

1 GENERAL OVERVIEW AND INTRODUCTION TO ESTOPPEL

SELF-ASSESSMENT

(1) Explain the concept "estoppel" and give an example.

Estoppel is a doctrine which operates in the following circumstances: Where one person represents to another that a certain set of facts exists, and the other, as a result of such representation, alters his or her own legal position to his or her detriment, the person making the representation is precluded or estopped from asserting that a different set of facts actually exists.

2 THE ENGLISH AND SOUTH AFRICAN LAW OF ESTOPPEL

SELF-ASSESSMENT

(1) Briefly describe how the reception of the English law of estoppel into South African law took place.

Remember that for a proper and thorough grasp of estoppel in our modern law, you need to read the historical development of estoppel in English law and study its reception into South African law.

The fact that estoppel originated from English law (ie a common law legal system) inevitably meant that it was not entirely compatible with the South African civil law heritage. However, estoppel eventually developed its own South African flavour and without it our law would be much the poorer.

(2) Are South African courts bound by the decisions of the English courts concerning the law of estoppel?

Explain.

Consider the implications if the English law of estoppel had to be strictly adhered to in a South African context. Among other things it would mean that every development peculiar to the English law would have to be applied in South African law. Remember that while English law has had a profound influence on South African law, it has not replaced Roman-Dutch law. Also bear in mind differences between the English concept of estoppel (see 2.3) and the concept as it has evolved in the modern South African law (refer to 1.2.1 in study unit 1).

(3) Critically discuss Steyn CJ's opinion in Trust Bank van Afrika Bpk v Eksteen 1964 (3) SA 402 (A) concerning the authority of English case law on the law of estoppel for South African courts.

Note that the answer to this question overlaps with the previous one. Have you considered whether a compromise approach to the issue of (the influence of) English law is more feasible than an extreme one? You will also note from studying the study guide that a fairly comprehensive body of South African case law has developed on estoppel and that it rarely happens that a court looks for guidance in English law to resolve some estoppel-related issue. Nevertheless, English law provides a convenient and useful point of reference.

3 REQUIREMENTS FOR A SUCCESSFUL RELIANCE ON ESTOPPEL: INTRODUCTION; MISREPRESENTATION

Scenario 1

A, the owner of a cow which had previously disappeared, recognised the cow at an auction but failed to say anything when it was sold to B. Can A be prevented from claiming the cow with the rei vindicatio?

Is based on the facts of *Maling v Hargreaves* 25 SC 123 discussed in paragraph 3.2.3 above and provides an apt illustration of circumstances in which the estoppel-denier could reasonably have been expected to act positively and speak. Bear in mind that such instances are the exception rather than the rule. Try to think of more examples.

Scenario 2

C entrusts his car to D for safekeeping and D proceeds to sell the car to E. Will E be able to plead estoppel successfully when C claims his car with the rei vindicatio?

Deals with the question whether the mere leaving of one's article with another creates the impression that the other party has the dominium or ius disponendi in respect of the article. Generally, the answer is in the negative. See the feedback and paragraph 3.2.4 above in this regard. Can you think of an exception where the mere entrusting of one's article to another may create the impression that the other party has the dominium or ius disponendi in respect of the article? See paragraph 4.3.2 in study unit 4 below.

SELF-ASSESSMENT

(1) What are the requirements for a successful reliance on estoppel?

All the requirements for estoppel should be kept in mind while you are studying each separate element. Also bear in mind that some of these elements are required strictly (e.g. misrepresentation) while others are not (e.g. fault).

(2) What is meant by a "representation"? Explain and elucidate your answer with examples.

Compare the concept of a representation with the delictual element of an act. You will notice that a representation is but a specific example of an act. In this way your understanding of the law of delict will benefit you in your study of estoppel.

(3) What is meant by a "misrepresentation"? Explain.

Compare the concept of a misrepresentation with the delictual elements of act and wrongfulness.

(4) What criterion is used to determine whether a representation reflects an untruth?

Discuss.

