



FACULTY: LAW
MODULE NAME: COMMERCIAL LAW 1A
MODULE CODE: KMR1A11 / COL41A1
ASSESSMENT: EXAM

MEMO

QUESTION ONE

[Terms of a contract]

[Blackboard: Fill in multiple blanks]

1. Michael and Moloi want to start a business that produces and sells hand sanitizers. As Michael is the only one with money to invest in the business, they agree that Moloi will only start drawing a salary once the business makes a profit of at least R 5 000 per month. This is a [**suspensive condition**].
2. Michael and Moloi want to start a business that produces and sells hand sanitizers. As Michael is the only one with money to invest in the business, they agree that Moloi will only start drawing a salary after the passing of five months. This is a [**suspensive timeclause**].
3. Michael and Moloi want to start a business that produces and sells hand sanitizers. They agree that Michael will continue providing start-up capital to fund the business until the lockdown is lifted to a certain extent and the country is on alert level 1. This is a [**resolutive condition**].
4. Manny and Gloria enter into an agreement in terms whereof Manny will revamp and modernise Gloria's kitchen. They agree that should the revamping process not be complete by 12 July 2020, Manny will have to pay R 2 500 to Gloria. This is a [**penalty clause**].
5. Jermaine and Jabu enter into an agreement in terms whereof Jermaine will sell his 1950s vintage Ford Mustang to Jabu. They undertake that should one of them breach this agreement, the other will be able to cancel the agreement immediately. This is a [**cancellation clause**].
6. Gloria undertakes to provide her niece and her niece's fiancé with R 5 000 as a wedding gift upon the conclusion of their marriage at the end of the year. This is a [**suspensive condition**].
7. Noyo and Rihanna agree that Rihanna can work at Noyo's record label for the next six months. This is a [**resolutive timeclause**].
8. Moses agrees to buy Pieter's off-road mountain bike. This transaction is subject to the sale of the mountain bike that Moses currently owns. This is a [**suspensive condition**].
9. Karen undertakes that Ginger may inherit her collection of vintage records when she passes away, as Ginger loves music and has always admired Karen's records. This is a [**suspensive timeclause**].
10. Lenny agrees that Kenny may make use of his extra laptop until his (Kenny's) business takes off and he starts to make a profit. This is a [**resolutive condition**].

QUESTION TWO

[Breach of contract]

[Blackboard: Fill in the blank]

Identify the form of breach of contract in each of the following scenarios:

- 2.1 Annie and Anton enter into an agreement in terms whereof Annie will purchase Anton's car. In terms of their agreement Annie must pay the purchase price of R 50 000 into Anton's bank account by no later than Friday, 29 May 2020. By Saturday morning, 30 May 2020, no payment had been made into Anton's bank account. This form of breach is **[*mora debitoris* / default by the debtor]**.
- 2.2 Annie and Anton enter into an agreement in terms whereof Annie will purchase Anton's car. In terms of their agreement Annie must pay the purchase price of R 50 000 into Anton's bank account by no later than Friday, 29 May 2020. By Saturday morning, 30 May 2020, no payment had been made into Anton's bank account. Annie had repeatedly requested Anton's bank account details but he ever provided same to her. This form of breach is **[*mora creditoris* / default by the creditor]**.
- 2.3 Onalena and Obakeng enter into an agreement in terms whereof Obakeng will rent a room in Onalena's house. They agree that the first month's payment will be R 10 000 – R 5 000 deposit and R 5 000 rent. On the first day of the month, Obakeng pays R 7 000 to Onalena. This form of breach is **[positive malperformance]**.
- 2.4 Mokone and Mohammed enter into an agreement in terms whereof Mokone will deliver a consignment of 10 000 facemasks to Mohammed. In terms of their agreement, the delivery is scheduled for Friday. On the previous Monday, however, Mokone phones Mohammed and informs him that he will no longer be delivering the masks on Friday. In fact, he proceeds to inform Mohammed that he will not be delivering the masks at all. This form of breach is **[repudiation]**.
- 2.5 Eric and Erica are set to get married on Saturday, 6 June 2020. They have entered into a contract with Sugar and Spice Caterers to provide the catering for their wedding. Sugar and Spice Caterers erroneously wrote the date of the wedding down as 16 June, and on Eric and Erica's wedding day of 6 June, there is no food for the guests to eat. This form of breach is **[prevention of performance]**.

QUESTION THREE

[Breach of contract and remedies]

[Blackboard: Essay]

- 3.1 Jonas and Jody enter into a contract in terms whereof Jody will purchase ten horses from Jonas at a purchase price of R 20 000 each. On 20 May 2020 Jonas arrives at Jody's farm with horse trailers to deliver the horses. Instead of the ten horses agreed upon, Jonas only delivers eight horses. Jonas insists that Jody pay him the agreed total amount of R 200 000. Jody feels that it wouldn't be fair to pay for ten horses, as

she only received eight. Until the matter has been resolved, Jody refuses to make any payment to Jonas.

- (i) What type of breach of contract has been committed by Jonas? (1)
Positive malperformance (1)
- (ii) Which remedy is available to Jonas to ensure payment, and what would the possible result of exercising this remedy be? (3)
*Jonas can use the remedy of execution of the contract (1), but the court would in all possibility grant an order for reduced performance (1).
May be used where a party has rendered defective or incomplete performance.
(1)*

Spelling and grammar (1)

- 3.2 Anban and Andrea enter into a contract in terms whereof Andrea will deliver fresh meat to Anban for a family celebration that he is hosting. In terms of their contract Andrea will deliver the meat on Friday, as Anban is having the celebration on Saturday. Andrea only delivers the meat on Saturday evening after the celebration is over. Anban is very upset at the state of affairs as he had no food ready to host his family, and he had to hastily order Uber Eats at a great additional expense.

- (i) What type of breach of contract has been committed? (1)
Prevention of performance (1)
- (ii) Which remedy/ies is/are available to Anban, and what are the consequences thereof? (3)
Anban can cancel the agreement (1) and he can claim damages (1) from Andrea. For cancellation: restitution must take place, so Anban must return the meat to Andrea (1)

Spelling and grammar (1)

QUESTION FOUR

[Agency]

[Blackboard: Multiple choice]

Choose the correct option:

- 4.1 Kenisha has won the lotto and wants to purchase a farm. She doesn't have the time to drive around South Africa to view various farms that are for sale, and she instructs Jermaine to act on her behalf by looking at farms and purchasing a suitable option. Close to the town of Springbok in the Northern Cape, Jermaine purchases a farm on Kenisha's behalf from Gregory.
- a) The contract of sale is entered into between Kenisha and Gregory.**
 - b) The contract of sale is entered into between Kenisha, Jermaine and Gregory.
 - c) The contract of sale is entered into between Kenisha and Jermaine.
 - d) The contract of sale is entered into between Jermaine and Gregory.

- 4.2 Kenisha has won the lotto and wants to purchase a farm. She doesn't have the time to drive around South Africa to view various farms that are for sale, and she instructs Jermaine to act on her behalf by looking at farms and purchasing a suitable option. Close to the town of Springbok in the Northern Cape, Jermaine purchases a farm on Kenisha's behalf from Gregory.
- a) Kenisha is the principal, Jermaine is the agent, and Gregory is the third party.**
- b) Kenisha is the agent, Jermaine is the principal, and Gregory is the third party.
c) Kenisha is the principal, Jermaine is the third party, and Gregory is the agent.
d) Kenisha is the third party, Jermaine is the agent, and Gregory is the principal.
- 4.3 Which of the following is NOT a requirement for a valid contract of agency:
- a) The contract must be legal.
b) Necessary authority of the agent to act on behalf of the principal.
c) The parties must have contractual capacity.
d) No formalities have to be complied with.
- 4.4 James acts as agent for Bobby. Bobby wants to purchase a vintage car. James finds the perfect car and purchases it from Moloi on Bobby's behalf. In all the excitement of finding the perfect car, James fails to inform Moloi that he is acting on behalf of Bobby. In terms of the doctrine of the undisclosed principal:
- a) The contract is between Bobby and Moloi.
b) The contract is between James, Bobby and Moloi.
c) The contract is between Bobby and James.
d) The contract is between James and Moloi.
- 4.5 James acts as agent for Bobby. Bobby wants to purchase a vintage car. James finds the perfect car and purchases it from Moloi on Bobby's behalf. In all the excitement of finding the perfect car, James fails to inform Moloi that he is acting on behalf of Bobby. In terms of the doctrine of the undisclosed principal:
- (i) The contract is between James and Moloi.
(ii) Bobby can become party to the agreement in the place of James should he so choose.
(iii) The contract is between Bobby and Moloi.
(iv) The contract is between Bobby and James.
- a) Only option (i) is correct.
b) Options (i) and (ii) are correct.
c) Only option (iii) is correct.
d) Only option (iv) is correct.
- 4.6 Rachel as agent entered into a contract with Joseph on behalf of Roscoe, the principal. Rachel did not have the authority to enter into this agreement. Roscoe is however satisfied with the agreement that Rachel entered into and wishes to be party thereto. Roscoe can validate Rachel's actions by means of:
- a) ratification.**
b) rectification.
c) estoppel.

