
Answers

Section A

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

Section B

- 1 (a) This question requires candidates to explain whether there was a valid offer.

A valid offer must set out the essential and material terms of the envisaged contract. The mere acceptance of such terms would then create legal consequences which were certain or ascertainable. In other words, an offer must be complete and definite: *Benkenstein v Neisius* (1997). The advertisement made by Dimpho fails to meet this requirement. This is because an essential term of the envisaged contract is absent which is the price for the proposed sale of the house. Dimpho is in essence inviting offers on her property and was not making an offer. Lame cannot sue for breach of contract as there was no valid offer to accept.

- (b) This question requires candidates to discuss the legal consequences of an offer.

A contractual offer does not of itself create rights and duties between the offeror and the offeree. It only gives rise to an expectation or a hope of a future right. This is because, by accepting the offer, the offeree has the capacity to create the

obligations envisaged by the offer. An offer therefore has limited legal consequences. Because it does not create legal consequences, it may be revoked, it will lapse upon the death of the offeror and it cannot be ceded since it does not form part of the patrimony of the offeror or the offeree.

- 2 (a)** This question requires candidates to discuss the legal nature of pre-incorporation contracts.

David is advised that he is personally liable on the contract with Horizon Properties. Before a company is incorporated, it has no legal existence. Accordingly, it has no capacity to enter into a contract. The company cannot sue or be sued on a pre-incorporation contract. However, persons who conclude contracts for the unborn company can be held personally liable on such contracts. In *Kelner v Baxter* (1866), it was held that since the company was not in existence at the time of the agreement, the company could not be held liable for the cost of the wine purchased by the company promoter 'for and on behalf' of the unborn company.

- (b)** This question requires candidates to discuss the provisions of s.179 Companies Act 2003 on prerequisites for the enforceability of pre-incorporation contracts.

DP Foods are advised that they are not liable on the contract.

In terms of s.179 Companies Act 2003, a company can incur liability on a pre-incorporation contract only if certain requirements are met. First, the contract must be in writing; second, it must have been entered into by a person who professed to act as agent or trustee of the unborn company; third, the contract or a certified copy must be delivered to the Registrar simultaneously with the delivery of the application for incorporation and fourth, the company must actually adopt or ratify the contract after its incorporation. Since these four steps were not carried out by the promoters of DP Foods, it is not possible to fix liability for unpaid rentals on the company. See *TL Investments (Pty) Limited v Molefe* (1985).

- 3 (a)** This question requires candidates to explain if there has been a breach of directors' duties.

Kitso's conduct is in breach of his duties as a director. In terms of s.130 Companies Act 2003, directors have a duty not to make use of confidential information received by them on behalf of the company for their own personal gain. Further, directors have a duty not to compete with the company or become a director of a competing company without approval of the company. These rules exist in common law as well. In *Robison v Randfontein's Estates* (1921), the court held that a director has a duty not to place himself in a position of conflict of interest with his company. By advising his wife to take advantage of an opportunity which he came to know through his position, Kitso acted contrary to the provisions of the Companies Act.

- (b)** This question requires candidates to discuss remedies available to the company.

The company may bring an action for breach of directors' duties in terms of s.130 (7) as read with s.166 Companies Act 2003. Such an action would be for damages. Directors' duties are owed to the company itself in terms of s.130 (5) Companies Act 2003. Any action for damages ought to be brought by the company. A derivative action may also be brought by a shareholder or director on behalf of the company in the event that it is unable or unwilling to sue. Kitso would then be required to account for the secret profit which he has made. See *Regal (Hastings) v Gulliver* (1967).

- 4 (a)** This question requires candidates to explain the most secure investment option.

The most secure investment option of the three is the debenture with a fixed charge. This is because should the company default on the repayments, the debenture holder can make a claim on the assets of the issuing company until the money is repaid in full. The debenture with a floating charge would be the next in line in offering security. The ordinary share offers the investor no security. The investor must await the end of the financial year in order to learn if the company has made any profit and if the company intends to declare a dividend.

- (b)** This question requires candidates to explain the meaning of a floating charge.

A floating charge gives a person who has made a loan to a company rights over the company's assets. The company, however, retains the right to deal with such assets in the ordinary course of business. In order to be certain of the assets over which he has a charge, a lender must wait until his floating charge crystallises. Whatever assets are available at the point of crystallisation are the assets which the lender will have a charge over.

- 5 (a)** This question requires candidates to properly identify the offence committed.

In terms of s.324 Companies Act 2003, it is an offence to deal with securities on the basis of unpublished price sensitive information.

- (b)** This question requires candidates to discuss legal remedies available to investors who have suffered losses as a result of insider dealing.

Insider dealing occurs when a person trades in securities when he is in possession of unpublished price sensitive information which the other party to the transaction is unaware of. Generally, such a person would have obtained unpublished price sensitive information by virtue of a relationship of trust or other contractual relationship, through fraud, or theft or other wrongful method. Such a person would then seek to exploit such information for their own benefit and at the expense of other parties with whom they transact. The law seeks to regulate such conduct by criminalising insider trading and other forms of market abuse like fraudulent inducement to invest, making of false statements and false transactions, distributing misleading documents with a view to fraudulently inducing others to invest in securities and stock market manipulation. These offences are listed in ss.324–328 Companies Act 2003.

Dumelang has been the victim of insider dealing perpetrated by Zainab. In addition to criminal liability, Zainab will be liable to Dumelang under s.324(4) Companies Act 2003 for the amount of loss incurred by him by reason of her fraudulent transaction.

Section A

1–45 One or two marks per question, total 70 marks.

Section B

- 1 (a)** This question requires candidates to explain whether there was a valid offer.
- 2–3 A concise answer showing thorough understanding of the material.
 - 0–1 An insufficient answer showing unsatisfactory grasp of the material.
- (b)** This question requires candidates to discuss the legal consequences of an offer.
- 2–3 A concise answer showing thorough understanding of the material.
 - 0–1 An insufficient answer showing unsatisfactory grasp of the material.
- 2 (a)** This question requires candidates to discuss the legal nature of pre-incorporation contracts.
- 2–3 A complete answer with adequate explanation.
 - 0–1 An incomplete answer with inadequate explanation.
- (b)** This question requires candidates to discuss the provisions of s.179 Companies Act 2003 on prerequisites for the enforceability of pre-incorporation contracts.
- 2–3 A detailed answer discussing the relevant provisions.
 - 0–1 A partial answer with inadequate explanation.
- 3 (a)** This question requires candidates to explain if there has been a breach of directors' duties.
- 2–3 A complete answer with adequate understanding of the relevant rules.
 - 0–1 An incomplete answer with inadequate explanation.
- (b)** This question requires candidates to discuss remedies available to the company.
- 2–3 A detailed answer explaining the remedies.
 - 0–1 A partial answer with an unsatisfactory explanation.
- 4 (a)** This question requires candidates to explain the most secure investment option.
- 2–3 A complete answer explaining the most secure option.
 - 0–1 An incomplete answer with inadequate explanation.
- (b)** This question requires candidates to explain the meaning of a floating charge.
- 3–4 A detailed answer discussing a floating charge.
 - 0–2 A partial answer with inadequate explanation.

- 5 (a)** This question requires candidates to properly identify the offence committed.
- 2 A complete answer with identification and adequate explanation of the offences.
 - 0-1 An incomplete answer with improper identification and inadequate explanation.
- (b)** This question requires candidates to discuss legal remedies available to investors who have suffered losses as a result of insider dealing.
- 3-4 A detailed answer explaining available remedies.
 - 0-2 An inadequate answer with partial explanation.