ONR314

(Undergraduate)

Law of Business Entities

2012

English

Department Mercantile Law

Compiled by Prof E Snyman-Van Deventer

Updated by A Koorsen & HJ Moolman

Evaluator: Prof JV du Plessis

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16-credit module

160 notional hours module
1. INFORMATION CONCERNING THE COURSE

ONR 314 is a semester course presented during the first semester of the year. The course deals with Business Law and specifically with the Law of Partnerships; Close Corporations Law, Business Trusts and Stokvels. The course is presented by Adv. HJ Moolman and Ms A Koorsen..

The aim of the course is to familiarise learners by way of introduction with the general legal principles of the Law of Business Entities Law and their practical application. Formal lectures, transparencies, a textbook, prescribed material and self-study will be utilised during the course.

Learners are welcome to discuss any problem they may experience concerning the course with the lecturer concerned during lectures, consulting hours or by appointment.

2. AIM OF THIS GUIDE

The guide introduces the student to the following:

2.1 The contents of the course;

2.2 The work programme to be followed during the course including lecture times, test dates, etc;

2.3 The general rules regarding sources used as well as the presentation and evaluation of study material;
2.4 The administrative rules regarding predicates, admission to examinations, pass requirements, absence from tests and consulting hours.

3. STUDY MATERIAL
3.1 Prescribed Textbook
There is no prescribed textbook. Relevant material will be available on Blackboard.

4. WORK PROGRAMME
4.1 Lecture times and plan
Two Lectures A and two Lectures B are presented every week. A student is expected to attend one Lecture A and one Lecture B in the language of his or her choice and at the time of his or her choice every week.

4.2 Tests

For the time and venue of the test, please consult the official tests time-table of the Law Faculty.

Test marks are usually available in the second week after the test and carry equal weight in respect of the semester mark.

4.3 Lectures programme

Lecture 1 Administrative.

LAW OF PARTNERSHIP
Lecture 2 & 3 The partnership as legal concept
Lecture 4 The partnership as business form
Lecture 5 & 6 Internal Relations
Lecture 7 External Relations
Lecture 8 Dissolution

CLOSE CORPORATION LAW
Lecture 9 Background and concept
Lecture 10 & 11 Membership
Lecture 12 & 13 Internal relations
Lecture 14 & 15  External relations
Lecture 16  Personal liability

STOKVEL
Lecture 17  Defining a stokvel
Lecture 18  Legal nature of a stokvel

BUSINESS TRUSTS
Lecture 19  Defining a business trust
Lecture 20  Legal nature of a business trust

5. ADMINISTRATIVE INFORMATION

5.1 Mission and vision of the Department
The mission and vision of the Department is available for learners’ information at the lecturer.

5.2 Admission and pass requirement
Learners must consult the Year Book for the General Regulations and the Specific Regulations which apply to the Faculty of Law.

Semester mark:
In view of the fact that the tests are of equal value, the semester mark is calculated by adding your test marks and calculating a percentage.

Sub-minimum
A sub-minimum is not required in any of the two sections.

5.3 Test and Examination

5.3.1 University’s policy re tests
The University’s policy re tests is applicable to this course as well as the Faculty’s policy (see 5.3.2.1 hereunder)
5.3.2 Evaluation

5.3.2.1 Test (evaluation for the acquisition of a year mark)

There will be only three assessment opportunities per course during a semester. Each student must submit marks for two such opportunities in order to obtain a semester mark. The first- and second assessment opportunities will remain unchanged, as currently arranged by departments, which are two tests for this course. The third assessment opportunity will be a test which will consist of two parts:

Part I: The same scope of work as the first test
Part II: The same scope of work as the second test.

The third assessment opportunity can be taken as either a written or an oral test, or both written and oral, in respect of the applicable (previously unavailed of) part. A prerequisite to participate in the third opportunity will be that a student must already have taken part in either the first or second opportunity. The first two assessment opportunities will be in lecture free weeks, but the third assessment opportunity will not be in a lecture free week.

5.3.2.2 Promotion

Only students who have attained a semester mark of at least 70% will qualify for promotion. Should the student be promoted, this mark will constitute the final mark for the module in question. The promotion evaluation will not change this mark. (In other words, if you attained a semester mark of 73% and you are promoted, your final mark for the module will remain 73%). In order to determine whether a student may be promoted, he or she will be required to undertake a summative assessment. This summative assessment can (in accordance with the prevailing circumstances and the number of students involved) take the form of an oral or written assessment, or be in the form of an assignment. (The duration of a written assessment will be a maximum of 30 minutes). A clear demarcation of the work to be studied for the summative assessment, as well as the method of assessment to be employed, must be communicated to students (for example by placing a notice on the notice-boards). The same time-table as the one to be used for the third assessment opportunity will be used for the summative assessment. In
other words, the summative assessment will be undertaken on the date to which the third assessment opportunity has been assigned for that particular module.

**Exception:** Students who have to write the third assessment opportunity and who might after doing so qualify for promotion must make a special arrangement for a summative assessment with the lecturer involved as soon as possible (before the third assessment is written). This assessment will, in other words, take place *after* the third assessment opportunity, but *before* the examinations commence.

### 5.3.2.3 Examination

The final evaluation is a two-hour examination paper to be written in June 2012 as scheduled on the official examination timetable of the University.

**Admission to the examination:** No student will be admitted to the examination unless all prescribed tests were written. [See Reg A 14(c)] The pass mark is 50% (average examination and year mark).

NB: A SUBMINIMUM OF 40% MUST BE OBTAINED IN THE EXAMINATION PAPER. For the relevant general regulations and specific regulations the Yearbook of the University should be consulted.

You should verify this date on the final timetable. Should you make a mistake reading the exam timetable, you should immediately appeal to the exam-division for special consideration of the matter.

You must complete all the tests in order to obtain admission to the exam. In order to pass a course, you should obtain a total average of 50%, and satisfy sub-minimum requirements of 40% in the exam. To pass a course with distinction, you should obtain a final average of at least 75% (Regulation A 17).
5.3.3 **Special Exam**
A student qualifies for a special exam if he/she needs a maximum of TWO semester courses or ONE year course (courses failed) for the completion of a degree (Regulation A 21).

5.3.4 **Exam and test results**
Marks are made available on the bulletin boards in the C R Swart Building and no marks may be given telephonically.

A learner may discuss an examination paper with a lecturer and the head of department WITHIN 5 EXAM DAYS after results are posted, with a right to immediate appeal via the head of department to the dean (Regulation A 27).

Objection to any test results must be made within 7 DAYS after release of such results. Answer papers not collected during class by the learner him/herself from the lecturer, must collect their answer papers from either the lecturer or his assistants at a convenient time. If not collected within 3 weeks following the handing out in class, these papers will be destroyed. If the learner wishes to discuss his/her results with his or her lecturer, the answer papers in question must be produced.

5.4 **Dress**
Students are expected to dress neatly and suitably when attending lectures and writing tests.

5.5 **Consulting hours**
Adv. HJ Moolman
Johannes Bril building
Tel. 0514017084
moolmanhj@ufs.ac.za

Ms. A. Koorsen
CR-Swart building 8B
Tel. 0514017073
koorsena@ufs.ac.za
Before or after class or any time by appointment.

5.6 Departmental Head
Learners are welcome to discuss any aspect of the course with Prof JV du Plessis, Head of the Department, Johannes Brill Building 30.

Explanation: Compulsory class attendance

Since a previous regulation which made compulsory class attendance enforceable was abandoned in view of available alternative learning activities, various factors have compelled the faculty to reconsider the situation.

According to the 2008 Botes report, a significant percentage (75%) of alumni stated that, in their opinion, compulsory class attendance should be applied throughout all the years of study. Together with this, the 2009 SASSE report indicated that law students’ learner engagement is generally poor and that, for example, they fall far short of putting in the amount of learning hours that can be expected of them.

- **The current position is that a large group of students only turn up to write tests. Not only is this highly unprofessional, but it also creates a strong impression of being undisciplined.**

- **In the face of poor attendance there can be no question of continuous and formative assessment and the development of communicative abilities in classes. No form of meaningful, professional teaching (for example through interesting class presentations, audiovisual presentations, law laboratories, more modules that are oriented to legal practice) can be offered within a professional faculty without taking a professional stance and a display of discipline on the part of the students.**

The matter was again raised via the Faculty Council with the Executive Management, and the faculty was granted approval to make class attendance compulsory again.

Upon registration, therefore, students must already accept the fact that they are contractually bound to at least 75% engagement per module. This undertaking must be indicated in study guides and must be enforced by means of a regulation.

**It appears that the decision displays two aspects, i.e.:**
Implementation of compulsory class attendance and other methods of enforcing learning engagement (minimum of 75% of engaged learning activities per module).

Improvement/amendment of teaching and engaged learning activities, including continuous formative assessment and various interactive modes of teaching delivery such as contact sessions, group discussions, group work, additional assignments, class tests.

In view of the above-mentioned (p. 4) Student Code of Ethics and towards achieving the learning outcomes set out above (p. 19), aimed at a professional career, the faculty accordingly advises students to “utilise their work capabilities to their full potential”.

Besides the fulfilment of intellectual (cognitive) and skills objectives through its undergraduate education, the Faculty also strives through its strategies to achieve feeling/values (affective) objectives in its students.

More specifically, besides:

(A) Intellectual objectives
   (Knowledge, insight, application).

(C) Skills objectives
   (Communication skills, Management skills).

The following affective objectives are aimed at:

(B) Feeling/values objectives

Receptiveness level:
(a) Students must be ready/willing to learn.
(b) Students must be ready/willing to devote attention (time) to the module.

Reaction/interest level:
(a) Students must be interested in the module.
(b) Students must react to challenges in the module.

Appreciation level:
(a) Students must perceive the value of what they learn in the module.
(b) Students must have a positive attitude towards the broader law curriculum.
Composition level:
(a) Students must be able to judge the merits of matters, viewpoints and ideas against their own point of view.

Embedment level:
(a) Students must possess their own value system which makes it possible to order a complex world in an effective manner and to act in accordance with this value system.
(b) Students must strive towards:
   An independent view of life and the world.
   Maintaining professional ethics.
   A scientific disposition.
   Independent decision making and being able to adopt an independent point of view.

Reg. A19 – Re-admission and checking of a student
(a) Except where stipulated otherwise in the faculty calendars, a student is not allowed to register for a module more than twice except with permission of the dean in consultation with the head of the department concerned.

Presentation of modules from other universities
(Explanation of Reg A10)
1. All requests of students to present modules at other universities, should be motivated in writing.
2. (a) Should the relevant departmental chairperson not be convinced that an acceptable reason exists why the equivalent UFS module cannot be presented, a request of a student for recognition of equivalent module(s) that he/she wishes to present at another university, shall only be granted by the Dean in terms of Reg A31.
   (b) Should a student already have failed the equivalent UFS module twice or more than twice, his/her request for recognition of a module that he/she wishes to
present at another university, shall only be granted in exceptional circumstances, with due consideration of Reg A31.

(c) No exit-/final year modules may be presented through other universities.
BACKGROUND

Law of business enterprises continues on your knowledge regarding the law of obligations. Most of the business enterprises have the contract as element. Therefore, you need to make sure that you are conversant with the general principles of the law of contract. The law of delict is also applicable in respect of delictual liability. The constitutional law is also important for the law of business enterprises in the light of the Constitution of South Africa 106 of 1996 being applicable on all business enterprises in South Africa.

The law of business enterprises deals with the different types of enterprises which the business person, either in the formal or informal sector, can utilise to do business. The entrepreneur has the choice between the sole proprietorship, the partnership, the close corporation, the company and the business trust. We shall deal with the basic principles of the partnership, the close corporation, the stokvel and business trust during this semester. The company will be studied in ONR324.

HOW TO USE THIS GUIDE

This studyguide is an exposition of this semester’s lectures. The lectures are set out as follows in this guide:

- **Subject** (as a heading) – The heading indicates what the lecture is all about.

- **Prerequisites** – Indicates (where applicable) which prior knowledge or prior learning you need in order to successfully approach that subject.

- **Study objectives** – Expound the basic knowledge and skills you need to accomplish after you have completed the lecture. When you study/prepare for the exam/test, this will serve as your demarcation.

- **Study** – Prescribed material which you HAVE to study. It includes the applicable passages in your prescribed textbook. Refer to the checklist hereunder, indicating all the prescribed cases, for your own usage – tick off the case after you have read and
summarised it. When a case is used in more than one lecture, you can even copy your summaries to use in the different lectures. Just remember that the emphasis may differ slightly in different lectures.

- **Read** – Material which you may read by own choice. It is however recommended that these sources be consulted as it will improve your basic knowledge and understanding of the course.

- **Purpose of prescribed material** – A brief exposition of the importance of the prescribed material in order for you to study it within that context and to get a grip on the gist of the matter.

- **Activities** – Different activities are included to assist you in mastering and applying the work.

- **Vocabulary** – A list of important terminology is included. You need to look up the meaning of these words. There is a space provided at each lecture in this guide where you can complete the meaning of the terms.

- **Questions for revision** – These questions are basically included for your own usage to test your knowledge. These questions are not necessarily asked in tests and examinations, but will guide you through the work and, if you are able to answer all these questions, you will also be able to answer any question in a test or examination.

- **Control** – At the end of each lecture you will find a ‘control panel’ which will refer you to the applicable passage in the textbook which you had to study. You may check whether you have read, summarised and/or studied the material.

**MEANING OF ACTION WORDS FOR ASSESSMENT**

This list of words is provided in order for you to understand what is expected of you during evaluation. You already studied this list in Criminal Law (Adv Kruger).

**Name/List:** Give the information requested in short sentences – no discussion.

**Describe:** Give a detailed account of a topic by mentioning the parts, characteristics or qualities of the matter.
Discuss: Explain the meaning of something by using logic arguments.
Identify: Give the main points relating to the subject.
Give an overview: Give a summary (shortened version) of the main points relating to the issue and comment on them.
Outline: Give a general summary. It should contain a series of main ideas supported by secondary ideas. Omit minor details. Show the organisation of the ideas.
Summarise: Give the main points of something. Do not include details, illustrations, critique or discussion.
Illustrate: Use a sketch, diagram or graphic presentation or explain a concept or solve a problem.
Bring in relation to: Clearly indicate the relation between different aspects of a topic and show what the connection or similarities are.
Interpret: Comment on the available facts, with reference to appropriate examples. Give a clear indication of your own understanding of the matter.
Contrast: Emphasise the differences, distinctiveness and inequalities of facts or events.
Compare: Put the facts, events or problems in opposition and indicate similarities and differences; or analyse the similarities and differences between statements, ideas, etc. (Take note of the difference between contrast and compare.)
Comment on: Give your own opinion on a given matter. Say whether you agree or disagree with a certain statement.
Criticise: Give your reasoned opinion of something, showing its good and bad points. Your opinion must be supported by the facts and reasoning. To criticise does not mean that you must attack.
Examine/analyse: Split the given information into its parts and critically discuss the relevant issues.
Explain: Give a clear and precise account of something. Elucidate with examples and/or illustrations and motivate your conclusions or results.
Evaluate: Judge the quality of something on the bases of specific points of departure of criteria. Also give your own opinion. Do not discuss.