- d) the doctrine of the undisclosed principal.
- 4.7 Kristin enters into a contract with Keegan. She tells Keegan that she is acting as agent on behalf of a company with the name of ABC Limited. As it turns out, ABC Limited does not exist.
- a) The contract is entered into between Kristin and Keegan.
 - b) The contract is entered into between Keegan and ABC Limited.
 - c) The contract is entered into between Kristin and ABC Limited.
 - d) **No legal relationship exists between the parties.**
- 4.8 Morgan as agent entered into a contract with Thabo on behalf of Noah, the principal.
- a) If Morgan failed to inform Thabo that she is acting on behalf of Noah, Noah may replace Thabo as party to the contract in terms of the doctrine of the undisclosed principal.
 - b) **If Morgan failed to inform Thabo that she is acting on behalf of Noah, Noah may replace Morgan as party to the contract in terms of the doctrine of the undisclosed principal.**
 - c) If Morgan failed to inform Thabo that she is acting on behalf of Noah, Noah may replace Morgan as party to the contract in terms of the doctrine of estoppel.
 - d) If the contract that Morgan had entered into was to purchase a large house, but Noah had instructed her to purchase a small flat, Noah will be able to replace Morgan as party to the contract in terms of the doctrine of the undisclosed principal.
- 4.9 Daniel is Morris' estate agent and has been instructed by Morris to sell his house. Which of the following is **not** a circumstance under which this authority will terminate:
- a) Daniel finds a purchaser and proceeds to sell the house.
 - b) As a result of a severe storm, Morris' house was struck by lightning and has burned to the ground so that nothing remains.
 - c) Morris had given Daniel four months to sell his house. After four months have passed, the house has still not been sold.
 - d) **Morris has a change of heart and he renounces the authority that he gave to Daniel.**
- 4.10 Nancy wants to start a business for which she will require space that she can utilise for a small factory. Nancy is so busy applying for a small business loan at various banks that she does not have the time to look at premises that would be suitable. She instructs Maria to look at premises on her behalf and to enter into a lease agreement when she finds something suitable. Maria finds the perfect space for Nancy to use and she enters into a lease agreement with Luwazi, the landlord. The parties in this scenario are:
- a) **Nancy as the principal, Maria as the agent, and Luwazi as the third party.**
 - b) Nancy as the agent, Maria as the principal, and Luwazi as the third party.
 - c) Nancy as the agent, Maria as the third party, and Luwazi as the principal.
 - d) Nancy as the third party, Maria as the principal, and Luwazi as the agent.

QUESTION FIVE

[Agency]

[Blackboard: True or False]

- 5.1 In an agency scenario, there will always be at least four parties involved.
False.
- 5.2 An agent may always delegate his authority to another sub-agent.
False.
- 5.3 André acts as agent for Michael. Michael was involved in a serious motor vehicle accident, and as a result Michael has become mentally incapacitated. The authority granted by Michael to André will terminate.
True
- 5.5 Laura as agent entered into a contract with Marky on behalf of Dan, the principal. Laura failed to inform Marky that she is acting on behalf of Dan. Marky may decide whether he wants to be bound to Laura or to Dan.
True
- 5.6 A third party may only rely on estoppel if he knew that the agent was not authorised to act.
False.
- 5.7 Amber as agent entered into a contract with Tisetso on behalf of David, the principal. Amber failed to inform Tisetso that she is acting on behalf of David. David decides that he does indeed wish to be party to the contract. In terms of the doctrine of the undisclosed principal, David may replace Amber as party to the contract.
True.
- 5.8 Chelsea as agent entered into a contract with Dibakiso on behalf of Noel, the principal. Chelsea failed to inform Dibakiso that she is acting on behalf of Noel. Noel decides that he does indeed wish to be party to the contract. In terms of the principle of estoppel, Noel may replace Chelsea as party to the contract.
False.
- 5.9 Noma as agent entered into a contract with Keitumetse on behalf of Thabiso, the principal. Noma failed to inform Keitumetse that she is acting on behalf of Thabiso. Thabiso decides that he does indeed wish to be party to the contract. In terms of the doctrine of the undisclosed principal, Thabiso may replace Keitumetse as party to the contract.
False.
- 5.10 Sheethal as agent entered into a contract with Rorisang on behalf of Niko, the principal. This contract that Sheethal had entered into was to purchase a vintage car, but Niko had instructed her to purchase a vintage motorcycle. In terms of the doctrine of the undisclosed principal, Niko will not be able to replace Sheethal as party to the contract.

True.

QUESTION SIX

[Agency]

[Blackboard: Matching]

6.1 Match the question/statement in column A to the most accurate answer/description in column B:

	A: Question/statement	B: Answers/description
1.	Example of authority by the operation of law.	Authority of the curator of a person that has been declared mentally unfit
2.	Example of authority given by the principal.	Mandate
3.	Instance where authority will lapse.	Revocation by the principal
4.	Principal may approve agent's action without authority in this manner.	Ratification
5.	Duty of the principal.	To remunerate the agent

Additional/alternative answers to also be provided in column B:

Renunciation by the principal	Rectification	To remunerate the mandator
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6.2 Match the question/statement in column A to the most accurate answer/description in column B:

	A: Question/statement	B: Answers/description
1.	Agent acts on behalf of the principal but fails to inform the third party of such.	Doctrine of the undisclosed principal may be applicable
2.	A director acting on behalf of a company is an example of...	Agency.
3.	Requirement for valid agency.	Authority.
4.	In an agency scenario, the party acting on behalf of another.	Agent
5.	May be applicable when the agent acts without authority.	Estoppel

Additional/alternative answers to also be provided in column B:

Doctrine of <i>caveat subscriptor</i> may be applicable	Mandate	Third party
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QUESTION SEVEN

[Agency]

[Blackboard: Fill in the blank]

Fill in the missing word/s:

- 7.1 Jasmin as agent entered into a contract with Sammy on behalf of Moses, the principal. Jasmin failed to inform Sammy that she is acting on behalf of Moses. The parties to the contract are Sammy and **[Jasmin]**.
- 7.2 Martin as agent entered into a contract with Moonsamy on behalf of Rajesh, the principal. As a general principle of agency, there will be no rights and liabilities between Martin and **[Moonsamy]**.
- 7.3 Molly as agent entered into a contract with Kanye on behalf of Moshesh, the principal. Molly did not have the authority to enter into this agreement. Moshesh is however satisfied with the agreement that Molly entered into and wishes to be party thereto. Moshesh can validate Molly's actions by means of **[ratification]**.
- 7.4 Mandate is an example of a way in which **[authority]** can be given by the principal.
- 7.5 In an agency scenario, there will always be an amount of at least **[three]** parties involved.

Multiple choice (10 marks)

- 1.1 Samson and Archie enter into a contract. A term in the contract stipulates that Samson is selling his bicycle to Archie in exchange for R 550. Identify the type of term in this contract:
- e) Naturalia.
 - f) Essentialia.**
 - g) Incidentalialia.
 - h) All of the above.
- 1.2 Samson and Archie enter into a contract pertaining to the sale of a bicycle. Although the parties have not expressly stated so, it is their true intention that the bicycle will be in good working condition upon delivery. Identify the way in which the parties' true intention can be incorporated into the contract:
- a) Expressly.
 - b) Tacitly.**

- c) Implied.
- d) None of the above.

