higher education & training

Department:
Higher Education and Training
REPUBLIC OF SOUTH AFRICA

MARKING GUIDELINE

NATIONAL CERTIFICATE

JUNE EXAMINATION

MERCANTILE LAW N5

20 JUNE 2016

This marking guideline consists of 9 pages.

Copyright reserved

SECTION A

QUESTION 1

1.1	1.1.1	D
	1.1.2	D
	1.1.3	A
	1.1.4	D
	1.1.5	C
	1.1.6	C
	1.1.7	A
	1.1.8	A
	1.1.9	C
	1.1.10	C
	1.1.11	C
	1.1.12	D
	1.1.13	C
	1.1.14	B
	1.1.15	C

(15 × 2) (30)

1.2	1.2.1	E
	1.2.2	D
	1.2.3	G
	1.2.4	K
	1.2.5	J
	1.2.6	A
	1.2.7	F
	1.2.8	C
	1.2.9	B
	1.2.10	H

(10 × 1) (10)

1.3	1.3.1	False
	1.3.2	False
	1.3.3	True
	1.3.4	True
	1.3.5	False
	1.3.6	False
	1.3.7	False
	1.3.8	True
	1.3.9	False
	1.3.10	True

(10 × 1) (10)
[50]

SECTION A: 50

SECTION B

QUESTION 2

2.1 2.1.1
- Not entitled to unless arranged beforehand
- Unless partnership benefited by special services
- In excess of normal services
- Reasonable compensation
- Reimbursement expenses in service of partnership
- For injuries sustained in execution of duties (Any 4 × 2) (8)

2.1.2
- All partners have access to property of partnership.
- Free access to books/deeds/documents
- May make extracts from them.
- May ask auditors for explanations unless forbidden by agreement. (4 × 2) (8)

2.2
- Absolute honesty/good faith expected of agent
- Places ability/skill/expertise at principal's disposal
- Agent must place principal's interests before his own
- Must hand over all profits/benefits to principal
- Accept no secret commissions or bribes of any nature
- May not use/divulge information to the detriment of the principal
- Personal interests must not clash with duty as agent
- Agent must keep his/her property separate from principal's, if not, considered principal's property (Any 5 × 2) (10)

2.3 2.3.1 Meaning: The creditors of Mr Constantia (Michael Fenner-Solomon) demanded their money from him. (1 × 2) (2)

2.3.2 Effect: That the assets of Mr Fenner-Solomon would be seized upon application from the creditors. The debtor (Mr Fenner-Solomon) has to proof (give reasons) to the court why his estate should not be finally sequestrated. (1 × 2) (2)

2.3.3 Securities: bonds✓✓ and suretyships✓✓ (2 × 2) (4)

2.3.4 Meaning: The financial position of Morgan Creek Properties cc has seriously weakened or deteriorated OR the financial position has taken a turn for the worse. (1 × 2) (2)

2.3.5 An Act of insolvency: 'Mr Solomon admitted in an e-mail that Warbler's Way wasn't viable and that the market had been non-existent for many years'. (1 × 2) (2)

2.3.6 Meaning: Attempts were made to manage the debt in such ways to make payment thereof acceptable to all parties (i.e. the debtor and the creditors). (1 × 2) (2)

Copyright reserved

2.3.7 Creditors:
- Standard Bank Personal Banking Division
- ABSA
- Penny Pinchers
- James Clinch (4)

2.3.8
- Mr Fenner-Solomon has two property development businesses and in total have assets worth R196 million and Liabilities of R240 million.
- Mr Fenner-Solomon is commercially insolvent as his liabilities exceed his assets by R44 million (i.e. R240m minus R196m).

