



**LAW OF PROPERTY AND SECURITY B**

**2010**

**PROFESSOR R. MQEKE**

# LAW OF PROPERTY AND SECURITY B

## COURSE OUTLINE 2010

### 1 Introduction

#### Overview

Law of Property and Security B is a semester course which aims to build upon on the content of the Law of Property and Security A course and to introduce students to other aspects of property law, especially the law relating to security and some of the most important South African property law statutes.

#### Credit value

10 credits which translate to 10 hours to be spent on this course per week. There are two 45 minute lectures per week in this course. Students are thus required to do 8 hours and 30 minutes of independent work in this course per week.

### 1.3 Assumptions of prior learning

It is assumed that:

- students have the ability to communicate in written and spoken English at least at the level of NQF level 4;
- students are capable of independent work.
- students have passed at least one year of law studies.

### 2 Outcomes

#### 2.1 Critical outcomes

This course will contribute to students attaining the following critical outcomes:

- 2.1.1 organise and manage themselves;
- 2.1.2 collect, analyse and evaluate information;
- 2.1.3 recognise problem solving contexts;
- 2.1.4 identify and solve problems;
- 2.1.5 communicate effectively;
- 2.1.6 participate as responsible citizens and
- 2.1.7 be culturally sensitive.

#### 2.2 Intended specific outcomes

##### A) Knowledge outcomes:

It is intended that students know and understand:

- 1 the purpose and function of real and personal security and the property statutes dealt with in the syllabus.
- 2 the sources (especially case law and litigation) of the law studied
- 3 the legal principles of the aspects of property law covered.

##### B) Skills outcomes:

At the end of this course, students should be able to:

- 2.2.1 Identify and explain the significance of the different sources of property law;
- 2.2.2 explain the significance and content of key property law concepts;
- 2.2.3 apply the legal principles of property law to specific situations ;

- 2.2.4 research and write a case note on at least one case with a property law focus;
- 2.2.5 demonstrate the ability to critically reflect on issues in property law and communicate orally and in writing the legal position as well as their own point of view.

### **C) Values Outcomes**

It is intended that students evidence an appreciation of:

1. the strengths and weaknesses of the aspects of property law covered in the course
2. academic integrity in acknowledging sources in research
3. the ethics of disclosing all relevant law, whether favourable or not, to a given factual situation.

## **3 Teaching methods**

There will be two lectures per week. Class discussions will be held flowing from the material covered in lectures and prescribed readings. Students are expected to prepare for lectures by doing the prescribed readings beforehand and are encouraged to engage in lecture room discussions: the Socratic method of lecturing will be used in this regard. All the prescribed material will not be addressed directly in lectures. Students are expected to take responsibility for their learning by independently study according to the guidance provided by the course outline and the lecturer. There will be a handout giving a synopsis of the law relating to real and personal security as well as statutes covering alternative forms of land title.

## **4 Course content**

This course deals, inter alia, with the notion of possession, servitudes, restrictive conditions and Constitutional property. It also examines the nature and effect of mortgage agreements, pledge agreements, some provisions of the Security by Means of Movable Property Act, the different types of lien, judicial mortgages, the nature of a suretyship agreement, the essentials of such an agreement, the parties to the agreement, the rights and duties of the parties and the termination of the agreement, and an overview of the following Property Statutes:

- (a) the Alienation of Land Act 68 of 1981
- (b) the Sectional Titles Act 95 of 1986
- (c) the Share Blocks Control Act 50 of 1980;
- (d) the Property Time-Sharing Control Act 75 of 1983;

Other statutes are those listed under Part C.

I have divided the course into four main parts, namely, Part A, B, C and D.

## **5 Resources**

As in the law of Property A you are required to make use of the reading list indicated below.

- 1) Silberberg and Schoeman's: *The Law of Property*, 5<sup>th</sup> edition (2006) LexisNexis
- 2) Van der Walt & Pienaar: *Introduction to the Law of Property*, 5<sup>th</sup> Edition (Juta)
- 3) Van der Walt: *Casebook for students Law of Property* (Juta)
- 4) Willie's Principles of South African Law, 9<sup>th</sup> edition by Francois Bois (ed) (Juta) 2007.
- 5) Carey-Miller with Anne Pope *Land Title in South Africa* (Juta)

## Student Assessment

Specific outcomes	Assessment Criteria	Assessment Task
On completion of the course students should be able to: Understand and explain the concept of possession and possessory remedies in our law	What evidence must student provide to show that they are competent? The student must be able to : Describe the difference between possession and ownership, the different kinds of possessors and describe the circumstances under which the various possessors can make use of the various possessory remedies	Write an essay on the elements of possession and describe the scope of the remedy of mandament van spolie in our law
Understand and explain the definition, characteristics, creation and extinction of servitudes	Describe the main types of servitudes and their main features	Write an essay, supported by authority, showing the termination of servitudes
Understand and explain nature and the enforcement of restrictive conditions in our law	Describe the legal nature and the interpretation of restrictive conditions	Write an essay, supported by authority, showing the removal or modification of restrictive conditions.
Understand and explain the nature and enforcement of Constitutional property right	Distinguish between conjunctive & disjunctive interpretation of the definition of labour tenant	Write an essay show the recent decisions interpret the provisions of section 1 of the Land Reform.
Understand and explain personal and the various kinds of real security rights	Describe the nature and the content of the contract of suretyship. Distinguish between a mortgage and pledge. To what extent are these contracts affected by the National Credit Act 38 of 2005	Write an essay supported by authority showing the effect of non compliance with the provisions of section 6 of the General Law Amendment Act on the validity of a contract of suretyship
Understand and distinguish the various types of security rights	Distinguish the land lord tacit hypothec and a lien	Write an essay supported by authority showing the main differences between the landlord tacit hypothec and a lien
Understand and explain the alternative forms of title	Discuss the essence of a sectional title scheme	Write an essay supported by authority showing the difference between a section title scheme and a share blocks scheme

### **Assessment strategy**

The final mark will be calculated as follows:

Examination: 70 marks

Classwork: 30

### **Test and assignment**

There will be a test which will be written in the fourth term. The assignment will be written during the third term. The test will contain questions which will be equivalent to that which may be found in the November Examination.

### **Examination**

A two hour paper will be written in November. The examination will be out of 70 marks and there will be class mark component of 30 marks.

