

MRL 4801 Q & A

SECTION A: NEGOTIABLE INSTRUMENTS

QUESTION 1 OF THE EXAM (NEGOTIABLE INSTRUMENTS)

Define the following terms in the context of negotiable instruments:

1. Issue (3)

The first delivery of a bill or note, complete in form, to a person who takes it as holder.

2. Acceptance (4)

Acceptance means an acceptance completed by delivery or notification and is the signification by the drawee of his assent to the order of the drawer.

3. Payment in due course (3)

Payment made at or after the maturity of a bill to the holder thereof in good faith and, if his title to the bill is defective, without notice thereof.

4. Delivery (2)

Actual or constructive transfer of possession from one person to another.

5. Negotiation (3)

Negotiation is the transfer of a bill from one person to another in such a manner as to constitute the transferee the holder of the bill.

6. A cheque (3)

A cheque is a bill drawn on a bank payable on demand.

7. Bearer (2)

Any person in possession of a bill payable to bearer.

8. Holder (3)

The payee or endorsee of a bill or note, who is in possession of it, or the bearer thereof.

9. In good faith (?)

A thing is deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not.

What are the fundamental differences between an endorser and a transferor by delivery? (6)

1. Endorser:
There is no contract on the bill which places an obligation on the payee before his signature is placed thereon.
Transferor by delivery:
The transferor by delivery is not liable on the bill because he has not signed it.
2. Endorser:
The payee must deliver the document to another after having signed it to create a contract.
Transferor by delivery:
The transferor by delivery, being the holder of a bill payable to bearer, only delivers the document – there is no signature in any capacity.
3. Endorser:
The endorser's liability arises from the contract on the bill, and he is liable by virtue of the instrument itself.
Transferor by delivery:
The transferor by delivery is not liable on the bill (he did not sign it) – there is thus no question of liability that arises from the contract on the bill.

Alvereen Leonard draws a cheque payable to “Michelle Koekemoer or order”, but Michel's name is misspelt. Michel wishes to negotiate the cheque. What must Michel do? (2)

If the payee or the endorsee's name is misspelt or if the payee or endorsee is wrongly designated, that party may endorse as so wrongly described, adding his proper signature if he thinks fit.

Explain the difference between “relative” and “absolute” defences and give an example of each. (4)

Absolute defences may be raised against the holder in due course but relative defences may not. Absolute defences relate to the document itself. The defendant, by raising an absolute defence, avers that although it appears that he has bound himself on the bill, it is not attributable to him. The defence that the defendant lacked capacity during the signing of the bill is an example of an absolute defence.

Two types of defences that do not apply to and may not be used against the holder in due course are the defences of defect in title, and a personal defence. These two types of defences together are sometimes referred to as relative defences. An example of a defence of defective title would be a claim for the recovery of a bill against a thief.

Discuss the differences between sections 58 and 83 of the Bills of Exchange Act 34 of 1964 (4)

Section 58 protects the bank when it has paid the cheque in good faith and in the ordinary course of business to a non-holder. Section 83 protects a drawee bank that paid the cheque in good faith and in the ordinary course of business to another bank or by crediting the depositor's account with the drawee bank. Section 58 applies to cheques paid over the counter whereas section 83 does not. For a bank to be protected by section 58, there must be a forged or unauthorised endorsement on the cheque. A bank may be protected by section 83 even if there is no endorsement at all.

List FOUR ways in which the drawee bank's duty and authority to pay a cheque drawn on it by its customer is terminated. (4)

When the bank receives notice of its customer's:

- Death
- Incapacity
- Sequestration or winding-up
- Judicial management

Name TWO reasons why the determination of the due date on a bill of exchange is important. (2)

- The due date is important in determining the time of payment. Section 43(2)(a) and (b) of the BEA provides that a bill should be presented for payment on its due date, except when it is payable on demand.
- Payment in due course of a bill can only take place on or after the due date.
- A holder can only be a holder in due course if he receives the bill before the expiry of the due date.
- Because a bill is only discharged after payment in due course, the due date is also of importance in regard to the discharge of the bill.

In each of the following scenarios, explain fully whether X is a holder, a holder in due course, or merely a possessor:

- 1. A draws a bill on B in favour of 'C' and delivers it to him. C endorses the bill and delivers it to X after the due date of the bill. (3)**

X is a holder of the bill because he is an endorsee in possession of the bill. An overdue bill may still be negotiated, however, X cannot become holder in due course of the overdue bill because a holder in due course must have become holder of the bill before it became overdue.

- 2. A draws a cheque on B Bank in favour of 'Cash or order' and delivers it to X. (3)**

This is a bearer cheque. X is thus a holder thereof because he is in possession of a bearer cheque. The first delivery of a bill to the payee of a bearer bill is both "negotiation" and "issue", therefore, if all other requirements have been met, which they appear to have, X is the holder in due course.

- 3. A draws a bill on B in favour of 'C or order' and delivers it to him. C endorses the bill in the following manner: "Pay D or order for collection". C delivers the bill to D. D endorses the bill and delivers it to X. (3)**

With reference to the following scenarios, explain fully in each case whether the cheque is transferable or not:

1. **A draws a cheque on B Bank in favour of 'C or order'. The cheque is uncrossed and marked "not negotiable". (2)**

This is an order cheque and is transferable.

2. **A draws a cheque on B Bank in favour of 'C or order'. The cheque is crossed and marked "not negotiable". (3)**

The cheque is transferable. Although the payment instruction is altered by the crossing, the crossing has no effect on the negotiability of the cheque. Even if the words "not negotiable" are added to a crossing, the cheque can still be negotiated within the meaning of section 29(1), so that the transferee is constituted the holder of the cheque. The addition of the words "not negotiable" to a crossed cheque has two consequences: with reference to the negotiability of it in terms of section 80, and to the true owner's rights in terms of section 81.

3. **A draws a cheque on B Bank in favour of 'C or order'. The cheque is crossed and marked "not negotiable – account payee only". (4)**

An order cheque is in principle transferable unless words restricting its transferability are printed on the cheque. The words "account payee only" are nothing more than an instruction to the collecting bank to collect payment of the cheque for a specific payee. In the *Sham Magazine Centre* case, the court came to the conclusion that the words "not negotiable" in conjunction with the words "a/c payee only" do not exclude the transferability of a cheque. This cheque is therefore transferable.

A draws a cheque on B Bank in favour of 'C'. The cheque is crossed and the words 'not negotiable account payee only' and 'no further transfer' are printed on the face of the cheque. A delivers the cheque to C as payment for a debt. D steals the cheque from C, writes on the back of the cheque 'pay X', forges C's signature and delivers it to X who takes it in good faith and for value. X deposits the cheque into his account at S Bank for collection. B Bank pays S Bank in good faith and without negligence. B Bank debits the account of its customer, A, and S Bank credits the account of its customer, X.

Advise C fully about his rights against S Bank with reference to decided cases and the Bills of Exchange Act 34 of 1964. (10)

C is the true owner of the cheque. The true owner of a lost or stolen cheque acquires rights under section 81 if the cheque is crossed and marked 'not negotiable'. However, in terms of section 81(5) S Bank will not be regarded as having given consideration for the cheque (one of the requirements which must be met for C to acquire a right of action against S Bank, the possessor) merely because:

- (1) It has credited the account of X before receiving payment for the cheque, or because
- (2) Any such payment was applied towards reducing a debt owed by X to S Bank.

S Bank will only be liable as possessor towards C if S Bank fails to give any information concerning the cheque to C.

However, S Bank may be delictually liable towards C. In terms of the decision in *Indac Electronics*, the true owner of a stolen cheque can charge the collecting bank with negligence if the collecting bank negligently collects the cheque on behalf of a client who is not entitled to receive payment on that cheque.

The cheque is a traditional non-transferable cheque in terms of section 6(5), and may therefore only be deposited into an account bearing a name identical to that of the payee.

The court in *Indac Electronics* decided that a collecting bank which collects the amount of a cheque for the wrong person is indeed liable to the true owner for compensation. A collecting bank is negligent if it fails to take reasonable steps to determine whether its client is *ex facie* entitled to payment of the cheque. The Supreme Court of Appeal in the *Columbus Joint Venture* case stated that whether a collecting bank was negligent or not could only be decided after careful consideration of all the facts and circumstances of the matter. In our case, the facts point *prima facie* clearly to negligence, because S Bank accepted a non-transferable cheque for the account of someone other than the payee of the cheque.

Following the judgment in *Indac*, C will have to prove the following five elements in order to be successful in his bid to hold S Bank liable for wrongful collection of the cheque:

- An act or omission
- Unlawfulness of the act or omission (S Bank is legally obliged not to collect cheques negligently)
- Intent or negligence on the part of the collecting bank
- Loss
- Causal connection between the act or omission and the loss suffered.

Alvereen Leonard draws a bill of exchange on B Ltd in favour of "Carmen Smith or order", payable three months after date. Carmen immediately presents the bill for acceptance, but B Ltd dishonours the bill by non-acceptance.

