
Answers

Section B

- 1 (a) Section 21 Companies Act 2008 now regulates the position concerning pre-incorporation contracts. In terms of this section, a person may enter into a written agreement in the name of, or purport to act in the name of, or on behalf of an entity which is yet to be incorporated. A pre-incorporation agreement is defined in s.1 as 'an agreement entered into before the incorporation of a company by a person who purports to act in the name, or on behalf of, the company, with the intention or understanding that the company will be incorporated, and will therefore be bound by the agreement'. There are no formal requirements to conclude a s.21 contract, except that it has to be in writing. It is therefore possible for Andre, based on s.21, to conclude a contract, and more specifically a lease agreement, even though the company has not been incorporated yet.
- (b) The common law is not excluded by s.21. Personal liability does not follow automatically in terms of the common law, as in s.21. Subsection (2) provides that a person doing anything contrary to subsection (1) is jointly and severally liable with any other such person for liabilities created as provided for in the pre-incorporation contract. Since there are no formal requirements which must be met for a s.21 contract to be valid, except that it must be in writing, it can sometimes be difficult to determine whether the s.21 construction was used. It is important to be clear on this as, seen from the above discussion, the personal liability of the promoter under the common law differs from that in terms of s.21.
- 2 (a) Dana, the owner of the dental practice, cannot terminate the contract as the exclusion clause protected the seller from the liability. By signing the agreement, Dana had agreed to all the terms included in it even though she had not read them. Furthermore, if the exclusion clause in the agreement is very clear, comprehensive and unambiguous, there is no reason why Dana should not be bound by it. That is a matter of interpreting the wording of the particular contract.
- (b) The fact that the agreement is reduced to writing brings the parol evidence rule (also known as the extrinsic evidence rule or the integration rule) into operation. In terms of this rule, once a contract has been reduced to writing, the written document is the only record of the agreement. The document stands as the only evidence of the terms of the parties' contract. There are, however, a number of exceptions.
- 3 (a) Fiduciaries generally include: trustees, agents, partners, directors and attorneys. The contents of the duty of a fiduciary will vary depending on the specific relationship between the parties. A fiduciary can be said to be a person acting on behalf of another and in the best interests of that person. With regards to directors, it is clear that a director is a fiduciary and their overriding duty is to act in the best interests of the company.
- (b) When a person becomes a director of a company, it is commonly accepted that they owe a fiduciary duty to the company to act *bona fide* and in the best interests of the company. The facts of this scenario are based on that of *Minister of Water Affairs and Forestry v Stilfontein* (2006). The court concluded that the directors had breached their fiduciary duty because they had not 'acted in good faith upon reasonable grounds' when they all suddenly resigned. Their mass resignation resulted in them being unable to fulfill their duties which they owed to the company and its members. A breach will thus be based on the common law, but also on s.76(3) Companies Act 2008. It therefore seems that Eddie will be in breach of his fiduciary duties should he resign as director.
- 4 (a) The only assistance provided in the Companies Act 2008 on the meaning of 'financial assistance' is that it does not include lending money in the ordinary course of business by a company whose primary business is the lending of money and financial assistance includes a loan, guarantee, the provision of security or otherwise (see s.44(1) and (2)).
- (b) A director will be liable for any loss, damage or costs sustained by the company as a direct or indirect result of the director being present at the meeting, or participating in the making of a decision adopted by written consent of a majority of the directors, and failing to vote against the provision of financial assistance, as provided for in s.44 Companies Act 2008. It seems that subjective knowledge on the part of the director is necessary.
- It is not indicated in the facts provided which director was present (and how they have voted) at the meeting where the decision was made to provide Gugu with financial assistance. One will thus have to consider the actions of the various directors on a case by case basis to determine liability.
- 5 (a) Section 424 Companies Act 1973 (which is still applicable) may also be used to impose personal liability. This section empowers a court to hold the directors of a company personally liable for the debts of the company where the business of the company was carried on recklessly with the intent to defraud creditors. The remedy provided by s.424 supplements the common law remedies available against wrongdoers who cause injury by their intentional or negligent acts. In *Ex parte Lebowa Development Corporation Ltd* (1989), it was suggested that obtaining credit for a company without disclosing the risk that the company may not be in a position to repay the loan or that the terms of repayment may not necessarily be honoured, may indeed amount to fraud on the creditor, even if the company's representative honestly believed the risk was

not great. In *Philotex (Pty) Ltd v Snyman* (1998), the creditors successfully used s.424 against directors. In this case the directors of a company (a subsidiary in a group of companies) allowed the insolvent company to keep on trading to create a good impression of the company group. It would thus appear that a strong case can be made for holding Joshua and Kris personally liable for the debts of Good Food (Pty) Ltd. It would appear that the two of them should be held liable as they carried on trading after it was clear that they ought to have known that there was no reasonable chance of the company avoiding insolvent liquidation.

- (b) Section 22 Companies Act 2008 states that a company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose. The effect of a company trading in terms of this prohibited conduct in s.22 is the possibility of the Commission requiring the company to cease carrying on its business or trading.

Section B

- 1** (a) One mark for each relevant point made relating to the statutory pre-incorporation contract, up to a maximum of four marks.
(b) One mark for each relevant point made relating to personal liability when concluding a pre-incorporation contract in terms of s.21. A maximum of two marks can be awarded.
- 2** (a) One mark for each relevant point made relating to the possibility to terminate the agreement in question in terms of the common law. A maximum of four marks can be awarded.
(b) One mark for each relevant point made relating to the parol evidence rule. A maximum of two marks can be awarded.
- 3** (a) One mark for each relevant point made relating to the concept 'fiduciary' in the context of directors' duties. A maximum of two marks can be awarded.
(b) One mark for each relevant point made relating a breach of fiduciary duties. A maximum of four marks can be awarded.
- 4** (a) One mark for explaining the meaning of 'financial assistance', to a maximum of two marks.
(b) One mark for discussing the possible liability of directors when contravening the statutory prohibition on financial assistance. A maximum of four marks can be awarded.
- 5** (a) One mark for each relevant point on liability in terms of s.424 Companies Act 1973, a maximum of four marks can be awarded.
(b) Two marks for explaining the effect of conducting business as prohibited in s.22 Companies Act 2008.