Have you considered whether there is any difference between the test for wrongfulness in the law of delict and the test to determine whether a representation reflects an untruth? Pay careful attention to the courts' expression of this requirement in the context of estoppel.

(5) Under what circumstances will an omission constitute a misrepresentation? Explain and elucidate your answer with examples.

The question of misrepresentation by omission is a tricky one and much will depend on the particular circumstances of a case. Pay careful attention to the examples from case law. Try to determine why the court allowed the plea of estoppel to succeed in a particular instance.

(6) Under what circumstances does an owner make a misrepresentation by leaving his or her thing in the possession of another person? Discuss in detail, citing examples from case law.

This is a very important aspect of this part of the study material since it deals with a situation which often seems to occur. Bear in mind that the requirement of fault also tends to feature prominently in such circumstances, so refer to this section again once you have completed study unit 4.

(7) The light meter of John's camera malfunctions. John takes his camera to a camera dealer for repairs. After the technician has repaired the camera, he absent-mindedly leaves it among second-hand cameras offered for sale. Peter buys the camera from the store. When John discovers this, he claims the camera from Peter. Peter, raising estoppel, says that John has

made a misrepresentation that the camera was for sale. Advise John on the merits of Peter's defence.

Note that this question and the previous question relate to the same study material. In the circumstances it cannot be said that John, merely by leaving his camera with the camera dealer, had created the impression that the dealer had dominium or ius disponendi in respect of the camera (see *Electrolux (Pty) Ltd v Khota* 1961 (4) SA 244 (W) above). Try to think of further examples where estoppel might succeed in such circumstances and be mindful of the fact that fault features prominently as a requirement.

(8) To whom must the misrepresentation be made in cases of estoppel?

This aspect is fairly straightforward.

The misrepresentation must be made to the person pleading estoppel (the estoppel-asserter).

4 REQUIREMENTS FOR A SUCCESSFUL RELIANCE ON ESTOPPEL: FAULT

PRACTICAL SCENARIOS

Scenario 1

The owner of a building finds a purchaser for the building, but the prospective purchaser refuses to buy it while it is still being leased. The lessee, thinking that his lease is due to expire on a particular day, writes a letter to the owner expressing his intention of vacating the property by a certain date. The owner shows the letter to the prospective purchaser who, on the strength of it, concludes the purchase. The lessee discovers that he has made a mistake and notifies the new owner. The owner applies for his eviction. Will the lessee be able to rely on the terms of the lease to prevent his eviction?

The scenario is based on the facts of *Riddelsdell v Williams* 1874 *Buch* 11 discussed in paragraph 4.2 above. It provides an illustration of circumstances in which the estoppel-denier clearly was negligent and therefore justifiably not permitted to rely on the actual state of affairs. Consider, however, the effect of judgments such as this one against the approach of the Appellate Division in other cases discussed in paragraph 4.2.

Scenario 2

A leaves his car for repairs with B, who services cars in his back yard and also sells old cars from the premises. A forgets the original registration papers of the car in it when he leaves it with B. B repairs the car but leaves it standing next to old cars which are for sale. C shows an interest in buying the car and B's wife, upon finding the registration papers in the car, assumes that it is for sale and sells it to C. Will C be able to plead estoppel successfully when A claims his car with the rei vindicatio?

This is a case where negligence on the part of owner will probably have to be proved to invoke estoppel successfully against the owner's rei vindicatio. Since the owner was negligent in leaving the registration papers of the car in it when he left it with a person who inter alia sold second-hand cars, a plea of estoppel should succeed. See paragraph 4.2 in this study unit. Also refer to paragraph 3.2.4 in study unit 3. As previously mentioned, the aspects of entrusting one's article to another and negligence are usually the focal points when the article ends up in the hands of a third party who invokes estoppel against the rei vindicatio of the owner.

SELF-ASSESSMENT

(1) Is intent a requirement for a successful reliance on estoppel? Briefly discuss.

See 4.1. Consider why intent should not be a requirement for a successful reliance on estoppel. As a matter of interest, can you think of instances in the law of delict where intent is required in order to establish liability?

(2) Explain the test for negligence in cases of estoppel.

