier), instalment contract, mortgage contract, lease (of movables), Incidental CA (subject to s5), any other agreement with deferred payment and a financing cost (ie. "charge, fee or interest")
 - Credit Guarantee eg. suretyship [but see s4(2)(c)]
 - Any combination of the above 3

Introduction (A regulations def.)

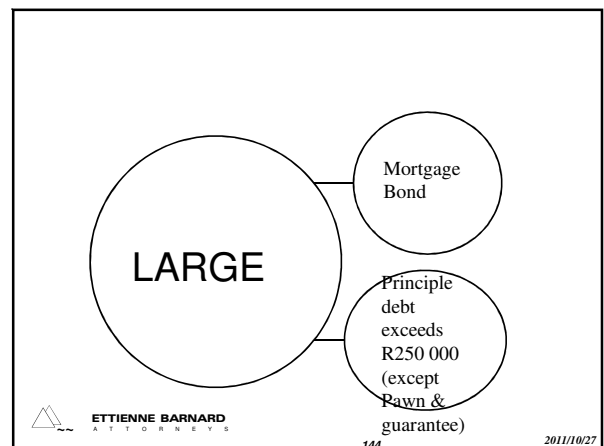
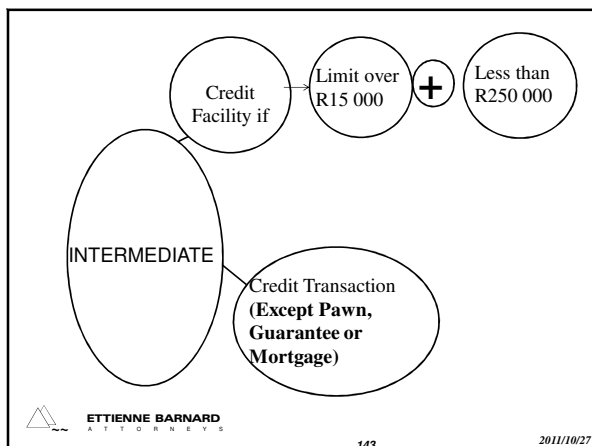
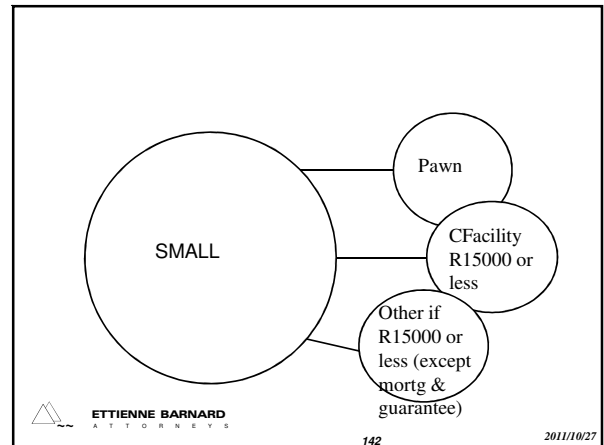
- **Short Term Credit Transaction :**
 - Has a deferred amount **R8000** or less
 - Is **repayable** in **6 months** or less
 - For example
 - a small loan (cf the small cash loan industry)
 - a small pawn transaction
- i.e. if they comply with the above

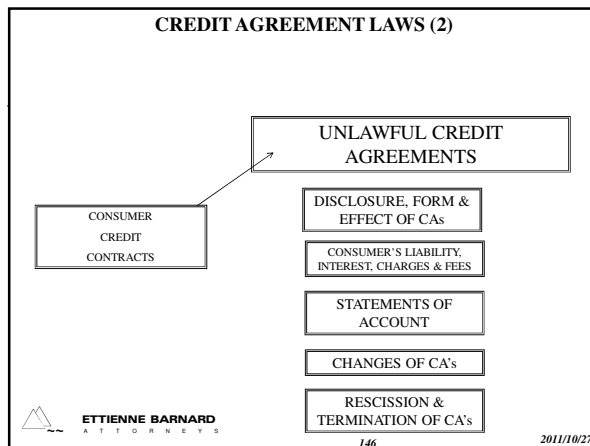
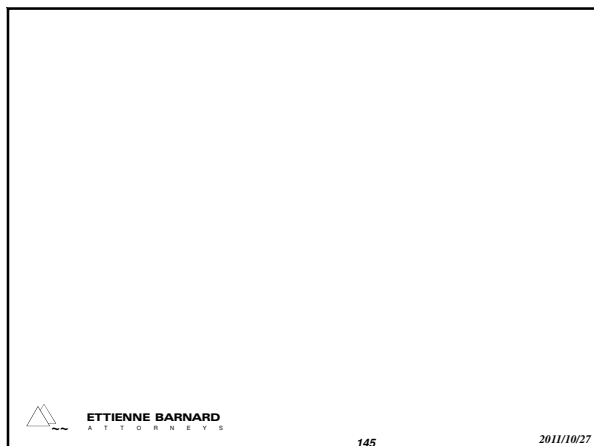
Introduction (Secured or Unsec?)

