

LAW OF NEGOTIABLE INSTRUMENTS

INTRODUCTION TO THE LAW OF NEGOTIABLE INSTRUMENTS

Commercial paper

A commercial paper is an instrument, which embodies contractual rights, and the possession of the instrument is required to enforce those rights that are contained in it. Not all commercial papers are negotiable instruments

Characteristics of negotiable instruments

The two basic characteristics shared by cheques, bills and promissory notes are: Simplicity of transfer and the possibility of transfer free from equities

One cannot transfer a better title to another person than the title one has oneself

However, the law of negotiable instruments creates an exception to this rule. The reason for the exception is based on commercial reality. Negotiable instruments will only be used as a method of payment if the person who takes the instrument as payment for a debt obtains ownership and full title to the instrument in the same way he would have if payment were made with cash

In applying this to negotiable instruments, it means that the person who takes the negotiable instrument in good faith acquires ownership of the instrument, even though the person from whom he received the instrument has no title or a defective title to it. In other words, such a person derives his title from the instrument itself and is not subject to defences that could be raised against his predecessor's title.

BASIC CONCEPTS AND DEFINITIONS

Definitions

A bill of exchange is defined in s 2(1) of the BEA as follows: [a] bill of exchange is 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.

A cheque is defined in s1 of the BEA as "a bill drawn on a bank payable on demand".

If the definition of a bill (provided above) is combined with that of a cheque in s 1, the definition of a cheque would then be the following: a cheque is an unconditional order in writing, addressed by one person to a bank, signed by the person giving it, requiring the bank to whom it is addressed to pay on demand a sum certain in money to a specified person or his order, or to bearer.

A promissory note: is defined in s 87(1) of the BEA as an unconditional promise in writing made by one person to another, signed by the maker, and engaging 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.

Payment to order or bearer

A negotiable instrument may be payable neither to order nor to bearer. Such an instrument is called a "non-transferable" instrument. A non-transferable instrument is payable to a specified person (the payee) only.

An instrument is payable to order if it is payable to

- A specified person or his order (e.g. "Pay John Smith or order")

- To the order of a specified person (e.g. "Pay the order of John Smith")
- To a particular person (e.g. "Pay John Smith")

The person to whom payment must be made (the payee) must be either named or otherwise indicated with reasonable certainty (s 5(1)).

An instrument is payable to bearer in the following instances:

- If it is made payable to bearer (s 6(2)). This will be the case when the instrument originally is made payable to "Bearer" or to John Smith or bearer".
- If the instrument is payable to "cash or order" or the order of cash" (s 6(2)).
- If the only or the last endorsement appearing on it is an endorsement in blank (s 6(2)).
- If the payee or endorsee is a fictitious or non-existent person or someone who does not have the capacity to contract. In fact s5 (3) of the BEA states that in these three cases, the instrument may be treated as if it were payable to bearer. A person "who does not have capacity to contract" probably means someone without any capacity to act, such as insane persons

Parties necessary to a bill, cheque and promissory note

Bill of exchange

There need not be three different persons, since the drawer and the payee (A draws a bill on B in favour of A) or the drawee and the payee (A draws a bill on B in favour of B) may be one and the same person (s 3(1)). But at least two different persons must be parties to the bill, since s2 (1) of the BEA requires a bill to be an order addressed by one person to another

The drawer is the person who gives the written order that a sum of money be paid. He draws the bill and must sign the bill as drawer.

The drawee is the person to whom the order to pay is addressed. As soon as the drawee signs the bill, that is, as soon as he accepts the drawer's order by placing his signature on the instrument, he is called the acceptor.

The payee is the person to whom payment must be made - he is the person whom the drawer names on the bill as the person in whose favour the bill is drawn.

A bearer is any person in possession of a bill payable to bearer

Cheque

The same parties as a Bill, since a cheque is essentially, a bill of exchange. Except the drawee of a cheque must, however, always be a bank.

Promissory note

The maker is the person who makes the promise to pay. The maker of a note corresponds to the acceptor of a bill because the maker undertakes to make payment personally

The payee of a promissory note is the person to whom the promise is made. When the payee negotiates the note (endorses and delivers it), he becomes the endorser.

The Bearer: What has been said about the bearer of a bill applies to the bearer of a promissory note as well

Relationships between parties bills, cheques and promissory notes

- (1) The underlying relationships
- (2) The relationships, which arise from the agreement to make use of the bill
- (3) The relationships on the bill

Underlying relationships: These relationships between the parties which lead to the drawing and issuing and later negotiation of the bill may be described as the underlying relationships. I.e. the reason why

Relationships that arise from the agreement to make use of the bill: the parties concerned must agree expressly or by implication that a bill will be used to effect payment.

Relationships on the bill: The bill owes its origin, issue and further negotiation to the above- mentioned relationships, but as soon as the bill has been issued, a new set of relationships arises on the bill itself. The bill still reflects the monetary aspects of the prior underlying relationships, but the parties no longer rely on those relationships to enforce their rights on the bill. They now rely on the bill and derive their rights and liabilities from the various contracts on the instrument; and the right to enforce these rights under the underlying obligations is suspended until the instrument matures.

Further parties to and capacity's under bills, cheques and promissory notes

Acceptance is defined in s1 of the BEA as follows: "Acceptance [means] an acceptance completed by delivery or notification". A clearer definition is given in S 15(1) of the BEA, which provides that: The acceptance of a bill is the

signification by the drawee of his assent to the order of the drawer".
A cheque is generally not accepted

S93 (1) of the BEA provides that the provisions relating to bills of exchange apply, with necessary modifications, to promissory notes. In applying the provisions relating to bills, a maker is deemed to correspond to the acceptor of a bill (s 93(2)).

Endorsement is defined in s1 of the BEA as "an endorsement completed by delivery". If the payee wishes to negotiate an instrument payable to order, he must endorse the instrument and deliver it. As soon as the payee endorses the instrument, his capacity changes and he becomes an endorser. Any subsequent holder who endorses the instrument is also known as the endorser of the instrument.

An endorser may endorse a negotiable instrument specially, that is, he may, above his signature, and indicate a specific person to whom payment must be made.

A holder is defined in s1 of the BEA as follows: "A holder [means] the payee or endorsee of a bill or note, who is in possession of it, or the bearer thereof. A holder is thus either the payee in possession, or the endorsee in possession, or the bearer, who will naturally be in possession

A HDC is defined in s27 (1) is as follows: A HDC is a holder who has taken a bill, complete and regular on the face of it, under the following circumstances, namely:

1. He must have become the holder of it before it was overdue, and if it had previously been dishonoured, without notice thereof; and
2. He must have taken the bill in good faith and for value, and at the time the bill was negotiated to him, he must have had no notice of any defect in the title of the person who negotiated it.

The similarities and differences between a bill of exchange and a cheque

A cheque is a special kind of a bill of exchange, and with a few important exceptions, the general provisions relating to bills apply. It is clear from S1 of the BEA that, in order for a bill to qualify as a cheque, two important qualifications must be met:

- The order to pay must always be addressed to a bank.
- It must be payable on demand.

The similarities and differences between a bill of exchange and a promissory note

This definition corresponds, in several respects, with the definition of a bill. The important differences are that

- A bill is an unconditional order given by one person to another while a promissory note is an unconditional promise made by one person to another.
- In a bill the order to pay is addressed to a third person, whereas in a promissory note the maker of the note promises to make payment.

BILLS OF EXCHANGE

The eight essential elements that a bill has to comply with are

- (1) An order;
- (2) In writing,
- (3) Which is unconditional;
- (4) Addressed by one person to another;
- (5) Signed by the person giving it;
- (6) Requiring someone to pay a sum certain in money;
- (7) On demand or at a fixed or determinable future time;
- (8) To a specified person or his order or to bearer (s 2).

A document that does not comply with one or more of these formal requirements does not qualify as a valid bill under the Act although it may have validity independent of the Act.

Unconditional

The order to pay must be unconditional. The order to the drawee must not be made dependent upon the fulfillment of some condition.

S2 (3) of the BEA specifies certain special orders which may be incorporated into a bill and which will be regarded as unconditional. An unqualified order to pay coupled with

- An indication of a particular fund out of which the drawee is to reimburse himself, or of a particular account which the drawee must debit with the amount; or
- A statement of the transaction giving rise to the bill; or
- A statement on the bill that is drawn against specified documents attached thereto for delivery on acceptance or on payment of the bill; or
- A statement on a bill that is drawn under or against a specified letter of credit or other similar authority is unconditional.

However, an order to pay out of a particular fund is conditional.

Addressed by one person to another

The order to pay is addressed by the drawer to the drawee. The drawee, that is, the person to whom the order to pay is addressed, must be named or otherwise indicated on the bill with reasonable certainty (s 4(1)).

A bill may be addressed to two or more drawees whether they are partners or not (A and B), but an order addressed to two drawees in the alternative (A or B), or to two or more drawees in succession (A, and if he does not pay then B), is not a bill of exchange (s 4(2)).

Signed by the person giving it

The general rule is that no person will be liable as drawer and equally as acceptor or endorser, if he has not signed the bill as such. Signature is an essential element of a bill. The person who must sign the bill is the drawer and as a rule his signature appears at the bottom right-hand side of the document. The signature of the drawer may be placed on a bill at any time, but until such time as the signature is placed, the bill is incomplete

A sum certain in money

The order must be to pay a defined sum of money. The order may not require anything else other than the payment of money (s 2(2)), and the sum of money which is payable must be definite. If anything else must be done besides the payment of money

The sum payable will still be certain although it is required to be paid

- With interest; or
- By stated installments; or
- By stated installments, with a stipulation in the bill that upon default in payment of any installment, the whole debt becomes due; or
- According to a rate of exchange indicated, or to be calculated as directed, by the bill (s 7(1)).

The amount payable need not necessarily be expressed in South African currency, but it must be expressed in a recognised currency

To pay on demand or at a fixed or determinable future time

The due date or time of payment of a bill may be either on demand, or at a fixed future time, or at a determinable future time.

According to S 8 of the BEA, a bill is payable on demand in the following instances:

- If it is expressed to be payable on demand, at sight, or on presentation;
- If no time for payment is stated

If a bill is not payable on demand, it must be payable either on a fixed future time or at a determinable future time.

At a fixed future time: The due date is simply named

At a determinable future time: There are four further methods of fixing the due date of a bill, and in all these cases the bill will be payable at a determinable future time.

- A fixed time after date- means the date on which the bill was drawn and which appears on the bill. If the bill is not dated, then the date of issue is the date of the bill. S 10 of the BEA provides that any holder may insert the true date of issue.
- A fixed time after sight- strictly speaking means "after acceptance of the bill", but the possibility naturally exists that acceptance will be refused. The period of three months will therefore be calculated from the date of acceptance, if the acceptance is dated (s 12(d)), or from the date of completion of acceptance, where the acceptance is not dated (s 10), or from the date of noting or protest, where the bill is dishonoured by non-acceptance (s 12(d))
- On the happening of a specified event which is certain to happen- The bill may, for example, be payable on the occurrence of a specified event which is certain to happen,
- At a fixed period after the happening of a specified event which is certain to happen

The main difference between the two cases above is that in the former case, the bill is payable when the specified event occurs. In the latter case, the bill is payable only once the specified period after a certain event has lapsed

The determination of the due date is important for the following reasons:

- The due date is important in determining the time of payment. S43 (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 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.
- The due date is also important in determining when the bill should be presented for acceptance. This must be before the due date of the bill has expired (s 39(1)(a)). S16 (1)(b), however, provides that a bill may also be accepted after due date.
- A holder can only be a HDC if he receives the bill before the expiry of the due date (s 27(1)(a)).
- A bill may be negotiated after expiry of the due date, but then the new holder takes it subject to defects (if any) attaching to the title of his predecessor on the due date (s 34(2)).

To a specified person or his order or to bearer: The order to pay must indicate to whom payment must be made. **Payee or payee's order:** if a bill is not payable to bearer it must always be payable to a specified person or his order. It can be two or more payees jointly or in the alternative. The payee may also be indicated by their title. Should the otherwise not be indicated, a bill is always transferable to the payee or his order. Where a bill is payable to "cash" or "cash or order" the bill is payable to bearer.

Payable to a person is interpreted to include any body or person incorporated or not i.e. payable to the partners of a partnership, or the executors of a trust S2 of the Interpretation Act 33 of 1957

A bill is payable to bearer if it is stated to be so payable, if the last endorsement is an endorsement in blank or if it is stated to be payable to "cash" or "cash or order"

The non-essential and other additional elements of a bill

Date: the bill does not need to be dated. If the date is not indicated, the date of issue is deemed to be the date of the bill

Place of drawing or payment: important if a bill drawn in one country is negotiated or accepted or payable in another country. S 70 of the BEA determines the rights, duties and liabilities of the parties to such an instrument

Amount: the BEA does not require the amount to be expressed in both figures and words. If there is a difference between the two, the amount in words is used. According to bank usage, banks will not accept cheques where the amounts differ

Stamp duty: is not required by the BEA for the validity of the bill. S100 however, states that the BEA shall not in any way restrict the laws relating to stamps or revenue

Sans Recours (exclusion of liability): in such a case the drawer or endorser cannot be held liable if the instrument is dishonoured. The Acceptor cannot exclude his liability! Where the acceptor limits his liability, his acceptance is qualified and the rules concerning qualified acceptance apply. If the acceptor purports to accept, but at the same time excludes liability completely, he then dishonours the bill.