See 4.1. Compare the test for negligence in regard to estoppel with the test for negligence in the law of delict. Is there any difference between the two?

(3) Is negligence a requirement for a successful reliance on estoppel? Discuss in detail, citing relevant case law.

See 4.2; 4.3.1; and 4.3.2. You may focus on decisions of the Appellate Division (now known as the Supreme Court of Appeal). This is a very important aspect of the study material and you should study it carefully. To practise, prepare a rough draft of your answer to such a question as if it were asked in an examination. Bear in mind that the material suggests a mark allocation of approximately 20 to 25 marks for such a question.

(4) In which cases of estoppel is negligence required? Discuss in detail, citing case law.

See 4.2. You may focus on decisions of the Appellate Division. This is but one aspect of the previous question. Bear in mind that the question of negligence as a requirement for estoppel is still a controversial one and the Supreme Court of Appeal has yet to settle the matter once and for all

(5) Why is negligence required if estoppel is raised against the rei vindicatio, but not in other cases?

See 4.2. (This question deals with the strong protection afforded ownership in our law.) As a matter of interest, consider other areas of law where the protection of ownership actually has been eroded.

(6) In which cases of estoppel is negligence not required? Discuss in detail, citing case law.

See 4.2; 4.3.1; and 4.3.2. Do not miss the exceptions mentioned in 4.2. Questions (3) to (6) are interrelated and therefore their answers tend to overlap. However, some of these questions focus on specific aspects of the negligence requirement in estoppel. Remember that these different aspects are all relevant.

(7) The light meter of John's camera malfunctions. John takes his camera to a camera dealer for repairs. After the technician has repaired the camera, he absent-mindedly leaves it among second-hand cameras offered for sale. Peter buys the camera from the store. When John discovers this, he claims the camera from Peter. Peter raises estoppel. Must Peter prove negligence on John's part in order to succeed with his reliance on estoppel? Advise.

See 4.2. Of course John institutes the rei vindicatio to get his camera back, and therefore Peter must prove negligence on John's part. You must substantiate your answer properly with reference to relevant case law.

(Do you remember that merely leaving your thing in the possession of another person does not necessarily amount to a misrepresentation that the other person has the right of ownership or the right to dispose of the thing? See 3.2.4 in the previous study unit.)

(8) What is the effect of fault on the part of the person who has been misled (the estoppel-asserter)?

See 4.4. This aspect is very important because fault on the part of the estoppel-asserter may have the effect of precluding reliance on estoppel. Have you considered why intentional misrepresentation will nullify negligence on the part of the estoppel-asserter? Refer to your study material on the law of contract and law of delict in relation to culpable misrepresentation. You will find similar approaches

5 REQUIREMENTS FOR A SUCCESSFUL RELIANCE ON ESTOPPEL: PREJUDICE PRACTICAL SCENARIO

A sells merchandise to customers on standard terms and conditions. To ensure a sale and commission, A's agent misrepresents facts to B as a result of which B enters into a contract with A on terms different to A's standard terms. A alleges a contract on the basis of his standard terms and B invokes estoppel in order to maintain a contract on the basis of the misrepresented facts. Must B prove actual, patrimonial prejudice in order for estoppel to be maintained or does the mere entering into of the contract suffice to constitute prejudice?

The scenario is based loosely on the facts of *Van Ryn Wine and Spirit Co v Chandos Bar* 1928 TPD 417, although in that case the seller was the party who (unsuccessfully) invoked estoppel. In your approach to this problem you should critically consider both approaches to the element of prejudice.

Although there is authority for both approaches, inter alia on the basis of *Peri- Urban Areas Health Board v Breet* 1958 (3) SA 783 (T), the mere entering into a contract may be regarded as a sufficient change in position to satisfy the detriment requirement. Consider whether, on the basis of existing authority, a court would be entitled to approach this matter strictly and require actual, patrimonial prejudice for reliance on estoppel in such circumstances.

SELF-ASSESSMENT

(1) Explain what the requirement of prejudice in case of estoppel entails and give examples.

