
Answers

Section A

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

Section B

- 1 (a) Lucy and Marius entered into a contractual agreement, and Marius has clearly failed to comply with its terms. Although he built a tower, his performance in fulfilling the contract has been defective in that he has failed to comply with the fundamental term that it had to be built to the height required, i.e. 12 metres. There is therefore no doubt that Marius is in breach of contract. The only question relates to the remedies which are available, and likely to be awarded, to Lucy. The two relevant remedies in this regard are specific performance and damages.
- (b) **Specific performance**
The first issue to deal with is the matter of specific performance. The aim of a claim for specific performance is to force the defaulting party, by an order of court, to render performance in the very terms agreed upon by the parties. In terms of such an order, the party who commits breach of contract is forced to deliver or manufacture an object of a specific quality and to pay damages as surrogate for performance.
- Considerable uncertainty surrounds orders of specific performance of obligations arising from contracts which involve the rendering of services. The courts in the past have also been reluctant to grant specific performance in respect of obligations

arising from *locatio conductio operis* (the putting out of work on contract) such as where a builder has undertaken to do alterations to a house or where a lessor is bound to repair the leased property. This approach stemmed from the consideration that it would be difficult for a court to supervise the execution of its order for specific performance. It would thus seem very unlikely that the court will grant an order for specific performance in the circumstances of the question.

Claim for damages

The next aspect deals with the potential claim for damages. In deciding what damages are to be paid for breach of contract, the courts employ a number of rules and principles to guide their action. These rules influence the recoverability of damages as well as the extent of the claim which could make it difficult and sometimes even impossible for the injured party to succeed with such a claim. These various rules may be considered under two headings: the rules relating to remoteness of damage and rules relating to the measure of damages. It would appear that Lucy would only be entitled to the difference between the value of the tower provided and the value of the tower which she had contracted for, i.e. R1,000.

- 2 (a) The *essentialia* of a partnership agreement are:
- Each partner must make a contribution.
 - The object should be to make a profit.
 - The partnership should be carried on for the joint benefit of the parties.
- (b) The main object of the parties must be to procure patrimonial benefit. This benefit is usually referred to as 'profit'. Patrimonial benefit, however, is much wider than the narrow accounting definition of 'profit', because it also includes the avoidance of a financial loss or the reduction of expenses. If the parties to the enterprise are not interested in making a profit but have another objective, such as the advancement of culture or sport, no partnership is formed. In this set of facts the main purpose is to provide a shelter. The purpose is not to make a profit to be divided between the partners. This is therefore not a valid partnership agreement as one of the essential requirements is not present.
- 3 (a) If the company does not really need the equipment or if they pay much more than its real value, then this will constitute financial assistance.
- (b) The answer will not be different. It will still qualify as financial assistance if the company did not need the equipment or pay more than its real value. Section 44(2) Companies Act, 2008 specifically states that financial assistance will be provided if issued by the company or a related or inter-related company. A subsidiary is a related company.
- (c) In terms of s.44 Companies Act, 2008, a company can give financial assistance for the acquisition of the company's securities if:
- The board is satisfied that immediately after providing financial assistance, the company would still satisfy the solvency and liquidity test and the terms under which the financial assistance is proposed to be given are fair and reasonable to the company. The board must also ensure that the conditions set out in the company's memorandum of incorporation have been satisfied. The provision of the assistance is also pursuant to a special resolution of the shareholders, adopted within the previous two years approving such assistance specifically or in general terms.
- 4 (a) The common law duties of directors are the fiduciary duties of good faith, honesty and loyalty and the duty of care, skill and diligence. The Companies Act (CA), 2008 now also partially codifies the duties of directors in ss.75 and 76. The common law is, however, still applicable unless specifically excluded in CA. The definition of a 'director' is provided in s.1 CA and it seems wide enough to include executive, non-executive, *de facto* and *de jure*, alternate, nominee and *ex officio* directors. The duties are applicable to all directors. There is therefore no distinction between executive and non-executive directors (see also *Howard v Herrigel* (1991) in this regard).
- (b) Yes, Joe can be held liable for damages based on a breach of his duty of care, skill and diligence. The test is a dual one, being subjective as well as objective. Since he is a financial expert, more is expected from him in respect of financial decisions of the board.
- (c) In principle, there is no distinction made between executive and non-executive directors when applicability of duties is considered (*Howard v Herrigel NNO*), but when judging the director's conduct, it is a factor which may be considered.
- 5 (a) Inside information is defined in the Financial Markets Act, 2012 as being specific or precise information which has not been made public and which is obtained or learned as an insider; and if it were made public, would likely to have a material effect on the price or value of any securities listed on a regulated market (see s.77). In this set of facts the information meets all these requirements.
- (b) An insider is a person who obtains inside information due to *inter alia* being an employee of the company. Ruth had inside information and was employed by the company. Ruth was therefore an insider because she is employed by the company. However, Sam was not an insider because he had no inside information.

- (c) An insider who knows that he or she has inside information and who deals directly or indirectly or through an agent (e.g. a stockbroker) for his or her own account in the securities listed on a regulated market to which the information relates or which are likely to be affected by it, commits an offence (see s.78 Financial Markets Act in this regard). Ruth therefore clearly committed an offence by selling her shares.

Section A

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

Section B

- 1**
 - (a)** One mark for each relevant point made relating to the relevant remedies, up to a maximum of two marks.
 - (b)** Two marks for each relevant point made relating to the application of specific performance and damages as possible remedies. A maximum of four marks can be awarded.

- 2**
 - (a)** One mark for each relevant point made relating to the essential elements of a partnership. A maximum of two marks can be awarded.
 - (b)** One mark for each relevant point made relating to the application of the essential elements to the facts in question. A maximum of four marks can be awarded.

- 3**
 - (a)** One mark for each relevant point made relating to whether this specific set of facts will qualify as financial assistance. A maximum of two marks can be awarded.
 - (b)** One mark for each relevant point made relating to the provision of financial assistance to a subsidiary company. A maximum of two marks can be awarded.
 - (c)** One mark for each relevant point made relating to the valid provision of financial assistance by a company for the acquisition of its shares. A maximum of two marks can be awarded.

- 4**
 - (a)** One mark for each relevant point relating to the duties of directors and how it applies to non-executive directors. A maximum of two marks can be awarded.
 - (b)** Two marks for explaining whether, and on what basis, Joe can be held liable for damages.
 - (c)** One mark for each relevant point on the differences between an executive and non-executive director, to a maximum of two marks.

- 5**
 - (a)** One mark for each relevant point on the definition of inside information, a maximum of two marks can be awarded.
 - (b)** Two marks for applying the definition to the facts relating to Ruth and Sam.
 - (c)** One mark for each relevant point relating to the criminal liability of Ruth, a maximum of two marks can be awarded.