Waivers: the drawer and any endorser may insert a stipulation waiving some of his or the holders rights.

ISSUE, NEGOTIATION, DELIVERY AND ENDORSEMENT

Before a person can be liable on an instrument, with the exception of a transferor by delivery, he must have signed the instrument and, except in the case of acceptance, delivery of the instrument must have taken place

Issue: the first delivery of a bill or note, complete in form, to a person who takes it as holder

Negotiation:

If the bill is marked "not transferable", or "non-transferable" and/or if the bill stipulates that it is payable to a particular payee alone ("pay C only"), or if it is restrictively endorsed ("pay D only"), then it may not be negotiated further (ss 6(5) and 75A)).

A crossed cheque marked "not negotiable" may indeed be negotiated in the sense that it may be transferred to a person who can take it as holder but the consequences stipulated in Ss 80 and 81 of the BEA will follow

If the words "not negotiable" appear on an uncrossed cheque payable to a specific person, the cheque is probably not negotiable at all.

S29: a person to whom a bill is negotiated must become the holder as a result of such negotiation. There are several instances where the Act recognises a negotiation as such but without the transferee becoming a HDC.

This is the case:

- Where a crossed cheque which bears the words "not negotiable" is negotiated
- Where a bill is negotiated after the due date (s 34(2))

→ Where a dishonoured bill is negotiated to a person who is aware of the dishonour (s 34(5))

Negotiation of a bearer instrument: is negotiated by mere delivery

Negotiation of an order instrument: endorsement by the holder and completed by delivery

Endorsement in blank: the payee places his signature on the back of the note, and it then becomes an instrument payable to bearer (s 6(2))

Special endorsement: the payee writes above his signature on the back of the instrument "Pay X or order". In such a case the note remains an instrument payable to order (s 6(3))

Delivery:

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

Functions of delivery:

1. **Negotiation:** the holder's endorsement is required for the negotiation of an instrument payable to order, and the endorsement is completed by delivery.

If the holder delivers an instrument payable to order without an endorsement: negotiation (as laid down in s 29(3)) does not take place and the transferee cannot be its holder. Delivery of an instrument payable to order without endorsement gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the bill endorsed by the transferor (s 29(4)). The transferee does not become the holder as a result of such a transfer, because it merely confers on the transferee possession of a bill payable to order without the transferee being either the payee or endorsee of such a bill.

Apart from the provisions of s 29(4) of the BEA, the holder of an instrument payable to order may transfer his rights in the bill by means of an ordinary cession. Notice of the cession to the debtor must be given, because if, in ignorance of the cession, the debtor pays the cedent, he cannot be compelled to pay again to the cessionary

Negotiation v Cession: The person to whom the instrument is negotiated may acquire a better right than that of his predecessor (depending on the circumstances), while in the case of a cession the cessionary can never acquire a better title than that of the cedent.

In the case of an instrument payable to bearer, delivery fulfils the function of transfer, which is necessary for the negotiation of such an instrument. In terms of S 29(2) of the BEA, an instrument payable to bearer is negotiated by mere delivery without endorsement.

2. **Formation of a contract:** S19 (1) of the BEA provides: "No contract on a bill, whether it be the drawer's, the acceptor's or an endorser's, shall be complete and irrevocable, until delivery of the instrument in order to give effect thereto"

In terms of s 19(1) of the BEA, the acceptor will be liable if his acceptance is confirmed by notice instead of delivery. This also explains s 1 of the BEA where it states: Acceptance means an acceptance completed by delivery or notification"

Other aspects of delivery:

If a bill is no longer in the possession of a party who signed it as a drawer, acceptor or endorser, a valid and unconditional delivery by the relevant party is presumed until the contrary is proved (s 19(4))

Delivery must be effected by the drawer, acceptor or endorser himself, or by or under his authority (s 19(2)(a))

There is an irrebuttable presumption that there has been a valid delivery of the bill by all parties prior to the HDC (s 19(3))

Mode of delivery: if the addressee has requested that the instrument be posted or the parties have agreed that the instrument be posted (and if certain requirements implied in delivery of an instrument by post have been met), the risk as well as ownership passes to the addressee immediately when the instrument is posted.

Endorsement:

⇒ "An endorsement completed by delivery"

⇒ The endorsement must be written on the instrument itself, or it may be written on a slip of paper appended to the instrument, termed an *allonge*

⇒ The endorser must sign it and the endorsement must be of the entire instrument (s 30(1)).

⇒ The mere signature of the endorser on the bill, without additional words, is sufficient to constitute an endorsement (s 30(2))

⇒ Where the bill is payable to the order of two or more persons who are not partners, all must endorse the bill,

unless the one endorsing has authority to endorse for the others (s 30(4)).

Endorsement in blank: does not specify any endorsee to whom payment must be made and the result is that the instrument becomes payable to bearer (s 31(1)).

S31 (4)- the changing of an endorsement in blank to a special endorsement: This may be done by any holder writing above the endorsement in blank a direction to pay the bill to, himself or to his order or to some other person (converted to an instrument payable to order)

Special endorsement: the name of the person to whom, or to whose order, payment must be made, followed by the endorser's signature. The instrument becomes or remains 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.

Restrictive endorsement: are those endorsements, which affect the negotiability of a bill or note. There are two types of restrictive endorsements:

1. One that prohibits negotiation or transfer altogether
2. One that gives the endorsee the right to deal with the instrument as indicated

A restrictive endorsement may altogether prohibit further negotiation or transfer of the instrument (s 32(1)).

A restrictive endorsement may give the endorsee the right to deal with the instrument as indicated in the endorsement, without ownership of the instrument passing to the endorsee.

A restrictive endorsement gives the endorsee the right to receive payment of the bill, and to sue any party thereto that his endorser could have sued, but gives him no power to transfer his rights as endorsee, unless it expressly authorises him to do so (s 32(2))

A restrictive endorsement is an endorsement, which restricts the negotiability of the instrument, and not in the sense of an endorsement, which limits the liability of the endorser

Conditional Endorsement: S33- the payer may disregard the condition and that the payment to the endorsee will be valid whether the condition is fulfilled or not

Functions of endorsement:

Transfer function: The endorsement of an instrument payable to order, completed by delivery, brings about a negotiation of the instrument.

Guarantee function: As soon as an endorser endorses a negotiable instrument, the endorser makes certain guarantees to the new transferee and his successors. The endorser guarantees that he will pay if the bill is dishonoured after proper presentment

If there are two or more endorsements on a bill, a rebuttable presumption exists that the endorsements were made in the order in which they appear on the instrument (s 30(6)).

Negotiation Back to Drawer, Prior endorser or acceptor, and negotiation of dishonoured and overdue:

A negotiable instrument, which is initially negotiable, remains negotiable until it has been restrictively endorsed or until it is discharged (s 34(1))

Negotiation back to drawer, prior endorser or acceptor: Such person may then re-issue 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 (s 35)

S 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.

If the bill was originally payable to the drawer's order, he may, after paying the bill, delete his own and subsequent endorsements and renegotiate the bill (s 57(4)). An endorser who pays a bill also has this right (s 57(4)).

Negotiation of an overdue bill: An overdue bill may still be negotiated, that is it may still be transferred from one person to another so as to make the transferee the holder (s 34(2))

No person, however, can acquire more rights in respect of the instrument than those, which the holder had at the time of its maturity, that is, no person may become HDC of such a bill after its due date. A bill with a fixed due date becomes overdue after expiry of such due date.

A bill payable on demand becomes overdue when it appears on the face of it to have been in circulation for an unreasonable length of time

A cheque is always payable on demand.

A promissory note payable on demand does not become overdue in the same circumstances (s 90(3)). The reason why an exception is made in the case of promissory notes is that notes are often given as security for debts and are held for long periods.

Negotiation of a dishonoured bill:

A bill may be dishonoured by non-acceptance or by non-payment, and in both cases the bill may still be negotiated.

If the bill is not yet overdue, a person who takes it unaware of the dishonour can be a HDC (ss 27(1)(a) and 34(5)).

A person, who takes a dishonoured bill while he is aware of the dishonour, takes it subject to any defect of title attaching thereto at the time of dishonour, even if the due date has not yet been reached (s 34(5)).

STUDY UNIT 5: SIGNATURE

S 21 of the BEA provides that no person will be liable as a drawer, acceptor (or maker) or endorser of an instrument unless he has signed it in that capacity

Two requirements to be satisfied before a party can become liable on a negotiable instrument, namely:

1. He must sign the instrument either as drawer, endorser, or maker or in any other capacity, which indicates his willingness to incur liability on the instrument; and
2. He must deliver the instrument to another person.

S95 BEA: if any instrument or writing is required to be signed, it is not necessary that the person must sign it with his own hand, as it is sufficient if his signature is written or printed thereon by some other person, by or under his authority. The authorised sealing or stamping with a seal or stamp of a corporation will be sufficient and be deemed to be equivalent to the signing or endorsement of any such instrument or writing

Van Niekerk v Smit & Others 1952 (3) SA 17 (T).

"Signature does not necessarily mean writing a person's Christian and surname but any mark which identifies it as the act of the party"

The authorised sealing with the corporate seal of a corporation (juristic person), or the authorised stamping with an official rubber stamp of a bank or juristic person, is also deemed to be sufficient and equivalent to a signature.

Functions of a signature:

Constitutive Function: A signature -that is, the drawer's or maker's signature- is one of the essential elements of a bill, cheque or promissory note, and as such is necessary for the coming into being of the bill, cheque or note

Guarantee function: No person is liable as drawer, endorser, or acceptor of a bill, or equally as maker or endorser of a note who has not signed it as such. If a person does sign in any one or other of these capacities, he will be liable on the document

Transfer Function: An order document is negotiated by the endorsement of the holder completed by delivery

A signature can fulfill more than one, but never all 3!

What function does each party's signature perform?

The Drawer- C,

He undertakes, among other things, to compensate the holder, or a subsequent endorser who is compelled to pay, if the bill is dishonoured after due presentment and provided the requisite proceedings on dishonour are duly taken

The acceptor- G

G: undertakes, among other things, to compensate the holder, or a subsequent endorser who is compelled to pay if the bill is dishonoured after due presentment and provided the requisite proceedings on dishonour are duly taken (s 53(2)).

The Endorser- T

T: The endorser's signature will fulfill only a transfer function and not a guarantee function where the endorser adds the words *sans recours* to his endorsement (s 14(a)).

Forged and unauthorised signatures

Forged signatures: the forger imitates the signature of somebody else with the intention to defraud. Such a signature may not be ratified

Unauthorised signatures: the signatory signs on behalf of another, but without that person's consent (authority). The principal (the person on whose behalf the unauthorised signature was made) may authorise and ratify such a signature.

Although s 21(b) of the BEA provides that the signature of a firm upon a bill is binding upon all the partners in the firm, this does not mean that the firm is bound as a matter of course. S 21(b) is dependent upon the factual circumstances of each case.

If the person receiving the bill from the so-called agent and the so-called agent himself both intended that the signature should still be ratified by the principal, the so-called agent would remain personally liable until the ratification actually took place.

What are the legal consequences of a forged or unauthorised signature?

Unauthorised:

1. In terms of s 24(1), the person who so signs shall be personally liable on the instrument.
2. S 22 provides that such unauthorised signature is wholly inoperative. Thus the person whose signature it purports to be will not be bound thereby unless he ratifies the unauthorised signature, which he may do in terms of s 22.

Forged:

Is also wholly inoperative but cannot be ratified.

"Negotiation" means the transfer of an instrument from one person to another so as to constitute the transferee the holder of it (s 29(1)). A bill payable to order, like the one mentioned in the scenario above, is negotiated by endorsement of the holder completed by delivery (s 29(3)). A holder is defined in terms of s 1 as "the payee or endorsee of a bill who is in possession of it, or the bearer thereof." Now in terms of s 22, a forged endorsement is wholly inoperative and does not bring about a negotiation or the right to retain the bill, to give discharge for it or to enforce payment of it. Thus, D who received an order bill on which there is a forged endorsement cannot be the holder of it. Because D cannot qualify as a holder, he can also not become a HDC, since he needs to qualify as a holder first before he can be a HDC (see s 27(1)). Thus, D is actually in possession of a bill payable to C or order and which C, has not endorsed, and accordingly D is merely a possessor of the bill.

S 22, a forged or unauthorised signature is wholly inoperative, and no right to retain or give a discharge for the bill, or enforce payment thereof against any party, can be acquired through that signature, unless that party is precluded from setting up the forgery or lack of authority as a defense.

General rule: a forged or unauthorised signature is wholly inoperative

A forged or unauthorised signature has no constitutive, guarantee or transfer function except in so far as the person against whom payment is sought to be enforced is precluded, by the operation of the doctrine of *estoppel* at common or *estoppel ex lege* (in terms of s 53(2)(b)) from raising the forgery as a defence.

