
Answers

Section B

- 1 (a) This question requires candidates to define an exclusion clause.

An exclusion clause is defined as a term limiting the liability of a party for misrepresentation or for breach of contract or limiting the liability of a party imposed by implied contractual terms.

- (b) This question requires candidates to discuss the enforceability of the exclusion clause.

The exclusion clause in the receipt signed by Zibane is enforceable. Exclusion clauses are a manner of limiting liability and they are enforceable provided that they are not against public interest, they are not fraudulent and they do not excuse a party from liability for intentional breach of contract. In this case, Zibane signed the receipt signalling acceptance of the terms and conditions under which her parcel would be transported. It is no defence to claim that she did not read the fine print. She is obliged to familiarise herself with the contents of the receipt before she signs it. The courier company was under no obligation to point out the clause to her. *Parker v South Eastern Railway* (1877). It can be argued that such clauses limiting liability in carriage are standard and to be expected in transactions of that nature. Zibane cannot argue that the courier had an obligation to point out the clause to her. In the absence of fraud or an attempt to avoid liability for an intentional breach of contract, Flamingo Couriers' liability is limited to P100 in terms of the exclusion clause *Afrox Healthcare BPK v Strydom* (2002).

- 2 (a) In order to render the partnership liable on the transaction, Thabo must prove three things. First, that Gillian had ostensible authority to bind the partnership. This requires proof that Gillian was held out to be a member of the partnership; that Gillian had authority to bind the partnership and that Gillian concluded the contract in the name of the partnership.

With respect to the first requirement, Thabo can establish that Gillian was held out to be a member of the partnership by Ahmed. Ahmed by his conduct held Gillian out to be a partner in his business by informing Thabo that Gillian would negotiate the contract. Thabo is justified in thinking that Gillian had authority to act on behalf of the partnership. With regard to the second requirement, Thabo can argue that Gillian had ostensible authority to bind the partnership. This authority arises from the fact that Gillian was held out by Ahmed as having the requisite power to conclude the contract on behalf of the partnership. With regard to the third requirement, Gillian concluded the contract in the name of the partnership being Office Supplies. Thabo is advised that he can successfully sue the partnership.

- (b) Since the partnership is still in existence, Thabo will be required to sue the partnership. The judgement will be given against the partnership and not against any of the partners individually – *Standard Bank of SA Ltd v Pearson* (1961). However, since partnerships have no limited liability, once execution has been effected against partnership assets for the P100,000, any unpaid amounts will be levied against the private assets of the partners as if the judgement had been entered against them *Matterson Bros v Rolfes, Nebel and Co* (1915).

- 3 (a) Amantle held a floating charge over movable assets of High Returns (Pty) Limited. A floating charge is a claim over the present or future property of a company: *Re Yorkshire Woolcombers Association Limited* (1903). By its nature, a floating charge allows the owner of the assets to deal with them in the normal course of business. The borrower is at liberty to sell the assets subject to a floating charge during the duration of the charge. This is because the floating charge only attaches to specific assets on the date of crystallisation, that is, the date when the charge matures. In Amantle's case, the loan period expired meaning that her charge over the company's movable assets had crystallised. It is at this point that Amantle should make a claim against the company's movable assets. Unfortunately for her, the assets have been sold and there is no security for her loan. Amantle is advised while she can still sue for the repayment of the capital and interest on her loan but she will be unable to rely on the floating charge as there are no movable assets which the charge may attach to.

- (b) With respect to the fixed charge over the land and buildings, Masego is advised that she ought to have ensured that a mortgage bond in terms of the Deeds Registry Act was registered against the land and buildings in order to secure her interest in them. At the time of bond registration, it would have become apparent that High Returns (Pty) Limited was not the owner of the land and buildings and could not therefore borrow against the fixed asset. Masego's fixed charge has no legal force and effect as it was unregistered and in any event it was over property which did not belong to the borrower. Masego can claim repayment of the loan and interest but she cannot rely on the fixed charge over the land and buildings as security.

- 4 (a) This question requires candidates to discuss the director's duty not to use corporate opportunity, property or information to make a secret profit.

