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Introductory Concepts and Overview of the South African Insolvency Law System

PowerPoint Slides

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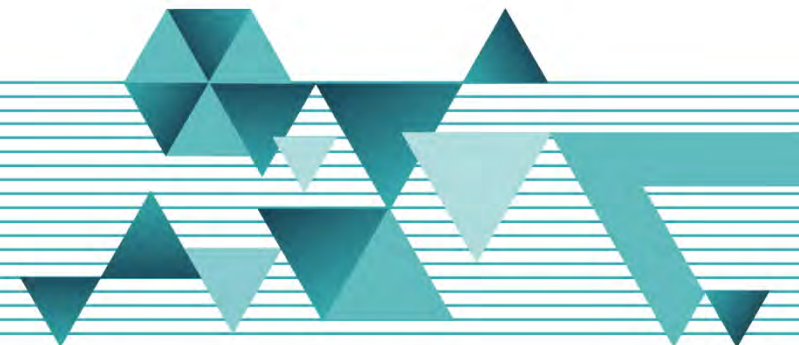


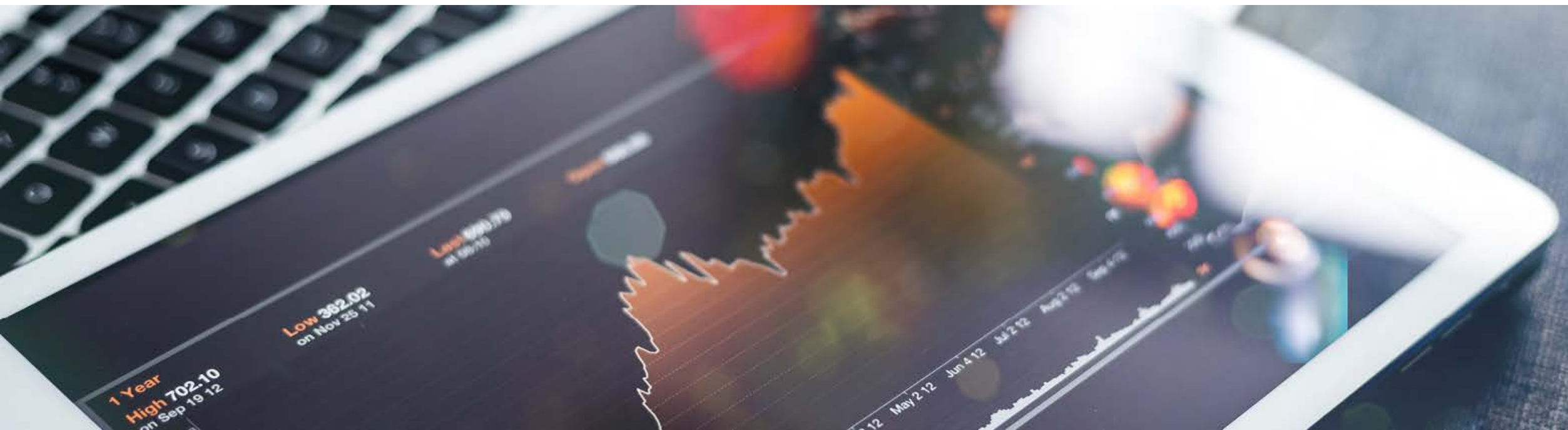
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Introduction

- Aims and Objectives of the Course to provide understanding
 - Background of insolvency law
 - Application and operation of the various primary and secondary legislation and case law
 - Drafting of the liquidation and distribution account (L & D account)
 - Rules relating to cross border insolvency and recognition of foreign judgments



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What is Insolvency?

- Deals with liquidations of Companies and Close Corporations
- Sequestrations of individuals, trusts and partnerships
- Rehabilitation of persons
- The role of the Master, meetings of creditors, protecting rights of creditors, Section 417 enquiries, subpoenas, attaching assets
- Business Rescue, Drafting Plans, Post Commencement Finance, Who gets paid what?
- MAKING THE BEST OF A BAD SITUATION



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Useful textbooks

- Meskin, Insolvency Law
- Mars, The law of Insolvency
- Henochsberg on the Companies Act
- Levenstein, South African Business Rescue Procedure
- Blackman- on the Companies Act

