higher education & training

Department:
Higher Education and Training
REPUBLIC OF SOUTH AFRICA

MARKING GUIDELINE

NATIONAL CERTIFICATE

MERCANTLE LAW N5

10 June 2021

This marking guideline consists of 9 pages.

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SECTION A

QUESTION 1

1.1 C
1.2 B
1.3 B
1.4 C
1.5 B
1.6 A
1.7 A
1.8 B
1.9 C
1.10 C

(10 × 2) **[20]**

QUESTION 2

2.1 False
2.2 True
2.3 False
2.4 False
2.5 False
2.6 True
2.7 False
2.8 True
2.9 False
2.10 False

(10 × 1) **[10]**

QUESTION 3

3.1 C
3.2 D
3.3 B
3.4 H
3.5 I
3.6 E
3.7 J
3.8 G
3.9 A
3.10 F

(10 × 1) **[10]**

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QUESTION 4

4.1 A person that acts on behalf of someone else without authority, only to the benefit of the other, and not with the intention to receive remuneration.

4.2 A right available to co-sureties. Where one surety is addressed to pay, he can claim that all co-sureties should be addressed pro rata for the debt.

4.3 A claim that a bona fide possessor has for money spent or labour performed without the permission of the owner. The expenses incurred were useful and increased the market value of the property, for example, the construction of a fence on a farm.

4.4 Applicable to the insolvent – where he or she will be restored to his or her original position after a certain period of time.

4.5 A contract entered into before the registration of a company.

(5 × 2) **[10]**

TOTAL SECTION A: 50

SECTION B

Answer any THREE questions from this section.

QUESTION 5

5.1.1
- A legal contract
- between two and maximum twenty
- to contribute to the partnership
- with the main aim of making a profit
- for their common interest and joint advantage. (5 × 2) (10)

5.1.2
- The right to share in the profits
- The right of control
- Right to compensation
- Right to division of assets at dissolution
- Right to inspection of the partnership books (5)

5.1.3 The duty of good faith.✓✓

This means that each partner
- must account for all secret profits or commission received
- must never be placed in a position where his or her personal interest is in direct conflict with the interest of the partnership.

Jabu made a secret profit and his personal interests are in direct conflict with the interests of the partnership.✓✓ (4 × 2) (8)

5.1.4 The partnership will also be dissolved if Pule is declared insolvent. Insolvency of either a partner✓✓ or partnership terminates a partnership.✓✓ (2 × 2) (4)

5.2.1 A contract whereby the pledgor✓ places his/her movable property✓ in the hands of the pledgee✓ as security for debt.✓ (4)

5.2.2
- The existence of a valid debt or obligation.
- Movable property which must be delivered.
- An agreement between the parties that a pledge will arise. (3)

5.2.3
- Creditor has the right to keep the property until payment is made.
- Creditor receives a preferential claim above other claims.
- Creditor may sell the property to obtain outstanding money. (3 × 2) (6)

5.2.4
- As soon as the debt is settled (paid in full).
- Renunciation of rights by the creditor.
- Novation – where an old debt is substituted by a new debt.
- Merger – where the pledgee becomes the rightful owner of the pledged goods.
- Alienation of the pledged goods – may only be done with consent of debtor. (5 × 2) (10)

[50]

QUESTION 6

6.1 Public company (1)

6.2 3 (1)

6.3 Memorandum of Incorporation (1)

6.4
- Ordinary shares
- Preference shares
- Deferred shares/Founding shares (3)

6.5 **NOTE TO MARKER: Any of the following can be marked as correct.**

- Debentures do not form part of owner's equity but form part of long-term liabilities.
- A debenture must be redeemed/paid back.
- A fixed interest rate must be paid.
- Debenture holders do not have voting rights.
- Debentures can be issued at part, at a premium or at a discount. (4 × 2) (8)

6.6 Prospectus (1)

6.7 **NOTE TO MARKER: Any of the following can be marked as correct.**
Main categories fiduciary duties are divided into:

Conflict of interest✓✓
- Must be avoided at all times and means that a director may not acquire any advantage other than the remuneration as director.✓✓

Bona fide acts/acting in good faith✓✓
- Must act in the best interest of the company.✓✓

Includes the following objective norms:
- Director may not exceed his powers (capabilities)✓✓
- No ultra vires acts may be undertaken.✓✓
- Director must exercise discretion, which means that he or she may not reach agreements,✓✓ for example, to vote in a certain way at directors' meetings.
- Director must apply his or her capabilities for the purposes which they were granted. (7 × 2) (14)

6.8 **NOTE TO MARKER: Any of the following can be marked as correct.**
- It does not affect the continuation of the company.
- Company falls under the control of the liquidator for purposes of liquidation.
- Directors must vacate their positions and their powers and duties are terminated.
- No transfer of shares or change in status of the company's members may take place unless the liquidator authorises it.
- No alienation or disposal of goods may take place.
- All civil claims by or against the company are suspended until a liquidator has been appointed.
- Confiscation or execution against an estate or assets of the company after the commencement of liquidation, is void.
- The company remains the owner of its property but is regarded as being in the custody and under the control of the liquidator. (5 × 2) (10)

6.9
- At least three members✓
- Must consist only of non-executive directors✓ who have not been involved in the day-to-day management. (2)

6.10 **NOTE TO MARKER: Any of the following can be marked as correct.**

- Nominate for appointment of an auditor.
- Determine the fees payable to such auditor and his or her terms of engagement.
- Ensure the appointment complies with the provisions of the Act and other relevant legislation.
- Consider any non-audit services the auditor may or may not have to perform.
- Preparation of a report, to be included with the annual financial statements.
- Report on receiving and handling concerns/complaints in the company.
- Submission to the board of directors on any matters concerning the company's accounting policies, financial control, records and reporting.
- Performing other functions as determined by the board.
- To consider whether the auditor's independence may have been prejudiced.
- Consider compliance with other criteria relating to independence or conflict of interest. (5 × 1) (5)