1.3 Samson and Archie enter into a contract pertaining to the sale of a bicycle. The contract provides the following special requirement concerning payment: "The purchase price of R 550 may be paid in monthly instalments with the last instalment being made on 10 June 2020." Identify the type of term in this contract:

- a) Naturalia.
- b) Essentialia.
- c) **Incidentalia.**
- d) All of the above.

1.4 Samson and Archie enter into a contract pertaining to the sale of a bicycle. One of the terms of the contract provide that Samson is to deliver the bicycle to Archie on 12 June 2020. Identify the way in which the above term has been incorporated into the contract:

- a) **Expressly.**
- b) Tacitly.
- c) Implied.
- d) None of the above.

1.5 Sipho and Thando wish to enter into a contract of lease. Both parties have been advised by Lerato, a lawyer specialising in property law, that by signing the written contract, both parties will be bound by the contract as well as by the ordinary meaning and effect of the words of the contract. Identify the legal principle that Lerato discussed:

- a) Parol evidence rule.
- b) Extrinsic evidence rule.
- c) **Caveat subscriptor rule.**
- d) Par delictum rule.

1.6 Identify a defence to the caveat subscriptor rule:

- a) Bad faith.

- b) Misrepresentation.**
- c) Prevention of performance.
- d) None of the above.

1.7 Johan and Henry enter into a contract for the sale of a white BMW motor vehicle. Subsequently the parties realise that the contract does not reflect their true intention as an error was made in the conclusion of the contract. The error was that the contract was to reflect the sale of a white Mercedes Benz and not a BMW motor vehicle. For this reason the parties wish to remedy the situation. Identify the applicable remedy in this respect:

- a) Ratification.
- b) Satisfaction.
- c) Implication
- d) Rectification.**

1.8 Adrian wishes to purchase a Big Mac meal from McDonald's. In terms of the current lockdown regulations, he may only do so online. Accordingly, he navigates through the McDonald's website and is instructed to click on a certain icon in order to make use of McDonald's services. The clicking indicates acceptance of the terms of the contract offered by way of a linkage page. Thereafter he selects the Big Mac option and makes payment. Once this process is complete, Adrian waits 10-15 minutes before his delivery arrives. Identify the type of agreement that Adrian entered into:

- a) Unsigned agreements.
- b) Ticket-services.
- c) Clicked-wrapped agreements.**
- d) None of the above.

1.9 In August 2019 Frieda and Imraan entered into a written contract of employment. The contract stipulates that Imraan is required to work only four hours daily. In May 2020, the parties enter into a dispute concerning Imraan's working hours. While Frieda acknowledges the written contract of employment, she argues that during July 2019 the parties agreed to an eight-hour work day for Imraan. This was allegedly captured in an unsigned document titled

“Imraan’s working hours”. Imraan’s lawyer tells him that, in terms of contract law, once a contract has been reduced to writing or integrated into a single complete document, the written document is the only record of the agreement and it is this document that is interpreted in order to determine the content of the contract. Identify the legal principle that Imraan’s lawyer discussed:

- a) **Parol evidence rule.**
- b) Caveat subscriptor rule.
- c) All of the above.
- d) None of the above.

1.10 Terms can be incorporated into a contract in the following manner:

- a) Orally.
- b) In writing.
- c) Tacitly.
- d) **All of the above.**

Subtotal: [10]

True and false (10 marks)

- 1. A contract can be incorporated in writing, or verbally, but not tacitly. **False**
- 2. The Parol evidence rule applies only to certain written agreements. **False**
- 3. In terms of the caveat subscriptor rule a signatory is bound by the written agreement where s/he has signed it and is also bound by the ordinary meaning and effect of the words of the contract. **True**
- 4. Fraud and illegality are defences to the caveat subscriptor rule. **True**
- 5. Tacit terms are terms which are incorporated into a contract by means of articulated (orally or in writing) declaration of intentions or terms agreed by the parties orally or in writing. **False**

6. Express terms are terms which are incorporated into a contract by operation of law. **False**
7. Implied terms are terms which are not expressed in words but are based on the parties true intentions or their intention as imputed by law. **False**
8. Essentialia can be defined as terms that identify a contract as a specific contract. **True**
9. Incidentalia can be defined as terms that are implied into a specific contract by law. **False**
10. Naturalia may generally be excluded by agreement. **True**

Subtotal: [10]

Fill in the missing word/s (5 marks)

1. The _____ Act contains an important exception to the parol evidence rule.
Consumer Protection
2. Rectification is permissible if there was a _____ when the agreement was put into writing. **Reasonable error**
3. A written contract may be improved in order to record the parties' true _____.
Intention
4. Incorporation of a contractual term may be express, tacit or _____. **Implied**
5. A condition is a contractual term that indicates whether a contract will start, continue to operate or terminate, and the consequences of the contract dependent on the occurrence, or non-occurrence of a specific _____ future event. **uncertain**

Matching of columns (2 x 5 marks)

	A: Question/statement	B: Answers/description
6.	Legislation that applies to clicked-wrapped agreements.	Electronic Communication and Transactions Act
7.	A defence to rebut the caveat subscriptor rule.	Illegality
8.	To correct a mistake in a contract.	Rectification
9.	To approve or give formal consent to a contract after its formation.	Ratification
10.	An unsigned document that does not require rectification to be declared valid, but rather condonation for non-compliance of a statute.	Unsigned will
11.		Unsigned contract of sale
12.		Prevention of performance
13.		Consumer Protection Act

Subtotal:[5]

	A: Question/statement	B: Answers/description

1.	A guarantee against latent defects is included in the contract by operation of law. Identify the manner of incorporation of the above term into a contract.	Implied term
2.	The exact nature of a motor vehicle is provided in a contract of sale. Identify the manner of incorporation of the above term into a contract.	Express term
3.	Terms that classify a contract as a contract of, for example, insurance. Identify the type of term.	Essentialia
4.	Terms which the law attaches to every contract of a particular class.	Naturalia
5.	A contracting party accepts absolute responsibility for proper performance relating to the absence of defects in the warrantor's product or service. Identify the contractual term.	Warranty
6.		Penalty
7.		Incidentalia
8.		Tacit term

Subtotal: [5]

SCOPE: TERMS OF CONTRACT, BREACH OF CONTRACT AND REMEDIES

Identify types of terms: (10 marks)

1. Justin, a building contractor, enters into a contract with Jameson, his employer, for the construction of a townhouse near Houghton. The contract stipulates that should one of them breach this contract, the other will be able to cancel the contract immediately. **Cancellation clause**
2. In terms of the contract of sale entered into between Siya and Doreen, Siya assures Doreen that the motor vehicle has undergone the required inspections and will perform as agreed. **Warranty clause**
3. Once Shay obtains a Bachelor's degree he will be eligible to receive the sum of R 50 000 from his mother. **Suspensive condition**
4. Thandi agrees to give Jason piano lessons for the next five months. **Resolutive timeclause**
5. Daniel and Shaun enter into a lease agreement wherein Daniel agrees that Shaun will rent Daniel's flat for the next ten months. **Resolutive timeclause**
6. Fisher and John enter into a contract for the sale of a male goat. Subsequently, John tries to amend the agreement so that it may reflect the sale of a female goat. Fisher reminds John that, in terms of the contract, the contract cannot be amended unless the amendment is recorded in writing and signed by both parties. **Entrenchment clause**
7. A contract of sale stipulates the following: "A party who is in breach of the contract forfeits all performance already rendered in terms of the contract." **Forfeiture clause**
8. Frank Zoro undertakes to give his wife, Zelda Zoro, R1 000 000 once he wins the lotto. **Suspensive condition**
9. Adam undertakes to give Reggie his BMW motor vehicle if the lockdown ends in July. **Suspensive condition**

10. Fantastic Attorneys Inc. enters into a five-year contract of lease with Redefine Properties on 18 June 2020. **Resolutive timeclause**

Subtotal: [10]

Scenario questions on breach (5 marks)

Identify which type of breach of contract is applicable in the given scenarios:

1. Johnny sells a cow to Ron and undertakes to deliver the cow to Ron's premises on 10 June 2020. On 10 June 2020 Johnny goes on a two-day holiday and forgets to deliver the cow. This is an example of **mora debitoris**.
2. Johnny sells a cow to Ron and undertakes to deliver the cow to Ron's premises on 10 June 2020. Ron undertakes that on 10 June 2020 he will open the gate to his premises to allow Johnny to deliver the cow. On 10 June 2020 Johnny proceeds to deliver the cow but is unable to do so as nobody opened the gate to Ron's premises. This is an example of **mora creditoris**.
3. Johnny sells a cow to Ron and undertakes to deliver the cow to Ron's premises on 10 June 2020. On 10 June 2020 Johnny kills the cow before delivery could be made. This is an example of **prevention of performance by the debtor**.
4. Lupton Construction CC, a construction company, enters into a building contract with Helmut, the employer. In terms of the contract, Lupton Construction CC is to commence with the building project on Monday 1 June 2020. One week before the commencement date, Lupton Construction CC informs Helmut that it will no longer perform in terms of the building contract. This is an example of **repudiation**.
5. Jack undertakes to go up the hill to fetch a bucket filled with ten liters of water for Jill. Jack came down with only 500 milliliters of water in the bucket. This is an example of **positive malperformance**.

