higher education & training

Department:
Higher Education and Training
REPUBLIC OF SOUTH AFRICA

MARKING GUIDELINE

NATIONAL CERTIFICATE

MERCANTILE LAW N6

20 JUNE 2018

This marking guideline consists of 9 pages.

Copyright reserved

GENERAL REMARKS

1. Answers are guideline and must not be seen as the only correct answer.
   Marks must still be allocated to answers with a similar meaning/idea. Semantic differences could occur and the examiner should be consulted where uncertainties occur during a marking guideline discussion.

2. Answers must be in full sentences at all times. Should answers not be fully described, defined or analysed, full marks cannot be given. For specific details, scrutinise each question carefully.

   NOTE: NO half marks are allocated.

3. Should a candidate do more than the required number of questions, ONLY THE FIRST FOUR QUESTIONS, WHICH INCLUDE THE COMPULSORY QUESTION, must be marked. In cases where FOUR questions in total have been exceeded, delete the fifth (last) question by drawing a red line across that section of the answer script.

   The marker must indicate his/her decision not to mark the particular question by writing the following statement at the bottom of that question. Please sign and date:

   THE CANDIDATE HAS ANSWERED MORE THAN THE REQUIRED NUMBER OF QUESTIONS (REFER EXAMINATION INSTRUCTIONS 1 & 2)

   Should any uncertainty arise, consult the examiner.

4. All borderline cases (raw score of 76 to 79 marks out of 200) must not be tampered with in any way. Do not inflate the marks unilaterally. Make a supporting statement in the report and leave the adjustment of marks to the process of moderation.
   A practical or semester mark must still be added to these raw scores.

Copyright reserved

SECTION A (COMPULSORY)

QUESTION 1

1.1	1.1.1	True		
	1.1.2	False		
	1.1.3	False		
	1.1.4	False		
	1.1.5	True		
	1.1.6	False		
	1.1.7	False		
	1.1.8	True		
	1.1.9	True		
	1.1.10	False		
			(10 × 2)	(20)
1.2	1.2.1	C		
	1.2.2	D		
	1.2.3	A		
	1.2.4	A		
	1.2.5	D		
	1.2.6	B		
	1.2.7	C		
	1.2.8	A		
	1.2.9	C		
	1.2.10	B		
			(10 × 2)	(20)
1.3	1.3.1	lienholder		
	1.3.2	close corporation		
	1.3.3	tacit hypothec		
	1.3.4	estoppel		
	1.3.5	limited by guarantee		
	1.3.6	turquand rule		
	1.3.7	certificate of incorporation		
	1.3.8	ratification		
	1.3.9	indemnify		
	1.3.10	undisclosed		
			(10 × 1)	(10)
				[50]

TOTAL SECTION A: 50

SECTION B

Answer any THREE questions in this section

QUESTION 2

2.1
- Cheaper and less complicated to establish
- Less formalities to adhere to (no partnership articles to prepare)
- Less membership required (1–10 for a cc instead of 1 to 20 for a partnership)

(3 × 2) (6)

2.2
- Name may be refused by registrar if undesirable
- Registrar may within 1 year of registration order name change
- CC may itself apply for name change
- Name must be followed by suffix 'CC' or 'BK'
- Wound up words ' in liquidation' must be added
- Display registered full name and registration number for public to see in legible letters/design
- All correspondence must bear name of corporation and cc plus registration number
- Members doing business in name of cc but not mentioning it is held personally liable for debts so incurred

(Any 5 × 2) (10)

2.3
- Must be a valid partnership agreement and comply with requirements
- Number of partners: min 2 and max 20 persons
- Contribution by each partner: property/money/labour/services/skills or knowledge
- Partnership is for the promotion of the interest of all its members
- Aim is to make a profit in which the partners hope to be able to share

(Any 4 × 2) (8)

2.4
- Obtains rights and duties of its own
- Can sue and be sued like ordinary persons
- Can keep house and do business – enter into contracts
- Perpetual succession

(4 × 2) (8)