### **Evaluation**

The evaluation of the course will take place in accordance with the evaluation cycle set up by the law Faculty. This means that the course will be evaluated at least every three years. Students are invited to discuss their difficulties and problems with this course either personally or through their student representative with the lecturer.

## Part A

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**Possession:** (In this part of the work see, *inter alia*, Silberberg and Schoeman, 'The Law of Property', 5<sup>th</sup> edition, chapter 12, LAWSA, vol 27, paras 52 – 102)

1. Nature and legal requirements (right of possession and the intention to control a thing). Is there a difference between *ius possidendi* and *ius possessionis*.
  - i) Objective control element.
  - ii) Mental element.
  - iii) Possession and the so-called presumption of ownership.
2. Types of possessions (civil and natural possession)
3. Different kinds of possessors: *Bona fide* and *mala fide* possessors and *bona fide* and *mala fide* occupiers. See paras 92 – 96.
4. Protection and loss of possession. See paras 71 – 89 LAWSA vol 27.
  - 4.1 Mandament van spolie (spoliation order). Defences
  - 4.2 Prohibitory interdicts
  - 4.3 Possessory action
  - 4.4 Loss of possession

NB : In addition to the cases discussed in the Students Casebook, see the following: *Willowvale Estates cc and Another v Bryanmore Estates Ltd* 1990 (3) SA 954 (W); *Nienaber v Sturkey* 1946 AD 1049; *Jivan v National Housing Commission* 1977 (3) SA 890 (WLD); *Stocks Housing (Cape) Ltd v Chief Ex Director, Department of Education and Culture Services and Another* 1996 (4) SA 231 (C). See the cases noted in November 2007 De Rebus at 35 and 36 on Servitudes and Spoliation.

## PART B

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1. Servitudes
  - i. Definition, characteristics, creation and extinction
  - ii. Classes of servitudes: Praedial and personal
  - iii. Personal servitudes
    - Usufruct
    - Usus
    - Habitatio
  - iv. Praedial servitudes: requirements
    - Rural and urban praedial servitudes
  - v. Public servitudes
  - vi. Termination
  - vii. Remedies
2. Restrictive Conditions
  - i. legal nature and contents of restrictive conditions
  - ii. enforcement and interpretation
  - iii. removal or modification of restrictive conditions

In this part of the work; see generally Van der Walt and Pienaar *Introduction to the Law of Property*, 4<sup>th</sup> edition, chapter 17 and, Silberberg and Schoeman *The Law of Property*, 5<sup>th</sup> edition, chapters 14 and 15. See also *Kruger v Joles Eiendomme (Pty) Ltd And Another* 2009 (3) SA (SCA) on the interpretation of servitudes.

## PART C

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### Constitutional Property

This is the continuation of the discussion briefly introduced in Law of Property A, with emphasis on the land reform statutes, under the overarching themes of restitution, redistribution and tenure reform. The relevant principal national land reform laws include the Restitution of Land Rights Act 22 of 1994, the Provision of Certain land for Settlement Act 126 of 1993; the Development Facilitation Act 67 of 1995, the Upgrading of land Tenure Rights Act 112 of 1993; the Land Reform (labour Tenants) Act 3 of 1996, the interim Protection of Informal Land Rights Act 31 of 1996, the communal Property Associations Act 28 of 1996, the Extension of Security of Tenure Act 62 of 1997 (ESTA). The Housing Act 107 of 1997, The Rental Housing Act 50 of 1999, the Communal Land Rights Act 11 of 2004 and the Prevention of illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 [PIE]. Most of these statutes were noted under sources of the law of Property in Property A. In dealing with the above land reform statutes we shall divide them in accordance with the heading under which each falls, noting the goals of land policy under each theme and the legislative mechanisms used to achieve the stated goals. Students will note that most of the statutes have been judicially considered by the superior courts. See, for example, *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga and Another* 2009 (1) SA 470 (W) where the Housing Act, PIE and sections 25 and 26 of the Constitution were discussed.

### Restitution

Goals and constitutional imperatives. See sections 121-123 of the Interim Constitution and the Restitution of Land Rights Act 22 of 1994.

### Redistribution

The main purpose of redistribution as stated in the White Paper is to make land available to the poor for residential and agricultural purposes in both rural and urban areas.

The following statutes seek to achieve this purpose. The Communal Property Association Act 1996, the Provision of Certain Land for Settlement Act, the Development Facilitation Act, Land Reform (labour Tenants) Act, Rental Housing, Housing Act.

### Tenure reform

The aim of this process is to protect people with insecure tenure by ensuring security of tenure. The following statutes are important "The interim Protection of Informal Land Rights Act 31 of 1996, Communal Property Association Act, ESTA, Communal land Rights Act and Land Reform (labour) Tenant Act.



## PART D

### PERSONAL AND REAL SECURITY

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#### Security

1. **Purpose:** The main aim of security is the protection of the creditor's interests (i.e. the payment of the principal debt)

In the commercial world, creditors often seek some form of security to "ensure performance of the other party's obligations" Havenga et al *General Principles of Commercial Law*, 5<sup>th</sup> edition, Juta (2004) 317.

- 1.1 **Kinds of Security:** There are two types of security in the context of debt payment, personal and real security. Both forms of security are derived from Roman law.

#### 1.1 Personal Security : Suretyship

In case of suretyship the creditor enters into a contract with a third party (surety) who undertakes to make payment in the event of a default by the principal debtor. It has been pointed out that suretyship itself is a contract and creates personal rights. "The effect is that the creditor has extended his rights against his debtor to a right against two people (the debtor and the surety) who are jointly and severally liable (Gibson South African Mercantile & Company Law, 8<sup>th</sup> edition G Visser et al (eds) (2003) (Juta) 531.) This will hereafter be referred to as Gibson (2003).

##### .1.1. What is suretyship

According to Gibson (2003:532) suretyship is a contract in terms of which a third party (surety) agrees to pay, while there is in existence an obligation due by a debtor to a creditor, the whole or part of that obligation to the latter, not in lieu of the debtor, but jointly and severally with the debtor – See also JG Lotz 'Surety' in WA Joubert (ed). The Law of South Africa, First Re-issue Vol 26, Butterworths (1997) par 190 who defines suretyship as a contract in terms of which one person (the surety) binds himself as debtor to the creditor of another person (the principal debtor) to render the whole or part of the performance due to the creditor by the principal debtor if and to the extent that the principal debtor fails, without lawful excuse, to render the performance himself.