Legislation

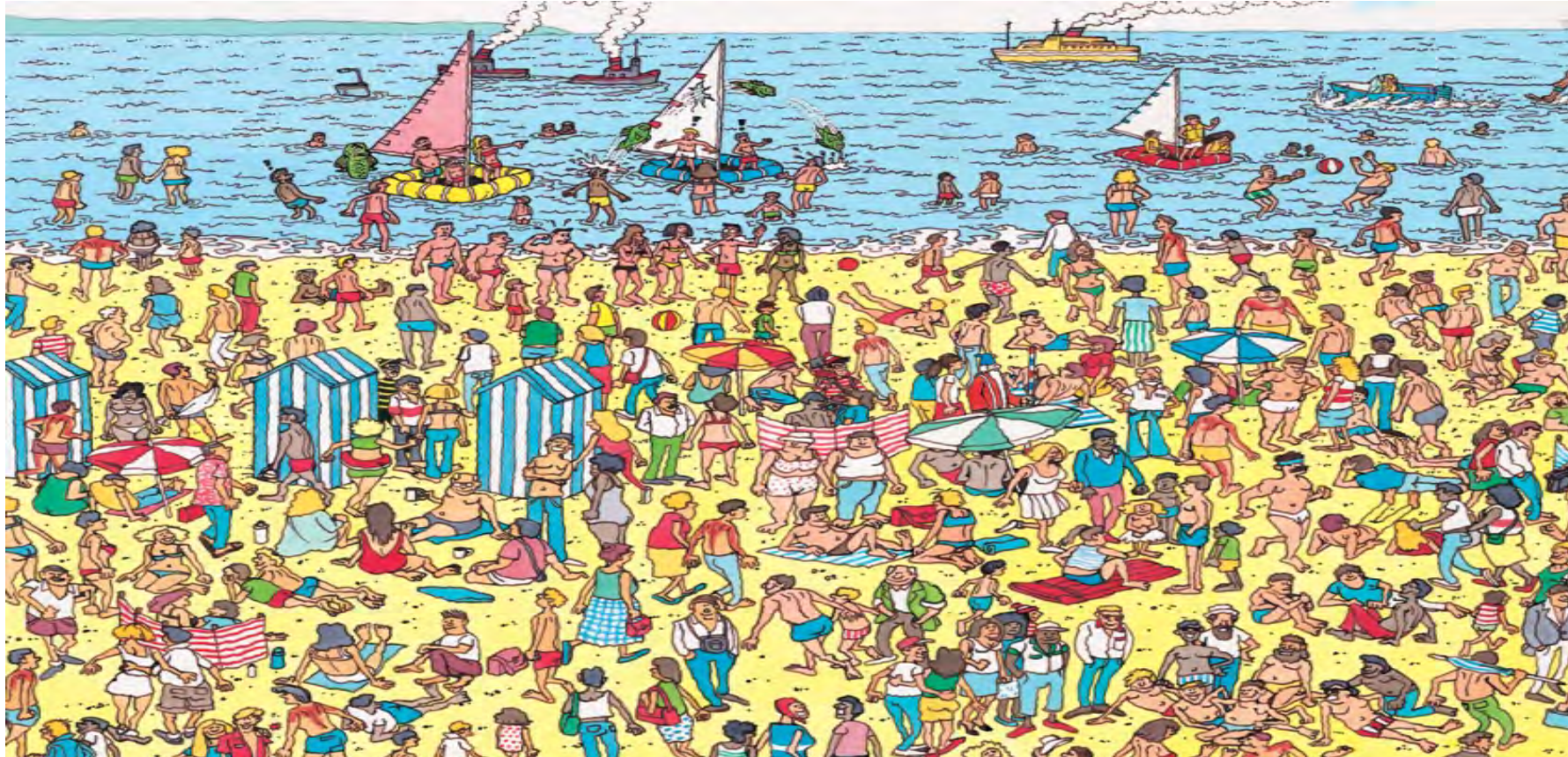
- Insolvency Act 1936
- Chapters 1 & 14 Companies Act 1973
- Chapter 2 & 6 Companies Act 2008
- S1 and Part 9 Close Corporations Act



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Sources of Insolvency Law





Sources of Insolvency Law

- Insolvency Act, 24 of 1936
- Companies Act (both old and new) schedule 5 Item 9, transitional arrangement
- Close Corporations Act (as amended) Read with Companies Act
- Cross Border Insolvency Act
- The common law



The Acts read together

- S 339 Companies Act says where the Companies Act is silent on any matter then revert to Insolvency Act
- “In the winding up of a company **unable to pay its debts** the provisions of the law relating to insolvency shall apply, in as far as they are applicable, be applied mutatis Mutandis in respect of any matter not provided for by this Act”
- Close Corporations Act S 66 says:
- Look towards the Companies Act provisions relating to Insolvency where matter not dealt with in CC Act
- Excludes certain Sections e.g. S 311 which deal with schemes of arrangement, S417 which deals with enquiries
- Includes Insolvency Act, by virtue S 339
- Item 5 schedule 9
- Also renders Chapter 6 applicable to Close Corporations



The future in the past

New Companies Act - Item 9, Schedule 5 - 2008 Companies Act



Transitional arrangements

- Schedule 5 provides:
 - Despite the repeal of the previous Act (i.e. the old Act), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to sub-items (2) and (3)
 - Despite sub-item (1), sections 343, 344 and 348 to 353 do not apply to the winding-up of a solvent company
- Schedule 5 excludes solvent companies from being wound up in terms of old Act. SOLVENT COMPANIES MUST BE WOUND UP IN TERMS OF NEW ACT
- What is a solvent company?
- A solvent company is defined as ??