- **Secured** CA is a CA where
 - An asset or a
 - A right
 is held as security (s1)
 - Eg. a pledge, cession of title, mortgage bond
- Reg39(3) **Unsecured** if no
 - asset,
 - right
 - suretyship or
 - Other form of personal security**Is held** to support the credit provider's claim



- ### Categories of CAs (s9)
- The Act categorizes the CA's
 - The Regulations set requirements for each cat.
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UNLAWFUL CA's
(except if it's a pawn transaction)

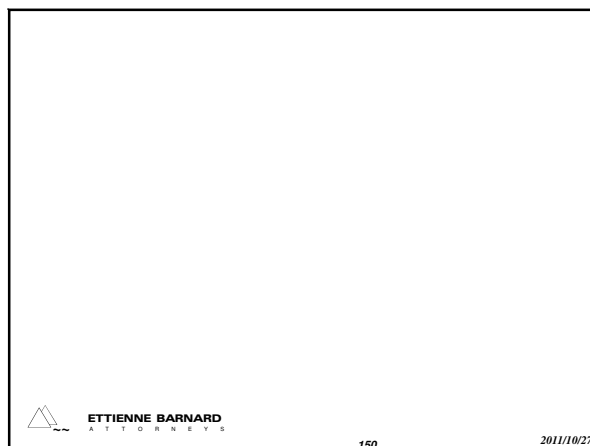
| CAPACITY | NEGATIVE MARKETING | UNLAWFUL SUPPLEMENT | CP UNREGISTERED | NCR NOTIFIED |
|------------------------|--|---------------------|---------------------------------|---------------------|
| MINOR | (ie. where ca exists unless cc declines) | | While act required it & | TO STOP & |
| MENTALLY UNFIT | | | Is registered within 30 days or | NO APPEAL pending & |
| ADMIN & NO CONSENT | | | has applied | NO REVIEW available |
| (Unless CP is mislead) | | | | |

s89

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- UNLAWFUL CA's (3)**
- Cases on “When contracting the credit provider was unregistered while the act required that it be registered”
 - Referred to in Desert Star Trading 145 v No 11 Flamboyant, case 33987/2008 ZANGHC
 - Also see Carangani Trade & Investment v Mason116/2009 CC
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- UNLAWFUL CA's (4) Effect:**
- **Void**
 - CP must **refund** Consumer plus interest
 - CP **rights cancelled** or
 - Forfeited to state if court orders otherwise (ie to prevent Cons. Being unjustly enriched)
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UNLAWFUL CA TERM if it

CIRCUMVENTS NCA


- Defeats Purposes
- Avoids CP duties/Overrides NCA

WAIVES RIGHTS

- Of CC
- Ito Common Law/Made Applicable

CP ILLEGAL ACTIONS

- Subjects CC to Fraud
- Results from Negative Marketing (ito s74)
- Links unlawful SUPPLEMENT

 **s90** 2011/10/27

UNLAWFUL CA TERM (2)if it

EXEMPTS/RESTRICTS CP LIABILITY


- For act/omiss/representation
- For guarantee/warranty (otherwise implied)

CC ACKNOWLEDGES

- No prior representation/warrantees
- Goods/Services received (before receiving)

CC FORFEITS MONEY

- Re s121 5 day cooling off period
- If CC fails to comply with CA before receiving
- Pre determined enforcem. costs exceedings NCA
- To that CP in priority over another CP

 **s90** 2011/10/27

UNLAWFUL CA TERM (3)if it

CC APPOINTS CP/CP AGENT


- As CC agent
- To enter CC premises to take goods
- To grant credit in future

CC UNDERTAKES IN ADVANCE

- To sign enforcement docs
- Give CC ID, Bank card or account, PIN, or similar item

CC CONSENTS TO JURISDICTION

- To court outside J & CC doesn't
- WORK/RESIDE there &
- Goods not kept there
- Of High Court while MC has concurrent J

 **s90** 2011/10/27

UNLAWFUL CA TERM (4)if it

CP MAY PAY CA OBLIGATION BY


- Debiting an asset/account/amount held by CP or 3rd party
- UNLESS ito standing debt arrangement or s124

CP'S LIABILITY IS LIMITED

- for subpara (iv) (enforcement)action

CONTAINS INTEREST RATE


- Without fixed relationship to a reference rate
- Where the reference rate is not the same as other similar CA's of the CP


 **s90** 2011/10/27

UNLAWFUL CA TERMS (5) if

Effect:

- **CLAUSE VOID**
- Court **must**
 - sever or **change** clause if it is reasonable with reference to contract as whole; or
 - **Declare agreement unlawful** from the start
 - And make **further** just & reasonable **order**
 - Eg. **repayment** of CC or **forfeiture** to State

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VARIATIONS OF CA TERMS

- Changes are **void** unless it
 - **reduces CC liabilities**
 - CC **initials** or signs in the margin opposite the change (after the change is made)
 - Is **written** and signed by the parties
 - Is oral, **recorded electromagnetically** and then written.

s116

CHANGE OF CA TERMS(2)

- CP may unilaterally **increase limit** only
 - If the CC has **in writing** requested it
 - **Once** per year
 - By
 - average monthly advances to
 - or monthly payments by CC during the last 12 months

s119 (4)&(5)

CHANGE OF CA TERMS(3)

