higher education & training

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REPUBLIC OF SOUTH AFRICA

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JUNE EXAMINATION

NATIONAL CERTIFICATE

MERCANTILE LAW N5

(13030105)

20 June 2016 (X-Paper)
9:00–12:00

This question paper consists of 17 pages.

GENERAL STUDIES

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DEPARTMENT OF HIGHER EDUCATION AND TRAINING
REPUBLIC OF SOUTH AFRICA

NATIONAL CERTIFICATE
MERCATILE LAW N5
TIME: 3 HOURS
MARKS: 200

NOTE: If you answer more than the required number of questions, only the required number of questions will be marked. All work you do not want to be marked must be clearly crossed out.

INSTRUCTIONS AND INFORMATION

1. SECTION A is COMPULSORY.
2. Answer only THREE questions from SECTION B.
3. Read ALL the questions carefully.
4. Number the answers according to the numbering system used in this question paper.
5. Start each question on a NEW page.
6. ALL the answers must be in full sentences except where indicated otherwise.
7. Write neatly and legibly.

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SECTION A (COMPULSORY)

QUESTION 1

1.1 Various options are given as possible answers to the following questions. Choose the answer and write only the letter (A–D) next to the question number (1.1.1–1.1.15) in the ANSWER BOOK.

1.1.1 The type of agent who undertakes to sell goods for the principal and who upon this, guarantees that third parties, with whom he/she concludes the contract, will meet their obligations is a/an …

A estate agent.
B auctioneer.
C broker.
D del credere agent.

1.1.2 Which ONE of the following statements is correct?

A One of the *essentialia* or characteristics of a partnership is that the agreement should be in writing.
B If all the *essentialia* of a partnership are present in an agreement, but the parties did not intend to conclude a partnership agreement, the agreement will still constitute a partnership agreement.
C If any one of the *essentialia* of a partnership is not present in an agreement, but the parties intended to conclude a partnership agreement, the agreement will not constitute a partnership agreement.
D The Partnership Act 52 of 1973 provides that a partnership agreement will only be valid if it contains all the *essentialia* of a partnership agreement.

1.1.3 On 27 March 2016 Mr Nel sold his car, valued at R90 000 to his son-in-law for R15 000 and delivered it to him. Beginning May, the same year, the estate of Mr Nel is sequestrated. There is no doubt that Mr Nel's estate was in an insolvent condition at the time the transaction involving the car took place. The trustee (curator) of Mr Nel's estate institutes an action to have the transaction set aside.

Which ONE of the following statutory (legal) grounds may the trustee rely on to have the disposition set aside?

A Disposition without value
B Voidable preference
C Undue preference
D Collusion

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1.1.4 Suzie, Joan and Nosiphiwe, all former models, are partners in SJN Model Agency. While doing a photoshoot for a well-known wildlife magazine in the Kruger National Park, Joan is attacked and severely injured by a lion. She later died in hospital of the injuries sustained.

Which ONE of the following statements is correct?

A The partnership will remain intact because there are at least two partners (Suzie and Nosiphiwe) left to continue with the business.
B SJN, as partnership, will remain intact because it is a separate legal entity.
C The partnership will dissolve on J's death, even if S and N decide to continue with the business of the partnership.
D The partnership will dissolve upon J's death, unless S and N decide to continue with the business of the partnership.

1.1.5 Bibi, Cece and Didi form a close corporation to manufacture and export Township Clothing under the label, Via Afrika to various global destinations. In order to meet the new government regulations for business in terms of employment equity and black economic empowerment, the three owners decide to include their dedicated and productive workforce of ten employees (who are employed as machinists, sewing and pattern makers) all as members. Since the membership of the close corporation exceeds the maximum allowable number, the CC is, legally speaking liable for debts incurred for a certain period of time.

Which is the correct period of time (expressed in months hereunder) that this question is referring to?

A 12
B 9
C 6
D 3

1.1.6 Fowzia and Walied are best friends. Walied wants to extend his overdraft at his bank to purchase a Harley Davidson motorbike. The bank agrees to lend him the money but as security they need Walied to organise a surety who will pay back the money should Walied not be in a position to do so. Fowzia agrees to stand surety for Walied's debt and the agreement is drawn up and signed.

Who are the parties to this agreement when it comes to the signing of this contract?

A Debtor and creditor
B Debtor and surety
C Surety and creditor
D Surety, debtor and creditor

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1.1.7 A, B, and C begin a partnership and later register the business as a close corporation. They each agreed to contribute the following amounts to the undertaking and it is further agreed that they would, as partners, share profits and losses in the same proportion as their respective contributions. Their contributions are as follow: A deposits R60 000; B contributes his life savings of R120 000 and C can only give R20 000 plus her expertise in having studied accounting.

