



DEPARTMENT OF MERCANTILE LAW

COMMERCIAL LAW 1A (CLA1501)

TUTORIAL LETTER 201/3/2011

FIRST AND SECOND SEMESTER

Dear Student

This tutorial letter contains the memorandums and commentaries on the two assignments.

The aim of this discussion is to draw your attention to certain important aspects of the questions which you may have overlooked. Read the comments carefully to make sure that you understand both why the particular answer is correct and why the distractors (the incorrect options) are incorrect. If you are still not sure after reading the commentary, go back to the original source in your prescribed textbook.

NOTE: All references in brackets refer to your prescribed textbook, Havenga M et al *General Principles of Commercial Law* 7 ed (2010).

COMMENTARY ON COMPULSORY ASSIGNMENT 01

QUESTION 1

(Chapter 1: The South African Legal System)

2 is **CORRECT**. Divorce concerns the status of a person and only the High Court is competent to decide cases involving status.

1 is **INCORRECT**. The Supreme Court of Appeal is only a court of appeal.

3 is **INCORRECT**. Magistrates' courts have very limited jurisdiction. A magistrate may not hear divorce actions or any of the other matters which fall exclusively within the jurisdiction of the High Court.

4 is **INCORRECT**. The Constitutional Court hears matters regarding the interpretation of the Constitution.

QUESTION 2**(Chapter 2: Introduction to the Science of Law)**

3 is **CORRECT**. One of the requirements for the transfer of ownership is that the transferor must deliver the thing to the transferee. In the case of immovables, actual delivery is impossible. Immovables are transferred by way of registration in the Deeds Office.

1 is **INCORRECT**. The transfer of ownership is not an automatic consequence of the conclusion of a contract of sale.

2 is **INCORRECT**. In the case of a contract of sale it is indeed a requirement for the transfer of ownership that the purchase price must be paid, or that the seller must have given the purchaser credit for the payment thereof, or that the purchaser must have given security for the payment thereof. This, however, is not the only requirement.

4 is **INCORRECT**. Although occupation is a method of acquiring ownership, in the case of a contract of sale of immovable property, ownership is only transferred upon registration of the transfer at the Deeds Office.

QUESTION 3**(Chapter 3: Law of Contract: Introduction)**

3 is **CORRECT**. All five requirements for a valid contract have been satisfied. Online contracting is possible. The Electronic Communications and Transactions Act 25 of 2002 regulates electronic contracts.

1 is **INCORRECT**, because the guests did not bind themselves in a contractual relationship with Sally. At most their actions amounted only to a social appointment or agreement but there is no enforceable contractual relationship. There was no serious intention on the part of the contracting parties to be legally bound.

2 is **INCORRECT**. By definition a contract is an agreement between two or more parties. One cannot agree with oneself, unless he or she acts in a different capacity on each side of the contract. There must be more than one party to a contract.

4 is **INCORRECT**. This agreement is not physically possible. Rights and duties must be physically possible. Therefore, the requirements for a valid contract have not been satisfied.

QUESTION 4**(Chapter 3: Law of Contract: Introduction)**

3 is the **CORRECT** answer, because the statement is INCORRECT. Freedom to contract can be limited in certain circumstances. A person may, for example, not conclude contracts which are unlawful or illegal.

1 is an INCORRECT answer, because the statement is CORRECT. Freedom to contract is considered to be one of the cornerstones of the modern law of contract.

2 is an INCORRECT answer, because the statement is CORRECT. One is generally free to choose with whom and on what grounds one wants to contract with another but freedom of contract can be limited.

4 is an INCORRECT answer, because the statement is CORRECT. Freedom to contract can be limited in circumstances. A person may, for example, not conclude contracts which are unlawful or illegal.

QUESTION 5**(Chapter 4: Consensus)**

4 is **CORRECT**. Social appointments, of which an invitation to a wedding reception is an example, have no legal consequences. Since the parties in this set of facts do not have the intention to create legally enforceable obligations, their agreement is not a contract.

1 is INCORRECT. Mr and Mrs Party may not claim additional costs from the parents or guardians because no obligation was created between Mr and Mrs Party and the uninvited children and/or their parents or guardians.

2 is INCORRECT. Mr and Mrs Party may not claim additional costs from the parents or guardians because no contract was concluded between Mr and Mrs Party and the guests. A mere social appointment does not create a contract.

