

# **Tutorial letter 201/1/2016**

**Commercial Law 2B**

**CLA2602**

**Semester 1**

**Department of Mercantile Law**

**IMPORTANT INFORMATION:**

This tutorial letter contains important information  
about your module.

BAR CODE

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## 1. LECTURERS AND CONTACT DETAILS

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## 2. FEEDBACK ON ASSIGNMENT 01

*Kindly note that the page references below is only applicable to the English version of the 8<sup>th</sup> edition of the prescribed textbook.*

### QUESTION 1

**Answer: (3)** (See paragraph 25.2.2 on page 382 of the textbook)

- **Option (3)** is the **CORRECT** answer. The essential parties to a bill are the drawer who draws the cheque on the drawee in favour of the payee.
- **Options (1); (2) and (4)** are **INCORRECT**. Acceptance, payment and endorsement are not essential to constitute a cheque. Therefore the payer, acceptor and endorser are not the essential parties to a cheque.

## QUESTION 2

**Answer: (3)** (See paragraph 25.2.6 on pages 387-391 of the textbook)

- **Option (3)** is the **CORRECT** answer. Section 1 of the Bills of Exchange Act 34 of 1964 defines a holder as “the payee or endorsee of a bill or note, who is in possession of it or the bearer thereof”. Alvereen is the payee in possession of the cheque, and therefore the possessor and the holder of the cheque.
- **Options (1); (2) and (4)** are **INCORRECT**. Alvereen is more than a mere possessor – he is the holder of this cheque. The payee of a cheque payable to order cannot become a holder in due course of such cheque. One of the requirements of a holder in due course is that the bill must have been negotiated to the holder (section 27). The first delivery of this cheque from Lesego to Alvereen (who takes it as a holder) is merely its “issue” and not “negotiation”.

## QUESTION 3

**Answer: (4)** (See paragraph 25.2.7.2.5 on pages 400-402 of the textbook)

- **Option (4)** is the **CORRECT** answer. Negotiation of an order cheque takes place by endorsement and delivery. When Michel (the payee/endorser) delivered the cheque to Anthea (the endorsee), she negotiated it to her.
- **Options (1); (2) and (3)** are **INCORRECT**: “Issue” is defined as “the first delivery of a bill, complete in form, to a person who takes it as a holder”. The first delivery of this cheque took place when Maphuti (the drawer) delivered it to Michel (the payee) – he issued it to her. The endorsement of a cheque refers only to the signing of a cheque. The cheque is generally not accepted.

## QUESTION 4

**Answer: (2)** (See paragraphs 25.2.7.2.4 and 25.2.7.2.5 on pages 400-402 of the textbook)

- See the explanation in Question 3 above.

## QUESTION 5

**Kindly note that this question has an error. All students will however automatically be credited with 1 mark for this question.**

**Answer:** (See paragraph 25.2.7.1.3 on page 396 of the textbook)

- There are three different functions that a signature on a cheque fulfils, namely a constitutive function, a guarantee function and a transfer function. See the discussion of the functions of a signature on a cheque in the textbook.

**QUESTION 6**

**Answer: (3)** (See paragraph 25.2.9.2.3 on page 408 of the textbook)

- **Option (3)** is **CORRECT** answer. Section 75A of the Bills of Exchange Act 34 of 1964 specifically makes it optional for the cheque to bear boldly across its face the words “not transferable”, either with or without the word “only” after the payee’s name.
- **Options (1); (2) and (4)** are **INCORRECT**. These are the three essential consequences of a cheque that bears boldly across its face the words “not transferable” in terms of section 75A. See the paragraph reference in the textbook above.

**QUESTION 7**

**Answer: (2)** (See paragraph 25.2.9.2.1 on pages 405-406 of the textbook)

- **Option (2)** is the **CORRECT** answer. Statement (i) and (iv) reflects what must be added on the face of the cheque to constitute a general crossing.
- **Options (1); (3) and (4)** are **INCORRECT**. A cheque with two traverse parallel lines with the name of the bank added across its face is specially crossed. The words “not transferable” do not serve to cross the cheque generally or specially.