See 5.1 and 5.2. The question of prejudice as a requirement for estoppel is as controversial as the issue of negligence, and a resolution in either case does not seem to be imminent. Have you considered why there should be a requirement of prejudice at all? The question of prejudice also features in the context of reliance-based contracts, although there it does not seem to be a prerequisite. Consult your study material on the law of contract and paragraph 8.5 in study unit 8 in this regard.

(2) Differentiate in detail between the two approaches to the requirement of prejudice in the South African law of estoppel. Refer in your answer to case law and the opinions of authors.

See 5.2. This question and the previous one overlap. Which approach do you consider to be the more appropriate? Give reasons for your answer.

6 REQUIREMENTS FOR A SUCCESSFUL RELIANCE ON ESTOPPEL: CAUSATION

PRACTICAL SCENARIO

A sells and delivers a car to B. A also provides B with documents indicating that the car has been paid for in cash and the registration documents for the car. B pays by cheque and soon thereafter sells the car to C. B's cheque is dishonoured and A attempts to reclaim the car from C who pleads estoppel against A's claim. Will the plea of estoppel succeed in the circumstances?

The scenario is based loosely on the facts of *Kajee v HM Gough (Edms) Bpk 1971 (3) SA 99 (N)* where the court actually found that estoppel could succeed in the circumstances on the basis that the intermediary's (B's) fraud was not the real or proximate cause of C being misled, but rather the negligence of the person who sold the car (A). However, you should consider all possible arguments within this context. Compare, for instance, the approach(es) adopted in *Union Government v National Bank of SA Ltd 1921 AD 121*. See also the feedback to question (4) above.

SELF-ASSESSMENT

(1) Are both factual and legal causation relevant for the law of estoppel? Discuss.

See 6.1 and 6.2. Note that these two facets of causation are combined in a single test in the case of estoppel. The fact that the courts do not explicitly differentiate between the two facets does not therefore justify a conclusion that only one of the two is relevant for the law of estoppel. Compare the approach to causation in the law of delict. Consider whether the law of estoppel could benefit from developments in the law of delict.

(2) What test is employed by the courts to determine whether there was a causal connection between the estoppel-denier's misrepresentation and the estoppel-asserter's prejudice? Discuss in detail.

See 6.2. Clarify your answer by discussing the facts of and decision in the *Union Government* case. Bear in mind that the courts are not always clear or uniform in their expression of the causation requirement.

(3) A postal agent and part-time government employee, P, permitted S, whom he had known for many years, to work in his office on Sundays because it was a quiet place in which to work. While he was in P's office, S used the official post office date stamp, which P had neglected to keep under lock and key, to stamp a number of unused blank postal order forms which had been stolen from a post office in another town about three years before. Having given the order forms the appearance of validity by stamping them, S disposed of them to various persons. Some of these persons deposited the orders they had acquired with the B bank. The B bank presented the orders to the post office and was paid their face value. The government, on discovering that the orders were not genuine, sought to recover under a *condictio indebiti* the amount the post office had paid to the B bank. The B bank raised the defence of estoppel by negligence, alleging that P had been negligent in not keeping the date stamp under lock and key and in allowing S access to the office. Discuss the merits of the defence of the B bank.

See 6.2. Question (3) is simply another way to test your mastery of the same study material you had to use in answering question (2). Note that the facts of this question are those of *Union*

Government v National Bank of SA Ltd 1921 AD 121. Note also that it was a case where estoppel was raised as a defence to an enrichment claim that is the *condictio indebiti*. This demonstrates the overall importance of estoppel and its potential application in the law of obligations (and elsewhere).

(4) The light meter of John's camera malfunctions. John takes his camera to a camera dealer for repairs. After the technician has repaired the camera, he deliberately leaves it among second-hand cameras offered for sale. Peter buys the camera from the store. When John discovers this, he claims the camera from Peter. Peter raises estoppel. Would it be correct to state that the conduct of an intervening person D like the technician in the given facts D would always be the "proximate cause" of the misled person's prejudice? Explain.

