INSTRUCTIONS

1. This paper contains four questions, each totalling 25 marks.
2. You are required to answer all the questions.
3. This is a closed-book examination, and you are not permitted to take any study materials into the examination room or to consult any such materials when writing the examination.
4. You are requested, in your own interests, to write legibly.
5. This paper consists of EIGHT (8) pages, please make sure you have all the pages.
QUESTION 1

A party may be held contractually liable even though he can show that in the process of contracting he made a material error as to the terms intended by the other party. Explain fully the legal principles applicable in this regard, making reference to relevant case law. What role do the principles play where a party has signed a document containing contractual terms? Is it possible for parties contractually to exclude reliance on mistake?

Having completed your discussion, comment briefly on whether there is a contract in the following cases.

(a) Vanessa, a prospective LLB student at the local campus, applies for a loan from Last National Bank. The bank indicates that it will only give her a loan if her stepfather, Dick, consents to stand surety for her. Vanessa eventually persuades Dick to go into town to see the Loans Manager. The latter produces a form full of detailed fine print and Dick, who is generally too lazy to read anything except the sports page in the newspaper, exclaims: ‘Oh no! Not a lot of legal mumbo-jumbo! I’ve no time to read all this now.’ The Manager replies politely that Dick’s consent to stand surety is essential if the loan is to go through, and Dick then signs the document, muttering something about banks and red tape. Later, Dick happens to glance through his copy of the suretyship and he discovers that it provides that he will be surety for ‘any amount owing at any time in the future’ by Vanessa to the bank ‘from any cause whatever’ (not merely the loan), and that he may not terminate his liability as surety without the prior written consent of the bank. Dick is unhappy with the scope of the suretyship undertaking and he refuses to accept liability.

(b) Terri, a tenant whose lease is about to expire, asks the landlord, Larry, if he will renew the lease for a further two years. Larry replies that he has no objection in principle to a renewal, but must have an increase in rent for the renewal period. He adds: ‘Let me think about how much and I’ll get my attorney to draft something and send it to you.’ Larry instructs his attorney, Dullwitt, to draft a new lease and to increase the rent from R4 500 to R6 500 per month. Dullwitt Drafts does the drafting, but forgets about the increase and reflects the rent in the document as R4 500. Terri, when signing, realizes there has been a mistake, but decides not to say anything to Larry whom, she observes, signs without bothering to read the document.
(c) Van der Merwe and Patel are negotiating a sale of shares. Van der Merwe says his lowest selling price is R490 per share but Patel stubbornly refuses to offer more than R440. Patel goes back to his office, and, having thought again about the matter, decides to increase his offer. He dictates to his secretary an offer to buy at R460. She carelessly types the price as ‘R490’ and Patel signs the letter without noticing the mistake. When Van der Merwe receives the letter he is taken aback at the price mentioned and amazed that Patel (whom he knows to be stubborn and hard-headed) appears to have had a change of heart. He accepts the offer quickly, in case there has been a mistake.

(d) Gullible, who is keen on buying a second-hand car as a birthday present for his son, takes a shine to a VW Golf standing in Otto’s showroom. After a test-drive, Gullible agrees to buy the vehicle on condition that Otto replaces certain parts in the engine and puts on a set of ‘sporty tyres’. When Gullible calls round to pick up the vehicle, Otto’s secretary hands him a document and says that Otto wants it signed. The document bears the logo ‘Otto’s Motors’ (the name of Otto’s business) and has the words ‘Manufacturer’s Guarantee’ printed in bold print across the top. Gullible asks what the document is for and the secretary says: ‘It’s just our standard guarantee.’ Gullible takes this to mean that the document relates to the new parts installed and he signs it without bothering to read it. Later, when the vehicle develops engine trouble, he peruses the document and discovers that it contains, *inter alia*, a voetstoots clause exempting the seller from liability for any latent or patent defect in the vehicle. Gullible would not have signed the document had he realized what it contained.

(e) Speedking is a rich ‘yuppie’ who, amongst other things, drives in motor rallies. He owns two Jaguar motor cars, one specially tuned and strengthened for rallies and the other, a luxury model. His equally rich young friend, Buff, takes him out to lunch at the Country Club and, during lunch, says: ‘I say, Speedy old chap, I am a great admirer of your Jag. Would you be prepared to sell it to me? I am willing to pay you R3 million for it. Of course, I am assuming it is still in good enough condition to match up to a Porsche or a top-of-the-range BMW.’ Speedking assures Buff that the car is ‘in excellent condition’ and accepts his offer. Throughout the discussion, Speedking is thinking of the luxury model, and Buff the rally model. The value of each model is approximately the same but Buff would not have agreed to buy the luxury model.