**QUESTION 8**

**Answer: (1)** (See paragraph 25.2.8 on page 403 of the textbook)

- **Option (1)** is the **CORRECT** answer. This option is not a requirement for payment in due course. Payment in due course must be made within a reasonable time after issue of the cheque and not within a fixed period of time.
- **Options (2); (3) and (4)** are **INCORRECT**. These are the requirements for payment to be made in due course. See the listed requirements in the textbook reference above.

**QUESTION 9**

**Answer: (2)** (See paragraph 25.2.9.3.1 on pages 409-410 of the textbook)

- **Option (2)** is the **CORRECT** answer. It is a requirement for the drawee bank to obtain a protection in terms of section 58 that it must have paid the cheque according to the crossing; in good faith and in the ordinary course of business. The requirement for the cheque to be paid in good faith and without negligence applies to the protection of the drawee bank in terms of section 79 of the Bills of Exchange Act.
- **Options (1); (3) and (4)** are **INCORRECT**. All of these requirements are for the protection of the drawee bank in terms of section 58.

**QUESTION 10**

**Answer: (2)** (See paragraph 25.2.7.1.4 on pages 396-398 and paragraph 25.2.6.2 on pages 389-391 of the textbook)

- **Option (2)** is the **CORRECT** answer. In terms of section 22 of the Bills of Exchange Act 34 of 1964, and as a general rule, “a forged or unauthorised signature is wholly inoperative and no right to retain or give discharge of the bill or to enforce payment thereof against any party through the signature”.

Unless that party is precluded by the operation of the doctrine of estoppel at common law or by the so-called statutory estoppel from raising the forgery as a defence.

- **Options (1); (3) and (4) are INCORRECT.** Based on section 22, Ben cannot, subject to an applicable exception, claim payments against anyone, including Maphuti, Cash Bank or Phillip. The exception is provided in section 53(2)(b) and provides that the indorser of the cheque, by indorsing it, is precluded from denying to a holder in due course the genuineness and regularity in all respect of drawer's signature and all previous indorsements. The requirements for a holder in due course are provided in section 27 of the Bills of Exchange Act 34 of 1964. Once the requirements for a holder in due course are satisfied, an indorsement of the cheque (in this case Lesego) is precluded from relying on the forged signature on a cheque against the claim for payment on a cheque.

### 3. FEEDBACK ON ASSIGNMENT 02

*Kindly note that the page references below is only applicable to the English version of the 8<sup>th</sup> edition of the prescribed textbook.*

#### QUESTION 1

**Answer: (4)** (See paragraph 26.6.1 on page 425-426 of the textbook)

- **Option (4)** is the **CORRECT** answer. Only a letter of credit is suitable for protecting the interest of both the exporter and the importer when making payments in case of an international purchase and sale.
- **Options (1); (2) and (3) are INCORRECT.** These payments methods are not suitable for protecting the interests of both the exporter and the importers in case of an international purchase and sale.

#### QUESTION 2

**Kindly note that this question has an error. All students will however automatically be credited with 1 mark for this question.**

**Answer:** (See paragraph 26.4.1 on page 423 of the textbook)

- The stop order is a payment mechanism employed in conjunction with the current cheque, credit card or savings account.
- The stop order contains a **written instruction** from the **account holder (debtor)** to the bank to pay a **fixed** amount on a regular basis to a specified third party and to debit the customer's account with the amount.
- A stop order is not an example of a negotiable instrument in terms of the Bills of Exchange Act 34 of 1964.
- Statements **(a), (d) and (f)** are the correct combination answer.

#### QUESTION 3

**Answer: (1)** (See paragraphs 27.4 and 27.5.2 on pages 450 and 454 of the textbook)

- **Option (1)** is the **CORRECT** answer. It is not a requirement for the creation of a valid trust that the property must be transferred to the trustee. A transfer of the property to the trustee is necessary for the administration of the trust, but is not essential for its creation.
- **Options (2); (3) and (4) are INCORRECT.** All the statements in these options are the essential requirements for a valid trust.

