higher education & training

Department:
Higher Education and Training
REPUBLIC OF SOUTH AFRICA

MARKING GUIDELINE

NATIONAL CERTIFICATE

NOVEMBER EXAMINATION

MERCANTILE LAW N5

1 DECEMBER 2016

This marking guideline consists of 10 pages.

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QUESTION 1

GENERAL REMARKS

NOVEMBER 2016

1. Answers found in this marking guideline are used as a guideline and must not be seen as the only correct answer/s.
   Marks must still be allocated to a candidate's answer provided that the answer has a similar meaning/idea. Semantic differences could 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 given to a candidate's answer/s. For specific details, scrutinise each question carefully.
   Please 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 afterwards.

   "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 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 By conduct✓

1.1.2 Legal person✓

1.1.3 Valid✓

1.1.4 Covering✓

1.1.5 CK1 form✓

1.1.6 Tacit hypothec✓

1.1.7 Free residue✓

1.1.8 30 Years✓

1.1.9 6 Months✓

1.1.10 Act of insolvency✓

(10 × 1) (10)

1.2 1.2.1 False✓
1.2.2 True✓
1.2.3 True✓
1.2.4 True✓
1.2.5 False✓
1.2.6 False✓
1.2.7 True✓
1.2.8 False✓
1.2.9 False✓
1.2.10 False✓
1.2.11 True✓
1.2.12 False✓
1.2.13 False✓
1.2.14 False✓
1.2.15 False✓
1.2.16 False✓
1.2.17 True✓
1.2.18 True✓
1.2.19 False✓
1.2.20 False✓

(20 × 1) (20)

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1.3
1.3.1 C✓✓
1.3.2 D✓✓
1.3.3 A✓✓
1.3.4 D✓✓
1.3.5 D✓✓
1.3.6 C✓✓
1.3.7 A✓✓
1.3.8 C✓✓
1.3.9 D✓✓
1.3.10 A✓✓

(10 × 1) **(10)**

TOTAL SECTION A: 20

[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: Minimum 2 and Maximum 20 persons✓✓
- Contribution by each partner: property/money/labour/services/skills or even knowledge✓✓
- Partnership is for the promotion of the interests of all its members/partners. aim: To make a profit in which the partners hope to be able to share✓✓

(Any 2 × 2) (4)

2.2
- Capacity to represent partnership – partners must be duly authorised to bind the partnership to contracts/judicial acts (express and/or impliedly)✓✓
- Joint and separate liability of each partner✓✓

(2 × 2) (4)

2.3
- Contract of mandate/by agreement✓✓
- Estoppel/ostensible authority✓✓
- Operation of law/implied by law✓✓
- Ratification✓✓
- Authority implied on the facts✓✓

(Any 4 × 2) (4)

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2.4 VOLUNTARY SURRENDER:
- debtor applies to court for an order to sequestrate his/her estate✓✓

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 sequestration order on the estate✓✓

(Any 2 × 2)

2.5
- Pecuniary (money/financial) consequences✓✓
- The insolvent may never be allowed to hold certain offices i.e. director of a company✓✓
- Insolvent may not contract or litigate during period of sequestration without permission of curator✓✓
- Social stigma clings to insolvent and may damage future career✓✓

(Any 2 × 2) (4)

2.6
- It obtains rights and duties of its own✓✓
- It can sue or be sued like ordinary persons✓✓
- It can keep house and do business – enter into contracts✓✓
- It is granted perpetual succession✓✓

(4 × 2) (8)

2.7 2.7.1
- Each partner must contribute that which was promised or agreed upon to give✓✓
- Contribution can be in the form of money and/or labour and/or industry✓✓
- Contribution can also be in form of goods/things in specie and/or skills/services rendered✓✓
- Prospective partner must hand over all fruits or appendages borne of/by goods from date of promise to date of contribution✓✓

