



MEMORANDUM

SUBJECT NAME : CAPITA SELECTA: PRIVATE LAW

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EXAMINER : MRS ME ROSTOLL

EXTERNAL EXAMINER : MS M KOEKEMOER (UNISA)

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INSTRUCTIONS :

- 1) Read all questions carefully and answer only what is asked.
 - 2) Do not waste time by providing unnecessary information that was not specifically asked for.
 - 3) Answer **Section A** (Enrichment and Estoppel) in one booklet.
 - 4) Answer **Section B** (Consumer Protection) in a separate booklet.
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SECTION A: Law of Enrichment and Estoppel

QUESTION 1

Indicate the option that correctly corresponds with each question set out below by selecting the letter pertaining to the option that you believe to be correct. There is only **one correct** answer to each question.

- 1.1 In the case of _____ the court effectively extended the direct claim of the unpaid creditor of a deceased estate against the heirs/legatees to the unpaid creditor of a company (in liquidation), who is now allowed to claim direct from a shareholder who received a liquidation dividend.
- a) **Kommissaris van Binnelandse Inkomste and Another v Willers and Others 1994 2 ALL SA 265 (A)**
 - b) *Pretorius v Van Zyl* 1927 226 (O)
 - c) *Buzzard Electrical v 158 Jan Smuts Avenue* 1996 4 SA 19 (A)
 - d) *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue & Another* 1992 4 SA 202 (A)
 - e) *Standard Bank Financial Services Ltd v Taylam* 1979 (2) SA 383 (C)
 - f) *Frame v Palmer* 1950 3 SA 340 (C) (1)
- 1.2 Which of the following does not serve as an argument in support of the abolition of the unique requirement of excusable error / mistake for the application of the *condictio indebiti*?
- a) The requirement is of sound heritage, finding its origin in Roman Dutch law
 - b) The requirement is necessary as other defences have not yet been developed to protect the recipient of the value;
 - c) The requirement is discriminatory as it punishes the claimant where the recipient may have been just as careless / negligent;
 - d) **Statement (a) and statement (b);**
 - e) Statement (b) and statement (c). (1)
- 1.3 The court in _____ held that restitution following cancellation of a contract as a result of breach takes place in terms of a contractual remedy and not in terms of the *condictio causa data causa non secuta*.
- a) *Standard Bank Financial Services Ltd v Taylam* 1979 (2) SA 383 (C)
 - b) *Gouws v Jester Pools (Pty)Ltd* 1968 3 SA 563 (T)
 - c) *First National Bank of Southern Africa Ltd v Perry NO & Others* 2001 (3) All SA 331 (A)
 - d) **Baker v Probert 1985 3 SA 429 (A)**
 - e) *Kommissaris van Binnelandse Inkomste and Another v Willers and Others* 1994 2 ALL SA 265 (A)
 - f) *Le Roux v Van Biljon* 1956 (2) SA 17 (T) (1)
- 1.4 Which of the following statements is correct?
- a) A successful plea of estoppel can be enforced against third parties.
 - b) The effect of a successful plea of estoppel will be to alter the true legal position.
 - c) A successful plea of estoppel can found a contract.
 - d) A successful plea of estoppel can found a marriage.
 - e) **A successful plea of estoppel means that in a particular matter the representation made by the estoppel denier is maintained as between the parties.**
 - f) None of the above statements is correct. (1)
- 1.5 In *Klug & Klug v Penkin* (1932) (CPP) the plaintiff succeeded with their claim in terms of the *actio negotiorum gestorum utilis* because the following requirement of the *actio negotiorum gestorum contraria* was not met:
- a) It was a result of indirect enrichment;
 - b) **The gestor administered the affairs of another under the *bona fide* belief that it was theirs;**
 - c) The gestor acted against the express wishes of the *dominus*;
 - d) The gestor acted *mala fide* in his own interests;
 - e) The gestor acted on behalf of the *dominus* without any authorisation or ratification. (1)