If the drawer's signature on a bill (or the maker's signature on a note) is forged, neither the payee nor any subsequent holder will be able to obtain payment on the instrument from the drawer (or maker) or any subsequent party who has put his signature on the instrument. This will be so because s 21 of the BEA provides that no person will be liable as a drawer, acceptor (or maker) or endorser of an instrument, unless he has signed it in that capacity. A drawee has no mandate to pay out a bill where the drawer's signature has been forged, even if such a forgery is very well executed. In the case where the signature of a drawer of a cheque has been forged, the drawee bank cannot debit the drawer's (its client's) account; since the drawer did not sign the cheque there can be no mandate to the drawee to pay. An exception to this would be where the drawer knows or suspects that his signature has been forged, but fails to notify the bank

If the endorsement of the payee or any subsequent holder of an order instrument is forged, any person who obtains such an order instrument subsequent to the forging will acquire no rights on it against any previous party. The purchaser of an instrument, if he qualifies as a holder, has the power to sue on the instrument and to enforce payment against prior parties (see s 36(a))

The purchaser of an order instrument on which an endorsement is forged or unauthorised cannot be the holder of it. A bearer instrument is negotiated by delivery only and an endorsement is superfluous to constitute the transferee bearer and thus holder of the instrument.

S 53(2)(b): an exception to the general rule

- No right to enforce payment of a negotiable instrument against any party can be acquired through a forged or unauthorised signature, unless that party is precluded by the operation of the doctrine of estoppel at common law (Roman-Dutch law) or by the legislative estoppel in terms of s 53(2)(b) from raising the forgery as a defence. According to the doctrine of estoppel, a person is precluded from denying the truth of a representation previously made by him (intentionally or negligently) to another person if that person, believing it to be true, acted on the representation to his prejudice.
- Is the exception to the general rule that forged or unauthorised signatures will be wholly inoperative on bills, cheques and notes. This S provides that if the endorser of a negotiable instrument endorses it, he is precluded from denying to a HDC the genuineness and regularity in all respects of the drawer's signature and all previous endorsements

- Aimed at creating a legislative estoppel in favour of a later "HDC" against an earlier "endorser"
- The "endorser" who signs the instrument after receiving it by way of forged endorsement is not really an "endorser", because only the holder of an instrument can "endorse" it.
- S 53(2) (b) creates a hypothesis that the appearance created in regard to a later possessor is upheld, provided it appears that he would have been a HDC if it were not for the fact that he had obtained the bill by way of a forged signature
- Payment by the drawee or acceptor (or maker) to the apparent HDC will accordingly not result in a discharge of the bill in terms of s 57, because it is not a payment in due course since the apparent HDC is not actually the holder.
- Payment in due course may be made only to a holder

⇒ S 22- the forged endorsement made by the thief, X, is wholly inoperative, therefore no title was transferred to E which she could then transfer to F.

⇒ E cannot ever be the true endorsee, because there was a forged endorsement and therefore she will merely be the "endorser by estoppel"

⇒ F is also not the holder of the cheque, because of the forged signature, and therefore F cannot claim payment from A, B Bank, or even from E- He will only be allowed to claim from the thief, X, but such claim will be based on the law of delict. Payment by B Bank to F will not discharge the cheque, as it would not be payment to a holder of it

⇒ If F can satisfy all the requirements for holdership in due course

in S 27(1) except that he must be a holder, he can claim payment only from E, by virtue of s 53(2)(b)

⇒ As far as E is concerned, F is a "holder by estoppel" which means that E cannot raise F's defective title as a defence against him.

⇒ The S 53(2)(b) provides that the endorser of a negotiable instrument (E), by endorsing it, "is precluded from denying to a HDC the genuineness and regularity in all respects of the drawer's signature and all previous endorsements"

⇒ F will therefore be able to claim the amount of the cheque only from E, but not from any of the earlier parties to the cheque

S 53(2)(b):

- The protection provided for in this s only applies to order instruments, since there must be a forged or unauthorised endorsement.
- It can be applied only if there are two parties after the thief (in other words, after the forged or unauthorised signature was placed on the instrument):
 - ⇒ One that could have been an endorser; and
 - ⇒ One that could have been a HDC, if it were not for the forged or unauthorised endorsement on it.

Capacity of parties to an instrument

- If a bill is drawn or endorsed by a minor or a person having no capacity to incur liability on a bill, the drawing or endorsement of the bill entitles the holder to receive payment of the bill and to enforce it against any other party thereto (s 20(2)).
- S 20(1) "Capacity to incur liability as a party to a bill is co-extensive with capacity to contract"
- Although the minor cannot be liable on a bill to any greater measure than he can be liable in terms of an ordinary contract, the person who takes the instrument from the minor by negotiation acquires, by virtue of the bill, the right to claim payment from any other party to the bill.

HOLDER

Where the bill is drawn payable to order there are two requirements that must be complied with in order for a person to become the holder of it:

1. The person has to be either the payee or endorsee
2. He must be in possession of it

Where the bill is drawn payable to bearer, any person who is in possession of it may be a holder

Definition of a holder

Holder: the payee or endorsee of the bill who is in possession of it or the bearer thereof

Bearer: the person in possession of a bill which is payable to bearer

- Possession of the instrument forms that basis of being a holder.
- The possessor must, be either the payee, endorsee or bearer

- Possession and the acquisition of the instrument need not be lawful
- Although a thief may be a holder, he will not be able to enforce payment on the bill. He may be able to pass good title to another and payment to him will indeed be a payment in due course.
- Delivery is a prerequisite for liability
- A person who is in possession of a bill payable to order which is payable to someone else, either originally or by endorsement, cannot be the holder thereof.
- The person who has acquired a bill through a forged endorsement can also not be the holder- S22 a forged signature is wholly inoperative

The rights of a holder

1. S 36(a): the holder may sue on the bill in his name. The holder may possess the instrument in the capacity of trustee, executor or curator. Irrespective of whether or not a person is the owner of a bill, if he is the holder, he will be able to receive payment that will constitute payment in due course, with the result that the instrument is discharged.
2. The power to present the bill for acceptance: S 39(1), presentment must be effected by the holder, personally or through a representative. S 41(2) if the drawee refuses to accept the bill, the holder has an immediate right of recourse against the drawer and endorsers and no presentment for payment is necessary. S46 that notice of dishonour must be given in order to bind all previous endorsers and the drawer on the bill. The effect of this is that the holder will have the right to recover, on dishonour by non-acceptance, from any of the previous endorsers or the drawer of the bill
3. S43: to present the bill for payment: the holder is the only person who may present the bill for payment, either personally, or through an authorised representative The holder also acquires a right of recourse against the drawer and the endorsers if the bill is dishonoured by non-payment. S 46 is also applicable.
4. The power to supplement certain deficiencies: S10 non- essential requirements of a bill, may be inserted by the holder
5. The power to make certain additions: S31 (4) if a bill has been endorsed in blank; the holder may convert this blank endorsement into a special endorsement. S76 (2) he holder may cross an uncrossed cheque either generally or specially. S76 (3) if a cheque is crossed generally, the holder may cross it specially. S76 (4) the holder may add the words "not negotiable" to a crossed cheque.
6. The right to a duplicate of the bill: S 67(1), if a bill (or note) is lost or destroyed, the person who was the holder of it (he is no longer holder due to the loss of possession) may request the drawer (or maker) to give him another bill or note of the same tenor, provided that the bill is not yet overdue. The holder has no right to apply for a fresh acceptance of the duplicate bill, or for a fresh endorsement of the duplicate bill or note.
7. The power to have the bill protested for better security: S49 (4), if the acceptor of a bill becomes insolvent or suspends payment before the bill matures, the holder may cause it to be protested for better security. Protest is made against the drawer and endorsers.

The duties of a holder

Presentment for acceptance:

Normally there is no duty on the holder to present the bill for acceptance. Only in the following three instances is the holder obliged to do so:

1. When the bill is payable after sight: necessary to settle the date of maturity of the bill. Must present the instrument for acceptance within a reasonable period of time after he has received it. S38 (2) what will be considered to be a reasonable time will depend on different factors
 2. If a bill expressly states that it must: be presented for acceptance, the holder must do so, before it is presented for payment S37 (2)
 3. If a bill is drawn payable to a place: other than the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment
- S 38(1)(b), where the holder of a bill payable after sight in (1) above does not present for acceptance, the drawer and the endorsers are discharged and they may no longer be held liable on the instrument.
 - S 39 if a bill is presented for acceptance, presentment must take place before the bills date of maturation
 - S 37(3) the holder is not obliged to present for acceptance
 - The holder will thus have a right against the acceptor if he accepts and will have an immediate right of recourse against the drawer and the endorsers in the case of dishonour by non-acceptance
 - The drawee becomes the acceptor after acceptance
 - S 51 if the drawee does not accept the bill, he is not liable on it
 - Upon acceptance the drawee or acceptor incurs certain liabilities on the bill
 - S39 a bill is duly present for acceptance if it is presented in accordance with the following:
 - The presentment must be made by or on behalf of the holder
 - The presentment must be made before the bill is overdue
 - The presentment must be made to the drawee

- If the drawee is deceased, presentment may be made to the executor
- If he is insolvent, presentment may be made to the drawer or the trustee
- A presentment by post, if in due course, is sufficient.
- S 39(2) presentment in accordance with the requirements for due presentment is excused and the bill will be treated as dishonoured by non-acceptance:
 - If the drawee is deceased or insolvent, or is a fictitious or non-existing person or a person not having the capacity to contract
 - If, after the exercise of reasonable diligence, such presentment cannot be effected
 - If, when irregular presentment is made, acceptance is refused on some other ground.
- The dishonour of a bill by non-acceptance- the holder obtains an immediate right of recourse so that presentment of payment isn't necessary.
- S 36(3) the fact that the holder has reason to believe that the bill will be dishonoured on presentment does not make presentment unnecessary
- S40 and 41: a bill is dishonoured by non-acceptance if:
 - The bill is presented for acceptance and it is not accepted within the customary time
 - It has been duly presented and acceptance is refused or cannot be obtained
 - Presentment for acceptance is excused and the bill is not accepted

Presentment of payment

- S43 present the bill for payment. If the holder does not do so, the drawer and the endorsers will not be liable- they will in fact be discharged.
- S43 (2) contains the rules as to presentment for payment: a bill is duly presented for payment if it is in accordance with:
 - ⇒ A bill not payable on demand must be presented on the day it falls due.
 - ⇒ A bill payable on demand must be presented within a reasonable time after its issue to render the drawer liable, and within a reasonable time after endorsement to render the endorser liable.
 - ⇒ The holder must personally or through an authorised representative present for payment.
 - ⇒ If a bill is drawn on or accepted by two or more persons who are not partners, presentment must be made to them all.
 - ⇒ If the drawee or the acceptor of the bill is deceased and no place of payment is specified, presentment must be made to the executor (if there is one).
- S43 (4) a bill is presented at the proper place if:
 - ⇒ When the place of payment is indicated on the bill, the bill is presented there;
 - ⇒ When the place is not indicated, but the address of the drawee or acceptor is given on the bill, it is presented at that address;
 - ⇒ When the place is not given and the drawee's address does not appear on the bill, it is presented at the drawee's place of business, or if that is unknown, then at his residence if this is known;
 - ⇒ When none of the abovementioned applies, the bill is presented for payment wherever the drawee or acceptor can be found.
- S 43(5), presentment by post will suffice if it is done in the normal course of business.
- S 44, presentment for payment by the holder may be delayed or dispensed with.
- S 44(1), delay in presentment is excused if the delay is caused by circumstances beyond the control of the holder and is not due to his fault, misconduct or negligence. However, if the cause for the delay ceases to operate, presentment must be made with reasonable diligence.
- Presentment for payment is dispensed with in terms of S 44 (2):
 - If, after the exercise of reasonable diligence, presentment cannot be effected
 - If the drawee is a fictitious person
 - Where the drawee is under no obligation to accept the bill and the drawer has no reason to believe that the bill would be paid if presented
 - As regards the endorser, if the bill was accepted and he has no reason to expect that the bill would be paid if presented
 - By express or implied waiver of presentment
 - If the drawee or acceptor is insolvent
- S14 the drawer and endorsers may also waive (as regards themselves) some or all of the holder's duties.
- S 44(3) the holder's obligation to present is not discharged even when he has reason to believe that the bill will on presentment be dishonoured unless:
 - If the holder duly presented it for payment and payment was refused or could not be obtained. ("Duly presented" in the context of presentment for payment is described in s 43(2)); and
 - If presentment is unnecessary and the bill is overdue and is not paid.
- Where a bill is dishonoured by non-payment, the holder immediately acquires a right of recourse against the drawer and endorsers, provided the holder has given notice of the dishonour

Notice of dishonour

- S46 notice of the bill must be given to the drawer and each endorser if the bill is dishonoured. Any drawer or endorser to whom notice is not given will be discharged.
- Purpose of the notice is to inform the prior parties that the bill has been dishonoured so that they will be able to avail themselves of the right of recourse against prior parties to them.
- S 46 (a) if notice of dishonour is not given, the rights of the HDC who became such a holder after this omission shall not be affected
- S 46 (b) where a bill is dishonoured by non acceptance and notification thereof is duly given again unless the bill was accepted after the first non-acceptance

HOLDER IN DUE COURSE

- The HDC enjoys the most comprehensive protection and the most rights of all holders
- There is a presumption in S 28(2) that every holder of a bill is a HDC.
- S 36(b) and (c) He acquires ownership of the instrument in his possession even if he acquired this instrument from someone who was not its true owner. The holder in due course also takes this instrument free from defects of title and mere personal defences available to prior parties among themselves.