(2 × 2) (4)

2.3.9 Meaning: Money might have been taken out of South Africa to use for the property development in Croatia. (2)
[50]

QUESTION 3

3.1 3.1.1 The lifeline thrown to companies in financial distress is Business Rescue. (1 × 2) (2)

3.1.2 Because instead of businesses being liquidated, they can go through business rescue and stand a chance of 'getting back on their feet'. (1 × 2) (2)

3.1.3 Companies and Intellectual Properties Commission (CIPC) (1)

3.1.4 (a) Business rescue is for companies in financial distress that can be rescued and become solvent again. (1 × 2) (2)

(b) Shell of protection: Companies enjoy a means of protection because business rescue provides a moratorium (a freeze) on assets from being repossessed and sold by creditors. (1 × 2) (2)

(c) It is meant for all companies that can be rescued and become solvent again and are not terminally ill companies. (1)

(d) Because assets are not sold immediately, the business is given a chance to become solvent again and business rescue also assist greatly in saving jobs being lost should the company be liquidated instead of being rescued. (1 × 2) (2)

3.1.5
- Commercial property sector
- Mining and related construction sector (2 × 2) (4)

3.1.6
- Business Rescue as a profession is not strictly controlled in terms of its code of ethics, code of practice.
- Although brought about by the new companies act, it seems there is no professional body yet to oversee the behaviour of those people who act as business rescue practitioners.
- There are no professional code of conduct that can discipline practitioners or hold them accountable for their actions.
- And thus as a new profession, a lot of work still has to be done in this respect to stop bringing the profession in disrepute.

(4 × 2) (8)

3.1.7 Apart from jobs being saved under business rescue, the advantage is that if a company is eligible for business rescue, then all stakeholders (i.e. employees, creditors and investors) will benefit from it in the end. (2)

3.1.8
- Companies that are liquidated does not come to an end (it does not affect the continued existence of a company) at least not until such time that it wound up by court order after the liquidation process
- The company falls under the control of the liquidator for purposes of liquidation
- Liquidation is the conversion of company assets into cash (selling of assets to turn its value into money) and dividing the money amongst the creditors of that company
- Company directors vacate their positions when an order for the liquidation of the company is granted by court order
- Directors may object to the voluntary liquidation order being ratified or appeal against the final liquidation order
- Any transfer of shares or change in the status of the company members (shareholders) after liquidation is void unless the liquidator authorises it
- Any alienation or disposal of goods/assets after commencement of liquidation by a company who cannot pay its debts is void unless the court decides differently
- All civil claims by or against the company are suspended until a liquidator has been appointed
- Any goods/assets that has been confiscated or seized after the liquidation process has started, is void
- The company remains the owner of its property but it is regarded to be in the custody and under control of the liquidator

(Any 9 × 2) (18)

3.2 Meaning: That the surety has the right to claim that the creditor must cede ✓✓ all his/her rights and privileges✓✓ which he/she has against the principal debtor and the co-sureties to the surety.✓✓ (3 × 2) (6)

[50]

QUESTION 4

4.1
- On completion of the work/transaction
- On expiration of time for which agent has been engaged
- On revocation by principal
- Agent's renunciation of office
- Death/Insanity/Insolvency of principal or the agent
- Mutual agreement between agent and principal (Any 5 × 2) (10)

4.2 4.2.1
- A situation where the insolvent makes a disposition on any occasion before sequestration with intention to prejudice one or more creditors over others.✓✓
- Liabilities must exceed assets at the time of making such disposition✓ (2 + 1) (3)

4.2.2 That the disposition that was made under 'undue preference' caused the debtor's liabilities to exceed his/her assets while under 'voidable preference' such disposition was made to settle a certain creditor's debt. (1 × 2) (2)

4.3 4.3.1 Written contract not essential, can also be oral to be valid
4.3.2 Only written contract (essential) to be valid
(2 × 1) (2)