##### .1.2. Content of the obligation between surety and creditor

The aforementioned author also points out that the object of the obligation between the creditor and the principal is the same as that of the obligation between the creditor and principal debtor. The surety may, however, limit his or liability to only part of the principal debtor's liability: see *Kaplan v ER Syfrets & Co* 1914 CPD 1104.

##### .1.3. Nature of the Contract

A suretyship is an accessory obligation because it arises from the primary obligation between the creditor and the principal debtor. In *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* 2000 (1) SA 167 (W) the court described a contract of suretyship as an ordinary commercial contract. Capacity to contract is very important: see the following cases: *Eerste Nationale Bank*

van Suidelike Afrika Bpk v Noordkaap Leivende Hawe Ko-öperasie Bpk 1997 (1) SA 299 (A) dealing with competency to stand surety without an authorisation by a special resolution; *Distillers Corporation Ltd v Modise* 2001 (4) SA 1071 (0) – competency of a spouse married in community of property to stand surety; *Nedbank Ltd v Van Zyl* 1990 (2) SA 469 (A) – a person cannot stand surety for himself and *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) – a contract of suretyship signed by an ill, hearing – impaired and almost blind lady who stood surety for her son's obligations.

See also s 49(1) of the Co-operatives Act 91 of 1981 regarding the requirement in respect of a co-operative to stand as a surety. It has been held that a contract of suretyship entered into by a person who lacks mental capacity cannot be enforced unless it can be shown that such a person obtained independent legal advice

#### 1.4. Validity requirements

In terms of section 6 of the General Law Amendment Act 50 of 1956 no contract of suretyship entered into after the commencement of this Act, shall be valid unless the terms thereof are embodied in a written document signed by or on behalf of the surety: Provided that nothing in this section contained shall affect the liability of signer of an aval under the laws relating to negotiable instruments.”

Lotz comments as follows on this section: “section 6 requires the terms of a contract of suretyship to be embodied in a written document”. This means that for the contract to be formally valid, both the terms that are essential for the material validity of any contract of suretyship and the additional terms on which the parties may have agreed upon must be in writing. Terms which are essential for the material validity of a contract of suretyship are the identity of the creditor, the surety and the principal debtor and the identification of the principal debt... The requirement that the contract must be ‘embodied in a written document’ does not, however, mean that every particular must be meticulously spelled out in the document...” see further par 195 of LAW SA as well as the leading case of *Fourelmel (PTY) Ltd v Maddison* 1977 1 SA 333 (A).

##### 2.1 Statutory requirement

S6 of the General Law Amendment Act 50 of 1956. This section has attracted a great deal of judicial commentary. See, inter alia:

- *Fourelmel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A);
- *Trust Bank van Afrika Bpk v Sullivan* 1979 (2) SA 765 (T);
- *First Consolidation Holdings (Pty) Ltd v Bissett* 1978 (4) SA 491 (W);
- *Jurgens v Volkskas Bank Ltd* 1993 (1) SA 214 (A);
- *Intercontinental Exports (Pty) Ltd v Fowels* 1999 (2) SA 1045 (SCA), and
- *Republican Press (Pty) Ltd v Martin Murray Associates cc & Others* 1996 (2) SA 256 (N).

The objects of the General Law amendment Act 50 of 1956

2.1 The object of the act is to achieve certainty and to avoid or minimise perjury or fraud: *Fourelmel* case.

2.2 What terms need be embodied in writing?

2.2.1 Only the terms essential for the validity of the contract:  
Bissett case.

2.2.2 Material terms (e.g. Identity of the party) can be incorporated by reference (Sullivan case). This applies in particular with reference to blanks in printed contracts.

2.2.3 Extrinsic evidence is admissible to explain why spaces were left in blank.

2.2.3.1 Blanks filled in after the surety had signed render the contract invalid: (Fourlamel case); but not filled in before the conclusion of the contract.

- Recitification:  
Only possible if contract valid ex facie the document: Intercontinental and Republican Press cases.

- **Formal requirements**

It is a formal requirement that a contract of suretyship be duly stamped –“if not it may not be made available for as purpose whatever and in particular may not be produced in evidence or made available in a court of law” (s 2 of the Stamp Duties Act 77 of 1968).

.1.1. **Liability of a surety**

- A surety's duty is to render the performance which he has bound himself to render.
- Problems may, however, arise where a surety is an illiterate person who has been tricked into signing as surety for the payment of the loan: *Khan v Naidoo* 1989 SA 724 (N).

The effect of suretyship is that it imposes on the surety the duty of performing the obligation if the principal debtor does not himself make performance when it is due: The creditor will then call upon the surety to make performance and he may insist on specific performance. It is only when the obligation consists in the performance of an act that the court will not grant an order of specific performance against the surety: *Corrans v Transvaal Government* 1909 T.S 613.

.1.2. **Liability of co-sureties**

Where two or more persons have bound themselves as sureties for the same principal debtor and in respect of the same principal debt, they are to be called co-sureties and are liable jointly and severally, that is, each for the whole debt “but subject to the right of each to demand from the creditor that the debt be divided between them.”

.1.3. **Liability of surety who has bound himself also as co-principal debtor**

According to Lotz par 199 “a surety who has bound himself as a surety and co-principal debtor remains a surety whose liability arises wholly from the contract of suretyship.”

.1.4. **Enforceability of the debt**

A surety's debt becomes enforceable as soon as the principal debtor is in default "If the surety has bound himself also as co-principal debtor, his debt becomes enforceable at the earliest, when the principal debt becomes enforceable..." par 200.

### .1.5. Defences

According to Lotz par 201 a surety may raise all the defences which are available to the principal debtor against the creditor except those that are personal to the principal debtor e.g. minority, insolvency, liquidation. Examples of defences which attach to the principal obligation, that is, defences to the validity or effectiveness of the original obligation or debt e.g. illegality, fraud, duress, payment, set off, prescription or the defence that the debt is unenforceable. Defences peculiar to the surety.