- For any change other than limit increase:
 - CP **must deliver changed CA** to CC within 20 days
 - The changed CA must comply with the **prescribed form** (of s 93)

s117

ENDING OF CA

- **CC may unilaterally** end CA by
 - paying the settlement amount to CP OR
 - Surrendering goods to CP **AND**
 - Paying any remaining amount (ito s127)


s122

- CP may end it only
 - if CC is in **default**


s123

TERMS

8.1 'Approved Bond' shall mean the issue of a quotation and Pre Agreement as received from the banking institution as per Section 92 of the National Credit Act No 34 of 2005;




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Commercial Contracts subject to NCA


- AOD
 - Carter Trading v Blignaut 2010 (2) SOUTH AFRICA 46 ECP
- Mortgage Bonds
- Suretyship agreements securing CA's




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- Balance of debt still due after goods returned


Neutral citation: *Rossouw v First Rand Bank Ltd* (640/09) [2010] ZASCA 130 (30 September 2010)



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TRUSTS

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TRUSTS(2)

- Do trusts have legal personality?
 - Common Law: No
 - “X and Y in their capacity as trustees **for the time being** of the XYZ Investment Trust”
 - NCA: Yes if
 - 3 or more trustees or
 - if a trustee is a juristic person)
 - CPA: Yes

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TRUSTS(3)
Documents Required:

- READ TERMS OF TRUST DEED NB
- TRUSTEES POWER DERIVED FROM TRUST DEED BUT NB Authority:
 - Section 6(1) TPCA- trustee may only act if Authorized in writing by Master-NB cannot be ratified
 - vdMerwe v vdMerwe 2000 (2)SA 519 (C)
- Resolution by trustees

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TRUSTS(4)
CONTENT of the TRUST DEED

| | |
|--|---|
| <ul style="list-style-type: none"> • Creator/Donor <ul style="list-style-type: none"> – Identify • Trustees <ul style="list-style-type: none"> – Identify – Powers – Duties – Ending of term – Succession • Beneficiary <ul style="list-style-type: none"> – Identify | <ul style="list-style-type: none"> – Vesting of rights – (Independent Trustee) • Donation <ul style="list-style-type: none"> – To trustees for benefit of Beneficiaries – Describe asset/amount • Name • Trust Object • Security exemption • Termination • Other |
|--|---|

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TRUSTS (5)
CLASSIFICATION
(PA Olivier:Trust Law & Practice)

- Private Trust
- Bewind Trust
- Discretionary Trust
- Business Trust

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The BEWIND Trust(1)

- The trust property is administered for the benefit of persons who have vested rights to the property.
- See Olivier PA: Trust Law & Practice pp108 to 111
- Geach & Yeats:Trusts Law & Practice p19

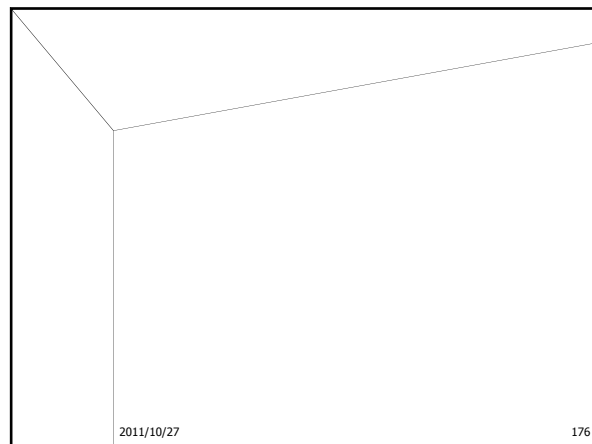
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The BEWIND Trust (2)

- NB problem of Bewind Trust:
 - Trust assets exposed to claims of creditors of the beneficiaries. So
 - Insolvency
 - Divorce
 - accident
- of beneficiary threaten the trust assets

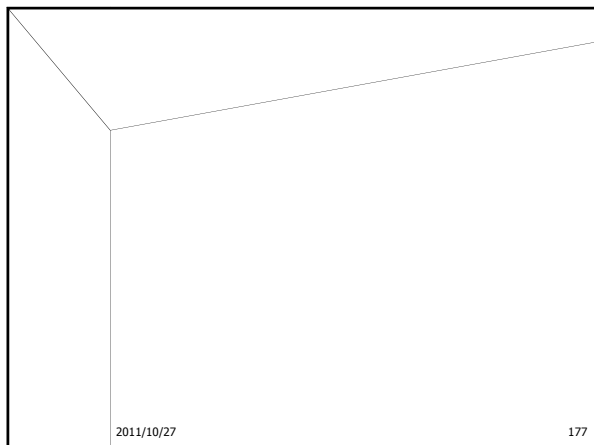
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CAPACITY

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...CHILDRENS ACT 38, 2005

- MAJOR WHEN 18 YEARS OLD
- CHILD MAY CONTR. FOR OWN BENEFIT
- IF CONTRACT CONTAINS OBLIGATIONS, GAURDIAN CONSENT REQUIRED
- MAY NOT ENTER LABOUR CONTRACT WITH CHILD YOUNGER THAN 15 YEARS.

