INSTRUCTIONS:
1. This paper consists of TWELVE (12) pages. Please ensure that you have all of the pages.
2. Please note that Section A and Section B are compulsory. There is, however, a choice between Section C and Section D.
3. Please note the marks allocated for each question and apportion your time accordingly.
4. Please note that this question paper must be handed in together with your answer booklet. Under no circumstances will your answers be marked if this question paper is not submitted.
5. Please note that the multiple choice questions in Section A must be answered in your answer booklet and not on this question paper.

SECTION A (10 MARKS)

Please select the most appropriate answer from the options provided. One mark will be awarded for each correct answer. No marks will be deducted for incorrect answers

1.1 Which of the following statements is/are correct?

i In Mensky v ABSA Bank Limited t/a Trust Bank [1997] 4 All SA 280 (W), the court decided that the agreement by which a bank undertakes to keep valuables in safe custody is a contract of lease and not a contract of depositum.

ii Money invested in a bank by an attorney on behalf of his client does not form part of the assets of the bank as it constitutes ‘trust property’ for the purposes of the Financial Institutions (Protection of Funds) Act 28 of 2001.

iii In terms of the common-law in duplum rule, arrear interest stops running when unpaid interest equals the outstanding capital and if the debtor makes a payment, which reduces the arrear interest to amount less than the amount of the capital, interest commences to run afresh until the capital amount is again attained.

(A) Statement i only  
(B) Statement iii only  
(C) Statements i and iii  
(D) Statements ii and iii  
(E) None of the above options
1.2 Which of the following statements is/are correct?

i. According to the Bills of Exchange Act 34 of 1964, a natural person may sign by making a mark instead of writing out his full name or surname.

ii. According to the case of *Nedbank v Pestana* 2009 (2) SA 189 (SCA), a bank may not unilaterally reverse a credit transfer under any circumstances.

iii. In carrying out its customer's instructions to make payment by electronic funds transfer, the bank acts as the mandatory of its customer and must exercise reasonable care and skill in performing its functions.

(A) Statement i only
(B) Statement ii only
(C) Statement iii only
(D) Statements i and iii
(E) Statements i, ii and iii

1.3 James Small is the manager of an electrical store in Pietermaritzburg. Sibusiso Duma is employed by James as a personal assistant at the store and he steals one of James' cheques, forges his signature on the cheque, and delivers the cheque to Peter Ndlovu in payment of a debt which he owes to him. The cheque is duly presented and paid by XYZ bank.

Which of the following statements is/are incorrect?

i. The bank is not entitled to debit the drawer's account unless it can show that it is entitled to the protection provided by s 58 of the Bills of Exchange Act 34 of 1964.

ii. The bank is entitled to debit the drawer's account as the drawer's own negligence in failing to supervise his employee facilitated the forgery.

iii. In terms of s 72B of the Bills of Exchange Act 34 of 1964, every customer of a bank is under a duty to exercise reasonable care in the custody of their cheque forms.

(A) Statement ii only
(B) Statements i and ii
(C) Statements ii and iii
(D) Statements i, ii and iii
(E) None of the above options
1.4 Which of the following statements is/are correct?

i Payment is a bilateral juristic act that requires the meeting of two minds.

ii A cheque drawn payable to ‘A or order or bearer’ is a bearer instrument while a cheque drawn payable to ‘A or bearer or order’ is an order instrument.

iii A party who takes an instrument which has been indorsed subject to a condition would not become the holder thereof.

(A) Statement i only
(B) Statements i and ii
(C) Statements i and iii
(D) Statements i, ii and iii
(E) None of the above options

1.5 Andy purchases certain goods from Derrick. In payment of the amount owed, Andy draws a cheque in favour of ‘Derrick or order’ and issues the cheque to him. Andy subsequently countermands payment and the cheque is dishonoured when Derrick presents it for payment.

Which of the following statements is/are incorrect?

i As Derrick and Andy are remote parties, Andy, if Derrick decides to sue in terms of the cambial obligation, may rely upon any defence that would have been available had the action been brought on an ordinary written contract.

ii Derrick may not sue Andy on the cambial obligation unless he gives him notice of dishonour.

iii Derrick does not qualify as a holder in due course even if he took the cheque in good faith.

(A) Statement i only
(B) Statements i and ii
(C) Statements ii and iii
(D) Statements i, ii and iii
(E) None of the above options
1.6 R draws a cheque in favour of ‘J or bearer’ and issues the cheque to J. J indorses the cheque in favour of K and delivers it to him. K delivers the cheque to A, who delivers it to T as a birthday present. Which of the following statements is/are correct?

i If the cheque is dishonoured, T cannot sue J in terms of the cambial obligation as J is merely a transferor by delivery.

ii T qualifies as the holder of the instrument but not as a holder in due course.

iii As K is a transferor by delivery, T cannot sue K on the instrument but may sue him for breach of warranty.