LAW REPORTS/COURT CASES: WHAT IS EXPECTED FROM YOU?

The exposition hereunder is already known to you. U dealt with it in Criminal Law with adv Kruger.
When a case is prescribed for you to study, follow the following steps:

**IDENTIFY TOPIC**
Ascertain: As part of *what topic* was the case prescribed, e.g. Partnership: liability

**STUDY TOPIC**
First *study* this topic (general legal principles) in your guide and text book

**CASE**
Now, *read* the case: focus on the topic
- First keywords
- headnote (obtain summary)
- facts (beginning of judge’s judgment)
- ruling (most of the times at the end of the case)
- rest of case (obtain detail)

Cases are usually evaluated in the following format:

<table>
<thead>
<tr>
<th>Discuss the</th>
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<tr>
<td>(a) facts, (very briefly)</td>
<td>(1)</td>
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<td>(b) legal question,</td>
<td>(1)</td>
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<td>(c) decision and</td>
<td>(1)</td>
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<tr>
<td>(d) <em>ratio decidendi</em></td>
<td>(1 or more marks)</td>
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Answer it as follows:

**FACTS**
- briefly the *relevant* facts (Usually in the beginning of the decision)

**LEGAL QUESTION**
- What is in dispute? (legal issue) = (Start with headnote for gist, detail in rest of case)

**DECISION**
- Answer legal question (yes/no) = Obtain decision at the end of the case

**RATIO DECIDENDI**
- *Reason* for the court’s decision = Most important part of the answer – be complete!!
## PRESCRIBED CASES

### PARTNERSHIPS

<table>
<thead>
<tr>
<th>PRESCRIBED CASE</th>
<th>READ</th>
<th>SUMMARISE</th>
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<tr>
<td><strong>Ally v Dinath</strong> 1984 2 SA 451 T</td>
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<td><strong>Carmel Trading Co Ltd v Commissioner, South African Revenue Services</strong> 2008 2 SA 433 SCA</td>
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<td><strong>Chipkin (Natal) (Pty) Commissioner, SARS</strong> 2005 5 SA 566 SCA</td>
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<td><strong>Commissioner, South Africa Revenue Services v Hawkers Air Services</strong> 2006 4 SA 292 SCA</td>
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<td><strong>Geldenhuys v East and West Investment (Pty) Ltd</strong> 2005 2 SA 74 SCA</td>
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<td><strong>Joubert v Tarry and Co</strong> 1915 TPD 277</td>
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<td><strong>Mulhman v Mulhman</strong> 1981 4 SA 632 W</td>
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<td><strong>Pezutto v Dreyer</strong> 1992 2 SA 379 A</td>
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<td><strong>Purdon v Muller</strong> 1961 2 SA 211 A</td>
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<td><strong>Robson v Theron</strong> 1978 1 SA 841 A.</td>
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<tr>
<td><strong>Venter v Naude</strong> 1951 1 SA 156 O</td>
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### CLOSE CORPORATIONS

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<tr>
<th>PRESCRIBED CASE</th>
<th>READ</th>
<th>SUMMARISE</th>
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<tr>
<td><strong>Airport Cold Storage (Pty) Ltd v Ebrahim</strong> 2008 2 SA 303 C</td>
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<td><strong>De Franca v Exhaust Pro CC and Another</strong> 1996 4 All SA 503 SE</td>
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<td><strong>Die Dros (Pty) Ltd Telefoon Beverages CC</strong> 2003 4 SA 207 C</td>
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<tr>
<td>Case/Party Name</td>
<td>Year</td>
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<tr>
<td>Du Plessis v Oosthuizen</td>
<td>1999</td>
<td>2</td>
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<td>G&amp;C Construction v De Beers</td>
<td>2000</td>
<td>2</td>
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<tr>
<td>Hanekom v Builders Market Klerksdorp (Pty) Ltd</td>
<td>2007</td>
<td>3</td>
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<td>Klass v Summers</td>
<td>2008</td>
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<td>L&amp;P Plant Hire v Bosch</td>
<td>2002</td>
<td>2</td>
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<td>Schwartz v Pike</td>
<td>2008</td>
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**The Business Trust**

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<th>Case/Party Name</th>
<th>Year</th>
<th>Volume</th>
<th>Page</th>
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<tr>
<td>Cupido v Kings Lodge Hotel</td>
<td>1999</td>
<td>4</td>
<td>257 E</td>
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<tr>
<td>Goodricke v The Registrar of Deeds, Natal</td>
<td>1974</td>
<td>(1)</td>
<td>404 N</td>
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<td>Land and Agricultural Bank of South Africa v Parker</td>
<td>2005</td>
<td>2</td>
<td>77</td>
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<tr>
<td>Nieuwoudt v Vrystaat Mielies (Edms) Bpk</td>
<td>2004</td>
<td>3</td>
<td>486 SCA</td>
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ADMINISTRATION

THEME 1: LAW OF PARTNERSHIP

THE PARTNERSHIP AS LEGAL CONCEPT

**Study objectives:**
Upon completion of this lecture, you must be able to:
1. Define the partnership.
2. Name and briefly discuss the general characteristics of the partnership.
3. Briefly and in broad outline describe the historical background of the partnership.
4. Discuss the sources of the South African law of partnership.
5. Discuss the legal nature of the partnership and the application of the two theories in respect of the legal nature and name the exceptions.
6. Name and briefly discuss the types of partnerships in the South African law of partnership and distinguish between these.

**Study:**
1. Chapter 2 "The Partnership as Legal Concept" pp10-17 in *Entrepreneurial Law*.
2. *Muhlmann v Muhlmann* 1984 3 SA 102 A.
3. *Ally v Dinath* 1984 2 SA 451 T.
4. *Commissioner, South Africa Revenue Services v Hawkers Air Services* 2006 4 SA 292 SCA
5. *Chipkin (Natal) (Pty) Commissioner, SARS* 2005 5 SA 566 SCA
6. *Venter v Naude* 1951 1 SA 156 O

**Purpose of the prescribed material:**

*Ally v Dinath* 1984 2 SA 451 T: This decision is about a universal partnership, but also shows how a partnership can dissolve through conduct/character of the partners.
Commissioner, South Africa Revenue Services v Hawkers Air Services 2006 4 SA 292 SCA: The case is about the legal nature of a partnership and the influence of Pde-V appeal court decision. This decision of the SCA rejects the Pde-V decision. (See attachment A)

Chipkin (Natal) (Pty) Commissioner, SARS 2005 5 SA 566 SCA: A partnership cannot have a taxable income as, in terms of the Income Tax Act, it is not a taxable entity. Allowances and deductions are calculated according to each partner’s taxable income.

Venter v Naude 1951 1 SA 156 O: A decision about extraordinary partnerships.

Activity

See whether you can understand the following passage from Pothier, translated from the original French into Dutch by Van der Linden:

Het contract van Societeit of Compagniefchap is een Contract, waar bij twee of meer perfoonen eene zekere zaak in’t gemeen aanbrengen, of zig verbinden te zullen aanbrengen, om daar mede gemeenfchappelijk eene eerlike winstte doen, met wederzijdsch verband, om dezelve aan elkander behoorlijk te verantwoorden.

Now compare it to the following English translation by Tudor:

Partnership is a contract, by which two or more persons put, or oblige themselves to put, something in common, in order to make there from in common a lawful profit, of which they reciprocally bind themselves to render each other an account.

Now compare both of these to the definition of a partnership given in your textbook. Can you understand what a difference language makes and can you imagine how difficult it must be to make sense of the archaic French in which our main source of the common law on partnership is written?

Glossary:

Partnership: ______________________________________________________________

______________________________________________________________

Associative element: _________________________________________________________

______________________________________________________________

Entity theory: _____________________________________________________________

______________________________________________________________
Aggregate theory: _____________________________________________________________

____________________________________________________________________________

Silent partnership: _____________________________________________________________

____________________________________________________________________________

Partnership en commandite: _____________________________________________________

____________________________________________________________________________

Universal partnership: __________________________________________________________

____________________________________________________________________________

Questions for revision:
1. Name the various meanings that can be given to the concept of partnership. (3)
2. List the general features of partnership. (5)
3. How many partners may a partnership have? (1)
4. Can a partnership be formed for a non-pecuniary object? (1)
5. What does associative element means? (1)
6. Name the sources of the South African law of partnership. (2)
7. Does South Africa have partnership legislation? (1)
8. Name the most important Roman-Dutch jurists who wrote authoritatively on the law of partnership. (6)
9. Explain the importance of Pothier as a source of South African law of partnership. (2)
10. Explain the entity theory. (3)
11. Explain the aggregate theory. (3)
12. Which theory is supported in South Africa? (1)
13. Name the instances under which a partnership will be treated as a separate entity. (2)
14. What are the implications of the fact that a partnership is not a juristic person? (4)
15. Name the types of partnerships in South African law. (3)
16. Name the different universal partnerships. (2)
17. Name the different extraordinary partnerships. (3)
18. List the differences between the silent partnership and partnership en commandite (2)
**Control:**

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<th>Read</th>
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<tr>
<td>Chapter 2</td>
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<td><em>Mulhman v Mulhman</em> 1981 4 SA 632 W.</td>
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**THE PARTNERSHIP AS BUSINESS FORM**

**Prerequisites:**

Before you can accomplish these study objectives, you firstly had to accomplish the objectives of Lectures 1 & 2. Your knowledge on the law of contract is very important in this lecture.

**Study objectives:**

Upon completion of this lecture, you must be able to:

1. Name the most important requirements of a partnership contract.
2. Identify and discuss the *essentialia* of the partnership and apply these to facts.
3. Discuss relevant authority.
4. Identify the *naturalia* of the partnership.
5. Discuss in full the partnership fund.

**Study:**

3. *Pezutto v Dreyer* 1992 2 SA 379 A
4. *Purdon v Muller* 1961 2 SA 211 A.

**Purpose of the prescribed material:**

*Joubert v Tarry and Co* 1915 TPD 277: This case is the *locus classicus* on the *essentialia* of the partnership.

*Pezutto v Dreyer* 1992 2 SA 379 A: A decision by the Court of Appeal on the *essentialia*.

*Purdon v Muller* 1961 2 SA 211 A: A decision by the court on the *essentialia* of the partnership.

**Glossary:**

Essential elements: ____________________________________________________________

____________________________________________________________________________

*Essentialia*: __________________________________________________________________

____________________________________________________________________________

*Naturalia*: ____________________________________________________________________

____________________________________________________________________________

Sequestration: ________________________________________________________________

____________________________________________________________________________

Co-ownership: ________________________________________________________________

____________________________________________________________________________

Partnership fund: ______________________________________________________________

____________________________________________________________________________

Partnership assets: ____________________________________________________________

____________________________________________________________________________

**Questions for revision:**

1. Name the *essentialia* of partnership. (4)
2. Explain the contribution that a partner must make towards the partnership (5)
3. Explain profit as the object of partnership. (3)
4. Explain patrimonial gain for each. (2)
5. Name the *naturalia* of partnership. (5)
6. What is the partnership fund? (1)
7. Explain co-ownership of partners. (3)
8. Explain the undivided share of a partner in partnership assets. (5)
9. Explain restricted usage of partnership assets. (5)

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**THEME 3: LAW OF PARTNERSHIP**

**INTERNAL RELATIONS**

**Study objectives:**

Upon completion of this lecture, you must be able to:

1. Define and discuss the relations between partners inter se.
2. Discuss the rights of partners.
3. Discuss the duties of partners.
4. Discuss the way in which these rights and duties can be enforced.

**Study:**

1. Chapter 4 "Internal relations" pp30-36 in *Entrepreneurial Law*.
2. *Robson v Theron* 1978 1 SA 841 A.
4. **Purdon v Muller** 1961 2 SA 211 A:

**Purpose of prescribed material:**

*Robson v Theron* 1978 1 SA 841 A: A case of the Court of Appeal setting out the remedies of partners *inter se*.

*Caramel Trading Co Ltd v Commissioner, South African Revenue Service* 2008 2 SA 433 SCA: In this decision it was decided that a former partner of a partnership had no proprietary claim to the dissolved partnership property, however, such could have a claim for a proportionate share of the proceeds after the liquidation of the assets.

*Purdon v Muller* 1961 2 SA 211 A: Informs of the substance of a relationship of good faith between partners.

**Glossary:**

*Uberrima fides*: ____________________________

*Societas leonine*: ____________________________

*Mutual mandate*: ____________________________

*Reasonable care*: ____________________________

*Actio pro socio*: ____________________________

*Actio communi dividundo*: ____________________________

**Questions for revision:**

1. Name the rights of partners *inter se*. (5)
2. Name the duties of partners inter se. (4)
3. Explain the duty of good faith between partners. (3)
4. Name the remedies available to partners to enforce their rights inter se. (4)

RIGHTS AND DUTIES BETWEEN PARTNERS INTER SE

1. RELATIONSHIP BETWEEN PARTNERS

A partnership is a contract uberrima fidei. The relationship between partners is the same as that between brothers, namely one of mutual trust and confidence.

The fiduciary relationship (this relationship as between brothers) gives rise to certain rights and duties/obligations. The partners have these specific rights and duties as partners.

The relationship between the partners is primarily determined with reference to the partnership agreement. In the absence of stipulations concerning the rights and duties of the partners in the partnership agreement, the common-law principles will be applicable.

2. RIGHTS OF PARTNERS

5 rights of the partners inter se: right to share in profit; the right to participate in management; right to compensation; right to inspect partnership books and accounts; right to distribution of assets on dissolution.

2.1 RIGHT TO SHARE IN PROFIT

* the purpose of a partnership is to make a profit and to divide the profit between the partners

* the proportion of each partners’ share can be determined by the partnership in the partnership agreement

* but no partner may be excluded form sharing in profit

* what happens when a partner is excluded form sharing in the profit of the partnership? Such an agreement is called a societas leonine.

* It is still an open question whether the insertion of such a clause in a partnership agreement has the effect that no partnership is formed, or whether the clause itself is merely void, thus leaving the partners to share profits in terms of common-law principles. Continental authorities favour both these viewpoint. There is also authority in certain legal systems that although the
presence of the so-called loin clause stand in the way of a partnership, the clause itself and the contract is valid as a donation agreement.

* can a partner be excluded from sharing in losses? *(naturalia* - can be determined by the partners inter se)*

* the partners are free to determine the amount of each partner's share in the partnership agreement

* in the absence of such an agreement, profits are shared in proportion to the partners' respective contributions to the firm

* where the value of the individual contributions cannot be ascertained, or where the contributions are equal in value, the profits are shared equally.

**2.2 RIGHT TO PARTICIPATE IN MANAGEMENT**

* each partner has a right to participate in the management of the partnership and to perform any management functions within the scope of the partnership business on behalf of the partnership without the consent of his fellow partners

* this means that every partner has the implied authority to conclude transaction within the scope of the partnership business and that he can bind his co-partners in this respect.