3 is INCORRECT. Even though Mr and Mrs Party made a mistake with the number of guests who would attend, they may not refuse to pay Good Food Caterers, because the agreement between Mr and Mrs Party and the caterers was that the cost would be calculated at a certain amount (R100) per guest, regardless of the number of guests who attended the reception.

QUESTION 6
(Chapter 4: Consensus)

3 is **CORRECT**. One of the requirements for offer and acceptance is that the offer may be addressed to a particular person or persons, or in general to an unknown person or persons. This is an example of an offer addressed to unknown persons.

1 is **INCORRECT**. The general rule is that an advertisement or a display in itself does not constitute an offer but an invitation to do business. Any person who reacts to David's advertisement makes an offer to David to buy the advertised car.

2 is **INCORRECT**. The general rule is that an offer may be made either expressly (in writing or orally) or tacitly (by means of conduct). An exception exists in the case of the purchase of land. In such a case the law prescribes that the offer and acceptance must be reduced to writing.

4 is **INCORRECT**. This is an example of an offer addressed to a particular person. The offer must be communicated to the offeree and, if he or she is not aware of the offer, no valid offer has been made.

QUESTION 7
(Chapter 5: Capacity to Act)

3 is **CORRECT**. A minor over the age of seven years has limited capacity to act. He or she may, however, conclude contracts without assistance which are exclusively to his or her benefit.

1 is **INCORRECT**. A person's capacity to act is not influenced by insolvency per se. However, if a person's estate is sequestrated as a result of insolvency, it will affect his or her capacity to act.

2 is **INCORRECT**. Although a declared prodigal has limited capacity to act, mere prodigal tendencies have no effect on a person's capacity to act. Only where a court has declared the person a prodigal and appoints a curator, will it affect that person's capacity to act.

4 is **INCORRECT**. A minor under the age of seven years has an insufficient level of development to enable him or her to form a sound judgment of contractual obligations. He or she has no capacity to act and cannot enter into any contract whatsoever.

QUESTION 8
(Chapter 5: Capacity to Act)

1 is **CORRECT**. Minors are natural persons who have not yet turned eighteen, are still unmarried or have not been declared majors by the court. Minors are under the guardianship of their parents or guardians. A minor over the age of seven years has limited capacity to act and must therefore conclude contracts with the assistance of a guardian. Barney needs assistance from someone who has full capacity to act (his parents) in order to supplement his judgement.

2 is **INCORRECT**. The Children's Act 38 of 2005 provides that a parent or guardian of a minor must assist the minor in contractual and other legal matters. A minor over the age of seven may conclude contracts without assistance if they are exclusively to his or her benefit, namely contracts in terms of which rights but not duties are acquired. Barney wants to sell the horses and will therefore acquire rights and duties. He therefore needs his parents' assistance. The fact that Barney inherited the horses is irrelevant.

3 is **INCORRECT**. Minors are natural persons who have not yet turned eighteen, are still unmarried or have not been declared major by the court. Minors are under the guardianship of their parents or guardians. A minor over the age of seven years has limited capacity to act and must therefore conclude contracts with the assistance of a guardian. Barney is sixteen.

4 is **INCORRECT**. Minors are natural persons who have not yet turned eighteen, are still unmarried or have not been declared a major by the court. Minors are under the guardianship of their parents or guardians. A minor over the age of seven years has limited capacity to act and must therefore conclude contracts with the assistance of a guardian. The value of the horses (movable property) is irrelevant. In the case of immovable property belonging to a minor, the value of the property will determine whether any consent additional to the guardian's assistance is required for the sale of the property.

QUESTION 9
(Chapter 6: The Agreement must be Possible)

3 is **CORRECT**. Contracts could be contrary to public policy because they restrict people's freedom to participate in legal or commercial intercourse. However, as an exception, the law does allow engaged couples to include a clause in their antenuptial contract to the effect that the one spouse makes the other his or her heir. This exception enables the first-dying spouse to provide for the maintenance of the surviving spouse.

1 is **INCORRECT**. Performance is legally impossible if it is contrary to good morals or public policy. This contract is in conflict with good morals. An act is contrary to good morals if it is contrary to the community's perception of what is proper and decent and in accordance with the conscience of the community. Contracts which are aimed at promoting sexual misconduct and which impair the stability of marriage are contrary to the South African community's perceptions of what is proper and decent.