**QUESTION 4**

**Answer: (3)** (See paragraph 28.6.3 on pages 479 of the textbook)

- **Option (3)** is the **CORRECT** answer. It is a requirement for the disposition based on undue preference to prove that the insolvent has made such disposition with the intention of preferring one or more of the creditors above another.
- **Options (1); (2) and (4)** are **INCORRECT**. The existence of an intention to prefer distinguishes undue preference from disposition based on voidable preference. In a disposition for undue preference, it is required that the insolvent's liabilities exceeds his or her assets "at the time of disposition" and not immediately after the disposition. It is not a requirement for disposition based on undue preference to prove that the disposition was made in the ordinary course of business.

**QUESTION 5**

**Answer: (3)** (See paragraph 28.2 on page 470 of the text book)

- **Option (3)** is the **CORRECT** answer. "Advantage to creditors" requires that there should be a reasonable prospect that each "ordinary creditor" will receive a not-negligible dividend.
- **Option (1); (2) and (4)** are **INCORRECT**. The requirement that there be an advantage to creditors does not require each "preferent creditor" to receive a not-negligible dividend. This advantage refers only to financial benefit. When there is an appreciable risk that the creditors might eventually have to make a contribution towards the sequestration costs, sequestration will not be regarded as beneficial to the creditors.

**QUESTION 6**

**Answer: (3)** (See paragraph 29.3.3 on page 494 of the textbook)

- **Options (3)** is the **CORRECT** answer. The court can remove the executor if the executor accepts or expresses a willingness to accept from anyone any benefit in consideration for that person being appointed to perform work on behalf of the estate.
- **Options (1); (2) and (4)** are **INCORRECT**. The statements in these options are grounds for removal of the executor by the Master.

**QUESTION 7**

**Answer: (4)** (See paragraph 29.5 on pages 496-501 of the textbook)

- **Option (4)** is the **CORRECT** answer. One of the duties of the executor is to submit to the Master an inventory of the property of the deceased estate within 30 days of his or her appointment.
- **Options (1); (2) and (3)** are **INCORRECT**. The executor must first be appointed by the Master before he or she can carry out his duties in the administration of the estate. The executor may open a cheque account in the name of the estate as soon as he or she holds cash more than R1000. Payment of creditors and beneficiaries is subject to the approval by the Master.

## QUESTION 8

**Answer: (4)** (See paragraph 29.4 on pages 495-496 of the textbook)

**Option (4)** is the **CORRECT** answer. The only document lodged with the Master when reporting an estate which serves the purpose to give the Master an indication of the value of the estate and to assist him or her to determine the solvency of the estate is the **preliminary inventory**.

## QUESTION 9

**Answer: (4)** (See paragraph 28.3.1 on pages 471-472 of the textbook)

- **Option (4)** is the **CORRECT** answer. It is referred in the textbook that an act of insolvency may be established where the debtor disposes of any or her property with the effect of prejudicing the creditors or preferring one or more above another. This refers to the actual disposal (e.g. sale of goods) of the property. An attempted disposition (in this case, the advertisement of property for sale) would also have the same effect. One of the important considerations for this act of insolvency is the counter value received for the disposition such as a sale below the market value.
- **Options (1); (2) and (3)** are **INCORRECT**. It must be proved that the debtor left the country **with the intention** to evade or delay payments. The sheriff's return must declare that he could not find sufficient disposable property to satisfy the judgment debt, and that he or she **gave the debtor an opportunity** to point out sufficient realisable property. The debtor must give **written notice** to any of the creditors that he or she is unable to pay any of his or her debts. A mere (unwritten) notification of a creditor that he or she is unwilling to pay will not constitute an act of insolvency.

## QUESTION 10

**Answer: (2)** (See paragraph 27.6.6.3 on pages 459-460 of the textbook)

- **Option (2)** is the **CORRECT** answer. The Master may remove the trustee if he or she has been convicted (not charged) of an offence.
- **Option (1); (3) and (4)** are **INCORRECT**. All these options are the circumstances in terms of which the Master may remove the trustee from the office.

## 4. DISCUSSION OF QUESTIONS CONTAINED IN THE MAY/JUNE 2012 EXAMINATION

The following are examples of some of the questions contained in the May/June 2012 examination paper. The questions appear in bold immediately followed by the suggested answer.