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CONSUMERS & CORPORATES

- NCA
 - s89 MINORS
 - s88(1) DEBT REVIEW
- CPA
 - s39 MINORS
- COMPANIES ACT 2008
 - s134 BUSINESS RESCUE COs & CCs only if
 - At arms length, for fair value, with BRPractitioner approval;
 - ITO a BR Plan; or
 - by order of court

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DRAFTING A LEGALLY UNIMPEACHABLE CONTRACT-CAPACITY

- PERSONS MARRIED IN C.O.P
 - Since 1 Dec 1993 (*GEN LAW AMENDMENT ACT 139 OF 1993*) MARITAL POWER ABOLISHED
 - IRRESPECTIVE OF WHEN THE MARRIAGE ENTERED INTO, *CHAPTER 3 OF THE MATRIMONIAL PROPERTY ACT* APPLIES:
 - CONSENT NECESSARY FOR A WHOLE LIST OF CONTRACTS (SEC 15)

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...S15 MATRIMONIAL PROPERTY ACT 88, 1984

- SPOUSE CONSENT REQUIRED FOR ALL LISTED TRANSACTIONS
- S15(2)(f) AMENDED TO PROVIDE FOR NCA CREDIT AGREEMENTS
- S15 NOW ALSO APPLIES TO CIVIL UNIONS
 - S13 CIVIL UNIONS ACT 17, 2006

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DRAFTING A LEGALLY UNIMPEACHABLE CONTRACT-CAPACITY

- 15(5): CONSENT MUST BE **IN WRITING** AND IT MUST BE ATTESTED BY **2 WITNESSES**
- 15(4): CONSENT MAY BE GIVEN BY VIA **RATIFICATION** WITHIN REASONABLE TIME AFTER THE CONTRACT (EXCEPT RE SURETYSHIP)
- 15(6): **NO CONSENT** NEEDED IF CONTRACT MADE IN **ORDINARY COURSE OF PROFESSION, TRADE OR BUSINESS**
- 15(9): DOES NOT NECESSARILY RENDER THE CONTRACT INVALID
- NB SAFEGUARD: **ALWAYS** LET SPOUSE MARRIED IN C.O.P. CONSENT

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CASE LAW re Marriages in COP

- Govender v Maitin 2008(6)SA 64 Debt
 - Court refused to use s15(9) against third party who acted in good faith
- Distillers Corporation v Modise 2001(4)S A 1071 (O)
 - S15(9) applied –Suretyship valid
- Gounder v Top Spec Investments 2008 (5) S A 151 SCA
 - Loan valid mortgage invalid
 - (but NCA did not yet apply)

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LEASE AGREEMENTS

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...PIE

- PREVENTION OF ILLEGAL EVICTION AND UNLAWFUL OCCUPATION OF LAND ACT 19, 1998
- Applies only to residential property
 - Ndlovu v Ngcobo; Bekker...v Jika 2003 (1) SA 113 (SCA)
- Can it be waived?

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LEASE

- House may be let for Business Purposes
- Why differentiate(Residential v.Comm)?
 - Use of property may be restricted by:
 - Owners wishes eg. to restrict wear and tear.
 - Local authority zoning restrictions
 - Rules of a Sectional Title scheme
 - Neighbour law eg. To avoid nuisance charges
 - Economic dictates
 - Rental Housing Act 50/1999 Applies
 - No VAT on residential

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LEASE

- Remember applicable legislation: eg
 - Stamp Duties Act
 - Repealed
 - Any other tax?who will pay?
 - Extension of Security Tenure Act 62/1997
 - Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19/1998
 - Rental Housing Act 50/1999(NB Chapter 3)

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...RENTAL HOUSING ACT 50, 1999

- Applies only to residential property
- S5(3): contains clauses deemed to be included in all lease agreements
- S5(4): Tenant may not waive these standard provisions
- S5(7): Inspection list (defects) must be annexed.
- S5(8): List of House Rules must be annexed

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...LAND LEASE AGREEMENTS AND THE NCA

- Excluded by s8(2)(b)?
- Definition of Lease differs from landlord and tenant type of lease
- Interest on arrear rental
 - (Incidental credit agreement?)

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...Land Lease Agreements and the CPA definitions

- **Consumer:** iro goods and services = Person in transaction with supplier in ordinary course of business unless transaction is exempt ito s5(2) & (3)
- Service includes (But not limited to)
 - provision of accommodation or sustenance
 - provision of right of access to any premises
 - provision of access or use ito rental

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...Land Lease Agreements and the CPA definitions

- **S5(2)(d) Act does not apply to any transaction that is a Credit Agreement ito NCA**
- **BUT:** goods & services are not excluded

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...LAND LEASE AGREEMENTS AND THE NCA

- Pareto Ltd & Others v Sigaban t/a Flowers & More A3016/09 [2010] ZAGPJHC 21 (15/4/2010)
- Lease agreement is an agreement covered by the CPA
- Gounder v Top Spec Investments (Pty)Ltd 2008 (5) SA 151 SCA

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LESSORS (OWNERS) RIGHTS CEDED to 3rd

- Effects of cession as part of mortgage bond can be drastic
 - Cf Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd [2008] ZASCA 128
 - »Right to collect rental
 - »Right to evict
- Ceded to Investec bank

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LEASE

- Is lease LONG term or SHORT term?
 - If long term (10 years+) must be registered in deeds office.
 - What about 9 years and 11 months with an option to renew?
 - If long term, who pays registration costs?