2 is **INCORRECT**. Performance is legally impossible if it amounts to an offence. Contracts that amount to offences are therefore legally impossible.

4 is **INCORRECT**. Performance is legally impossible when it is contrary to good morals or public policy. This contract is in conflict with good morals. Contracts which are aimed at promoting sexual misconduct and which impair the stability of marriage are contrary to the South African community's perceptions of what is proper and decent.

QUESTION 10
(Chapter 6: The Agreement must be Possible)

3 is **CORRECT**. The contract between Gretchen and Nick is unlawful and therefore void owing to legal impossibility.

1 is **INCORRECT**. No party may institute an action against the other to claim performance on the ground of an unlawful contract. This rule is expressed in the maxim *ex turpi causa non oritur actio* (no action arises from a shameful cause). Even if one of the parties has already rendered performance in terms of the unlawful contract, the court will not recognise the contract. Nick will therefore not be able to claim delivery of the driver's licence from Gretchen on the basis of the contract which arose between them.

2 is **INCORRECT**. The relief of unjustified enrichment is usually not allowed in unlawful contracts, as a result of the existence of a legal rule known as the *par delictum* rule. According to this rule, when there is equal guilt the possessor is in the stronger position. Gretchen is in possession of the sum of money agreed upon and, since Gretchen and Nick are equally guilty, Gretchen is in the stronger position. Therefore Nick cannot claim the purchase price from her.

4 is **INCORRECT**. Although option 3 is **CORRECT**, option 2 is **INCORRECT**. Option 3 is **CORRECT** because the contract between Gretchen and Nick is unlawful and therefore void owing to legal impossibility. Option 2 is **INCORRECT** because the relief of unjustified enrichment is usually not allowed in unlawful contracts, as a result of the existence of a legal rule known as the *par delictum* rule. According to this rule, when there is equal guilt the possessor is in the stronger position. Gretchen is in possession of the sum of money agreed upon and, since Gretchen and Nick are equally guilty, Gretchen is in the stronger position. Therefore Nick cannot claim the purchase price from her.

Total: [10]

COMMENTARY ON COMPULSORY ASSIGNMENT 02

QUESTION 1
(Chapter 6: The Agreement must be Possible)

2 is **CORRECT**. The undertaking by the debtor to deliver a specific mountain bike is a determined performance. As the debtor (Sifiso) may, at his sole discretion, choose to deliver a different mountain bike, the obligation is also facultative.

1 is **INCORRECT**. In the case of a generic obligation, the debtor (unless otherwise agreed) may choose performance from a specific genus (for example, to deliver any one of his ten mountain bikes).

3 is **INCORRECT**. In the case of an alternative obligation, performance may be selected from two or more specified alternatives. The two or more objects from which performance must be chosen are determined at the time of the conclusion of the contract.

4 is **INCORRECT**. An agreement involving a facultative performance is not invalid for that reason. Performance is determinable, there is consensus and it is physically possible to perform. If all the requirements for a valid contract are met, the contract is valid.

QUESTION 2
(Chapter 7: Formalities)

4 is **CORRECT**. Where formalities are prescribed by either legislation or the parties to a contract, they have to be complied with in order for the contract to be valid.

1 is **INCORRECT**. As a general rule, no formalities are needed for the formation of a valid contract.

2 is **INCORRECT**. The fact that a contract is in writing, does not mean that formalities are prescribed by the law or the parties as a requirement for its validity.

3 is **INCORRECT**. Where formalities are prescribed by legislation, these have to be complied with in order for the contract to be valid. If formalities are prescribed by the parties to a contract, these formalities also have to be complied with in order for the contract to be valid. Both legislation and the parties to the contract can therefore prescribe formalities, and not only legislation.

QUESTION 3
(Chapter 7: Formalities)

3 is **CORRECT**. An antenuptial contract must be notarially attested to and then registered in a Deeds Office within the prescribed period. However, if an antenuptial agreement has not been registered, the agreement is valid between the spouses, but not against third parties.