4.4 4.4.1
- Each member must make a contribution of money, property or services
- The extent of each member's interest must be expressed in a % (total 100%)
- Can become a member from a standing member or his deceased estate of by means of admission of additional member through present members which reduce their interest to accommodate a new member.
- Can obtain a member's interest from an existing member (a selling transaction).
- Where a member's estate is sequestrated the curator can sell the member's interest to existing members or to an outsider.
- By means of a ruling in a will unless the existing members have objections to it and the interest is sold to the corporation, members or outsiders. (Any 4 × 2) (8)

4.4.2
- A minor can only become a member of a CC from 18 years old.
- Guardian of a minor must lodge written consent of minor's membership to CC.
- Where such minor, described above, has been found guilty of theft, fraud, corruption, forgery, uttering a forged document, perjury. (3 × 2) (6)

Copyright reserved

4.5
- Pledgor/Debtor transfers pledged goods to another without pledgee/creditor's permission.
- Pledged goods taken illegally from pledgee eg theft/force
- Pledged goods claimed in execution of a court order (3 × 2) (6)

4.6
- One person acts on behalf of another
- Juristic act
- Authorised conduct
- Creates an obligation (4 × 2) (8)

4.7
- Factor
- Broker
- Auctioneer
- Del credere agent
- Estate agent (5 × 1) (5)

[50]

QUESTION 5

5.1 5.1.1 Prospectus (1)

5.1.2 Characteristics: The prospectus is a written invitation✓✓ addressed to the (wider) public✓✓ to buy shares✓✓ and in doing so procure capital for the company. (3 × 2) (6)

5.1.3 Common law liability arising from untrue statements in the prospectus. (1 × 2) (2)

5.1.4
- Options: Can claim a reduction (discount) in price where he has bought shares in this company
- He can cancel the transaction (claim restitution = to be placed in the position before he bought the shares) and claim his money back. (2 × 2) (4)

5.1.5
- NO – it is NOT a Personal Liability Company (PLC) because there is at least three directors and a PLC has at least one director.
- NO – it is a Public Company. It has at least three (3) directors as mentioned in QUESTION 5.1.

(If a candidate should only write :'NO', without any explanation then only ONE MARK)
(Any 1 × 2) (2)

5.2 Yes (1)

- Although under the new Companies Act 71 of 2008, no new close corporations (CC's) may be entered into or established after 1 May 2011, changes may be made to existing CC's for example adding new members.
- In this case it is possible to add two new members to the CC as long as the membership (in total) does not exceed ten (10) people. (Any 1 × 2) (2)

5.3
- Yes it is fair to treat directors and members the same because both directors and members stand in a position of trust to the businesses they are in charge of/managing
- Directors and members represent investors, shareholders, employees and the interests of other stakeholders in the running or managing of that company or close corporation and as such must always have the best interests of those parties at heart – they must always act in good faith
- No conflict of interest must exist between any director and the company or member/s and the close corporation (3 × 2) (6)

5.4 For partners:
- They are jointly and separately liable and can thus also be sued jointly and severally for partnership debts
- Partners' mandates are cancelled or terminated
- Duty to account to remaining partners (now called ex-partners)
- Accountability between partners and from other partners can be claimed

For outsiders:
- If creditors, may sue partners jointly/severally for debt and partners' representational authority is still in operation at least until outsiders have been informed of the dissolution or already have knowledge of it. Here partners are liable on the grounds of Estoppel (5 × 2) (10)

5.5

VOLUNTARY SURRENDER	**COMPULSORY SEQUESTRATION**
• Application done by debtor/partner or authorised agent, curator or trustee • Debtor must publish notice of surrender of the estate • Two copies of Statement of affairs must be submitted to local court and local magistrates' court	• Application brought by creditors • Application for sequestration must be submitted by creditors to Master of High Court • Application by creditors must mention amount and nature of claim and any security given by debtor (if any)

(6 × 2) (12)

5.6 5.6.1 Salvage lien
5.6.2 Improvement lien

(2 × 2) (4)
[50]

TOTAL SECTION: 150
GRAND TOTAL: 200

Copyright reserved