In addition to the above defences a surety may raise special defences or benefits, namely, the "benefit excussion" – the benefit that the creditor must first proceed against the principal debtor or benefit that the creditor must first proceed against the principal debtor or benefit of division when there is more than one surety. This benefit means that a claim be divided proportionately between him and other surety's.

The benefit of cession of action – This is available to a surety who has paid in terms of his suretyship obligation. It entitles the surety to have recourse against the principal debtor and co-surety's (Gibson [2003]: 533).

### .1.6. Termination of the Contract

- Termination of the principal debt also terminates the accessory obligation.
- In the case of the 'novation of a contract a surety is also released thereby.

### .1.7. Creditor's right against the surety

The creditor right against the surety is a personal right.

- **Real Security:** This means a real right which one person has over the property of another to secure an obligation.

This takes place when the debtor sets aside a particular corporeal asset which can be sold in execution by the creditor if the debt is not paid (Lotz 'Surety' par 189).

### Categories of real security

- a.) Mortgage
- b.) Pledge
- c.) Security granted by operation of law in respect of property of the debtor to the creditor.
- d.) Tacit hypothec
- e.) Judicial pledge
- f.) Statutory security rights
- g.) Liens

### **3.2 Mortgage**

Definition: "By a mortgage...is meant the real rights possessed by one person, who is called the mortgagee, over the property of another, who is called the mortgager, as security for the payment or fulfilment of a debt or some other personal obligations due by the latter to the former entitling the former to have his claim satisfied out of the proceeds of the property mortgaged in preference to such of the mortgagor's other creditors who have not a prior right or better right over the property" Hosten et al Introduction To South African Law, Butterworths (1997) p652 relying on Maasdorp Institute of South African Law vol II. Mortgage is a limited real right.

### **3.1.1 Requirements for the existence of a valid mortgage**

Hosten et al op cit at 652 give the following fourfold requirements:

- h.) There must be a principal debt to be secured by the mortgage. Even future debt can be secured. This is done by means of a covering bond.
- ii.) There must be a thing to form the object of the mortgage e.g. Movable or immovable property.
- iii.) There must be a valid ground or reason for the existence of the mortgage (e.g. An agreement between the mortgagee and the mortgagor). This is referred to as a *causa*.
- iv.) The real right of mortgage must have come into existence through some juristic fact or act (e.g. having possession of mortgaged thing [delivery of a movable property]). This is called a pledge. Registration [this is called hypothec or mortgage in the narrow sense of the word.] refers to registration in a deeds registry either of a mortgage bond over specified immovable property or of a special or general notarial bond over movables: Ellison KAHN (ed) Principles of Commercial law; Principles of the law of Mortgage, Pledge & Lien by Konrad M Kritzinger, Juta & Co (1999) pl. Once a bond has been registered in respect of a particular immovable property, the Registrar of Deeds is precluded from executing a transfer of that property until the bond has been cancelled or the property has been released from the operation of the bond by the written consent of the mortgagee. Registration by the Registrar of Deeds is, in accordance with the normal requirements for the transfer of real rights in immovable property. In this regard the principle *Qui prior est tempore potior est jure*, meaning priority in the time gives priority in law. This means that in the case of the insolvency of the debtor (mortgagor) preference in respect of claims is determined on the basis of the priority in the registration of the bond. This may be so where there are several bonds in respect of the same property. On the nature of the real rights created by a mortgage bond see, inter alia, Klerck NO v Van Zyl and Maritz NNO and Related cases 1989 (4) SA 263 (SE); *Lef NO v Dettmann* 1964 (2) SA 252 (A) and Kilburn v Estate Kilburn 1931 AD 501.
- v.) The agreement must meet the requirements laid down in the National Credit Act 34 of 2005. See the pre-agreement requirements such as pre-disclosures, delivery of the relevant documents free of charge; compliance with the plain language requirements, provisions relating to unlawful agreements and unlawful provisions in a contract and the right to cooling off.

### **3.1.2 Main features of a mortgage bond (What should a mortgage bond contain?)**

See in this regard *Zietsman's* case, supra. The case referred to some striking features e.g. they are remarkably long and complicated documents.

3.1.2.1 Covering bond clause

3.1.2.2 Insurance clause

3.1.2.3 Rates clause

3.1.2.4 Repairs clause

3.1.2.5 Forfeiture clause

[*pactum commissorium*]

3.1.2.6 Foreclosure clause and the provisions of the National Credit Act of 2005.

See the recent case of *Standard Bank of South Africa Ltd v Hales and Another* 2009 (3) SA 315 D&CLD.

A debt for an indefinite period would normally require the giving of notice to the mortgagor in most cases the period of notice will be fixed by the terms of the bond.

### **3.1.3 The accessory nature of a mortgage and parties to a mortgage.**

See again *Klerck NO v Van Zyl and Maritz NNO and Related cases*, supra; As in the case of suretyship a mortgage cannot exist without a valid principal obligation. Thus if a contract which forms the basis of a principal obligation contains provisions which are illegal, the enforceability of the mortgage will depend on whether the illegal term goes to the root of the contract or whether it is severable from it: *Badenhorst et al Silberberg and Schoeman The Law of Property*, 4<sup>th</sup> ed, LexisNexis, Butterworths (2003): 346. According to these authors the principal obligation need not be contractual, it may be delictual or a claim based on unjust enrichment.

### **3.1.4 Subject matter of mortgage**

According to *Badenhorst et al* at 347 every movable or immovable property (which is a thing in commence) may be the object of real security. The object should exist and both corporeal and incorporeal things can be the subject of real security: see sections s 6(1), 60 and 81 (a) of the Deeds Registries Act 47 of 1937 with regard to the mortgaging of a lease or sub lease which is in respect of an immovable; sections 68 (2), 69 (4) regarding the mortgaging of personal servitude and sections 71 (5) and (6) regarding the mortgaging of mineral rights.

### **3.1.5 Special mortgages of immovable property**

Before registration, a mortgage only creates personal rights and duties between parties.

