PART 4

STUDY GUIDE: CAPITA SELECTA

ESTOPPEL BY REPRESENTATION
LECTURES
10-11

ESTOPPEL

INTRODUCTION (BACKGROUND, PERSPECTIVE AND DEFINITION)

ELEMENTS: UNLAWFUL REPRESENTATION, DETRIMENT AND CAUSALITY

REMARK:

This unit covers two types of Estoppel. On the one hand the exceptio rei iudicatae (estoppel per rem iudicatam) and, on the other, Estoppel by representation. The former notion is not the well-known Estoppel (as we know it) and is applied when a case has been finally pronounced and again submitted for adjudication. This defence is only touched upon for the sake of completeness, but enjoys more serious scrutiny in the Law of Evidence and Procedure. On the contrary, the “true/real” Estoppel (by representation) will be dealt with in more depth.
The concept “Estoppel” is of Latin origin; in French it is known as estoupe. In Barnett v Van der Merwe (1980 3 SA 606(T): 612C) the Afrikaans’ woord “toestopping” is used as synonym. Literally it is aimed at stopping (prohibiting) the litigant to admit or deny a specific fact or state of affairs in the course of the administration of justice or in law (See Schmidt CWH Bewysreg 574). Flowing from this approach, it can be argued that the litigant being estopped to submit evidence to prove or rebut a specific fact, is actually functioning in the Law of Evidence. The correct view, however, is that on the basis of equity that the substantive law makes the admission of such evidence irrelevant. In other words, Estoppel prohibits the presentation of facts linked to a factum probandum. (See Hoffmann and Zeffert Evidence 256). Some writers are of the opinion that the substantive law is limited or extended by estoppel, without altering materially the substantive rules (in some cases it certainly happens). (See Van der Merwe and Van Huyssteen 1988(4) TSAR 568: 571; Lubbe 1991(1) TSAR 1: 18-19).

Another vexing question is whether the English law of estoppel replaced the South African exceptio doli mali. The Supreme Court of Appeal dealt with it decisively. Chief Justice Steyn found in Trust Bank v Eksteen (1964 3 SA 402(A): 410F-411A-C) that the South African rules pertaining to estoppel would not always have similar legal consequences to that of its English counterpart. The English law of estoppel is therefore not a source of estoppel in South Africa. English principles may be borrowed to adjust, improve and illuminate our law of estoppel. (See also Johaadien v Stanley Porter (Paarl) (Pty) Ltd 1970 1 SA 394(A): 401D-E). However, Trollip J said the following in Connock’s (SA) Motor Co Ltd v Sentraal Westelike Ko-operatiewe Maatskappy Bpk (1964 2 SA 47(T): “The English doctrine of estoppel by representation migrated to this country on the authority of a passport that it approximated the exceptio doli mali of Roman Law. However doubtful the validity of that passport might originally have been … the doctrine has now become naturalised and domiciled here as part of our law … “. 
STUDY:

[ON BACKGROUND, PERSPECTIVE AND DEFINITION OF ESTOPPEL]:

Sonnekus “Estoppel”(2): pp 1-31

OPSIONAL READING:

[ON INTRODUCTION AND PERSPECTIVE]

* Rabie Lawsa: par 337-390 (pp 176-210) and 1987 Supplement 498-499

• SCHMIDT CWH 1982 Bewysreg 2nd ed Durban: Butterworths 574-592


* DE WET JC 1939 “Estoppel by representation” in die Suid-Afrikaanse reg doctoral thesis Leiden (opsional directional reading)

* Lubbe GF “Estoppel, vertrouensbeskerming en die struktuur van die Suid-Afrikaanse privaatreg” 1991(1) TSAR 1-21

OPSIONAL READING:

[ON THE DEFINITION OF ESTOPPEL]

* Van der Merwe S en Van Huyssteen LF
  “A perspective on the elements of estoppel by representation” 1988(4) TSAR 568: 569 (from line 10 from the top to line 31)

* Waterval Estate and Gold Mining v New Bullion Gold Mining 1905 TS 717: 722-723
* Baumann v Thomas 1920 AD 428: 434-436
* BOWER G S(pencer) en TURNER AK 1977 The law relating to estoppel by representation 3rd ed London: Butterworth par 3

**OPSIONAL READING:**

[ON HISTORICAL APPROACH]

* Baumann v Thomas (above) 434-436
  • Union Government v National Bank 1921 AD 126-127 en 133-134 (per hr Innes)
  • * Union Government v Vianini Ferro-Concrete Pipes 1941 AD 43: 49 (per ja Watermeyer)
  * De Wet “Estoppel by representation” 10-15 en 83-92
  • Trust Bank v Eksteen 1964 3 SA 402(A): 410D-E (per Steyn CJ)

**STUDY**

[ON REPRESENTATION AND MISREPRESENTATION]