1 is **INCORRECT**. A contract for the alienation of land must be contained in a written contract, signed by both parties to the contract or their agents acting on their written instructions. If Peter did not comply with the formalities, the contract is void. However, any alienation of land in contravention of these formalities prescribed by the Alienation of Land Act 68 of 1981 will be deemed to be valid if both parties have performed fully and the land has been transferred to the new owner. However, Peter has not performed yet, and the contract is therefore void.

2 is **INCORRECT**. In terms of the General Law Amendment Act 50 of 1956 a contract of suretyship is valid only if it is in writing and signed by or on behalf of the surety. This contract is therefore void.

4 is **INCORRECT**. Only an antenuptial contract is partially valid if formalities have not been complied with. Contracts for the alienation of land and surety are void. If an antenuptial agreement has not been registered, the agreement is invalid against third parties, but valid between the spouses. The antenuptial contract will therefore not be completely void.

QUESTION 4
(Chapter 8: Terms of the Contract)

2 is **CORRECT**. If the uncertain future event (ie the obtaining of the loan) does in fact take place, the condition will be fulfilled. If this specified uncertain future event does not take place, as is the position here, the condition is not fulfilled, and the contractual obligations do not become operative, but are terminated.

1 is **INCORRECT**. The facts indicate the existence of a suspensive condition. When the agreement is concluded, a valid contract comes into being and a binding contractual relationship exists between the parties so that no party can withdraw from the contract. The operation of the contractual rights and duties is, however, suspended until the condition has been fulfilled.

3 is **INCORRECT**. Although a valid contract comes into being on acceptance of the offer by Fanie, the operation of the contractual rights and duties is suspended until the condition has been fulfilled.

4 is **INCORRECT**. A valid contract has come into being and a binding contractual relationship exists between the parties so that no party can withdraw from the contract. As the period allowed for the fulfilment of the suspensive condition has not yet elapsed, Fanie is not entitled to withdraw from the contract after a week, even if it appears that Stanley's chances of obtaining the loan are remote.

QUESTION 5
(Chapter 8: Terms of the Contract)

3 is **CORRECT**. A modus is a contractual term which burdens a contracting party to do something or to refrain from doing something. Jolwana is obliged to grow mealies on the farm. He will be in breach of contract if he does not do so.

1 is **INCORRECT**. This term is a resolutive condition. It renders the continued existence of the contract dependent on the occurrence of a specified uncertain future event, and the contract will come to an end when the uncertain event occurs.

2 is **INCORRECT**. This term is a suspensive condition. It suspends the operation of a contractual obligation until the occurrence of an uncertain future event, the birth of a male child.

4 is **INCORRECT**. This term is a supposition. It renders the existence of the contract dependent on an event which has already taken place, or on a state of affairs which exists at the time of concluding the contract, although the parties are not certain what the position is.

QUESTION 6
(Chapter 9: Interpretation of the Contract)

3 is the **CORRECT** answer because the statement is **INCORRECT**. One presumption in the interpretation of contracts is that the parties intend their agreement to be valid and enforceable. The courts will attempt to interpret the contract in a manner that will not affect its validity. If ambiguity exists, the courts will therefore not interpret the contract as invalid, but the ambiguous clause may be interpreted against the party who was responsible for its drafting.

1 is an **INCORRECT** answer because the statement is **CORRECT**. Words that carry a technical meaning, or which are used in a specific manner within a particular branch of business or profession, will be interpreted in accordance with that specific usage.

2 is an **INCORRECT** answer because the statement is **CORRECT**. It is accepted that the parties normally use all words in their ordinary grammatical meaning.

4 is an **INCORRECT** answer because the statement is **CORRECT**. An important presumption is that the parties do not intend to alter the common law unless, and only to the extent that, this is expressly indicated. Thus, where parties express themselves on a particular matter but omit some detail, the common-law rules will regulate that aspect.

QUESTION 7
(Chapter 10: Breach of Contract)

1 is **CORRECT**. Repudiation as a form of breach of contract is any behaviour by a party to a contract indicating that he or she does not intend to honour his or her obligations. Marshall's indication constitutes repudiation.

2 is **INCORRECT**. Mora debitoris as a form of breach of contract occurs when a debtor does not perform at the agreed time and the delay is due to his or her own fault. Marshall will not perform after the agreed time, but has indicated that he does not intend to perform at all. This constitutes repudiation.

3 is **INCORRECT**. Positive malperformance occurs when the debtor commits an act which is contrary to the terms of the contract. Marshall would have committed positive malperformance if he had, for example, delivered wine of a quality lower than export quality.