Subtotal: [5]

Short questions on breach and remedies: (2 x 5 marks)

1.

In light of the current lockdown regulations, Pietso, a manager of a large company, is required to supply his staff with face masks. He approaches Edmund, a face-mask manufacturer, in order to purchase face masks. The parties subsequently enter into a contract of sale in respect of 5000 face masks. In terms of the contract, Edmund is required to deliver the 5000 face masks to Pietso on 17 June 2020. On 17 June 2020, Edmund completely forgets to deliver the face masks to Pietso because he was binge watching “The Tiger King” series on Netflix. As a result, Pietso is unable to supply his staff with face masks. He does not, however, suffer any loss.

Pietso is aware of the fact that Edmund, as debtor, has breached the contract. More particularly, the form of breach of contract applicable in this scenario is mora debitoris. Discuss (i) the requirements to be proven by Pietso; (ii) the application of the requirements to the set of facts; (iii) and the remedy/ies available to Pietso.

Answer:

- (i) Performance must be delayed; and performance must be claimable. (1/2 x2)*
- (ii) Application – marker’s discretion (2)*
- (iii) Execution of contract or cancellation of contract (1/2 x2) **(Students may not argue for damages as Pietso has not suffered any loss as a result of the breach)***
- (iv) Mark for spelling and grammar (1)*

2.

In light of the current lockdown regulations, Pietso, a manager of a large company, is required to supply his staff with face masks. He approaches Edmund, a face-mask manufacturer, in order to purchase face masks. The parties subsequently enter into a contract of sale in respect of 5000 face masks. In terms of the contract, Edmund is required to deliver the 5000 face masks to Pietso on 17 June 2020. On 10 June 2020, Edmund emails Pietso and informs him that he is unable to make and deliver the face

masks. He ascribes this inability to the fact that he does not have the necessary finances to purchase the material required to make the face masks. As a result, Pietso is unable to supply his staff with face masks. He does not, however, suffer any loss.

Pietso is aware of the fact that Edmund has breached the contract. More particularly, the form of breach of contract applicable in this case is repudiation. Discuss (i) the requirements to be proven by Pietso; (ii) the application of the requirements to the set of facts; (iii) and the remedy/ies available to Pietso.

Answer:

- (i) *There must be an act; and an intention to repudiate. (1/2 x 2)*
- (ii) *Application – marker's discretion (2)*
- (iii) *Execution of contract or cancellation of contract (1/2 x2) (Students may not argue for damages as Pietso has not suffered any loss as a result of the breach)*
- (iv) *Mark for spelling and grammar (1)*

Multiple Choice Question (Remedies)

Bobby as suffered serious patrimonial damage as a consequence of Andrew's breach of contract. Which one of the following would not be an available remedy for breach of contract for Bobby?

- A) damages
- B) rectification of the contract
- C) execution of the contract
- D) cancellation of the contract

Where a defaulting party to a contract has committed a breach and the innocent party approaches the court for relief in the form of execution of the contract, which one of the following are not one of the possible orders which a court may declare?

- A) an interdict
 - B) cancellation of the contract
 - C) specific performance
 - D) reduced performance
-

Deborah is frustrated in her contractual relationship with Tsalo and is looking to cancel their contract. Which of the following would not be an instance where you can cancel a contract?

- A) cancellation because of repudiation
 - B) cancellation where performance is prevented
 - C) cancellation for specific performance
 - D) cancellation because of positive malperformance
-

Except for when there is a cancellation clause in the contract, when else can an innocent party cancel the contract due to default by the debtor?

- A) where the breach is specific and material
 - B) where the breach is claimable and material
 - C) where the breach is substantive and material
 - D) where the breach is serious and material
-

What is the main purpose of the remedy of damages for breach of contract?

- A) the innocent party must be placed in the position he or she would have been in had the contract been carried out
 - B) the innocent party must be placed in the position of the defaulting party of the the breach has been committed
 - C) the innocent party must be placed in the position to fulfil his or her contractual obligations
 - D) the innocent party is replacing the position to cancel the contract and claim at a minimum reduced performance
-

Knowing that with a breach of contract a defendant is only liable for loss that can be foreseen by the parties. The test for this is consequently the following:

- A) having regard to the subject matter in terms of the contract, the harm must be foreseen and mitigated
 - B) having regard to the subject matter in terms of the contract, the harm that was suffered can be said to have been reasonably foreseeable as a realistic possibility
 - C) having regard to the subject matter in terms of the contract, the harm must be the exclusive consequence of all damages
 - D) having regard to the subject matter in terms of the contract, the harm must be proven as the foreseen damages of he who alleges.
-

James suffered a breach of contract by Mark and now wants to cancel the agreement in accordance with the cancellation clause in the contract. However, James is not sure what the consequences of cancellation are. Which one of the following would not be a consequence of cancellation?

- A) a claim for reduced performance under the contract
- B) both parties are relieved of the obligation where neither has performed
- C) restitution in that whatever has been performed must be returned
- D) termination of obligations

Sipho has suffered a breach of contract by Lydia in the form of positive malperformance and now wants to cancel the contract. When will this breach be considered to be a material breach?

- A) where the defect is of such a serious nature that the creditor cannot be expected to abide by the contract
- B) where the defect is not present in a cancellation clause
- C) where the parties both have not considered the seriousness of the defect
- D) where the defect is not reflective of the content and quality for positive malperformance

Calvin has recently suffered a breach of contract in the form of mora debitoris. Which remedy can be considered as a primary remedy for this breach of contract?

- A) damages
- B) rectification of the contract
- C) execution of the contract
- D) cancellation of the contract

When with the innocent party be able to cancel the contract for default by the creditor?

- A) where there is a specific date perform which has lapsed
- B) where there is a cancellation clause in the contract
- C) where there is a notice of intention to cancel
- D) where there is an interdict against the defaulting party

Matching Questions (Remedies)

- | | |
|----------------------|---|
| specific performance | – execution of the contract |
| interdict | – to force or restrain a defaulting party |
| lex commissoria | – cancellation clause |

repudiation – intention to reject contractual duties
notice of intention to cancel – place the debtor in mora ex persona

3 additional answers:

performance is delayed
claiming damages
reduced performance

patrimonial loss – diminished estate as a consequence of breach
casual connection – damages suffered and the breach of contract
foreseeable damage – limitation of loss
restitution – that which has been performed must be returned
exceptio non adimpleti contractus – both parties need to perform simultaneously

3 additional answers:

time is of the essence
primary remedy
mora creditoris

Terms Questions

Tyson and Jermaine agrees that Tyson will purchase Jermaine's exotic guitar for a Hundred thousand Rand if the Covid-19 pandemic lockdown is lifted. This term is a [suspensive] [condition].

Creative Designs Pty (Ltd) agrees with 4IR Technologies Pty (Ltd) to design futuristic devices to complement the new artificial intelligence system embedded in 4IR Technologies' devices if they receive the government tender to supply these devices. This term is a [suspensive] [condition].

Wally undertakes to provide Jamieson with all the tools you will need to build Jamieson's new house on his birthday. This term is a [suspensive] [time clause].

Commando Pty (Ltd) undertakes to stop supplying missiles the company Denel on the first day of spring this year. This term is a [resolutive] [time clause].

Bobby enters into an agreement with Tammy, for the use of Bobby's mansion to film Tammy's new movie "How I Passed Commercial Law 1A" – till the end of the production. This term is [resolutive] [condition].