1. Explain whether Carmen may negotiate the bill to David. (2)

The bill is an order instrument, and section 29(3) provides that an order instrument is negotiated by endorsement of the holder completed by delivery. A negotiable instrument which is initially negotiable remains negotiable until it has been restrictively endorsed or until it is discharged (s 34(1)). The fact that a bill has been dishonoured or that its due date has already expired does not mean that it may not still be negotiated. Carmen may negotiate the bill to David.

2. Assuming so, can David become its holder in due course? (3)

Yes, David may be a holder in due course if the bill was dishonoured by non-acceptance. If Carmen negotiates the bill to David without delay it will still be some time before the due date arrives, and if David is unaware of the dishonour, there is nothing to prevent David from being a holder in due course.

Alvereen Leonard draws a cheque on B Bank in favour of "Carmen Smith or order", and delivers it to Carmen. Carmen endorses the cheque specially to David, with a view to paying him the next day for performance which he has to render in terms of an agreement between them. David, however, does not perform but finds the cheque on the desk in Carmen's office and takes it. David endorses the cheque and delivers it to Michel, who takes it in good faith and for value. Carmen discovers that the cheque is missing and arranges with Alvereen to countermand payment. When Michel presents the cheque for payment, B Bank refuses to honour it. Explain fully whether Michel can enforce payment against any of the parties. (8)

Michel is a holder in due course because he is the holder (endorsee in possession) of a cheque which is complete and regular on the face of it, and when it was negotiated to him, he was unaware of any defect in title and had no knowledge of previous dishonour. He took the cheque in good faith and for value. As soon as a bill comes into the hands of a holder in due course, there is an irrebuttable presumption that there has been a valid delivery of the bill by all parties prior to the holder in due course (section 19(3)).

Section 36(b) provides that the holder in due course holds a bill free from any defects in the title of the prior parties. Section 36(c)(i) provides that a holder in due course obtains a good and complete title to the bill even if the title of its predecessor was defective. Michel may thus enforce payment against all parties liable on the bill. None of the parties may claim a defence of title or a personal defence. The title of David might have been defective because of breach of contract, but title defences, which are relative defences, are not applicable to a holder in due course. Holders in due course are only subject to absolute defences, for example forged or unauthorised signatures. As there are no absolute defences to be raised against Michel, Michel will be able to enforce payment against any of the liable parties.

Alvereen Leonard draws a cheque for R1000 on B Bank payable to "Carmen Smith or order". Alvereen delivers the cheque to Carmen. The cheque is crossed and marked "not negotiable account payee only". David steals the cheque from Carmen, and after forging her (Carmen's) signature, delivers it to Michelle, who takes it in good faith and for value. Michelle gives the cheque to a messenger, Philemon, to pay into her (Michelle's) account at the F Bank. B Bank pays F Bank in good faith and without negligence.

1. Explain fully whether this cheque is transferable or not. (5)

The mere crossing of a cheque does not affect the negotiability or transferability of a cheque. The crossing of a cheque qualifies the instruction to the drawee bank by prescribing that payment must be made to a bank. The addition of the words "not negotiable" to a crossed cheque has two consequences: with reference to the negotiability of it in terms of section 80, and to the true owner's rights in terms of section 81. According to the *Sham Magazine* case, the words "account payee only" do not change the nature of the cheque – it is still a transferable order cheque. The words are simply an instruction to the collecting bank that the named payee must obtain payment of the cheque, and to serve as a safeguard if the cheque were to fall into the wrong hands. This cheque is therefore transferable.

2. Discuss whether Carmen can enforce payment against any of the following parties: Alvereen Leonard; B Bank; Philemon, who refuses to disclose any information at his disposal concerning the cheque; F Bank; David; Michelle. (15)

Alvereen Leonard:

If the cheque comes into the hands of the payee, in terms of section 79 the drawer is protected "as if payment had been made to the true owner thereof". In this case, the cheque did come into the hands of the payee, Carmen, since the cheque was stolen from her. Carmen therefore has no rights against Alvereen, the drawer, since Alvereen's liability on the cheque as well as on any underlying obligations are discharged.

B Bank:

Since B Bank paid in accordance with the crossing to another bank (F Bank), and since payment was made in good faith and without negligence, B Bank will be protected in terms

of section 79 “as if payment of the cheque had been made to the true owner thereof”. B Bank may thus debit the drawer, Alvereen’s account.

Philemon:

Since the messenger failed to furnish the true owner with any information in connection with the cheque at the owner’s request, the messenger is liable in terms of section 81(3), and on application of section 81(1) he is deemed to have been a possessor of the cheque and/or to have given a consideration therefor, or to have taken it as a donee.

F Bank:

According to section 81(5), a bank which receives a cheque which is crossed and marked “not negotiable” is not to be regarded as having given consideration therefor merely because it has in its own books credited its customer’s account with the amount of the cheque before receiving payment thereof, or because any such payment is applied towards the reduction or settlement of any debt owed by the customer of the bank. However, the collecting bank will lose its protection if it paid out cash over the counter for such a cheque, or agreed that its customer could immediately draw against the cheque.

David:

The true owner of the cheque, Carmen, will have a right of recourse against David, who intercepted the cheque and acted *mala fide*. Her remedy is based on delict or unjustified enrichment, and not on the cheque itself.

Michelle:

In terms of section 81(1), Carmen, the true owner, acquires a right of recourse against Michelle, a subsequent possessor, if the following requirements of section 81(1) are met:

- the cheque was crossed and marked “not negotiable”
- it was stolen while it was crossed and marked as above
- in terms of the BEA, the drawee bank, B Bank, paid under circumstances which would not render it liable to the owner
- Carmen is the true owner of the intercepted cheque
- Carmen must be able to show that she suffered damages as a result of the theft
- Michelle has the cheque in her possession after the theft or loss
- Michelle has taken the cheque for value

Michelle will therefore not be able to raise any defence should Carmen institute an action against her. It appears that all the requirements of section 81(1) are met, therefore Carmen will be able to hold Michelle liable.

3. Would your answer have been any different if the cheque had been crossed but had not been marked “not negotiable account payee only”? (5)

The true owner of a lost or stolen cheque acquires rights under section 81 only if the cheque is crossed and marked “not negotiable”. The addition of the words “not negotiable” to a crossed cheque confers protection on the owner in terms of section 81. Thus, if the words in question had been omitted, Carmen would not have been able to hold Philemon or Michelle liable. Also, there would be no instruction to the collecting bank that the named payee must obtain payment of the cheque.

Is the following document a valid bill of exchange? Discuss fully (6)

TO Alan and Brian

Please pay to the order of Anthea or Michelle the sum of R1000, being the amount due for services rendered by Anthea to myself, in monthly instalments of R200 commencing on 1 May 2013. Should any instalment not be paid on due date the full outstanding balance shall become immediately payable.

Sans recours

(Signed) Lesego Selemale

Section 2(1) of the Bills of Exchange Act defines a bill of exchange as “an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to a specified person or his order, or to bearer”. If an instrument does not comply with the requirements listed above, it is not a bill.

In analysing the instrument provided, the following may be said:

The wording of the bill, although courteous, is an order to pay. The order is unconditional notwithstanding the fact that the transaction that gave rise to the bill is mentioned. The sum payable is certain although it is required to be paid in instalments, and upon default of any instalment the whole sum becomes due. The date of payment is fixed (with regard to the first payment) and is determinable (with regard to future payments). The fact that the payees are indicated in the alternative (namely Anthea or Michelle) is permissible in terms of section 5(2)(b) of the BEA. Although the order to pay is addressed to two drawers jointly, this is not contrary to section 4(2) of the Act. The drawer and any endorser of a bill may insert into the bill an express stipulation limiting his own liability to the holder in terms of section 14(1)(a) (*sans recours*). The document is, therefore, a valid bill of exchange.

A draws an uncrossed cheque on B Bank in favour of “C or order”. D steals the cheque from C and forges C’s signature on the back of the cheque. He then presents it to B Bank for payment, which he receives over the counter.

Discuss fully whether B Bank made a valid payment. (5)

D is not a holder due to the inoperative forged signature. B Bank thus paid someone who is not a holder. The provisions of section 58 are aimed at the protection of a bank where it has paid somebody that is not the holder.

In order to be protected, the bank must make payment under the circumstances that meet the requirements of section 58, namely:

- The cheque must be an order cheque
- There must be a forged or unauthorised endorsement on the cheque

- The person whose endorsement was forged must not be a client of the branch of the bank on which the cheque was drawn
- The bank must pay the cheque in good faith and in the ordinary course of business
- The cheque may either be crossed or uncrossed (if it is crossed, it may not be paid OTC)

If the above requirements are met, B Bank's payment will be considered payment in due course to D.

What rights will X have with regard to the following instruments in each of the following cases? Explain, in particular, whether X is a holder, a holder in due course, or a mere possessor:

- 1. A draws a bill on B in favour of "C or order" and delivers it to C. C delivers the bill to X with the intention of transferring his rights to X but neglects to endorse the bill. (4)**

Since the bill is payable to "C or order", it is an instrument payable to order. A bill payable to order is negotiated by the endorsement of the holder followed by delivery. Because the holder, C, neglected to endorse the bill, no negotiation took place and the transferee (X) did not become the holder. However, section 29(4) provides that if a holder of a bill payable to order transfers it without endorsing it, the transferor gives the transferee (X) such title as the transferor, C, had in the bill, and the transferee acquires the right to have the bill endorsed by the transferor.