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- Is lease LONG term or SHORT term?
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RESIDENTIAL LEASE AGREEMENT
 ADDING CONTENT TO SKELETON

- **EXAMPLES**
 - **INDEMNITY FOR DAMAGES**
 - THE TENANT
 - INDEMNIFIES
 - THE LANDLORD
 - AGAINST ALL CLAIMS FOR DAMAGES
 - ARISING IN RESPECT OF THE USE OF THE PREMISES
 - BY ANY PERSON

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RESIDENTIAL LEASE AGREEMENT
 ADDING CONTENT TO SKELETON

- **EXAMPLES**
 - **NO REPRESENTATIONS OR GUARANTEES RE SUITABILITY OF THE PREMISES**
 - THE LANDLORD
 - HAS MADE NO REPRESENTATIONS
 - AND DOES NOT GUARANTEE
 - TO THE TENANT
 - THAT THE PREMISES ARE SUITABL

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RESIDENTIAL LEASE AGREEMENT
 ADDING CONTENT TO SKELETON

- FOR THE PURPOSES
- FOR WHICH THE PREMISES ARE LET
- SHOULD ALTERATIONS BE REQUIRED
- TO MAKE THE PREMISES MORE SUITABLE
- FOR SUCH PURPOSES,
- THE TENANT MUST
- PAY FOR
- AND HAVE THE ALTERATIONS MADE
- PROVIDED THAT

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RESIDENTIAL LEASE AGREEMENT
 ADDING CONTENT TO SKELETON

- THE TENANT
- MAY NOT EFFECT ANY STRUCTURAL CHANGES
- WITHOUT THE PRIOR
- WRITTEN CONSENT
- OF THE LANDLORD
- **THE LANDLORD WILL TAKE CARE OF THE OUTSIDE OF THE PREMISES**
 - FOR THE DURATION
 - OF THIS LEASE AGREEMENT

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RESIDENTIAL LEASE AGREEMENT
 ADDING CONTENT TO SKELETON

- THE LANDLORD
- MUST MAINTAIN
- THE OUTSIDE OF THE HOUSE
- AND EFFECT ANY REPAIRS
- THAT ARE NECESSARY
- SUCH MAINTENANCE AND REPAIRS ARE FOR THE ACCOUNT OF THE LANDLORD
- THE TENANT
- WILL ALLOW

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RESIDENTIAL LEASE AGREEMENT
 ADDING CONTENT TO SKELETON

- THE LANDLORD OR ANY PERSON APPOINTED BY THE LANDLORD
- TO ENTER THE PREMISES
- IN ORDER TO MAINTAIN OR REPAIR THE SAID OUTSIDE OF THE HOUSE
- **THE TENANT MUST TAKE CARE OF THE INSIDE OF THE PREMISES**
 - THE TENANT
 - MUST MAINTAIN
 - THE INSIDE OF THE HOUSE

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RESIDENTIAL LEASE AGREEMENT
 ADDING CONTENT TO SKELETON

- AND EFFECT ALL REPAIRS NECESSARY
- ON THE INSIDE OF THE HOUSE
- THE TENANT MUST KEEP THE
- INSIDE OF THE HOUSE
- IN THE SAME GOOD CONDITION AS IT IS
- AT THE START OF THIS AGREEMENT
- THE TENANT MUST SIMILARLY MAINTAIN, REPAIR, AND KEEP IN GOOD CONDITION
- ALL THE FURNITURE OF THE LANDLORD IN THE HOUSE

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RESIDENTIAL LEASE AGREEMENT
 ADDING CONTENT TO SKELETON

- AS LISTED ON THE INVENTORY ANNEXED HERETO
- ANY FURNITURE ITEMS LOST OR STOLEN DURING THIS LEASE,
- MUST BE REPLACED BY THE TENANT
- SHOULD THE TENANT NOT COMPLY,
- THE LANDLORD MAY EFFECT THE NECESSARY MAINTENANCE, REPAIRS AND REPLACEMENTS
- AND THE TENANT
- IS TO REFUND

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RESIDENTIAL LEASE AGREEMENT
 ADDING CONTENT TO SKELETON

- THE LANDLORD
- FOR ALL EXPENSES INCURRED IN THIS REGARD

– THE DUTY OF THE TENANT TO MAINTAIN THE GARDEN

- THE TENANT
- MUST MAINTAIN
- AND KEEP IN GOOD CONDITION
- THE GARDEN ON THE PREMISES
-

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RESIDENTIAL LEASE AGREEMENT
 ADDING CONTENT TO SKELETON

- HE/SHE MUST TAKE ALL REASONABLE CARE
- THAT ALL THE PARTS OF THE GARDEN INCLUDING THE
 - LAWN
 - HEDGE
 - ALL PLANTS
 - FLOWERS AND
 - SHRUBS
- ARE IRRIGATED EACH DAY
- THE TENANT WILL SEE TO IT THAT

