higher education & training

Department:
Higher Education and Training
REPUBLIC OF SOUTH AFRICA

MARKING GUIDELINE

NATIONAL CERTIFICATE

MERCANTILE LAW N5

12 JUNE 2019

This marking guideline consists of 10 pages.

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GENERAL REMARKS

1. Answers found in this marking guideline are to be used as a guideline and should not be regarded as the only correct answer/s. Marks must still be allocated to a candidate's answer provided the answer has a similar meaning/idea. Semantic differences may occur and the examiner should be consulted where uncertainties occur during a marking memorandum discussion.

2. Answers must be in full sentences at all times where expressly required by and stated in the question paper.Should answers not be fully described, defined or analysed, full marks cannot be awarded to a candidate's answer/s. 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 INCLUDES THE COMPULSORY QUESTION, must be marked. If more than 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. Sign and date the statement afterwards.

   'THE CANDIDATE HAS ANSWERED MORE THAN THE REQUIRED NUMBER OF QUESTIONS (REFER TO EXAMINATION INSTRUCTIONS 1 AND 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. Write a supporting statement in your marker's 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.

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SECTION A (COMPULSORY)

QUESTION 1

1.1 1.1.1 Estoppel
1.1.2 Friendly sequestration
1.1.3 Promoter
1.1.4 Cooperation agreement
1.1.5 Dividend

(5 × 2) (10)

1.2 1.2.1
- Improvement lien
- Enrichment lien
- Debtor-and-creditor lien

1.2.2 Co-sureties

1.2.3 Statement of assets

1.2.4 Twenty

1.2.5
- Uninterrupted
- Judicial ownership

1.2.6 Legal personality

1.2.7 Founding statement

1.2.8
- Secured assets
- Free residue

1.2.9
- Authorised
- Representative

1.2.10 Concurrent

(15 × 2) (30)

1.3 1.3.1 False
1.3.2 False
1.3.3 False
1.3.4 True
1.3.5 False

(5 × 2) (10)
[50]

SECTION B

Answer any THREE questions in this section.

QUESTION 2

2.1
- 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's aim is to promote the interest of all its members
- Aim to make a profit in which the partners hope to be able to share

(Any 4 × 2) (8)

2.2
- 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)

2.3
- Contract of mandate/by agreement
- Estoppel/Ostensible authority
- Operation of law/implied by law
- Through/by means of ratification
- Authority implied on the facts (Any 4 × 2) (8)

2.4 Voluntary surrender:
- Debtor applies to court
- for order to sequestrate estate (2 × 2)

Compulsory sequestration:
One creditor with a claim of R100 or more OR two or more creditors with claims of R200 or more
OR their agent applies to court for a sequestration order on the estate (2 × 2)
(4 × 2) (8)

2.5
2.5.1 Factor
2.5.2 Auctioneer
2.5.3 Broker

(3 × 2) (6)

2.6
2.6.1 No
This is an ordinary case of a debtor making a representation to reduce payment due to financial difficulty: Not insolvency

2.6.2 Yes
Removing your assets from a business place is a strong indication of an act to evade paying creditors and is an act of insolvency.

2.6.3 Yes
Offering some or all creditors payment of a certain amount of money in settlement could prejudice creditors and is an act of insolvency.

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2.6.4 Yes
Such an act strongly indicates an act of insolvency as Pieter is prejudicing that creditor in favour of his other creditors (should there be more than the one creditor).

(4 × 2) (8)

2.7
- Each partner must contribute what he or she promised to give
- Can be in the form of money and/or labour and/or industry
- Can also be goods/things in specie and/or skill
- Must hand over all fruits/appendages borne of/by goods from the date of promise to the date of contribution (4 × 2) (8)

[50]

AND/OR

QUESTION 3

3.1
- YES, a CC has a legal personality or is a juristic person.✓
- Explanation: The Close Corporations Act provides that a CC has the capacity and all the powers of a natural person, that is, it can conduct business and enter into contracts (legally binding agreements) with other persons.✓✓ (3)