Apart from the provisions of section 29(4), the holder of an instrument payable to order may transfer his rights in a bill by means of cession. X, the cessionary, cannot acquire more rights than what C, the cedent, had. Because C was the holder, X acquires the rights of a holder by way of cession.

- 2. A draws a crossed cheque on B Bank in favour of "C or order" and delivers it to C. C is a minor who, without the consent of his guardian, specially endorses the cheque in favour of X and delivers it to him. (3)**

C's endorsement, although not fulfilling the guarantee function, does fulfil the transfer function. The cheque is thus validly negotiated to X. If X complies with all other requirements as set out in section 27, he will be a holder in due course.

- 3. A draws an uncrossed cheque on B Bank in favour of "X or order" and delivers it to him. (3)**

X is a holder of the cheque because he is the payee in possession of the cheque. X will not be a holder in due course because the cheque was issued ("the first delivery of a bill, complete in form, to a person who takes it as holder") and not negotiated ("a bill payable to order is negotiated by the endorsement of the holder completed by delivery") to him.

A draws a bill on B in favour of "C or order". Upon receipt of this bill, C negotiates it to D by endorsement completed by delivery. D in turn negotiates the bill (by endorsement completed by delivery) to E. After presenting the bill for acceptance, E approaches you for some advice. Explain to E, under which circumstances he, as holder, may lose the right of recourse against the endorser, D, and the drawer A.(5)

E (the holder) will lose the right of recourse where, in terms of section 43, he fails to present the bill for payment and such failure is not excused or dispensed with (in terms of section 44). In this instance the drawer, A, and the endorsers, C and D, will not be liable – they will in fact be discharged.

E (the holder) will also lose the right of recourse against the drawer and endorsers where a bill is dishonoured by non-payment and the holder fails to give notice of the dishonour. In terms of section 46, notice of the dishonouring of the bill must be given to the drawer and each endorser of the bill in these circumstances. Any drawer or endorser to whom notice is not given will be discharged. The provisions of section 46(b) should be kept in mind in this regard. This section states that where due notice of dishonour by non-acceptance has already been given, it shall not be necessary to give notice of the subsequent dishonour by non-payment, unless the bill was accepted after the initial non-acceptance.

A draws a cheque on B Bank payable to “C or order”. D steals the cheque from C, forges C’s signature on the back of the cheque and delivers it to E. E signs the cheque and delivers it to X, who takes it in good faith and for value.

Explain fully whether X can enforce payment against A (2); C (2); D (2); E (6).

A:

In terms of section 22 a forged or unauthorised signature is wholly inoperative and there is no right to retain or give a discharge for the bill or to enforce payment thereof against any party. As a result of D forging C’s signature, the signature is wholly inoperative and X will thus not be able to enforce payment against A.

C:

Section 21 stipulates that no person is liable as drawer or endorser of a bill if he has not signed as such. Because C did not sign the bill, C will not be liable to X.

D:

D, the thief, was *mala fide*. X may institute an action against D based on delict or unjustified enrichment, and not on the bill itself.

E:

In terms of section 22 the forged endorsement made by the thief is wholly inoperative, therefore no title was transferred to E which he could then transfer to X. E cannot ever be the endorsee because of the forged endorsement. E will merely be the “endorser by estoppel”, but for purposes of section 53(2)(b) he will be regarded as the endorser.

X is not the holder of the cheque because of the forged signature. If X can satisfy all the requirements for holdership in due course (as set out in section 27), he can claim payment from E, by virtue of section 53(2)(b). Section 53(2)(b) provides that if E “endorses” the cheque and delivers it to X, E will not be allowed to rely on the principle that the forged signature of the thief is wholly inoperative. E is the “endorser by estoppel” and X is the “holder through estoppel”.

A draws a bill in favour of “C or bearer” and negotiates the bill to D. D presents it to B who refuses to make payment to D. Can D hold C liable? (6)

Because this is not an order bill, endorsement and delivery is not required for negotiation. As this instrument is payable to bearer, it is negotiated by mere delivery. Generally, a person is not liable as drawer, acceptor or endorser of a bill if he has not signed it as such. Because C did not sign the bill, he cannot be liable on it.

In addition, in terms of section 56, if the holder of a bill payable to bearer negotiates it by delivery without endorsing it, he is called a transferor by delivery and is not liable on the instrument in question.

A draws a cheque for R5 000 on B Bank in favour of "C or order". At C's request A posts the cheque to C. The cheque is crossed and marked "not negotiable account payee only". D intercepts and steals the cheque before it reaches C. D forges C's signature and negotiates the cheque to E, who takes it in good faith and for value. E gives the cheque to his messenger, Y to put into E's bank account at S Bank. E owes S Bank R10 000. S Bank applies the deposited cheque of R5 000 towards the reduction of E's debt. B Bank pays S Bank in good faith and without negligence. Discuss whether or not C can institute a legal action against the following parties: A (3); B Bank (3); D (2); E (5); S Bank (5); Y (2). (20)

A:

In terms of section 79, when a crossed cheque has come into the hands of the payee (C), the drawer is protected "as if payment of the cheque had been made to the true owner thereof". Where post is chosen as mode of delivery, the risk of loss is on the sender, unless the payee has requested that the cheque be posted, in which case the risk as well as ownership has passed to the payee immediately when the cheque is posted. As the cheque was posted at C's request, the ownership of the cheque passed to C on the posting of the cheque. A's liability on the cheque, as well as on the underlying obligations, are discharged because ownership has passed on to C.

B Bank:

Since B Bank paid in accordance with the crossing to another bank (S Bank), and since payment was made in good faith and without negligence, B Bank will be protected in terms of section 79 "as if payment of the cheque had been made to the true owner thereof". B Bank may thus debit the drawer, A's account.

D:

The true owner of the cheque, C, will have a right of recourse against D, who intercepted the cheque and acted *mala fide*. His remedy is based on delict or unjustified enrichment and not on the cheque itself.

E:

In terms of section 81(1) C, the true owner, acquires a right of recourse against E, a subsequent possessor, if the following requirements of section 81(1) are met:

- the cheque was crossed and marked "not negotiable"
- it was stolen while it was crossed and marked as above
- in terms of the BEA the drawee bank, B Bank, paid under circumstances which would not render it liable to the true owner
- C is the true owner of the intercepted cheque
- C must show that he suffered damages as a result of the theft
- E had the cheque in his possession after the theft or loss; and
- E has taken the cheque for value

E will therefore not be able to raise any defence, should C institute an action against him. It appears that all the requirements of section 81(1) are met, therefore C will be able to hold E liable.

S Bank:

According to section 81(5), a bank which receives payment on a cheque that is crossed and marked "not negotiable" will not be regarded as having given consideration in respect of such a cheque merely because the bank has credited the account of a customer with the amount of the cheque before receiving payment thereof or because any such payment has been applied towards the reduction or settlement of any debt owed by the customer to the bank.

However, S Bank will lose its protection if it paid out cash over the counter for such a cheque, or if it agreed that the customer could immediately draw against that cheque. In addition, if S Bank fails to give any information regarding the cheque, when so requested by C, it is deemed to have been a possessor of the cheque and/or to have given consideration for it, or to have taken it as a donee. Therefore, in the given situation S Bank will not be liable to C merely because it applied the cheque of E towards the reduction of E's debt.

Y:

Y cannot be liable in terms of section 81(1) because Y did not give consideration or take the cheque as donee. However, if Y fails to furnish the true owner, C, with any information in connection with the cheque at the owner's request, Y will be liable in terms of section 81(3), and on application of section 81(1) he will be deemed to have been a possessor of the cheque and/or given consideration for it, or to have taken it as a donee.

A draws a bearer cheque on B Bank. A locks the cheque in her drawer. X steals the cheque, but A discovers this and stops payment of the cheque at the B Bank. X presents the cheque for payment but the bank refuses to pay and now X sues A.

1. Is X the holder of the cheque? Motivate. (3)

A holder is defined as the payee or endorsee of a bill or note, who is in possession of it, or the bearer thereof. Bearer, is defined as the person in possession of a bill which is payable to bearer. Because X is in possession of a bill payable to bearer, X is the bearer and indeed the holder.

2. Will X succeed in her claim? Motivate. (3)

A may raise against X's claim the defence that the cheque was not duly delivered by A. A will have to prove that no due delivery took place, since there is a rebuttable presumption that due delivery has in fact taken place. X will probably not succeed in her claim. If, however, X negotiated the cheque to a third party who takes it as a holder in due course, A cannot raise the defence of non-delivery against that third party, since the presumption of due delivery in favour of a holder in due course is irrebuttable.

A draws a cheque on B Bank in favour of 'C or order' and delivers the cheque to C. C is a minor and without the assistance of his guardian he endorses the cheque and delivers it to X, who takes it in good faith and for value.

Is X the holder in due course of the cheque? Motivate. (4)

A signature on a cheque may in certain circumstances not perform the guarantee function that a signature normally performs, without affecting the validity of the cheque or liability of other parties. If a cheque is endorsed by a minor having no capacity to incur liability on the cheque, the endorsement entitles the holder to receive payment of the cheque and to enforce it against all other parties (in other words any other party excluding the minor) to it. Here the minor's signature does not fulfil a guarantee function, but it does fulfil a transfer function. X can still become a holder in due course if he complies with all the requirements as set out in section 27(1). In the given scenario it appears that X does comply with these requirements and therefore will be a holder in due course.