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RESIDENTIAL LEASE AGREEMENT
 ADDING CONTENT TO SKELETON

- THE LAWN AND HEDGES
- ARE REGULARLY TRIMMED AND TIDIED
- THE TENANT WILL ALSO NOT OVERSATURATE ANY PART OF THE GARDEN

– THE PAYMENT OF A DEPOSIT

- THE TENANT
- MUST WHEN SIGNING THIS AGREEMENT
- PAY
- TO THE LANDLORD

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RESIDENTIAL LEASE AGREEMENT
 ADDING CONTENT TO SKELETON

- A DEPOSIT IN THE AMOUNT OF R 3000-00 (THREE THOUSAND RAND)
- BEING AN AMOUNT EQUAL TO TWO MONTHS RENTAL (does this comply with the rental housing act?)
- THIS DEPOSIT WILL BE INVESTED
- BY THE LANDLORD
- IN A BANK ACCOUNT
- BEARING INTEREST
- WHICH IS TO BE PAID TO THE TENANT

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RESIDENTIAL LEASE AGREEMENT
 ADDING CONTENT TO SKELETON

- AT THE END OF THIS AGREEMENT
- IF THE TENANT HAS NOT BREACHED THIS AGREEMENT IN ANY WAY
- SHOULD THE TENANT BE IN BREACH,
- THE LANDLORD MAY ACT IN TERMS OF THE RENTAL HOUSING ACT AND APPLY THE DEPOSIT AND INTEREST THEREON AS SET OUT THEREIN.

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RESIDENTIAL LEASE AGREEMENT
 ADDING CONTENT TO SKELETON

- AT THE END OF THIS AGREEMENT (not later than 14/7/21 days after return of house ss5(3)(g);(i) & (j) Rental Housing Act 50/1999)
- FOR REASONS OTHER THAN BREACH OF CONTRACT BY THE TENANT
- THE LANDLORD WILL PAY
- THE DEPOSIT AND INTEREST THEREON
- TO THE TENANT WITHIN THE TIME SET OUT IN THE RENTAL HOUSING ACT ACT.

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RESIDENTIAL LEASE AGREEMENT
 ADDING CONTENT TO SKELETON

– THE PAYMENT OF SERVICE CHARGES BY THE TENANT

- THE TENANT
- MUST PAY
- ALL SERVICE CHARGES
- IN RESPECT OF THE LEASED PREMISES
- WHEN SUCH CHARGES BECOME DUE
- THIS INCLUDES CHARGES IN RESPECT OF WATER

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RESIDENTIAL LEASE AGREEMENT
 ADDING CONTENT TO SKELETON

- AND ELECTRICITY
- SUPPLIED TO THE PREMISES
- FOR THE DURATION OF THIS AGREEMENT
- SHOULD THE TENANT FAIL TO PAY SUCH CHARGES,
- THE LANDLORD MAY CANCEL THIS AGREEMENT
- WITHOUT ANY NOTICE TO THE TENANT, OR

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RESIDENTIAL LEASE AGREEMENT
 ADDING CONTENT TO SKELETON

- THE LANDLORD MAY PAY SUCH SERVICE CHARGES
- ON BEHALF OF THE TENANT.
- THE TENANT MUST THEN REFUND
- TO THE LANDLORD
- ANY SUCH AMOUNT PAID BY THE LANDLORD

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RESIDENTIAL LEASE AGREEMENT
 ADDING CONTENT TO SKELETON

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PARTNERSHIP AGREEMENT
AN UTMOST GOOD FAITH ARRANGEMENT

- EACH PARTNER MUST ACT WITH THE UTMOST (HIGHEST) GOOD FAITH TOWARDS THE OTHER. THIS INCLUDES THE DUTY OF EACH PARTNER TO:
 - DEVOTE HIS/HER SERVICES COMPLETELY TO THE PARTNERSHIP
 - DISCLOSE FULLY AT ANY TIME THAT THEY MAY EXIST, ALL INTERESTS IN BUSINESSES OUTSIDE THE PARTNERSHIP
 - AVOID ANY CONFLICT OF INTERESTS WITH THE PARTNERSHIP OR PARTNERS
 - NOT TO HOLD ANY OFFICE OUTSIDE THE PARTNERSHIP UNLESS PRIOR WRITTEN CONSENT HAS BEEN OBTAINED

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PARTNERSHIP AGREEMENT
DRAWINGS

- DRAWINGS BY PARTNERS:
 - EACH PARTNER MAY DRAW HIS/HER SHARE OF NET PROFITS
 - SHOWN IN THE ANNUAL INCOME STATEMENT
 - ONCE SAME HAS BEEN ACCEPTED AND SIGNED BY ALL THE PARTNERS
 - IN ANTICIPATION OF SUCH SHARE,
 - EACH PARTNER MAY ON THE LAST DAY OF EACH MONTH,
 - DRAW SUCH AMOUNT
 - AS THE PARTNERS MAY FROM TIME TO TIME AGREE, OR

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PARTNERSHIP AGREEMENT
DRAWINGS

- FAILING AGREEMENT,
- AS THE AUDITORS OF THE PARTNERSHIP
- MAY FROM TIME TO TIME DETERMINE
- WITH REFERENCE TO THE FINANCIAL PERFORMANCE OF THE PARTNERSHIP
- IN THE PREVIOUS FINANCIAL YEAR (THIS COULD ALSO BE DETERMINED BY ARBITRATION)
- IF, DURING ANY FINANCIAL YEAR,
- A PARTNER DRAWS MORE THAN HIS SHARE OF PROFIT FOR THAT YEAR,