See 6.2 (especially the quotation from LAWSA paragraph 665). This question alludes to the problematic aspect of intentional (fraudulent) conduct by a third party. Bear in mind that the position in this regard is not entirely certain and that case law does not reflect a uniform picture. Compare for instance *Union Government v National Bank of SA Ltd 1921 AD 121* and *Kajee v HM Gough (Edms) Bpk 1971 (3) SA 99 (N)*. Consider whether there is any real difference between the factual situations in these two cases. Should the outcome in both cases not have been the same? Is there merit in the approach adopted in *Kajee v HM Gough (Edms) Bpk*?

7 REQUIREMENTS FOR A SUCCESSFUL RELIANCE ON ESTOPPEL: THE RELIANCE ON ESTOPPEL MUST BE PERMISSIBLE IN LAW

PRACTICAL SCENARIO

A applies to the local authority for a licence to trade. The relevant committee of the local authority decides against granting the licence on certain grounds. The clerk who issues the licences mistakenly issues a trade license to A. Once the local authority discovers this mistake it immediately informs A that his licence has been revoked because it should not have been granted in the first place. A contests the revocation and invokes estoppel against an application by the local authority to have the licence revoked. Will A be successful?

The scenario is based loosely on the facts of *Hoisain v Wynberg Municipality 1916 CPD 194 198*, wherein it was held that where a town clerk without the authority of the municipal council issued a certificate to trade, he was not estopped from refusing to put the name of the person concerned on the list of general dealers for the area concerned, the reasoning being that he could not by his mistake be compelled to bring about a position which he had no power in law to create of his own free will. However, such a situation must be contrasted with the instance where the maintenance of a false impression would perpetuate a situation which is merely contrary to the policy consistently applied by a competent body without its being in conflict with any statutory decree or prohibition. In the latter case estoppel is applicable (see *Mossel Bay Municipality v Ebrahim 1952 (1) SA 567 (C)* discussed under 7.2 above). Remember that the distinction between these two scenarios is of cardinal importance in determining whether estoppel will succeed or not. Have you considered the implications for the law of contract? Consider the case of *National and Overseas Distributors Corp (Pty) Ltd v Potato Board 1958 (2) SA 473 (A)*. Would estoppel have succeeded if pleaded by the contract-asserter in that case? (See 8.5 in study unit 8.)

SELF-ASSESSMENT

(1) Explain the requirement that the reliance on estoppel must be allowed by law and elucidate your explanation with several examples.

See 7.1 and 7.2. Have you considered whether this is a rule of general application? Compare, for instance, the requirement that the conclusion of a contract, its performance and its object must be lawful before it will be enforced by a court of law.

(2) Give examples from case law where a reliance on estoppel would have brought about a result prohibited by common law or statutory law.

See 7.2. Have you noted that most of the examples relate to a statutory enactment that has not been complied with? Try to think of examples where estoppel would not be allowed because it would cause a situation prohibited in terms of common law.

(3) Can a reliance on estoppel result in an ultra vires act being valid? Discuss.

See 7.3. In this regard you should pay careful attention to the possible implications of the Constitution. Consider a possible situation where you think the Constitution could cause an exception to the general rule in this regard.

(4) Can a reliance on estoppel result in the validation of an act performed in the absence of capacity to act or contractual capacity?

See 7.4. Try to think of further examples where a reliance on estoppel cannot result in the validation of an act performed in the absence of capacity to act or contractual capacity.

(5) How have the South African courts applied the requirement that the reliance on estoppel must be allowed by law, in the area of hire purchase transactions (credit agreements)? Discuss.

See 7.5. Bear in mind that although this situation was highly problematic under the repealed Hire-Purchase Act, it is doubtful whether it will persist in future. Remember to pay attention to the nature of the problem (see 7.5.1) and the comments under 7.5.3 (especially the distinction between fictitious and invalid hire-purchase contracts).

8 THE APPLICATION OF ESTOPPEL IN CERTAIN PRACTICAL INSTANCES

PRACTICAL SCENARIOS

Scenario 1

A, the owner of something, represents to C that B is the owner and acting on this representation, C buys it from B. If C alienates the thing to D, would A be able to claim the thing from D with the rei vindicatio?