Definition and requirements for a HDC

- S 27 contains the requirements for a HDC
 1. The holder in due course must be a holder.
 2. The bill, which he receives, must be complete and regular on the face of it.
 3. He must have become holder of the bill before it became overdue.
 4. If the bill had previously been dishonoured, he must have no knowledge ("notice") of it.
 5. He must have taken the bill in good faith (bona fide).
 6. He must have given value for the bill.
 7. The bill must have been negotiated to him.
 8. He must have had no knowledge ("notice") of any defect in the title of the person who negotiated the bill to him

Must be a holder: he will thus have to be the payee or endorsee of the bill in his possession or the bearer thereof before he can be the HDC

Complete and regular on the "face" of it: refers to the outward or external appearance of the bill. The judgement of the reasonable person has to be kept in mind. A bill is irregular "on the face of it" if its appearance leads one to the conclusion that there are prior parties who have defences on the bill or that they are entitled to the real rights to it. E.g. where the holder receives a torn bill, where the holder receives an instrument after a thief has, evidently, erased the name of the payee. If an instrument lacks the essential elements, it will not be a bill of exchange and the person acquiring it will not be a holder- and will consequently not be a HDC

Must have become the HDC before it was overdue: the due date on the bill is the day on which it is payable. A bill, which is payable on demand, is due the moment it is presented for payment, and the due date is past if the holder, waits for an unreasonable time before presenting it for payment. Regard shall be had to the nature of the bill, trade usage with regard to similar bills and the facts of a particular case.

A person who acquires an overdue bill S34 (2) will take the bill "subject to any defects of title affecting its maturity", and he will not acquire nor give a better title than that which the person from whom he took it. An overdue bill may still be negotiated. The negotiation of an overdue bill will affect the transfer of the personal and real rights of the transferee only

The holder should have no knowledge that the bill was previously dishonoured

A holder must take the bill in Good faith: S 94 "a thing is deemed to be done in good faith, within the meaning of this act, where it is in fact done honestly, whether it is done negligently or not"

The holder must have taken the bill without knowledge of previous dishonour and without knowledge of any defect in title of the previous person who negotiated it to him. The holder's acquisition may be in bad faith if he merely suspects that something is wrong or that there is something improper about the bill.

Good faith is measured by determining whether the holder had a certain subjective state of mind when he acquired the instrument, not whether he should have had knowledge of a certain fact but whether he did in fact have such knowledge

Takes the bill for value"S25 "a holder take a bill for value if he takes to under onerous title". A person will be a HDC when he take a bill either for due consideration or on the basis of *quid pro quo*

The bill must have been negotiated: a cessionary or a person who has found a lost bill will not be a HDC even if all the other requirements have been met- because the bill was not negotiated to him

- S 29(3) the first delivery of an order bill to the payee cannot constitute negotiation because the delivery is not accompanied by the holder's endorsement. The payee of an order bill cannot be a HDC only a holder.
- If all the other requirements have also been met, the payee of a bearer instrument can be the HDC.

The holder must have not had knowledge of any defect in title of the person who negotiated the bill to him.

Rights if the HDC

Apart from the rights of the holder (pg 17), the HDC enjoys the following additional rights:

1. S 36(c)(i) if the title on a bill is defective and a holder negotiates it to a HDC; the HDC obtains a good and complete title on it.
A draws a cheque on B bank in favour of C or bearer. X, a thief, steals the cheque and negotiates it to D who is a HDC. D now has a valid title against A, B bank and C. C (who was the owner of the cheque) cannot claim the value from D
2. S 36(b) a HDC holds the bill free from any defects in the title of the parties prior to him, as well as from mere personal defences available to prior parties among themselves, and he may enforce payment against all parties liable on the bill. Absolute defences may be raised against the HDC
3. S 52(b) the acceptor, by accepting the bill, is precluded from denying to the HDC:
 - ⇒ The existence of the drawer, the genuineness of his signature and his capacity and authority to draw the bill;
 - ⇒ Where the bill is payable to the drawer's order, then the capacity of the drawer to endorse, but not the genuineness or the validity of his endorsement; and
 - ⇒ Where the bill is payable to the order of a 3rd person, the existence of the payee and his then capacity to endorse, but not the genuineness or the validity of his endorsementS52 (b) acceptor referred to as the acceptor by estoppel
4. S 53(1)(b) the drawer of a bill is precluded from denying to a HDC the existence of the payee and his then capacity to endorse. Drawer by estoppel
5. S 53(2)(b) the endorser of a bill, by endorsing it is precluded from denying to a HDC the genuineness and regularity in all aspects of the drawers signature and all previous endorsements. Endorser by estoppel
6. S 19(1) no contract of the bill shall be complete and irrevocable until the bill is delivered. S 19(3) if a bill is in the hands of a HDC a valid delivery of the bill by all parties prior to him is irrebuttably presumed to have taken place
7. S 54 if a person signs a bill otherwise than as a drawer, acceptor, or drawee certifying a cheque, he thereby incurs the liability of an endorser to the HDC
8. S10 (b) if a wrong date is inserted on a bill and it comes into the hands of a HDC, the bill shall not be void, but shall operate and be payable as if the inserted date had been the true date
9. S 18(3) if an incomplete bill is not completed within a reasonable time and strictly in accordance with authority given, and it is negotiated to a HDC after it is completed, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been completed within the time allowed and strictly in accordance with the authority given
10. S 46(a) if a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of the HDC who became holder after the omission shall not be prejudiced thereby

Absolute and relative defences

Relative defences may not be raised against a HDC

Absolute defences

- Relates to the document itself
- S 20(1) the defence that the defendant lacked capacity
- A defendant may also claim that his signing of the document should not be seen as a valid and legal act because such was obtained by *vis absoluta* (by force without his consent)
- S21 no person is liable as drawer, acceptor or endorser of the bill if he has not signed it as such. A HDC will according to S22 not be able to hold a defendant liable, where a signature is forged or unauthorised, because such signature is wholly inoperative
- A bill or an acceptance was materially altered without the defendant's consent. The defendant will in effect only be liable on the document, as it existed in its original form.
- The *non est factum*- where a person signs a document unaware that it is a negotiable instrument, or that it will be used as such. The signer of the document must not have created the impression either negligently or intentionally that he binds himself on it

Relative defences

- S 36(b) a HDC "holds the bill free from any defect in the title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill"
- S 36 (c)(i) if a holder's title is defective, the HDC obtains a good and complete title to the bill

- 2 types of defences that may not be used against a HDC: the defence of a defect in title (*defence in rem*) and a mere personal defence (*defence in personam*) they may be defences against others, but not against the HDC
- *Nemo plus iuris* - one cannot transfer more rights than one has - is not applicable to a HDC in the context of relative defences (it does however, apply in the context of absolute defences)

Defences in rem (defective title)

- Refer to claims for the recovery of the bill and to defences available against the rights arising from the bill that are based on the contract on the bill or on the underlying agreements.
- S 27(2) e.g. of defects in title:
 - If he obtained the bill, or the acceptance thereof, by fraud or other unlawful means, or for an illegal consideration and is deemed to have been so defective if he negotiates the bill in breach of good faith, or under such circumstances as amount to fraud
- Most important title defence - breach of contract
- Misrepresentation, undue influence, error, payment, set-off, and prescription

Personal defences

- E.g. an unliquidated (undetermined amount) counterclaim as a personal defence

THE CONTRACT OF THE DRAWER, ACCEPTOR AND ENDORSER ON THE BILL

The contract of the drawer on the bill

S 53(1)(a) liabilities of the drawer:

- ⇒ The drawer guarantees that the bill will be accepted and paid according to its tenor if properly presented
- ⇒ The drawer undertakes to compensate the holder or endorser, who is compelled to pay on the bill, if it is dishonoured, provided of course that the requisite proceedings on dishonour are duly followed.
 - The drawer must comply with the following requirements to incur an obligation: signing the document as drawer and delivery of it.
 - Requirements to render the drawer liable: proper presentment for acceptance or payment as the case may be, dishonour by non-acceptance or non-payment as the case may be and notice of dishonour.
 - All these requirements have to be complied with before the drawer may be held liable for the holder or endorser
- ⇒ The drawer guarantees to the HDC that the payee exists and that he has the capacity to endorse the document. The existence and contractual capacity of the payee is guaranteed to the HDC. The drawer does not guarantee the signature of the payee.
- ⇒ S 14(a) the drawer may insert words into the bill, which would either exclude or limit his liability towards the holder. Where the drawer excludes his liability, his signature performs a constitutive function only
- ⇒ S 14(b) the drawer may also waive, some or all of the holder's duties
- ⇒ S 51 a bill is not an assignment of funds in the hands of the drawer and available for payment

The contract of the acceptor on the bill and acceptance

- ⇒ The drawee, the person who is ordered to pay by the drawer, is not liable on the bill in this capacity
- ⇒ S 51 if the drawee does not accept the bill, he is not liable on it. By accepting the bill, the drawee becomes the acceptor and does incur liability on it

Acceptance

- ⇒ S 15(1) the acceptance of a bill is signification by the drawee of his assent to the order of the drawer. General rule that only the drawee has the capacity to accept the bill
- ⇒ Only 3 instances that require the holder to present the bill for acceptance:
 - Where the bill is payable after sight and presentment is necessary to fix the due date
 - Where the bill expressly stipulates that it shall be presented for payment
 - Where the bill is payable at a place other than the place of business or residence of the drawee
- ⇒ S 37(3) in no other instance is presentment for acceptance necessary to render a party liable on the bill. The holder is free to present the bill for acceptance in other instances
- ⇒ Time for acceptance: S 16 s bill may be accepted:
 - Before it has been signed by the drawer;
 - While it is otherwise complete;
 - When it is overdue;
 - After it has already been dishonoured by non-acceptance or non-payment

⇒ Requirements for a valid acceptance: s 15(2) read with S19 (1):

- It must be written on the bill and signed by the drawee
- The mere signature of the drawee without additional words, is however sufficient
- It must not stipulate that the drawee will perform by any other means than the payment of money
- The contract on the bill will not be complete and irrevocable before delivery of the document
- If the drawee gives notice to the person entitled to the bill that he has accepted it, the acceptance becomes complete and irrevocable

Types of acceptance

⇒ S 52(a) the acceptor, by accepting it, engages that he will pay it according to the tenor of his acceptance

⇒ S15 the acceptance of the bill is the signification by the drawee of his assent to the order of the drawer

⇒ General Acceptance: S 17(2)(a) general acceptance is the assent without qualification by the drawee to the order of the drawer. S 17(2)(b) an acceptance to pay at a particular place will be deemed to be a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere. Conforms with S 15(1)

⇒ Qualified acceptance S 17(3)(a) varies the effect of the bill as drawn. Conforms to S52 (a). An acceptance is qualified according to S 17(3)(b) if it is:

Conditional- makes payment by the acceptor dependant on the fulfilment of a condition

Partial- acceptance to only pay part of the amount which the bill is drawn

An acceptance to pay only at a particular specified place and not elsewhere

Qualified with regards to time and payment

The acceptance of one or more of the drawees but not all

⇒ S 42(1)- a holder may refuse to accept the qualified acceptance, and if he is not able to obtain an unqualified acceptance, he may regard the bill as dishonoured by non-acceptance

⇒ S 42(2) and (3) if the holder chooses to accept a qualified acceptance, then the drawer and all endorsers are freed of their liabilities, except those who have previously authorised the holder to take a qualified acceptance.

⇒ S52 obligations the draw takes upon himself by acceptance- he undertakes to pay the bill according to the tenor of his acceptance:

- He guarantees to the HDC that the drawer exists, that the drawer's signature is genuine and that the drawer had capacity and authority to draw on the bill
- The acceptor guarantees the capacity of the drawer to endorse in the case of a bill drawn payable to order of the drawer. He does not however guarantee the genuineness of the endorsement
- If the bill is payable to the order of the 3rd party, the drawee guarantees by his acceptance of the payee and his capacity to endorse at the time it was endorsed, but not the validity or genuineness of the endorsement of the payee.

Certified cheques

⇒ S 72A (1) a cheque is certified if a drawee indicates on it in writing that it will be paid or that there are funds available for payment.

⇒ S 72A (2) when the drawee certifies a cheque, he undertakes to pay to the holder, drawer or endorser who has been compelled to pay the cheque, the amount recoverable in terms of his (the drawee's) guarantee.

⇒ The drawee is precluded from denying to a HDC:

- The existence of the drawer, the genuineness of the drawer's signature and the drawer's capacity and authority to draw the cheque; and
- The existence of the payee and his capacity to endorse the cheque.

⇒ One of the differences between a cheque and a bill is the fact that a cheque is drawn on a bank

⇒ S72A the liability of a bank that certifies a cheque is similar to that of an acceptor in that this bank undertake to pay the holder

The endorsers contract on the bill

⇒ The payee- there is no contract on the bill which places an obligation on him before his signature is placed thereon

⇒ The payee must deliver the document to another person, after having signed it, in order to create a contract

⇒ S53 (2) the endorsement brings with it the following liabilities for the endorser:

- He guarantees that on due presentment, the bill shall be accepted and paid according to its tenor and if it is dishonoured, he will compensate the holder or endorser who is compelled to pay it, provided the required proceedings on dishonour are duly taken.
- The endorser guarantees all aspects of the genuineness and validity of the drawer's signature and of all previous endorsements to a holder in due course
- The endorser is precluded from denying to his immediate or a subsequent endorsee that, at the time of his endorsement, the bill was valid and existing and that he had a valid title to the bill at that stage.