(A) Statement ii only
(B) Statement iii only
(C) Statements ii and iii
(D) Statements i, ii and iii
(E) None of the above options

1.7 Which of the following statements is/are correct?

i A banks which pays cash over the counter on an unindorsed or irregularly indorsed cheque will not be entitled to the protection provided by s 83 of the Bills of Exchange Act 34 of 1964 (as amended).

ii In terms of the Administration of Estates Act 66 of 65, an executor is precluded from opening an estate cheque account in the name of the deceased estate unless he/she has money in the estate in excess of R 1000.

iii A drawer is said to ‘mark’ a cheque when he adds certain words to the face of the cheque or deletes certain words in the instrument.

(A) Statement i only
(B) Statements i and ii
(C) Statement iii only
(D) Statements i, ii and iii
(E) None of the above options
Mary Poppins instructs her employee, Scandal Shaik, to purchase certain office supplies for an amount not exceeding R 100. Mary signs a cheque in blank, crosses it by inserting two parallel transverse lines across the face of the instrument and then hands it to Shaik. Shaik makes the cheque payable to ‘Cash or Bearer’ for the amount of R 1000 and hands the cheque to Alice Wonderland in payment of a debt owed to her. The cheque is dishonoured and Alice Wonderland wants to sue on the cheque.

Which of the following statements is/are incorrect?

i Mary may raise the defence of material alteration as she intended the cheque to be payable for R 100 and Shaik made the instrument payable for R 1000.

ii Alice qualifies as the holder of the instrument but not as a holder in due course as the crossing prevents the cheque from being negotiated.

iii Alice can sue Shaik on the instrument for the full amount as he and Mary are jointly and severally liable.

(A) Statement i only
(B) Statements i and ii
(C) Statements ii and iii
(D) Statements i, ii and iii
(E) None of the above options

Which of the following statements is/are incorrect?

i A debtor who has arranged a stop order or debit order against his bank account may cancel the stop order or debit order at any time without having to obtain the creditor’s consent.

ii In terms of the Trust Property Control Act 57 of 1988, it is mandatory for a trustee to open a separate savings account at a banking institution.

iii According to the case of Joint Stock Co Varvarinshoye v ABSA Bank Ltd and Others 2008 (4) SA 287 (SCA) the bank cannot appropriate money standing to the credit of its customer’s account to set it off against a debt owed by the customer in respect of another account to the exclusion of the rights of third parties.

(A) Statement i only
(B) Statement ii only
(C) Statements i and ii
(D) Statements ii and iii
(E) None of the above options
1.10 Which of the following statements is/are incorrect?

i When the customer deposits money into his bank account then the bank becomes the owner of that money and this gives rise to a contract of depositum between the bank and the customer.

ii The case of Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (In Liquidation) 1998 (1) SA 811 (SCA) constitutes authority for the view that the in duplum rule does not apply to overdraft accounts when banks adopt the practice of capitalising interest.

iii According to the case of Kircos v Standard Bank of South Africa Limited 1958 (4) SA 58 (R), a bank does not owe a duty of care to its customer when issuing deposit slips to him/her as such a duty would be too onerous on banks.

(A) Statement ii only
(B) Statements ii and iii
(C) Statements i and ii
(D) Statements i, ii and iii
(E) None of the above options

PLEASE TURN OVER FOR SECTION B
SECTION B (45 MARKS)

PLEASE NOTE THAT THIS SECTION IS COMPULSORY AND THAT ALL QUESTIONS IN THE SECTION MUST BE ANSWERED

QUESTION 1 (12 marks)

1.1 A draws an uncrossed cheque on Standard Bank (Hayfields Branch) in favour of ‘B or order’. The cheque is subsequently stolen by C who writes ‘Pay D’ on the back of the cheque, forges B’s signature immediately below these written words and delivers the instrument to D in payment of a debt owed to him. The bank makes payment to D. It transpires that B is an account holder at Standard Bank (Church Street Branch). Is the bank entitled to debit the drawer’s account? Explain fully. (5)

