higher education & training

Department:
Higher Education and Training
REPUBLIC OF SOUTH AFRICA

MARKING GUIDELINE

NATIONAL CERTIFICATE

MERCANTILE LAW N5

28 NOVEMBER 2018

This marking guideline consists of 5 pages.

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GENERAL REMARKS

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.

   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	F		
	1.1.2	G		
	1.1.3	K		
	1.1.4	M		
	1.1.5	E		
	1.1.6	B		
	1.1.7	A		
	1.1.8	H		
	1.1.9	J		
	1.1.10	I		
			(10 × 2)	(20)
1.2	1.2.1	A		
	1.2.2	B		
	1.2.3	A		
	1.2.4	A		
	1.2.5	D		
			(5 × 2)	(10)
1.3	1.3.1	Distribution		
	1.3.2	Subsidiary		
	1.3.3	CK7		
	1.3.4	Company directors and CC members		
	1.3.5	Existing members' interest		
	1.3.6	En commandité		
	1.3.7	The purchase price has been paid		
	1.3.8	Liens		
	1.3.9	Creditor		
	1.3.10	Without a mandate		
			(10 × 1)	(10)
1.4	1.4.1	False		
	1.4.2	True		
	1.4.3	False		
	1.4.4	False		
	1.4.5	False		
	1.4.6	False		
	1.4.7	False		
	1.4.8	True		
	1.4.9	True		
	1.4.10	False		
			(10 × 1)	(10)
				[50]

TOTAL SECTION A: 50

SECTION B

Answer any THREE questions in this section

QUESTION 2

2.1 2.1.1 SURETYSHIP (2)

2.1.2 BANK ABC = CREDITOR
WOLFGANG = SURETY (2 × 2) (4)

2.1.3 CO-SURETIES (2)

2.1.4 BENEFICIUM DIVISIONIS = BENEFIT OF DIVISION

HERE THERE IS MORE THAN ONE SURETY i.e. CO-SURETIES

CO-SURETIES ARE JOINTLY AND SEVERALLY LIABLE FOR THE SAME DEBT (PIERRE'S DEBT OF R320 000)

WHERE THE CREDITOR (BANK) DEMANDS PAYMENT FROM THE CO-SURETIES (IF THE DEBTOR/PIERRE CANNOT PAY), THE CO-SURETIES CAN DEMAND THE PRINCIPAL DEBT (R320 000) BE DIVIDED

THE PRINCIPAL DEBT IS THEN DIVIDED AMONGST THE SURETIES (WOLFGANG AND HIS FRIEND IN THIS CASE) EXCLUDING INSOLVENT SURETIES OR SURETIES WHO ARE OUTSIDE THE JURISDICTION OF THE COURT

ONCE DEBT IS DIVIDED, EACH SURETY IS LIABLE FOR PRO RATA SHARE OF THE TOTAL LIABILITY (R320 000) or R160 000 EACH OR FOR WHATEVER AMOUNT OF THE TOTAL DEBT EACH SURETY AGREED TO STAND SURETY FOR (7 × 2) (14)

2.2 WITH REPRESENTATION, ONE PERSON ACTS ON BEHALF OF ANOTHER PERSON

ACTING ON BEHALF OF ANOTHER MUST BE A LEGAL ACT

THE ACT MUST BE AUTHORISED

THE ACT IS BINDING BETWEEN THE PARTIES (OF WHICH ONE OR MORE WERE NOT INVOVLED IN THE ORIGINAL REPRESENTATION OR NEGOTIATION) (4 × 2) (8)

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2.3 THABO AND PORTIA IS MARRIED ANTENUPTIAL CONTRACT AND HIS DONATION OF THE HOUSE TO HIS WIFE (PORTIA) PRESUMABLY BEFORE THABO'S ESTATE WAS SEQUESTRATED

BECAUSE THE HOUSE WAS DONATED AND REGISTERED IN PORTIA'S NAME BEFORE/PRIOR TO THABO'S SEQUESTRATION

BECAUSE THABO DONATED THE HOUSE TO HIS WIFE IN TERMS OF A LEGAL ANTENUPTIAL CONTRACT (NOTHING UNTOWARD THIS ACTION)

THE HOUSE WAS ACQUIRED BY WAY OF DONATION FROM THE INSOLVENT SPOUSE (THABO)

WHAT WILL ALSO MAKE IT DIFFICULT FOR THE TRUSTEE TO CLAIM THE HOUSE AS A DISPOSITION WITHOUT VALUE IS THE FACT THAT IT WAS A GENUINE DONATION (NOT A SHAM TRANSACTION)

THE DONATION WAS DONE IN GOOD FAITH AND NOT TO CONCEAL OR HIDE ASSETS TO THE DETRIMENT OF THABO'S CREDITORS

THIS CASE ALSO FORMS PART OF THE CONSEQUENCES REGARDING THE SEPARATE ESTATE OF THE INSOLVENT'S SPOUSE (PORTIA) WHERE PORTIA HAS TO PROOF THAT THE HOUSE DOES IN FACT NOW BELONG TO HER (LEGAL TRANSFER AND REGISTRATION OF THE HOUSE IN HER NAME AND NOW PART OF HER ESTATE).

