INSTRUCTIONS

1. This paper contains four questions, each totalling 25 marks.
2. This paper consists of SIX (6) pages. Please make sure you have all the pages.
3. You are required to answer all the questions.
4. 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.
5. You are requested, in your own interests, to write legibly.
QUESTION 1

1.1 With reference to the reported cases, discuss the precise legal effect of an invitation for tenders. In the course of your answer, explain the legal position where:

- an invitee submits a ‘referential’ tender;
- an invitee ‘under-quotes’ due to inaccuracies in the tender documents provided by the invitor;
- the invitor is an organ of state and, in calling for tenders, exercises a public power in terms of legislation.

Having completed your discussion, comment briefly on the legal position in the following situations.

(a) Fawlty Erections (Pty) Ltd, a private building contractor, sends letters to selected plumbing contractors inviting them to submit tenders for the execution of certain plumbing work ‘as set out in the tender documents available for inspection at our premises’. The letter states: ‘Only tenders that comply with the specifications will be considered. Fawlty Erections does not bind itself to accept the lowest or any tender or to give reasons for its rejection of any tender.’ One of the selected parties, Gungout, inspects the tender documents and submits a tender. He subsequently learns that, although his tender complied fully with the specifications, Fawlty Erections awarded the contract to another contractor, Slough, who tendered to do the work for a contract price of ‘R3 000 less than any other tender submitted.’ Gungout ascertains further that his own tender was for a lower price than all the other tenders submitted, apart from that of Slough.

(b) The Council of Pleasantville Municipality, after receiving numerous requests to erect a new taxi rank, publishes a notice in the press inviting interested parties to submit tenders for the job. The conditions of tender state: ‘It is recorded that the Council does not bind itself to accept any tender, and it is not compelled to provide any reason for the rejection or acceptance of any tender.’ The lowest tender received is that of Reddy–Steady Builders, a large and financially sound contractor, which performed a large part of the work for the old taxi rank. The Tender Adjudication Committee of the municipality recommends to the Council that it accept this tender. However, at a meeting behind closed doors to decide the issue, the mayor manages to persuade the Council to award the contract to the mayor’s brother-in-law. The latter has recently started in the building trade and has promised that, if awarded the contract, he will ‘form a company or CC’ and start work as soon as he can ‘raise the necessary funds’.

[15 Marks]
1.2 ‘Breach, no matter how serious, does not itself terminate the contract. It is only where the innocent party cancels the contract on account of the breach that it comes to an end.’ Referring to relevant case law, discuss the following:

(a) when a contract may be cancelled on the ground of *mora debitoris*, positive malperformance and repudiation (*note*: there is no need to explain what is meant by these concepts);

(b) how cancellation of a contract is achieved;

(c) the effect of cancellation.

Having completed your discussion, consider the following problem.

Simone sells a piece of land to Poobie for R400 000. The price is to be paid by way of a deposit of R50 000 within 7 days of signature of the contract and the balance of R350 000 on registration of transfer of the property into Poobie’s name. Poobie is obliged to lodge a bank guarantee for payment of the balance before Simone can be called upon to give transfer. No date for lodgment of the guarantee or for transfer of the property is agreed upon. Poobie pays the deposit within the stipulated period. Shortly thereafter, Simone consults you. She states that she is ready to give transfer and is anxious to obtain payment as soon as possible. Otherwise she wishes to call off the transaction and re-sell the property. To date, Poobie has not indicated whether he has been successful in obtaining a guarantee for the balance of the price. What steps would you advise Simone to take in the circumstances? Outline the steps briefly.

[10 Marks]

[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 R 5 million. Paddy says: ‘I can’t afford more than R3 million.’ 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 R5 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 R400 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 R3 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 R500 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 R4 million.’ 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 R4.5 million.’ This speech tips the balance in Haste’s mind and he buys at the asking price of R4.5 million. When he takes over the restaurant, he discovers that the President previously visited only 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 pay 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 reported cases, write a full note on the remedy of compensatory damages: the basic measure applied, the essential elements of the claim, and the rule governing mitigation of loss. Include in your answer discussion of the following:

- the proper time for assessing the *quantum* of the innocent party’s loss in the case of repudiation;
- whether contractual damages are recoverable for personal injury, pain, suffering, and the like;
- the distinction between factual and legal causation;
- the distinction between the so-called contemplation and convention principles.

Having completed your discussion, consider the following problem.

Jack, a farmer, takes his broken–down tractor to Farm Maintenance (Pty) Ltd (‘FM’) and requests FM to do repairs to the tractor’s brakes and engine. He explains to the manager that he needs the tractor to be properly overhauled so that he can prepare his fields for planting in a month’s time. FM does some repair work on the tractor, but when Jack tries it out, it immediately breaks down again. The manager of FM is most apologetic and assures Jack that he will ‘do whatever is necessary to rectify matters.’ But the same thing happens on no less than three occasions, Jack receiving an assurance each time that the problem will be rectified. After the second abortive attempt at repairs, Jack considers taking the tractor elsewhere, but is dissuaded from doing so by FM’s manager, who is adamant that FM ‘at last understands the problem and will rectify it.’ Eventually, after a month and a half, Jack gets his tractor back, apparently in working order. It is already late in the season, but Jack decides to go ahead with his ploughing. When he takes to the fields, the tractor’s brakes fail (due to FM’s careless workmanship) and the tractor is damaged beyond repair in the ensuing crash. In addition, Jack suffers a back injury which requires an emergency operation and a month of hospitalization and post–operative treatment.

[TOTAL Q4: 25 MARKS]

TOTAL FOR PAPER: 100 MARKS