With reference to the following document, discuss fully whether or not this document is a valid bill of exchange. (6)

<p>TO Allie and Brian</p> <p>Three months after my (Eesa Fredericks') death, pay to the order of ABC Partnership the sum of R1000 being the amount due for services rendered.</p> <p><i>Sans recours</i> (Signed) Eesa Fredericks</p>
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Section 2(1) of the Bills of Exchange Act defines a bill of exchange as "an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to a specified person or his order, or to bearer". If an instrument does not comply with the requirements listed above, it is not a bill.

In analysing the instrument provided, the following may be said:

The wording of the bill is an order to pay. The order is unconditional notwithstanding the fact that the transaction that gave rise to the bill is mentioned. The sum payable is certain. Although the order to pay is addressed to two drawees jointly, this is not contrary to section 4(2) of the Act. The date of payment is a determinable future time, being three months after the happening of a specified event which is certain to happen (Eesa's death), which is permissible in terms of section 9(1)(b). The drawer and any endorser of a bill may insert into the bill an express stipulation limiting his own liability to the holder in terms of section 14(1)(a) (*sans recours*). The document is, therefore, a valid bill of exchange.

On 13 January 2011, A draws a cheque for R250 on B Bank in favour of "C or order" and delivers it to C as a birthday gift. Two months later, C negotiates the cheque to D by endorsement and delivery to repay a gambling debt that C owes D. Five months later, D endorses the cheque in favour of E.

Discuss whether or not E is a holder in due course. (6)

If D delivers the cheque to E, E will be the holder of the cheque, because he will be the endorsee in possession of the cheque. He can then be a holder in due course, provided that the requirements of section 27 are met:

- The holder in due course must be a holder
- The bill must be complete and regular on the face of it

- He must have become holder before it became overdue
- He must have had no knowledge of prior dishonour if any
- He must have had no knowledge of any defect in the title of the person who negotiated the bill to him
- He must have taken the bill in good faith
- He must have taken the bill for value
- The bill must have been negotiated to him

A draws a bill on B in favour of "C or bearer". C endorses this bill specially in favour of D. Discuss fully the effect of C's special endorsement of the bill. (4)

The BEA makes provision for the conversion of an order bill into a bearer bill and the conversion of an endorsement in blank into a special endorsement, but it does not provide for the conversion of a bill originally payable to bearer into one payable to order.

If an instrument is originally payable to bearer, it cannot be converted to one payable to order by a special endorsement. If the holder specially endorses a bearer document, the instrument remains payable to bearer despite such endorsement.

The bill in question is a bearer bill, and therefore remains payable to bearer despite the endorsement. By endorsing the bill, C is now liable on the bill.

Suppose A draws a bill on B in favour of "C or order" and C negotiates the bill under special endorsement to D. D in turn endorses under special endorsement to E. E negotiates the bill back to A.

Explain whether A can enforce payment against any of the parties. (4)

The BEA recognises the possibility of a negotiable instrument being negotiated back to the drawer, to a prior endorser, and even to the acceptor or maker in the case of a promissory note. Such a person may then reissue and further negotiate the bill or note as long as the instrument remains negotiable, that is, provided it has not been discharged or restrictively endorsed (section 35). Section 35 provides further that A is not entitled to enforce payment of the bill against any intervening party to whom he (A) was previously liable. In other words, A, to whom the bill was negotiated back, may not later enforce payment against C, D, or E as endorsers, because A was formerly liable to them as drawer. A can thus not enforce payment against any of the parties in this case.

A draws a cheque on B Bank in favour of "C or order". The cheque is crossed and marked "not negotiable". Without any agreement with C, A sends the cheque to C by post. D steals the cheque in the post before it reaches C. D deposits the cheque in X's account with X's consent. Discuss who the true owner of the cheque is. (4)

As the cheque belongs to the person who lost it or from whom it was stolen (the true owner), the finder or the thief is not the owner. Where the parties did not agree on the method of delivery and the drawer decides to send the cheque by post, he remains the owner until it reaches the payee. Since there was no agreement as to the method of delivery, A remains the owner of the cheque which was intercepted by D before it reached C. Accordingly, A is the true owner.

A draws a cheque on B Bank in favour of "C only". The cheque is crossed and the words "not transferable" appear in black, bold letters beneath the date of the cheque. A delivers the cheque to C. K, a thief, steals the cheque from C, opens a new account in the name of "C & K" at S Bank and pays the cheque into his new account. S Bank delivers the cheque to B Bank for payment. B Bank pays the amount of the cheque to S Bank in good faith and in the ordinary course of business.

Advise C fully with reference to the Bills of Exchange Act and decided cases on the possible liability of the following parties: B Bank (4); S Bank (6)

B Bank:

In this question we are dealing with a non-transferable cheque in terms of section 75A(1). B Bank will only be protected if it paid the cheque in terms of section 79, as section 79 is applicable to both transferable and non-transferable cheques (sections 58 and 83 apply only to transferable cheques). To be protected by section 79, B Bank must pay the cheque in good faith and without negligence in accordance with the crossing. However, B Bank paid S Bank in good faith and in the ordinary course of business. B Bank can thus not rely on section 79 for protection.

S Bank:

In terms of the decision in *Indac Electronics*, the true owner of a stolen cheque can charge the collecting bank with negligence if the collecting bank negligently collects the cheque on behalf of a client who is not entitled to receive payment on that cheque. According to the court in *Indac*, a collecting bank is negligent if it fails to take reasonable steps to determine whether its client is *ex facie* entitled to payment of the cheque. In our case, there is *prima facie* negligence on the part of S Bank, because it accepted the cheque for the account of someone other than the named payee. In *Columbus Joint Venture*, the court confirmed that a collecting bank is legally obliged to use caution when opening new accounts in order to prevent possible loss to the true owner of a stolen cheque. It also stated that the question of whether a collecting bank was or was not negligent could only be decided after careful consideration of all the facts and circumstances of the matter. The facts of our case are similar to those in *Kwa Mashu Bakery* case. The court found that the name of the account into which cheques were deposited was not the same as the name of the payee on the cheques, and for this reason alone the collecting bank was negligent. The importance of the judgment lies in the court's finding that the collecting bank must take reasonable steps when an account is opened to ensure that the person opening the account is in fact who he claims to be.

A draws a bill on B in favour of C or order, payable three months after date. C immediately presents the bill for acceptance, but B dishonours the bill by non-acceptance. C negotiates the bill to D.

1. Can D be a holder in due course? (4)

Yes, D may be a holder in due course if the bill was dishonoured by non-acceptance. If C negotiates the bill to D without delay it will still be some time before the due date arrives, and if D is unaware of the dishonour, there is nothing to prevent D from being a holder in due course.

2. Would your answer be different if the bill had been dishonoured by non-payment? (3)

Yes. D would not qualify as a holder in due course if the bill was dishonoured by non-payment, because a bill such as this with a fixed due date can only be presented for payment on the due date. D will therefore only be able to receive the dishonoured bill at the earliest

on the due date. Even if he alleges that he was unaware of the dishonour, his *bona fides* will rightly be open to question because he should have asked himself why C did not present the bill for payment on that day.

A draws a cheque on B Bank in favour of "C or order". X steals the cheque from C. At the bank X professes to be the payee C and, in the presence of the teller, forges C's signature on the back of the cheque.

- 1. In these circumstances, will B Bank be protected by section 58 if the bank pays X? (3)**

No. The reason for this is that no endorsement on the cheque has been forged. C's forged signature does not purport to be an endorsement (because the thief X professes to be C), and the bank does not regard it as such, since X is professing to be the payee, C.

- 2. Would your answer differ to the answer above if, after forging C's signature, X presents himself at the bank as a holder who has obtained the cheque by virtue of C's "endorsement"? (3)**

In that case, C's forged signature does purport to be an endorsement, that is for the purposes of the so-called "negotiation" to X. If the bank pays X, it will be protected by section 58, and the payment will be deemed a payment in due course to X even though X is not a holder of the cheque (assuming that the other requirements of section 58 are met).

- 3. How would your answer have differed from the answer in 2 above if X himself did not present the cheque for payment, but delivered it to D who received payment from the bank in his own name? (4)**

The answer would not differ and the position is the same. The forged signature also purports to be an endorsement the purpose for which is negotiation (as opposed to mere receipt). If B Bank pays D, it will be protected by section 58, and the payment will be deemed a payment in due course to D even though D is not a holder of the cheque.

QUESTION 2 OF THE EXAM (METHODS OF PAYMENT)

Alvereen Leonard, a client of Royal Bank, is issued with a VISA credit card. Alvereen decides to do her monthly shopping at Discount Warehouse. At all its paypoints, Discount Warehouse indicates that any VISA credit card can be used to make payment for goods and services.

- 1. What type of credit card is this VISA credit card? (1)**

A three-party credit card.