* mutual mandate = *(naturalia)*

* so a partners' right to participate in management can be excluded or limited or varied

* because of the right to participate in management, a partner is also entitled to use partnership property, but for partnership purposes only and are not allowed to use the partnership property for private purposes if it would conflict with the carrying on of the partnership business

**2.3 RIGHT TO COMPENSATION**

* in the absence of any agreement to that effect, a partner is not entitled to claim remuneration or compensation for services rendered by him as a partner to the partnership

* but the partner may agree that one or more of them is to receive a salary

* if a partner has performed special work/services beyond that performed by the other partners, and which was not contemplated as part of his duties under the partnership contract, he will be entitled to claim remuneration or compensation for his services

* a partner is entitled to be refunded for expenses which he has incurred in connection with the partnership affairs over and above his own share of expenses
* a partner is also entitled to be indemnified for losses which he has personally sustained whilst carrying on the business of the partnership.

2.4 RIGHT TO DISTRIBUTION ON DISSOLUTION

* a partner holds an undivided share in the partnership assets until the partnership dissolves and the partnership estate is liquidated
* after all the debts of the partnership have been paid, a partner has the right to claim his share in the surplus assets of the partnership
* during liquidation the assets of the partnership are usually converted into money and the partner's share in the remaining cash (if any) is paid out to him.

2.5 RIGHT TO INSPECT PARTNERSHIP BOOKS AND ACCOUNTS

* each partner is entitled to access to the accounting records of the partnership
* access to financial information is necessary to enable the partner to make management decisions
* in the absence of any restrictive agreements between the partners, a partner may inspect the records at all reasonable times
* he may also appoint another person, e.g. an accountant to analyse and explain the records to him
  but only if the involvement of the third party (accountant) will not lead to a breach of confidentiality which will injure the partnership
* a partner is also entitled to, within reasonable limits, to make extracts and copies of the records
* a partner may also insist that the records be kept at the partnership's principal place of business.
3. DUTIES

If you have a right, the opposite of that right is an obligation or a duty. for every right there is a duty.

3.1 CONTRIBUTION

* each partner has to contribute something to the partnership
* money, labour, rights, knowledge, etc

3.2 SHARING IN LOSSES

* a partner shares in net profit, as well as net loss
* in the absence of a contrary agreement, the general rule is that the net losses must be shared in the same proportion as profit

3.3 DUTY OF CARE

* each partner must display reasonable care in managing the partnership affairs
* he can be held liable for damages if, due to his negligence, the partnership property/estate is damaged of affected
* reasonable man-test?
* good father / pater familias
* the manner in which the partner manages his own affairs?
* view of SA courts: the partner must display reasonable care for somebody with his knowledge and expertise.

3.4 DUTY OF FULL DISCLOSURE

* partnership = relationship between brothers (uberrima fidei)
* a partner may not acquire and retain for himself any benefit or advantage which falls within the scope of the partnership business
* Olifants Tin "B" Syndicate two rules:
  i) the partner must disclose all secret profits;
  ii) a partner must guard against a conflict of interest

4. ENFORCEMENT OF PARTNERS' RIGHTS AND DUTIES
- Robson v Theron

- Two actions: actio pro socio and actio communi dividundo

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**THEME 4: LAW OF PARTNERSHIP**

**EXTERNAL RELATIONS**

**Study objectives:**
Upon completion of this lecture, you must be able to:

1. Discuss the contractual liability of partners.
2. Discuss the delictual liability of partners.
3. Discuss the criminal liability of partners.
4. Discuss litigation by and against partnerships.
5. Discuss the liability of partners in partnership debts.
6. Distinguish between the liability of the partner for partnership debts before and after dissolution of the partnership.

**Study:**

2. Geldenhuys v East and West Investments (Pty) Ltd 2005 2 SA 74 SCA
3. Carmel Trading Co v Commissioner, SARS 2008 2 SA 433 SCA
Purpose of prescribed material:

*Geldenhuys v East and West Investments (Pty) Ltd* 2005 2 SA 74 SCA: This appeal court decision deals with the liability of the partners for the debts of the partnership.

*Carmel Trading Co v Commissioner, South African Revenue Service* 2008 2 SA 433 SCA: In this decision it was decided that a former partner of a partnership had no proprietary claim to the dissolved partnership property, however, such could have a claim for a proportionate share of the proceeds after the liquidation of the assets.

*Venter v Naude* 1951 1 SA 156 O: Informs of the liability of extraordinary partners for the debts of the partnership.

**Glossary:**

Power of representation: ________________________________

________________________________________________________________________

Authority: __________________________________________________________________

________________________________________________________________________

Mutua praepositio: __________________________________________________________________

________________________________________________________________________

Estoppel: __________________________________________________________________

________________________________________________________________________

Vicarious liability: __________________________________________________________________

________________________________________________________________________

**Questions for revision:**

1. Name the three main requirements for conclusion of a contract on behalf of a partnership. (3)
2. Name the requirements for a contract concluded on behalf of the partnership (4)
3. Explain the principle of *mutua praepositio*. (10)
4. Explain the authority of a partner to conclude contracts on behalf of the partnership. (5)
5. Explain when a third party may use the defence of estoppel, when dealing with a partnership. (5)
6. Explain the requirement that a contract must be concluded in the name of the partnership. (5)
7. Explain the doctrine of the undisclosed principal. (5)
8. Explain the application of the doctrine of the undisclosed principal in the law of partnership. (5)
9. Is a partner liable for the delicts committed by his co-partners? If so, when? (3)
10. What is vicarious liability? (2)
11. Can a partnership commit a crime? (2)
12. Is a partner liable for crimes committed by a co-partner? (2)
13. Can a partnership sue or be sued? (2)
14. Who are liable for partnership debts during the existence of the partnership? (2)
15. Can a partner sue for the recovery of a partnership debt on his own? (2)
16. When can a creditor claim the partnership debt from an individual partner? (2)
17. Explain joint and several co-debtors. (4)

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THEME 5: LAW OF PARTNERSHIP

DISSOLUTION
**Study objectives:**
Upon completion of this lecture, you must be able to:
1. Name the grounds for dissolution of the partnership and briefly discuss each one.
2. Discuss the formalities for the dissolution of a partnership.
3. Discuss in full the consequences of the dissolution of the partnership in general.
4. Discuss the consequences of the dissolution of the partnership on the relations between partners.
5. Discuss the consequences of the dissolution of the partnership on the relations between partners and third parties.

**Study:**
1. Chapter 6 "Dissolution" pp 46-52 in *Entrepreneurial Law*.
2. *Commissioner, SARS v Hawkers Air Services* 2006 4 SA 292 SCA
3. *Carmel Trading Co Ltd v Commissioner, SARS* 2008 2 SA 433 SCA

**Purpose of prescribed material:**
*Commissioner, South African Revenue Services v Hawkers Air Services* 2006 4 SA 292 SCA:
The decision is about the sequestration of a partner of a partnership.

*Carmel Trading Co Ltd v Commissioner, South African Revenue Services* 2008 2 SA 433 SCA:
In this decision it was decided that a former partner of a partnership had no proprietary claim to the dissolved partnership property, however, such could have a claim for a proportionate share of the proceeds after the liquidation of the assets.

**Glossary:**
Dissolution: ________________________________________________________________

____________________________________________________________________________

Sequestration: ________________________________________________________________

____________________________________________________________________________

Liquidation: __________________________________________________________________

____________________________________________________________________________

Distribution: __________________________________________________________________
**Questions for revision:**

1. Name the grounds for dissolution of a partnership (10)
2. Explain the formalities for dissolution of a partnership. (3)
3. Does dissolution of the partnership terminate the relationship between partners? (2)
4. Is partnership still liable for partnership debts after its dissolution? (2)
5. Is a debtor of a partnership still liable towards the partnership for payment of the debt after the dissolution of the partnership? (2)

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ANNEXURE A: INTRODUCTORY REMARKS ON THE LEGAL NATURE OF PARTNERSHIP – PROF. J.J. HENNING

The general rule

A partnership is seen as a group of persons acting jointly. The general rule is that a partnership is not a legal entity separate from its members. The rights and duties of the partnership are the rights and duties of the parties, and the property is owned in common by the partners in undivided shares. It, therefore, appears that a partnership does not have a legal existence separate from the partners.

In principle, a contract concluded between two partnerships with the same members can, therefore, be regarded as void since a partnership is not a *persona iuris* and a person cannot contract with himself/herself in the same capacity.

In addition, section 31 of the Companies Act 61 of 1973 stipulates that no association of persons formed for the purpose of carrying on any business that has for its object the acquisition of gain by the association or by the individual members thereof shall be a body corporate, unless it is registered as a company under this Act or is formed in pursuance of some other law.

As a result of considerations of the practical convenience of dealing with a single entity rather than with a group of individuals, a partnership is treated as a separate entity in particular cases, and it has been described as a “quasi persona”. Considerations of convenience resulted in a partnership being regarded as a separate entity in a number of cases. However, these cases do not obviate the general rule that a partnership is not a body corporate like a company.

Civil actions by or against a partnership

Although it is often emphasised that legally a partnership in itself does not exist separate from the partners, an individual partner cannot be summoned for a partnership debt during the existence of the partnership, and a single partner cannot without more ado institute action to enforce a claim of the partnership. Action must be instituted by or against all the partners jointly or in name of the partnership.

---

7 Muller v Pienaar 1968 3 SA 195 (A).
8 Strydom v Protea Elendomsagente 1979 2 SA 206 (T).
9 Potchefstroom Dairies v Standard Milk Supply Co 1913 TPD 506.
An action by or against the partnership in own name is, in fact, an action by or against the partners jointly.\textsuperscript{11}

This matter is regulated by Rule 14 of the \textit{Supreme Court Rules} and Rule 54 of the \textit{Magistrate’s Court Rules}. In terms of Rules 14 and 54, a partnership may sue or be sued in its own name in both courts. However, the rules are not mandatory, merely permissive, with the result that actions can also be instituted by or against all the partners jointly. In both courts, any party can by way of a notice require that a partnership that sues or is sued in own name provide a statement of the names and addresses of the persons who, at the time of the cause of debt, were partners in the partnerships so that the consequent judgement can also be passed against them. Should the claimant acquire a sentence against the partnership without revealing the names of the partners, execution may only be levied on the partnership assets, and not the separate estates of the partners.\textsuperscript{12}

\textit{Supreme Court Rule} 14(5)(h) and \textit{Magistrate’s Court Rule} 40(3) are of special interest in so far as the view of a partnership as a separate entity is concerned. They provide that if sentence is passed against a partnership, the partnership assets must first be depleted before the sentence can be passed against the separate property of the partners.

The question as to whether a partnership can institute an action against a partner is also of interest. In \textit{Shingadia Bros v Shingadia},\textsuperscript{13} a partnership between A, B, and C leased part of the partnership property to A. A neglected to pay the rent, and the question arose as to who must institute action against A. The court decided that although the normal requirement is that all partners must jointly institute action, the requirement in this case cannot hold because A will then be both claimant and defendant in the same case. The court decided that the other partners must institute action against the defaulting partner, with the plea that the amount owing must be deposited in the partnership fund. The correct method is thus not that A, B, and C must institute action against A, but that only B and C must institute action against A.

The result is thus that if one partner, who is authorised to do so by some or by all of the other partners, except for the partner who is the defendant, institutes action on behalf of each of the other partners separately against the defending partner for the satisfaction of his/her obligations towards the partnership, the action should be allowed. However, if the partner who institutes action is authorised thereto by all the partners in the partnership, the action for exception ought to be tolerated.

\textbf{Sequestration of the partnership estate}

\textsuperscript{12} \textit{Rees v Feldman} 1927TPD 884.
\textsuperscript{13} 1958 1 SA 582 (FSC).
According to Muller v Pienaar\textsuperscript{14} and Michelow v Premier Milling Co,\textsuperscript{15} for the purposes of Insolvency Act 24 of 1936, a partnership is treated as an entity separate from its members. In Gardee v Dhanmanta Holdings,\textsuperscript{16} it was, for example, also decided that the debtor is the partnership alone.

Although a partnership is not a body corporate, the starting point of the Insolvency Act 1936 is that all partnership assets must be used for paying the creditors of the partnership, while private creditors are allocated the assets in the separate estates of the partners. Therefore, creditors of the partners are not entitled to prove claims against the partnership estate, and creditors of the partnership are not entitled to prove claims against the separate estates of the partners. If a balance remains in one of the separate estates of the partners following payment to the creditors, the balance is available to the curator of the insolvent partnership estate in so far as it may be necessary to settle the debts of the partnership. If a balance remains in the partnership estate after all the creditors have been paid, the curator of the insolvent estate of a partner is entitled to the same share as the partner would be entitled to if his/her estate were not sequestrated.

Section 92(5) of the Insolvency Act 1936 stipulates that separate liquidation and distribution accounts must be drawn up with respect to the partnership estate and the estate of each partner.

To establish whether the application by a partner for rehabilitation is approved or not, the claims instituted against his/her private estate are taken into account, and not the claims against the estate of a partnership of which he/she was a member. The court can, however, take into account the conduct of the partner in respect of partnership matters.\textsuperscript{17}

THE VALIDITY OF THE CONTRACT

In principle, a partnership can only be a party to a contract if it is a body corporate. The validity of the contract should depend on the legal nature of a partnership. In Potchefstroom Dairies v Standard Milk Supply Co, it is stated that\textsuperscript{18}

... it makes little difference whether we regard a partnership as a persona or whether we regard it as a contractual compound of several personae. In the one case the firm name if properly signed is the signature of the persona, in the other case it is the signature of the contractual compound. And the difference between the two seems more academic than substantial ...

In Muller en 'n Ander v Pienaar,\textsuperscript{19} it is unequivocally stated that:

\textsuperscript{14} supra.
\textsuperscript{15} 1960 2 SA 59 (W).
\textsuperscript{16} 1978 1 SA 1066 (N).
\textsuperscript{17} Ex parte Cohen 1974 4 SA 674 (W).
\textsuperscript{18} supra 513.
\textsuperscript{19} supra.
[a]lthough for some purposes such as for instance insolvency a partnership is considered a separate entity, it is indeed not a body corporate. A partnership has legally no existence separate from the partners such as for instance a company.

The two apparently conflicting judgements may confuse students. South African authors accept as general postulate that a partnership is not a body corporate, although there are certain exceptions. For the present purposes, this aspect is best explained by Lindley:

THE MERCANTILE AND LEGAL NOTION OF A FIRM

The mercantile view
Partners are called collectively a firm. Merchants and lawyers have different notions respecting the nature of a firm. Commercial men and accountants are apt to look upon a firm in the light in which lawyers look upon a corporation, i.e. as a body distinct from the members composing it, and having rights and obligations distinct from those of members.

Hence, in keeping partnership accounts, the firm is made debtor to each partner for what he brings into the common stock, and each partner is made debtor to the firm for all he takes out of that stock. In the mercantile view, partners are never indebted to each other in respect of partnership transactions but are debtors and creditors of the firm ...