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- 1.6 Which of the following statements is correct? In *John Bell & Company v Esselen* 1954 1 SA 147 (A):
- a) The Appellate Division held that the *condictio indebiti* was available to the company against the defendant (Esselen);
 - b) The Appellate Division held that the company had made a conscious payment to Esselen;
 - c) **A company secretary had fraudulently issued a company cheque to Esselen and therefore no conscious payment was made to Esselen;**
 - d) None of the above statements is correct.
 - e) More than one of the above statements is correct. (1)
- 1.7 Van der Walt levelled severe criticism against the availability of the *condictio indebiti* to unpaid creditors against heirs/legatees. Which one of the following is not one of his criticisms –
- a) He doubts the historical foundations for such remedy;
 - b) He points out that there was no undue payment by the creditor, but that his impoverishment arises from the depreciation of his personal right to claim payment from the deceased estate;
 - c) He argues that payments are made to heirs and legatees in terms of liquidation and distribution accounts pursuant to the provisions of sections 34 and 35 of the Administration of Estates Act 66 of 1965 and therefore their enrichment is not *sine causa*, but *cum causa*;
 - d) He argues that the unpaid creditors are not impoverished at the expense of the heirs or legatees, but their impoverishment arises from their own failure to prove their claims in time and properly against the deceased estate;
 - e) He argues that there is no need for the *condictio indebiti* in this situation, since there is a statutory remedy available;
 - f) **All of the above;**
 - g) None of the above. (1)
- 1.8 Which of the following statements is correct? In *B&H Engineering v First National Bank of South Africa Ltd* 1995 2 SA 279 (A), the Appellate Division held that:
- a) **The *condictio sine causa specialis* was the appropriate remedy under the circumstances;**
 - b) The *condictio indebiti* was the appropriate remedy under the circumstances;
 - c) When FNB honoured the cheque in favour of B&H Engineering, a resolutive condition was fulfilled;
 - d) B&H Engineering was enriched under the circumstances;
 - e) None of the above options is correct. (1)
- 1.9 According to De Wet the following test for prejudice should be applied to be successful with the defence of estoppel –
- a) The actual position of the estoppel assertor (if the representation is not maintained) versus the position the estoppel assertor would have been in had the representation been maintained;
 - b) The actual position of the estoppel denier (if the representation is not maintained) versus the probable position in which the estoppel assertor would have been in had he not been misled by the estoppel denier's representation (the representation was never made);
 - c) **The actual position of the estoppel assertor (if the representation is not maintained) versus the probable position in which the estoppel assertor would have been in had he not been misled by the estoppel denier's representation (the representation was never made);**
 - d) The actual position of the estoppel denier (if the representation is not maintained) versus the position the estoppel assertor would have been in had the representation been maintained;
 - e) None of the above. (1)
- 1.10 Which of the following options is correct? The so-called "pure" *condictio causa data causa non secuta* is available where:
- a) The transferor transfers money or property to the transferee under circumstances where there is no *causa retenendi* but makes the transfer with the aim of illiciting a response from

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- the transferee that will create a *causa retenendi* (and the illicit response is then not forthcoming);
- b) There was no *causa dandi* at the time of the transfer of the money or property concerned and also no *causa retenendi*;
 - c) There was a *causa dandi* at the time of the transfer of the money or property concerned;
 - d) **The transferor transfers money or property to the transferee under circumstances where there is no *causa dandi* but makes the transfer with the aim of illiciting a response from the transferee that will create a *causa dandi* (and the illicit response is then not forthcoming);**
 - e) More than one of the above options is correct.
 - f) None of the above options is correct. (1)
- 1.11 In *Stellenbosch Farmers' Winery Ltd v Vlachos t/a Liquor Den* 2001 3 All SA 577 (A) the court held that it was unnecessary in this case to decide if the traditional test for causation should be replaced with a more flexible approach because of the following reason/s –
- a) Stellenbosch Farmers Winery could have sued Vlachos on the basis of the law of contract;
 - b) The matter was not properly argued before the court;
 - c) Irrespective of any of the traditional tests being applied, it would not matter as there was no causal connection between Vlachos's representation and the plaintiff's prejudice;
 - d) Options (a) & (c) are correct;
 - e) **Options (b) & (c) are correct;**
 - f) None of the above. (1)
- 1.12 Marcus steals Julia's watch and gives the watch to Marcus' sister, Maria, as a gift for Maria's birthday. Maria, of course, is unaware of the fact that the watch was stolen from Julia. One of Maria's children accidentally drops the watch and steps on it and the watch is destroyed. Which of the following statements is correct?
- a) Maria acquired the watch *ex titulo onerosa*.
 - b) Maria did not acquire the watch *ex titulo onerosa*.
 - c) Maria is not liable to Julia because, owing to the destruction of the watch, Maria has not been enriched.
 - d) According to *Van der Westhuizen v MacDonald and Mundel* 1907 TS 933, Maria has no obligation to Julia under the circumstances.
 - e) **Options (a) and (c) are correct.**
 - f) Options (a), (c) and (d) are correct. (1)
- [12]**