In our law the owner's claiming of his or her property which is in the hands of another by means of the rei vindicatio is based on the Roman principle of *ubi rem meam invenio ibi eam vindico* (where I find my property, that is where I claim it). According to Van der Merwe, C has not become the owner of the thing even though he may successfully rely on estoppel to rebut A's claim to the thing in question. The reason for this is that B cannot transfer to C more rights than he himself has (the *nemo plus iuris* rule). This view would mean that where in this example C alienates the thing to D, A would be able to claim the thing from D with the rei vindicatio because the latter would not be able to raise estoppel against A. However, an owner's rei

vindicatio may be restricted where he or she entrusts his or her property to a factor (an agent for sale) for selling, and the factor, exceeding the bounds of his or her authority, sells the goods. The owner can reclaim his or her property with the rei vindicatio only if the buyer has connived with the factor to defraud the owner. However, in Pretorius v Loudon 1985 (3) SA 845 (A), doubt was expressed about the question whether this exception applies in our law. See question (1) and 8.2 in this regard. Consider whether there is a need for this rule in South African law

Scenario 2

X, a partner in a business, resigns from the partnership. Y provides goods and extends credit to the partnership because X is a good businessman and very wealthy. Owing to poor management, the partnership is soon in dire financial straits after X's departure. Y is not aware of the fact that X has left the partnership and continues to provide goods on credit to the partnership. When the partnership cannot settle his account, Y looks to X for payment. Can X be held liable for debts of the partnership incurred after his departure?

The partnership is dissolved when a partner resigns from it. The former partner is not liable for debts incurred by the new partnership after his or her resignation. Although he or she is no longer a partner, in certain circumstances he or she can nevertheless be held liable as a partner by persons who have dealt with the firm in the belief that he or she is still a partner. This rule was not an offshoot of the estoppel principles, but was known to our common law (De Wet 71). Thus in this scenario X could possibly be held liable for the debts of the partnership. The question is whether in the circumstances he indeed had a duty to inform Y that he had resigned from the partnership. See question (3) and 8.4 in this regard.

Scenario 3

In a letter H offers a trailer to S for sale for R50 000,00. The matter is referred to a department of S which has no knowledge of the price asked by H. The department is prepared to pay R30 000,00, and writes a letter to H undertaking to buy the trailer but negligently fails to mention any price. Did a contract come into being? If so, on what terms?

The facts in this scenario closely resemble those in Hodgson Bros v SAR 1928 CPD 257 where the court found that S had unreasonably created the impression in H's mind that the truck was being bought for the larger amount (ie R50 000,00 in the scenario); therefore, in spite of dissensus a contract had come into being. This case is often construed as one dealing with a contract based on the reliance theory in the absence of consensus. However, it is equally plausible to find that a fiction of a contract existed between the parties based on estoppel, but since the reliance theory gives rise to an actual contract while estoppel only maintains the fiction of one, the reliance theory is the better option to follow in the circumstances. See question (4) and 8.5 in this regard.

SELF-ASSESSMENT

(1) A, the owner of a thing, creates the impression that B is the owner of it, and C, reacting on the strength of this impression, buys the thing from B. When A claims the thing from C, C raises estoppel. The court finds in C's favour. Has C now become owner of the thing? Discuss in detail, citing the opinions of writers.

See 8.2. It is important here to note the difference between estoppel as a means of acquiring ownership of a thing and estoppel as a means to prevent the owner of a thing from claiming it with the rei vindicatio. In the former instance the successful estoppel-asserter becomes the actual owner of the thing, while in the latter instance the estoppel-asserter does not become owner. Have you considered the practical consequences of this distinction? Compare the situation where personal as opposed to real rights are involved. Should the same argument apply?

(2) Briefly explain the two most important applications of estoppel to the field of representation in terms of mandate.

See 8.3. Have you considered practical examples to help you to understand the potential problems that may arise in this regard? It might be helpful to review the general requirements for the application of estoppel when considering this matter.

(3) Briefly explain the contribution of estoppel to the field of the law of partnership.