1.2 James draws a cheque in favour of ‘Mike or order’ for the amount of R 100 and issues the cheque to Mike. Mike owes a debt of R 1 000 to Seth and wants to negotiate the cheque to him in payment of the debt. Mike changes the amount of the cheque to ‘R 1 000’ and instructs Ryan to indorse the cheque on his behalf and deliver it to Seth. Ryan specially indorses the cheque in favour of Seth and signs the cheque by appending his signature and Mike’s full name on the back of the cheque. Ryan does not qualify his signature to indicate that he is signing on behalf of Mike. Ryan delivers the cheque to Seth. Seth indorses and delivers the cheque to Zondi who in turn negotiates it to Terrence, who takes it in good faith and for value. The cheque is dishonoured and Terrence wants to sue Ryan and Seth on the instrument. Explain whether he is entitled to do so. (7)

QUESTION 2 (11 marks)

Peter draws a cheque in favour of ‘John or order’ and Robert signs the cheque as ‘surety’. The cheque is issued to John. John specially indorses the cheque in favour of Derrick and delivers it to him. Derrick signs his name on the back of the cheque (without writing any other words thereon) and delivers the cheque to Paul who delivers it to Megan. Megan writes the words ‘Pay Darren’ above Derrick’s signature and delivers the cheque to Darren.

2.1 Is Darren the holder of the instrument? Explain. (3)

2.2 Assume that the cheque is dishonoured and that Darren is entitled to sue on the instrument. Explain whether Darren would be able to sue the following parties:

2.2.1 Robert (2)
2.2.2 Megan (2)
2.2.3 Paul (3)

2.3 Assume that Darren specially indorses the cheque in favour of John and delivers it to him. The cheque is dishonoured and John wants to sue Derrick on the instrument. Explain whether he is entitled to do so. (1)
QUESTION 3 (12 marks)

3.1 Explain what is meant by a credit transfer and how this differs from a debit transfer. (2)

3.2 Identify and explain the legal relationships involved in a typical tripartite credit-card scheme. Thereafter comment on the legal position in the following instance:

After writing his final exam paper on 10 October 2010, Damien Duck decides to go to a nightclub to celebrate. During the course of the evening, Damien accidentally drops his wallet which contains his credit card. The wallet is picked up by Naughty Khumalo who, during the course of the next few days, uses Damien’s credit card to make various payments over the internet. On 14 October 2010, Damien realises that his credit card is missing and he immediately informs his bank (ABSA Bank) of this. The bank issues him with another card. At the end of the month, Damien receives a statement of account indicating that he owes the bank R 2 500 in respect of transactions which took place with his previous credit card on the following dates, namely:

11 October 2010: R 135
12 October 2010: R 675
13 October 2010: R 425
15 October 2010: R 165
16 October 2010: R 225
17 October 2010: R 875

When Damien approaches ABSA Bank to resolve the matter, he is referred to Clause 3.2 of the agreement which he signed with the bank when he opened his previous credit card account. The relevant clause reads as follows:

‘The cardholder shall be liable for all loss resulting from any unauthorised use of his credit card and/or PIN number whether as a result of his negligence or otherwise’

Damien wants to know whether he is liable for the amount of R 2 500. Damien believes that Clause 3.2 is unfair and must be against public policy. Advise him on the legal position, assuming for the purposes of this question that the credit card agreement is subject to the provisions of the National Credit Act 34 of 2005. (10)
QUESTION 4  (10 marks)

Mr Khumalo is a wealthy businessman who is the sole director of a large company known as Laser Printers (Pty) Ltd. Mr Khumalo and Laser Printers (Pty) Ltd have been banking with First National Bank for the past 10 years and have various bank accounts with the bank. It emerges that Laser Printers (Pty) Ltd has been funding the election campaigns of ZANU-PF (a political party in Zimbabwe). The media reports that Laser Printers (Pty) Ltd has been using its bank accounts with First National Bank to warehouse money destined for ZANU-PF thereby continuing to further ‘a corrupt and oppressive regime.’

When the bank discovers this information it decides to sever all ties with Mr Khumalo and Laser Printers (Pty) Ltd. On 10 August 2010, the bank notifies Mr Khumalo that they will be closing all bank accounts both in his name and in the name of Laser Printers (Pty) Ltd with effect from 1 September 2010. The bank advises Mr Khumalo to make alternate banking arrangements. After the bank accounts are closed on 1 September 2010, the bank issues the following statement to the media:

‘In light of recent events, we have decided to sever all ties with Mr Khumalo and his company, Laser Printers (Pty) Ltd. Mr Khumalo was a prominent client of the bank who had millions of rands in his various bank accounts with us. We were not aware, however, that the bank accounts were used to fund the activities of ZANU-PF’