QUESTION 2

- 2.1 Which unjustified enrichment action can be used to recover possession of a thing? (1)
***Condictio possessionis* (1)**
If student answered *condictio indebiti* (1/2)
- 2.2 List three instances in which it is not necessary to prove the requirement of excusable error to be successful with the *condictio indebiti*. (3)
- **Transfers made by one party to another "under protest and duress" (1)**
 - ***Ultra vires* payments and payments made by minors (1)**
 - **Unpaid claims against deceased estates (1)**
- 2.3 Briefly explain why the law of estoppel cannot be successfully raised against a claim from the South African Revenue Services ('SARS') to pay your personal income tax? (3)
[7]
- **There is no case law in support hereof but if a estoppel denier were successful in raising its defence of estoppel against paying its taxes then it would unfairly fall on other consumers to pay said taxes. (1)**
 - **Estoppel is a defence based on fairness and justice and it would be against public policy should such a defence be successful. (1)**
 - **SARS is mandated in terms of legislation to collect taxes, cannot circumvent legislation by using estoppel. (1)**

QUESTION 3

Frans sold a vehicle to Amber and the agreement of sale provided that payment must be made by Amber to Frans a month after delivery of the vehicle. Frans gave Amber the registration papers for the vehicle to enable her to secure finance but then Amber did not pay Frans in terms of the contract. Frans then discovered that the address given by Amber was a vacant stand and that he had been the victim of fraud. In fact Amber's associate, Peter, had registered the vehicle in his own name and thereafter had sold the vehicle to a car dealership. That dealership registered the vehicle in its name and sold it to Vanessa who in turn registered the vehicle in her name. Frans asked the court to order the return of the vehicle from Vanessa claiming that he was still the owner. Discuss Vanessa's chance of succeeding with raising estoppel as a defence against Frans's ownership claim in respect of the vehicle with reference to the case of *Van der Molen v Fagan 2013 203 (SCA)*.

Your answer should address the following components of the court's judgment:

- a. the validity of the agreement between Frans and Amber; and
- b. the defence of estoppel being raised by Vanessa against Frans.

Do not discuss the facts of the case and limit your discussion to the legal principles put forward in this case. Your answer should not exceed one page.

(11)

[11]

The student is required to discuss two components. Firstly, the agreement concluded (4 marks), and secondly, the defence of estoppel (5 marks – student has to list the requirements of estoppel and specifically discuss representation). Two marks for application to given set of facts. Marker to apply discretion when assessing each answer.

The facts of the case are exactly the same as the given scenario.

The doctrine of estoppel can in certain instances, defeat a vindicatory remedy. If an owner causes an outsider to believe that a possessor is the owner of the property and has the right to dispose of it, the owner is 'estopped' from denying that the possessor had such right.

The issues in this appeal are whether the respondent intended to pass ownership to Amod upon delivery and whether, if she did not, she is nonetheless estopped from asserting ownership of the vehicle. Van der Molen contends that ownership of the vehicle passed from Fagan to Amod upon conclusion of the agreement and Amod taking delivery of the vehicle. And if ownership did not pass, the respondent is nevertheless estopped from asserting ownership of the vehicle because by handing the vehicle's original documents over to Amod she represented that he was its owner, or entitled to dispose of it, and also negligently failed to report it as stolen timeously. In this instance Van der Molen raised the defence of estoppel and argued that by handing over possession of the vehicle and its documents to Amod, Fagan had represented to him that the car dealership was the owner and Fagan was therefore estopped from claiming ownership.