Mallisa agrees with Norman that she may continue to provide him with coffee beans for the duration of the month of May. This term is a [resolutive] [time clause].

Zippo fully agrees to operate Zeno's oil-production factory 24 hours a day and that Zippo will pay Zeno 1000 Rand for each hour that production is halted. This term is a [penalty] [clause].

Thokozile and Themba have a contract for the transportation and delivery of coal. According to the contract, if the train does not arrive at 10h00 every day, Thokozile will pay Themba R500 for each time the train is not on time. This term is a [penalty] [clause].

Sizwe will give Thandi her mother's pearl necklace, when her mother has died. This term is a [suspensive] [time clause].

Bonnie will rent Brendan's flat for a period of one year, if Brendan get the job in eSwatini. This term is a [suspensive] [condition].

True and False (Remedies)

An innocent party can claim damages as a result of the breach of the contract even where that innocent party has cancelled the contract or claimed execution thereof. (True)

With an order for specific performance a court of law seeks fulfilment of the contract. (True)

According to the defence of *exceptio non adimpleti contractus* one party cannot claim performance from the other party unless the prior party has performed as well. (True)

The cancellation of the contract would only be available to an innocent party where there is a cancellation clause in the contract. (False)

The rationale of damages as a remedy lies in the fact that an innocent party's patrimony should not be diminished by a breach of contract. (True)

An innocent party cannot claim damages where he or she has cancelled the contract or claimed execution thereof even if that innocent party has suffered loss as a result of the defaulting party's breach. (False)

Compensation for pain and suffering can be claimed in contract, where it is as a result of a breach of contract. (False)

The innocent party to the breach of contract has the duty to mitigate damages or limit the loss flowing from the breach. (True)

The threat to cancel a contract does amount to a cancellation. (False)

Execution of the contract and cancellation of the contract are to mutually exclusive remedies for breach of contract. (True)

Type of Breach

Kuli enters into an agreement with Arizona Pty (Ltd) for discounted travelling deals, which will be delivered via coupons on the first day of every month. On the 2nd of May 2020, Arizona(Pty) Ltd has still not delivered a single coupon to Kuli. This type of breach of contract is [mora debitoris or default by the debtor].

Petronella is an independent contractor who paints houses. Geoffrey enters into an agreement with Petronella to paint his house on the 1st of May 2020, for the amount of 20,000 Rand. On the 1st of May, when Petronella arrives at the house, Geoffrey is not at home and the gates of the house are locked. Geoffrey's wife who is at home, does not want to allow Petronella onto the premises and states that Geoffrey said that nobody should be allowed onto the premises in his absence. This type of breach of contract is [mora creditoris or default by the creditor].

DJ Superstep is a world-renowned disc jockey. Loco Investments (Pty) Ltd enters into an agreement with DJ Superstep to perform at their gala event on the 1st of June 2020. However, Detrick the CFO of Loco Investments discovers on DJ Superstep's Twitter account that he is promoting a performance

in Dubai on the 1st of June 2020. Loco Investments now fears that DJ Superstep will not perform at their gala event. This type of breach of contract is [repudiation].

Mandi Truck Hire (Pty) Ltd entered into an agreement with Petrol Paul (Pty) Ltd, to fill up their trucks with 80 litres of petrol every day at a rate of 12 Rand a litre. Upon a random inspection of the fuel tanks of the trucks, Frank and employee of Mandi Truck Hire (Pty) Ltd, discovers that the trucks have only been filled with 70 litres of petrol. This type of breach of contract is [positive malperformance].

Devon is a wildlife farmer in the Northern Cape province. Ntando enters into an agreement with Devon for the purchase of a prized Kudu bull, named Ashanti. The purchase price was set at 1 million Rand. Ntando, ran into some financial difficulty and is unable to pay the required sum. Ntando, sneaks onto Devon's farm and shoots the bull – Ashanti. Devon is now unable to perform under the contract. This type of breach of contract is [prevention of performance].

Fill in the Missing Word (Remedies)

The available contractual remedy claimed by an innocent party will depend on the nature and seriousness of the [breach] committed.

Where a party has rendered defective or an incomplete performance, and innocent party may be granted an order for [reduced] performance.

Exceptio non adimpleti contractus is the defence of the [incomplete] contract.

The onus or burden of proof is always on the plaintiff to prove damages for breach of contract, he who alleges must [prove].

Generally with a breach of contract the law provides redress in the form of [remedies] where a innocent party's rights are infringed.

Short Essay Question

Khwezi is the owner of Khwezi's Stables (Pty) Ltd. Through her company, Khwezi rents out stable spaces for horses. Tau, who just recently acquired the racing horse 'Legs of Thunder Skosana' is looking for a place to accommodate his horse. Tau approaches Khwezi for her services and they enter into a contract. According to their contract, Tau will deliver the horse to the stables at any time and in return he will share with Khwezi 10 percent of Legs of Thunder Skosana's winnings. Further according to the contract, Tau must also transfer Khwezi's share of any and all winnings within one hour after each race.

On 1 July 2020, Legs of Thunder Skosana wins the Rothman's July Derby and pockets 10 million Rand in winnings. In all the excitement, Tau forgets to transfer Khwezi's share of the winnings. The next day, Tau calls Khwezi in order to make arrangement for the transfer period however, Khwezi refuses his offer and informs him that he is in breach of their contract. Khwezi now wants to sue Tau for breach of contract.

Answer the following questions:

1. Identify the type of breach involved. (1)

mora debitoris (1)

2. Explain to Tau through its definition, why the type of breach mentioned in question 1 could be applicable to his situation. (3)

A discussion of the definition of breach in the context of the facts (1) [for the discretion of the assessor]

"If the debtor does not perform at the agreed time (1), and the delay is without legal justification (1). Then the debtor is in mora or in default.

One mark for spelling and grammar.

Ambuwani is a data science entrepreneur who enters into an agreement with Johannesburg Supreme University, commonly known as JSU. According to their agreement, Ambuwani will deliver laptops to each of JSU's students within one month of signing the agreement. The agreement further states that JSU will provide Ambuwani with the names and addresses of all of its students within a reasonable time. The agreement also states that JSU will only pay Ambuwani after the successfully confirmed delivery of 100 laptops.

One month after the signing of the agreement JSU still has not provided Ambuwani with the details of the students. Ambuwani now wants to cancel the agreement due to breach of contract in the form of default by the creditor.

Answer the following questions:

1. Under which circumstances would Ambuwani have access to the remedy of cancellation of the contract for default by the creditor?
 - a. Specific date to perform / time is of the essence (1)
 - b. Notice of intention to cancel (1)
 - c. Cancellation clause (1)
2. Noting the reference to "reasonable time" would Ambuwani be able to cancel the agreement for default by the creditor?

Yes. (1)

one mark for spelling and grammar

MULTIPLE CHOICE

1. Which of the following statements are correct?
 - a) Any debt that arises from a bill of exchange or negotiable instrument prescribes after a period of three years.
 - b) A debt from a mortgage bond prescribes after a period of 20 years.
 - c) Release requires the bilateral consent of both debtor and creditor.**
 - d) Rescission and cancellation of a contract mean the same thing.
 - e) In set-off, the debts owed between Bongiwe in her personal capacity and Nonkululeko in her professional capacity can be set off as long as the debts are of the same kind.

2. With regards to impossibility of performance, which of the following statements is incorrect:
 - a) In the case of supervening impossibility of performance, the contract simply terminates between the parties.
 - b) Where performance becomes impossible due to the fault of one of the parties, breach of contract occurs providing the innocent party with remedies.
 - c) In the case of initial impossibility of performance, the contract does come into existence and then terminates later.**
 - d) Objective impossibility of performance means any reasonable person in that position would have found performance to be impossible.
 - e) Subjective impossibility means that it is only impossible for a specific debtor to perform.