4 is **INCORRECT**. Prevention of performance by the debtor occurs when he or she culpably renders his or her own performance impossible. Prevention of performance by the creditor occurs where a creditor culpably renders the debtor's performance impossible. In respect of the delivery of the wine, Marshall is the debtor. He would have committed prevention of performance if he had, for example, destroyed the bottles of wine. In respect of the receipt of the price agreed upon, Marshall is the creditor. But as the price has been paid, he can no longer prevent Ted from performing.

QUESTION 8**(Chapter 10: Breach of Contract; Chapter 11: Remedies for Breach of Contract)**

1 is **CORRECT**. If a contract contains a cancellation clause, the creditor will indeed be able to cancel the contract in the event of the debtor's default, even if the default is not a material breach of contract.

2 is **INCORRECT**. A debtor can acquire a right of cancellation if the creditor is in mora with a substantial part of his or her obligation, by sending the creditor a notice of his or her intention to cancel the contract. If he or she does not give notice of his or her intention to cancel the contract, the creditor cannot acquire a right of cancellation.

3 is **INCORRECT**. In the absence of a cancellation clause, a creditor will be justified in cancelling the contract only where the time for performance is stipulated and where the failure to perform by the stipulated date constitutes a serious breach of the contract.

4 is **INCORRECT**. Timely but defective performance does not constitute breach of contract in the form of mora debitoris. One of the requirements for mora debitoris is that performance must be delayed. In this option performance is timely. The debtor therefore does not commit breach of contract in the form of mora debitoris. By rendering defective but timely performance, the debtor does not commit mora debitoris, but positive malperformance. The contract cannot be cancelled for breach of contract in the form of mora debitoris. It can, however, be cancelled for breach of contract in the form of positive malperformance.

QUESTION 9**(Chapter 12: Transfer and Termination of Personal Rights)**

2 is **CORRECT**. Where prescription runs against a minor, the completion of prescription is delayed under certain circumstances. If the prescription period will be completed before the minor reaches majority, the completion of prescription will be delayed until one year after the minor has reached majority. If the prescription starts during minority but will only be completed after the minor has reached majority, prescription will only be delayed if completion will occur within one year of the minor reaching majority. If completion will only occur more than one year after the minor has reached majority, it will not be delayed. The completion of prescription is delayed until the minor becomes a major whereupon it continues to run again.

1 is **INCORRECT**. Prescription will start running, but the completion thereof will be delayed. It is a basic rule that prescription starts running as soon as the claim becomes enforceable. This is in the interest of legal certainty. So it does not matter whether the debtor is a minor or not.

3 is **INCORRECT**. Interruption of prescription occurs when certain legal processes are instituted against the debtor. Prescription cannot be interrupted where a minor is involved since he or she lacks the necessary legal capacity of a major to acknowledge liability in terms of a contract.

4 is **INCORRECT**. Prescription cannot run against the minor's legal guardian since the latter can only ratify contracts entered into by the minor and the minor's legal guardian does not take over the legal obligations of the minor. The minor thus remains responsible for any debt on the contract.

QUESTION 10
(Chapter 12: Transfer and Termination of Personal Rights)

2 is **CORRECT**. Supervening impossibility of performance occurs when performance is possible at the time of the conclusion of the contract, but factors beyond the control of the contracting parties intervene and result in objective impossibility of performance. A contract does come into being, but is terminated when supervening impossibility of performance occurs.

1 is **INCORRECT**. Prevention of performance occurs when performance is made impossible through the fault of one of the parties. It is a form of breach of contract. Supervening impossibility of performance (in other words, impossibility **not** due to the fault of one of the parties) terminates an obligation. Prevention of performance does not terminate the obligation.

3 is **INCORRECT**. If performance becomes impossible after the debtor has fallen in mora, such supervening impossibility of performance does not have the effect of extinguishing the obligation, with the result that the debtor who is in mora may not claim to have been relieved from his obligation where performance has become impossible.

4 is **INCORRECT**. Possibility of performance is one of the requirements for a valid contract. If performance is impossible at the conclusion of the contract, no contract is concluded. Therefore initial impossibility does not terminate an obligation, because no obligation came into existence.

TOTAL: [10]

THE LECTURERS
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