2.5 2.5.1 A prospectus is issued, not a certificate of incorporation

2.5.2 The new Companies Act (no 71 of 2008) makes provision for the establishment of not only companies with share capital (or profit oriented such as a public company, state-owned company, private company and a personal liability company) but also for non-profit companies such as an association for the advancement of art, culture or religion

2.5.3 Proceedings to sequestrate a company is undertaken by the master of the high court and not in the district where the company is doing business

Copyright reserved

2.5.4 A business dealing in selling art can register an any type of company but where its main aim is not to make profit it can register as a non-profit company under the new Companies Act 71 of 2008 (previously known as a Sction 21 or Article 21 company under the old Companies Act)

2.5.5 The word 'limited' simply means that the liability of the members of such company is limited to the extent or amount of their investment (to the monetary value of their shares) in such company and that the members (or shareholders) are not liable to pay the company debts should the company be sequestrated. At most, members or shareholders can loose all their shares in a company that is being sequestrated.

(5 × 2) (10)

2.6
- By debtor leaving the country/departing with intention to evade paying his debts
- Failing to satisfy requirements of execution against debtor
- Disposing/Attempt to dispose of property whereby certain creditors are prejudiced
- Removing property
- Making an offer to one or more creditors to release him from debts partly/wholly
- Failing to lodge complete statement of affairs by due date for surrender
- Giving notice in writing to any creditor that he is unable to pay such debt
- Giving notice in the Government Gazette of intention to sell/alienate business

(Any 4 × 2) (8)

[50]

AND/OR

QUESTION 3

3.1
- Full name of corporation
- Main business
- Postal address
- Full name/ID numbers/birthdates of members
- Members' interest expressed in % form
- Particulars of contributions (if any)
- Name/postal address of accounting officer
- Date of financial year end (7 × 2) (14)

3.2 3.2.1
- Not entitled to unless agreed beforehand
- Unless partnership benefited by special services
- In excess of normal services
- Reasonable compensation
- Reimbursement of expenses in service of partnership
- For injuries sustained in execution of duties (Any 3 × 2)

3.2.2
- Partners are co-owners and thus have a right in this regard
- May share in assets in proportion determined in partnership agreement or as they agreed to beforehand
- If no agreement, then share in same proportion as they would divide profits (3 × 2)

(6 × 2) (12)

3.3
- Ordinary shares
- Deferred/Floating shares
- Preference shares
- Cumulative preference shares
- Redeemable shares
- Nonvoting ordinary shares (Any 4 × 2) (8)

3.4
- When a valid debt has been established and recognised by the parties
- When the intention of both parties is that the debt would exist even though the article pledged is not in possession of the creditor
- Where the article still has to be delivered/handed over and is damaged or is stolen (3 × 2) (6)

3.5 3.5.1 Estate agent
3.5.2 Auctioneer
3.5.3 Broker

(3 × 2) (6)

3.6 I DO NOT AGREE WITH THIS STATEMENT

Reason/motivation:
Private- and public companies go insolvent or bankrupt irrespective of whether they will be subjected to business rescue because the latter is only applied or sought when there is good reason to believe that instead of sequestrating a company, such company can still be revived financially if under judicial management or control . (4)
[50]

AND/OR

QUESTION 4

4.1
- Money
- Property
- Services (3 × 2) (6)

4.2
- A minor can only become a member of a CC when at least 18 years old
- Guardian of a minor must lodge written consent of minor's membership to CC
- Where such minor as described above has been found guilty of theft, fraud, corruption, forgery, uttering a forged document, perjury (3 × 2) (6)

4.3 FOR PARTNERS: Can be sued jointly and severally for partnership debt
Partners' mandates are cancelled/terminated
Duty to account to remaining partners

FOR OUTSIDERS: If creditors, may sue partners jointly/severally for debt
(Any 2 × 2) (4)

4.4
- Where partner acted/contracted impliedly for benefit of partnership
- Where actions were incidental to the proper conduct of the business
- Where actions fall within scope of the partnership business (3 × 2) (6)

4.5
- If a partnership estate is sequestrated the court also sequestrates the estates of each individual partner
- Does not apply to en commandite or special partners
- A partner may escape sequestration of his separate estate if he undertakes to pay all the debts of the partnership within a specified period of time and has given sufficient security to that effect. (3 × 2) (6)