Registration of the mortgage confers real rights on the mortgagee. This occurs as soon as the mortgage is registered and signed by the Registrar of Deeds. *Badenhorst et al* 349 make the following important statements of the legal position:

“Two distinct phases are therefore distinguished; the first phase in which personal rights between the parties are agreed to in the bond agreement and the second phase, registration, which effectively establishes real security over the burdened property. A mortgage bond in the traditional form contains an acknowledgment of debt by the mortgagor for the amount of the bond including a recital of the principal obligation which the bond secures, and a declaration binding specific immovable property as security for the payment of the debt and the fulfilment of all other obligations enforced on him/her in terms of the bond. Thus a mortgage bond in this form fulfils three functions in so far as it constitutes:

- An instrument of hypothecation or the hypothecary part.
- A record of the terms and conditions of the obligation in respect of which the hypothecation is to create a security; (recording part) and
- An acknowledgement of debt or the admission of liability. In *Zietsman v Allied Building Society* 1989 (3) SA 166 (O) the Court put the last part slightly differently as follows: “an acknowledgement of debt or a promise to pay, which in itself could be relied on by the Allied Building Society (which was the creditor in that case). This part of the bond was described in the above case as the obligatory part. In the recent case of *Standard Bank of South Africa Ltd v Sauderson and others* 2006 (2) SA 264 (SCA) Cameron JA and Nugent JA described a mortgage bond as an agreement between the borrower and lender, binding upon third parties once it is registered against the title of the property, that upon default the lender will be entitled to have the property sold in satisfaction of the outstanding debt. Its effect is that the borrower, by his or her own volition, either on acquiring a house or later, when wishing to raise further capital, compromises his or her rights of ownership until the debt is repaid...The mortgage bond thus curtails the right of property at its roots, and penetrates the rights of ownership for the bondholder’s rights are fused into the title itself.”

### **3.1.6 Types of Mortgage Bonds**

#### **3.1.6.1 Kusting brief**

A bond passed to secure the purchase price of land. It may be passed in favour of a person who has lent and advanced money to the mortgagor towards the purchase price of the land to be mortgaged.

#### **3.1.6.2 For money lent and advanced**

#### **3.1.6.3 Covering Bond**

This is a mortgage registered as security for an amount that will be lent or advanced to the mortgagee in future or future debts in general. This constitutes an exception to the rule that a valid principle debt must already exist as security. See the case of *Kursan v Eastern Province Building Society and Another* 1996 3 SA 17 (A).

#### **3.1.6.4 Participation Bond**

According to Van der Walt and Pienaar, *Introduction to Property*, Juta (2002): 299, a participation bond is registered in terms of the requirements of the Collective Investment Schemes Control Act 45 of 2002, in favour of participants in a collective investment scheme, in the name of a nominee company as a mortgage over the immovable property of the mortgagor who was granted the loan by the nominee company. See the explanation given by the authors at page 266.

### **3.1.6.5 Notarial bonds**

Van der Walt & Pienaar op cit at 300 state that a notarial bond is registered against specific corporeal movable property of the mortgagor as security for the payment of the principal debt to the mortgagee and after registration, this grants the mortgagee a limited real right to the objects of security without these objects being delivered to the mortgagee. See s1 (1) of the Security by means of Movable Property Act 57 of 1993; see also the following cases *Chesterfin (Pty) Ltd v Contract Forwarding (Pty) Ltd* 2002 1 SA 155 (T) and *Bokomo v Standard Bank of SA Bpk* 1996 4 SA 450 (C). See again a good summary of notarial bonds given at page 267 of Van der Walt & Pienaar.

### **3.1.6.6 Surety Bond**

A bond granted by a surety over his/her movable or immovable property in favour of the creditor.

### **3.1.6.7 Landbank Mortgages**

This type of mortgage serves as security for money advanced to farmers by the Landbank for agricultural purposes. See Land and Agricultural Development Bank Act 15 of 2002. See Michelle Kelly-Louw *The Landbank's Decision of whether or not to join in the Insolvency Proceedings* 2004 Speculum Juris 281. See also Van der Walt & Pienaar p267.

### **3.1.6.8 Rights of the mortgagee and unenforceable conditions**

- **Pledge**

- 3.1 The pledge object
- 3.2 Rights of the pledgee
- 3.3 The obligations of the pledgee towards the pledgor
- 3.4 Termination of pledge and mortgage
- 3.5 Cession in *securitatem debiti*

### **Foreclosure and *parate executie***

It has already been noted that one of the general effects of a mortgage is to enable the creditor, in the event of default to have mortgaged security realised and to obtain payment of the secured debt from the proceeds. "On default, the creditor cannot simply keep the property... The mortgagee is generally obliged to obtain judgement..."



It is, however, in some cases permissible for the mortgagee, with the agreement of the mortgagor, to have the mortgages property sold without the need for judicial execution. This process of non judicial realisation is called *parate executie* (Kahn 1999: 23). See the leading case of *Senwes Ltd v Muller* 2002 (4) SA 134 (T) on the legality of a *parate executie* clause in a notarial bond. Moseneke AJ agreed with the reasoning in *Findevco (Pty) Ltd v Faceformat SA (Pty)* 2001 (1) 251 (E). See Lee Steyn *Perfection Clauses, Summary Execution (Parate Executie) Clauses, Forfeiture Clauses and Conditional Sales in Pledge Agreements and Notarial Bonds* 2004 OBITER 443.

- **Real Security rights created by law**

- Tacit hypothec of the lessor
- Tacit hypothec of the credit grantor
- Judicial pledge
- Statutory Security rights
- Liens

#### 4.1.1 **Real security rights created by operation of law**

That is in the absence of any agreement to that effect between the parties and even against their wishes.

#### 4.1.2 **Tacit Hypothec of the Lessor**

Definitions, see also, *Bloemfontein Municipality v Jackson* 1929 AD 266 on the requirements.

#### 4.1.3 **Tacit Hypothec of the credit grantor**

See, in connection with this, section 84 of the Insolvency Act 24 of 1936.

#### 4.1.4 **Judicial Pledge**

Definition, see Van der Walt and Pienaar, *Introduction to Law* chapter 19.

#### 4.1.5 **Statutory Security Rights**

Categories of statutory security rights include the following: a statutory mortgage; a statutory fictitious pledge; statutory lien and preferent right.

#### 4.1.6 **Liens**

Definition. Categories of liens:

- Debtor Liens
- Creditor Liens
- Enrichment Liens

Legal requirements and enforcement.