See 8.4. Generally speaking this aspect should not give you any difficulties. Review the requirements for successful reliance on estoppel when considering this section.

(4) May estoppel play any part in causing contracting parties to be held bound in the absence of consensus? Explain in detail.

See 8.5. You must refer to theories concerning the basis of contractual liability in your answer. An important aspect to consider here is that the application of the reliance theory to the law of contract and its application to estoppel are related. In fact, the reliance theory evolved from estoppel. It is therefore not surprising that some of the elements for a successful reliance on estoppel have caused problems when applying the reliance theory to the law of contract. To date it is still unsure to what extent fault and prejudice may play a role in the application of the reliance theory. Have you considered the similarities and dissimilarities between the upholding of a fictitious contract by way of estoppel and a contract based on the reliance theory? Do you think either is preferable as regards contract law?

(5) Explain very briefly what part estoppel has to play in the case of waiver of rights.

See 8.6. Remember to review the requirements for successful reliance on estoppel when considering this aspect. Have you considered practical scenarios illustrating the functioning of estoppel in this context?

9 THE BASIS AND NATURE OF ESTOPPEL

SELF-ASSESSMENT

(1) Is the basis of estoppel in South African law to be found in the exception doli? Explain.

See 9.2. Your answer must take the following into account:

- . The fact that the courts have used the exceptio doli as justification for the introduction of estoppel into our law
- . The opinions of writers
- . The two forms of the exceptio doli
- . The view of the Appellate Division that the exceptio doli has not become part of South African law

(2) Is the basis of estoppel in South African law to be found in the adagium nemo contra suum factum venire debet? Explain.

In *Smit v Smit's Executor* 14 SC 142 Lord de Villiers expressed the view that the principles of estoppel are embodied in the maxim *nemo contra suum factum venire debet* ("no one may go against his own act"). This maxim did not enjoy universal application in Roman law. As De Wet points out, the expression on its own is meaningless. It makes sense only if the *factum* is qualified. Only when the *factum* is a definite expression of intention, by which a person wishes to bind himself, can he or she (by means of reliance on the maxim concerned) be prevented from denying it. It is not, however, the basis of estoppel. In the case of estoppel the intention to be bound is not required – not even the intention to create a particular impression is required. There are, however, supporters of the view that the basis of estoppel is a contract, express or implied, in terms of which the parties are supposed to have agreed that certain facts either exist or do not exist – even if the facts should prove inconsistent with reality.

For example, where an ostensible authority is created, the principal responsible for the false impression is precluded from maintaining the true state of affairs as against the deceived third party, for the very reason that he has agreed with that third party to accept as true a state of affairs which differs from that which actually exists. By his acting on the strength of the misrepresentation, the third party is then deemed to have accepted the offer. Such an agreement is usually a sham, and often most artificial at that. See the remarks of Greenberg J in *Van Ryn Wine and Spirit Co v Chandos Bar*: "Cases may arise in which there is in fact no mutual consent and accordingly no contract." One might also ask the supporters of the contractual basis of estoppel how an intention can be construed in cases of negligent misrepresentation. Although a person can be estopped where he brought another under the impression that he wished to be bound, the view of Lord de Villiers that the principle of estoppel is embodied in this maxim cannot be accepted without qualification. The maxim may indicate the functioning of estoppel, but not its actual basis.

(3) Does protection of good faith constitute the basis of estoppel? Explain.

The basis of estoppel is sometimes sought in the protection of good faith. Of course, protection of *bona fides* also occurs over and above the principles of estoppel (cf the doctrine of notice, prescription, position of the *bona fide* possessor, etc), but the characteristic feature of estoppel is the fact that good faith is protected by the maintenance of the impression created. As has been explained previously, the injured party must have acted in good faith. If he or she has not done so, he or she has not been misled. From the point of view of the injured party, estoppel manifests itself in the protection of the impression created.

(4) Is the basis of estoppel to be found in a delictual action for misrepresentation? Discuss in detail.