Which ONE of the following calculations, as to how they will share in profits at the end of each financial year, is correct?

A A gets 30%; B receives 60% and C gets 10%.
B According to the partnership agreement they share profits in the ratio of 3 : 6: 1.
C It is not possible to calculate their profit sharing as the amount of profit they made is not yet known.
D It is possible to calculate profit sharing once their contributions have been received by the business.

1.1.8 What type of lien will an accountant have over the accounting statements prepared for a client for the outstanding professional fee for services rendered?

A Debtor and creditor
B Salvage
C Improvement
D Express

1.1.9 Vinesh and Roxy enter into a partnership to operate and manage a video rental shop. Vinesh contributed R50 000 and Roxy R25 000. The partnership agreement states that profits will be shared (divided) equally, but nothing is mentioned on how the net losses (if any) of the partnership must be divided.

Indicate the correct statement.

A It is an essential element of the partnership agreement that Vinesh and Roxy must both share in the net losses of the partnership.
B Vinesh and Roxy will share the losses according to the size of their respective contributions.
C Vinesh and Roxy will share the losses equally.
D The partnership agreement is invalid because it does not regulate how the net losses must be shared between the partners.

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1.1.10 Which ONE of the following statements, about a personal liability company, is correct?

A The company's memorandum of incorporation must state that it is a personal liability company.
B The company is considered to be a profit company and must have at least seven members.
C The directors are only jointly and severally liable together with the company for the company's contractual debts and liabilities.
D The company's name must end with the word 'Limited' or in abbreviated form as 'Ltd'.

1.1.11 Indicate the incorrect statement regarding the consequences of a rehabilitation order:

A The insolvent obtains a discharge of his/her pre-sequestration debt.
B The process of sequestration comes to an end.
C The insolvent must still pay the balance of the debts from any future income.
D The insolvent is released from any disqualifications against him/her as a result of the sequestration of his/her estate.

1.1.12 All companies receive their legal personality by means of the following:

A Registrar of companies
B Memorandum of incorporation
C Founding members or promoters
D The Companies Act

1.1.13 Indicate the correct statement, in terms of the law of agency dealing with the doctrine of the undisclosed principal.

A The principal is always known to all parties throughout the act of being represented by the agent.
B The principal is not known and can be sued by the other party to reveal him/herself during the act of representation.
C The principal is generally not known during the act of representation and can, where necessary, reveal him/herself at a later stage.
D The principal cannot be liable towards any third party where his/her identity is revealed.

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1.1.14 In terms of the Companies Act 71 of 2008, the transferability of shares and number of shareholders of a private company is described as the following:

A There is no legally prescribed minimum or maximum number of shareholders.
B There is no difference between a private and public company when it comes down to the number of shareholders it may have.
C The private company, like any public company, may sell shares to the public.
D The private company may, like the public company, transfer its shares because it qualifies as a 'profit company'.

1.1.15 Thabo takes out a life insurance policy contract with Longlife Insurance Company during January 2012. The estate of Thabo is finally sequestrated on 1 September 2015. The value of the policy is R70 000 at the time.

Indicate which of the following statements, regarding the claim of the insolvent estate on the money to the policy, is correct:

A Thabo may keep R50 000 of the policy since three years have elapsed since the date of the policy agreement entered into and it has not been ceded otherwise.
B The full amount of the policy vests in (belongs to) the insolvent estate.
C Thabo may keep the full amount of the policy for his own benefit.
D The full amount of the policy forms part of Thabo's insolvent estate as five years have not elapsed since the policy was taken out by Thabo.

(15 × 2) (30)

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1.2 Choose a description from COLUMN B that matches a/an word/item in COLUMN A. Write only the letter (A–K) next to the question number (1.2.1–1.2.10) in the ANSWER BOOK.

COLUMN A		COLUMN B	
1.2.1	Notarial bond	A	may be formed with or without members
1.2.2	Private company	B	the assets in an insolvent estate which do not serve as security for secured creditors
1.2.3	Tacit hypothec	C	right to division of assets at dissolution
1.2.4	Shareholders	D	has a minimum of one director
1.2.5	Dissolution of a partnership	E	not subject to the landlord's hypothec
1.2.6	Non-profit companies	F	people dealing with a company deemed to know the contents of their public documents
1.2.7	Constructive notice	G	remedy for the landlord where the tenant is in arrears with the payment of the rent
1.2.8	Partners in general	H	the certificate of incorporation is endorsed in the founding statement
1.2.9	Free residue	J	positive non-performance
1.2.10	Close corporation	K	company retained earnings can be re-invested or distributed in form of dividends to this group of people

(10 × 1) (10)

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1.3 Indicate whether the following statements are TRUE or FALSE. Choose the answer and write only 'true' or 'false' next to the question number (1.3.1–1.3.10) in the ANSWER BOOK.