QUESTION 3

3.1
- Mutual agreement✓✓
- Lapse of time for which partnership was formed✓✓
- If purpose of partnership has been fulfilled✓✓
- Death of one of the partners✓✓
- Change in membership of partnership✓✓
- Sequestration of one of the members' estates or that of the partnership✓✓
- One of the partners gives notice that he/she wants to retire✓✓
- By an Order of court✓✓
- Membership exceeds maximum number of twenty partners✓✓
- If war breaks out and one of the partners is in enemy territory✓✓
- If there is no likelihood of any future profits being realised✓✓

(Any 5 × 2) (10)

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3.2
- Benefit of division (beneficium divisionis)✓✓
- Benefit of cession of actions (beneficium cedendarum actionum)✓✓
- benefit of excussion (beneficium excissionis)✓✓

(3 × 2)
Latin terminology not required, but also accepted (6)

3.3 Meaning: acting beyond their powers

- Companies only existed in law for the sole purpose for which it was founded/established and as such only had legal capacity to perform only such acts as indicated by its objectives. Any act that fell outside of its objects clause was null and void✓✓
- Where a company has engaged in any act that is ultra vires and against the provisions of its MOI, any such acts would be null and void and could only be validated by the unanimous assent of its shareholders✓✓

(2 × 2) (4)

3.4
- Companies are allowed to repurchase its shares (subject to solvency and liquidity tests)✓✓
- If company does not meet solvency and liquidity tests, the agreement between the shareholder/s and the company will remain in force (will not be undone)✓✓
- Where repurchase of shares is in contravention of the solvency and liquidity tests, the company can apply for a court to have the repurchase of such shares set aside (reversed) (3 × 2) (6)

3.5
- Composition or accord binds the insolvent and all concurrent creditors without exception – meaning whether or not they all or not have voted for or against this and attended such meeting or not✓✓
- The insolvent's assets may revert back to him/her✓✓
- The insolvent is entitled to a certificate signed by the Master to the effect that the offer of accord has been accepted and that if the terms exceeded at least 50 cents in the Rand, the insolvent may apply for rehabilitation✓✓
- Composition does not bind independent creditors of insolvent's spouse✓✓

(Any 3 × 2)

3.6
- Private placing✓✓
- Offer for subscription to shares✓✓
- Offer for sale of shares✓✓
- A rights offer✓✓
- A rights issue✓✓

(Any 3 × 2) (6)

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3.7 Ordinary shares:✓✓
- Dividends are received after the preference shares have received their dividends✓✓

Deferred/floating shares:✓✓
- Dividends received only if ordinary shares have received a prescribed minimum dividend✓✓

Preference shares:✓✓
- Are first to be receiving dividends and expressed as a fixed % of the nominal value of the shares✓✓
- Only entitled to dividends if profits are available for division and the dividend is declared in accordance with the articles of association✓✓

(3 × 2 × 2) (12)

QUESTION 4

4.1
- full name of corporation✓✓
- the main business to be done✓✓
- postal address✓✓
- full name/id numbers/birthdate of members✓✓
- members' interest expressed in % form✓✓
- particulars of contributions (if any)✓✓
- name/postal address of aacounting officer✓✓
- date of end of financial year✓✓

(Any 4 × 2) (8)

4.2
- debtor can be rehabilitated✓✓
- debtor is not liable for debts incurred prior to sequestration of his/her estate✓✓

(2 × 2) (4)

4.3
- Where the principal approves the appointment of sub-agents✓✓
- Where any such acts/mandate is widely known as trade usage✓✓

(2 × 2) (4)

4.4
- Payment of the promised commission✓✓
- Reimbursement of agent's expenses✓✓
- Indeminification of agent against claims of third parties✓✓

(3 × 2) (6)

4.5 4.5.1 DEBTOR - & CREDITOR LIEN✓✓

4.5.2 SALVAGE LIEN✓✓

4.5.3 DEBTOR - & CREDITOR LIEN✓✓

4.5.4 SALVAGE LIEN✓✓

(4 × 2) (8)