Mr Khumalo is upset about the fact that the bank has closed the bank accounts and has published this information. He is particularly concerned about the fact that no other bank will now accept him as their client. Advise him on the legal position and on all of his rights in the above matter.
SECTION C  (20 marks)

ANSWER ALL THE QUESTIONS IN THIS SECTION

QUESTION 1  (10 marks)

Trump National (Pty) Ltd is contemplating doing business with Hilton (Pty) Ltd. The transaction in question could potentially involve thousands of rands and Trump National (Pty) Ltd requires certain information about the general financial standing of Hilton (Pty) Ltd before entering into the transaction. Trump National (Pty) Ltd approaches its bank (Nedbank) with a view to obtaining a general banker's report on Hilton (Pty) Ltd (You can assume for the purposes of this question that Hilton (Pty) Ltd is a customer of ABSA Bank and that Hilton (Pty Ltd has consented to the furnishing of the banker’s report). Nedbank obtains a report from ABSA Bank which reads as follows:

‘Hilton (Pty) Ltd is trading normally and should be able to meet all of its financial commitments in the ordinary course of business’

On the strength of this report, Trump National (Pty) Ltd agrees to do business with Hilton (Pty) Ltd. It subsequently emerges that Hilton (Pty) Ltd was in financial trouble for several months before the transaction was concluded and was basically surviving on the substantial overdraft and credit facilities provided to it by ABSA Bank. Because Hilton is unable to pay what it owes Trump National (Pty) Ltd the company suffers significant financial loss. Explain fully whether Trump National (Pty) Ltd can hold ABSA Bank delictually liable for furnishing the incorrect banker’s report

QUESTION 2  (2 marks)

Mr De Kock is a practising attorney who has a personal current account and savings account with Standard Bank. As per the requirements of the Attorneys Act 53 of 1979, Mr De Kock also maintains a separate trust banking account with the same bank. It appears that Mr De Kock’s personal current account is substantially overdrawn but his attorney’s trust account reflects a credit balance. Explain, with reference to the provisions of the Attorneys Act 53 of 1979, whether the bank can appropriate money from the trust banking account to pay the debt owed in respect of Mr De Kock’s personal account.
QUESTION 3 (8 marks)

Peter Poonsamy receives a post-dated order cheque from one of his debtors. The cheque is drawn payable to ‘Pieter Moonsamy’. Explain whether Peter will qualify as the holder of the cheque and whether he can qualify as a holder in due course.

Assume that Peter received the cheque in payment of a gambling debt owed to him and that he now wants to negotiate the cheque to Jack Daniels pursuant to a valid contract of sale between the parties. What must Peter do in order to validly negotiate the cheque to Jack? If he negotiates the cheque will Jack qualify as a holder in due course? Explain.

Please note that in answering the parts dealing with the holder in due course you must only discuss the element/elements which might be in issue. Furthermore, you need not concern yourself with the issue of whether any indorsement made by Peter will render the instrument ‘irregular’.

SECTION D (20 marks)

ANSWER ALL THE QUESTIONS IN THIS SECTION

QUESTION 1 (10 marks)

Write a note in which you critically discuss South Africa’s Code of Banking Practice. Your note should consider and provide answers to the following questions:

- Is there a need for a Code of Banking Practice?
- Are the provisions of the Code of Banking Practice legally enforceable?
- Can a provision of the Code of Banking Practice be construed as forming a tacit term in the relationship between the bank and its customer?
- What role does the Ombudsman for banking services play in enforcing the Code of Banking Practice?

QUESTION 2 (3 marks)

Explain the effect of the following marking appearing on the face of a cheque:
QUESTION 3  (7 marks)

Chancer has a deposit account with Nedbank. With a view to obtaining a higher return on his investment, Chancer approaches the bank for financial advice on 10 January 2010. He is referred to the manager of the bank’s specialist broking division (Mr Liability) who has over 29 years of experience in the broking profession. Chancer tells Mr Liability that he wants to redeem his investment at the end of October as he wants to use whatever profit he makes to pay for his daughter’s wedding. Mr Liability advises Chancer to take R 500 000 out of his deposit account and invest this money in a particular off-shore investment. Chancer agrees and the money is subsequently invested in the off-shore investment. On 30 October 2010, Chancer tries to redeem his investment but he discovers that the capital amount has actually decreased to R 350 000. He complains to the manager of the broking division but is told that off-shore investments cannot be made on a short-term basis and that ‘one needs to have patience in order to obtain better returns’.

Chancer now approaches you for legal advice. He wants to know whether he can sue Nedbank for furnishing him with incorrect advice regarding the off-shore investment. Advise him.