The legal view
But this is not the legal notion of a firm. The firm is not recognised by lawyers as distinct from the members composing it. (T)he law, ignoring the firm, looks to the partners composing it, ... what is called the property of the firm is their property, and what are called the debts and liabilities of the firm are their debts and liabilities. In point of law, a partner may be the debtor and creditor of his co-partners, but he cannot be a debtor or creditor of the firm of which he is himself a member ... this non-recognition of the firm ... is one of the most marked differences between partnerships and incorporated companies.

Although much is to be said for the recognition of the partnership as a legal entity, and there are indications that a partnership (maatschap, societeit, compagnieschap) was indeed considered a "corpus mysticum, een verbeeld lichaem of een lichaem op zich zelven" in the Roman-Dutch law, our courts followed the English law, and for the present purposes, it must be accepted, at least as a point of departure, that a partnership is not a separate entity.

19 supra 202.
22 R v Schamosewitz & Schatz 1915 AD 693; Mcleod & Shearsmith 1938 TPD 87; Parker v Rand Motor Transport Co 1930 AD 353; R v Levy 1929 AD 312; Muller v Pienaar supra; Strydom v Protea Eiendomsagent supra, to name but a few.
The general rule is thus that a partnership itself cannot be a party to a contract, although there may be exceptions in certain circumstances:

Implicit in this decision (Silbert) is the recognition of the underlying contract between two partnerships. (It) seems to me that ... whereas here there was no proof that the plaintiff and Winskoop Belegging were being separately conducted ... their attempt to contract with each other was, seeing they were the same persons, stillborn.23

In the Shingadia case, it was accepted that the contract in question was indeed valid, based on English authority and Whitaker v Whitaker & Rowe:24

the contract sued on a lease by one partner to a partnership firm appears to embody a somewhat anomalous relationship, but its validity according to our law is admitted ...

This point of view does not seem logical and has been queried:

It is submitted that an agreement whereby a person purports to let property to, or hire property from, a partnership of which he is a partner is not a lease because a party to a lease cannot be both lessor and lessee which, since a partnership is not a legal persona, would be the position if such an agreement were to be recognised ... 25

It is, however, clear that Judge Clayden in the Shingadia case was himself not happy with the point of view because he states the following on the nature of the contract in question:26

It may well be that in a true analysis such a contract is in effect a contract by which the other partners allow the partner who leases the property to use their interests in the partnership property in consideration of an undertaking by him to pay the rent into the partnership funds ... On such an analysis the obligation of the defendant to pay the rent is an obligation owed not to the partnership but to his partners, but it is an obligation not to pay money to them but to pay it into the partnership funds.

The construction of Judge Claydon seems correct.

---

**THE ACTION**

The aspect is mentioned in par. 2 above and is discussed in the Shingadia case. If the conclusion in the Shingadia case is applied here, the action must be instituted by Y and Z, and not by all partners jointly. Since an action instituted in the name of the partnership is in reality an action instituted by all the partners jointly,27 the same principle is also used in the case in question, and the second defence of W and X ought to succeed.

23 Strydom case supra 210-211.
24 1931 EDL 122 op 125.
26 supra 585.
27 Vrystaatse Lewendehawe Ko-operasie Bpk v Van Jaarsveld supra; Parker v Rand Motor Transport Co supra 358.
In reality, we are dealing with an action between partners, and because a partnership is not a separate entity, it cannot act as plaintiff or defendant in a case. In English law, a partnership may as the result of express statutory provision institute an action in own name against a partner.

According to Lindley ...

... an action in name of the firm may be maintained by or against one of its own members ...

There is no such statutory arrangement in South African law. Keeping this difference between the English and South African law in mind, the conclusion would be that W and X’s second defence ought to succeed.

**P DE V REKLAME (EDMS) BPK V GESAMENTLIKE ONDERNEMING VAN SA NUMISMATIESE BURO (EDMS) BPK EN VITAWARE EDMS BPK 1985 4 SA 876 (K)**

**INTRODUCTION**

Although a partnership is not a legal person, it is accepted as a starting point in the Insolvency Act 24 of 1936 that the partnership assets must be used to pay the creditors of the partnership, while the assets of the separate estates of the partners must be used to pay the private creditors. The effect of the scheme of the Insolvency Act is that the common law rights of the creditors of the partnership are diminished, as they are not entitled to prove their claims against the estates of the partners, but only against the partnership estate. On the other hand, the creditors of a partner are not entitled to prove their claims against the estate of the partnership. The scheme of the Insolvency Act can only apply if the estates of the partnership and the partners can be simultaneously sequestrated as provided in section 13(1) of the Insolvency Act. The provisions of section 13(1) are mandatory. According to the opinion of Judge Van den Heever, the choice is between either the scheme of excussion regulated by the Insolvency Act or the customary excussion in accordance with common law. The scheme of the Insolvency Act cannot be applied halfway by sequestrating the estate of the partnership, and not the estates of the partners. If the estates of one or more of the partners cannot be sequestrated (for example, because the partner is protected by a statutory moratorium or because the partners are body corporate as companies who can only be liquidated in terms of the provisions of the Companies Act 61 of 1973), the partnership cannot be sequestrated in terms of the Insolvency Act, but the common law method of excussion must be followed. According to Judge Van den Heever, it is also clear that the Insolvency Act, as such, was never aimed at...
a situation where the only members of the partnership are two incorporated companies and where there is not a single natural person "who is a partner or who can represent the partnership as such".

The "customary excusion according to common law" is described as follows in *Michalow v Premier Milling Co Ltd*:

In the absence of special rules of procedure, a creditor 'of the partnership' would be entitled to sue any individual partner for payment of the whole debt and failing satisfaction sue the other partners one by one. Any partner unable to meet the claim would be liable to have his estate sequestrated, and his trustee would be entitled to sue the other partners for pro rata payments of the debts of the solvent member. Some of them may as a result become insolvent and the trustees in those estates would be entitled to claim their return of payments resulting in undue or voidable preferences. The chain reaction and counter action of insolvency and litigation would go on until all the creditors are paid in full or until all the classes of creditors have found equitable dividend levels.

In the *Michalow* case, it was emphasised that:

>[s]uch a process of liquidation and distribution is so cumbersome and costly that the Legislature substituted for it a practicable, though wholly artificial, scheme for dealing with joint (partnership) debtors who are unable to meet their liabilities. Such a scheme is embodied in the Insolvency Act.

**PARTNERSHIP, MORATORIUM, AND INSOLVENCY**

In the case where one or more of the partners are entitled to a statutory moratorium (for example, in terms of the Moratorium Act 25 of 1963) and the partnership debt is payable before any of the partners renders service, the time of the institution of the action or case is crucial.

If at the time of the institution of the action or case, none of the partners are doing military service, the action or case can be proceeded with normally. The court in which the action or case is instituted may, however, defer it on such conditions as at the court's discretion.

If sentence is granted in the action or case against the partnership, the implementation thereof must first take place against the partnership assets.

If there are not sufficient partnership assets to satisfy the debt, the separate estates of the partners who are not doing military service can be excused for the remainder of the debt since the separate estate of the partner on military service is still protected by section 2(1)(b). Upon lapse of this protection, his

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31 1960 2 SA 59 (W) 63C.
32 *Per* Judge Marais.
33 Rule 40(30) of the Magistrate's Courts Rules and Rule 14(5) of the Uniform Court Rules; *Muller v Pienaar* supra.
34 *Partridge v Harrison & Harrison* supra; *SA Mercantile Co Ltd v Marlborough* supra; *Dunlop (SA) Ltd v Olivier* supra.
separate estate can, however, also be excused, and his partners can also exercise their right of regress, if any, against him.

Likewise, in an application for the mandatory sequestration of the partnership, only the estates of the partnership and those of the non-serving partners will simultaneously be sequestrated, but not the estates of the partners doing military service. This approach is expressed as follows in Partridge v A and R Harrison:

The position thus is that there are cases where sequestration of a partnership does not necessarily involve sequestration of the private estates, that the estates when sequestrated are separately administered, and that there seems to be no reason why the legislature should have wished to withhold this protection from the partner on active service.

Judge Van den Heever expressly subscribes to the dictum in Dunlop (SA) Ltd v Olivier.

From the provisions of sec 5(5)(b)(i) it seems to me inevitably to follow that the proper course was adopted in the Case of Partridge v Harris (1940 WLD 265) and, that is, to sequestrate the partnership estate together with the private estate of the member of the partnership not on active service is within the court's jurisdiction.

This approach, which has been consistently applied in a series of decisions extending over a period of more than forty years, was recently queried in P de V Reklame (Edms) Bpk & Gesamentlike Onderneming van SA Numismatiese Buro (Edms) Bpk en Vitaware (Edms) Bpk. Judge Van den Heever decided that the provisions of section 13(1) of the Insolvency Act 24 of 1936 are mandatory. If the estate of one of the partners cannot be sequestrated, for example, because the partner is a body corporate or enjoys a moratorium, the partnership cannot at all in terms of the Insolvency Act be sequestrated, but the method of common law excursion in terms of the law of civil procedure must be followed.

With the greatest respect, however, the end result of this decision is, in turn, also not above criticism since a concursus creditorum, especially as far as it concerns the claim of partnership creditors to the partnership assets, is made impossible. The common law preference right of partnership creditors on partnership assets in terms of the maxim ut creditores unius societatis negotiationis in eiusdem bonis et

35 1942 2 PH C 87 (W).
36 1942 OPD 146 147-148.
37 Sic!
38 See also Dunlop (SA) Ltd v Unie Garage 1942 1 PH C 16 (O).
39 Partridge v Harrison 1940 WLD 265; SA Mercantile Co Ltd v Marlborough Boot & Shoe Manufacturing Co 1940 2 PH C 79 (C); SA Mercantile Co Ltd v Labovitz 1940 CPD 581; Ex parte Commercial Hotel 1940 2 PH C 94 (C); Prosser v De Lange 1941 1 PH K 6 (W); Dunlop SA Ltd v Olivier 1942 OPD 146; Dunlop (SA) Ltd v Unie Garage 1942 1 PH C 16 (O); Laymore (Pty) Ltd v Five Streams Wattle Estate 1957 3 SA 671 (N); SA Incorporated Merchants Protection Agency Ltd v Kruger 1947 3 SA 304 (T); SA Leather Co (Pty) Ltd v Main Clothing Manufacturers (Pty) Ltd 1958 2 SA 118 (O). See also Henning, 1978, Tydskrif vir Hedendaagse Romeins-Hollandse Reg, 5; Henning and Nieuwenhuis, The law of South Africa, VII, 240 – 241; Bamford, Law of partnership and voluntary association in South Africa, 3rd ed. (1982), 66; J.F. Coaker and D.T. Zeffert, Wille and Millin’s Mercantile law of South Africa, 18th ed. (1984), 743; E.M. de la Rey, Mars, The law of insolvency in South Africa, 8th ed. (1988), 20 – 21 (hereafter “De la Rey Mars”).
40 1985 4 SA 876 (K).
creditis praeferantur creditoribus alterius mercaturae⁴² also suffers as a result of the decision. Besides, it is not logical to make the availability of sequestration and the applicability of the prescriptions and remedies of the Insolvency Act dependent on a mere coincidence such as the composition of the membership of the partnership involved. The position is aggravated in that provisions whereby certain partnerships in terms of the Companies Act 46 of 1926 could be liquidated as unregistered companies are not included in the Companies Act 61 of 1973. Similar provisions could be encountered in the British Companies Act 1948⁴³ and the Companies Act 1985.⁴⁴ They still appear in the Insolvency Act 1986.⁴⁵ A feasible solution for the "unsequestrable" and "unliquidatable" partnership will have to be found.⁴⁶

**Other exceptions**

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⁴³ Ss. 398-405.
⁴⁴ Ss. 665-674.
⁴⁵ Ss. 220-229.
THEME 7: LAW OF CLOSE CORPORATIONS

BACKGROUND AND CONCEPT; FORMATION AND CONVERSION

Study objectives:

Upon completion of this lecture, you must be able to:

1. Briefly explain the historical development of the close corporation as business form.

2. Briefly name the aims of close corporations.

3. Name the distinctive characteristics of the close corporation.

4. Compare the close corporation with other business forms.

5. How were close corporations were formed? Explain.

6. Explain the basic rules pertaining to the name of a close corporation.

7. Discuss the constitutive documents of a close corporation.

8. Discuss conversions of close corporations to companies and explain the consequences thereof.

9. Discuss the impact of the Companies Act, 2008 on the close corporations.

Study:

1. Chapter 33 "The close corporation: background and concept" pp 574-581 in Corporate Law

2. Chapter 34 "Formation and conversions" pp584-590 in Corporate Law.


4. Companies Act 71 of 2008 Schedule 2

5. Die Dros (Pty) Ltd v Telefoon Beverages 2003 4 SA 207 C.
**Purpose of prescribed material:**

_Die Dros (Pty) Ltd v Telefoon Beverages 2003 4 SA 207 C:_ In this decision various aspects in connection with the legal personality of a CC are discussed.

**Glossary:**

Close corporation: _____________________________________________________________
____________________________________________________________________________

Constitutive documents: ________________________________________________________
____________________________________________________________________________

Founding statement: ___________________________________________________________
____________________________________________________________________________

Association agreement: _________________________________________________________
____________________________________________________________________________

Decriminalization: ______________________________________________________________
____________________________________________________________________________

Accounting officer: _____________________________________________________________
____________________________________________________________________________

Conversion: ___________________________________________________________________
____________________________________________________________________________

**Questions for revision:**

1. List the most important reasons advanced for a new legal form with corporate personality for small business. (5)

2. List the distinctive features of a close corporation. (11)

3. What are the registration requirements of a close corporation? (10)
4. How do you form a close corporation? (10)

5. What are the constitutive documents of a close corporation? (2)

6. List the content of the founding statement. (8)

7. Explain the requirements with regard to the name of a close corporation. (10)

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MEMBERSHIP AND MEMBER’S INTEREST

Study objectives:

Upon completion of this lecture, you must be able to:

1. Discuss in full the membership of close corporations.
2. Explain the requirements for membership of a close corporation.
3. Explain the termination of membership of a close corporation.
4. Discuss the member's interest of a close corporation.
5. Explain the nature of a member's interest in a close corporation.
6. Explain in full the acquisition of a member's interest in a close corporation.
7. Explain in full the transfer of a member's interest in a close corporation.

Study:

1. Chapter 35 "Membership and member’s interest" pp596-607 in Corporate Law.
3. Kanakia v Ritzhelf 1004CC t/a Passage to India 2003 (2) SA 39 D.
4. Schwartz v Pike 2008 3 SA 431 SCA.

Purpose of prescribed material:

Kanakia v Ritzhelf 1004CC t/a Passage to India 2003 (2) SA 39 D: Deals with the winding up of a CC

Schwartz v Pike 2008 3 SA 431 SCA: Is about the member’s interest in a CC.