3. Which ONE of the following statements regarding novation is correct:
 - a) Novation concerns the transferring of new rights to parties
 - b) Novation means that parties to a disputed contract conclude a new contract
 - c) Novation entails the creation of a new debt between the parties**
 - d) Novation does not require a previous valid debt to be in existence
 - e) Novation is the same concept as compromise

4. The following statements concerning cession are incorrect:
 - i. Cession requires the consent of all three parties;
 - ii. Cession may be prohibited in certain instances;
 - iii. Cession is defined as the transfer of rights and duties from one person to another;
 - iv. Formalities are required for cession to take place
 - a) Only ii, iii and iv are incorrect
 - b) Only i, iii and iv are incorrect**
 - c) All of the above are incorrect
 - d) Only i and ii are incorrect
 - e) Only ii and iv are incorrect

5. Which ONE of the following statements is correct:
- a) The prescription period for a debt arising from a cheque is 15 years;
 - b) Release means that the debtor absolves himself from liability;
 - c) Compromise requires the existing debt between the parties to be in dispute;**
 - d) Merger means that a new debt replaces the old debt;
 - e) Set-off can take place between debts in respect of money and goods.
6. The following statements regarding cession are correct:
- i. The person to whom the right is transferred is called the cessionary;
 - ii. The person who transfers the right is called the debtor;
 - iii. The personal right is transferred to another creditor;
 - iv. Cession does not terminate or create a new obligation;
 - v. The law may prohibit cession in certain circumstances
- a) All of the above are correct
 - b) Only i, ii, iii and iv are correct
 - c) Only i, iii and v are correct
 - d) Only i, iii, iv and v are correct**
 - e) Only ii, iii, iv and v are correct
7. A contract can be terminated by agreement between the parties in the following way:
- a) Cession
 - b) Performance
 - c) Cancellation
 - d) Novation**
 - e) Rescission
8. When a contract is terminated by way of cancellation, it means the following:
- a) An act of withdrawing from a contract due to reasons other than breach of contract
 - b) The co-operation of the creditor is required for the termination to take place
 - c) No co-operation by the creditor is necessary – usually the debtor must refrain from doing something
 - d) An act of withdrawing from the contract due to breach of contract**
 - e) The parties agree to end the contractual relationship amicably
9. The following statements regarding fulfilment of the contract are correct:
- i. Fulfilment means discharge of the duties between the parties;
 - ii. Once there is proper performance in terms of the contract by both parties – the contractual relationship ends
 - iii. Performance entails both a unilateral and bilateral act of the parties

- iv. Fulfilment means that the contract is terminated
 - v. Performance of the obligation is considered to fulfilled when both parties have performed in terms of a bilateral juristic act
- a) Only i, ii, iii and iv are correct
 - b) Only ii, iii, iv and v are correct
 - c) Only i, ii, iv and v are correct**
 - d) All of the above are correct
 - e) Only ii, iv and v are correct

10. In order for set-off to occur, the following requirements must be met:

- i. Debts must be of a similar nature
 - ii. Debts must arise in the future
 - iii. Debts must be liquidated
 - iv. Debts must be claimable (due and payable)
 - v. Debts must be between the same persons in the same capacities
- a) All of the above are true
 - b) Only i, iii and iv are correct
 - c) Only ii, iii, iv and v are correct
 - d) Only i, iii, iv and v are correct**
 - e) Only i, ii, iv are correct

TRUE AND FALSE

- 1. Cession requires the consent of all three parties; debtor, cedent and cessionary. (False)
- 2. Cession in terms of an agreement can never be prohibited. (False)
- 3. In the case of delegation, only the debtor and creditor need to be in agreement for delegation to take place. (False)
- 4. Assignment requires the consent of all three parties to the agreement. (true)
- 5. In order for novation to take place, there does not need to be an existing valid contract between the parties. (False)
- 6. In order for a compromise/settlement to be reached between the parties, there must be an existing valid agreement between them. (False)
- 7. Release requires consensus from both the debtor and creditor. (True)
- 8. Set-off may operate in respect of a debt which is only payable at a future date. (False)
- 9. If a lessee purchases the leased property from the lessor, merger takes place. (True)
- 10. A debt secured by a mortgage bond prescribes after 20 (twenty) years. (False)

IDENTIFY TERMS

Identify the specific contractual terms listed below:

- 1 This sale of land is dependent upon the buyer obtaining a loan for R500 000 from a registered bank or building society in South Africa. (2)

[Suspensive condition]

- 2 An extract from an agreement states the following: The lessor leases the dwelling situated at 2 African Street, Port Elizabeth, to the lessee for the sum of R4000 per month for the duration of 2020. The lessee's right to lease the premises will come to an end should she marry or give birth to any children. (2)

Resolutive condition

- 3 John Smith undertakes to give his son, James Smith, R100 000 on 31 December 2020. (2)

Suspensive time clause

- 4 Anny Godso agrees to give R50 000 to her daughter, Melinda, on the death of Anny's father, David Godso. (2)

Suspensive time clause

- 5 The employer agrees to employ the employee to pick beans on the employer's farm, Monte Vista, at a rate of R250 per day until 30 September 2020. (2)

Resolutive time clause

- 6 Should either party breach any of their obligations in terms of the contract of this agreement, then the harmed party may cancel this agreement on giving the other party five days' written notice. (2)

Cancellation clause

- 7 Bandile provides Jake with the assurance that the tools sold to Jake will not rust for five years from the date of purchase. (2)

Warranty clause

- 8 Harry rents a farm from Jeff for 10 years. (2)

Resolutive Time clause

- 9 The builder agrees to complete the work on the property by 1 December 2020. The builder will pay the owner an amount of R600 for every day from 1 December 2020 that the work has not been finished. (2)

Penalty Clause

- 10 Penny agrees to allow her daughter, Susan, to live in her Sea Point apartment until she completes her LLB degree at the University of Cape Town. (2)

Resolutive condition

MATCH THE COLUMNS

Match the Columns

Cession	The transfer of personal rights from one party to another.
Delegation	The transfer of duties from one party to another.
Assignment	The transfer of rights and duties from one party to another.
Novation	Parties to a valid and existing contract conclude a second contract with the intention of terminating and substituting the existing contract with the second one.
Release	Bilateral juristic act based on consensus between debtor and creditor.
	The same person becomes both debtor and creditor of the same debt.
	The correcting of a mistake in a contract.
	Extinguishing of similar debts.

Extinctive prescription	The extinguishing of a right through the passage of time.
Merger	The same person becomes both debtor and creditor of the same debt.
Compromise	Agreement between parties to settle an existing dispute between them.
Set-off	Extinguishing of similar debts.
Supervening Impossibility of performance	Performance becomes impossible after conclusion of the contract due to an Act of God.
	Performance is absolutely impossible at the time of the conclusion of the contract.
	Court order that prohibits a party from acting or continuing to act in a specified manner.
	The gaining of a right through a passage of time.

IDENTIFY TYPE OF BREACH COMMITTED

1. Keagan enters into a contract with Lindobuhle in terms of which he will sell her a vintage bicycle for R1200. The parties agree that Keagan will deliver the bicycle to Lindobuhle on 3 May 2020 at the University of Johannesburg Fountain at 12:00. Keagan goes shopping with his friend James on the day and completely forgets to meet Lindobuhle to deliver the bicycle to her. Lindobuhle stands at the fountain waiting all day and Keagan never pitches. What type of breach of contract has been committed by Keagan?

Mora Debitoris/default by the debtor (1)

2. Melissa hires Gemma to renovate her kitchen. They agree that Gemma will replace all the existing white tiles in the kitchen with turquoise tiles. Gemma replaces the white tiles with pink tiles. Melissa is furious. She did not give Gemma permission to do that, as the contract stated that the tiles must be turquoise. What type of breach of contract has been committed by Gemma?
Positive malperformance (1)
3. Andrew sees an advertisement for French Bull dog puppies in his local newspaper. He has always wanted one and therefore decides to purchase one from Bennie. Andrew goes to collect the puppy from Bennie's house one morning. Andrew enters the area where the puppies are kept, the puppy pen, but does not see a small bowl of water right in front of him. He slips on the bowl and falls on the puppy, killing the puppy instantly. What type of breach has been committed?
Prevention of performance (1)
4. Katlego has a catering company. Julia hires Katlego's catering company to cater for her daughter's 21st birthday party on 1 June 2020. Exactly one week before the birthday party, Katlego send Julia an email indicating that the company will no longer be able to cater for the event and does not provide reasons for doing so. What type of breach has been committed by Katlego?
Repudiation (1)
5. Manny employs Phil to paint the inside of his new apartment in Braamfontein. They agree that Phil will start with the painting on 2 June 2020 at 8:00. Phil arrives at the apartment at 8:00 on 2 June to start the painting job but Manny is not there to allow Phil entry. Phil sits outside the apartment all day waiting for Manny and Manny does not arrive. What type of breach has been committed by Manny?