The transferor by delivery

- ⇒ S56: if a holder of a bill payable to order negotiates it by delivery without endorsing it, he is called a transferor by delivery. A transferor by delivery is not liable on the bill because he has not signed it
- ⇒ S56 (3) the transferor by delivery warrants to his immediate successor, if the latter is a holder for value, that: the bill is what it purports to be; he (the transferor by delivery) has a right to transfer it and at the time of transfer, he is not aware of any fact which renders it valueless

THE DISCHARGE OF THE DEBT ON THE BILL, AND RELATED MATTERS

Discharge of the bill

As a rule, the instrument is discharged as soon as the acceptor or drawee has effected payment in due course. After discharge, the debt on the bill is extinguished, together with all the contracts on the bill.

Dishonoured by non-payment- the holder must give notice of dishonour to the drawer and all previous endorsers. After that the holder may sue any of the previous endorsers or the drawer for payment. May not sue subsequent endorsers.

Methods of discharge (6 ways):

1. Discharge by payment in due course:

- PDC discharges the bill and extinguishes the rights of the owner against him
- S 57(1) a bill is discharged by PDC if such payment is made by or on behalf of the drawee or acceptor
- PDC "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"
- 5 requirements for payment in due course:
 1. There must be a payment- it is the duty of the drawee or acceptor to make payment of the bill in money
 2. The payment must be made in good faith- if the drawee or acceptor pays a person with a defective title, he must have no knowledge of such defective title.
 3. The payment must be made on or after the due date- the payment of a bill before its maturity will not discharge it, even if the due date has been accepted only for the benefit of the acceptor
 4. Payment must be made to the holder of the instrument- S58 and 79 are exceptions to the rule that payment by the drawee or acceptor must be made in due course to the holder
 5. The payment must be made without notice of any possible defect in the holder's title to the bill (also implied by the requirement of good faith)
- It will be proportionally discharged if part payment is made by or on behalf of the drawee or acceptor

2. Discharge by way of confusio or merger:

S59 a bill is discharged if the acceptor is or becomes the holder of the bill in his own right at or after its maturity (the acceptor becomes the owner or creditor in respect of the bill) application of the common law principle of confusio

3. Discharge by way of waiver:

S 60(1) the holder of a bill may waive his rights against the acceptor wholly and unconditionally

S 60 (2) the waiver must be in writing of the bill, unless the bill is delivered up to the acceptor S 60(3)

the holder may also waive the liabilities of any party to the bill at or after its maturity.
S 60(4) S60 will not affect the rights of the HDC who had no knowledge of the waiver

4. Discharge by cancellation of the bill:

S 61 a bill may also be discharged if the holder intentionally cancels the bill and the cancellation is apparent on it

5. Novation: occurs when an existing obligation is replaced with a new one, thereby extinguishing the old one.

6. Set-off or compensation: when 2 parties are mutually indebted to each other and both debts are due. Set-off is made by operation of law. A bill is thus only discharged if the debts of the holder and the acceptor are set-off against each other. If set-off is to occur between the holder and any other party, this other party will be discharged but not the instrument itself

Release of parties to the bill

- Means that one or more of the liable parties are released of their obligations to the bill
- General rule is that if one party fulfils his obligations in terms of the bill, it acts as a valid fulfilment for all of the parties on the bill who could institute action against him
- Most important ways in which parties to a bill are released:
 - ⇒ By discharge of the bill
 - ⇒ By payment which does not give rise to the discharge of the bill
 - ⇒ By not fulfilling his obligations- in such an instance certain parties to the bill will be released, although the bill itself is not discharged. These requirements apply to bills and not to cheques and notes in every case: the holder must duly present, either for acceptance or for payment; in the event of dishonour either by non-acceptance or by non-payment, the holder must give due notice of such dishonour
- If the holder of a bill, which is not payable on demand, fails to present the bill for payment at its maturity, as required by S43 (2)(a), the drawer and endorsers are released in terms of S43 (1)(b). However, the bill itself is not discharged, and the acceptor remains liable

CHEQUES

The relationship between bank and customer

- A person who deposits money in the bank, and whose deposit is accepted on the understanding that the depositor's cheques will be honored while he has sufficient funds in his account or has made arrangements for overdraft facilities, is a customer of the bank.
- Agreement between the bank and customer (cheque account)- 2 most important contracts:
 1. A contract of loan for consumption (*mutuum*) - the bank undertakes to borrow all deposits made in the cheque account and to repay the money on demand
 2. A contract of mandate (*mandatum*) - the bank undertakes to carry out all the payment instructions of the customer made by cheque and to collect on behalf of the customer cheques deposited in the account.
- The content of this relationship is governed by the naturalia of the specific loan and mandate agreement as well as by the prevailing trade usage
- The general principle is that the bank cannot become liable on the cheque to 3^r parties S51
- The bank is not liable on the cheque as drawee and its duties arise solely from its relationship towards the customer
- The instructions of the customer, and his authority, may be revoked. The words "payment stopped" are usually used. S73 uses "countermand of payment"
- Only the drawer who gave such instruction and authority may revoke that instruction and authority. Countermanding of payment can take place at any time prior to payment by the bank.
- S73 the duty and authority of the bank to pay its customer's cheque are terminated when it receives notice of the customer's death, incapacity, sequestration or winding up, judicial management, or that his estate has been wound up or he has been declared a prodigal

The cheque

- A cheque is a bill drawn on a bank payable on demand S1
- S8 a bill is payable on demand if it is expressly stated to be so payable, or if it is expressed to be payable at sight or payable on presentation or if no time for payment is expressed.
- The cheque is an instruction addressed by the customer to the bank to pay the amount stated on the cheque to the person mentioned therein and, this instruction must be complied with by the bank provided there are sufficient funds to the credit of the customer
- The customer must draw the cheque in such a manner that will practically eliminate fraud.
- The authority should be given to the bank in a proper manner and the can only justify its act when it pays, if the customer's signature on the document is genuine or authorised.
- The forged signature of the customer entails no loss to the customer, but the bank pays at its own risk no matter how good or skillful the forgery may be
- If the customer knows or suspects that his signature as drawer on a cheque has been forged, it is his duty to inform the bank within a reasonable time. If he fails to do so, the customer will have to bear the loss

S58

- Aimed at the protection of the bank where it has paid someone who is not the holder
- The position at common law is that a bank is obliged to pay cheques to the holder, if it pays some other person, it may not debit the customer's account and must shoulder the loss itself
- The bank must make payment under the circumstances that meet the requirements of S58. If these requirements are met, the payment by the bank will be deemed to be payment in due course notwithstanding the fact that payment was made to the non-holder.
- Requirements of S58:
 - The cheque must be an order one- it may not be a non-transferable cheque, since such a cheque is not payable to order, but to a designated person only
 - There must be a forged or unauthorised endorsement on the cheque- forged or unauthorised endorsement of the payee or subsequent endorser and not to the forged or unauthorised signature of the drawer
 - 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
- Payment in due course discharges the cheque and relieves the bank of paying the amount for the second time to the real creditor
- If the payee, or a person professing to be the payee, wishes to cash a cheque over the counter at the drawee bank, it is customary for the bank to require that person's signature on the back of the cheque. That signature serves as identification and a receipt, and is not placed on cheque to serve as an endorsement
- The drawee bank is protected by S58 only if the forged or unauthorised signature purports to be an endorsement

Other forgeries

- The bank, must prove that the customer's instruction was given in a manner which amounted to negligence

Presentment for payment

- It should be presented for payment at the bank where it is drawn within a reasonable time S72 (1)
- Mere delay in presenting a cheque for payment within a reasonable time does not discharge the drawer

CROSSED CHEQUES

Types of crossing

General crossing: is constituted by the addition, on the face of the cheque, of 2 parallel lines either with or without the words "not negotiable" S 75(1)

Special crossing: is constituted by the addition, on the face of the cheque, of the name of a bank, either with or without the words "not negotiable" or "and company" or any abbreviation thereof S 75(2). In the case of a special crossing it is not necessary to add the 2 parallel lines to the cheque

- The cheque can be crossed at any time before the cheque is discharged through payment
- S76: the following may cross the cheque: the drawer, the collecting bank, any holder, and the bank to which a cheque is crossed specially (may add a second crossing- a special crossing for collection)
- S77: a crossing authorised by the act is a material part of the cheque and it shall not be lawful for any person to obliterate, cancel or, save as authorised by this act, add to or alter such a crossing
- The drawer of a cheque may cancel a crossing before delivery

Effect of the crossing of a cheque

- The instruction of the drawer to the drawee bank is qualified and a specific manner of compliance is prescribed, namely that payment should be made to a bank in accordance with the provisions of s 78.
- Although the crossing alters the payment instruction, 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 S 29(1)
- Result of the crossing of a cheque is that the customer's (drawer's) payment instruction to the drawee bank should be carried out in the following manner:
 - If the cheque is crossed generally the drawee bank may pay only to a bank, that is, any bank
 - If a cheque is crossed specially, the drawee bank may pay only to the specific bank to which it is crossed, or to that bank's agent for collection, if it is a collecting bank
- If the bank on which a crossed cheque is drawn, pays the cheque contrary to the crossing, it does not carry out the drawer's instruction and cannot debit the drawer's account, unless, in fact payment has been made to the true owner or his authorised representative
- S 78(4) gives the true owner a claim for damages against the drawee bank, except where the proviso applies.

The protection of the drawee bank and the drawer of a crossed cheque

- If the drawee bank does pay to a bank in accordance with the crossing, and payment takes place in good faith and without negligence, then in terms of S 79 the drawee bank will be deemed to have paid in due course, although in actual fact it has not
- S58 applies to both crossed and uncrossed cheques.
- The position of S58, which overlaps with S79, may be relevant if the drawee bank pays in accordance with the crossing, but negligently (s 58 merely requires a payment " in good faith and in the ordinary course of business")
- Another difference between 58 and 79: 58 does not afford protection if the forged endorsement purports to be that of a customer of the particular bank branch on which the cheque was drawn. S 79 does not contain this limitation. S 79 protects not only the drawee bank, but also the drawer of a crossed cheque.

Question!

A draws a cheque on B Bank in favour of C or order. The cheque is crossed generally. X steals the cheque from C, forges C's signature on the back of the cheque, and delivers the cheque to D who takes it in good faith and for value. D deposits the cheque for collection in her banking account with S Bank. S Bank presents the cheque for payment to B Bank. B Bank pays it to S Bank (that is in accordance with the crossing), in good faith and without negligence. B Bank debits the account of its client, drawer A, and S Bank credits the account of its client D. It goes without saying that D was not the holder of the cheque, since she is neither payee, nor bearer, nor endorsee. Under s 22 the forgery is wholly inoperative. Does the true owner C, have any rights against B Bank or drawer A or any other party?

Answer

C's rights are as follows:

- Against drawer A: If the cheque has come into the hands of the payee, drawer A shall be protected, under S 79, "as if payment of the cheque had been made to the true owner thereof". In this case, the cheque did in fact come into C's hands (it was stolen from her), and therefore C has no rights against drawer A. If the cheque had not come into C's hands, C would not have been the owner and A would in actual fact not have paid C.
- Against drawee bank (B Bank): Since B Bank paid to a bank in accordance with the crossing, and since it paid in good faith and without negligence, B Bank is protected under S 79 "as if payment of the cheque had been made to the true owner thereof".
- Against possessor D and collecting bank (S Bank): Both D and S Bank were in good faith, and therefore, although the stolen cheque went through their hands, they are not delictually liable to the true owner. See the discussion in unit13 below, where this aspect is treated in more detail.
- Against thief X: Since the thief was mala fide, she is delictually liable to C.
- Alternatively C could also hold him liable on the basis of unjustified enrichment.

Accordingly, it is apparent that the true owner, C has a right of recourse against the thief only. The true owner of a stolen or lost cheque therefore is in an unfavourable position.

CROSSED CHEQUES MARKED "NOT NEGOTIABLE", AND ENDORSEMENT OF CHEQUES DEPOSITED IN A BANK ACCOUNT.

Crossed cheques marked "not negotiable"

Crossing and "not negotiable" marking:

- A crossed cheque may be negotiated and it is possible for subsequent holders to become HDC
- S 6(1) a bill (cheque) must be payable either to bearer or to order to be negotiable
- The crossing of a cheque qualifies the instruction to the drawee bank by prescribing the manner of compliance with the instruction; in accordance with the provisions of S78, payment must be made to a bank
- The addition of the words "not negotiable" to a crossed cheque has 2 important consequences: S80 negotiability and S81 the true owners rights

S80

"If a person takes a crossed cheque which bears on it the words "not negotiable", he shall not have, and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had."