Glossary:

Membership: _________________________________________________________________
____________________________________________________________________________
Member’s interest: ________________________________________________________________
____________________________________________________________________________

Trust \textit{inter vivos}: ______________________________________________________________
____________________________________________________________________________

\textit{Nomine officii}: ______________________________________________________________
____________________________________________________________________________

Register of members: _______________________________________________________________
____________________________________________________________________________

Questions for revision:

1. Can a juristic person be a member of a close corporation? (1)

2. Can a close corporation have more than 10 members? (1)

3. What is the qualification to be a member of a close corporation? (2)

4. When does a juristic person qualify for membership of a close corporation? (2)

5. How does a member cease to be a member of a close corporation? (10)

6. What is a member’s interest? (5)

7. What is the nature of member’s interest? (5)

8. How does one acquire member’s interest? (3)

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INTERNAL RELATIONS

Study objectives:

Upon completion of this lecture, you must be able to:

1. Discuss the fiduciary duties and duties of care and skill of members of a close corporation.
2. Discuss in full the association agreement.
3. Explain the aim and function of the association agreement.
4. Explain the contents of the association agreement.
5. Discuss the management of the close corporation.
6. Discuss the circumstances under which members of a close corporation can have recourse to the court.
7. Discuss proceedings against fellow members.
8. Explain when payments may be made to members.
9. Explain the prohibition on loans and security in terms of section 52.

Study:

1. Chapter 36 "Internal relations" pp610-623 in Corporate Law.
3. De Franca Exhaust Pro CC 1996 All SALR 503 C.
4. Geaney v Portion 117 Kalkheuwel Properties CC 1998(1) SA622 (T)
5. Gatenby v Gatenby 1996 3 SA 118 E.
6. Hanekom v Builders Market Klerksdorp (Pty) Ltd 2007 3 SA 95 SCA
7. Schwartz v Pike 2008 3 SA 431 SCA.
Purpose of prescribed material:

De Franca Exhaust Pro CC 1996 All SALR 503 C: A decision about the fiduciary relationship of members of a CC and the dissolution of a CC on the grounds of a breakdown of that relationship between members.

Geaney v Portion 117 Kalkheuwel Properties CC 1998(1) SA622 (T): A decision about the fiduciary relationship of members of a CC and the dissolution of a CC on the grounds of a breakdown of that relationship between members.

Hanekom v Builders Market Klerksdorp (Pty) Ltd 2007 3 SA 95 SCA: A decision on suretyship in a CC and s 52 of the CC Act.

Schwartz v Pike 2008 3 SA 431 SCA: Informs of the purpose of an association agreement.

Glossary:

Association agreement: _________________________________________________________
____________________________________________________________________________

Alterable provisions: ___________________________________________________________
____________________________________________________________________________

Unalterable provisions: _________________________________________________________
____________________________________________________________________________

Questions for revision:

1. What is the purpose/object of an association agreement? (3)

2. Name the general principles applicable in the absence of an association agreement. (6)

3. What is the function of the association agreement? (3)
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THEME 10: LAW OF CLOSE CORPORATIONS

EXTERNAL RELATIONS

Study objectives:

Upon completion of this lecture, you must be able to:

1. Discuss pre-incorporation contracts of close corporations.
2. Discuss alternative methods of pre-incorporation contracts of close corporations.
3. Discuss in full the capacity and representation of a close corporation.
4. Discuss in full members as representatives of the close corporation.
5. Discuss in full non-members as representatives of the close corporation.
6. Briefly explain the operation of section 55.
7. Briefly explain the operation of section 54.

Study:

1. Chapter 37 "External relations" p626-636 in Corporate Law.
3. Die Dros (Pty) Ltd v Telefoon Beverages 2003 4 SA 207 C.

Purpose of prescribed material

Die Dros (Pty) Ltd v Telefoon Beverages 2003 4 SA 207 C: Part of the decision is about the end of a contract, namely, the CC.

Klaas v Summers 2008: 4 SA 187 C: A decision on the power of members to bind the CC.

Questions for revision:

1. Name the requirements in terms of section 53 for a pre-incorporation contract concluded on behalf of a close corporation before its incorporation. (4)
2. Explain the powers and capacity of a close corporation. (5)

3. Explain section 54 of the Close Corporations Act. (5)

4. What is the scope of sect 54 of the Close Corporations Act? (4)

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THEME 11: LAW OF CLOSE CORPORATIONS

LIABILITY OF MEMBERS; DISSOLUTION AND DEREGISTRATION

Study objectives:

Upon completion of this lecture, you must be able to:

1. Explain the personal liability of a member of a close corporation as a sanction.

2. Explain the liability of a member for the debts of a close corporation.

3. Discuss in full the liability of a member for reckless or fraudulent carrying on of business of the close corporation.

4. Name the cases of personal liability of a member of a close corporation.

5. Explain the consequences of abuse of corporate juristic personality.

6. Explain the criminal liability of a member of a close corporation.

7. Name the offences created by the Close Corporations Act.

8. Explain the administrative sanction in terms of section 15.

9. Discuss the liquidation, deregistration and winding-up of a close corporation.

Study:

1. Chapter 38 "Personal liability in terms of the Act" pp637-646.


3. Airport Cold Storage Ltd v Ebrahim 2008 2 SA 378 T.


5. L&P Plant Hire v Bosch 2002 2 SA 662 SCA.

6. Schwartz v Pike 2008 3 SA 431 SCA.
Purpose of the prescribed material

*Airport Cold Storage Ltd v Ebrahim* 2008 2 SA 378 T: This decision is about the personal liability of members of a CC.

*G&C Construction v De Beer* 2000 2 SA 378 T: The decision discusses the liability of the members of a CC for debts of the CC in terms of s 63(a) of the CC Act.

*L&P Plant Hire v Bosch* 2002 2 SA 662 SCA: The decision discusses the liability of members of the CC for the debts of the CC in terms of s 64 of the CC Act.

*Schwartz v Pike* 2008 3 SA 431 SCA: On death of a member of a CC, his member’s interest must be dealt with in accordance with the association agreement.

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THE DEFINITION AND LEGAL NATURE OF STOKVEL

Study objectives:

After completion of this module, you must be able to do the following:

1. Briefly explain the historical development of stokvels.
2. Understand and explain what a stokvel is.
3. Differentiate between the types of stokvels.
4. Explain the advantages and disadvantages of stokvels.
5. Explain whether a stokvel is a partnership.
6. Compare the stokvel with other business enterprises.
7. Establish the value of stokvels as a form of business enterprise.

Study:

Your class notes and the newspaper reports included in the studyguide. Please remember also to study the material in your reader.

Read:

If you want to know more about stokvels, you may read “Die stokvel. ‘n Ondernemingsregtelike studie”, DHC Van der Merwe, Transactions of the Centre for Business Law, No. 26. 1996. Bloemfontein: UFS.

Questions for revision:

1. Discuss the legal nature of stokvels.
2. “A stokvel is another form of partnership.” Do you agree with this statement? Motivate your answer.
3. With reference to the abovementioned material regarding stokvels, make a list of the advantages and disadvantages of stokvels.
The stokvel:

Historical background
The term “stokvel” comes from the rotating cattle auctions (“stock fairs”) of English settlers in the Cape during the early 1800s. During these auctions, a herd of cattle would be bought by a group of persons and then divided among them.

When gold was discovered at the Main Reef on the Witwatersrand, a gold rush brought many people from all over the world to the Witwatersrand. Many of the people who flocked to the Rand were male workers from the Cape who brought the stokvel concept with them. The terrible circumstances in which these people had to work and live caused many people to die of cholera, smallpox, tuberculosis, and typhoid. Funerals are very important in black societies, and workers began to establish burial societies, a form of stokvel, to help them meet the high costs of the funerals. The modern stokvel movement thus dates back to the mid-19th century and originally grew out of burial societies formed by African migrant labourers.

The stokvel is still known to South African society today and is found in various forms. The National Stokvels Association of South Africa (NASASA) was formed in 1988 and has a membership of 11 500 groups with about 150 000 individuals belonging to these groups. There are about 8 000 members in the NASASA Funeral Scheme. In 1994, Integrated Market Research found that 26% of the South African population were stokvel or burial society members; the members’ median income was R450.00 per month; and the turnover of stokvels in South Africa was R200 million per month. In 1997 there was at least 800 000 active stokvels in South Africa with a total membership of approximately 10 million people, representing a formidable economic force.

The enormous growth of the stokvel movement has led to the formation of a 'super-stokvel', the National Stokvels Association of South Africa (NASASA). Registered as an 'association not for gain', it represents the interests of the movement country-wide, negotiates benefits for its members from banks, insurance companies and commercial firms and aims to establish its own financial institutions. It also operates a funeral scheme. Members pay an annual fee of R30.

With a large South African bank, it has organised a People's Benefit Scheme (PBS) which helps a stokvel, or 'group', to manage its funds efficiently and achieve a financial track record. The scheme covers savings and fixed deposits, offers group loan facilities and has its own unit trust company.
What is a stokvel?

Based on traditional African concepts of self-help and mutual support, the stokvel is a group of people who have joined together to pledge regular contributions to a common fund from which each member can draw, usually for a specific purpose. In many stokvels the pooled money is awarded to each member in turn to enable him or her to make large cash purchases.

A stokvel is a type of credit union in which a group of people enter into an agreement to contribute a fixed amount of money to a common pool weekly, fortnightly, or monthly.

Stokvels are thus clubs or syndicates serving as rotating credit unions in South Africa where members contribute fixed sums of money to a central fund on a weekly, fortnightly or monthly basis. Each month a different member receives the money in the fund, which was collected during that period, with no one ever defaulting on contributions. The members can then use the collected fund for their own use, either for payment or investment purposes. These stokvels have been a target for various investment houses in South Africa, hoping to bring these informal saving schemes into the main stream financial world. Having said that, the stokvels are still very much a part of black South African communities and will probably do so for a number of years to come. (http://en.wikipedia.org/wiki/Stokvel 11/9/2010)

Variations on the word “stokvel” or other names used in South Africa for this type of enterprise are the following: Stockfel; Stockfair; Gooi-gooi; Mahodisana; Mohodisana; Kuholisana; Umgalelo; Chita; Chitu; Istoki.

Most authors describe a stokvel as a rotating credit union which is formed by a group of participants, who agree to make regular contributions to a common pool, weekly, fortnightly or monthly. Money from that pool is then paid in full/partially to every participant, either on a rotating basis or in times of financial need.

The construction of a rotating credit union can be explained in simplified terms, as follows: A number of people agree to meet on a regular basis and to make a contribution on such occasions. The contributions are then paid to a certain member of that group. With the next meeting contributions are made again, but is paid to another member of the group. This procedure is repeated until everyone in that group has received a payment. this has the following implication: Say for instance there are 10 people in the group who meets on a monthly basis during which a contribution of R100 is made – in 10 months’ time, every member of that
group would have contributed an amount of R1000 (10 x R100) just to receive an amount of R1000.

Some people view a stokvel as a savings-association and some describe a stokvel i.t.o. its social function.

The Act on Banks 94 of 1990 define a stokvel by indicating that “stokvel-actions” are not regarded as actions which fall within the scope of the trading of a bank, although it seems that some of the definitions of a stokvel are indeed capable to sort the “financially orientated stokvels” under the prohibitions of sect 11 of the Act on Banks. See the definition of a stokvel in GN 2173, published in GG 16167 of 14/12/1994.

Currently the view is held that stokvels should not be about collecting money and storing it into savings accounts and fixed deposits. Stokvels need to adopt modern commercial attributes and blend it with their own African traditional value systems. Stokvels are losing out on lucrative BEE deals. The National Empowerment Fund is bombarded with companies wanting to sell their shares to broad-based groups, but can’t find them.

Certain organisations claiming to be stokvels may in fact be running illegal get-rich-quick ‘pyramid’ schemes which offer exceptionally high returns on investments but make payouts from members’ current contributions without having sufficient capital in reserve. In 1996 an organisation guaranteeing a return of 300 per cent to its 53000 members had its funds frozen by the Registrar of Banks. This was done when the Registrar found that it held about R50 million - R40 million more than the R9,9 million limit for stokvels stipulated by the Banks Act.

**Types of stokvels**

Various forms of stokvels are found in South Africa. The types that frequently occur are as follows:

Burial societies (also called *makgotlas*): The purpose of a burial society is to offer financial help to a family after a member of the family has died. Contributions are made in different ways. Distinguish between formal and informal burial societies. In African communities in particular, burial societies not only provide informal insurance to pay funeral expenses but usually oblige their members to help the bereaved family in various practical ways. It is of great importance to members of many communities to be buried where their forefathers were buried and to have customary rituals observed. The burial society will therefore also pay for the transport of the
dead person’s body to his or her traditional home and for the expenses involved in mourning rites. All members are expected to visit the bereaved family to offer condolences and consolation, to attend the funeral service as well as the preceding nightly vigils and, when a wage-earner has died, to help the dependants tide over their financial loss. Women members may be required to help the family prepare the house, for example, by sweeping, removing furniture from the bedroom, turning pictures and mirrors around to face the walls, smearing ash on windows to show that a death has occurred in the family and preparing food for the mourners.

Investment clubs

_Umgalelo_ clubs: Most of these clubs are of a religious nature. Parties start with prayer and last two days. Usually you receive the total amount of contributions you have made plus 20%.

Youth stokvels: Children may also be members of a stokvel. Parents of children who are members save money for them, but the children themselves are also involved. Aim is to provide financial assistance for the care-taking and upbringing of children.

“Istoki”: Every member gets a turn to be the host of a party. Food is bought with members’ contributions. The host then sells that food (at a high price) to the guests. That money then goes to the host.

“Gooi-goois”: Function for a relative short period of time. Contributions can be in money or _in natura_. E.g. every member contributes groceries which is then given to a specific member. All the contributions can be given to a member or the group can choose to give the member only a part of the contributions – the rest of it will then go to a central fund which are equally divided amongst members at the end of a rotation term.

Big budgeting associations: Contributions consist of big contributions. Members apply then for a payment into the contributions. The payment goes together with a huge celebration where you have to pay admittance.

Investment clubs: Differentiate between collective, open and closed investment clubs.

- Women’s clubs - to buy groceries, furniture or presents.
- Joint ventures - to buy major items such as buses, cars or taxis.
• Investment syndicates - to help members invest in fixed deposits or unit trusts or to start their own businesses.

• Saving clubs - These savings clubs have had a profound impact on the social and economic development of black people in South Africa. The reason that these clubs are so successful also centers around the social aspects surrounding these clubs - for example women organisers hold parties on Sunday afternoons. In the past they have set the social scene a-buzz with group names like the 'Transvaalians', 'Black Lions', 'Victory Ladies' and the 'Double up 6Bs'. They often wore uniforms, sang initiation and popular songs as well as hymns.

Stokvel parties - where members take turns to organise huge celebrations at which food and liquor are sold. The host takes the profits. These parties may go on for two or three days.

Advantages and disadvantages of stokvels

Advantages:

• Fellow-members of a burial society provide the bereaved family not only with money for a proper burial, but also with moral and social support.

• Members are dependant and sympathetic towards other members

• Stokvel meetings offer the opportunity to socialise with friends and family.

• If formal institutions such as banks will not provide a person with a loan, a stokvel can be approached.