- 2. The cost of Alvereen's groceries at Discount Warehouse is R2000. Can Discount Warehouse refuse to accept payment with Alvereen's VISA credit card? Give reasons for your answer. (4)**

A supplier who has concluded a contract with a card issuer is obliged to accept the credit cards when presented as a method of payment. Because Discount Warehouse indicates that any VISA credit card can be used to make payment, it is obliged to accept Alvereen's credit card. However, if the card is invalid or the amount exceeds the maximum stipulated in the agreement between the issuer and the supplier, payment with the credit card may be refused.

- 3. While Alvereen is in Discount Warehouse, her handbag (which contained her VISA credit card) is stolen. She immediately informs Royal Bank of the theft. Two hours later, her stolen VISA card is used to purchase R3000's worth of CDs and games from Musica. Can Royal Bank debit this amount from Alvereen's account? Give reasons for your answer. (5)**

In the event of theft or loss of a credit card, the cardholder bears the risk of loss until such time that the cardholder has notified the issuer. Royal Bank may not hold Alvereen liable for payment because Alvereen had informed Royal Bank earlier of the theft. Once Royal Bank is notified, it has to act (either by blocking the card or cancelling it) so that unauthorised purchases cannot be made. Because Royal Bank failed to do this, Royal Bank may not debit Alvereen's account. If it had, it will have to credit it with the amount of the unauthorised purchases.

Describe, in the correct sequence, the steps involved in payment by means of a letter of credit in an international transaction. (10)

1. The parties to an international trade contract agree that payment will be effected by means of a documentary letter of credit.
2. The purchaser/importer arranges with the bank for the issuance of a letter of credit in favour of the vendor/exporter.
3. The bank then issues the letter of credit in favour of the vendor. The letter of credit is forwarded to the vendor.
4. If another bank is employed, this bank may confirm the letter of credit; or it may merely advise or notify the beneficiary of the issuance of the letter of credit.
5. Once the vendor receives or is notified of the letter of credit and agrees to the terms thereof, the vendor proceeds with the shipment and will eventually submit the necessary documents to the issuing, confirming, or advising bank in order to receive payment.
6. Upon receipt of the documents, the bank will inspect them in order to ascertain whether they are in strict conformity with the terms stipulated in the letter of credit. If they are, the bank pays the vendor or accepts his or her bills.
7. The paying bank is eventually reimbursed by the issuing bank. The issuing bank will in turn be reimbursed by the purchaser.

Standard Bank issues a VISA credit card to Philile Zwane, an existing client. Standard Bank also concludes an agreement with Thula Pharmacy (Pty) Ltd, a pharmacy franchise, in terms of which the latter agrees to accept all VISA credit cards issued by the Standard Bank as valid payment method for purchases made at Thula Pharmacy (Pty) Ltd.

1. What type of credit card is the VISA Card in this set of facts? (1)

A three-party credit card.

2. Identify the card issuer. (1)

Standard Bank.

3. Identify the supplier. (1)

Thula Pharmacy.

4. Philile wants to use her VISA credit card to make a payment. Can Thula Pharmacy (Pty) Ltd refuse to accept Philile's VISA credit card as a payment method? (2)

No, except if the card is no longer valid.

Describe what an electronic funds transfer is. (2)

An electronic funds transfer can be described as a funds transfer that is effected largely or completely by electronic techniques. It works just like a cheque in that an instruction is given by the customer to the bank for the transfer of money to another account.

There are a limited number of exceptions where the issuing bank may refuse to enforce a documentary letter of credit.

List THREE of these exceptions. (3)

The issuing bank may refuse to enforce the letter of credit when the underlying contract is:

- **Contrary to law**
- **Against good morals or public policy**
- **Involves fraud**

List briefly THREE differences between a stop order and a debit order (6)

1. The stop order is a mandate from the account holder to his bank to pay from his account, while the debit order is not only a mandate to the bank to pay but also an authorisation to the creditor to request payment from the bank.
2. The stop order is never given to the creditor, while the debit order is handed over to the creditor and the duty to request punctual payment rests on the creditor.
3. The stop order can only be used to provide for a deduction of a fixed amount from the account of the debtor. The debit order, in contrast, may provide for a varying amount to be deducted from the account of the debtor.

World-Wide Cash is a British company which issues travellers' cheques. The following words appear on their travellers' cheques: "World-Wide Cash promises to pay an amount of \$100 to the bearer of this document provided that it is presented for payment within 90 days of date". No place for payment is indicated on the travellers' cheque.

Briefly discuss whether or not the Bills of Exchange Act applies to this document. (4)

The Act does apply. There is nothing in the set of facts that indicates that this travellers' cheque does not conform to all the requirements of a promissory note. As the place of payment is not an essential of a bill of exchange (or a promissory note) it does not affect the validity of the document.

Alvereen Leonard, a customer of Woolworths, is issued with a Woolworths store card that allows her to purchase goods on credit at any Woolworths store in South Africa.

1. What type of credit card is the Woolworths store card? Explain your answer. (2)

A two-party credit card. The two parties are the card issuer, Woolworths, and the cardholder, Alvereen. Woolworths is also the supplier of the goods and services purchased.

2. May BP Garage (who sells a limited range of Woolworths products) refuse to accept the Woolworths store card as a payment? Give reasons for your answer. (3)

BP Garage's liability depends on whether they have concluded an agreement with Woolworths to accept the Woolworths store card as a method of payment. If they have not, the credit card is only valid between Woolworths stores and the cardholder. As BP Garage is not a Woolworths store, it can refuse the card as a method of payment.

If, however, BP Garage has an agreement with Woolworths not only to sell their products but also to accept their store card as a method of payment, then it may not refuse.

List THREE similarities between debit orders and stop orders. (3)

1. Both are methods of payment.
2. Both contain instructions to the bank where the debtor is an account holder to pay a certain sum to the creditor.
3. Neither of them is a negotiable instrument.

Name TWO instances in which the issuing bank may refuse to enforce the letter of credit. (2)

Enforcement may be refused where the underlying contract is against good morals or public policy, or where there is fraud involved.

SECTION B: INTELLECTUAL PROPERTY AND COMPETITION LAW

A, an avid musician, writes the lyrics and accompanying music to a new song that he wishes to perform. He enlists the help of a friend, B, to record a demo of the song. B makes all of the arrangements for recording the song which A sings to the accompaniment of an acoustic guitar, which he also plays. Once the song is recorded, B decides to release the recording on the internet for free distribution and download without consulting A.

1. Which different types of copyright works are embodied in the recording, and who is the copyright owner of each? (3)

Literary work (lyrics). A is the owner.

Musical work (the accompanying music). A is the owner.

Sound recording. B is the owner.

2. Will B's decision to release the track without A's consent be a direct or indirect infringement of copyright and which rights will be affected? Briefly motivate your answer by explaining which rights would be applicable. (4)

It will be a direct infringement of copyright. Section 6 of the Copyright Act provides that the owner of a literary or musical work has the exclusive right to do or to authorise the doing of the following acts: reproduction of the work, its publication, its performance in public, a broadcast of the work, the making of an adaptation of the work, and so on. The first 4 rights would be applicable in this instance. [I am unsure of this answer. It wasn't in a study guide activity nor in any of the past tut memos, so I had to do it the old fashioned way]

3. Which remedy would be the most effective for the purposes of preventing B from further distributing the song? (1)

An interdict.

Prof Chuks is a professor of economics at the University of Knowledge. In one of his lectures for Economics 101, he played a video clip of the 2013 budget speech for two minutes by the Minister of Finance (Ms Ndubisi). In her speech Ms Ndubisi stated that South Africa is sailing into treacherous fiscal waters with sluggish economic growth and declining tax revenue. The purpose of the budget speech was to enlighten students on the factors impacting on the economy of the country. Prof Chuks approaches Prof Nkem, an expert in intellectual property law, regarding the playing of the clip for economics students. Advise Prof Chuks on fair dealing as a statutory defence to infringement and state also whether there was an infringement of copyright. (2)

Fair dealing with a work is an act that shall not constitute copyright infringement. The making of a copy of the whole or of a substantial portion of the work concerned will not be permitted. In terms of section 12(8) of the Copyright Act, speeches of a political nature do not enjoy copyright protection. The budget speech could be construed as a speech of a political nature, and therefore it will not be afforded copyright protection, meaning there was no infringement of copyright by Prof Chuks.

Ms Philile Zulu, the CEO of GudTime Entertainment, approaches a law student for advice regarding the duration of copyright granted to the following works:

1. Computer programs (1)

50 years from the end of the year in which the work was made public with the owner's consent, or in which it was first published. If not published within 50 years of making, then it lasts for 50 years from the making of the work, calculated from the end of the year in which the work is made.

2. Artistic works (1)

50 years calculated from the end of the year in which the author of the work dies.

Adidas AG, a German corporation, is the parent company of the Adidas group of companies. They hold the rights to well-known three strip trade marks and the slogan 'the mark with the three stripes'. These trade marks are used on sport shoes and clothing. The three stripe mark has become an exceptionally valuable and distinctive mark because of its high degree of visibility. It can readily be identified by consumer as a badge of origin of Adidas products. It comes to the attention of Adidas AG that a South African company, Pepkor Retail Limited, is selling sport clothing and footwear on which they use two and four stripe marks.