From the aforementioned it should be clear that the basis of estoppel should not simply be sought in delictual misrepresentation. Misrepresentation can give rise to delictual liability in terms of the *actio legis Aquiliae* and it can result in the remedy of estoppel. However, to try and simply force estoppel into the framework of the law of delict and to view it as yet another delictual remedy can give a warped picture. The first danger associated with such an approach is that the distinctive requirements for a plea of estoppel which have developed in legal practice over the years, are simply equated with the well-known requirements for delictual

liability. It is clear from the discussion of the requirements for estoppel that the requirements for a successful plea of estoppel are not identical with the requirements for delict. One needs only to have regard for the requirements of fault and prejudice, as well as causation, and for the fact that for estoppel to succeed, the reliance on estoppel must be legally permissible. The latter requirement has no equal in the law of delict. These differences between the delictual requirements and those for a plea of estoppel can be explained on the basis of the important differences between the remedy of estoppel and delictual remedies in so far as their nature, operation and purpose and function are concerned. These justifiable differences are also evident from.

(5) State the differences between estoppel, the actio legis Aquiliae and the interdict.

These justifiable differences are also evident from a comparison between estoppel, the actio legis Aquiliae and the interdict:

(1) Estoppel is not a remedy on which a plaintiff relies in his declaration. This remedy serves only as an answer or a defence in the replication or plea.

(2) Whereas an interdict and an action ex delicto are available in the case of any type of unlawful conduct, estoppel is relevant only in the case of misrepresentation.

(3) The aim of an action ex delicto is to recover monetary compensation for the damage suffered. The object of an interdict is to prohibit specified human conduct. Estoppel does not have either of these two functions:

the effect of estoppel is that an impression which has been created, is upheld.

(4) Fault is not required for an interdict, whereas it is a requirement for an action ex delicto; fault is a requirement for estoppel only in certain cases.

(5) Whereas an action ex delicto is aimed at the recovery of damages, estoppel is aimed at the prevention of damage.

(6) Is estoppel a rule of the law of evidence? Explain.

It is often maintained that "estoppel is a rule of evidence", and indeed "a rule of evidence, which precludes a person from denying the truth of some statement previously made" (see De Wet 106). The contention that estoppel, invoked as an exception or replication, forms part of the law of evidence originates from nothing less than a confusion of ideas. Estoppel must after all be raised in the pleadings. The leading of evidence is that part of the process in which allegata or allegations are proved. It should therefore be quite obvious that evidence is not contained in the pleadings.

Furthermore, as De Wet 106 points out, estoppel is not a rule of evidence in the sense that it excludes evidence. Facts alleged by the parties in their pleadings, which have not been admitted, form the facts at issue. The more facts there are at issue, the more evidence will have to be led. A person relying on estoppel must plead the facts on which he or she relies, and in so doing he or she introduces more facts at issue in so far as they are not admitted. Only evidence which purports to prove the facts at issue is admissible. Hence the effect of estoppel is to make more evidence admissible, rather than to exclude it. Because it is often contended that estoppel is a doctrine of the law of evidence, and not one belonging to substantive law, we find it dealt with in most works on evidence (eg Hoffmann & Zeffert The SA law of evidence).

(7) Is estoppel a remedy sui generis? Explain briefly.

It is probably correct to accept that estoppel is a legal remedy sui generis, which does not really correspond with either the exceptio doli or an action ex delicto. Estoppel is a useful legal remedy introduced into our law under the influence of English law in order to fill an important gap in our legal system. It can only lead to confusion when the sui generis nature of estoppel is denied and it is forced into some or other category in our legal system. When the sui generis nature of estoppel is understood, its principles can be allowed to develop in accordance with the particular need which has to be served and without the distortion and confusion caused by dogmatism. The application of and basis for estoppel ought not to be defined in more general terms than those made in the following remark in LAWSA paragraph

652: Briefly stated, the doctrine of estoppel by representation consists in this, that a person is precluded, i.e. estopped, from denying the truth of a representation previously made by him to another person if the latter, believing in the truth of the representation, acted thereon to his prejudice.

This indicates the basis of estoppel and is also the reason for its existence.