higher education & training

Department:
Higher Education and Training
REPUBLIC OF SOUTH AFRICA

MARKING GUIDELINE

NATIONAL CERTIFICATE

NOVEMBER EXAMINATION

MERCANTILE LAW N4

20 NOVEMBER 2013

This marking guideline consists of 11 pages.

Copyright reserved

QUESTION 1.1

1.1	1.1.1	False√ – only applicable to moveable goods on the premises√	
	1.1.2	False√ – the parties are mistaken with regard to the quality of the matter√	
	1.1.3	True√	
	1.1.4	False√ – a tacit term is an implied term that reads into a contract automatically – has direct effect on contract. √	
	1.1.5	True√	
	1.1.6	True√	
	1.1.7	False √– it means that the operations of the contract is suspended till the happening of an uncertain future event√	
	1.1.8	True√	
	1.1.9	False√, it means the transfer of rights to a third party. √	
	1.1.10	True√	
		(15 x 1)	(15)
1.2	1.2.1	Counter offer√√	
	1.2.2	Par delictum rule√√	
	1.2.3	Delegation√√	
	1.2.4	Positive malperformance√√	
	1.2.5	Merger√√	
	1.2.6	Unjustified enrichment/Enrichment√√	
	1.2.7	Fraudulent misrepresentation√√	
	1.2.8	Duress√√	
	1.2.9	Parol evidence rule√√	
	1.2.10	General crossing√√	
		(10 x 2)	(20)
1.3	1.3.1	Essentialia√	(1)
	1.3.2	Voetstoots sale√	(1)

Copyright reserved

	1.3.3	The tacit warrant against eviction√ The tacit warrant against latent defects√ The passing of the risk rule	(Any 2 x 1)	(2)
	1.3.4	Price must be fixed√ Article must be determined√ Contract must be unconditional	(3 x 1)	(3)
	1.3.5	Installment sale transaction√		(1)
	1.3.6	Jeanet – credit receiver√ Bert – credit grantor√	(2 x 1)	(2)
1.4	1.4.1	The Law of persons√		
	1.4.2	The law of succession√		
	1.4.3	Family Law√		
	1.4.4	Mercantile Law√		
	1.4.5	The law of obligations√		
			(5 x 1)	(5)
				[50]
			TOTAL SECTION A:	**50**

Copyright reserved

SECTION B

QUESTION 2

PLEASE NOTE: LEARNER HAS TO DO THREE OF THE FOLLOWING FOUR QUESTIONS.

FORM OF BREACH	DEFINITION	EXAMPLE *
Mora debitoris√	Late performance by the debtor√	Roses have to delivered at certain time, but no delivery takes place√
Mora creditoris√	The creditor does not give cooperation to receive proper performance. √	Person arrives with performance, but gates are closed√
Positive malperformance√	The party did perform, but not as agreed. √	Yellow roses delivered instead of red ones√
Repudiation√	Refusal to perform√	Party says expressly that he/she is not going to perform/tacit refusal√
Rendering performance impossible√	Making performance impossible yourself√	Setting the place alight yourself to claim from insurance√

*any applicable example in line with examples given. (5 x 4) (20)

2.2
- To pay the rent√
- To use the property for the purpose for which it was let√
- To return the property undamaged √

(3 x 1) (3)

2.3
2.3.1 Undue influence – voidable√
2.3.2 A mistake – void√
2.3.3 Duress – voidable√
2.3.4 Misrepresentation – voidable√
2.3.5 An illegal contract – voidable√

(5 x 1) (5)

2.4 **Symbolic delivery**√
The article cannot be delivered – something that will place the buyer in control is given√
Example: key to a door; bill of lading√

Traditio brevi manu√
Delivery with the short hand√
The buyer is already in possession of the article bought
A borrowed a book and then decided to buy it√

Traditio longa manu√
Delivery with the long hand√
Goods are too heavy to deliver
Example: the pointing out of cattle

Copyright reserved

Constititum possessorium√
buyer bought goods, but left it with the seller for alterations√
Example: a ring left at the jeweler√ (4 x 3) (12)