### QUESTION 1 - NEGOTIABLE INSTRUMENTS AND OTHER METHODS OF PAYMENT.

- (a) **A draws a crossed cheque on B Bank payable to "C or order". A thief (D) steals the cheque from C and forges C's signature on the back of the cheque and delivers it to E. E then places his signature on the cheque and delivers it to F who takes it in good faith and for value. F deposits the cheque into his bank account at I Bank. F does not receive payment.**

**Discuss whether or not F can institute legal action against the following parties:**

- (i) **A** (1)  
(ii) **B Bank** (1)



(iii) C	(2)
(iv) D	(2)
(v) E	(4)

[10]

- (i) A In terms of section 22, A will not be liable because the forged signature is wholly inoperative.
- (ii) B In terms of section 22, B Bank will not be liable because the forged signature is wholly inoperative. No right to enforce payment against any party can be acquired through the forged signature
- (iii) C In terms of section 21, no one can be held liable as drawer, indorser or acceptor unless he/she has signed the bill. C did not place any signature on the cheque and is accordingly not liable.
- (iv) D To be liable on the cheque, D, the thief, must have placed his own signature on the cheque. The thief was never a party to the cheque. The thief forged a signature; he did not place his own signature on the cheque. Therefore, the thief is not liable **in terms of the cheque**. If the thief can be found, he can be held liable based on delict or unjustified enrichment.
- (v) E E endorsed the cheque after the forged indorsement. Section 53(2)(b) applies and requirements are met. Requirements of Section 53(2)(b) have to be met: being that there must be order cheque; a forged indorsement plus true indorsement. E is known as indorser by estoppel. Section 53 (2)(b) provides that the indorser of the cheque is precluded from denying the genuineness and regularity in all respects of the drawer's signature and all previous indorsements. E will therefore be held liable to F. E will not be able to rely on the principle that the forged signature of the thief renders the cheque wholly inoperative as Section 53 (2)(b) applies. F will be able to claim payment for the amount of the cheque from E, **BUT**, not from any earlier parties before the forgery.
- (b) Distinguish between the “issue” and “negotiation” of a cheque and thereafter explain why the distinction between “issue” and “negotiation” is important. (5)**

Issue is the first delivery of a cheque complete in form to a person who takes it as a holder. It takes place only where the drawer delivers a cheque to the first payee thereof. Negotiation refers to any further transfer of a cheque after issuing the cheque. The recipient of a cheque that was negotiated may also become a holder in due course if all the other requirements for holder in due course are met. Negotiation is one of the requirements which must be met before a person may become a holder in due course of a cheque. Only the payee of a bearer cheque may become a holder in due course through mere issuing. The payee of an order cheque will never become a holder in due course since there is no indorsement on the cheque.

- (c) **A draws an uncrossed cheque on B Bank in favour of “C or order”. X steals the cheque from C, forges C’s signature on the back of the cheque and presents the cheque for payment at B Bank. X obtains payment from B Bank over the counter.**

**What protection will B Bank enjoy, in the abovementioned example, in respect of the forged indorsement?**

**(5)**

B Bank is deemed to have paid the bill in due course if all the requirements listed in section 58 are met.

The requirements of section 58 that must be complied with are:

- The cheque must be payable to order.
- The cheque may be crossed or uncrossed as this section applies to both.
- There must be a forged or unauthorised indorsement on the cheque.
- The drawee bank must pay in good faith and in the ordinary course of business.
- The forged indorsement must not be that of a customer of the bank at the branch on which the said cheque is drawn.

From the facts it appears that all the requirements of s 58 are complied with, accordingly B Bank will be protected.

## **QUESTION 2 – THE LAW OF TRUST/ADMINISTRATION OF ESTATES**

- (a) **John, the executor of the estate of the late Michael Jackson approaches you for advice on the types of documents which are considered “[a] trust document” in terms of the Trust Property Control Act 57 of 1988.**

**List THREE examples.**

**(3)**

- (i) a written agreement ;
- (ii) a testamentary writing (or a will) ; and
- (iii) a court order.

