Answers

Section A

1 A
2 A
3 A
4 A
5 C
6 A
7 D
8 B
9 B
10 B
11 C
12 D
13 C
14 B
15 A
16 C
17 A
18 A
19 A
20 A
21 A
22 A
23 A
24 B
25 A
26 A
27 C
28 B
29 A
30 A
31 A
32 B
33 B
34 A
35 C
36 C
37 A
38 C
39 A
40 B
41 B
42 A
43 B
44 B
45 B

Section B

1 (a) The facts of the problem indicate that Cathy does not want visibility in any way in relation to the partnership. A partnership *en commandite* would best suit Cathy's wishes and circumstances. It is a partnership in which business is to be carried on in the name of one partner only, but to which the undisclosed partner or partners contribute a specific sum of money. The partners agree that the undisclosed partner is to have a share of the profits, if any, and to bear losses, if any, but in no case is their liability to exceed their specific contribution. Cathy has contributed $20,000 in the business and her entitlement to profits and level of liability are dependent upon the level of her interest in the partnership. Like anonymous partnerships, the sleeping partners are not liable to third parties but only to the disclosed partner and they are liable only to the extent of their contribution. The limited liability of the sleeping partners in an anonymous partnership or a partnership *en commandite* is lost if their names are disclosed, or if they carry on partnership business openly. (*Lamb Brothers* v *Brenner and Company (1886)*)

In conclusion it can be said that since Cathy does not want open involvement with the partnership, she can 'invisibly' participate as a sleeping partner or partner *en commandite*.

(b) A partnership comes to an end on the death of any one partner. But the partners may expressly agree that, in the event of the death of a partner during the partnership term, the partnership will not be dissolved but will continue for the full term *(Dickinson & Brown* v *Fisher's Executors (1916)*. The surviving partners can reconstitute themselves into a new partnership. In light of Limu's death, the partnership is automatically ended but Christopher and Victor can reconfigure a new partnership.

2 **(a)** The issue to be discussed relates to the remedy of specific performance for Adam as a result of the failure by Mukwa to fulfil the order to supply furniture to Adam. As a general rule the right to specific performance is not absolute. The court will not order the defendant to perform specifically if it would be impossible for them to do so, whether the impossibility is accidental or due to the fault of the defendant. In *Shakinovsky* v *Lawson & Smulowitz (1904)*, for example, a purchaser sued for specific performance of a contract of sale (transfer of property). It was established that transfer was impossible, as the seller had disposed of the subject matter of the sale to a *bona fide* third party. The court held that it could not grant an order for specific performance. So the buyer was entitled only to damages for the loss suffered. Each case is judged in light of its own circumstances *(Hynes* v *King Williamstown Municipality (1951)*. The cardinal principle which the court is obliged to follow is that it must refrain from ordering performance if this would produce a result that is inequitable or contrary to public policy *(Benson* v *SA Mutual Life Assurance Society (1986))*.

In conclusion it should be noted that since Mukwa is unable to effect specific performance because the furniture is no longer available, the most viable remedy available to Adam are damages.

(b) The issue of lost profits relating to the $40,000 and $100,000 involving Adam falls under the realm of consequential damages. Consequential damages are not always recoverable as a matter of right. Their availability is dependent upon clearly defined rules. The law makes a distinction between 'general damages' and 'consequential damages.' Lost profits are treated as consequential damages when, as a result of the breach of contract, the innocent party has a loss on other business arrangements. *(Gloria's Caterers (Pty) Ltd t/a Connoisseur Hotel* v *Friedman (1983))* In *Victoria Falls* v *Transvaal Power Co. Ltd* v *Consolidated Langlaagte Mines Ltd (1915)* Innes CJ said 'such damages only are awarded as flow naturally from the breach, or as may reasonably be supposed to have been in the contemplation of the contracting parties as likely to result therefrom... Moreover, it is the duty of the complainant to take all legal steps to mitigate the loss consequent on the breach ... It follows that damage for loss of profits can only be awarded when such loss is the direct, natural or contemplated result of non-performance.'

In other cases, however, where the profits are necessarily speculative, contingent or conjectural, our law refuses to take them into consideration. If however, it can be proved to the court that the profits were reasonably to be expected, and would certainly have been realised, but for the breach of contract, they form as much a part of the damages as any other loss.

To conclude, it is quite clear that the loss of profits by Adam relating to the amounts of $40,000 and $100,000 respectively can be presumed to have been within the reasonable contemplation of the parties when the contract was concluded. That being the case Adam is likely to be in a position to recover the two figures that constitute loss of profits.