- Despite the addition of the words "not negotiable", the cheque can still be negotiated in the sense in which the word "negotiate" is used in S 29(1)- a transfer from one person to another in such a manner as to constitute the transferee the holder of the cheque

- Where the drawer adds the words "not negotiable" to a crossed cheque, no subsequent holder can become a HDC. Even though a crossed cheque and marked "not negotiable" can still be negotiated, the person to whom it is transferred cannot become a HDC of it

S81

- By crossing a cheque and adding the words "not negotiable", certain rights are conferred upon the true owner in terms of S81
- At common law the owner of stolen property, has no action for damages against a *bona fide* possessor of his property. The owner can certainly claim his property by using the *rei vindicatio* *Leal & Company v Williams*

A draws a cheque on B Bank in favour of C or order. The cheque is crossed generally. X steals the cheque from C, forges C's signature on the back of the cheque, and delivers it to D, who takes it in good faith and for value. D deposits the cheque in his account with S Bank for collection. S Bank presents the cheque for payment and B Bank pays S Bank (that is in accordance with the crossing). Payment is made in good faith without negligence. B Bank debits the account of its customer, drawer A, and S Bank credits the account of its customer D.

Take note that D never qualified as holder of the cheque since he was neither payee, nor endorsee, nor bearer. Under S 22, the forgery of C's signature was wholly inoperative. The question is whether the true owner, C, who in this example suffered loss, has any rights against B Bank or drawer A or any other party. Before examining C's rights, we should first determine the meaning of the expression "true owner".

Note:

You will notice that X stole the cheque from C.

This implies a prior delivery by A to C. C was therefore the true owner. Let us now look at C's rights according to the facts in the example:

- Against drawer A: If the cheque has come into the hands of the payee, the drawer is protected in terms of S 79 "as if payment of the cheque had been made to the true owner thereof". In this example the cheque indeed came into the hands of the payee C because the cheque was stolen from him. Therefore C has no rights against drawer A, since A's liability on the cheque as well as any underlying obligation has been discharged. Remember that the rules with regard to delivery of cheques by post could influence this answer.
- Against drawee bank (B Bank): Since B Bank paid to a bank in accordance with the general crossing, and since payment was made in good faith and without negligence, B Bank is protected under s 79, "as if payment of the cheque had been made to the true owner thereof". Therefore, B Bank may debit drawer A's account.
- Against thief X: The true owner will have an action against the thief, who is mala fide. His right of recourse is based on delict (or unjustified enrichment) and not on the cheque itself. However, the problem is that thieves, by the very nature of their profession, cannot be easily traced and, should they be traced, they might not earn enough money while in jail to compensate the true owner for his loss.
- Against possessor D and collecting bank (S Bank): Applying the principles explained above, it is clear that at common law the true owner has no claim against D or S Bank. D was in good faith, and that rules out a claim against him. S Bank acted in good faith and without negligence, and therefore it cannot be held liable.

⇒ As the owner, the true owner is normally entitled to possession of the cheque, and is also the person entitled to the personal rights which are embodied in the argument

⇒ If a debtor posts a cheque to his creditor without the latter's consent or request, and the creditor does not receive it, the debtor is not discharged

⇒ If payment by cheque may be made by post, the drawer is expected to indicate the payee correctly, to make the cheque payable to order, and cross it. The drawer carries a loss that is the result of not meeting these requirements. If the creditor (payee) authorise payment by posting a cheque, he bears the damage of an interception and misuse or delay in the delivery of the cheque after postage. Otherwise the debtor bears the risk.

- ⇒ The ownership of the cheque passes to the creditor on the posting of the cheque
- ⇒ The true owner of a lost or stolen cheque acquires rights under S81 only if the cheque is crossed and marked "not negotiable"
- ⇒ S81 the true owner of a cheque acquires a right against a subsequent possessor, provided that the requirements of S81 are met
- ⇒ Requirements for S81:
 - The cheque must have been crossed and the words "not negotiable" must have been added
 - The cheque must have been stolen or lost while it was crossed and marked
 - The drawee bank must have paid it "under circumstances which do not render such bank liable to the true owner in terms of the BEA" (S 78(4) renders a drawee bank liable to the true owner - disregard of a crossing)
 - The plaintiff must prove that he is the true owner of the cheque
 - The true owner must show that he suffered loss as a result of the theft or loss of the cheque
 - The possessor against whom a claim is brought must have been in possession of the cheque after the theft or loss
 - The possessor must have either given consideration for the cheque, or taken it as the donee- Rebuttable presumption S 81(4) can be rebutted by proving that in fact he neither gave any consideration, nor received it as a gift.
- ⇒ S 81(5) a bank which receives payment of a crossed cheque marked "not negotiable" shall not be deemed as having given a consideration for it 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 such payment is used towards the reduction or settlement of any debt owed by the customer to the bank
- ⇒ S 81(5) is subject to the provisions of S 81(3) if the bank fails to furnish any information at its disposal in connection with the cheque, it is deemed to have been a possessor of the cheque who either gave a consideration for it or took it as a donee. The collecting bank will also lose its protection if it pays cash over the counter for such a cheque, or if it agrees that its customer may draw immediately against that cheque.
- ⇒ S 81(2): Renders a person who pays such a cheque into his bank account after cashing the cheque for someone or who pays the cheque in with the intention of paying such other person, liable in terms of S 81(1); S 81(2) provides that the former is, for the purposes of S 81(1), deemed to have been a possessor of the cheque and to have given a consideration for it. S 81(2) does not apply to collecting banks.
- ⇒ S 81(3): someone who takes a cheque to which S 81(1) applies into his possession or custody after it has been stolen or lost, and who fails to furnish the true owner, at his request, with information at his disposal in connection with the cheque, is for the purposes of S 81(1) deemed to have possessed the cheque and to have given a consideration for it or to have taken it as a donee
- ⇒ S 81(7): gives a person who has made good the true owners loss in terms of S 81(1) the same rights against possessors prior to her as the true owner had against them in terms of S 81(1)
- ⇒ The thief himself will probably not be liable in terms of S 81(1) because he has not given consideration for the cheque or taken it as a donee.

Endorsement of cheques, which are deposited in a banking account

S83 and S84 deal with the endorsement of cheques. The purpose was to abolish the necessity for the endorsement of cheques when they were deposited in the banking account of the payees concerned

S 83

If a drawee bank on whom a cheque is drawn pays that cheque in good faith and in the ordinary course of business, the cheque is discharged and the drawee bank incurs no liability merely on the ground that there is no endorsement or that the endorsement is irregular. The commercial banks in SA have agreed that if a cheque is negotiated and is not deposited in the payee's account, both the payee's and the depositor's endorsements must be placed on the cheque, unless the cheque has been endorsed specially to the depositor, in which case the latter's endorsement is not necessary

S84

At present the collecting bank acquires such rights, as it would have had if the depositor of the cheque had endorsed the cheque in blank- the bank acquires the rights of a holder if the depositor were a holder

NB!!Question

A draws a cheque for R1 000 on B Bank in favour of C or order. A delivers the cheque to C. The cheque is crossed and marked "not negotiable". T steals the cheque from C and after having forged C's signature, negotiates it to E who takes it in good faith and for value. E gives the cheque to a messenger, Y, to pay into his (E's) account at F bank. B Bank pays F Bank in good faith and without negligence.

Discuss the rights of the true owner (C) against the following persons:

- (1) The drawer (A)
- (2) B Bank
- (3) T (4) E
- (5) The messenger, Y, who refuses to give any information he has on the cheque
- (6) F Bank

Answer:

C's rights are the following:

1. Against drawer A: If the cheque came into the hands of the payee, in terms of s 79 the drawer is protected "as if payment of the cheque had been made to the true owner thereof". In this case, the cheque did come into the hands of the payee, C, since the cheque was stolen from him. C therefore has no rights against A, the drawer, since A's liability on the cheque as well as on any underlying obligations are discharged.
2. Against drawee bank (B Bank): Since B Bank paid to a bank in accordance with the general crossing, and since the payment was made in good faith and without negligence, in terms of S 79, B Bank is protected "as if payment of the cheque had been made to the true owner thereof". Therefore, B Bank may debit A's account.
3. Against thief X: The true owner will have a right of recourse against the thief who was mala fide. His right of recourse is based on delict (or enrichment), and not on the cheque itself.
4. Against possessor E: In terms of S 81, C, the true owner, acquires a right of recourse against E, since the following requirements of s 81(1) have been met:
 - The cheque was crossed and marked "not negotiable"
 - The cheque was stolen while it was crossed and marked as above.
 - The drawee bank paid under circumstances, which, in terms of the BEA, do not make the bank liable against the true owner.
 - The plaintiff is the true owner.
 - C (true owner) must be able to show that he suffered damage as a result of theft. - E had the cheque in his possession after the theft or loss.
 - E gave a counter performance for the cheque (he took the cheque for value).
5. Against messenger Y: 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 S 81(3), and on application of s 81(1) he is deemed to have been a possessor of the cheque and/or to have given a consideration therefore, or to have taken it as a donee.
6. Against collecting bank (F Bank): According to s 81(5), a bank which receives a cheque which is crossed and marked "not negotiable" is not to be regarded as having given consideration thereof 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 to 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 that cheque.

NON-TRANSFERABLE CHEQUES AND CHEQUES MARKED A/C PAYEE ONLY"

- It is possible for a holder to restrict the further transfer of an order cheque (s 31), it is impossible to convert a bearer cheque into a non-transferable cheque
- A crossing on a cheque is a mere instruction to the drawee bank to pay another bank, the collecting bank, and as such does not influence the nature of the cheque.

Two categories of non-transferable cheques:

1. S 75A(1) non-transferable cheque on which the words "not transferable" are printed with or without a crossing, 2. "Traditional" non-transferable cheque, which, in terms of s 6(5), bears, words or conveys an intention to prohibit transfer.

Non-transferable cheques

S 75A(1) non-transferable cheque

- ⇒ Where a cheque bears boldly across its face the words "not transferable" or "non-transferable", either with or without the word "only" after the payee's name:
 - The cheque shall not be transferable but shall be valid as between the parties thereto;
 - The cheque shall be deemed to be crossed generally, unless it is crossed specially;
 - The words "not transferable" or "non-transferable" may not be cancelled and any purported cancellation shall be of no effect.
- ⇒ Only valid between the parties to the cheque
- ⇒ The drawer, the drawee bank and the named payee only, since a non-transferable cheque cannot be transferred to another person

⇒ Because S 75A(1) non-transferable cheques are deemed to be crossed, they must be paid into the bank account of the payee so that the bank on which they are drawn can pay it to another bank

Traditional non-transferable cheques

S 6(5)

If a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties to the bill, but is not negotiable.

⇒ Such a cheque contains words, which intend to prohibit its transfer. Thus, only the named payee can be the holder thereof and he is not entitled to negotiate or transfer it to someone else

⇒ Methods whereby a cheque may be made non-transferable:

- It is sufficient to write the words "not transferable" clearly on the face of the cheque. Such a cheque is non-transferable in terms of S75A. The mere omission of the word "order" is not sufficient- the reason being that a bill is payable to order if S 6(3):
 - It is expressed to be payable to a particular person and
 - It does not contain words prohibiting transfer or
 - Indicating an intention that it should not be transferable
 - The word "only" can be added after the payee's name
- The words "or bearer" are deleted and replaced with the word "order". The cheque also bears the words "not transferable". This cheque is not transferable because the impression of transferability of the word "order" is subordinate to the clear indication of non-transferability
- The words "not negotiable" on a crossed cheque imply, S80 that the cheque is still transferable, but that nobody may become the holder.
 - If a crossed cheque marked "not negotiable" is made payable to the named payee "only", the cheque will be non-transferable in terms of S 6(5).
 - If a cheque is crossed and marked "not transferable" and it is payable to the named payee "only" we are dealing with a S75A cheque

S 75A(2)

⇒ Concerns the liability of a bank when it fails to "concern itself" with a non-transferable cheque.

⇒ S 75A(2) a bank will not be negligent by reason only of the bank's "failure to concern itself" with:

- An endorsement which prohibits transfer of a cheque or
- Words or an intention that indicates that a cheque is non-transferable, other than in the manner provided for in S 75A(1)

⇒ Any words on a cheque restricting further transfer of that cheque, such as "transfer prohibited", will result in the cheque being a "not transferable" cheque even though the wording does not comply with the provisions of S75A

⇒ It was decided in the **Sham Magazine** case that the words "account payee only" on a cheque as part of the crossing is not to be interpreted as words prohibiting transfer

Non-transferable cheques and the drawee bank's liability

The object of a non-transferable cheque is to ensure that no one other than the named payee is to receive payment on the cheque.

Whether ss79, 83 and 58 apply to non-transferable cheques:

S79

Can a drawee bank rely on due payment if it pays the amount of the crossed, non-transferable cheque in good faith and without negligence to another bank, which is collecting it for the wrong person?