Regarding the first issue, if an agreement that defers payment of the purchase price for a non-negligible period after the agreed delivery date, resulting in a contractually deferred payment, is one for credit and the parties may validly agree that ownership shall not pass until the purchase price has been paid. It is clear that parties contracted for credit and did not contemplate transfer of ownership until the full purchase price was paid.

Regarding estoppel, the Court set out the requirements for a successful defence of estoppel against ownership: (1) representation by the owner that the possessor of the thing is the owner thereof; (2) the representation must have been made negligently; (3) the party claiming estoppel must have relied upon the representation and (4) such reliance must be the cause of that party acting to its detriment.

The court held that Van der Molen could not succeed because the representation he relied upon was made when Fagan handed over the documents to Amod, who, armed with possession and the registration documents, registered the vehicle in his friend's name. But the representation had been made to Amod and not to Van der Molen. And the actual fraudulent representation was made subsequently by Amod and his friend. Thus Fagan had no connection to the dealership. Fagan's application accordingly succeeded and she successfully brought a vindicatory claim for the motor vehicle's return.

(SUB-TOTAL: Section A)

[30]

SECTION B: Consumer Protection

All questions are to be answered with reference to the **Consumer Protection Act, 68 of 2008** ('CPA'), the regulations promulgated under the CPA and the facts given below.

Clear Vision Optometrists (Pty) Ltd is situated in the Wedge Mall in Rivonia. It is part of the franchise group, Bright Vision Africa (Pty) Ltd, with its head offices situated in Lagos, Nigeria. After the 2016/2017 financial year end, Clear Vision Optometrists had an annual turnover of R2.95 million.

QUESTION 1

Briefly explain each of the following terms:

- 1.1 Juristic person (2)
Traditional notion of juristic person like a company and CC (1) but also includes a body corporate, partnership or association and trust as defined in terms of the Trust Property Act. (1)
- 1.2 Tribunal (1)
The National Consumer Tribunal (established by/in terms of section 26 of the National Credit Act). (1) Student can also refer to functions of tribunal ie adjudicating disputes; imposing fines.
- 1.3 Consumer (1/2 x 4 = 2)
Student must include all 4 categories –
- **a person to whom those particular goods or services are marketed** in the ordinary course of the supplier's business; (1/2)
 - **a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business**, unless the transaction is exempt from the application of this Act; (1/2)
 - **a user of those particular goods or a recipient or beneficiary** of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and (1/2)
 - **a franchisee in terms of a franchise agreement**, to the extent applicable in terms of section 5 (6) (b) to (e). (1/2)
- 1.4 Supply chain (1)
Collectivity of suppliers/includes producer importer, distributor, retailer. (1)
- 1.5 Direct marketing (2)
To approach a person in person, by mail or by electronic medium (1) direct/indirect purpose of promoting or offering to supply goods or services or requesting any donation (1)

[8]

QUESTION 2 – strict adherence to the answers as per the memorandum

- 2.1 Briefly state the main purpose of the CPA. (1)
The aim of the CPA is to promote and advance the social (1/2) and economic (1/2) welfare of consumer in South Africa.
- 2.2 The CPA makes provision for the protection of 'vulnerable consumers'. How is this term defined in terms of the CPA? (4)
All consumers with any of the following traits/circumstances:
- **Low income**
 - **Remote areas**
 - **Minors/seniors**
 - **Illiteracy/visual impairments/language barrier**
- 2.3 Optometrists are generally also regulated by additional legislation and regulation. If there were to be a conflict between the aforementioned acts and/or regulation and the CPA, how would one resolve such a conflict? (2)
Initially, the two acts will be applied together (1) and inconsistencies will be dealt with by applying the provision of the act which affords greater protection/is more beneficial to the consumer. (1)
- 2.4 What constitutes 'plain and understandable language' as prescribed in terms of section 22 of the CPA? (4)
Language which the ordinary consumer (1) of the class of persons for whom the document is intended (1) with average literacy skills and minimal experience (1) as a consumer would be able to understand without undue effort. (1) [11]

