INSTRUCTIONS TO STUDENTS

1. This paper contains three questions. Unless otherwise stated, references to the Companies Act are to the Companies Act 61 of 1973.
2. Answer ANY TWO questions.
3. Where appropriate, refer in your answers to relevant decided cases.
4. This is a closed book examination; no materials of any kind may be brought into the examination venue or consulted during the examination.
5. This exam paper consists of (3) pages.

QUESTION ONE

Section 252(1) of the Companies Act 61 of 1973 provides that –

“Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company may . . . make an application to court for an order under this section”

Discuss the way in which the courts have interpreted this provision, including the kind of conduct which has (and has not) been held to constitute conduct which is “unfairly prejudicial, unjust or inequitable” in this context. Discuss also what relief the court is empowered to grant in terms of this section.

[30 marks]
QUESTION TWO

The Companies Act 71 of 2008 provides in section 76(2) that:

“A director of a company must—

a) not use the position of director, or any information obtained while acting in the capacity of a director—

i) to gain an advantage for the director, or for another person other than the company ….”

Discuss the common law principles (that is to say, the principles laid down by the courts) on which this statutory provision is based and explain how the courts have applied those common law principles. Your answer should include a detailed discussion of the decision of the House of Lords in the case of Regal Hastings Ltd v Gulliver [1942] IAIER 378 (HL).

[30 marks]

QUESTION THREE

The articles of association of Ajax (Pty) Ltd provide, inter alia, for the appointment of a managing director (but do not specify the powers of such an appointee) and also provide that the board of directors can delegate any or all of their powers to one or more directors or officers of the company. Two directors at a meeting of a board of directors constitute a quorum.

Ajax (Pty) Ltd is a trading company, engaged in the manufacture of computer components. It has five directors, Alan, Bheki, Clive, Dhlamini and Edward.

Bheki is the chairman of the board of directors.

Alan was appointed managing director by a contract in terms of which he was to work full-time for the company, but a month ago he became seriously ill and has been in hospital for the past four weeks. Without being asked to do so, and without any formal resolution being passed by the board of directors, Bheki (who, apart from his duties as chairman of the board of directors, is a non-executive director who previously only attended board meetings and took no further part in the company’s affairs) has for the past four weeks been working nine-to-five for the company, carrying out Alan’s duties, sitting at his desk and, inter alia, taking his phone calls, handling his correspondence, and dealing with customers and creditors.

Question 3…/
Question 3 continued…

During the course of those four weeks, constant power failures caused by Eskom’s “load-shedding” programme were seriously disrupting the company’s manufacturing program. Without discussing it with anyone, Bheki purchased an electricity generator on behalf of the company from Electro (Pty) Ltd, at a price of R800 000, signed the order on behalf of the company, and the generator was delivered to the company a few days ago.

Electro (Pty) Ltd is now demanding payment of the R800 000. The other directors of Ajax (Pty) Ltd are very unhappy at Bheki’s purchase of the generator, which they believe was too expensive and not suited to the company’s needs. Those directors have now instructed the company’s attorney to write to Electro (Pty) Ltd saying that Ajax (Pty) Ltd is not bound to the contract for the purchase of the generator, “firstly, because the purchase was ultra vires the company, secondly because Bheki had no authority enter into a contract to purchase the generator on behalf of the company, and thirdly because Ajax (Pty) Ltd is not bound to the contract in terms of the rule in *Royal British Bank v Turquand*.”

Electro (Pty) Ltd have brought the attorney’s letter to you, and have asked you for advice as to whether the contract for the purchase of the generator is binding on Ajax (Pty) Ltd, and whether there is any legal substance to the attorney’s letter in relation to the point of ultra vires, lack of authority, and the non-application of the *Turquand* rule, given that Bheki was not only a director but chairman of the board of directors.

Give full advice to Electro (Pty) Ltd.

[30 marks]