### **Additional reading list covering the law relating to personal security**

- Background on security: see Peter Havenga et al, *General Principles of Commercial Law*, Juta (2004) p 317
- Personal security: the contract of suretyship

- Definition: see your handout
- Nature of the Contract: In *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* 2000 (1) SA 167 (W) the court described a contract of suretyship as a ordinary commercial contract.
- Accessory nature of a contract: see Lotz LAWSA, vol 26, para 192.
- Capacity to contract: *Eerste Nasionale Bank van Suidelike Afrika Bpk v Noordkaap Lewende Hawe Koöperasie Bpk* 1997 (1) SA 299 (A) (competency to stand surety without an authorisation by special resolution); *Distillers Corporation Ltd v Modise* 2001 (4) SA 1071 (O) – a competency of a spouse married in community of property to stand surety); *Nedbank Ltd v Van Zyl* 1990 (2) SA 469 (A) (a person cannot stand surety for himself); see also *Litecor Voltex (N) Pty Ltd v Jason* 1988 (2) SA 78 (D).
- Content of an obligation between the creditor and the surety: see Lotz LAWSA para 191.

## 1. Statutory requirement

s6 of the General Law Amendment Act 50 of 1956. This section has attracted a great deal of judicial commentary. See, inter alia:

- *Fourlamel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A);
- *Trust Bank van Afrika Bpk v Sullivan* 1979 (2) SA 765 (T);
- *First Consolidation Holdings (Pty) Ltd v Bissett* 1978 (4) SA 491 (W);
- *Jurgens v Volkskas Bank Ltd* 1993 (1) SA 214 (A);
- *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA), and
- *Republican Press (Pty) Ltd v Martin Murray Associates cc & Others* 1996 (2) SA 256 (N).

1.1 The object of the act is to achieve certainty and to avoid or minimise perjury or fraud: *Fourlamel case*.

1.2 What terms need be embodied in writing?

1.2.1 Only the terms essential for the validity of the contract: *Bissett case*.

1.2.2. Material terms (e.g. Identity of the party) can be incorporated by reference (*Sullivan case*). This applies in particular with reference to blanks in printed contracts.

1.2.3 Extrinsic evidence is admissible to explain why spaces were left in blank.

1.2.3.1 Blanks filled in after the surety had signed render the contract invalid: (*Fourlamel case*); but not if filled in before the conclusion of the contract.

## 2. Rectification:

Only possible if contract valid *ex facie* the document: *Intercontinental* and *Republican Press cases*.

## 3. Co-sureties

If the document indicates that two or more sureties intend to enter into a joint contract, they must all sign the document in order for the contract to be valid.

3.1 Benefit of division. This is a defence raised by a surety who is sued alone when there are several sureties in respect of one and the same obligation. The surety also has right to a contribution from co-sureties.

#### 4. Defences and benefits generally

4.1 See your notes on defences. See also *Varvargos v Fidelity Bank Ltd* 1989 (4) SA 384 (W).

4.2 Benefit of excussion

4.3 Benefit of cession of actions

#### 5. Termination of the suretyship obligation

Discharge of the surety

Payment

Termination of principal obligation

Conduct prejudicial to the surety

#### Additional reading list covering real security

##### Real security

1. General introduction to real security

1.1 Mortgage and pledge

1.1.1 Main features of a Mortgage Bond: *Zietsman v Allied Building Society* 1989 (3) SA 166 (O) where the court referred to the instrument of hypothecation, the recording part and the obligatory part.

1.1.2 Parties: Mortgagor, mortgagee, pledgor, pledgee.

1.1.3 Capacity to contract

1.2 The causa element.

1.3 Accessory nature of the principal obligation:

- *Thienhaus v Metje & Ziegler Ltd* 1965 (3) SA 25 (A);
- *Klerk NO v Van Zyl & Maritz NNO and related cases* 1989 (4) SA 263 (SE);
- *Nedcor Bank Ltd v Kindo* 2002 (3) SA 185 (C); and
- *Commissioner of Customs & Excise v Randle's Brothers & Hindson Ltd* 1941 AD 369.

#### PLEDGE

The following information on pledge can be accessed in A J van der Walt and G J Pienaar, *Introduction to the Law of Property* 4<sup>th</sup> edition p 292 – 309

This lecture seeks to explain the following questions:

1. What does pledge mean?
2. What requirements must be met regarding the object of pledge?
3. What requirements must be met regarding control in the case of pledge?
4. What are the rights and duties of the pledge?
5. Does pledge differ from cession in *securitatem debiti*?

Please note that the latter includes the pledging of personal rights as security for a debt and general cession of security (for example, the cession of book debts).

- Both corporeal and incorporeal movable of a pledgor can be given to a creditor in pledge as real security for the payment of the principal debt.
- The pledge object.
- Only movable property can be delivered as security by the pledgor to the pledgee. Please note that only in the case of a notarial bond in terms of s1 (1) of Security by means of Movable Property Act s7 of 1993 that delivery of property does not take place in a pledge situation.
- In the case of corporeal property a single object or a collection of objects can be used as security.
- Incorporeal movable property can also be used as security.
- The fruits of an object form part of the object of pledge. If the right to fruits is granted to the pledgee in lieu of interest on the principal debt in terms of a *pactum antichreseas*, the pledgee can consume and alienate the fruit.

### Delivery

1. In order to establish and retain security in the form of a limited real right to the pledgor's property, the object of a pledge must be delivered to the pledgee and controlled by him. See further Van der Walt and Pienaar at 213.
2. Rights of the pledgee: See Van der Walt and Pienaar pp 294 on cession in *securitatem debiti* generally Van der Walt and Pienaar pp 305 – 306. The case of *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty)* 1993 1 SA 77 (A) refers to the *reversionary interest*. In the light of this case law refers to cession in *securitatem debiti*.

### **Hypothec as a form of real security**

On this topic see generally A J Van der Walt and Pienaar at 307 real security are sometimes granted to a person by operation of law, that is, in the absence of any agreement. "These security rights arise automatically if certain preconditions are present... Some of them are referred to as tacit hypothec (a hypothec can be any kind of security right, and in this case it is called 'tacit' because it is created to non-statutory security rights by operation of common law."

The following hypothecs will be dealt with:

- i) Landlord tacit hypothec. A landlord enjoys a tacit hypothec over the tenant's movable property which has been brought onto the premises, for arrear rent. It needs to be perfected by the attachment of property in terms of the court order. This hypothec is limited by section 2 of the Security by Means of Movable Property Act 57 of 1993. The limitation does not apply if the hypothec has been perfected.