- **Gishen v Nedbank Ltd, Volkskas Bank Ltd v Bonitas Medical Aid Fund**
- In Gishen the court pointed out that S79 contains no indication that it applies only to transferable cheques. The court held that S79 does apply to non-transferable cheques
- This will be the case with both the traditional non-transferable cheque and the S 75A(1) non-transferable cheque

S83

- Applies to transferable cheques only
- Question left open in the Gishen case
- Applies only to cheques, which can validly be endorsed. Non-transferable cheques are therefore excluded

S58

- If a cheque is uncrossed, S79 is not applicable
- S58 applies to cheques made payable to order only, and which are thus transferable

- A drawee bank paying a non-transferable cheque to another bank, which collected it for a wrong person, will not be able to rely on the protection of S 58

Cheques marked "a/c payee only"

- ⇒ The named payee can become a holder, but never a HDC, of a non-transferable cheque. The reason for this has to do with negotiation
- ⇒ The drawer of a non-transferable cheque who delivers it to the named payee, issues the cheque to the named payee who takes it as a holder
- ⇒ A practise was established to add the words "a/c payee only" on crossed cheques. The meaning of "a/c payee only" was considered in **Standard Bank of South Africa Limited v Sham Magazine AD Holmes JA**
The AD had to decide whether the words "a/c payee only" excluded the transferability of a cheque. If the words prohibited the transfer of the cheque, Standard Bank could not have been the holder of the cheque. The AD came to the conclusion that Standard Bank, as endorsee did qualify as the holder of the cheque and was entitled to institute action on the cheque against Sham magazine as drawer

NB!!Question

A draws a cheque on B Bank in favour of "C". The cheque is crossed and the words "not negotiable" 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 on it and gives the cheque 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. Advise C in full about the possible liability of the following

parties:

- (1) B Bank
- (2) X
- (3) S Bank

Answer

Important: You must first determine the meaning of all the words that appear on the face of the cheque to answer such a question correctly. In this example, the cheque is non-transferable. It is an S 6(5) non-transferable cheque because the words "no further transfers" are printed on the face thereof.

In addition, the words "not negotiable" are also printed on the cheque, which means that s 81 is applicable (see unit 13 again). Therefore C may, as the true owner of a stolen, crossed cheque marked "not negotiable", hold X, as possessor of the cheque, liable in terms of s 81 if all the requirements are met.

(Do you remember that the words "not negotiable" may also appear on non-transferable cheques?)

C may be advised as follows:

1. The liability of B Bank

B Bank is protected by s 79 because the bank paid the cheque in good faith and without negligence to S Bank, as mandated by the crossing. Therefore B Bank will not be liable towards C.

2. The liability of X

C, as the true owner of a stolen, crossed cheque marked "not negotiable", may hold X liable as possessor in terms of s 81 if he can prove that:

- (1) The cheque was crossed;
- (2) The words "not negotiable" were printed on the face of the cheque;
- (3) The cheque was stolen after it was crossed & marked "not negotiable";
- (4) He is the true owner of the cheque;
- (5) He suffered damages because of the theft of the cheque;
- (6) X was a possessor of the cheque after it was stolen;
- (7) B Bank made a protected payment in terms of s 79; and (8) X gave consideration for the cheque.

It seems that C will not have a problem proving requirements (1) to (8) of s 81. Thus, C will be able to hold X liable as possessor in terms of s 81.

3. The liability of S Bank

In terms of s 81(5) S Bank will not be regarded as having given consideration for the cheque 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 owned 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 (s 81(3)).

Please note that the possible delictual liability of S Bank will also be relevant in this case. After studying unit 15, you should be able to discuss S Bank's potential delictual liability with reference to both the Indac Electronics and the Columbus Joint Venture case, both are prescribed.

THE COLLECTING BANK

In terms of the AD decision in **Indac Electronics (pty) Ltd v Volkskas Bank Ltd**, 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 operation and legal nature of collection

Distinguish between the payment of uncrossed and crossed cheques, and the payment of order, bearer and non-transferable cheques

Uncrossed cheques

A holder in possession of an uncrossed cheque can obtain payment in 3 different ways:

1. He can present the cheque for payment at the branch of the bank where it is payable; or
2. He can request another bank to cash the cheque for him; or
3. He can deposit it into his own bank account so that it can be collected by his own bank

If a bank other than the drawee bank pays an uncrossed cheque across the counter, that cheque has in effect been negotiated to the bank by the holder. The bank then collects the amount of the cheque for itself as the holder

When an uncrossed cheque is presented at the bank branch where it is payable, no collection takes place

Crossed cheques

- Crossing a cheque means that the drawee bank is only allowed to pay it into the bank, so the cheque must in effect be deposited into the holder's bank account
- If the drawer and the holder of a crossed cheque are clients of the same bank, the bank is itself both the collecting and the drawee bank. In this case, it meets the requirements of the crossing by debiting one client's account and crediting the other's

Order cheques, bearer cheques and not negotiable cheques

- When a cheque has been made payable to order the signature of a holder is necessary to enable the bank to negotiate the cheque and present it for payment as the holder.
- When a cheque is payable to bearer, no endorsement is required for negotiation. The simple act of delivering it to the bank means that the bank becomes the holder of the cheque
- A cheque, which is non-transferable, is not payable to order or to bearer. Reason being that only the payee of a non-transferable cheque can be the holder. A non-transferable cheque cannot be further negotiated, i.e. nobody can be a HDC. The bank will honour a non-transferable cheque only as the representative of the payee and not as the holder
- Banks will only accept traditional non-transferable cheques if they are paid into an account with the same name as the holder, S 75A(1) non-transferable cheques are deemed to be crossed, so all non-transferable cheques may only be paid into a bank as required by S78

The collecting banks responsibility to the true owner

Whether negligence is sufficient to make the collecting bank liable?

Indac Electronics v Volkskas Bank

The AD Vivier JA:

"There can now be no reason in principle why a collecting banker should not be held liable under the extended *lex Aquiliae* for negligence to the true owner of a cheque, provided all the elements or requirements of *Aquilian* liability have been met."

- The appeal court decided upon exception 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
- In the **Indac** case the facts point *prima facie* clearly to negligence. The bank accepted an order cheque for the account of someone other than the payee of the cheque

Columbus Joint Venture v Absa Bank Ltd

- Our courts have decided that when a new client applies to open a banking account, the bank is legally obliged to take reasonable steps to prevent abuse of that account.
- The SCA had to decide whether Absa negligently, as alleged by Columbus, opened an additional bank account for an existing client without checking all the particulars provided by that client. The court concluded that Columbus could not prove that Absa was negligent in opening another account for its client without conducting an in-depth investigation
- The SCA 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

- 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

Absa Bank Bpk v Ons Beleggings

- Whether a collecting bank can be expected to investigate the genuineness of the endorsement on a cheque
- The Appeal court found that although a collecting bank is not obliged to investigate the authenticity of an endorsement, it must check whether an endorsement makes the cheque appear *ex facie* regular and genuine.

Kwamashu Bakery Ltd v Standard Bank of South Africa Ltd

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. If a thief tries to open an account under the exact name of the payee as it appears on the cheque, damage can only be prevented if the bank takes reasonable steps when the account is being opened to ensure that it is not a false account.

Question

A draws a cheque on B Bank in favour of " M or order" in settlement of his debt to M. The cheque is crossed and marked " not negotiable" and " for a/c payee only". A delivers the cheque to M. D steals the cheque from M and writes on the back of it: " Pay D signed M" D presents the cheque to C in settlement of his debt to C. C gives the cheque to his messenger, X, to deposit into C's account at S Bank. S Bank presents the cheque to B Bank for payment. B Bank pays the amount of the cheque to S Bank in good faith and without negligence. B Bank debits A's account, and S Bank credits C's account.

Answer the following questions: 1. Is the cheque transferable?

2. Would your answer be different if the cheque had been marked "not transferable" and " pay M only"?

3. Is C a holder of the cheque?

4. Would your answer to (3) be different if D had not stolen the cheque and M had endorsed it in favour of C?

5. Has the payment of the cheque by B Bank to S Bank settled the debt between A and M?

6. Who was the true owner of the cheque?

7. Will the true owner of the cheque have any right of recovery towards the following parties: C; X; B Bank; S Bank?

8. With reference to the possible liability of S Bank, would your answer have been different if A had entered the words "not negotiable" and "not transferable" on the front of the cheque?

9. Can B Bank be protected by S 79 if the words "not negotiable" and "not transferable" have been entered on the cheque and if B Bank paid the cheque into the collecting bank of the wrong payee?

10. What does M have to prove in order to hold S Bank delictually liable for collecting the cheque for the wrong person?

Answers

1. Yes. The cheque is still transferable regardless of the wording on it (see unit14).

2. Yes. In terms of S 6(5) the cheque will now not be transferable because the words that appear on it prohibit further transfer of the cheque. (Read the discussion of non-transferable cheques in unit14 again if your answer was wrong.)

3. Read the definition of "holder" in s1of the Act. In this case C cannot be the holder of the cheque because he is not the payee (M is) or the endorsee (there is no valid endorsement) in possession of the cheque. C is not the bearer in possession of a bearer cheque either. The cheque will only be a bearer cheque if it is, for instance, payable to bearer. You should refer back to unit 2 if you are not able to name the three other cases in which a cheque will be payable to bearer. Remember that C must be in possession of the cheque in order to be the holder (s 1).

Because C is not a holder of the cheque, he cannot be a holder in due course either (see s 27(1) for a definition of a holder in due course). You should realise by now that you will not be able to answer questions like these if you do not know and understand your definitions.

4. In this case C would be the holder of the cheque because the order cheque was endorsed to him and he is in possession of it. C will not, however, be a holder in due course, because S 80 states that a person who receives a cheque marked "not negotiable" cannot have a better title to it than his predecessor. M was only a holder, so C can also only be a holder. (Refer again to unit13if you are not sure why C cannot be a holder in due course.)

5. Yes. Although B Bank's payment was not made to the holder of the cheque, which is one of the requirements for payment in due course, B Bank and A are protected by S79. In terms of S 79, it can be assumed that payment was made to the true owner of the cheque (this has the same effect as a payment in due course) if the drawee bank paid a crossed cheque into another bank in good faith and without negligence. A is protected because B Bank paid the cheque after it came into M, the payee's possession (s 79). B Bank is therefore

entitled to debit A's account. M is not entitled to ask A for a second cheque because the debt owed to M by A was cleared by B Bank's payment.

6. M is the true owner of the cheque. Remember that someone does not need to be in possession of a cheque to be its true owner. It is only in the case of holdership that one has to be in possession of the cheque. "Delivery" was explained to you in unit 4.

Note that the rules of delivery by post or otherwise are important when determining whom the true owner of a cheque is. When a payee, for instance a creditor, agrees that a drawer (in this example, the debtor) can make payment by post, the risk and the rights of ownership are transferred to the addressee (creditor) when the cheque is posted. The drawer, however, takes the risk that the cheque might be stolen if he organises delivery of a cheque by post without the consent of the payee.

7. The cheque was crossed and marked "not negotiable", so C is, in terms of s 81, potentially liable to the true owner (M) if all the requirements of this S have been met (see unit13). According to the Sham Magazine case (unit14), the words "a/c payee only" does not change the nature of the cheque it is still a transferable order cheque. The words "a/c payee only" 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. (See Standard Bank of SA v Sham Magazine Center 1977(1) SA 484(A) at 504H.)
- X is the messenger not a subsequent possessor who gave value for the cheque. He simply acted on behalf of C, and will not be liable in terms of s 81. X could of course be liable if M was to ask him for information about the cheque and he refused to provide it (see unit13, where we discuss s 81(3)).
 - B Bank is protected by S 79. As we discussed in 5 above, when the drawee bank paid a crossed cheque to another bank in good faith and without negligence it was as if payment had been made to the true owner of the cheque. B Bank is therefore entitled to debit A's account.
 - S Bank will not be liable in terms of s 81, because all it did was to collect payment on behalf of C and credit C's account. As such, it did not give consideration for the cheque, nor did it receive the cheque as a gift. S Bank will however have to provide M with all the information about the cheque; if it fails to do so, it may be held liable as a possessor. (See unit13, where we discussed ss 81(3) and 81(5), and note carefully how S Bank as the possessor of the cheque can be liable to M as the true owner.)

S Bank may be held delictually liable by M. In Standard Bank of SA v Sham Magazine Center, Holmes JA said that the words "not negotiable", appearing together with the words "a/c payee only" on a cheque, would not exclude the transferability of the cheque.

The words "a/c payee only" are nothing but an instruction to the collecting bank that a certain payee must receive the amount of the cheque, and also serves as protection if the cheque ends up in the wrong hands (refer once more to unit14). The fact that S Bank did not make certain that payment was made to the correct person may point to negligence.

(When possible you should always refer to relevant judgments in your answers. For example, the Indac case (as discussed above) might be relevant when you are answering question 7.)

8. In this case not only will the true owner (M) not be protected by s 81, but the cheque will also not be transferable. (See unit13 and the answer to 7 above.) As with question 7 above, a strong case could be made out that S Bank was negligent. M, as the true owner of a non-transferable cheque, could claim that S Bank, as the collecting bank, should have taken notice when it received a non-transferable cheque with an endorsement being deposited on behalf of someone other than the stated payee (M). According to Indac Electronics (Pty) Ltd v Volkskas Bank Ltd 1992 (1) SA 783 (A), a collecting bank which acts negligently in collecting the amount of a cheque for the wrong person will be liable to the true owner for damages. The question is whether S Bank took reasonable steps to determine whether its client, C, was entitled to payment ex facie the cheque or not. (See 798D^800A in the Indac case referred to above.)
9. Yes, S 79 will protect B Bank if B Bank, as the drawee bank, paid to the wrong person a non-transferable cheque with "not negotiable" written on it. Refer to unit14, where we explained that S 79 is applicable to both transferable and non-transferable cheques. The protection offered by S 79 will also cover both the traditional non-transferable cheque in terms of S 6(5) and the S 75A(1) non-transferable cheque on which the words "not transferable" appear. (Refer back to unit12, where we discussed the requirements of s 79.)
10. In terms of Indac Electronics (Pty) Ltd v Volkskas Bank Ltd M, as the true owner, will have to prove that:
- The collecting bank had received payment of a cheque on behalf of someone who had not been entitled to payment;
 - In receiving such payment, the collecting bank had acted unlawfully and negligently;
 - The conduct of the collecting bank had caused the owner to sustain loss;
 - The damages claimed represented proper compensation for such loss.