Pascal's conduct is unlawful. It is in breach of s.130(f) and (g) Companies Act, 2003 which prohibit use of company opportunity, property or information for unlawful purposes. In terms of the common law, the director is in a fiduciary position in relation to the company. He must not use corporate opportunity, property or information to make a secret profit. A director

who makes a secret profit must account for the profit to the company. It is possible for the company in general meeting to ratify the decision of the board and consent to the profit being made. In *Robinson v Randfontein Estates* (1921), a director bought a farm in his private capacity, then sold it to the company in which he was a director making a substantial profit. He did not disclose his interest in the transaction nor did he disclose the profit he made. When the company discovered the transaction, the company sued the director to recover the secret profit. The court held that the defendant director was in breach of his duty to disclose his interest in a contract with the company and a duty to disclose the profits he had made.

(b) This question requires candidates to discuss remedies available to the company where a director has breached their duty to the company.

- (i) The company can obtain an interdict to stop directors acting on a resolution to purchase the land.
- (ii) The company can sue the director in delict for damages arising out of his wrongful use of corporate opportunity and information.
- (iii) The company can sue for rescission of the contract particularly because there has been a non-disclosure of the transaction to the company.
- (iv) The company can sue demanding that the director account for the secret profits made.
- (v) The company can sue for restoration of company property where the property is traceable, or compensation where restoration of company property is not possible.
- (vi) The company can pass a resolution dismissing the director from office. In terms of s.151 Companies Act, 2003, a private company would have to pass a special resolution while a public company would have to pass an ordinary resolution.

5 (a) This question requires candidates to discuss the offence of corruption under the Corruption and Economic Crime Act, 1994.

Faizal has committed the offence of corruption. In terms of s.31(1) Corruption and Economic Crime Act, 1994, 'a member or an employee of a public body is guilty of corruption if he or an immediate member of his family has a direct or indirect interest in any company or undertaking with which such body proposes to deal, or he has a personal interest in any decision which such body is to make, and he, knowingly, fails to disclose the nature of such interest, or votes or participates in the proceedings of such body relating to such dealing or decision.'

Faizal's wife has a direct interest in Plastic Pipe's bid for the tender. Faizal has failed to disclose the nature of his wife's interest. He goes on to vote and participate in the decision of the tender board. As secretary of the board, he is aware or can be deemed to be aware of the need to disclose an interest. Faizal influences the board to appoint his wife's company as the supplier of the required pipes. His conduct is corrupt.

(b) This question requires candidates to cite what defence is available to a charge of corruption.

The defence advanced by Faizal will not suffice. In terms of s.31(2) Corruption and Economic Crime Act, 1994, it is a defence to a charge of corruption to state that the person having an interest has first made in writing to the public body the fullest disclosure of the exact nature of his interest and has been permitted thereafter to take part in the proceedings relating to such dealing or decision.

In this case a disclosure is not enough. Without permission to take part in the tender proceedings, the disclosure alone will not suffice. Since no permission was granted, Faizal's defence must fail.

Section B

- 1 (a)** This question requires candidates to define exclusion clauses.
- 1–2 A concise answer showing thorough understanding of the material.
0 An insufficient answer showing unsatisfactory grasp of the material.
- (b)** This question requires candidates to state grounds upon which exclusion clauses are not enforced.
- 2–4 A concise answer showing thorough understanding of the material.
0–1 An insufficient answer showing unsatisfactory grasp of the material.
- 2 (a)** 3–4 A concise answer showing clear understanding of principles governing partners' authority.
0–2 A weak answer with poor understanding of relevant legal principles.
- (b)** 2 An accurate answer citing the relevant legal principles.
0–1 An inaccurate answer showing uncertainty regarding relevant principles.
- 3 (a)** 2–3 An answer thoroughly traversing the meaning and application of floating and fixed charges.
0–1 An inaccurate answer displaying inadequate understanding of relevant material.
- (b)** 2–3 An answer thoroughly traversing the meaning and application of floating and fixed charges.
0–1 An inaccurate answer displaying inadequate understanding of relevant material.
- 4 (a)** This question requires candidates to discuss the director's duty not to use corporate opportunity, property or information to make a secret profit.
- 3–4 A complete answer explaining the duty.
0–2 An incomplete answer with inadequate explanation.
- (b)** This question requires candidates to discuss remedies available to the company where a director has breached their duty to the company.
- 1–2 A detailed answer discussing available remedies.
0 A partial answer with inadequate discussion.
- 5 (a)** This question requires candidates to discuss the offence of corruption.
- 2–3 A complete answer with identification and adequate explanation of the offence.
0–1 An incomplete answer with improper identification and inadequate explanation.
- (b)** This question requires candidates to discuss the legal defence to the offence of corruption.
- 2–3 A detailed answer explaining the legal defence.
0–1 An inadequate answer with partial explanation.