Sonnekus “Estoppel”(2): pp 48-52 (heading 1 & 2); 70-75 (sub-heading 5.3.3.1 & 5.3.3.2); 75-78 (sub-heading 5.4 – “conduct”); 78-80 (sub-heading 5.5 – “silence”); and 87-94 (heading 6 – relate to fact & “promissary estoppel”)

**OPSIONAL READING:**
NOTE

The representation (conduct) is very often so intertwined with the reasonableness of the conduct (wrongfulness) that it is difficult to separate the issues (for example “the representation must be precise and unambiguous” pp. 70 - 78 (5.3.3.1-5.3.3.3) above). In an effort to simplify the matter, the following summary is given:

SUMMARY

1 Conduct (representation)

= by which communication is made by representor (Estoppel denier)(also agent/agency by Estoppel Quinn, Strachan, Monzali v Smith/Estoppel by negligence Fawdon/Estoppel by silence Beckett) to representee (Estoppel assertor)(agent/public or class/came to notice) acting on the faith thereof to his detriment

= any way thoughts are conveyed

⇒ words (spoken or written)

+ conduct (acts/inaction/silence)
NOTE be cautious: reasonable understanding + reasonable expectation (both parties) in cases of misrepresentation by conduct.

See

| Universal Stores v OK Bazaars 1973(A) |
| Aris Enterprises v Protea Ass 1981(A) |
| Glofinco v ABSA Ltd t/a United Bank 2002 6 SA 470(SCA) |
| Botha v White 2004 3 SA 184(T) |
| Concor Holdings v Potgieter 2004 6 SA 491 (SCA) at 495B per Cloete JA |

= must relate to existing facts (not about the law, an opinion or about a statement of future intention – willingness to contract – Hauptfleisch/Garlick v Philips/ Ndongeni)

| Baumann v Thomas, Aris, Wege v Kemp |

“Promissory Estoppel” (English) permitting Estoppel based on a representation or promise as to the future (no contract because consideration is absent) High Trees case (cf Jorden v Money)

South Africa: promise will create valid contract enforceable at law – no need for the doctrine of promissory Estoppel. Thus, an opinion will still not found a plea of Estoppel

2 Misrepresentation (wrongfulness)

Please study the following material from:

Sonnekus “Estoppel(2)”: 52-87 (headings 3 to 5); 94-97 (heading 7)
NOTE: The representation (conduct) is very often so intertwined with the reasonableness of the conduct (wrongfulness) that it is difficult to separate the issues, but these requirements need to be distinguished. Guidelines to distinguish wrongfulness from conduct follow:

SUMMARY

Misrepresentation/falseness/deceit/untruthfulness

= wrongfulness/unlawfulness/unacceptableness
= does it reasonably reflect a falsehood?

➢ objective test/boni mores/ convictions of the community
➢ general criterion/test for unlawfulness
➢ “reasonable third man/person” in all the circumstances (boni mores criterion – not test for negligence) would have been misled
➢ Factors considered:
  * knowledge (actual and constructive) (Blackie Swart/ Grosvenor Motors ABSA v Blumberg 1997(A)/ ABSA v De Klerk 1999(W))
  * relationship between the parties
  * a deliberate lie
  * rule of thumb: possession and ownership very often separated (no representation) + documents/
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keys/share sertificate – “scenic apparatus” –
genral circumstances

crystallized/solidified criterion for wrongfulness expressed in the following archaic terms:

“must have been intended to be acted upon in the manner in which the representee acted” (*Connock’s v Senwes*) – if it is an *omission* – the reasonable person is placed in the shoes of the Estoppel denier + exclusive knowledge + relationship between parties + statutory duty to inform

“it must have been such as to lead the reasonable man to believe that it was meant to be acted upon in that manner”

“could reasonably be expected to mislead” (*Strachan v Blackbeard Grosvenor/ Motors v Douglas*)

“it must be material” (*Coolcat Restaurante /Khani v Premier, Vrystaat*)

“it must be precise and unambiguous” (only representation in words) (*Beyleveld/ B&B Hardware 1989(A)*); if it pertains to conduct then the test is reaffirmed by Cloete JA in *Concor Holdings (Pty) Ltd t/a Concor Technicrete v Potgieter* 2004 6 SA 491(SCA): 495B: “Our law is that a person may be bound by a representation constituted by conduct if the representor should reasonably have expected that the representee might be misled by his conduct and if in addition the representee acted reasonably in construing the representation in the sense in which the representee did so”. Sonnekus speculates in the case discussion (2005.4 *TSAR* 877: 884-885) that the court in this
case in effect places a “duty to speak” on every owner leaving
his property in the hands of an occupier or controller to warn
every potential third party that he is still the owner, importing a
sort of blanc “duty to speak” on the owner. Such an approach is
contrary to what had been required for the “duty to speak” in the
past.

