IMPORTANT INFORMATION:
This tutorial letter contains important information about your assignment.
Dear Student

This tutorial letter contains the memorandum and commentary on Assignment 02.

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 02

### QUESTION 1
(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. Paul'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. Paul 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. Paul 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, Chris 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, Paul is the creditor. But as the price has been paid, he can no longer prevent Chris from performing.

### QUESTION 2
(Chapter 13: The Contract of Sale)

5 is **CORRECT**. Both statements B and D are **CORRECT**. B is CORRECT because the parties reached agreement on the merx as well as the purchase price. D is CORRECT because a valid contract of sale is concluded if the parties agree on the merx and agree that a third person will determine the purchase price.

1 is **INCORRECT**. Although B is CORRECT, A is **INCORRECT**. B is CORRECT because the parties reached agreement on the merx as well as the purchase price. A is INCORRECT because the price agreed upon by the parties must be an amount of money, otherwise the contract is not a contract of sale, although it may be a different kind of contract. In this instance a contract of exchange would have been concluded.
2 is INCORRECT. Both statements A and C are INCORRECT. A is INCORRECT, because the purchase price agreed upon by the parties must be an amount of money, otherwise the contract is not a contract of sale, although it may be a different kind of contract. In this instance a contract of exchange would have been concluded. C is INCORRECT because the merx is not definite and no means for ascertaining which farm will be the object of the sale has been agreed upon.

3 is INCORRECT. Although D is CORRECT, A is INCORRECT. D is CORRECT because a valid contract of sale is concluded if the parties agree on the merx and agree that a third person will determine the purchase price. A is INCORRECT because the purchase price agreed upon by the parties must be an amount of money; otherwise the contract is not a contract of sale, although it may be a different kind of contract. In this instance a contract of exchange would have been concluded.

4 is INCORRECT. Although B is CORRECT, C is INCORRECT. B is CORRECT because the parties reached agreement on the merx as well as the purchase price. C is INCORRECT because the merx is not definite and no means for ascertaining which farm will be the object of the sale has been agreed upon.

**QUESTION 3**

(Chapter 15: The contract of Insurance)

1 is CORRECT. If the insurer undertakes to pay the insured or the beneficiary a fixed sum of money if the event insured against takes place, the insurance is non-indemnity insurance.

2 is INCORRECT. When the insurer undertakes to make good any damage which the insured may suffer, the insurance is indemnity insurance.

3 is INCORRECT. Although the undertaking in non-indemnity insurance is to pay a fixed sum of money, this does not happen at the expiry of a fixed period, but when the event insured against occurs.

4 is INCORRECT. As is the case with indemnity insurance, an insurable interest is required in the case of non-indemnity insurance, which must, in the latter case, exist at the time of conclusion of the contract.

**QUESTION 4**

(Chapter 20: The Law of Agency)

4 is CORRECT. If Abe has the necessary authority to conclude a contract on behalf of Carol for the purchase of the immovable property, there will be a valid contract between Carol and Simangaliso.

1 is INCORRECT. When Abe acts on behalf of Carol with the necessary authority to do so, a contract of sale comes into existence between Carol and Simangaliso, and not between Abe and Simangaliso.

2 is INCORRECT. The contract between Carol and Abe is a contract of agency and not of sale.

3 is INCORRECT. It is possible for one person to conclude a contract on behalf of another as long as there is a valid contract of agency between them.
QUESTION 5
(Chapter 23: Security)

4 is CORRECT. In the case of real security the creditor has a right against the property of the debtor, whereas in the case of personal security a third person binds him or herself in a personal capacity to the creditor for the debtor’s obligation to the creditor. However, the Security by Means of Movable Property Act 57 of 1993 provides that if a special notarial bond has been registered over corporeal movable property (the truck) and the property has been described in such a way that it is readily recognisable, that property is deemed to have been pledged to the bondholder (Boss Bank), despite the fact that it has not actually been delivered to him or her. Therefore, if Jacques registers a notarial bond over the truck he does not need to deliver it to Boss Bank.

1 is INCORRECT. In the case of mortgage bonds, the subject matter can only be immovable property. Jacques’s only asset is the truck, which is movable. As Jacques is not the owner of the business premises, which is indeed immovable property, he cannot mortgage it.

2 is INCORRECT. Pledge is constituted by agreement between the pledgor (Jacques), who undertakes to deliver movable property (the truck), to the pledgee (Boss Bank), and the subsequent delivery of the movable property (the truck) in question. This type of security does not suit Jacques’s needs because he needs the truck and will therefore not be in the position to deliver it to Boss Bank for security as a pledge.

3 is INCORRECT. A lien is the right to retain possession of another’s property on which money or labour has been expended. A lien is a form of real security which arises by operation of law and not as a consequence of agreement between parties. In the case of a lien, the property is in the possession of the creditor. Jacques’s situation does not fall in the ambit of the three liens recognized in law.

TOTAL: [10]

THE LECTURERS
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