- **Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd 2014**
 - Section 80 of the new Act relates to the voluntary winding-up of a solvent company.
 - A distinction is drawn between factual insolvency (where liabilities exceeds assets) and
 - Commercial insolvency where a company is unable to pay its debts (even where assets may exceed liabilities)



Concursus Creditorum

- Walker v Syfret
- In *Walker v Syfret* the court explained the key concept of concursus creditorum as follows:
 - “The sequestration order crystallises the insolvent’s position; the hand of the law is laid upon the estate, and at once the right of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order.”
- What does this mean?
- No set off of debts
- Provision in contract which allows you to terminate on insolvency invalid
- Uncompleted contract- take it as you find it
- Right to cancel which accrues prior to concursus, continues to exist after concursus.
- Your shoes are your shoes
- And when does it start?



Free Residue

- Free residue is defined as:
“the portion of the estate which is not subject to any right of preference by reason of any special mortgage, legal hypothec, pledge or right of retention.”
- Types of creditors:
 - Secured
 - Preferent
 - Concurrent



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- Constitution of the Republic of South Africa 1996
 - Supreme Law of the land
 - All legislation must pass constitutional muster
- Master of the High Court
 - in charge of and in control of the Administration of Deceased Estates
 - issues certificates appointing liquidators/trustees
 - confirms liquidation accounts
 - can remove a liquidator or trustee



Real vs Personal Rights

- Real Right-
 - the object of a real right is a thing,
 - a right which is enforceable against the world at large,
 - e.g. owner of a car,
 - Mortgage bond registered against property.
- Personal Right-
 - a legal obligation between two or more people gives rise to personal rights and the obligation to perform,
 - legal obligation can arise from contract, delict or family relationship.



Security

- Real Security
 - The right to receive payment from a specified asset
 - Mortgage bond
 - Pledge
 - Landlords hypothec
- Personal Security
 - No right to receive payment from a specified asset
 - E.g. suretyship agreement



Overview of Insolvency Law

- Origins-
 - Roman Dutch law together with English Law
 - Look at the Act and then look to the case law to see how the Courts have interpreted the Act
 - 1829 First Insolvency Legislation introduced in the Cape
 - Insolvency Act 1936 regulates insolvent persons
 - Unified Insolvency Bill ?????



- Options available to debtor
 - Administration- debts less than R50 000
 - Debt review National Credit Act.
 - Voluntary Surrender
 - Compulsory Sequestration
 - Debt enforcement - summons



Overview of Insolvency Proceedings

- Friendly Sequestration
 - Why would you want to be sequestrated?
 - Why is it called a friendly sequestration?
 - Why not just go for voluntary surrender?



Overview

- General
 - Insolvency Act regulates the position.
 - Create an orderly process for creditors for either secured or concurrent to obtain payment for their claims.
 - Once the order granted, control of the estate invest in the Master of the High Court and then in a trustee once appointed.
 - The trustee disposes of all the assets and distributes the proceeds to all creditors.
 - Potential setting aside of voidable dispositions.



Business Rescue

Judicial Management

- USELESS form of business rescue
- 1926
- Not many have been successful
- Most companies go from Judicial Management to liquidation
- Purpose to save company



- In *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd* Josman J referred to judicial management as “a system which has barely worked since its initiation in 1926.





Ethos behind Business Rescue

- To recognise that the effects of insolvency are not limited to the private interests of the insolvent and his creditors, but that other interests of society or other groups in society are vitally affected by the insolvency and its outcome and to ensure that those public interests are recognised and safeguarded.
- To provide means for the preservation of a viable commercial enterprise capable of making a useful contribution to the economic life of the country.
- To reorganize or restructure the company's affairs to either maximize the return to creditors alternatively maximize the likelihood of the company continuing to exist on a solvent basis.



- Purpose to save the company, alternatively wind it down to max return to creditors
- BR purpose to increase the return to creditors
- BR: Control and management handed over to a BRP
 - Once under BR - legal moratorium
 - Company given a chance to restructure its affairs
 - Creditors and shareholders vote on a plan
 - BRP implements the plan






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