• Juristic personality

• Limited liability

• Perpetual succession

• Teaching of discipline e.g. to save

• Rules can easily be varied and can cater for members (whose turn to receive money is still to come) to receive some money in times of need

• Rules can be varied to suit the stokvel’s needs
• Informal procedures regarding internal matters

• Can provide access for members to loans

• Represent members in the community

• Can give surety as a group to a financial institution, if one of the members need such security

  In considering loan-applications from members, the member's character is more important than his physical security

**Disadvantages**

• The noise and the liquor sold illegally during stokvel parties are problems and may lead to arrests by members of the police.

• If a burial society is unable to provide enough cash for a burial, the family must pay for the funeral of a loved one out of their own pockets.

• Fighting between members of the stokvel may lead to problems.

• People who believe in savings-accounts at financial institutions, consider stokvels being nonsense

• Compulsory contributions

• Lengthy periods between payments

• Payments can be insufficient to meet your needs

• Skipping of contributions can cause non-payments

• Some members can be advantaged more than others

• Someone can steal the money (the treasurer/attacker)

• In most cases no interest on contributions

• Loans are not as generous as financial institution's loans

• Non-payment by members
Legal nature of a stokvel

Introduction

Unlike companies, close corporations, and partnerships, stokvels are not part of the formal business sector. No legal protection is offered to the stokvel and its members. Regardless of this fact, the number of stokvels in South Africa is rapidly growing, and stokvels are becoming an increasingly more important source of income for many people. However, it is important to note that a stokvel is not a pyramid scheme.

The Banking Act 94/1990 refers to stokvels as activities that do not fall within the definition of the functions of a bank.

Essentialia of stokvels

Credit and credit scheme: The rotation of funds between members according to a predetermined plan. The credit scheme may be formal or informal.

Contribution: To give money or help, etc. towards a common purpose. The contributions are mainly money or hosting the stokvel party.

Rotation: A fixed contribution by members at fixed times to the society. For example, if 10 members contribute R10.00 each weekly, a different member will receive R100.00 every week. The core is that participants agree to make regular contributions to a fund, which is given, in whole or in part, to each contributor in rotation.

Support: There is a mutual relationship whereby members agree to support one another and in accordance with the aims of the stokvel. The mutual help or support may be moral, financial, or social. This element is based on the philosophy of ubuntu.

Capital pool: Money and every form of property used or capable of being used in the production of income or wealth.

Self-imposed regulation: Self-imposed on and by the members, not externally, to regulate or control by rule the stokvel, money, etc. in order to protect the interest of the members.

Legal personality

If a stokvel does not have profit as its objective, it can, in terms of section 31 of the Companies Act, become a legal person through conduct. If a stokvel has legal personality, a member can
only be held liable for his/her contribution to the stokvel. The stokvel will have perpetual succession and will be capable of owning property apart from its members.

**Partnership?**

Since 1863, SA courts relied on the *essentialia* of partnership to determine whether a partnership exists between parties. The courts held that if there is (1) a contribution by the parties, (2) a joint business for mutual benefit, and (3) profit-sharing, then it is a partnership.

Compare the essential elements of a stokvel as well as all the characteristics of a stokvel with those of a partnership to determine whether a stokvel is a partnership.

**ACTIVITY:**

Read the following article and write a letter to the newspaper commenting on the factual and legal correctness and accuracy of the report:

**Stokvels - more than just a savings scheme** by Monday Paper Volume 22:26

Monday, 15 December 2003

Sombre moment: Believing that death reunites individuals with their ancestors, families are choosing funerals that cost 3.5 times more than the entire monthly household income.

With nearly 50% of black adults in South Africa investing approximately R12-billion in stokvels and burial societies annually, marketers should not only recognise the importance of these saving schemes but also support them with appropriate products and services.

This is according to Professor John Simpson, head of the UCT Unilever Institute of Strategic Marketing, who was presenting the findings of Stokvels: Making Social Cents?, a research project that has attempted to understand the complexities of the cultural, social and financial interface of this thriving industry.

The project evolved from a previous institute project, namely Stockings and Stokvels, which was undertaken in 2002.

Simpson explained: "The specific objective of Stockings and Stokvels was to discover what really happens at Christmas time in black South Africa. The marketing community expressed a need for more information on stokvels specifically and the institute recognised the need for
meaningful information on the informal 'banking industry' and its contribution towards the purchase of consumer products and services."

Stokvels have been part of black South African history for the past 50 years with "stock fairs" being held in the Eastern Cape in the early 19th century. Labourers then adopted the concept as an indigenous alternative to "settler" banking.

What started as a simple savings solution has today grown into a fascinating range of stokvels for every possible need in life, ranging from joyous occasions such as the Christmas stokvel (saving for a generous December food shopping spree), to a hybrid of the stokvel, the burial society, which lends financial and social support to grieving families.

Stokvel members contribute a fixed amount of money to a common pool weekly, fortnightly or monthly. Money is drawn either in rotation or when a particular need or occasion arises.

Burial societies, on the other hand, can be seen as informal self-insurance schemes, which absorb the costs of social activities and cultural requirements of funerals.

Born from a need to create a trustworthy environment for saving, the stokvel has gone beyond the role of simply "making life easier".

The institute's research shows that the stokvel is not necessarily limited to only poor or rural South Africans. In fact, black executives in urban areas belong to highly sophisticated stokvels that generate significant income.

The methodology of the research included 24 focus groups, conducted nationwide during May and June 2003. The groups were both urban and rural, 60% aged 30 plus, gender specific, with three of the groups focusing on insight from non-stokvel members.

Eighteen in-depth interviews were conducted in Gauteng, KwaZulu-Natal and Cape Town.

Secondary research included quantitative and qualitative desk-top research from a number of different sources. One such source was FinMark Trust, who contributed information from their studies into stokvels and burial societies in South Africa.

The institute's findings show that marketers should take cognisance of the fact that well over half of all stokvel members are women living in Gauteng and KwaZulu-Natal.
Forty one percent of stokvel members and 45% of burial society members do not have a personal bank account. These individuals are referred to as "the unbanked".

The total amount invested in stokvels annually by the unbanked sector is estimated to be R1.3-billion. This amount rises to an estimated R2.6-billion when dealing with investments by the unbanked in burial societies.

"We have seen that some stokvels and burial societies have very sophisticated micro lending schemes," said Simpson. "But while they evolve into highly efficient businesses, they continue to retain their communal character."

According to Simpson this is where the concept of "ubuntu" comes into play.

"In the black community every person is seen as an integral part of the community. When a child is born, they belong to the community. Biological parents are essentially responsible for the child but the community plays a role in the child's development.

"In this 'ubuntu society' people look after each other's needs and share resources. Trust is the other side of the ubuntu coin, which is probably best translated as a common humanity," Simpson added.

With burial societies, however, it is the concept of death, which continues to evoke reverence.

Believing that death reunites individuals with their ancestors, families are choosing funerals that cost 3,5 times more than the entire monthly household income.

"People who can barely afford groceries are spending up to R18 000 for a casket," explained Simpson.

But as one respondent said: "When you die you are reunited with your forefathers and this warrants a big send off."

Simpson said that despite the huge amount of money being poured into stokvels each year, the research findings show how, for the most part, South African marketers have not responded to, or understood this informal banking and business sector.

He added that marketers needed to respond proactively to the market in order to play a role in its future, which would depend on other savings solutions and the ability of the formal banking industry to understand and communicate effectively with stokvel members.
"It's back to Marketing 101 - knowing your customer and what their needs are," commented Simpson. "Stokvels have stood the test of time and will continue to be around, adapting and adjusting as and when they need to. As marketers, we don't want stokvels to die, we want them to thrive and we want to help them thrive."

The future of burial societies is, however, dependent on several factors, one of which is the HIV/AIDS epidemic.

Respondents in the study expressed a real concern about the ability to bury the dead with dignity, respect and a traditional ceremony, especially with funding drying up as a result of increases in deaths.

But as one respondent stated: "AIDS will make people support each other because we are all affected. A lot of people are unemployed, the only cover they can rely on is that provided by the burial societies."
State must support stokvels — indaba

SARAH EVANS
STAFF INTERN

THE DEPARTMENT of Economic Development and Tourism in partnership with the Gauteng Stokvel Company hosted a stokvel delivery indaba at the City Hall on Wednesday.

The indaba emanates from the Northern Cape Stokvel Chamber that was launched in August last year and aimed at increasing business opportunities and empower small businesses in the Province.

Some of the objectives listed by the chamber include creating benefits and opportunities for stokvels and leveraging the collective buying power of stokvels.

The indaba targeted small, informal businesses and vendors in the city and it is the first event of its kind for the Province. Depending on the success of the indaba, more events like this one could be on the cards for other districts in the Northern Cape.

Sandile Simon White, CEO of The Stokvel Company, addressed the gathering on the status of stokvels in the country.

He spoke at length about business opportunities for stokvels and the reasons why many stokvels fail.

His thoughts were that stokvels are not supported enough by the government, insurance companies, supermarkets and the like.

He added that stokvels should be offered discounts and benefits by shops and other companies that they engage with in order to promote communal money saving and investing.

Reuben Olfant (founder and CEO of LifeBest Insurance), and Helkie De Beer (Progress Milling) also spoke at the indaba.
Call for black South Africans to join the mainstream economy

BY BALDWIN NDABA

Black people are spending billions of rands in unregulated and unprotected business schemes and should look at investing the money in the mainstream economy.

This is according to the South African Insurance Association’s (Saia) transformation manager Leila Moonda, who was speaking at a two-day conference in Johannesburg this week.

Saia’s conference on modernising stokvels, burial societies and the informal savings market was attended by various small businesses in Johannesburg and surrounding areas, and attracted speakers from the banking and insurance sectors.

Moonda, in her address titled “Challenges and opportunities that the stokvels face in developing capacity to maximise opportunities,” encouraged these small businesses to join the mainstream economy of South Africa. She said the amount invested in these informal saving schemes was estimated at R12-billion a year.

“More than 50% of black South Africans participate in stokvels and burial societies annually. There is no formal connection to the formal financial sector and these stokvels are not regulated. There is also a lack of sufficient knowledge of the formal financial sector,” Moonda said, appealing to small businesses to join the mainstream economy.

She said the Financial Sector Charter signed in October 2003 demanded that small businesses be provided with the necessary assistance to improve on their business efforts.

“The charter effectively commits all signatories to actively promote a transformed, vibrant and globally competitive financial sector that reflects the demographics of South Africa and contributes to the establishment of an equitable society by providing financial services to black people.”

Moonda added that the charter would give them contractual saving schemes and credit for small and micro enterprises for poor households and the sector would provide them with sustainable and affordable banking services.

The conference ended yesterday.

Source: Star 10 March 2006 p7
Savings clubs resilient – SA study

MAYA FISHER FRENCH
WE know through studies that men usually make household’s investment decisions.
Women tend to manage day-to-day expenses, but men decide how the money will be invested and decide on spending for big items. But could this be the reason we have such a low savings rate in South Africa?

Old Mutual has launched a Savings Monitor to track South African savings behaviour. The initial research shows men and women have very different attitudes. Men tend to save to spend on assets like cars, homes and appliances, while women tend to save for more social needs – emergencies, education, funerals and medical expenses.

Another surprising statistic was that stokvels or savings clubs are one of the main ways people save, irrespective of income. Although black households were the only racial group to save in collectives (with 43% saving this way), it is not only lower-income households. In fact it is the higher-income earners – R6 000 to R20 000 – that saved in stokvels. Again women tend to be the main savers in this category with 50% of women interviewed taking part in a savings club.

This is significant, as stokvels were the most resilient form of saving in the recession, after contractual savings like medical aid and endowments. Those who saved cash on their own reported a big fall in savings (36% to 54% depending on whether in a bank or under their mattress), while those saving in a stokvel reported just a 13% fall. This shows the value of social contracts. People do not want to lose face.

For SA’s savings industry, promoting the savings club environment by proving cost-effective and safe investment products would be a way to boost the savings rate. The other would be to target women.

Source: Citizen 1 December 2009 p23

Stokvel speel nog groot rol om armes te help

KAREN EBERSOHN
STOKVEL, in die gemeenskap van Botshabelo speel nog ‘n groot rol om armes te help om in moeilike tye te oorleef.

Dit was een van die bevindinge van made Alice Neube. ‘n Juniør lekitor by die Universiteit van die Vrystaat (UV). Sy het ‘n studie gedoen oor die geelytheid en uitdagings van vroue wat in die gemeenskap aan stokvel meedoem.

Stokvel is wanneer ‘n groep mense byeenkom, elkeen ‘n bedrag geld gee en dan kry elke van die groep om die betuig die groot bedrag geld.

Neube het gister as gaspreker op die UV se konferensie oor rampbestuur opgetree.

Die studie is tussen Februarie en Oktober verlede jaar gedoen.

"Ek sien vroue as leiers in die gemeenskap en het die studie onderneem om uit te vind in watter mate stokvel nog bestaan."

Sy sê hoewel die gemeenskap reeds as dorp op sy eie bestaan, kom informele werkskettinge, in die vorm van stokvel, nog voor. ‘n Vroeëre studie wat in 2003 gedoen is, het getoon 66,3% van die mense hier is werkloos. "Hier is ‘n groot aantal mense werkloos en stokvel is ‘n informele manier hoe hulle oorleef."

Een van die interessante dinge wat sy bevind het, is dat daar so ‘n groot vertrouensverhouding tussen mense in een stokvel-groep heers dat hulle geen formele kontrak onderteken nie. Hulle maak staan op elke lid se woord.

Neube sê stokvel maak nog ‘n groot deel van die gemeenskap uit en daarom is daar sekere aanbevelings wat sy maak om die vroue hier in die praktiek te ondersteun. "Die regering moet betrokke raak en help met die geld. Vaardighede oor hoe om in groep saam te werk, leierskapers en ondernemingsvermoe moet ook uitgebrei word."

Sy sê stokvel is deel van die mense se lewe in Botshabelo en is ‘n betroubare bron van hulp in tye van nood.

Neube sê dit is om die rede dat stokvel na blanke gemeenskappe oorwoei.

Die konferensie het gister gestig.
Stokvel members cut out the luxuri

By XOLISA McGWATYU

FOR stokvel member Nomalady Mf Fields, the end of the year usually heralds a bumper shopping trip when she and her savings partners splash out on delicacies and luxury items.

But this time the festive season has brought less joy than previously because high food prices and tough economic times have whittled away their collective saving power.

"A huge difference can be seen: I keep all the slips each year to compare the prices and this year they've gone up rapidly," said Mf Fields.

The price of 10kg of a premier brand of rice now costs R125, whereas last year it was less than R100 so members will get two bags instead of three. "We had to sit down and discuss this as there were many things that needed to be scaled down," said Mf Fields, who lives in Mf Fields. They had prioritised basic food and products like flour, mealie meal and cleaning materials.

At their first meeting next year, Mf Fields said they would discuss the idea of increasing the monthly contribution from R200 to R250.

Another East London savings club member, Lupeka Tom, said their 18 members each contributed R300 a month and raised additional money by charging penalties for latecomers at their monthly meetings.

Tom said their club looked out for specials. "We have had to cut out the sheep that we used to buy and other luxury things like puddings."