1.3.1 Art Dealers (Pty) Ltd can obtain and own a 30% interest in MS Stationers CC.

1.3.2 The principal is liable if the mandate to the independent contractor is illegal.

1.3.3 A notice of voluntary surrender of an estate must be published in the Government Gazette and in a local newspaper in the area where the person lives.

1.3.4 A principal debt needs not be in existence at the time when a contract of suretyship is entered into.

1.3.5 Members of a partnership can contribute money, skills and/or labour but the members of a close corporation must all contribute money to become valid members.

1.3.6 The memorandum of incorporation together with the notice of incorporation forms the constitution of a company.

1.3.7 A surety replaces a debtor's liability.

1.3.8 Solvency is a position where a debtor can pay his/her debts.

1.3.9 Where a close corporation is in delay or simply does not submit an annual return, the registrar of companies or CIPC can deregister that CC and only issue its re-registration if it registers as a private company.

1.3.10 A partner en commandité may only be held liable for the amount contributed to the enterprise by the partner.

(10 × 1) (10)
[50]

TOTAL SECTION A: 50

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SECTION B

Answer only THREE questions from this section.

QUESTION 2

2.1 Discuss the following rights of partners in a partnership:

2.1.1 The right to compensation (4 × 2) (8)

2.1.2 The right to inspection of the books (4 × 2) (8)

2.2 An agent is always expected to exercise the utmost good faith in his/her dealings. Discuss this duty of the agent. (5 × 2) (10)

2.3 Read the case study below and answer the questions.

MR CONSTANTIA GETS THE CHOP

Readers may well recall *Noseweek's* story about Michael Fenner-Solomon aka Mr Constantia, who was putting up a luxury development in Constantia called Warbler's Grove. Fenner-Solomon was struggling to upload the eight R20-million-plus units he had built and as creditors began to hound him, he would warn them off with the message: 'I am Mr Constantia; cross me and I'll make sure you never work in the area again.'

There are some creditors you can't threaten, however, and Standard bank is one of them. On 6 December, the bank brought a High Court application to place Fenner-Solomon's close corporation, Morgan Creek Properties 144, into provisional liquidation. The affidavit, filed by a senior Standard Bank employee, claimed that the CC owed the bank a cool R155m. Although the loan was secured by various bonds and suretyships from Fenner-Solomon and his family, the bank employee said there had been defaults in payments, and 'a material adverse change' in the CC's financial position.

She told the court that Fenner-Solomon had admitted in an e-mail that Warbler's Way was not viable: 'Despite many attempts at restructuring the debt on this project, the market that this development was aimed at had been virtually non-existent for many years.' The bank employee said that on top of the R155m, Fenner-Solomon's CC owed R22m to Standard Bank's Personal and Business Banking division.

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It also owed Absa R2m; Penny Pinchers R2,5m; and a James Clinch R8,5m (Fenner-Solomon sold Clinch a property for R9,5m, took the money before transfer, then sold it on to a Mrs Searle. When Clinch objected, Fenner-Solomon was only able to refund him R1m). In total, Fenner-Solomon's CC had properties worth R196m, owed R240m, and was therefore commercially insolvent. Other nuggets in the affidavit were that Fenner-Solomon's other CC, Michael Grant Developments CC, owed SARS R5,5m; and that he was involved in a development of 15 villas in Croatia – where, Standard Bank had reason to believe, funds may have been diverted from South Africa.

Noseweek asked Standard Bank's attorney, Adam Harris of Bowman Gilfillan, whether the order had been granted, but all we got was a sniffy 'I don't talk to the press'. But another source said it had been granted – and that Fenner-Solomon was enjoying a holiday in Mauritius while all this unpleasantness was going on.