1. What is the function of a trade mark? (1)

A trade mark identifies and distinguishes those goods or services for which it is used from goods or services of the same kind supplied by some other person.

2. With reference to relevant South African case law, advise Adidas AG whether they can prevent Pepkor Retail Limited from using the two and four stripe marks on their shoes and clothing under the Trade Marks Act. (4)

Section 35 of the Trade Marks Act prohibits the unauthorised use of a trade mark which has become well known in the Republic. It is not necessary that the mark should have been registered or used in the Republic. A mark will be regarded as well known if it has acquired a reputation in the Republic among a substantial number of persons (*McDonald's Corporation v Joburgers Drive-Inn Restaurant*). The proprietor may restrain the use of any mark which

constitutes a reproduction, imitation or translation of his well-known trade mark in relation to goods or services which are similar to the goods or services for which the trade mark is well known, provided such use is likely to cause deception or confusion.

3. Would your answer to the above question differ if Pepkor Retail Limited was the proprietor of motor vehicles and they used the two and four stripe marks on such vehicles? Explain by reference to the Trade Marks Act. (4)

If the trade mark is registered in the country, then the answer would not differ. The rights acquired by the registration of a trade mark are infringed by the unauthorised use in the course of trade in relation to any goods or services of a mark which is identical or similar to a trade mark registered, if such trade mark is well known in the Republic and the use thereof would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trade mark, notwithstanding the absence of confusion or deception (section 34(1)(c)).

4. What is the duration of a trade mark? (1)

10 years, but this period may on certain conditions be renewed from time to time.

X is the proprietor of the FLIGHTLINE TRAVEL agency situated in Johannesburg. X commenced operating her business in January 1995. X has not registered any trade mark in respect of her business operations. X uses the name FLIGHTLINE together with a drawing of a “smiling travel bag” on all her stationery and in advertisements. The FLIGHTLINE travel agency specialises in budget tours and has acquired a reputation for offering high quality inexpensive holidays both in South Africa and abroad. To expand her business, X plans to open a further travel agency in Cape Town under the same name in 2014, but an enquiry reveals that B has opened a travel agency in Cape Town under the name FLIGHTLINE TRAVEL six months earlier. B has adopted a similar logo and trade dress for her Cape Town travel agency as that used by X. Advise X whether she can prevent B from using the name FLIGHTLINE TRAVEL and a similar get-up in relation to the Cape Town travel agency under the private law of competition. (5)

X can institute an action against B for passing off. Passing off takes place where a trader represents to the public that his enterprise, goods, or services are those of his competitor. He does so by using or imitating his competitor's distinctive marks. X must prove the following two things:

1. That the trade mark, get-up, service mark or trade name which X claims has been imitated is known in the market and has acquired with the public a reputation associated with her goods, service, or business
2. That B's conduct is calculated to deceive the public

As X's business has been on the market for almost two decades, and has acquired a reputation, she should be able to establish the required reputation for her mark FLIGHTLINE TRAVEL. The exact same name used by B is sure to deceive or confuse the public. Accordingly, X should succeed with an action for passing off against B.

Joe is a manufacturer of cosmetic products which he markets under the mark *Beau-T*. The *Beau-T* cosmetics utilise a recipe which Joe discovered during a visit to a remote tribe on the Virgin Islands. James, a chemist in the employ of Joe, was instrumental in adapting the Virgin Island formula for use in Joe's *Beau-T* cosmetics. James subsequently leaves Joe's employ to start his own cosmetic manufacturing business. Shortly thereafter, Joe discovers that James is using the same recipe in his competing cosmetic products. Advise Joe whether there are any grounds on which he can institute action against James under the private law of competition. (5)

Where a trader by any means whatever acquires and uses the confidential information or trade secrets of a competitor, he interferes with his competitor's goodwill. Not only the disclosure of secret information, but obtaining it and using it is unlawful. To qualify as a trade secret, the information must be confidential and have economic value. This means that the information must not be generally known by others and it must be of value to its holder. Joe may institute an action against James for unlawful competition in the form of misappropriation of a trade secret. In addition, Joe may also rely on an express or implied term in the contract of service which was concluded with James. It must be borne in mind that although an employer's right to his trade secrets are worthy of protection, a former employee is still entitled to use his or her own skill and experience, even to attain a similar result.

Alvereen, an ornithologist, is employed by the Gauteng Zoo. The director, Richard, instructs Alvereen to write an introductory article on the endangered black eagle for use in the Zoo's publication *GUIDE TO THE RAPTORS OF GAUTENG*. Richard also commissions Phumudzo, a freelance photographer, to take a photograph of the black eagle to illustrate the Guide. The Guide is published in June 1995. Mikhalien obtains a copy of the photograph and uses it in her wildlife calendar.

1. Who is the author of the article? (1)

Alvereen.

2. Who is the author of the photograph? (1)

Phumudzo

3. Who is the owner of the copyright in the article? (1)

Richard

4. Who is the owner of the copyright in the photograph? (1)

Richard

5. What is the duration of the copyright in the photograph? (2)

50 years from the end of the year in which it was published, 1995.

6. Does Mikhalien's conduct constitute copyright infringement? (4)

In terms of section 12 of the Copyright Act, the fair dealing with a work for the purpose of personal or private use shall not be regarded as an infringement, however the making of a copy of the whole or of a substantial portion of the work concerned will not be permitted. Because Mikhalien has obtained a copy of the photograph only, and uses it privately, she does not infringe copyright.

Richard approaches you for legal advice. Richard wrote a word processing computer program in "FORTRAN", a programming language. Phumudzo bought one of Richard's programs. Phumudzo made two copies of the computer program. The one copy is used by Phumudzo's wife at home. Phumudzo lent the other copy to a friend, Mikhalien. Two months later, Mikhalien released a new computer program on the market. Mikhalien's computer program is written in a different programming language and has two functions that Richard's program does not have. The sales of Mikhalien's computer program are very good. Richard confronts Mikhalien and she acknowledges that she made use of Richard's computer program when she wrote her own program, but maintains that her program is an original work as she added two new functions to it. Mikhalien is of the opinion that Richard cannot take any steps against her.

Advise Richard. (10)

Section 11B of the Copyright Act provides that, in relation to a computer program, only the copyright owner may do or authorise the following acts:

- The reproduction of the computer program in any manner or form;
- The publication of the computer program if it was as yet unpublished;
- Making an adaptation of the computer program;
- Reproducing or publishing an adaptation of a computer program; or
- Letting, or offering or exposing for hire by way of trade, directly or indirectly, a copy of the computer program

Mikhalien has directly infringed Richard's copyright in the program by making an adaptation of the program, an act which only Richard may do or authorise to be done. Richard may seek relief by means of an interdict preventing further sales, as well as damages for patrimonial loss incurred as a result of the sales of the adaptation which probably affected sales of the original.

Alan is the owner of the trade mark ROAMER which is registered in respect of radios. Alan discovers that Brian has commenced using the mark ROMA on radios and that Brian has filed an application to register the trade mark ROMA in respect of radios in terms of the Trade Marks Act 194 of 1993.

1. Advise Alan whether he can prevent Brian from using the mark ROMA in respect of radios. (5)

One of the acts that does constitute an infringement of a registered trade mark and that may be prohibited, is the unauthorised use in the course of trade of an identical or confusingly similar mark in relation to goods or services for which the trade mark is registered (section 34(1)(a)). Whether a mark is confusingly similar to a registered trade mark or not, can be determined only after due consideration of the meaning, sound, and appearance of the two marks. An application of this test shows “Roamer” and “Roma” to have a marked similarity. Also, the two marks are used in relation to identical goods, namely radios. Accordingly, infringement has taken place, and M will be able to prevent P from using the mark ROMA in respect of radios.

2. Advise Alan whether there are any provisions in the Act which would prevent Brian from registering the mark ROMA as a trade mark in respect of radios. (5)

A mark which is inherently deceptive or the use of which would be likely to cause deception or confusion cannot be registered (section 10(12)). Furthermore, section 10(14) provides that a mark cannot be registered if it is identical or so similar to an already registered trade mark that the use thereof in relation to goods or services for which registration is sought would be likely to cause deception or confusion. “Roamer” and “Roma” have a marked similarity. “Roamer” is registered in respect of radios. Registration of “Roma” is sought in respect of the identical goods, namely radios. The use of these marks in relation to the same goods would be likely to cause deception or confusion. M can therefore prevent P from registering “Roma” in respect of radios.

Whilst in the employ of Ben, a perfume manufacturer, Jay became acquainted with some of Ben’s secret perfume formulas. Jay’s job description is that of “perfume blender”. Jay resigns from his position with Ben and commences employment as a perfume blender with Ina. Ben is worried that Jay may use his secret perfume formulas in his new employment as perfume blender with Ina. Advise Ben whether his perfume formulas will be protected under the private law of competition. (10)

Where a trader by any means acquires and uses confidential information of a competitor, he interferes with his competitor’s goodwill. Not only the disclosure of secret information but obtaining and using it is also unlawful. To qualify as a trade secret, the information must be confidential and have economic value. This means that the information must not be generally known by others and it must be of value to its holder. The perfume formula appears to qualify as a trade secret. Ben’s perfume formulas will therefore be protected under the private law of competition. Ben may also rely on an express or implied term in the contract of service which he concluded with Jay. It must be borne in mind that although an employer’s right to his trade secrets are worthy of protection, a former employee is still entitled to use his or her own skill and experience, even to attain a similar result.