How a typical stokvel works

The following is an example of a stokvel with 17 members:

1. The stokvel is divided into two distinct areas – joint venture and grocery;
2. Each member pays R1 500 a month;
3. R1 200 of that goes into the joint venture, giving a monthly total of R20 400;
4. The remaining R300 goes towards groceries for a monthly total of R5 100;
5. By the end of the year, the stokvel collects R244 800 for the joint venture and R61 200 for groceries; and
6. The joint venture money gets divided among the members at the end of the year, with interest from the bank, while the grocery money is used to buy food for each member.

Source: Daily Dispatch 20 December 2008 p3
Stokvels “miss the action”

By THIETSO MUTSOENENG

STOKVELS are losing out on lucrative broad-based empowerment equity deals, despite having a combined cash flow of about R12bn a year, government funding agency officials said yesterday.

National Empowerment Fund (NEF) programme manager Victor Mabuza said: “Few stokvels, if at all, are involved in broad-based empowerment despite having financial muscle to come to the party.”

There are thousands of stokvels around the country providing a place where friends meet for companionship, good times and a social way of saving money. But they are not organized enough to access the funds, or put the resources together to buy stakes in these companies, said Mabuza. It would help if stokvels in a specific area organised themselves to create a body that would coordinate them. “Let’s not look at stokvels as just saving clubs; there is R12bn circulating in this industry,” he said.

Mabuza was dismayed that this money was in savings and fixed-deposit accounts with little interest, while other investment vehicles, such as buying equity stakes, could be used for a much higher return.

“Texted as a tool to bring previously disadvantaged groups into the economic mainstream, empowerment has been criticised for benefiting a few politically connected individuals.”

Broad-based empowerment on the other hand, is designed to benefit thousands of community groups, but the NEF said it was difficult to locate them.

“The NEF is bombarded with companies wanting to sell their shares to broad-based groups, but we can’t find them.”

He was speaking at a convention, Modernising Stokvels and Burial Societies, in Johannesburg yesterday, where various stokvel clubs and burial societies were represented. The NEF was looking at designing a loan product for stokvels, but the process had been delayed because of the jumbled nature of the industry. Mabuza declined to divulge details of the product, saying it was difficult to put together a product for a disorganised industry.

According to FineMark Trust, an agency that promotes access to financial services, at least one in 10 people in South Africa belongs to some kind of stokvel.

Convention organiser and Techno Spaza creator Simon White said: “It is very sad to see that as much as the country has transformed, one market not claiming its rightful place is the informal savings club.”

He said Techno Spaza would launch stokvel support centres across the country this year, starting with the first one in Attridgeville, Pretoria in June.

Source: Daily Dispatch 9 March 2006 p10
Informal savings ‘need revamp’

By JAMESON MALULEKE
STOKVELS and burial societies need a critical recipe for transformation, so that what is worth preserving is nourished and nurtured, Techno Spaza CEO Simon White said.

White was speaking at a two-day conference in Sandton yesterday about transforming the informal savings market in SA.

Stokvels and burial societies, ‘oor-goois’, megodisanos (providing money to each other on a rotational basis) and saving syndicates are part of informal savings, and have assumed various identities through the years among different ethnic groupings.

He said SA had radically transformed in the past 11 years, but the informal savings market had not transformed itself accordingly.

“As much as stokvels and savings societies represent a broad base of disadvantaged groups, and stakeholders that have a long-standing tradition, they have not been able to capitalise on the various empowerment opportunities in the market that are supposedly targeting disadvantaged groups.

“This is despite the huge membership, capacity and buying power they have represented over the years,” said White.

The informal savings market would need a higher degree of creativity, innovative marketing, technological application, quality service and measurable delivery to members so that they might become ambassadors for new recruits. White said successful nations were nations that saved, and by that discipline had built the means to venture into territories.

“We need to learn from other successful nations like the Japanese, Germans and South Koreans, and our own successful cases.

“We need to take the good from the bad, keeping the good to transform this market, (making) it more meaningful and useful to members and communities,” he said.

South Africans needed to learn and adopt modern commercial aspects, and blend them with African traditional value systems.

Modernisation did not necessarily equate to Westernisation, and did not mean people had to scrap their cultural integrity to remain competitive.

– jamesonm @citizen.co.za

Source: Citizen 8 March 2006 p10
Bleak season for Cape cops after stokvel scheme scam

Frustration after R40 000 goes missing

By Myolisi Cophe

SCORES of Cape Town city police members had a bleak Christmas after one of them allegedly misappropriated thousands of rando meant for distribution from a stokvel co-operative savings scheme.

Some members were to take their groceries to their Eastern Cape homes and have since postponed or cancelled their trips.

The municipal police members, who had saved the money, laid a complaint of fraud at the Bishop Lavis police station last week, saying their festive season had turned into a nightmare and they had been badly hit financially.

"I'm a bread-winner at home and as I'm talking to you now, my cupboard is empty," said Yolisa Solomela.

She joined the Masiphathisane stokvel organisation while she was a city police member but has since left the service.

The term "stokvel" is a colloquial name for money-saving co-operatives that pay dividends in the form of cash or groceries to members at the end of the year.

Masiphathisane was formed by city police members four years ago and members each saved R300 a month.

The money would then be used to buy large amounts of groceries at discount prices from a wholesaler and distributed among members.

But members received a festive season shock when a member, who was keeping about R40 000 of the amount, did not turn up at the Trade Centre in Maberton as arranged.

She does administration work in Mitchell's Plain and was trusted by other city police members because she was older than them. When approached for comment, she refused to speak to the press.

"Because we are city police members we cannot beat this member or confiscate her belongings," said another member, who refused to be named.

SA Police Service spokesman Elliot Sinyangana confirmed that a complaint of fraud was being investigated against a city police member.

"We are still busy taking statements and that information will be sent to the state prosecutor for a decision," he said.

Source: Weekend Post 31 December 2005 p2
**SAPS warns stokvel members to be careful**

**NIVASHNI NAIR**
**DURBAN BUREAU**

THE South African Police Service has sent out a warning to stokvel members to be cautious when withdrawing large sums of money as well as during the sharing of the saved money.

Recognising that many people put money aside for the festive season, the police are advising stokvel members to submit their bank account details to an individual member or group treasurer.

“The South African Police Service is hereby appealing to members of the communities, especially those who are saving money in groups, to be very careful. It is advisable that the individual members should submit their bank account details to their group leaders or treasurers so that their money can be paid directly into their bank accounts, or rather be paid by cheque, in order to prevent them from being attacked and their entire savings being taken away from them,” police spokesperson Superintendent Phindile Radebe advised.

She warned that one must also be cautious when choosing a group leader to perform the task as the person might also have ulterior motives.

“Do not succumb to the pressure from your group leader if he insists on collecting the total cash from the bank rather than depositing the money into the individual accounts. Take precautions, as they could have ulterior motives,” Radebe said. She added that in the event of a group leader collecting the money from the bank, it is advised that the money be shared at the nearest police station.

“Protection and security is guaranteed if this procedure is followed. [Police] stations will be responsible to raise awareness in their respective areas,” she added.

nivashni@witness.co.za

Source: Natal Witness 14 December 2005 p 4
Stokvels can turn into big business

Stokvels are not about drunks who bank together or burial societies meant for old women who thrive on funerals. AMANDA NGUDLE reports

SOMETHINGS NEVER change. If you drive around the township on the first weekend of the month, you will catch a glimpse of women in uniforms and berets rushing off to burial society meetings.

This proves that there are still those who have held onto the idea of saving together for unforeseen burial proceedings.

However, a few people have evolved. Young people prefer to help their contemporaries in whatever they deem reasonable. There are CD, DVD, cutlery and crockery clubs.

But the issues remain the same. Many can't keep time hence the R5 fines. The uniform is another bone of contention in many clubs. A few feel the uniform looks better on some while it does nothing for others.

Serious matters include issues of authority and people who are given senior roles.

The treasurer role is one most people feel they can fulfill, yet only the financially viable member is deemed perfect for it.

Some feel authority is given to well-off members so that more meetings can be held at their "posh houses".

Most clubs seem to lack a constitution which will act as a point of reference.

The Veterans from Esther Park on the East Rand are at one another's throats over the issue of the ages of people covered by the burial club.

One member is even threatening to pull out if she doesn't have things her way.

"We never discussed the ages of people covered by the society, so when a member had a stillborn child, she wanted us to bury the child," says founder member Thuli Mashileane.

"We should have said that members must provide the ID numbers of their subordinates because we cannot cover pregnancies," she says.

When the Veterans decided to spend some of their investment profits, they treated themselves to a five-course meal at an upmarket restaurant and refused to deal with the matter.

"We don't want to be known as the women from that troublesome society so please no pictures," says Mashileane.

These stokvel clubs spend their profits on the pleasures of life because most monthly meetings are held in the privacy of the hosting member's home.

But hosting such a gathering can be hard work. The host has to get up early to prepare for the arrival of her team who come bearing money, gossip or criticism to her home.

However, the Tahlwelo Crokerky Club is a bunch of caring, farsighted and flexible people. Since its establishment in 2000, the neighbours of Tahlwelo Extension have established themselves as one of the most admired clubs in Soweto.

"The concept was driven by the fact that even though we had been neighbours for more than 15 years, we were still strangers to one another," says Mary Hamane, one of the founder members.

When the club started, members only contributed R10 a household a month but after saving more than R500 over six months, they realised they could increase their savings if they were committed.

"We decided not to hold onto the R500, but to buy members things they could use for social gatherings. We started by buying plates and each member now owns 20 china plates, glasses and tea cups."

Each member now contributes R10 a month and the club is the envy of many of its peers.

The group owns a marquee, four catering tables, catering pots, slaughtering knives, peeling knives and cutlery and crockery that can serve 800 people.

But the women say the way forward is to plough the money into a lucrative investment.

"We might buy shares, a business or get a bank manager to give us options," says Hamane.

Source: City Press 10 July 2005 p 29
Ayanda Szezi
Economics Correspondent

Despite the high levels of unemployment in SA, particularly in the country’s second city, Cape Town, some poor households do save. Although their methods may often appear somewhat unconventional and not always consistent, they realise the importance of saving for funerals, education and emergencies.

These are the findings of the Financial Diaries project, which seeks to give a comprehensive picture of the financial inflows and outflows of poor households by gathering data on income, consumption, savings, lending and investment.

The research was conducted by the Southern African Labour and Development Unit at the University of Cape Town — it was sponsored by the Ford Foundation, FinMark Trust and the Micro Finance Regulatory Council.

The information was gathered from 166 black households in Langa in Cape Town, Diepsloot in Johannesburg and Lugelensi, a rural village in eastern Cape. Regular interviews were conducted over a year.

"Poor households have little money, but this does not mean that they do not manage what they have," says Daryl Collins, project director of the Financial Diaries.

On average, households used 17 different financial instruments over the course of a year — four savings instruments, two insurance instruments and 11 credit instruments.

SA’s total savings, including those of government, households and corporations, stands at about 13.5% of gross domestic product — well below the 20%-plus needed to boost economic growth.

Only 36% of the households surveyed used formal, long-term savings instruments such as retirement annuities, while 57% belonged at least one stokvel and burial society.

Bridget Lamont, CEO of the South African Savings Institute, says saving is especially hard for the poor, as they earn only enough to live on.

"What is needed is more rigorous money management and keeping track of credit. Taking credit so you can live is a problem," Lamont says. But having access to a basic banking account provides some discipline in money management.

"Stokvels and burial societies have done a lot of good in helping communities bury their loved ones, but they are not very secure, and with the higher death toll as a result of HIV/AIDS, funds get depleted quicker," says the savings institute CEO.

According to the respondents in the study, stokvels are intended as savings for a specific fixed event or for emergencies.

The project gives the example of a domestic worker living in Diepsloot with her four-year-old daughter. She has three active bank accounts and two jobs, each paying R1 000 a month after deductions.

Her salary is paid into two of the accounts, and the other is used as a fixed-deposit. She has about R5 000 in her savings account, and leaves at least R200 in each of her other accounts. She also keeps some money in her house for emergencies.

She belongs to four stokvels and two burial societies. She also has a savings plan for her daughter’s education, which matures when the daughter turns 16.

She has accounts from two clothing stores, which she has not used since last November.

More than 90% of the respondents hide money away somewhere in their homes, so that it is easily accessible during emergencies.

Keeping money in home is seen as more cost-effective as travelling to a bank and using ATMs would cost more for township and rural dwellers, says Collins. But this form of saving is less effective as they are more likely to lend it out to neighbours and family relatives, or use it.

The study found that although 67% of the households surveyed had a savings account, it was mainly used for transactions rather than a means for long-term accumulation.

Collins says products such as the Mzansi account have made banking more friendly and cost-effective, but there is a need for more flexible instruments based on an understanding of the way the poor manage their money.

"Stop-overs are one example. It is much easier to put money aside if you don’t even see it. We could go even further to be more creative about the methods that are used," he says.

Nearly all (95%) of households pay off some form of debt every month. About 24% are considered to be highly indebted, with average monthly debt payments of 31% of monthly income.

"Highly indebted" is defined as having average monthly debt payments of more than 20% of total income.

The study found that highly indebted urban households made 90% of their payments to formal financial credit institutions, while their rural counterparts paid 71% to informal creditors.
Poor learn how to save themselves

David Satterthwaite

A new global movement is beginning to transform the lives of some of the world's poorest urban dwellers.

Up to a third of the world's population lives in slums, and improving the quality of life of the poorest is one of the greatest environmental challenges. But a new international movement, the Federation of Slum and Shack-dwellers, is challenging governments and aid agencies to address problems.

The movement is being formed by slum and squatter inhabitants. They not only drive change locally, but support it in other nations. Hundreds of housing initiatives are under way.

In India, two federations work together — the National Slum Dwellers Federation and Mahila Milan. Both are savings schemes formed by homeless women. They have more than 750,000 members and work in 70 cities. They have designed and constructed community toilet blocks that serve hundreds of thousands of people and are implementing hundreds of slum upgrades and new housing schemes.

In South Africa, the Homeless People's Federation has more than 100,000 members. It has helped thousands of families get housing, and many more to improve their homes, get water and sanitation and acquire land tenure rights.

Similar programmes are under way in Namibia, Kenya, Philippines, Cambodia and Thailand.

These federations are remarkable for several reasons. They are organised and managed by poor or homeless people. They are funded by community-managed savings schemes that provide members with credit to fund such things as medical treatment or school books. They also teach the savers how to manage money.

The federations design and manage their projects. Each one encourages savings groups to try out solutions to specific problems, such as the provision of community toilets. In doing this, they are encouraged to improve on the usual public-toilet design. When the new toilet is finished, other savings groups visit it, ask questions about how it was financed and managed, and consider whether they could design and build one. Growth comes from those who learn from these exchanges.

Most are women who began as managers of savings schemes. Many are illiterate, yet have managed complex projects. Community visits by federation members are frequent. International exchanges take place too, as established federations help to form other savings groups.

Professional staff from NGOs support the federations, especially in developing links with international funders.