[Source: *Noseweek*, 2013]

2.3.1 Briefly explain what you understand by the phrase from the article in the fourth line '… as creditors began to hound him.' (1 × 2) (2)

2.3.2 Briefly explain the effect of provisional liquidation as mentioned in this article. (1 × 2) (2)

2.3.3 Which TWO financial instruments were given to the bank as security for the loan to the business in question? (2 × 2) (4)

2.3.4 Consider the phrase from the article and comment on it: '… a material adverse change in the CC's financial position.' (1 × 2) (2)

2.3.5 Write down the sentence (words) from the article that tells us that the owner, Mr Fenner-Solomon has possibly committed an act of insolvency. (1 × 2) (2)

2.3.6 What is the meaning of the phrase' … restructuring the debt on the project.'? (1 × 2) (2)

2.3.7 Apart from Standard bank being a creditor of Mr Fenner-Solomon or his business, Morgan Creek Properties CC, name FOUR other creditors. (4 × 1) (4)

2.3.8 Consider the financial position of Mr Fenner-Solomon. Comment on the position of both his businesses with regard to its solvency or not and motivate your answer by writing down an amount of money to conclude your position on his financial standing. (2 × 2) (4)

2.3.9 What is the meaning of the phrase from the article '… funds may have been diverted from South Africa.'? (1 × 2) (2)

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QUESTION 3

3.1 Read the article below and answer the questions.

BUSINESS RESCUE – HELP FOR AILING FIRMS

Companies in financial distress were thrown a lifeline in April 2011 with the introduction of business rescue legislation. Though, not without teething problems, business rescue is proving to be an invaluable alternative to liquidation. 'The number of jobs already saved is a good indication of what is possible', says Amanda Lotheringen, Companies & Intellectual Properties Commission (CIPC) director responsible for business rescues.

A CIPC survey published in May 2011 found that in rescues concluded, 4 256 jobs (75%) out of an original 5 680 involved had been saved. 'If followed correctly, business rescue is a fantastic process and is the way to go for SA,' says Daniël Terblanche, a director of accounting firm Mazars.

Business rescue provides companies with a 'shell of protection' through a moratorium on asset repossessions by creditors, says Adam Harris, a director of law firm Bowman Gilfillan. But it is not a care-all solution. 'Business rescue is for companies that can be rescued and become solvent,' says Harris. 'It is not for terminally ill companies.' That said Harris believes courts could be overzealous in their approach. 'The courts have set the requirements for a rescue to be granted, and there has been some criticism that the bar has been set too high,' says Harris.

According to the CIPC, of 498 business rescue applications in 2012, a third (162) went on to the implementation phase. Even when a business rescue bid fails to achieve its objective it is preferable to immediate liquidation. 'A liquidation results in fire sales of assets at auctions at below fair value,' says Harris. 'Through a business rescue, assets can be sold in an orderly fashion, ensuring creditors receive the maximum dividend.' This is particularly important in the commercial property sector, where, Terblanche says, a high level of business rescue activity is being seen. Also prominent, he adds, are mining and related construction firms in northern KwaZulu-Natal and the northern provinces, where mine labour unrest is causing material financial distress.

Formalisation of the business rescue practitioner industry is still a work in hand. At present, licences are issued to practitioners on an ad hoc basis for each of the assignments they take on. Business rescue has also attracted some unscrupulous individuals. 'A few bad apples have caused some reputational damage,' says Lotheringen. To address this, she says, a competency framework has been drawn up. The next step will be to produce training material.

[Source: *Financial Mail*, July19 – 24, 2013, Stafford Thomas]

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3.1.1 What is this 'lifeline thrown to companies in distress' that this article refers to? (1 × 2) (2)

3.1.2 Briefly explain why, in your opinion, business rescue would be an invaluable alternative to liquidation. (1 × 2) (2)

3.1.3 Write the name of the (legal and professional) body that is responsible for business rescues in South Africa. (1)

3.1.4 Write short notes on the following by referring to the article above.

(a) What business rescue is (2)

(b) What the meaning of the 'shell of protection' is that is being referred to in the article (1 × 2) (2)

(c) The type of companies for which business rescue meant (1)

(d) Why business rescue is preferred to immediate liquidation of a company (1 × 2) (2)

3.1.5 Write TWO sectors in the SA economy where high levels of business rescues are prevalent. (2 × 2) (4)

3.1.6 Comment on the following statement: 'It is clear from the article that the work of business rescue practitioners is far from being professionally regulated, is a work in progress and a lot of work still needs to be done.' (4 × 2) (8)

3.1.7 Briefly explain the main advantage of business rescue under the new Companies Act as opposed to that of 'judicial management' under the previous 'old' Companies Act of 1973. (1 × 2) (2)

3.1.8 Write detailed notes on what the consequences of liquidation are for any company that finds itself in that position. (9 × 2) (18)

3.2 What is meant by the phrase 'benefit of cession of actions' in the context of contracts of suretyship? (3 × 2) (6)

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QUESTION 4

4.1 Name FIVE ways in which agency may be terminated. (5 × 2) (10)

4.2 Briefly discuss, in terms of the Insolvency Act, undue preference as a defeasible disposition (in other words situations where the insolvent debtor gets rid of certain or all of his/her assets under certain specific circumstances) under the following headings:

4.2.1 Meaning/Description (2 + 1) (3)

4.2.2 ONE difference between *undue preference* and a *voidable preference*. (1 × 2) (2)

4.3 Consider a suretyship and a partnership agreement.

What are the essential requirements, with reference that such contracts have to be in writing in order to be valid (legally enforceable)?