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PARTNERSHIP AGREEMENT
DRAWINGS

- HE/SHE MUST REFUND
- TO THE PARTNERSHIP
- THE EXCESS DRAWN
- ONCE THE ANNUAL INCOME STATEMENT HAS BEEN ACCEPTED AND SIGNED BY ALL THE PARTNERS
- UNTIL REFUNDED, SUCH EXCESS WILL BEAR INTEREST AT THE PRIME INTEREST RATE AS DETERMINED FROM TIME TO TIME BY THE BANKERS OF THE PARTNERSHIP
- A CERTIFICATE BY A BANK MANAGER OR ACCOUNTANT OF THE BANK SETTING OUT THE PRIME RATE FOR A SPECIFIC PERIOD WILL BE PROOF OF THAT RATE UNTIL THE CONTRARY IS PROVED.

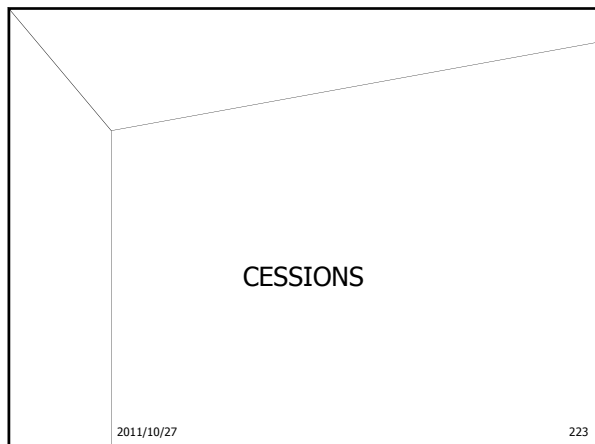
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PARTNERSHIP AGREEMENT
DISSOLUTION

- TERMINATION OF THE PARTNERSHIP
 - LIFE INSURANCE
 - ON LIFE OF EACH PARTNER
 - FOR AMOUNT TO BE AGREED FROM ANNUALLY BETWEEN THE PARTNERS
 - ON DEATH OF A PARTNER, THE REMAINING PARTNERS TO TAKE OVER THE PRACTICE
 - PROCEEDS OF POLICY TO SETTLE CLAIM OF ESTATE RE PARTNERSHIP SHARE
 - PROCEEDS TO BE PAID TO DECEASED ESTATE
 - IN FULL AND FINAL SETTLEMENT OF ANY CLAIMS RE PARTNERSHIP SHARE

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Cession

- **Transfer of rights**
- **2 forms NB:**
 - Out-and-Out Cession
 - As security for debt
- NB remember if contract requires notice to debtor, notice must be given.
- lack of such notice does not render cession invalid, but ineffective until notice given. (Lynn & Main v Brits Community Sandworks CC 2009 (1) SA 308 (SCA))

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Cession (2)

- Notice to debtor also NB on practical level
 - Where debtor without knowing about cession pays cedent, Cessionary has no claim
 - **Van staden NO and anor v Firstrand Ltd and anor 2008(3) SA 530**

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Cession (3)

- Effects of cession as part of mortgage bond can be drastic
 - Cf **Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd [2008] ZASCA 128**
- However facts must be analyzed
 - Voltex v Ras (7436/2009)ZAGPPHC [12/3/2010]
- Re-ceding does not always solve the problem.
 - **HOMES FOR SOUTH AFRICA (PTY) LTD v RAND BUILDING CONTRACTORS (PTY) LTD 2004 (6) SA 373 (W)**

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Cession (4) Out & Out

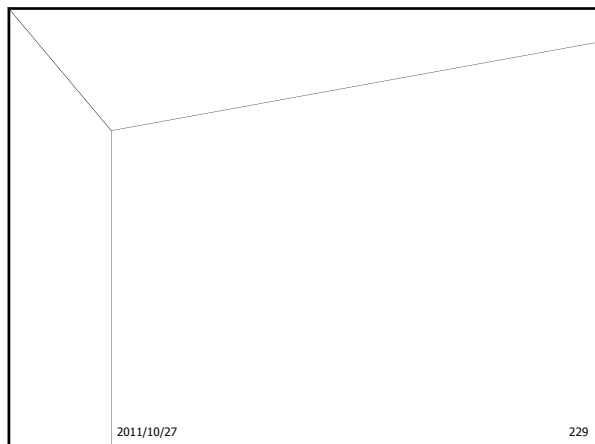
- **Essentials**
 - Describe the rights
 - Transfer by the cedent
 - Acceptance by the cessionary
 - Underlying reason for the cession
 - The remuneration of the cedent
- Delivery of docs evidencing cession
- Notice to the relevant debtor
- Warranty by cedent re title to & validity of rights

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Cession (5) Out & Out

- **No reversionary right**
- **Liability of cedent for**
 - Costs incurred by cessionary in enforcing rights
 - Damages cedent might suffer if rights unenforceable
- If rights re future claims are ceded, undertaking that docs and details will be supplied.