[Total Q1: 25 marks]
QUESTION 2

Referring to the reported cases, explain the requirements that must be satisfied for a misrepresentation to found an action for rescission of a contract. Include in your answer discussion of when silence may be regarded as actionable and the legal position in regard to ‘puffing’. Having completed your discussion, consider briefly whether the remedy of rescission is available in the following cases.

(a) Spudd, is the owner of the MacTavern Restaurant, specialising in traditional Irish food. He offers to sell the restaurant to Paddy for R1 million. Paddy says: ‘I can’t afford more than R750 000.’ Spudd replies: ‘Paddy, this is a potential gold mine! If you devote your full attention to the business you should achieve a gross turnover of well over R750 000 a month.’ This last statement convinces Paddy to buy for R1 million. After running the restaurant for a short period, he discovers that Spudd, despite having worked long hours in the business every day for several years, never managed to obtain a turnover of more than R200 000 per month.

(b) Shezi offers to sell his Nissan bakkie to Parbhoo. Parbhoo is concerned that the vehicle may be defective in certain respects. When he raises his concerns, Shezi says ‘Don’t worry, before I deliver the bakkie, I will have Speedy Motor Repairs overhaul it and repair any defects’. Parbhoo accepts Shezi’s offer on this understanding. A few days later, he takes delivery of the vehicle and pays the price. He then discovers that Speedy Motor Repairs have not overhauled or even seen the vehicle. The manager of Speedy tells Parbhoo that they (Speedy) ceased to have any dealings with Shezi two years before when he failed to settle a debt which he owed them.

(c) Myte lives a short distance from the centre of town. Across the road from his house he owns 2 hectares of land on which he exercises his dogs. His friend, Mayne, who is a property developer, says to him one day: ‘It’s a shame to see that large piece of land lying idle: it seems to be ideal for township development. I’ll offer you R1 million for it.’ Myte has recently learned that the town-planning scheme for the area does not permit subdivision and that the market value of the land is only R200 000. Realizing that disclosure of these facts will put Mayne off, Myte does not mention them and simply accepts Mayne’s offer. After the parties have signed a written contract, Mayne discovers that he cannot establish a township on the property.
(d) Van der Merwe, a Karoo farmer, is approached by Joos, who says that his son, Slyke, has ‘X-ray eyes’ and can ‘see water underground, sometimes as far down as 100 metres.’ Joos offers to have his son look for water on Van der Merwe’s farm for a fee of R20 000. Van der Merwe is impressed with the son’s apparent supernatural abilities, and he decides to accept Joos’ offer. Slyke’s divining efforts are unsuccessful and Van der Merwe reluctantly gives Joos a cheque for the agreed contract price. Later that day, a police sergeant tells Van der Merwe to be ‘on the look-out for a pair of tricksters, Joos and Slyke’ who are defrauding people by pretending to be water diviners. Van der Merwe realizes that he is one of the victims and decides to stop payment on the cheque.

(e) Solly is the owner of the ‘Continental Restaurant’, which overlooks a small dam. He advertises the restaurant for sale and Haste comes to inspect it with a view to buying. Haste says: ‘I am prepared to offer you R1 500 000.’ Solly, who is in need of more money than this, decides to try and persuade Haste to offer more. He says to Haste: ‘Look, this is no ordinary restaurant. Our customers include the President. With the liquor licence attaching to the premises you can hold moonlight parties alongside the lake. It’s a real bargain at R2 million.’ This speech tips the balance in Haste’s mind and he buys at the asking price of R2 million. When he takes over the restaurant, he discovers that the President only previously visited on one occasion, and that nearly all the restaurant’s business is done during the day so regular patrons have no interest in holding parties next to the dam.

[Total Q2: 25 marks]

QUESTION 3

Discuss fully the law relating to supervening impossibility of performance, referring to the reported cases. Having completed your discussion, comment on the legal position in the following cases.