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4.6
- Members of a CC have limited liability towards the debts of the CC✓✓
- Members must adhere to an agreement to co-operate✓✓
- C will be solely responsible in his personal/private capacity for the debt of R145 000 and NOT the CC✓✓
- Seller must take action against person C to recover the R145 000✓✓
- A & B may ratify C's actions afterwards by agreeing to pay for the birds, but cannot be compelled to do so✓✓

(5 × 2) (10)

4.7 Nominal = Amount of capital stated in memorandum of incorporation (moi) is amount company is authorised to issue✓✓
Issued = that part of nominal capital which has been issued/allocated to shareholders✓✓ (4)

4.8
- 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)

QUESTION 5

5.1
- members shall act honestly and in good faith in relation to the corporation✓✓
- members shall avoid any material conflict of his own interest with those of the corporation✓✓
- members shall not derive any personal economic benefit from the corporation✓✓
- must notify every other member at the earliest opportunity of any material interest he/she may have in any contract of the corporation✓✓
- not compete in any way with the corporation in its business activities✓✓

(Any 3 × 2) (6)

5.2
- It gives an outline of the procedures that must be followed in the administration of the legal entity✓✓
- It handles issues with regard to financing, termination of membership, take-over of members' interest, restrictions on retiring member's interest✓✓
- Deals with issues that are common to the shareholders agreement eg. division of authority, appointment of representatives, % profit sharing and policy issues✓✓

(Any 2 × 2) (4)

5.3.1 A licenced agent, authorised by a principal/seller✓✓ who sells movable/immovable goods on his behalf✓✓by public auction on a commission basis✓✓ (6)

5.3.2
- An agent who undertakes to sell goods for his principal✓✓
- Guarantees that third party with whom he contracts will meet their obligations✓✓

(2 × 2) (4)

5.4
- Call on debtors to pay their debts✓✓
- Take in possession/control all movable goods/search and attach it✓✓
- Open bank account, deposit all such monies✓✓
- Open book, record all money etc. received by him✓✓
- Convene creditors' meetings✓✓
- Tender expenses of meetings✓✓
- Examine all claims/supporting documents collected✓✓
- Recommended any movable property sold/ought to be sold to the Master✓✓
- Obtain full explanation from insolvent for his insolvency✓✓
- Investigate affairs of insolvent✓✓
- Sell property of insolvent estate after 2nd meeting of creditors✓✓
- Any offers, must satisfy the trustee✓✓
  within 6 months submit liquidation account/distribution etc. to the Master✓✓
- Trading account signed by the trustee✓✓
- Government Gazette confirmation to distribute estate✓✓
- all receipts for dividends paid to creditors lodged with the Master✓✓
- any surplus pay it to Master which will be paid out to insolvent after rehabilitation✓✓
- Receives notice of intention of insolvent to apply for rehabilitation and must report to Master any facts which would justify the Court in refusing, postponing or qualifying the rehabilitation✓✓

(Any 5 × 2) (10)

5.5 5.5.1 Must have at least three members (non-executive directors)✓✓ (2)

5.5.2 The non-executive directors must have not been involved in day-to-day management of company in the preceeding THREE (3) financial years✓✓ (2)

5.5.3

- nominate appointments for auditors✓✓
- determine fees payable to auditors & terms of engagement✓✓
- ensure appointment complies with companies act✓✓
- consider non-audit services auditor may/may not have to perform✓✓
- pre-approve any non-audit services to be rendered✓✓
- preparation of a report as to how audit committee carried out itstasks✓✓
- report of receiving and handling concerns/complaints in the company✓✓
- submit reports to the board of directors on any matters concerning companies accounting policies, controls, records and reporting✓✓
- performance of functions as determined by the board of directors✓✓
- to consider whether auditor's independence may have been prejudiced✓✓
- consider compliance with other criteria relating to the independence or conflict of interest of the auditor in execution of duties✓✓

(Any 8 × 2) (16)

TOTAL SECTION B: 150
GRAND TOTAL: 200

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