- (b) **John would like to know his rights, powers and duties as the executor of the deceased estate.**

**Name any FIVE of these rights, powers and duties.**

**(5)**

- (i) taking custody of the estate;
- (ii) the opening of a banking account;
- (iii) to submit executor’s inventory to the Master;
- (iv) advertisement of notice to creditors to lodge their claims against the estate;
- (v) examination of claims against the estate;
- (vi) determination of solvency of the estate;
- (vii) determining who the legatees and heirs are;
- (viii) lodging and advertising of the liquidation and distribution account; and
- (ix) liquidation of the estate.

**QUESTION 3 – THE LAW OF INSOLVENCY**

**(a) Meven approaches a court to apply for the sequestration of his estate.**

**What are the requirements that Meven must prove in order to obtain a sequestration order? (4)**

- (i) He has complied with formalities for notification of creditors and other interested parties.
- (ii) That he is indeed insolvent, i.e., that his liabilities exceed his assets.
- (iii) That sequestration (or surrender) *will be (not there is a reasonable believe)* to the advantage of the creditors.
- (iv) There are sufficient assets to cover the costs of sequestration.

**(b) Meven is successful in obtaining a sequestration order and a trustee is appointed to administer his insolvent estate. While realising the assets in the estate, the trustee discovers that Meven has alienated some of his assets before the application for sequestration of his assets.**

**Name THREE forms of dispositions that the trustee can apply to have set aside. (3)**

Any **three** of the followings:

- (i) Dispositions not made for value;
- (ii) Voidable preferences;
- (iii) Undue preferences;
- (iv) Collusive dispositions; and
- (v) Voidable transfer of a business.

**(c) Briefly explain what the trustee should do with respect of uncompleted contract under the following circumstances:**

- (i) Where neither the insolvent nor the other party has performed. (2)**
- (ii) Where only the other party has performed, but the insolvent has not. (1)**

**[3]**

- (i) The trustee can claim performance from the other party, but the trustee has to tender performance of the obligation of the insolvent. He/she may also repudiate. The other party will then have only a concurrent claim for damages against the estate.
- (ii) Depending on the wishes of the creditors, the trustee may either uphold the contract and perform, or repudiate the contract. If he repudiate, the other party will then have a concurrent claim for the return of his or her performance as well as for damages.

## 5. GENERAL GUIDELINES FOR THE MAY/JUNE 2016 EXAMINATION

### PREPARING FOR THE EXAMINATION

- Plan in good time how you are going to master the work. Therefore ensure that you allocate sufficient study time in preparation for the examination: you will **not be able to master this course successfully over a weekend.**
- Study regularly and make sure that you are able to do the activities in the study guide and understand the feedback provided.
- Set questions for yourself and try answering them without the aid of a study guide or textbook.
- Contact your lecturers in time if you are in doubt about the content of the work or the feedback given in relation to the activities.
- Read through the content of the work as many times as possible in preparation for the examination.
- Attend the video conference the dates, venues and times of which will be provided to you in tutorial 103.

### THE STRUCTURE OF THE MAY/JUNE 2016 EXAMINATION

- The May/June 2016 examination is divided into **FOUR SECTIONS (A to D)** which consist of questions from all the prescribed chapters in the textbook. The types of questions contained in each section are as follows:
  - **SECTION A** consists of **10 multiple choice questions** (2 marks each). The answers to the multiple choice questions have to be filled in on the mark reading sheet provided to you.
  - **SECTION B** consists of **10 true/false questions** (1 mark each). Your answers have to be completed in the space provided on the examination paper itself.
  - **SECTION C** consists of **10 mix and match questions** (2 marks each). Your answers have to be completed in the space provided on the examination paper itself.
  - **SECTION D** consists of **3 questions** worth 50 marks in total, and has to be completed in the space provided on the examination paper itself.
- The examination paper contains questions from all topics contained in your prescribed material.

### DURING THE EXAMINATION

- Read the questions carefully and answer only that which is asked.
- Plan your answer before writing it down.
- In general, you will need to write down ten facts if a question counts ten marks.
- Try answering the questions point by point and make use of shorter sentences.
- Write legibly and neatly.
- Note the division of marks and use available time and the space provided in the examination paper accordingly.

**We wish you all the best.**

**CLA2602 LECTURERS**