(a) Tyler agrees to replace the bathroom and kitchen tiles in Omy’s luxury mansion with a brand of high quality imported tiles. The parties agree that the work must be finished by 1 June and penalty of R1 000 will be payable for each day that the work remains uncompleted after 1 June. When Tyler calls on Central Tile Supplies (from whom he obtained a quote for the tiles prior to contracting with Omy), he is told that the firm’s stocks have run out and that the next consignment of this type of tile will be only arriving from overseas on 30 June. Tyler can obtain the tiles from another supplier in Cape Town, but at double the cost. He had not anticipated supply problems when he quoted his price, and he now stands to make a loss on the contract. Omy threatens that he will enforce the penalty clause or sue for damages if the work is not done on time.
(b) Selby of Selby Motors agrees to sell a second-hand motor car to Biyah for R50 000. The parties agree that Selby will put new tyres on the car and do certain other minor repairs and that Biyah will bring a cheque for the price when he calls to collect the car at the end of the week. Later that day, when Selby’s employee takes the car across town to have new tyres put on it, he negligently collides with a bus, and the car is damaged beyond repair. Selby argues that he is excused from liability in terms of the contract because the subject matter has effectively been destroyed.

(c) Hettie agrees to hire a vehicle from Larry for a period of 1 year. Shortly after taking delivery of the car, Hettie negligently collides with a lamp post, leaving the vehicle damaged beyond repair. Hettie maintains that, because she no longer has use of the vehicle, she is excused from liability in respect of the monthly rent. Larry does not agree.

(d) Dicey Stores order 20 TV sets from Dazzle TV Suppliers. The day before the sets are to be delivered, the premises of Dazzle TV Suppliers are flooded during a heavy downpour and 10 of the TV sets are damaged beyond repair.

[Total Q3: 25 marks]

QUESTION 4

With reference to the decided cases, explain the right of a contractant to specific performance. Include in your answer discussion of the following:

(1) what precisely is meant by the term ‘specific performance’;
(2) when a court will not order specific performance;
(3) the nature of the court’s discretion to refuse specific performance;
(4) factors that militate against or favour the granting of specific performance;
(5) the effect of the decisions in ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd 1981 (4) SA 1 (A) and Benson v SA Mutual Life Assurance Society 1986 (1) SA 776 (A).
Having completed the above, briefly consider the following problems.

(a) L lets his house to T for 5 years. The contract provides that T is not entitled to make improvements to the premises, and that on expiry of the term of the lease, he must restore the premises to L in the same good order and condition in which he (T) received them. While the lease is in force, T installs expensive Italian tiles in the bathroom and lays carpets throughout the house, increasing the overall value of the property by some R15 000. When T vacates at the end of the lease, he does not remove the tiles and carpets. L ascertains that the reasonable cost of doing this will be R5 000 and wishes to recover this amount from T.

(b) B agrees to buy 1000 shares from S at a price of R50 per share, payment to be made on delivery of the share certificate. On the date agreed upon for delivery and payment B goes to S’s office and is told that S has left for London on urgent business and will only be back in two weeks’ time. The trading price of the shares on the Stock Exchange at this time is R50 per share. Before S returns, the price of the shares on the Stock Exchange soars to R80 per share. On S’s return, B again goes to see him and demands delivery of the shares against payment of R50 000. S refuses to deliver.

(c) Smiley, a carpenter who specializes in the making of cupboards, enters the employment of Mustah Builders (Pty) Ltd (MB). Smiley signs a written contract stating that, for the duration of the contract (a period of three years), he will not work as a carpenter for any other business manufacturing cupboards or enter the services of any competitor of MB. After a year, Smiley abandons his job at MB and goes to work for one of MB’s competitors. MB want to prevent him from doing so.

(d) Archibald is employed as the chief accountant and financial manager for Mainstream Products (Pty) Ltd. After an argument with the Managing Director of the company, he is unlawfully dismissed. He wants to obtain an order compelling the company to reinstate him.

(e) Orville engages Biltt to build a wall across the front of his (Orville’s) property in return for payment of a lump sum on completion. Biltt does part of the job and then refuses to perform any further until he receives part payment for the work he has done. Orville is satisfied with the quality of workmanship so far and wants an order compelling Biltt to finish the job. He is happy to pay the contract price once the wall has been completed.
(f) The Bridal Suite at the Lush Hotel is a detached rondavel. To improve the attractiveness of the suite, the hotel orders from Eezee Furnishers an enormous circular water-bed, to be specially made for R300 000. Before Eezee Furnishers start making the bed, the rondavel is struck by lightning and destroyed. The hotel management informs Eezee Furnishers of this fact and asks them not to make the bed, as it will be too big to fit any other room in the hotel and they will have no use for it. Eezee Furnishers reply that they are going ahead with the order and will demand R300 000 on delivery of the bed in due course. Having completed the bed, they demand payment of R300 000 against delivery.

[Total Q4: 25 marks]