ANSWER QUESTIONS 3 AND 4 WITH REFERENCE TO THE FOLLOWING SET OF FACTS:

Clear Vision Optometrists (Pty) Ltd is situated in the Wedge Mall in Rivonia. It is part of the franchise group, Bright Vision Africa (Pty) Ltd, with its head offices situated in Lagos, Nigeria. After the 2016/2017 financial year-end, Clear Vision Optometrists had an annual turnover of R2.95 million.

QUESTION 3 – marker to apply discretion with each question as various provisions of the CPA may be applicable which allows for deviation from the memorandum

Indicate whether the CPA will apply in each of the following instances. Briefly motivate your answer in each instance.

(Note: no marks awarded if motivation is incorrect)

- 3.1 Margaret purchases Clear Sight eye drops for her husband from Clear Vision Optometrists for R210. (2)
CPA is applicable, (1) it is a normal consumer agreement in terms of which goods are supplied to the consumer in exchange for compensation. (1)
- 3.2 Clear Vision Optometrists purchases stock from Specs & Frames CC, which is one of the largest manufacturers and suppliers of prescription glasses and designer frames. Specs & Frames has an annual turnover of R800 million. (3)
The CPA is applicable as Clear Vision Optometrists, being a franchisee, (1) qualifies as a consumer in terms of the CPA irrespective of it being a juristic person (1) and even if its annual turnover exceeds the threshold of R2million (which it does in this case).(1) (NOTE: only fixed term agreements concluded between JPs are excluded from the ambit of the CPA) OR franchisee is always protected by the CPA regardless of its annual turnover exceeding the threshold of R2million, (1) however they will only be protected if they are acting into the franchise agreement, (1) thus the CPA does not apply because the franchisee is not being protected from the franchisor in this particular transaction. (1)
- 3.3 Joanna buys contact lenses on budget with her credit card from Clear Vision Optometrists as her medical aid savings fund is already depleted. (2)

Credit transactions are exempted from CPA as it is governed by the NCA (1) but goods supplied in terms of the agreement will still fall within the ambit of the CPA.(1)

- 3.4 Clear Vision Optometrists and Bright Vision Africa concludes an agreement for Clear Vision Optometrists to open the branch in Rivonia. (2)
The CPA is applicable to all franchise agreements concluded between the franchisor (Bright Vision Africa) and the franchisee (Clear Vision Optometrists) (1) and the franchisee qualifies as a consumer for purposes of the CPA. (1) [9]

QUESTION 4

Consider the following set of facts and briefly discuss the implications of the CPA on each situation.

- 4.1 A representative of Clear Vision Optometrists contacts Jarod Singh telephonically at his home on Monday night at 7pm to promote a new range of designer frames for prescription glasses and designer sunglasses. Jarod decides to purchase four pairs of designer sunglasses as he intends to give them as Christmas gifts. Each pair costs R750 and the order is delivered the next day at Jarod's home. (3)
The agreement was concluded following direct marketing. (1)
Direct marketing can be defined as to approach someone in person, by mail or by electronic medium with the aim of directly/indirectly promoting or offering to supply goods or services. (1) This specific transaction is permissible as the consumer was contacted within the allowed time of 8am – 8pm on weekdays. (1)
Also right to privacy, right to inspect goods, consumer should be informed of his right to cancel the agreement
- 4.2 Refer to the facts in **question 4.1** above. Assume that Jarod decides to return two pairs of the designer sunglasses and he contacts Clear Vision Optometrists on the Friday after purchasing the sunglasses on Monday and informs them of his decision. Explain on what basis he is entitled to do this and how the procedure works. (6)
Jarod is allowed to do this as he is exercising his cooling-off right (section 16 of the CPA). (1) This right allows Jarod to cancel the agreement without penalty, (1)
within 5 business days, (1)
by giving notice. (1)
The supplier can request a reasonable fee to restore goods in a re-saleable form, for example original packaging if it had been disposed of. (1)
The supplier has 15 days to return payment to the consumer. (1)
Goods deemed to be unsolicited if not collected by the supplier within the set time period (1)
- 4.3 Bright Vision Africa requires Clear Vision Optometrists to purchase their eyeglass cases from a designated supplier appointed by Bright Vision Africa. Clear Vision Optometrists is of the view that they can make use of a different supplier which will supply more affordable eyeglass cases than what they get from the current prescribed supplier. (3)
Clear Vision Optometrists as the franchisee qualifies as a consumer (1)
They accordingly have the right to choose which supplier they make use of and cannot be forced to purchase from specific suppliers, (1)
There is however a defence available to a franchisor as a supplier, as they can argue that the packaging is reasonably related to the branded products which forms part of the trade mark of the franchise. (1)
Award marks if student discusses right to choose in general
- 4.4 The following advertisement appears in the local newspaper, Rivonia Times:

<p style="text-align: center;">Clear Vision Optometrists</p> <p style="text-align: center;">SPECIAL SPECIAL SPECIAL</p>
--

We were lucky enough to get hold of a small consignment of highly sought after 100% organic contact lens solution.

It is imported from Germany and its non-toxic solution offers the best organic eye care.

Now available only at the Rivonia branch.

WHILE STOCKS LAST!!!



Jabu visits Clear Vision Optometrists at the Wedge Mall in Rivonia after seeing the above advertisement. At the shop, Jabu learned from the shop's manager that the said organic solution was no longer available and that they in actual fact only had 20 (twenty) 500ml containers available of the solution to the public when placing the advertisement. The manager however suggested that Jabu should consider buying a different brand of contact lens solution, of which they had ample stock. (5)

Bait marketing (s30), (1)

The supplier cannot mislead/deceive the consumer about the actual availability of the product. (1)

A defence is available to the supplier if they offered to supply/procure someone else to supply same/similar goods to consumer and consumer unreasonably refuses. (1)

This was however not the case as the manager did not make such an offer and offered a different brand of goods to the consumer available in the shop. (1)

The wording 'while stocks last', is not sufficient as the supplier has to expressly state any limitations on availability. (1)

OR

Advertisement clearly indicated that there is a limitation on stock therefore it complies with the CPA

- 4.5 The following notice appears as part of a very large notice board at the main entrance to the Clear Vision Optometrists' shop at the Wedge Mall in Rivonia:

**IMPORTANT NOTICE TO ALL CUSTOMERS
PLEASE TAKE NOTE OF THE FOLLOWING**

The franchisor, owner and/or its employees/representatives do not accept any responsibility for any injury, financial loss or harm. In other words, the franchisor/owner/employees/representatives cannot be held liable or sued for any injury, financial loss or damage of any nature whatsoever. You are entering the pharmacy at your own risk.

Indicate whether this notice complies with the provisions of the CPA. Explain your answer. (5)

S 49 applies in this context – 2 subsections must be mentioned.

- **Ito s 49 (1) (1): any notice purporting to limit liability must be drawn to the attention of the consumer in a manner and form that satisfies certain formal requirements.**
- **Ito s 49 (2) (1): if a provision or notice concerns any activity or facility that is subject to any risk of an unusual character or nature (1); the presence of which the consumer could not reasonably be expected to be aware or notice, consumer must have assented to that provision or notice by signing or initialling the provision or otherwise acting in a manner consistent with acknowledgement of the notice. (1/2)**

Application to the facts - 1 mark for each of the below to make up the total marks

- **Have to inform consumers**
- **Plain and understandable language**

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- Marks can also be awarded when student gives examples of plain and understandable language (font size and style etc)
 - Conspicuous manner
 - Time to comprehend
 - Student can also argue that risk is not of an unusual nature as injuries were not serious
- (Max 5 marks)

(Sub-Total: Section B)

TOTAL:

[22]

[50]

[80]