2.5 Lack of funds√
Post dated cheques√
Stale cheques√
The cheque may be filled in incompletely or incorrectly√
The signature of the drawer may be incomplete or irregular√
Alternations may have been made
The words and the figures may differ
Payment may have been stopped by the drawer
The drawer may be insolvent or dead (Any 5 x 1) (5)

2.6 2.6.1 False√ – only to moveable property√

2.6.2 False√ – only applicable if contract was concluded on other premises than business premises and where initiative went out from credit grantor. √

2.6.3 True√

(5 x 1) (5)
[50]

QUESTION 3

3.1 Expiration of specified period√
This is where lease is concluded for specific period of time/no notice is required. √

By notice√
This is where a contract is for an indefinite period of time – notice must be given√

Cancellation√
Cancellation may take place by either party in the event of material break of contract by the other√

By agreement√
The lease may be terminated by mutual agreement between the parties. √

Insolvency of the tenant
General rule is that insolvency of the tenant does not terminate the lease/trustees will decide whether the lease can continue

Merger
This happens when the lessor and the lessee merge into one person

Supervening impossibility of performance
This is where performance becomes impossible due to vis major/casus fortuitus – contract is terminated. (Any 4 x 2) (8)

Copyright reserved

3.2 3.2.1 Accidental loss. √√
This is a loss beyond the control of the parties/vis major√√ (2 x 2) (4)

3.2.2 Robin will bear the loss for the 25 cases√√ as these cases have been remove from the rest of the stock – therefore the article was determined. √√

Distell will bear the loss for the other 10 cases√√ as they were not distinctly marked and separated from the rest. √√ (4 x 2) (8)

3.2.3 The manager will bear the loss as this is not accidental loss, √√ but rendering performance impossible himself. √√ (2 x 2) (4)

3.3

EMPLOYEE	INDEPENDENT CONTRACTOR
The employee puts his service at his employer's disposal/under supervision and control√	Undertakes to perform a certain job, but does not operate under the control and supervision of the employer√
The what, how and when is prescribed by the employer√	He uses his own discretion regarding the 'how', when of doing the job. √
Employer is liable for the delicts of the employee committed during the course of his work√	In general, employer is not liable for delicts of independent contractor√
Employer provides the employee with means such as tools to perform his work√	The independent contractor must provide his own tools to perform his work√
Employee is part of the employer's business organisation√	The contractor is an independent third party. √
Employee is entitled to minimum notice and is protected against unfair dismissal√	Independent contractor is entitled to notice as per contract and is not protected against unfair termination√
Employee is entitled to paid leave, the dates to be arranged with the employer√	Not entitled to paid leave and chooses his own dates for any vacation. √

(Any 5 x 2) (10)

3.4 3.4.1 Misrepresentation: Withholding of information √ or supplying of false information√ (2)

3.4.2 voidable contract√√

Defective consensus√√

(2 x 2) (4)

3.4.3 lying about an article being brand new and then it is not √

(Any applicable answer) (2)

Copyright reserved

3.4.4 Cancellation√
Damages√
Specific performance√ (3)

3.5 Sources of the law√
Legislation√
Common Law√
Constitution√
Precedent system√
Custom√ (5)
[50]

QUESTION 4

4.1
- This is a special remedy for latent defects√√
- The seller guarantees that there will be no latent defects√√
- Should there be a latent defect, the seller will be in breach of contract. √√
- The actio quanti minoris is used when the buyer has lesser use of the article. √√
- The buyer can claim a reduction in the selling price. √√
- General rule is that no damages can be claimed. √√ (Any 5 x 2) (10)

4.2 4.2.1 Valid contract √
Statutory exception allowing this. √

4.2.2 Not valid/voidable √
Fraudulent misrepresentation√

4.2.3 Valid √
ratification took place√

4.2.4 Valid √
Emancipation√

(4 x 2) (8)

4.3

CHEQUE	PROMISSORY NOTE
An order√	A promise√
Drawn up by drawer√	Drawn up by maker√
Three parties – drawer, √ drawee and payee	Two parties – maker and payee√

(Any 2 x 2) (4)