6.11 **NOTE TO MARKER: Any of the following can be marked as correct.**

- Good continuity.
- Limited liability of shareholders.
- Investments in the company are transferable. (2 × 2) (4)

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QUESTION 7

7.1.1 It fulfils the same aim as the MOI.✓✓ It sets out the procedures that have to be followed in the administration of a juristic person.✓✓ (2 × 2)

It handles the business which is normally found in a partnership agreement,✓✓ especially in connection with the financing of the business,✓✓ grounds for termination of membership,✓✓ the taking over of a retiring member's interest and limitations on a retiring member's interest.✓✓ (2 × 2)

It deals with the business appearing in a shareholder's agreement, for example,✓✓ the division of powers,✓✓ the appointment of representatives of the corporation,✓✓ the percentage profit-sharing✓✓ and general policy.✓✓ (2 × 2) (12)

7.1.2

- Voluntary disposal of member's interest.
- A forced sale of a member's interest as a result of insolvency.
- A testamentary bequest of a member's interest.
- Deregistration or liquidation and the consequent dissolution of the close corporation.
- As the result of a court order. (5)

7.1.3
- An unrehabilitated insolvent
- Someone dismissed from a position of trust
- Someone found guilty of theft, fraud, forgery, corruption or any illegal act. (3)

7.1.4 Yes. (1)

7.2.1
- A creditor who has a liquidated claim for not less than R100
- Two or more creditors who on average have liquidated claims of not less than R200 (2)

7.2.2
- The court must have the necessary claim against the debtor – a liquidated claim for not less than R100 or on average not less than R200 where there is more than one creditor.
- That the debtor is indeed insolvent or that the debtor has committed a deed of insolvency.
- There is sufficient reason to believe that it would be to the advantage of the creditors. (3 × 2) (6)

7.2.3
- Application for sequestration is done by the insolvent debtor, or partner or authorised agent, curator or trustee.
- Before acceptance of surrender by the court, the insolvent debtor must publish the notice of surrender of his/her estate.
- A statement of affairs must be submitted to the court and the local magistrate's court. (3 × 2) (6)

7.2.4 **NOTE TO MARKER: Any of the following can be marked as correct.**
- No further payments to a creditor or creditors must be made.
- The insolvent must keep accurate records of all his assets received and all payments made during his/her business or profession.
- He/she must assist the trustee in realising any property that belongs to the estate.
- The insolvent must attend all meetings with creditors.
- The debtor must submit a statement of affairs to the Master.
- He/she must keep records of all moneys received.
- He/she must hand over all assets to the trustee.
- He/she must keep the trustee informed of any change of address. (5 × 1) (5)

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7.2.5 (a) Composition (accord) (2)

(b)
- It binds the insolvent and all concurrent creditors.
- The insolvent's assets may revert to him/her.
- The insolvent is entitled to a certificate indicating that the accord has been accepted and that he/she can apply for rehabilitation.
- Accord does not bind the independent creditors of the insolvent's spouse. (4 × 2) (8)

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QUESTION 8

8.1 **NOTE: Any applicable and correct example**

- By agreement✓
  For example, an agency enters in a contract with an agent to sell property on behalf of the seller✓✓

- Estoppel✓
  For example, an agent left the agency, but the agency did not inform the market that person X is no longer an agent and person X continues to act on behalf of the principal✓✓

- Authority implied by law✓
  For example, a guardian acting on behalf of a minor✓✓
  A curator acting on behalf of an insane person
  A curator acting on behalf of an insolvent estate
  A partner acting on behalf of a partnership

- Ratification✓
  For example, an agent may only enter into contracts up to R1 200 000. Agent X entered into a contract for R1 250 000. The principal gave consent afterwards.✓✓

- Authority implied by the facts✓
  For example, managers of a business have implicit authority to do all things reasonably incidental to carrying on that type of business.✓✓ (5 × 3) (15)

8.2
- To perform his or her mandate according to the instructions of the principal
- To display care, skill and diligence
- To be honest and show good faith
- To account to the principal (4)

8.3
- An agent appointed to sell the principal's goods at a commission.
- Goods are placed under his or her control.
- Factor uses his or her own discretion and may even dispose of the goods under his or her own name.
- The factor has the right of retention – meaning that he/she can keep the goods for costs incurred and until commission has been paid. (4 × 2) (8)

8.4
- Recognise and accept the duty to account to the agent.
- Must reimburse the agent for expenses incurred in the execution of his/her duties.
- Must indemnify the agent against all losses suffered in the execution of the mandate.
- Must pay the agent the agreed remuneration. (4)

8.5 8.5.1 Debtors' and creditors' lien✓ – an implied right granted by law✓ to a person who spent money or performed labour with the express or implied permission of the owner – he or she can keep the money until commission is paid.✓ (3)

8.5.2 Possession of a lien must be judicial/legal✓✓
Actual physical control over the property together with the intention to keep the property for his or her own advantage.✓✓

Uninterrupted possession✓✓
Lien is lost if person who incurred the expenses voluntarily parts with such property.✓✓ (8)

8.6
- The mortgagee obtains a real right on the immovable property of the debtor.
- The mortgage bond which is in writing and registered serves as security for the mortgagee where the debtor fails to meet his/her obligations.
- This claim is a preferential right and is valid against all persons.
- Also includes any attachments, for example, storerooms, swimming pool, etc.
- Should the debtor's property be sold, the mortgagee will retain his or her preferential right. (4 × 2) (8)

[50]

TOTAL SECTION B: 150
GRAND TOTAL: 200

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