While daydreaming in class, Kganya scribbles an English poem at the back of her Mathematics handbook. It is similar to a poem by Mahlasedi, which is one of their prescribed works for Sepedi Home Language grade 12. Assume that copyright subsists in the Sepedi poem and that Mahlasedi is the owner of the copyright therein.

1. What type of copyright “work” is a poem? (1)

A literary work.

2. What would the duration of copyright in Mahlasedi’s poem be? (2)

50 years, calculated from the end of the year in which the author (Mahlasedi) dies.

3. On what exclusive right of Mahlasedi is Kganya infringing? (1)

The right to make or authorise the making of an adaptation of the work.

4. Is it possible for Kganya to have copyright in her English poem? (3)

Yes. Section 2(3) of the Copyright Act states that a work shall not be ineligible for copyright by reason only that the making of the work involves an infringement of copyright in some other work. A work can therefore enjoy copyright protection notwithstanding the fact that it infringes on the copyright of another work. Kganya will have copyright in her English poem if her poem meets both the inherent and formal requirements for subsistence of copyright.

Meagan is planning a special party for her husband’s 40th birthday and wants to commission a professional photographer to take pictures at the event. Meagan wants to be the owner of the copyright in these photos.

Advise her fully. (10)

The general rule is that the author of a work will also be the first owner of the copyright therein (section 21(1)(a)). The author of a photograph is the person who is responsible for the composition of the photograph. This would mean that the photographer would be the author and owner of the copyright of the photographs he takes at the event. However, there are three categories of exceptions to this rule which are contained in sections 21(1)(b), (c), and (d). Where a person commissions the taking of a photograph, the painting or drawing of a portrait, or the making of a gravure or a cinematograph film or a sound recording and pays for it in money or money’s worth, that commissioning person shall be the owner of the copyright in the work. Unless there is an agreement between Meagan and the professional photographer which excludes this exception, Meagan, as the commissioning person, will indeed be the owner of the copyright in the photos if she pays for the photos in money or money’s worth.

ABC Productions are making a documentary film about Pretoria's jacaranda trees. Some scenes are filmed in the gardens of a university campus in the city that also features many giant sculptures situated among the trees and buildings. As the presenter is pointing out the oldest trees on the terrain, some of these sculptures are visible in the background.

Is this film infringing the copyright in the sculptures? (3)

No. With regard to artistic works only, copyright shall not be infringed if it is included in a cinematographic film, a television broadcast, or transmission in a diffusion service, if such inclusion is merely by way of background, or incidental to the principal matters represented in the film, broadcast, or transmission. The same applies with regard to the inclusion in the above-mentioned media of such works of art as are permanently situated in a street, square, or similar public place.

A, a manufacturer of sweets and chocolates, wishes to market a new range of chocolates. His marketing department suggests that they call the chocolates SWEET AND SMOOTH.

Can the name SWEET AND SMOOTH be registered as a trade mark? (3)

To qualify for registration as a trade mark, a mark must be capable of distinguishing the goods or services of B from the similar goods or services of other persons (section 9(1)). A mark is capable of distinguishing if, at the date of application for registration, it is inherently capable of distinguishing or it is capable of distinguishing by reason of its prior use. The mark SWEET AND SMOOTH describes the goods to which it will be applied and so is not capable of distinguishing A's chocolates.

R is the proprietor of the HADEDAS IN FLIGHT trade mark which is registered in South Africa in respect of whisky. S commences marketing a new range of wine in South Africa under the FLIGHT OF THE HADEDA mark.

Does S infringe on R's trade mark? Explain. (7)

One of the acts that constitutes an infringement of a registered trade mark is the unauthorised use in the course of trade of an identical or confusingly similar mark in relation to goods or services for which the trade mark is registered (section 34(1)(a)). Whether a mark is confusingly similar to a registered trade mark or not can be determined only after due consideration of the sense (meaning), sound, and appearance of the two marks. An application of this test shows that HADEDAS IN FLIGHT and FLIGHT OF THE HADEDA have a marked similarity. Also, the two marks are used in relation to identical goods, namely alcoholic beverages. If the argument is that wine and whisky are not identical goods, then they are at least similar goods, and section 34(1)(b) will apply. Accordingly, infringement has taken place.

Mary is a manufacturer of cosmetic products which she markets under the mark SKIN-DEEP. The SKIN-DEEP mark has not been registered as a trade mark. The SKIN-DEEP range proves extremely popular. Queen starts marketing a range of cosmetic products in competition with Mary. Queen's products are marketed under the mark SKIN-DIP and in a similar packaging to that used by Mary.

Advise Mary whether there are any grounds on which she can institute action against Queen under the law of competition. (5)

Mary can institute an action against Queen for passing off. Passing off takes place where a trader represents to the public that his enterprise, goods, or services are those of his competitor. He does so by using or imitating his competitor's distinctive marks. In a passing-off action, Mary must prove the following two things:

1. That the trade mark, get-up, service mark, or trade name which she claims has been imitated is known in the market and has acquired with the public a reputation associated with her goods, services, or business
2. That the defendant's conduct is calculated to deceive the public.

Mary's products are extremely popular, and she should be able to establish the required reputation for her mark SKIN-DEEP in relation to cosmetic products. SKIN-DEEP and SKIN-DIP are confusingly similar and the use by Queen of the name SKIN-DIP is likely to deceive or confuse the public. Accordingly, Mary should succeed with an action for passing off against Queen.

ABC Beers launches a new advertising campaign. It consists of a table comparing its three most popular beers with the three most popular beers produced by FJH Beers. The table includes information on the number of vitamins and minerals added by ABC Beers to its beers, and shows that FJH Beers does not add vitamins or minerals to its beers. This information is correct. Can FJH Beers institute an action against ABC Beer for unlawful competition because of this comparative advertising? (5)

The infringement of a competitor's goodwill by spreading untrue, disparaging allegations about his enterprise, goods, or services is wrongful in principle. Such conduct is in conflict with the competition principle. The mere fact that a trader's statements in advertising material contain a comparison (comparative advertising) of his goods, services, or business with those of a rival trader does not constitute wrongfulness. It is only when statements contain untruths which amount to a disparagement of the rival's goods, services, or business that the rival becomes entitled to relief (*Post Newspapers (Pty) Ltd v World Printing and Publishing Co Ltd*). FJH cannot institute an action against ABC because the information is correct.

Jane is the author and copyright owner of an historic novel. This book – her life's work – contains many colourful illustrations. However, as it is 800 pages long and written in complicated language, it is very difficult to follow the intricate series of events. Jane's book is also quite expensive and sales are very slow. Another writer, Matthew, quickly realises the potential of Jane's well-researched saga. He uses Jane's book to create an abridged and simplified version thereof. Matthew's 300 page version is an instant success.

1. Name three types of copyright "works" embodied in Jane's book. (3)

-Literary work (text)

- Artistic work (illustrations)
- Published edition

2. Is it possible for copyright to subsist in Matthew's abridged version of Jane's novel? Explain. (6)

Yes, a work shall not be ineligible for copyright only because the making of the work involved an infringement of copyright in some other work. Copy right will subsist in Matthew's version if the requirements for copyright are met:

- Originality and
- Material embodiment, and
- Author a qualified person or
- First published or made in South Africa

However, Ben will not be able to exploit his copyright without infringing on Ann's copyright.

3. What would the duration of the copyright in Jane's book be?

Jane's lifetime and 50 years after the end of the year in which she died.

Emma is the owner of a large workshop that mass produces silver jewellery designed by herself.

1. Emma commissions Mark, a freelance computer programmer, to create computer programs for her business and pays him for the work. Who is the owner of the copyright in these programs? (2)

The general rule is that the author of a work will also be the owner of the copyright therein. The author of a computer program is the person who exercised control over the making of the program, and would in this case be Emma. Emma is therefore the copyright owner.

2. What is the duration of the copyright in these programs? (2)

50 years from the making of the work, calculated from the end of the year in which the work is made.

3. It has come to Emma's attention that some of her designs are being reproduced by another manufacturer, Ron. She asserts that Ron is infringing on the copyright in her works. Can Ron rely on the three-dimensional reproductions exception? Explain by referring to all the requirements set out in section 15(3A) of the Copyright Act. (6)

Copyright in an artistic work shall not be infringed where a three-dimensional reproduction of an artistic work is copied if

- the three-dimensional reproduction has already been made available to the public with the consent of the copyright owner;
- the three-dimensional reproduction has primarily a utilitarian purpose; and
- it has been made by an industrial process

Ron cannot rely on the three-dimensional reproductions exception because one of the requirements, namely that the reproduction has a utilitarian purpose, is not met.

THERMO-SUN is a Korean manufacturer of solar stoves which it markets under the mark DIDI. THERMO-SUN's DIDI mark is registered in Korea in respect of stoves. The DIDI mark is well known worldwide, including South Africa, for its quality and environmentally friendly products. While THERMO-SUN is preparing to expand their business to South Africa, GRIN, a manufacturer of home appliances in South Africa, has commenced marketing a new range of gas stoves under the mark DIDI.