- ii) Tacit hypothec of the municipality in respect of municipal services fees, surcharges on fees, property rates and other municipal taxes. In terms of section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 this hypothec enjoys preferences over any mortgage bond registered against the property. The case of *BOE Bank Ltd v Tshwane metropolitan Municipality* 2005 (4) SA 336 (SCA) confirmed this. The case involved competing claims between the bank and the municipality in respect of the proceeds realised in a sale in execution of a certain immovable property. The Bank argued that section 118 (3) must read to incorporate the time limit stipulated in s118(1) and that the charge contemplated in subsection (3) was therefore limited to debts that became due during the immediately preceding two years. The Court rejected this argument holding that s118(3) is, on its own wording, an independent, self contained provision.

### **Ranking of creditors in the event of the insolvency of the debtor**

This is determined by the provisions of the Insolvency Act 24 of 1936 and Judicial Matters Second Amendment Act 1998. Sections 95 to 103 of the Insolvency Act lay down the legal order of preference in accordance with which the Trustee/Liquidator must pay the creditor's claim. The legal order of preference was altered by the Judicial Matters Second Amendment Act 122 of 1998 which elevated the preferent claim afforded to employees of the insolvent for arrear salaries and wages. The legal order of preference is as follows:

#### **Secured claims (section 95)**

1. Claims secured by a special mortgage (mortgage bond or special notarial bond), landlords legal, (tacit) hypothec, lien or right of retention. In terms of s 89 (1) of the Insolvency Act, the costs of preserving maintaining an asset subject to a secured claim are to be paid out of the proceeds realised on such asset, as well as certain other costs of sequestration referred to in s 89 (1).
2. Funeral and death-bed expenses (section 96). The funeral expenses of the insolvent... subject to a maximum of 300-00 in total.
3. Salaries or wages of former employees of the insolvent. Salaries for a maximum of three months up to a maximum of R12 000-00.
4. Costs of Sequestration (Section 97).
5. Costs of Execution (Section 98).
6. Preference in regard to certain statutory obligatory (Section 99).
7. Taxes on Persons or the Income or Profits of Persons.
8. Preference under a General Bond (Section 102). This is a bond generally hypothecating movables, corporeal and incorporeal. This bond can be perfected by means of attachment of the property. Thereafter the bondholder acquires the status of secured creditor. He is regarded as a pledgee. See the interesting case *IKEA Trading Und Design SG v BOE Bank Ltd* 2005 (2) SA 7 (SCA) where the two competing bondholders in respect of the same assets. The BOE Bank was the holder of a general covering notarial bond passed in its favour by Woodlam Industries CC (Woodlam) over assets in 1991. The second bondholder was IKEA Trading Und Design SG (IKEA) which in 1998 had registered in its favour a special bond, purportedly under s1(1) of the Security by means of the Movable Property Act 57 of 1993, over assets of Woodlam listed in a schedule to the bond. BOE Bank applied to the Eastern Cape High Court for an order the liquidation and distribution

account in respect of Woodlam Industries cc be redrawn so as to reflect its preference by virtue of that bond. The applicant attached the validity of the other bond for not complying with the requirements of s1 (!) of the Act, BOE Bank succeeded in its application.

That meant that its security would rank ahead of IKEA's and other preferent concurrent claims. On appeal Lewis JA agreed with the finding of the High Court that the bond registered by IKEA over the movable property of Woodlam did not meet the requirements of s 1(1) of the Act. The section requires that the assets be specified and described in the bond in a manner which renders it readily recognisable. Students are expected to read the following informative articles on notarial bonds: "Notarial Bonds and Insolvency" by Professor Susan Scott in 1995 THRHR p 684 and Professor Michelle Kelly-Louw "The Preferential Right of the Local Government or the Body Corporate above that of the mortgage Bondholder During Insolvency Proceedings" 2004 volume 18 no 2 Speculum Juris p 168.

#### 9. Non-preferent claims (section 103).

The concurrent creditors are paid pro-rata in proportion to the amount of each claim. If the concurrent claims have been paid in full, the balance of the free residue shall be applied in respect of interest on the concurrent claims at 8% per annum. Additional comment on *Parate executie* is *SA Bank of Athens Ltd v Van Zyl* 2005 (5) SA 93 (SCA) at 99 where the court stated "Parate executie has long been acceptable under the common law (*Osry v Hirsch, Loubser & Co Ltd* 1922 (PD 531 at 541-7), provided that the terms of the agreement authorising the procedure are not unconscionable or incompatible with public policy (*SASFIN (Pty) Ltd v Beukes* 1989 1 SA 1 (A) at 13 J -14 A), for example, (a) entitling the creditor to determine the fact of the debtor's default, or (b) authorising the creditor to seize the debtor's property without the court's imprimatur (*Ncino Bonino v De Lange* 1905 TS 119 at 124)..." At page 100 the court went on to state the current legal position as follows: [14] In *Fugla (NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 (5) SA 248 (SCA) this court upheld the validity of a notarial covering bond which entitled the creditor, in the even of default on the part of the debtor, to take possession of the debtors' property, to sell the assets as security for the proceeds in settlement of the debt. The court a quo had granted the creditor an order perfecting its security." See also Lee Steyn "Perfection Clauses, Summary Execution (*Parate Executie*) Clauses, Forfeiture Clauses (Pacta Commission and Conditional Sales in Pledge Agreements and Notarial Bonds – The position classified" 2004 vol 25 (2) OBITER 443. The author makes the following points at 452: "A *Pactum Commissorum*, in a pledge agreement, is void... but a conditional sale or a provision that the creditor may take over the pledged article at a fair price then determined, is valid... a perfection clause is valid and may be enforced by the court... In relation to immovable property, *parate executie* is invalid..."

Execution of immovable property after the sheriff found the debtor's movable assets insufficient to satisfy the creditors claim.

Students are expected to read *Standard Bank of South Africa Ltd v Sanderson and others* 2006 (2) SA 264 (SCA).