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Cession (6) As security

- Often referred to as *Cession in securitatem debiti*
- Essentials
 - Describe rights
 - Describe the obligation to be secured
 - Transfer of rights by cedent **to serve as security for that obligation**
 - Acceptance by cessionary
- Duration of cession

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Cession (7) As security

- Delivery of docs evidencing the rights
 - Eg. a lease agreement showing right to rental payments
- Duty to provide updated info and docs from time to time
- Notice to the relevant debtor
- Warranty by cedent re
 - title to rights & validity of rights

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Cession (8) As security

- Deal with the reversionary right
 - ie. What is to happen when debt paid or
 - Where debt secured is smaller than value of rights ceded
 - Cession of reversionary right?
- Liability of cedent for
 - Costs incurred by cessionary in enforcing rights
 - Damages cedent suffers if rights unenforceable

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Cession (9) As security

- Creditors right to provide a Certificate of Indebtedness
- Pledge v Cession of rights in security
 - On insolvency of receiver,
 - Pledged rights remains part of transferors estate
 - Ceded rights are part of cessionaries estate
 - Discussed in *Alexander & Anor NNO v Standard Merchant Bank Ltd 1978 (4) SA 730 (W)*

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Cession (10) As security

- Cedent's powers on cessionary's default
 - Eg. *Parate Executie*
 - (*Execution without recourse to a court*)
 - See *SA Bank of Athens Limited v May van Zyl SCA (Case 430/2003)*
 - *summary execution is not contra sec 34 of the Constitution.*

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SURETYSHIP

- FOR A VALID CONTRACT
 - ID CREDITOR
 - ID SURETY
 - ID PRINCIPAL DEBTOR
 - NATURE OF PRINCIPAL DEBT (SURETY=ACCESSORY CONTRACT)
 - EXTENT OF SURETY'S LIABILITY
 - PERIOD OF SURETY'S LIABILITY

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SURETYSHIP (2)

- FOR A VALID CONTRACT
 - SIGNED BY OR O.B.O. SURETY
 - MUST BE WRITTEN (GNL LAW AMENDMENT ACT 50/1956)
 - ESSENTIAL ELEMENT BLANK=AGREEMENT INVALID
 - BLANK SPACE IN CLAUSE= CLAUSE UNENFORCEABLE

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SURETYSHIP (3)

Nedbank Ltd v Wizard Holdings (Pty) Ltd and Others 2010 (5) SA 523 (GSJ)

- Defence raised:
 - blank space in each deed relating to the limit of the undertaking, but which blank spaces were **subsequently completed** when the applicant inserted the word 'unlimited'
 - in each case, the contracts did not comply with s 6 of the Act and were accordingly invalid.

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SURETYSHIP (4)

Nedbank Ltd v Wizard Holdings (Pty) Ltd and Others 2010 (5) SA 523 (GSJ)

- Court Held:
 - The limit to the surety's liability was not one of the essential terms
 - could obviously be a significant and material term
 - Blank space pertaining to a non-essential but material term did not necessarily render agreement void (for non-compliance with the statutory formalities.)

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SURETYSHIP (5)

- FOR A VALID CONTRACT
 - IF INTENTION IS JOINT SURETYSHIP AND ONLY ONE SURETY SIGNS=AGREEMENT UNENFORCEABLE
 - MARRIAGE IN COMMUNITY OF PROPERTY
 - SPOUSE CONSENT ABSENT=INVALID
 - UNLESS
 - » CONSENT OR
 - » USUAL COURSE OF BUSINESS/PRACTICE/OCCUPATION

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SURETYSHIP (6)

- BENEFITS RENONUNCED
 - EXCUSION, DIVISION & CESSION OF ACTIONS
 - NBNB comply with plain language requirement of s64 NCA (if NCA applies)
 - S22 CPA "or any other law" requires writing
 - All suretyship must be in plain language
 - (GNL LAW AMENDMENT ACT 50/1956 requires writing)

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SURETYSHIP (7)

- Prescription
 - As it is an accessory contract
 - If judgement has been taken against the principal debtor,
 - Claim against a surety prescribes only 30 years after such judgment
 - Eley (Formerly Memmel) v Lynn & Main Inc 2008(2) SA 151 (SCA)
 - 2011

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SURETYSHIP (8)

- Disinterested surety, eg.
 - Director that has resigned or
 - Member that has sold shares
- May terminate liability by notice
 - Barnard v Carl Greaves Brokers (Pty) Ltd & anors 2008(3) SOUTH AFRICA 663 (C)

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SURETYSHIP (9)

- Errors in Suretyships may be rectified but the wrong suretyship must be a valid contract
 - Inventive Labour Structuring (Pty) Ltd v Cofre 2006 (3) SOUTH AFRICA 107 (SCA)
 - Court conducts a 2 stage enquiry
 - 1 Is there a valid suretyship ito Gnl Law Amendment Act 50, 1956
 - 2 Have the requirements for rectification been met?

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SURETYSHIP (10)

- Use of words:
 - “exhaust remedies ” versus “excuss”
 - Fedbond Nominees (Pty) Ltd v Meier 2008(1) SA 458 (CC)
 - “exhaust ” is wider than “excuss”
 - Creditor was to exhaust remedies against Principal debtor & other sureties first

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THANK YOU!

**Wishing you
all the best with the
exams.**