Answer this question under the following headings:

4.3.1 Partnership agreement

4.3.2 Suretyship agreement

(2 × 1) (2)

4.4 Discuss this topic, with reference to membership in close corporations, under the following headings:

4.4.1 The ways in which membership in a close corporation can be obtained (4 × 2) (8)

4.4.2 The possibility of a minor becoming a member of a close corporation

(3 × 2) (6)

4.5 When does a pledge holder not lose his/her right to an article, even though he/she loses possession of the article? (3 × 2) (6)

4.6 Name FOUR characteristics of representation (agency). (4 × 2) (8)

4.7 List FIVE types of agents typically being studied in the law of agency. (5 × 1) (5)

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QUESTION 5

5.1

A very good friend of yours contacted you recently. He told you that he had received a document that looks like a booklet of sorts and as far as he can make out, it is from a certain health and fitness company. Part of the information in this booklet contains the brief background, history and capital requirements of this company. The booklet also mentions the fact that there are at least three directors and that this company will be incorporated in due course.

With this information as background, your friend wants to know the following from you:

5.1.1 Must he take this booklet and the information in it seriously? Is it not just another fraudulent act from a business trying to trick people into a money-making scam or does this booklet and the content have some merit?

Identify the booklet or document that had been sent to him on the basis of the above information. (1)

5.1.2 Explain to your friend the characteristics of this particular document that you have identified in QUESTION 5.1.1. (3 × 2) (6)

5.1.3 Assume your friend is interested to act on the information contained in the booklet or document sent to him. Still unsure of whether he should make contact with this company, he wants to know if he can hold the business liable with regard to the contents of this document should he make decisions based on the information this health and fitness company has mentioned therein.

Advise your friend accordingly by identifying the broad description of the information above that he has mentioned to you. (1 × 2) (2)

5.1.4 Describe the options open to your friend with regard to QUESTION 5.1.3 should the company be guilty of printing misleading information in this booklet and where he has already acted on the information, believing that it is true. (2 × 2) (4)

5.1.5 Considering the information your friend has given you in QUESTION 5.1.4, would you say this business is a personal liability company?

Substantiate your response by giving a suitable motivation for your answer. (1 × 2) (2)

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5.2 Read the following scenario and answer the question.

After completing their studies in Financial Management in 2007, three students decided to form a Close Corporation. Since then, they offer accounting – and other financial services to small businesses operating in the area where they live. This year, due to an increase in clients, it has become necessary to expand their business. The owners want to recruit two more family members.

Advise them on the following question:

Considering the membership of a close corporation, can the owners recruit two new members? Write 'yes' or 'no' and give a suitable reason for your answer. (1 + 2) (3)

5.3 With reference to the fiduciary duties of directors of companies and members/owners of close corporations, is it fair that directors and members should be treated the same way in terms of the execution of their fiduciary duties under the Companies Act 71 of 2008? Motivate your answer. (3 × 2) (6)

5.4 Partners A and B wish to dissolve the partnership between them.

Advise them with regard to the consequences dissolution will have on their liability to partnership creditors (outsiders) as well as their capacity to represent the partnership. (5 × 2) (10)

5.5 'A person may be declared insolvent by means of any one of two ways, that is voluntary surrender or compulsory sequestration.'

Illustrate the THREE important differences between *voluntary surrender* and *compulsory sequestration* as shown in the example below.

HINT: Redraw and complete the TABLE in the ANSWER BOOK.

VOLUNTARY SURRENDER	COMPULSORY SEQUESTRATION

(6 × 2) (12)

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5.6 State the type of enrichment lien that is present in each of the following cases:

5.6.1 During stormy weather the harbour patrol staffs (port authority) rescues someone's yacht. The strong wind broke the ropes that secured the yacht to its mooring and the yacht was busy drifting out to sea.

5.6.2 Johannes rents a sheep farm in the Swartland district. As there was no facility provided on the farm where the sheep could have access to drinking water, Johannes sinks a borehole to provide water for the sheep.

(2 × 2) (4)
[50]

TOTAL SECTION B: 150
GRAND TOTAL: 200

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