3 **(a)** The proposed action by Nelion and Limukani to petition the courts to force the company to declare dividends is extremely bad in law. Dividends may be declared at the discretion of the directors. Article 117 Table A Companies Act, Chapter 24:03 provides that the directors, before recommending any dividend, may set aside out of the profits of the company, such sums as they think proper as reserves or reserves which shall at the discretion of the directors, be applicable for any purpose to which the profits of the company may be properly applied and pending such application may at their discretion, either be employed in the business or be invested in such investments .....

In *Buenos Ayres Southern Railway Company* v *Preston (1947)*, after incurring heavy losses on its trading account for several years, a company made profits in one year sufficient to pay full dividends on preference shares. The directors however, considered that it would be unwise to pay such dividends and decided to transfer the profits to reserve. The court held that the directors had the power to do that.

Therefore Nelion and Limukani cannot compel the company through court action to declare a dividend, notwithstanding the fact that the company realised some profits in its trading operations during the period 2011-2013.

(b) Since Limukani holds preference shares, he has a right to cumulative dividend. Preference shares confer on holders, preference over other classes of shareholders in respect of either dividends, repayment of capital or both. Preference shares are usually cumulative unless the articles or terms of issue state otherwise. In respect of Nelion, since he is an ordinary shareholder he has no entitlement to a cumulative dividend.

(c) A debenture holder like Tino is usually a secured creditor. The liability of the company is fixed and is not dependent upon whether or not the company is making a profit. Both the interest and the capital must be repaid when they fall due.

4 **(a)** Out of the four proposed resolutions the following are special resolutions:

(i) Resolution 1, increase in the share capital, s.87.
(ii) Resolution 3, change of company name, s.25.

Ordinary Resolutions

Resolutions 2 and 4

Special resolutions are passed at meetings held on 21 days notice in terms of s.133 Companies Act, Chapter 24:03. It must be passed by a majority of 75% of members entitled to attend and vote.

Ordinary resolutions require a simple majority to be passed and unless it is an ordinary resolution with a special notice the period of notice is 14 days.

(b) The agenda suggests that the proposed meeting was an Extraordinary General Meeting. The usual business to be considered at an Annual General Meeting is

- approving accounts
- appointment/reappointment of directors and auditors
- fixing auditors remuneration and director's remuneration
- declaration of a final dividend of the year.

5 Insider dealing involves information which relates to the securities themselves or to the state of the company which issued them. The information must be specific and precise and in addition, the information must not be in the public domain. If the information had been made public it would be likely to have a significant effect on the price of the securities, for example, falling or rising profits or decisions to pay a higher dividend than expected or a lower one or no dividend at all.

(a) In terms of the definition of insider dealing George as an insider is liable for insider dealing.

(b) Ernest has had access to insider information through George and is equally liable.

(c) Tanya's participation does not fall within the definition of insider dealing and therefore she is not liable for the offence of insider dealing.

Section A

1–45 One or two marks per question. Total marks 70.

Section B

1 **(a)** 3 – 4 marks A good answer must accurately define a partnership *en commandite*.
1 – 2 marks An average answer.

(b) 1 – 2 marks Correct answer which shows that upon the death of a partner, the partnership is automatically dissolved.

2 **(a)** 1 – 2 marks Correct answer discusses why specific performance is unlikely to be available.

(b) 3 – 4 marks A good answer that correctly discusses the concept of loss of profits arising out of breach and whether or not such damages are foreseeable.

1 – 2 marks A lukewarm answer.

3 **(a)** 1 – 2 marks A correct answer.
0 marks An incorrect answer.

(b) 1 – 2 marks A correct answer.
0 marks An incorrect answer.

(c) 1 – 2 marks A correct answer.
0 marks An incorrect answer.

4 **(a)** 3 – 4 marks A correct answer would accurately identify special resolutions from ordinary resolutions. The respective notice periods would be accurately stated.

1 – 2 marks An average answer.

(b) 1 – 2 marks The correct answer would show that the agenda suggests that this was an Extraordinary General Meeting as opposed to an Annual General Meeting.

5 **(a)** 1 – 2 marks A correct answer.
0 marks An incorrect answer.

(b) 1 – 2 marks A correct answer.
0 marks An incorrect answer.

(c) 1 – 2 marks A correct answer.
0 marks An incorrect answer.