Copyright reserved

4.6
- All such contracts must be in writing
- The person who concludes the contract must declare that he or she acts as agent or trustee for the company which is still to be formed
- At registration the memorandum of incorporation ('MOI') must contain the acceptance of any such contracts as one of its aims
- Two copies of all such contracts (of which one, certified by a notary) must accompany the submission of the memorandum at registration of the company
- After incorporation, the company must accept or ratify the contract/s – where it is a company with share capital, it should already be entitled to commence business (4 × 2) (8)

4.7
- Benefit of cession of actions (beneficium cedendarum actionum)
- Benefit of excussion (BENEFICIUM EXCUSSIONIS)
- Benefit of division (BENEFICIUM DIVISIONIS) (3 × 2) (6)

4.8
- Insolvent debtor loses control over his or her estate and is unable to alienate, estrange or squander his or her assets
- All creditors are protected in the sense that certain creditors may not act in a manner that only they are advantaged by the sequestration and thereby prejudice the rights of other creditors
- Proceeds of the insolvent estate are shared pro rata amongst all creditors, with exception of preferment creditors (Any 2 × 2) (4)

4.9
- Salvage liens
- Improvement liens (2 × 2) (4)

[50]

AND/OR

QUESTION 5

5.1
- 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 or by means of admission of additional member through present members who 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)

Copyright reserved

5.2 5.2.1 A partnership cannot consist of any number of partners; membership or partnership is restricted to a minimum of 2 and maximum of 20 persons.

5.2.2 As soon as the partnership articles are drawn up the partnership is deemed to exist legally; there is no registrar of companies nor a certificate of incorporation issued.

5.2.3 When a partner retires or dies, the partnership dissolves. A partner cannot merely nominate a replacement for him or her as the partnership dissolves and the remaining partners must decide on the way forward provided the total number of partners does not exceed 20 at any given time.

(3 × 2) (6)

5.3
- A person must make a contribution or undertake to do so (deliver the contribution) and make such contribution before the person will be deemed to be a partner.
- This contribution is made unconditionally and can take the form of not only money but also skill, movable or immovable property or goods, knowledge, skill or even personal services to the partnership. (4)

5.4
- The capacity to represent the partnership must be present - partners must be duly authorised to bind the partnership to contracts/judicial acts (express or implied authority).
- Joint and separate liability of each partner must be clear. (2 × 2) (4)

5.5
- Any person/s dealing with a company are taken to have clear notice of the memorandum and articles.
- Where third persons and a company have a relationship involving an ultra vires transaction such transactions are no longer void.
- People who deal with the company cannot be expected to know of irregularities or conflict in internal management of company. (Any 2 × 2) (4)

5.6
- Copy of underwriter's contract/affidavit to carry out obligations
- Written affirmation by auditors, lawyers, bankers and bankers of company that their names may appear in the prospectus
- Copy of every essential contract named in prospectus
- Written consent to act as director (4 × 2) (8)

5.7
- It proves that all prescribed documents for registration have been submitted and that the company has been legally registered.
- The company has obtained legal personality apart from its members. (2)

5.8
- Judicial mortgages or mortgages by order of court
- A mortgage on the debtor's property is given to the creditor by means of a court order. In such instance the creditor may sell the debtor's property, take the amount of money due and return the balance (if any) to the debtor.

(2 × 2) (4)

5.9 Where the insolvent makes agreements with certain of the creditors to prejudice them above the other creditors. Such actions/arrangements are voidable and when discovered all actions are reversed.

TWO EXAMPLES: Dispositions without value
Voidable preference
Undue preferences (Any 2 examples)
(2 × 2) (6)

5.10
- Where creditor has a liquidated claim for not less than R100 against debtor
- Two/more creditors who have in ave. claims of not less than R200 against debtor
- Debtor committed an act of insolvency or is insolvent. Reason to believe that it is advantageous to creditors if debtor's estate is sequestrated (Any 2 × 2) (4)

[50]

TOTAL SECTION B: 150
GRAND TOTAL: 200

Copyright reserved