These grassroots organisations seek partnerships with the government but on their terms. Demands often result in getting negative responses. But when federations take officials to see evidence of their efforts, negotiations are more productive.

In most cities in Africa and Asia, there is little official information about the settlements where the poor live, yet programmes to improve conditions need detailed maps and data. These are expensive and difficult to produce professionally. Many federations have undertaken city-wide surveys of all tenements and squatter settlements, which they present to the government with their plans. They prepare detailed maps and statistics upon which upgrading plans can be based. These are essential for government action, but are owned by the inhabitants, giving them more influence in negotiations.

Although the federations seek partnerships with governments, some politicians feel threatened by their independence. Professionals in local and international NGOs can be reluctant to hand power to the poor. And even where their importance is recognised, the support needed cannot always be provided.

Official aid agencies find it difficult to offer support as the federations do not fit their funding frameworks — but the United Kingdom Department for International Development and Swedish and Danish aid programmes have found ways to this. It is clear that, if permitted, these federations have the potential to multiply and change lives.

David Satterthwaite works at the International Institute for Environment and Development

Source: Mail & Guardian 7 October 2004 p 42
Women build houses for the homeless

by Phumlani Mdolomba

FOR almost a decade, Nomfundu Mbeng, 39, and her 11-year-old child stayed in a one-roomed shack on the Unifound informal settlement gravesite in Queenstown.

Now they finally have a four-roomed house, thanks to a group of women under the banner of the Homeless People’s Federation.

The federation consists of 150 homeless women and is known as Bayazaenzela.

Since its inception in 1992, the federation has built 100 four-roomed 72m² houses, which are the first of their kind in the province.

The women were once subjected to forced removal, arrest, assault and detention without a warrant by police.

Nongazi Magwashu, spokesperson for the federation, said the women had seen the need to help the government build houses for the homeless.

She said they did that through the savings scheme they started in 1995.

“As from then we managed to build 100 houses from our own pockets. As dedicated women, we are accelerating service delivery by building houses for the homeless. These cost R14 000 instead of the government two-roomed houses which cost close to R20 000.”

“No matter who says what, as women we are going to strive to better our lives because a gravesite is not a place to stay,” she said.

A very happy MEC for Housing and Local Government, Gugile Nkwinti, handed over R11,2 million to the federation to build 489 house in Queens-town and East London for homeless people.

Nkwinti commended the women and challenged other people to do the same. He said the People's Houses Process directorate in his department is looking for people who can build houses for themselves.

“There was a perception that said government subsidies are too little and cannot afford to build 42m² houses, but these women have proved those critics wrong because they spent only R14 000 to build 72m² houses.

“I want to stress that as provincial government we are fully behind this initiative,” he said.

Provincial and Local Government Deputy Minister Ntombazana Botha said it was encouraging to see women committing themselves in bringing better life to all.

“As the government this is what we are looking for – for people to meet us halfway, and I am sure the government would not let you lose your balance when you try to meet it halfway,” she said.

Source: Daily Dispatch 12 November 2003 p 16
UCT Unilever Institute calls for change of mindset in marketing

‘Eurocentric’ approach to stokvels comes under fire

Charlotte Mathews

Consumer Industries Editor

MARKETERS show the "height of arrogance" in developing products in first-world environments and presenting them to stokvels in the belief that they can educate the community into understanding the product, says University of Cape Town Unilever Institute director Prof John Simpson.

Simpson was presenting the conclusions of the Institute’s recent study — Stokvels: Making Social Centres — to financial and retail organisation representatives in the first of a series of seminars that would also be taken to Durban and Gauteng later this month.

The study was sponsored by South African Breweries and the FinMark Trust.

Simpson said stokvels and burial societies were alive and likely to be around for many years.

Stokvels owed their existence to being financially efficient and providing much-needed social support as they fitted into a community-focused culture.

Formal market offerings, however, were generally Eurocentric, inflexible and focused on individuals rather than groups.

A change of mindset on the part of marketers was needed to recognise that supporting stokvels would enhance economic empowerment and grow markets.

The Institute’s research showed that almost one in two black adults was members of a stokvel.

Based on conservative estimates by the FinMark Trust, about R5.6bn was invested in stokvels annually and R8.4bn in burial societies.

Most of the participants were in the middle to upper living standards measure categories and aged between 25 and 49.

Numerous different types of stokvel were identified, starting with a basic stokvel or savings club, where individuals made regular weekly, fortnightly or monthly contributions and received a lump sum on a rotational basis throughout the year or at year-end.

Some stokvels consisted of only members of a family, who grouped together to buy land or cars.

A more sophisticated stokvel, and one expected to grow, was the investment group, for which the 32-day savings account was still the most popular product — but they were also showing interest in unit trusts.

Stokvels could also be grocery stokvels, where groceries or coupons rather than cash was paid out.

There was an opportunity for grocery retailers to make up packages and deliver them to the stokvel, giving value-added offers to bulk buyers and ensuring personal security. One of the biggest risks and disadvantages that those surveyed raised about stokvels was the possibility of being robbed.

Burial societies could be informal and traditional or funeral schemes, and there were also formal sector products offered by insurers such as Hollard.

Traditional burial societies did not make a profit, but there was a growing perception that the funeral schemes run by local black entrepreneurs, offering a package including casket, grave stone and hearse, were making increasing and disproportionate profits.

Rising deaths from HIV/AIDS, with deaths expected to peak at 5 million in 2010, would increasingly affect burial societies, the institute concluded.

Source: Business Day 12 September 2003 p 2
Secret world of stokvels

Many more people are getting involved in what was traditionally a women’s enterprise

by NALINI NAIDOO

My instructions were to drive to a certain point in one of the city’s suburbs and from there phone for directions. Following a series of left and right turns through streets with no names, I arrived at the house that had been described to me – the paintwork on the front walls, the trees in the garden and the cars parked in front.

Even before greetings were exchanged, I was told, “no photographs.” So I settled in an empty chair next to Senzi*, who had been assigned to tell me what was going on. The other 15 people in the room were huddled around a large table, in the middle of which lay a pile of money. An animated discussion was going on and three scribes were writing in three separate books.

It was a sunny Sunday afternoon in Maritzburg and a stokvel meeting was deep in progress. I watched riveted by the intensity of the discussion and the looks of total concentration on the participants’ faces.

Stokvels are informal community-based savings scheme that have their roots in savings clubs started mainly by township women who stashed away a few rands each month so that they could have extra money for the festive season – enough to visit families in the rural areas, buy a few luxury items or pay for school fees and books at the start of the new year.

Stokvels are still a popular form of saving as most poor people do not have access to the formal banking sector.

Senzi says some of their members are also professionals – teachers and nurses who have bank accounts but prefer this way of saving to avoid paying exorbitant bank charges. She added that, although stokvels are traditionally women’s clubs, more men are joining and in their group they have six men. They have to keep things secret, she said, to keep sgebenga’s from finding out about their money.

The National Stokvel Association of South Africa estimates that about R1 billion a month is collected by stokvels and membership is about eight million countrywide.

Over the past 12 years stokvels have increasingly interfaced with the formal banking sector and have been granted legal status under the Banks Act.

‘Come Christmas, when they are all paid out, they hold a party.”

“Our stokvel has 38 members and when we meet we bring in our monthly contribution of R120. Even those who do not attend the meeting send their money with other members.”

According to Senzi, they did not want to be photographed as the families of some of the members do not know that they belong to a stokvel. “We don’t want our relatives to make unnecessary demands on us.” She went on to explain that the entire system is based on trust and her particular stokvel has been in existence for five years.

“We make sure that only reliable, trustworthy people become members and this is done through personal recommendations by existing members of the group. Most of the people here are from the same neighborhood or are close friends and rela-
atives. We haven’t had any problems so far and we now know each other well enough that we are confident that we will continue without trouble. All of us want our stokvel to succeed.”

I learnt that I was allowed to attend the meeting because one of their oldest members, Themb*, had invited me. They trusted her, so they trusted me. I had met Themb through a mutual friend to whom I had expressed an interest in finding out what happened at a stokvel meeting.

Most of the discussion was around record keeping. The money was carefully counted and stacked in neat piles. Senzi said they keep three sets of books so that they can cross-check every transaction. To earn interest their club also lends out money and the fee is R30 for every R100 borrowed. Here as well, loans are only given to people who are highly recommended by members.

If by mid-year they find that the interest earned is low, then each member is allowed to borrow R500 and pay back R600. “We do not pay this back all at one time, but in parts and we don’t mind as this allows us extra spending money during the year and in the end we will be getting the interest.”

According to Senzi the money is kept by one of the older members of the club, and none of them questions the method of storage — whether the money goes into a bank or under a mattress. All they know is that this member has never let them down and that over the years every cent that was paid in was shared out come pay-out time.

“First we share out what we paid in so each member gets about R1 440, then we share the interest that we earned during the year,” Senzi said.

Speaking to some of the other members, I discovered that the stokvel not only offers them the opportunity to save but to interact socially. They all said they look forward to their monthly meetings, which last about two hours. They enjoy the sense of belonging to the group and sharing of being in control of their money and learning basic financial management. Come Christmas time, when they are all paid out, they hold a huge party with lots of food and drink — to celebrate a successful year of saving and the bonds they have formed.

* Names have been changed.
Banking issues raised by Sun Multi Serve

Where does an informal savings system end and the formal banking sector begin? That question should be of interest to many emerging markets where a sophisticated and heavily regulated banking system, hooked up to the international capital market, often co-exists with a sprawling group of lightly regulated local moneymakers.

It has become a particularly sensitive issue in South Africa since the central bank's chief of banking supervision Christo Wiese froze the assets of a black, informal savings scheme last month, causing thousands of investors to panic.

The scheme, Sun Multi Serve, was closed because its assets had vastly exceeded the R9.9 million limit above which institutions must comply with banking laws. Its investment practices were also questioned. Sun Multi Serve, however, claims that it is the victim of the “cultural intolerance” levelled against black savings groups by the mainly white banking regulators.

There are two separate points in this case. The first is whether Sun Multi Serve, which promised investors a return of well over 100 percent, was indeed cheating them. That was Wiese's opinion last month. He said that it was operating a pyramid scheme and that “the sooner such schemes are shut down, the less they hurt people”.

The company started only in February last year. It had taken an astonishing R30 million in deposits from some 53 000 small, black investors by the time the central bank discovered what it was doing.

The second, broader point is how to marry a first-world system of banking regulation with an informal savings sector that reaches into remote villages and townships.

Sun Multi Serve's managers met Chris Liebenberg, the finance minister, on January 6 and are due to see him again soon. They insist that their informal savings group is part of African tradition. It claims that it is just another stokvel, or credit union, which acts much like a mutual fund.

Some stokvels have grown into important sources of finance for small black businesses, which lack the collateral necessary to borrow from banks. But the amount of money they hold is relatively tiny: an estimated total of R8 billion, compared with the R690 billion held in formal private savings, pensions and financial institutions.

It is estimated that at least a quarter of all black South Africans belong to a stokvel of some kind.

Stokvels provide useful finance to small groups that would otherwise find it hard to raise money from banks. But the bigger, more sophisticated and more integrated with the formal sector that the stokvels become, the more difficult it will be to excuse them from tight regulation. - The Economist

Source: Sunday Independent 21 January 1996 p 12
Police hunt woman who allegedly stole stokvel’s money

MTHOBISI MAKHATHINI

POLICE are searching for a suspect from Inadi, near Pietermaritzburg, who is alleged to have stolen more than R25 000 in stokvel money from the Sizanani Club.

Inspector Joey Jeevan said police are looking for a 32-year-old woman who has been accused by the stokvel club members of defrauding them of money that was supposed to have been deposited in the bank.

Sizanani Club member Thulile Ndlouv told The Witness that a woman called Khanyisile Ngubo had been sent to deposit the club’s money every month since February last year, and to their surprise when they went to withdraw the money in December, there were no funds available.

Ndlouv said that on December 14, 2007, she was supposed to accompany Ngubo to the bank to withdraw their savings, but Ngubo insisted that she would go to the clinic first and then to the bank, and then call Ndlouv to come with her to withdraw the money.

“I waited the whole day for her call, but she never phoned. We then went to her house the same evening to inquire why she never pitched up. We were told by her mother that she had not returned from the clinic,” Ndlouv said.

She added that other members suspect she was using the money for herself and when the time came for allocations she vanished.

Another stokvel member, pensioner Bongiwe Bhengu, said she was going to build a rondavel, but because of the theft she hasn’t been able to do so. Bhengu said another member was supposed to use the money for her wedding in December, but battled to have a decent wedding.

“This girl appeared to be so trustworthy and I never thought that she would do something so drastic. I almost fainted when the bank showed us a statement that revealed that no money had been deposited since February last year,” she said, adding that the club has 20 members, who contributed R100 for the first six months and R200 for the six remaining months of the year.

SAPS Midlands appeals to anyone with information regarding Khanyisile Ngubo’s whereabouts to contact Inspector Justene Groenewald of Plessislaer Police Station on 033 398 9752.

mthobisi@witness.co.za

THE DEFINITION AND LEGAL NATURE OF BUSINESS TRUSTS

**Study objectives:**
After completion of this module, you must be able to:
1. Briefly explain the origin of business trusts.
2. Discuss, evaluate and criticise *Goodricke v The Registrar of Deeds, Natal*.
3. Discuss the differences, if any, between a business trust and a partnership.
4. Discuss the structure of a trust and a business trust
5. Discuss the purpose of a trust and a business trust
6. Discuss the role, function and duties of parties to a trust
7. Argue whether a business trust is a partnership or not.

**Study:**
1. Cilliers and Benade et al Entrepreneurial Law pp. 348 tot 361
2. *Cupido v Kings Lodge Hotel* 1999 4 SA 257 E.
4. *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 SCA
5. *Nieuwoudt v Vrystaat Mielies (Edms) Bpk* 2004 SA 486 SCA

**Purpose of the prescribed material**
*Cupido v Kings Lodge Hotel* 1999 4 SA 257 E: Court found that there was no reason why a business trust that conducted business under a particular name should not be cited by that name.

*Goodricke v The Registrar of Deeds, Natal* 1974 (1) SA 404 N: Four persons entering into a deed of trust with intention of forming an investment fund. Registrar said it is a partnership. Court declared that the trust was created by four persons with the intention of forming an investment fund not a partnership.

*Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 SCA: Certain types of business trusts having developed in which functional separation between control and enjoyment entirely lacking, particularly so in case of family trusts. The Master should ensure that adequate separation of control from enjoyment maintained in every trust.

*Nieuwoudt v Vrystaat Mielies (Edms) Bpk* 2004 SA 486 SCA: In this case the Supreme Court of Appeal found that trustees must act jointly unless trust deed otherwise provides. The court also
found the application of Turquand rule to trusts troubling in light of absence of central register for trusts or trustees, as exists in respect of companies and close corporations.

**Glossary:**

Trust: __________________________________________________________________________
______________________________________________________________________________

Trustee: __________________________________________________________________________
______________________________________________________________________________

Trust founder: ________________________________________________________________
______________________________________________________________________________

Trust beneficiary: ______________________________________________________________
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Trust assets: _________________________________________________________________
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