3.2

		CLOSE CORPORATION	PARTNERSHIP
3.2.1	Legal personality	Yes, can exist independently without its members✓	No, cannot exist without its members✓
3.2.2	Liability for business debts	Liable for its own debts, not the members' debts✓	Partners are jointly and separately liable for partnership debts✓
3.2.3	Effect of membership change	Has perpetuity as long as membership does not exceed 10 in total✓	As soon as there is any change in total number of partners (2–20 partners), it will be dissolved until membership issue is resolved✓
3.2.4	Responsibility of fiduciary duty	Each member has this responsibility towards each other in the CC✓	Each partner must display duty of good faith in the partnership✓
3.2.5	Submission of annual income tax returns	As a business, it submits tax returns annually after distributions are made to members✓	Partnership does not submit income tax returns, but individual partners sharing profit are taxed in their own hands✓

(5 × 2) (10)

3.3
- Member must act honestly and in good faith in relation to the corporation.
- Member must exercise his/her powers of management and representation in the interest and for the benefit of the corporation
- Member must avoid any material conflict between his/her own interests and those of the corporation
- Member shall not derive any personal economic benefit to which he/she is not entitled by reason of his/her membership of or service to the corporation
- Member shall not compete with the corporation in its business activities
- Must notify every member at the earliest opportunity of the nature and extent of any material interest he/she may have in any contract of the corporation
- If member breaches the fiduciary duty, he/she will be liable to the corporation for any loss suffered by the corporation or any economic benefit derived by him/herself
- If member fails to give notice of his/her interest in a contract of the corporation, the contract is VOIDABLE at the instance of the corporation
- If the corporation chooses not to be bound but on application, a court decides that the corporation is to be bound, the court may make such an order
- All members may ratify a subsequent breach of a member's fiduciary duty except where a member did not exercise his/her powers of management in the interest of the corporation (Any 6 × 2) (12)

3.4 3.4.1
- No
- In accordance with the directors' fiduciary duties set out in the Companies Act 71 of 2008, Mrs Baleni (as director) has breached her duties since there is a clear conflict of interest in this instance.
- Mrs Baleni may not abuse her position as director to gain advantage for herself and thereby knowingly cause harm to the company. (2 × 2) (4)

3.4.2 She did not fulfil her duty to avoid a conflict of interest and did not act in good faith (bona fide). (2)

3.4.3
- Remedies for shareholders: They can insist that the sale of the farm to Mrs Baleni be set aside or cancelled. In terms of the Companies Act, her action amounts to a clear conflict of interest (because she bought the farm that was offered to the company) and the contract is VOIDABLE, in other words, the transaction may be set aside if the shareholders so wish.
- The shareholders may bring (legal) an action for damages against Mrs Baleni (director) for the R2 million the company had to pay in order to buy the farm from her. (2 × 2) (4)

3.5 3.5.1 Benefit of excussion/Beneficium excussionis (2)

3.5.2 Your friend (surety) may demand that the creditor (Bank X) first take legal steps against the principal debtor (friend's wife) for payment before the creditor (Bank X) approaches your friend for payment.✓✓

Where the creditor's action against the debtor is unsuccessful, the surety (your friend) is liable for the debt plus any legal costs.✓

(3)

3.6 Three consequences of insolvency:
- Pecuniary (financial) consequences
- Insolvent may never be allowed to hold certain offices
- Insolvent may not contract or litigate during period of sequestration without permission of curator
- A social stigma that clings to insolvent and may damage
- Future career (Any 3 × 2) (6)

3.7 Meaning of defeasible (voidable) dispositions:
Where the insolvent concludes agreements with certain creditors to benefit them above other creditors such actions/arrangements are VOIDABLE, and when discovered, all these actions will be reversed. (1 × 2)

ONE EXAMPLE: Dispositions without value OR
Voidable preferences OR
Undue preferences (1 × 2)
(Any 2 × 2) (4)
[50]

AND/OR

QUESTION 4

4.1 4.1.1 Is the document which regulates the internal/household affairs of the company (2)

4.1.2
- Must be in the prescribed form and signed by each subscriber of the memorandum and witness thereto
- Each subscriber must give his/her full name/s, occupation, residential and postal address
- Must be registered and can be altered (differs between companies)
- If forms are not modified to reflect essence of that type of company (e.g. private or public liability company) it will cease to operate as such (4 × 2) (8)