#### A. Alternative Forms of Title

- i) **Sectional Title**: Sectional Title Act 66 of 1971 as amended from time to time.
- ii) **Background**: See Chapter 20 of Badenhorst et al Silberberg and Schoeman's *The Law of Property*, 4<sup>th</sup> Edition.
- iii) **Essence of a sectional title scheme**: the creation of sectional ownership.

iv) **Definition of terms:**

- acquisition of ownership in part of a building.

'Building' means a structure of a permanent nature erected or to be erected and which is shown on a sectional plan as part of a scheme.

A 'Scheme' is defined as a development scheme. The latter is defined as a scheme in terms of which a building or buildings situated or to be erected on land within the area of jurisdiction of a local authority is or are, for the purposes of selling, letting or otherwise dealing therewith, to be divided into two or more sections, or as contemplated in the proviso to section 2(a).

Co-ownership and common property.

The creation of sectional ownership gave rise to legislative innovations in the sphere of the law of the property. Badenhorst et al at pp 414 – 418 have noted the following:

- Creation of a new legal object.
- Creation of new types of use rights.
- Creation of a new type of juristic person.
- Challenge to existing legal principles.
- Changes to the common law of ownership.
- Changes to the system of transfer of registration.

v) Procedure for the establishment of a sectional title scheme, effect of registration and sale of units.

vi) Key managerial aspects of sectional title schemes.

- Participation quota
- Rules of the scheme

vii) **Managerial organs of the scheme**

- Body Corporate, trustees and general meeting
- Managing agent
- Administrator

viii) **Content of sectional ownership**

- Sectional owners entitlements and duties
- Common property and exclusive use areas
- Settlement of disputes

B. **"Share Blocks"**

By DW Butler, *The Law of South Africa*, by Professor WA Joubert, (ed) volume 25 Part I First Reissue.

i) **Definition**

A share block, according to Butler, consists of block of shares in a company granting the shareholder a personal right to occupy a particular part of a building owned or leased by the company. See also the definition of a shareblock in x1 (XXI) of the Shareblocks Control Act 59 of 1980 and *Rosslare (Pty) Ltd v Registrar of Cos* 1972 2 SA 524 (b). See also the recent case of *Flexi Holiday Club v La Lucia Sands Shareblocks Ltd* [2006] 2 ALL SA 479 (D).

The terms of occupancy are regulated by the constitution of a Company and by a use agreement between the shareholder and the company.

ii) **Historical Development**

Shareblocks have been used in South Africa (in Kwa Zulu-Natal) since early 1950's and followed by Cape Town in mid 1950's. By 1980 it was estimate that about 30,000 families in Durban area alone had obtained occupational rights to flats in terms of the Shareblocks scheme.

Abuses in the scheme led to the appointment of a commission of enquiry into the Development Schemes Bill. The Commission found that the continued existence of Shareblocks schemes was justified but there was a need for legislation to remove some of the defects in the schemes.

iii) **Shareblocks Control Act**

The recommendation of the commission culminated in the enactment of the Share Blocks Control Act 59 of 1980. The purpose of the Share Blocks Control Act is to control the operation of shareblock schemes and to provide for matters connected therewith. See further par 3 of LAWSA p3.

iv) **Shareblock Company**

A shareblock company is defined as a company incorporated under the Companies Act No 61 of 1973 whose activities include the operation of a shareblock scheme. See further par 4 LAWSA.

v) **Shareblock Scheme**

A share scheme is defined as a scheme in terms of which a share, in any manner whatever, confers a right to or an interest in the use of immovable property. Immovable property in relation to a share block company means land and include any building erected or to be erected in it. The company need not necessarily own the land but may be the lessee..." par 5 LAWSA.

vi) **Administration of Share Blocks Control Act**

See par 7 of LAWSA.

vii) **Planning and execution of Scheme**

For an outline of a typical share block scheme see par 8 of LAWSA.

viii) **Vehicles for Share block Schemes**

See par 9 of LAWSA.



ix) **Types of Share block companies and the formation of a share block company**

See para's 10 and 11 of LAWSA.

- x) Use agreement and capacity of share block company.
- xi) Consequences of *ultra vires* acts by the share block company.
- xii) Financing the development.
- xiii) Marketing of Share Blocks: offering of shares for sale to members of the public, formal requirements for contract for acquisition of shares, contents of contracts for acquisition of shares, other requirements and restrictions.
- xiv) Rights and obligations of the block shareholders: use of share block as security, rights under the use agreement, occupation rights, voting rights, dividends and payments on winding up, protection of members and prohibition against waiver.
- xv) Obligations of block shareholder and management of the scheme.

C. **Time Share Schemes**

See *Time-sharing* by DW Butter in WA Joubert (ed) *The Law of South Africa* Volume 27.

i) The Concept

According to Butler the concept of time sharing is a generic term indicating an interest in property in terms of which a number of persons successively have the exclusive right to occupy or use certain property for a specified or determinable recurrent period of time. "The essential characteristics of a time-share is that it confers on the holder an exclusive right to occupy or use property for specified or determinable recurrent periods of time for the duration of the time-sharing scheme. For example, the time-share holder may acquire the right to occupy a particular flat for the first two weeks of July each year..."

Time-share is primarily a commercial concept. The legal title or interest acquired by the holder of a time-share depends on the legal vehicle used for the scheme to which time-shares relates, for example, sectional title, share blocks or lease.

The term "time-sharing" is derived from the America computer industry where it means that the user of a computer acquires access to a computer only when he needs it and pays for the computer time which he has actually used. Time-share is usually associated with the occupation of apartments in multi- unit developments like block of flats or "hotels"...

- ii) Historical development: see par 255 LAWSA
- iii) Advantages: see par 256 LAWSA
- iv) Exchange faculties and floating time: par 256 LAWSA
- v) Statutory Control: par 258
- vi) Definition of time-sharing interest

- vii) Definitions of accommodation, of alienation and property time-sharing scheme: paras 260, 261 and 262 *LAWSA*.
- viii) Application to share blocks
- ix) Legal methods for time-sharing schemes and marketing of time-shares. See paras 266 – 278 *LAWSA*.

D. **Retirement Schemes**

See generally Badenhorst et al, pp 475.

E. **Alienation of Land Act 68 of 1981**

- i) Object of the Act
- ii) The Concept of alienation
- iii) Land
- iv) Signature
- v) Signature by agents
- vi) Contents of written contracts