You should also refer to other relevant cases that are applicable to the possible delictual responsibility of a collecting bank. You might for instance refer to the Columbus Joint Venture v Absa Bank case, as discussed above, in which it was found that the facts and circumstances of a case are, as in the Indac case, very important when determining the possible negligence of the collecting bank.

As you will have noticed, before you answer a question you must first identify what the question refers to and what is expected of you. In this case, the cheque was crossed and marked "not transferable" and "a/c payee only".

You should realise that s 81 will be relevant if the words "not negotiable" appear on a cheque. According to Holmes JA the words "a/c payee only" do not affect the transferability of the cheque but are simply an instruction to the collecting bank that a certain payee must receive payment of the cheque. The words "a/c payee only", similarly, serve only as a safeguard if the cheque should fall into the wrong hands.

(Refer once more to Standard Bank of SA v Sham Magazine Centre and further, and to unit 14 where this was discussed.)

PROMISSORY NOTES

S87 (1):

"An unconditional promise in writing made by one person to another, signed by the maker and engaging 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"

S88: a note is inchoate and incomplete until it is delivered to the payee or bearer

Difference between a Bill of Exchange and promissory note:

In the case of a bill, there is an order by the drawer to somebody else to pay. In the case of a note there is a promise by the maker that he himself will pay. If the bill is accepted, then the person to whom the order is addressed has accepted the order, and the drawer in such a case only guarantees payment in the event of the acceptor not paying. The maker of a promissory note is in the same position as the acceptor of a bill

Unconditionality: if the note only refers to the reason for the promise without making it dependant on a certain performance, it is unconditional

Payment on demand: if a note payable on demand has been endorsed, it must be presented for payment within a reasonable time of the endorsement (reasonable time: nature of the instrument, trade usages and the facts of a particular case must be considered)

Application of the act

The acceptor of a bill must be deemed to refer to the maker of a note. The drawer of an accepted bill payable to the drawers order must be deemed to refer to the first endorser of a note. The provisions relating to presentment for acceptance, acceptance and bills in a set, do NOT apply to promissory notes S93 (3)

Functions of the promissory note

Instrument of proof: facilitates proving the existence of a debt

Instrument of obtaining credit or financing

Instrument of investment: A seller who is willing to accept a promissory note to provide credit to the buyer may negotiate the note to the bank. The bank may present the note for payment on its due date or it may endorse the note. A note, which has been endorsed by a bank, can readily be discounted in the money market. The discounting of a promissory note is the purchase of a note before maturity at a discount .

Instrument of security: promissory notes may be pledged.

Joint and several liability

⇒ If a note reads "I promise to pay" and is signed by two or more persons, it is deemed to be their joint and several note

⇒ Implies that the creditor may choose to claim the full amount from all or any of the debtors.

⇒ In the presence of a contrary intention on the face of the promissory note, any note, which is signed by two or more persons, is deemed to be their joint and several note- a rebuttable presumption in terms of S 89(2).

The maker's liability

A comparison between the provisions of S52 relating to the liability of the acceptor and S92 dealing with the liability of the maker:

- S52 the acceptor undertakes to pay according to the tenor of his acceptance
→ S 92(a) the maker's warranty amounts to an undertaking to pay according to the tenor of the note
Both pay according to their own undertaking
- S52 (b)(iii) the acceptor is precluded from denying to the HDC the existence of the drawer, the genuineness of

his signature, his capacity and authority to draw on the bill. There is also a restriction of the acceptor regarding a bill payable to the drawer's order and where a bill is payable to the order of a 3rd person
→ S92(B) the maker is precluded from denying to the HDC the existence of the payee and his capacity to endorse at that time (only restriction on the maker regarding the HDC)

CREDIT CARDS

Advantages for the cardholder: it is a relatively safe method of payment for both the debtor and creditor, it provides credit for a certain period to the cardholder, and if the supplier has agreed with the card issuer to accept the credit card as a method of payment, the cardholder can insist on the credit card being accepted by the supplier as a method of payment

Disadvantages: it is not always a very safe method of payment when paying for goods which are ordered by phone, the credit card is not a negotiable instrument and therefore cannot be transferred from one person to another

Different types of credit cards

Two types: two-parties and three-party credit cards

In two-parties credit cards the parties are the card issuer (who is also the supplier) and the cardholder

Three-party credit cards

The card issuer (which is usually a bank), the cardholder and the supplier. The card issuer enters into contracts with different suppliers who agree to accept the credit card when presented by the cardholder as payment or goods and services purchased. The card issuer also undertakes to reimburse the supplier (subject to certain conditions and minus a specific percentage) for the purchases made by the cardholder. The card issuer also contracts with the cardholder that the cardholder may make purchases on credit subject to the limit agreed to by the parties

The legal relationship in terms of a three-party credit agreement

3 different sets of legal relationships flowing from the 3 party credit card agreement:

1. The relationship between the card issuer and the card holder
2. The relationship between the card issuer and the supplier
3. The relationship between the cardholder and the supplier

The relationship between the card issuer and the cardholder:

- The individual debts are continuously set-off against each other with only the balance remaining due
- Where the card issuer has made payment in good faith, the cardholder's account may be debited, irrespective of whether the cardholder's signature has been forged or not
- An additional fee is usually paid for an insurance premium in the event of unauthorised use of the card

The relationship between the card issuer and the supplier

- Governed by the express terms of the agreement between the card issuer and supplier.
- 2 of the standardized terms of this agreement are that the card issuer will only pay the supplier if the card used to make purchases by the cardholder is valid or that the amount purchased does not exceed the maximum stipulated in the agreement

The relationship between the cardholder and the supplier

- 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
- The cardholder will therefore not be liable for payment to the supplier unless the card issuer fails to pay the supplier. The liability of the cardholder ceases and the supplier may claim payment directly from the cardholder.
- The cardholder becomes owner of the merchandise bought by credit card when he or she is put in possession of the merchandise. Because the supplier relies on the card holder for payment, the presumption arises that the supplier has parted with the ownership of the articles as soon as the cardholder is put in possession of them

The legal relationship in terms of a two-party agreement

The legal consequences of the loss or theft of a two-party agreement is similar to that of a three-party agreement. The only difference is that once the cardholder has informed the card issuer, it implies that the cardholder has informed the supplier as well. Generally, this means that once the card issuer has been informed the card issuer/supplier bears the risk of loss for unauthorised payments.

The unauthorised use of a credit card

- Occurs when the credit card is used without the permission of the cardholder.
- Who is responsible for paying where a thief or some other person who has by chance come into possession of the credit card uses the credit card? The standard contracts concluded between the supplier, issuer and cardholder usually contain provisions in respect of such losses
- The standard-terms agreement between the card issuer and the cardholder provides as follows:

- ⇒ The cardholder bears the risk of loss until such time that the cardholder has notified the issuer
- ⇒ The issuer bears the risk of loss from the moment that it received the notification until such time as the supplier has been notified
- ⇒ Once the supplier has been notified, the supplier is obliged to refuse to accept the card as payment for purchases made
- The National Credit Act provides statutory protection to the cardholder where the cardholder has informed the card issuer of the loss of the card or the pin. This protection will not apply where the card issuer can prove that the cardholder has acted fraudulently

TRAVELLERS' CHEQUES

Traveller's cheques and the bills of exchange act

- There is no legislation which applies specifically to traveller's cheques
- Whether a traveller's cheque amounts to a bill of exchange, cheque or a promissory note as described in the BEA is an important question because if a document qualifies as a bill of exchange or promissory note as defined in the BEA, the provisions of the act will regulate the relationship on the document. However, if a document does not satisfy the definition of a bill of exchange or promissory note, the parties to the document cannot rely on the provisions of the act
- 2 types of traveller's cheques:
 1. Traveller's cheque in terms of which payment by the issuer of the traveller's cheque is made conditional on countersignature by the traveler- does not conform to the essential element of Unconditionality as required by the BEA
 2. Travellers cheques in terms of which payment by the issuer of the traveller's cheque is not made conditional by the countersignature by the traveler- conforms to the requirements of a bill of exchange as envisaged in the BEA

Theft and loss of traveller's cheques

- Usually the purchase agreement between the issuer and the buyer will determine their obligations in the case of theft or loss of the traveller's cheque
- Generally, the position is as follows. If the traveller's cheque countersigned before presentment of payment (contrary to the purchase agreement) is paid by the issuer, the purchaser of the cheque will not be able to claim a refund against the issuer in the event of the cheque being lost or stolen.
- Where the traveller's cheque is lost or stolen before it has been countersigned- implies that the signature of the original purchaser has been forged so as to obtain payment. The purchaser's claim for a refund will depend on the wording of the contract with the issuer and the question of whether the purchaser has complied with all his contractual obligations

ELECTRONIC FUNDS TRANSFER

- A fund transfer that takes place completely or in part by use of electronic techniques.
- All payment instructions which are transmitted through magnetic material such as magnetic tapes, disks or cassettes, or through purely electronic media such as telephones and telex, or by use of electronic transmissions between computers or between a computer and a terminal.
- In the absence of such specific legislation the legal relationships between the parties involved in terms of electronic fund transfers are regulated by the general principles of the law of contract as evidenced in the contract between the parties.
- Payment comprises two basic steps: the payment instruction is given by the debtor to the financial institution, which holds the funds and that financial institution will transfer the funds to the account of the beneficiary at the same or another financial institution

Different systems:

Customer activated systems and systems, which are activated by banks to facilitate electronic fund transfers between banks and to send financial messages.

Systems, which are activated by banks: the Automated Clearing Bureau (pty) Ltd commonly ACB established to provide for computerised facilities between banks

Customer activated systems: 3 electronic fund transfer systems, which are activated by customers: the ATM, EFTPOS and home banking

ATM

- Advantages: the convenience of the customer being able to access his accounts 24 hours per day; the

reduction in labour costs and in the volume of paper crossing the bank counter; an increase in the number of customers who can be served; and direct input of information into the bank's record-keeping system.

- Can operate off-line or on-line
- The risk of unauthorised withdrawals: whether the customer may be debited with the amount of such an unauthorised withdrawal? Most financial institutions ensure that it concludes with a prospective customer contains a clause, which specifically excludes the banks liability in such an instances. A bank may only debit its customer if the bank has made payment to the customer or acted in accordance with his mandate
- In the absence of an express term there might be a tacit-term in the banker-customer contract that the customer would carry the risk of an unauthorised withdrawal
- All of the surrounding circumstances which exist at the conclusion of the contract will be taken into account when the court has to determine the intention of the parties
- ATM deposits: the transaction slip supplied by the machine is simply a record of what the customer has keyed into the machine
- Whether the payment takes place at the moment when the amount to be deposited is inserted into the machine, or only when the deposit envelope is opened and the bank accepts the contents. If the deposit is made by means of a cheque, it is clear that payment to the bank takes place only when the cheque is honoured.
- Only a contract of deposit exists while the envelope is in ATM. In terms of the general principles of the contract of deposit, the depositary is liable for the loss of the property deposited with him, unless the depositary can prove that such loss was not due to his fault.
- Should the bank prove that the contents of the envelope deposited into the ATM were either lost or stolen without any fault on the bank's part, it would, therefore, not be liable as depositary towards the customer.

EFTPOS:

- Electronic Funds Transfer at Point of Sale is essentially a debit transfer
- The legal relationship between the participating parties: the payment will be complete when the funds are unconditionally credited to the beneficiaries account.
- 3 interdependent contracts:
 1. The contract between the customer and the merchant: is a contract of purchase and sale
 2. The contract between the customer and their bank: is governed by the agreement, which was concluded when the card was issued to the customer
 - Most important standard terms in this contract: defining the circumstances under which the bank is entitled to debit its customers account. Most contracts indicate that the customer will only be liable until the bank is informed of the loss of the card or the pin and the obligation of the customer to keep the pin a secret. If even an unauthorised person correctly inputs the pin, the contractual conditions under which cards are issued make the customer responsible for loss suffered.
 - The EFTPOS transaction is irrevocable
 3. The contract between the merchant and the bank: a standard commercial bank account contract containing particular terms relating to EFTPOS payments, most important being the time at which the merchants account at the bank will be credited with the EFTPOS payment, and to the procedures for dealing with erroneous or unauthorised transactions.
 - Problems which could arise from an EFTPOS transaction: a customer may not have sufficient funds in his account to pay for the goods or services purchased
 - Off-line system: whether the original claim of the merchant against the cardholder is extinguished by novation? Novation will in such a case take place when the creditor obtains a new personal right against a 3rd party thereby extinguishing the existing personal right that the creditor has against the customer
 - In order for novation to take place, it must also be clear that the parties themselves intent to extinguish the old debt and institute a new one in its place. The intention is that the merchant obtains a personal right against the financial institution and that the customer is not liable to pay the merchant, provided that the financial institution pays the merchant
 - In an off-line system the bank undertakes to pay all payment instructions which are accepted by the system provided that the merchant has complied with certain security procedures
 - In an on-line system, if the payment instruction is accepted, the bank will execute payment, not because of the bank's undertaking, but as mandatory of the customer
 - The merchant will have to take care that no unauthorised person obtains access to the EFTPOS system