Mora Creditoris/default by the creditor (1)

FILL IN THE MISSING WORD

1. Where performance becomes impossible without the fault of any of the parties, the obligation between them is **terminated**.
2. The extinguishing of similar debts between two parties is known as, **set-off**.
3. Delegation requires the **consent** of all three parties.
4. A debt arising from a bill of exchange prescribes after **6 (six)** years.
5. Extinctive prescription starts running from the day the **debt** becomes due.

SHORT QUESTIONS – BREACH OF CONTRACT AND REMEDIES

QUESTION 1

Tom undertakes to transport a ton of bricks from Jack's construction site in Lenasia to Lindani's site in Pretoria by midday 15 May 2020. When Tom arrives to pick up the bricks from Jack's yard, he discovers that the bricks have not arrived from the manufacturing site yet. This delay, which is beyond Tom's control, causes him to

deliver the ton on bricks to Lindani's site one day later than agreed upon. Answer the following questions:

1. Is Tom in breach of the contract? Explain your answer. (2)

No (1), this does not amount to *mora debitoris* as the debtor is excused from performing where he can prove that a ground of justification exists for his failure to perform. In this case, the delay was due to an unforeseen circumstance (1).

2. Would your answer to the above question be different if the reason for Tom's delay was that he stopped on the way at this girlfriend's house to stay the night? (2)

Yes (1), in this instance, Tom is in breach in the form of *mora debitoris* as he delayed performance and there is no ground of justification for his delay (1).

1 mark for spelling and grammar

QUESTION 2

Jabulani enters into a contract with Simon in terms of which Jabulani will purchase an ox from Simon for R5000. Simon agrees to deliver the ox on 31 May 2020. On 31 May 2020, Simon arrives at Jabulani's farm and delivers a bull instead of an ox. Jabulani is furious and comes to you for legal advice.

1 Explain to Jabulani the type of breach that Simon's conduct amounts to. (2)

The type of breach committed by Simon is known as positive malperformance (1). This means that Simon does perform an act but his performance is defective (1).

2 Explain to Jabulani whether he may cancel the contract in this instance. (2)

Jabulani is entitled to cancel in the case of positive malperformance if there is a cancellation clause (1) or where the breach is considered to be material (1).

1 MARK SPELLING AND GRAMMAR

ADDITIONAL TERMS QUESTIONS

Identify the types of terms:

1. Jackie allows Tim to farm on her property until her son, James, obtains his BSC Agriculture degree from the University of Stellenbosch. This is a [Resolutive] [condition].
2. Thabo will pay Rhys R5000 upon Celine's death. This is a [Suspensive] [Time Clause]
3. Isabel hires Aron as a personal trainer. Isabel pays Aron R2000 per month up front. Aron informs Isabel that if she misses a session, she will lose the money already paid for the month. This is a [Forfeiture] [clause]

4. The contract between Jane and John contains the following provision: "Any violation of the provisions stipulated in Clause 11 above shall be sanctioned by the payment of R1000 by the defaulting party." This is a [Penalty] [Clause]
5. Njabulo sells his 2010 VW Polo to Shaawn and gives her an assurance that the vehicle is still in proper working condition. This is a [Warranty] [clause]
6. Stacey rents her apartment in Sophiatown to Kedi for R4000 a month until 31 December 2020. This is a [Resolutive] [timeclause]
7. The contract between Boitumelo and Masai for the sale of land states the following: "The sale is subject to Masai obtaining a loan for 60% of the purchase price within 60 days of signing the contract with Bogus Bank Ltd". This is a [Suspensive] [condition]
8. The contract between Amy and Michele states the following: "This contract can only be amended in writing by the parties to the contract". This is a [Entrenchment] [clause]
9. Karabo agrees to buy her sister, Lindi, a pair of Nike Air Maxes if she passes her driver's license test the first time. This is a [Suspensive] [condition]
10. Jimmy may rent Dimitri's house until Dimitri's death. This is a [Resolutive] [Timeclause]

EXAM QUESTIONS

Identify the following contractual terms:

1. Blue Bank Ltd agrees to give Super Strikers Football Club R1 million if they win the African Football tournament that will be hosted on 20 June 2020. **(suspensive condition).**
2. Yash agrees that Kam may use his Commercial Law 1A textbook until the end of the first semester. **(Resolutive timeclause)**
3. Shreya agrees to buy Keyura an iPhone 11 if Keyura gets 80% or above in her Commercial Law 1A exam being written on 4 June 2020. **(Suspensive condition)**
4. Yugan hires Sesh to build a bar in his house. Should Sesh not finish building the bar within 3 weeks of starting the project, he must pay Yugan R500 for every day he is delayed. **(Penalty clause)**
5. Kubash and Vee agree to offer their healthcare services to rural communities. Their agreement stipulates that should they wish to alter the terms of the contract, it must be done in writing. **(entrenchment clause)**
6. Ronnie agrees to deliver 100kgs of potatoes to Peter every week. Peter agrees that he will pay Ronnie R2000 after every delivery. Should either party not perform as required, the contract will be cancelled. **(Cancellation clause)**
7. Thegesh is employed at Data Dynamics Ltd. The contract states that should he commit any crime whilst he is employed, the contract will be terminated. **(Resolutive condition)**
8. Javi is employed at Telesure Ltd for a period of 3 years. **(Resolutive timeclause)**

9. Sam agrees that should she commit a breach of contract, she will not be allowed to claim back what she has performed in terms of the contract. **(forfeiture clause)**
10. Milly agrees to give her son her house when she dies. **(suspensive time clause)**

Identify the type of breach of contract committed.

1. Clarke is hired by Bruce to paint his house with white paint by 10 June 2020. Clarke finishes painting the house but has used a grey paint. **(Positive malperformance)**
2. Desmond enters into a credit agreement to purchase a microwave. He agrees that the payment of the installment is due on the 1st of every month. In July, Desmond forgets to pay his installment on 1 July and pays it on 10 July. **(Mora Debitoris/default by the debtor)**
3. DJ Khaled agrees to play music at Justin's house on 30 June 2020, for R10 000. On 20 June 2020, DJ Khaled phones Justin and informs him that he is not going to play music at Justin's house. **(Repudiation)**
4. Claire requires her staircase fixed in her house. She hires Phil to come and fix the staircase on 15 July 2020. Claire agrees to pay R5000 for his services. When Phil arrives on 15 July 2020, he finds that Claire's house is locked and her phone is off when he tries to call her. He cannot fix the staircase as a result of not gaining access to the house. **(Mora Creditoris/Default by the creditor)**
5. Cecile is looking to buy a puppy for her daughter. She finds a Bulldog that she thinks her daughter would love. Frank, the owner of the Bulldog, agrees to sell it for R5000. Cecile and Frank agree that Cecile will pay Frank the R5000 now and that she will come pick up the dog the next day. That evening, Frank poisons the Bulldog, which dies. **(Prevention of Performance)**

Short questions on breach and remedies

Question one

Joe has been hired by Nancy to build and install five new cupboards for her kitchen. Nancy agrees to pay Joe R5000 for his work and they both agree that he will take three weeks to complete the job. Joe begins working immediately and completes three cupboards, however after ten days he stops working on the remaining cupboards and does not complete the work as agreed. Nancy is upset and comes to you for advice.