4.1.3 It governs amongst others, the …
- issue and transfer of shares
- alteration of capital
- borrowing powers
- meetings
- directors and their powers
- dividends
- accounts (Any 3 × 2) (6)

4.2
- Is aimed at rehabilitating the ailing company
- To help the financially crippled company to get a grip on its affairs under control of judicial management
- To become a successful firm again and to prevent further mismanagement
(Any 2 × 2) (4)

4.3 Must display the necessary care and skill in executing his capabilities
Must apply his knowledge and skill in handling company business
Must be allowed to delegate to capable person/s and may in absence of any suspicion accept that his duty has been performed (3 × 2) (6)

4.4 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)

4.5
- The company inherits the former CC's history, in a sense.
- (Change of name in legal sense, etc. must be done at CIPC)
- ALL existing contracts and/or summonses for debt/court cases pending goes over to the company
- Must inform all members and creditors of current state of affairs (3 × 2) (6)

4.6
- Sequestration process is terminated
- Insolvent is freed from all disqualifications resulting from sequestration
- ALL insolvent's debts before sequestration (fraud excluded) are extinguished (Any 2 × 2) (4)

4.7 4.7.1 The duty to account in full to his principal

4.7.2 Must perform his mandate with care, diligence and skill

4.7.3 The duty not to act negligently and to perform his mandate or to act in good faith at all times

4.7.4 The duty to exercise utmost good faith in the performance of his duties

4.7.5 Duty to exercise utmost good faith in the performance of his duties
(5 × 2) (10)
[50]

AND/OR

QUESTION 5

5.1
- Ordinary shares:
  Dividends are received after preference shareholders received their dividends
- Deferred/Floating shares:
  Dividends received only if ordinary shareholders have received a prescribed minimum dividend
- Preference shares:
  Are first to receiving dividends and expressed as a fixed percentage of the nominal value of the shares OR
  Only entitled to dividends if profits are available for division and a dividend is declared in accordance with the articles of association

(1 mark for class + 3 marks for classification) (3 × 4) (12)

5.2 5.2.1
- Description of the bonded property
- Interest (%) payable by the debtor or mortgagor
- Manner in which the borrowed capital will be repaid
- Period over which the bond will be extinguished/settled
- Rights of the mortgagee/creditor in event of the non-payment of the interest portion and the principal amount borrowed

(5 × 2) (10)

5.2.2
- Mortgagee/Creditor/Lending institution or person shall take care of bonded property where such property is placed under the mortgagee's care and supervision
- When debtor/mortgagor settles the debt, the mortgagee or creditor must return the property together with all fruits produced by the property during that time
- When debt is settled the mortgagee/creditor must cancel the bond (document) and return or hand it over to the mortgagor or debtor

(3 × 2) (6)

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5.3 5.3.1 (a) In terms of the articles of association and the Companies Act, the director will be disqualified from acting as a director. No, he cannot hold the position of director of the company.

(b) If he continues to hold his position as director, it will amount to a serious (criminal) offence.

(c) The Companies Act states that unless authorised by the court, a person removed from office on account of misconduct or on account of theft, will be disqualified from acting as director.

(d) The court has the discretion, based on the seriousness of the offence and the interests of the company, to grant or not to grant authority to act as director. The court cannot authorise a person to participate in the management of the company without also declaring him authorised to act as a director.

(4 × 2) (8)

5.3.2 (a) YES, your friend is correct.

(b) The creditors can apply to the High Court for the (provisional) sequestration of your friend's business (debtor's estate).

(c) The Insolvency Act stipulates that a debtor commits an act of insolvency if he gives notice in writing to any of his creditors that he is unable to pay any of his debts.

(3 × 2) (6)

5.4
- To report to the company
- Auditor's principal duty to report to company members on all (financial and other) accounts examined by him/her including every balance sheet, profit and loss statement and any other document annexed thereto
- The duty of reasonable care
- The auditor must act honestly and with reasonable care and skill otherwise he/she may be sued for damages. The auditor must verify with skill, care and caution which is exactly what a reasonable competent, careful and cautious auditor should do.

(Any similar or reasonable explanation is acceptable) (4 × 2) (8)

[50]

TOTAL SECTION B: 150
GRAND TOTAL: 200

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