Advise THERMO-SUN whether it can prevent GRIN from using the mark DIDI in respect of gas stoves under the South African Trade Marks Act, despite the fact that THERMO-SUN's DIDI mark is not registered in South Africa. (5)

Section 35 of the Trade Marks Act prohibits the unauthorised use of a trade mark which has become well known in the Republic. It is not necessary that the mark should have been registered or used in the Republic. The proprietor may restrain the use of any mark which constitutes a reproduction, imitation, or translation of his well-known trade mark in relation to goods or services which are similar to the goods or services for which the trade mark is well known, provided such use is likely to cause deception or confusion. THERMO-SUN's DIDI is well known worldwide and in South Africa. The two marks DIDI and DIDI are identical and are used in relation to identical goods, namely gas stoves. The use by GRIN of the mark DIDI is likely to cause confusion or deception of the public. Accordingly, THERMO-SUN will be able to prevent GRIN from using the mark DIDI in respect of gas stoves.

Assume THERMO-SUN's mark DIDI is registered in South Africa for stoves and that it is well known in the Republic. X-ID, a manufacturer of home cleaning products, commences marketing an oven cleaning preparation under the mark DIDDY

1. Complete following sentence:

If THERMO-SUN wants to rely on section 34(1)(c) of the Trade Marks Act to prevent X-ID from using the mark DIDDY for an oven cleaner, they will have to prove that X-ID's unauthorised use of the trade mark is likely to... (2)

...take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trade mark, notwithstanding the absence of confusion or deception.

2. Will THERMO-SUN be able to prevent X-ID from registering the mark DIDDY in respect of home cleaning products? (2)

Yes. A mark may not be registered if it is identical or similar to a registered trade mark which is well known in the Republic and its use would be likely to take unfair advantage of, or be detrimental to, the distinctive character or repute of the registered trade mark, notwithstanding the absence of deception or confusion (section 10(17)).

3. What is the duration of a trade mark registration? (1)

Ten years, but this period may, on certain conditions, be renewed from time to time.

Jameson (Pty) Ltd, a whisky producer, hears that Daniel (Pty) Ltd has launched a new whisky under the name KALAHARI PRIDE. Daniel states that this new whisky is made in the Kalahari Desert using traditional San methods and contains 50% less calories than ordinary whisky. Neither of these allegations is true. Jameson loses sales as health conscious people buy KALAHARI PRIDE because they believe the false claims. Can Jameson take legal action against Daniel? (5)

Daniel's conduct is unlawful. It is infringing Jameson's right to attract custom by deception concerning its own product. The wrongfulness of Daniel's conduct does not lie in the fact that it is misleading the public, but lies in the fact that by its deception, it prevents clients from drawing a clear distinction between its whisky and that of its competitors. Jameson can institute an action against Daniel for unlawful competition. The action would comply with the requirements for competition in contravention of a statutory provision as formulated in *Patz v Greene*. The conduct of Daniel would be prohibited both in the interests of particular persons (whisky producers), and in the interests of the public.

When will information qualify for protection as a trade secret? Explain briefly and give examples. (5)

To qualify as a trade secret, the information must be confidential and have economic value. This means that the information must not be generally available to or known by others. Also it must be of value to its holder. Examples of information recognised by the courts as trade secrets include: price lists, tender prices, credit records, and customer lists.

George Best is a renowned journalist who won several awards for his coverage of the recent floods in Pretoria and other parts of South Africa. George was responsible for many newspaper and magazine articles about the floods, which included photographs he had taken. He also made a short documentary film about the events.

1. Identify four types of copyright "works" that are relevant in the above scenario. (2)

- Literary work (articles)
- Published editions
- Artistic works (photographs)

-Cinematograph film (documentary film)

2. What are the requirements for copyright to subsist in George's works? (4)

Copy right will subsist in George's works if the requirements for copyright are met:

- Originality and
- Material embodiment, and
- Author a qualified person or
- First published or made in South Africa

3. Who is the author of the text and the photographs in the newspaper and magazine articles? (2)

George. He is the person who created the text. He is the person responsible for the composition of the photographs.

Assume that George has been a full-time employee of the proprietor of *Disaster Magazine* for many years

1. George is approached by *Catastrophe Magazine*, who wants to republish his articles that appeared in *Disaster Magazine*. Who is the owner of the copyright in the articles for purposes of publication in another magazine? (2)

The proprietor of *Disaster Magazine* (section 21(1)(b)).

2. George is also approached by Calamity Publishers, who wish to publish a selection of his articles that have appeared in *Disaster Magazine* in book form. Who is the owner of the copyright in the articles for the purposes of publication in book form? (2)

George (section 21(1)(b)). [in all respects other than the publication in a newspaper or other periodical, the owner is the author]

Assume that George worked as a freelance journalist, and was commissioned by ABC News Service to report on the floods for payment. Who will be the first owner of the copyright in

1. The text of George's articles? (2)

George (section 21(1)(c))

2. The photographs and documentary film? (2)

ABC News Service (section 21(1)(c))

Assume that George Best is employed as Professor at the Unisa School of Journalism. The series of flood related articles and the film were part of a bigger Unisa community engagement project. Community engagement is part of Professor Best's job description. Who is the first owner of the copyright in the works created by Professor Best? (2)

Unisa (section 21(1)(d))

What is the duration of the copyright in the photos that appeared in newspapers and magazines as part of George's articles? (2)

50 years from the end of the year in which the work was first published.

Drive-Thru is a German manufacturer of luxury motor vehicles which it markets under the mark D-T. Drive-Thru distributes their vehicles throughout Europe, the United Kingdom and the USA. D-T cars are widely recognised for their quality and have become extremely popular in these markets. Drive-Thru's D-T mark is registered in Germany in Class 5 in respect of motor vehicles, but the mark is not registered in South Africa. Although D-T vehicles are not marketed in South Africa, many South Africans are familiar with the brand through overseas visits, international car magazines, television programmes and films wherein D-T cars are featured. Drive-Thru learns that W&B, a South African company, has commenced marketing a new range of luxury cars under the mark D&T.

- 1. Advise Drive-Thru whether it can prevent W&B from using the mark D&T in respect of luxury motor vehicles under the South African Trade Marks Act, despite the fact that Drive-Thru's D-T mark is not registered in South Africa. (5)**

Section 35 of the Trade Marks Act prohibits the unauthorised use of a trade mark which has become well known in the Republic. It is not necessary that the mark should have been registered or used in the Republic. The proprietor may restrain the use of any mark which constitutes a reproduction, imitation, or translation of his well-known trade mark in relation to goods or services which are similar to the goods or services for which the trade mark is well known, provided such use is likely to cause deception or confusion. Drive-Thru's mark D-T has become well known in South Africa. The two marks D-T and D&T do have a marked similarity and are used in relation to identical goods, namely luxury cars. The use by W&B of the mark D&T is therefore likely to cause confusion or deception of the public. Accordingly, Drive-Thru will be able to prevent W&B from using the mark D&T in respect of luxury cars.

- 2. Will Drive-Thru be able to prevent W&B from registering the mark D&T in class 5 in respect of motor vehicles in South Africa? (2)**

Yes. Section 10(6) prohibits the registration of a well-known foreign trade mark in respect of goods or services similar or identical to the goods or services in respect of which the trade mark is well known and where such use is likely to cause deception or confusion.

TRUE of FALSE

“In South Africa protection against unlawful competition is provided at common law. Today South African law recognises a general action for unlawful competition. There are also a number of isolated statutory provisions which overlap or supplement the protection provided by the common law.” (1)

True.

In *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd*, Van Dijkhorst J came to the conclusion that unfairness and dishonesty *per se* could not be the criteria for judging the unlawfulness of competitive conduct, but that another norm needs to be applied. Name this norm and briefly explain what it entails. (3)

The norm to be applied is the objective one of public policy, that is, the general sense of justice of the community – the *boni mores* – manifested in public opinion. In determining and applying this norm in a particular case, the interests of the competing parties have to be weighed, bearing in mind also the interests of society. The morals of the marketplace – the business ethics of a community where the norm is to be applied – are of major importance in its determination.

Susan has been an operator of tour services in Cape Town for more than twenty years under the trade name WONDER TOURS. Her business has acquired an excellent reputation in respect of high-quality tour services. One of Susan’s marketing strategies is a DVD compilation of all points of attraction in South Africa. The DVD is sold under the name ‘WONDER TOURS – tourism assistant’. Peter, who was employed by Susan as marketing manager for more than 15 years, resigns and starts a travel business in Cape Town called WUNDA TOURS. He uses the expertise, customer lists and contact information he accessed while in the employ of Susan to market his business. He also copies Susan’s DVD compilation of points of attraction in SA and sells it under the name ‘WUNDA TOURS – A gateway to SA tourism’. The DVD was edited only where necessary in order to align it with Peter’s tour services. Susan wishes to institute action to prevent Peter from continuing with this product.

Name three appropriate forms of unlawful competition on which Susan can base her action against Peter. (6)

- Misappropriation of a competitor’s trade secrets
- Passing off
- Misappropriation of a rival’s performance