Answer the following questions:

- a. Explain what type of breach of contract Joe has committed (2)
Positive malperformance.
- b. In your opinion, which remedy would Nancy claim? Provide a reason for your answer (2). **The answer should be specific performance, as this aims to fulfil the objective of the contract. Students may say reduced performance, however only if Nancy has already paid her performed her part. Cancellation is a drastic remedy and seeks to terminate the obligations so it may not be the best remedy in this situation. However students may argue that she cancels the contract and gets another builder to complete the work and then also sues for damages. Damages may be claimed in addition to specific performance or cancellation.**

1 mark awarded for spelling and format

Question Two

Cherry Blossom Ltd orders 10 000 boxes of hand sanitizer from Mentos Ltd, a pharmaceutical company. In the contract, both parties agree that Mentos Ltd will deliver the stock of sanitizer within 2 weeks of signing the agreement. They agree that the total price of the stock is R500 000, which will be paid once delivery is made. The agreement is signed on 1 June 2020. On 15 June 2020, Cherry Blossom Ltd has not received its stock from Mentos Ltd and have not heard anything from them. Cherry Blossom Ltd comes to you for advice. Answer the following questions:

- a. Explain what type of breach has been committed (2) (***Mora Debitoris*/ default by the debtor – they have not performed on time/ or delay is without legal justification**)
- b. Briefly advise which remedies are available to Cherry Blossom Ltd. (2) **Specific performance, cancellation is the breach is serious (students must motivate) and damages. Motivation must be provided.**

1 mark awarded for spelling and format

Multiple Choice Questions

Question one

The following is an example of a form of breach of contract:

- i. ***Mora debitoris***
- ii. *Caveat subscriptor*
- iii. Supervening impossibility of performance
- iv. Parole evidence rule
- v. *Par delictum*

Question 2

Mora ex re in respect of *mora debitoris* means:

- i. **Where a specific date or time for performance has been stipulated in the contract and the debtor fails to perform on or before the appointed time, he is automatically in *mora*.**
- ii. Where no exact date has been specified, the creditor can determine a date by demanding that the debtor perform before or on a certain date. Should demand in writing and give reasonable time. A demand is therefore necessary by the creditor before the debtor can be in *mora*.
- iii. The debtor must pay interest for being in *mora*
- iv. The debtor must send a letter to the creditor explaining why s/he is delayed.
- v. The debtor is prohibited from delivering goods to his/her ex partner.

Question 3

Positive malperformance with reference to breach refers to:

- i. **The content or quality of performance**
- ii. The timing of the performance

- iii. Whether the debtor has a positive attitude whilst performing the work
- iv. Making the performance impossible to perform
- v. Performing better than what the creditor has expected.

Question 4

Sesh agrees to cater food for Vee's birthday on 1 July 2020. On 28 June 2020, Sesh calls Vee to inform her that he will no longer be catering the food for her birthday.

What type of breach of contract has occurred?

- i. Positive malperformance
- ii. *Mora debitoris*
- iii. **Repudiation**
- iv. Prevention of performance
- v. There is no breach of contract

Question 5

Claire agrees to pay her rental of R5000.00 every month to Phil on the 1st day of every month. For the month of July, Claire pays her rental on the 30 June. What type of breach of contract has occurred?

- i. *Mora debitoris*
- ii. Prevention of performance
- iii. Repudiation
- iv. **There is no breach of contract**
- v. *Mora creditoris*

Question 6

Mary hires Bo to tile her kitchen. They agree that Bo will tile the kitchen with blue tiles. Bo completes the kitchen but has tiled the kitchen with green tiles as he feels they will better suit Mary's kitchen and they were more expensive than the blue tiles. What type of breach of contract has occurred?

- i. There is no breach of contract because performance has been rendered.
- ii. **Positive malperformance**
- iii. Repudiation
- iv. Mistake
- v. *Mora debitoris*

Question 7

The two requirements for *mora debitoris* are:

- i. The debtor must perform and the debtor's performance must be incomplete.
- ii. The debtor's performance must be delayed and the performance must be defective.
- iii. **The debtor's performance must be delayed and performance must be claimable.**

- iv. The debtor's performance must be delayed and performance must be impossible to perform later on.
- v. The debtor must contact the creditor and apologise for the delay.

Question 8

Repudiation may be defined as:

- i. **When a person withdraws from a contract by words or conduct through which a party to a contract indicates that he or she may not honour the obligations under the contract without lawful justification.**
- ii. Withdrawing from a contract by words or conduct due to a legal excuse.
- iii. Drawing up an amendment to the original contract.
- iv. Where a party makes performance impossible to perform.
- v. A Latin term for 'reproduction'.

Question 9

When breach of contract in the form of prevention of performance is committed by the creditor, the following occurs:

- i. **The debtor's performance is made impossible by the culpable act of the creditor and can never be rendered.**
- ii. The debtor makes his own performance impossible.
- iii. The creditor delays the debtor's performance but it is still possible to perform in the future.
- iv. The creditor informs the debtor that the debtor is no longer required to perform.
- v. The creditor prevents the debtor from getting married to another person.

Question 10

A breach of contract may occur when:

- i. The parties have fulfilled the obligations of the contract.
- ii. **The obligations by one of the parties is not achieved as a consequence of the fault of one of the parties.**
- iii. The parties do not read the contract and have to draft a new one.
- iv. The parties require rectification of the contract.
- v. The parties agree through a handshake.

True or False

1. One of the requirements of *mora creditoris* is that the performance must no longer be possible. **(FALSE)**
2. In order for prevention of performance to constitute a breach of contract, performance must still be possible. **(FALSE)**
3. The requirements for repudiation include an act and an intention to repudiate. **(TRUE)**
4. Positive malperformance may comprise of a negative act or a positive act **(TRUE)**
5. A breach of contract relating to the quality of the debtor's performance constitutes *mora debitoris* **(FALSE)**

6. Supervening impossibility of performance will relieve the debtor's duty to perform as long as his performance was not delayed (**TRUE**)
7. Supervening impossibility of performance is a form of breach of contract (**FALSE**)
8. Default by the debtor or creditor are examples of forms of breach of contract (**TRUE**)
9. *Mora ex persona* means that the debtor or creditor is automatically in *mora* because a specific date or time for performance has been stipulated in the contract and the debtor/creditor has failed to perform on or before the appointed time. (**FALSE**)
10. *Mora ex re* is when the other party needs to determine a date of performance by demanding that the defaulting perform before or on a certain date. (**FALSE**)

Fill in the blank space

1. The Latin term for default by the creditor is (***Mora creditoris***)
2. is where a party tries without lawful justification to withdraw from the contract by words or conduct, or where the party gives notice that he or she cannot or will not perform (**Repudiation**)
3. Where a party is automatically in *mora* because s/he has failed to perform on a specific date or time as stated in the contract, this is known as *mora ex (re)*
4. The is the party who is responsible for performing an obligation in terms of the contract (**debtor**)
5. Where a party breaches a contract by committing positive malperformance, s/he has rendered incomplete, improper or performance (**defective**)

Match the columns

1. <i>Mora debitoris</i>	A. Default by the debtor B. Default by the creditor C. Prevention of performance D. Italian cheese
2. Two requirements for repudiation are an act and.....	A. An intention to repudiate B. Performance must be claimable C. Performance must become impossible to render D. Unhappiness
3. For positive malperformance, the breach of contract relates to....	A. The quality of the performance B. The timing of the performance C. The happiness of the creditor D. The unhappiness of the debtor
4. In the event of repudiation, a party may without justification try to withdraw from a contract through words or.....	A. Conduct B. Telepathy C. Palm reading D. An excuse
5. In the event of prevention of performance by the creditor, the	A. Impossible

debtor's performance is rendered.....	<p>B. Supervening impossibility of performance</p> <p>C. Possible</p> <p>D. Voidable</p>
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1. <i>Mora ex persona</i>	<p>A. Where no exact date has been specified, the creditor can determine a date by demanding in writing that the debtor perform before or on a certain date.</p> <p>B. Where a specific date or time for performance has been stipulated in the contract and the debtor fails to perform on or before the appointed time.</p> <p>C. Prevention of performance</p> <p>D. An ex girlfriend/boy friend</p>
2. Where the debtor renders incomplete or defective performance.	<p>A. Positive malperformance</p> <p>B. Default by the debtor</p> <p>C. Discharge</p> <p>D. Unhappiness</p>
3. One of the requirements for <i>mora creditoris</i> is...	<p>A. That the debtor must render performance</p> <p>B. That the creditor makes performance impossible to render</p> <p>C. That the happiness of the creditor</p> <p>D. That the unhappiness of the debtor</p>
4. When the obligations of the contract are not fulfilled due to the fault of one of the parties, this constitutes...	<p>A. Breach of contract</p> <p>B. Discharge</p> <p>C. Delict</p> <p>D. An excuse</p>
5. One of the forms of breach of contract.	<p>A. Repudiation</p> <p>B. Supervening impossibility of performance</p> <p>C. Par delictum</p> <p>D. Voidable</p>