Copyright reserved

4.4 Liability for independent contractor

Employer cannot incur vicarious liability for the delicts of the independent contractor√√ (2)

Exceptions include
where the employer instructs the independent contractor to perform the unlawful act or where he subsequently ratifies it√√

Where the employer gives incomplete instructions to the independent contractor and in consequence damage is caused to a third party√√

Where the employer issues instructions to the independent contractor whereas he himself does not have authority to perform such act√√

Where the performed action is of such a nature that it is potentially dangerous in the sense that it could give rise to harm being caused and the employer fails to take the necessary precautionary measures. √√ (Any 4 x 2) (8)

4.5 Formalities

Writing√

Notarial execution√

Registration√ (Any 2 x 1) (2)

4.6 4.6.1 Damages: This is an amount of money that must be paid to the aggrieved party in order to compensate him or her for financial losses suffered as a result of the guilty party's breach of contract. √√ (2)

4.6.2 Calculation of sum of money to be paid

The loss must result from the breach itself√√

The loss must be measurable in money√√

The consequences must be natural and forseeable√√

They must mitigate the losses. √ (4 x 2) (8)

4.7 Where the risk will not pass

Where the parties excluded the passing of the risk rule√√

Where the goods have to be weighed, measured or counted√√

Where the contract of sale is conditional√√

Where the seller does not deliver on time√√ (4 x 2) (8)

[50]

Copyright reserved

QUESTION 5

5.1 5.1.1 Not a mistake√
mistake of motive√

5.1.2 Not a mistake√
mistake of expression√

5.1.3 Not a mistake√
prevented by estoppels to rely on a mistake√ (3 x 2) (6)

5.2 Essentialia of a contract
There must be a price√
There must be an article√
There must be an agreement to purchase and sell√ (3 x 1) (3)

5.3 Credit grantor
seller√
the person who renders the service√
the lessor√ (3 x 1) (3)

5.4 Duties of the landlord
To deliver use and occupation or enjoyment of the property let√
To maintain the property√
To ensure the tenant undisturbed use√
To compensate the lessee for additions and improvements√ (4 x 1) (4)

5.5 5.5.1 General crossing: Cheque must be paid into a bank account√

Special crossing: Cheque must be paid into a bank account at a specific branch√

5.5.2 Blank endorsement – payee signs at the back of the cheque, without specifying to whom payment must be made. √

Special endorsement – payee signs at the back of the cheque, specifying to whom payment must be made. √

5.5.3 Drawer – the person giving the instruction to the bank that payment must be done√

Drawee – the bank that must affect payment√

Not negotiable – document transferred with equity√

Not transferable – document cannot be transferred – there can only be one payee√

(4 x 2) (8)

Copyright reserved

5.6 Huur gaat voor koop

This principle protects the tenant where the property is sold before the lease expires. √√
This means that the tenant can stay on for the whole duration of the lease. √√

A distinction must be made between
a short term lease – tenant can stay on√√

an unregistered long term lease – tenant will have to leave after ten years/treated as short term lease√√

registered long term lease – tenant can stay for the whole duration of the lease√√
Inheritance of property – tenant can stay as heir does not pay for the property√√

Expropriation of land – tenant not protected√√ (5 x 2) (10)

5.7 5.7.1 Stare decisis – to stand by a previous decision√

5.7.2 the pretium – the price√

5.7.3 contra bones mores – against good morals√

5.7.4 the merx – the article√

5.7.5 the ratio decidendi – the reason for the decision√

5.7.6 an iusta cause – a reasonable cause√

5.7.7 an iusta error – a reasonable mistake√

5.7.8 Caveat subscriptor – let he who signs beware√

(8 x 1) (8)

5.8 Circumstances under which buyer can claim damages
Where the parties expressly excluded this warranty in the contract of sale√√
Where the defect did not exist at the time of the conclusion of the contract√√
Where the buyer was aware of the existence of the defect and accepted it√√
Where the aedilition remedies have become prescribed√√ (4 x 2) (8)

TOTAL SECTION B: 150
GRAND TOTAL: 200

Copyright reserved