“the representation ought in the totality of the circumstances (of
both parties) and according to the objective reasonableness
criterion be considered to be a misrepresentation”

Estoppel assertor is not more gullible than reasonable third person be on his
guard against misrepresentations (no protection against own stupidity or
laziness) (*Info Plus v Scheelke 1998(A)*)

STUDY
[ON PREJUDICE]


OPTIONAL READING
[ON PREJUDICE]

* Van der Walt CFC “Wat word van die
nadeelvereiste by bedrog en by estoppel?”
1973 *THRHR* 386-395

* Van der Merwe SWJ en Van Huyssteen
LF “A perspective on the elements of
estoppel by representation” 1988(4) *TSAR*
568: 569 (last par) to 571 (at “Similar …”)
Thompson v Voges 1988 1 SA 691(A): 709H-712C; 713B-C en 714E-F. See also discussion in 1988(21) De Jure 390 ff

Jonker v Boland Bank PKS Bpk 2000 1 SA 542(O): 547G ff

SUMMARY

⇒ “Prejudice”/”detriment”/”loss”
⇒ patrimonial in nature (Autolec v Du Plessis, ABSA v De Klerk)
⇒ more lenient approach (Glisson, Resisto Dairy, Thompson v Voges)
  “change in legal position”/”diminution of right”
⇒ When? When denier wants to resile from contract (preventative remedy)
⇒ Comparative test: present and hypothetical position if allowed to resile – concrete approach (Jonker v Boland Bank 2000(O))
⇒ Or total patrimonial estate (abstract approach) (Thompson v Voges 1988(A) Cf ABSA v De Klerk 1999(W))
⇒ Take reasonable steps to avoid prejudice
⇒ Actual loss (precise extent of prejudice and not more)(Thompson v Voges)

STUDY

[ON CAUSATION]

Sonnekus “Estoppel”(2): pp 121-132

Stellenbosch Farmers’ Winery Ltd v Vlachos t/a The Liquor Den 2001 3 SA 597(SCA)

SUMMARY
Proximate cause test applied
- Not pure test for causality
  - Includes some form of limitation of liability (legal causality: natural and probable consequences theory – reasonable foreseeability)

Submission: factual causation only (Sonnekus)
- + separate limitation requirement – for instance “not in the public interest” (be cautious not to confuse “public policy” with the factor considered for wrongfulness)

ASSESSMENT: SELF-EVALUATION

1 Define the doctrine of Estoppel. [5]

[For the solution, see Sonnekus Estoppel(2): p 1 (first paragraph & footnote 1)]

2 What is the basis (foundation) of the doctrine of Estoppel? [10]

[For a solution, see Sonnekus Estoppel(2): p 3 (2nd paragraph) & pp 25-27 (heading 11) & 27-30 (heading 12)]

3 What is “issue Estoppel” and how do you distinguish it from exceptio rei iudicata and “true” Estoppel? Use cases to substantiate your answer. [10]

[For a solution, see Sonnekus Estoppel(2): pp 18-20 (headnote 7) and the cases discussed by the same, namely Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk 1995 1 SA 653(A): 664D-E]
and 668C-669G; *Bafokeng Tribe* 1999 3 SA 517(BH): 566B-E]. See also *Ex parte Viviers et Uxor (Sattar Intervening)* 2001 3 SA 240(T).

See the most recent case as well, namely *Hayes v Minister of Finance & Development Planning Western Cape* 2003 4 SA 598(C). [Take note of the special plea and the ordinary defence in your answer as well].

4 Does Estoppel found a cause of action and how is it related to (distinguished from) the law of delict? [5]

[For a solution, see *Sonnekus Estoppel(2)*: pp. 20 - 23 (headings 8 & 9) & 30 (sub-heading 12.3)]

5 Is Estoppel a rule of substantive law or a rule of evidence? [5]

[For a solution, see *Sonnekus Estoppel(2)*: pp. 15 - 18 (heading 6)]

6 What is understood by the following expressions:

6 1 “Estoppel by conduct”? [1]

6 2 “Estoppel by silence”? [1]

6 3 “Estoppel by negligence”? [3]

[For a solution, see *Sonnekus Estoppel(2)*: pp. 9 - 10 (sub-heading 4.4) & 11-13 (par (i) bottom 10 & par (iii) bottom p. 11 – discussion of the cases of *TW Beckett & Co v B Gundelfinger* 1897 OR 77 (as an example of “Estoppel by silence”) and *Fawdon v Lelyveld* 1937 TPD 339 (as an example of “Estoppel by negligence”)) and 152-156 (heading 4)]

7 Was Estoppel adopted from English law or was it introduced into South African law via Roman/Roman Dutch law? Explain shortly. [3]

[For a solution, see *Sonnekus Estoppel(2)*: pp. 43 - 45 (heading 5: Conclusion)]
When will a representation be unlawful? Distinguish between the act and the unreasonableness thereof. [10]

Will the “alteration of the Estoppel assertor’s position to his detriment” be enough to found the prejudice requirement for Estoppel? Discuss. [10]

What is meant by “proximate cause” in connection with establishing the link between the misrepresentation and the potential detriment as requirement for Estoppel? Explain. [5]