(Any 5 × 2) (10)

2.4 2.4.1 As partners only share in NET PROFITS, it is implied that they will also share NET LOSSES
Partners share losses until the business/partnership realises profits or does not show any more net losses
Partner Y will therefore be bound to share in this 'incidental loss' as the business (estate agency) did not show a net profit for that year
(Any 1 × 2) (2)

2.4.2 Partners have a duty of good faith toward each other
As such, partners are obliged to disclose any information which may affect the partnership business (e.g. that she sold 2 stands and not 1)
Therefore partners must prevent conflict of personal and partnership interests
Partner X;s secret profit is in conflict with the partnership interest because selling the stands fall within the scope of the partnership business
Partner X can therefore be made to disclose and account for the entire transaction (selling 2 stands, not one) and made to share the profit from the sale of the two stands with partner Y (Any 3 × 2) (6)

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2.4.3 In general, where a partnership suffers damage or loss as a result of a partner's negligence or intentional action/s, that partner will have to compensate the co-partners (partnership) for the damage or loss
As partner Y acted negligently and did not fulfill his duty to exercise reasonable care in his handling of the partnership affairs, he (Y) must compensate the partnership for the damage (R40 000) caused by his conduct (Any 1 × 2) (2)
[50]

QUESTION 3

3.1 Nomawabo's agreement with her creditors to pay them back over a certain period of time amounts to 'composition' or 'accord' and has the following effects on her (business) relationship with her creditors:
The agreement or accord binds both Nomawabo (insolvent) and all her concurrent creditors without exception and irrespective of whether her creditors voted for or against it at their meeting where it was discussed
With composition or accord, all the insolvent's (Nomawabo's) assets revert to her (remains with her. No assets will be attached/liquidated etc).
The insolvent (Nomawabo) is entitled to a certificate from the Master of the High Court stating the offer of accord she had made, its acceptance and her application for rehabilitation should she have made an offer to repay her creditors at least 50 cents for every Rand owed.
Accord (or the act of composition) however does not bind the independent creditors of the insolvent's (Nomawabo's) spouse (4 × 2) (8)

3.2 3.2.1 **AUTHORISED ACT**

The member would have acted in the interest of the cc and thus the cc will be held liable for any such acts committed by its authorised members

3.2.2 **UNAUTHORISED ACT**

Acts committed by cc members not authorised in the founding statement will render the members personally liable

3.2.3 **ACTS NOT STATED IN THE FOUNDING STATEMENT**

Acts not stated but still in scope of its business will bind cc whereas any other acts not stated may be ratified afterwards

(3 × 2) (6)

3.3 3.3.1 **SPECIFIC RIGHTS THAT EACH ARE AFFORDED THE HOLDER THEREOF**.

Debentures are 'loans' to the company and thus debenture holders are creditors to such a company
Shares are part of the share capital of a company and shareholders are members of that company

3.3.2 **LIABILITY OF HOLDING A DEBENTURE AGAINST LIABILITY OF OWNING SHARES**

Debenture holders have no liability in a company where they have debentures
Shareholders have limited liability in the company they own shares in and to the amount of the value of their shares, i.e. losing their shares where company invested in goes insolvent/bankrupt

3.3.3 **RECEIPT OF INTEREST OR DIVIDEND AS PAY-OUT FOR EACH**

Debentures do not need the approval of company members or share- holders for the payment of interest
Shares do need the recommendation/approval by the Board and approved at the Annual General Meeting (AGM) of shareholders for the payment of dividends to shareholders

3.3.4 **RETURN OF CAPITAL TO THE INVESTOR**

Debentures are redeemable either at fixed rate or at option of the company during the lifetime of the company
Shares are non-repayable during the lifetime of that company except where those shares are redeemable preference shares

3.3.5 **EXTENT TO WHICH EACH IS SECURED BY A CHARGE ON COMPANY ASSETS OR NOT**

Debentures are safe (secured) and as such their value do not have any effect on the assets of the company where held
Shares are not secured on the assets of the company where shares are owned as assets are acquired by capital raised through selling shares

(2 × 5) (10)

3.4 3.4.1 Members' register
3.4.2 Prospectus
3.4.3 Memorandum of Incorporation
3.4.4 Certificate of Incorporation
3.4.5 Debenture certificate

(5 × 2) (10)

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3.5 3.5.1 Where a partnership contract/agreement does not mention how profits will be shared, the rule is that profits must be shared PRO RATA (in proportion to partners' contributions)✓✓
Each partner's share in the R20 000 profit will be as follow:
A gets 20% of R20 000 = (R4 000) ;✓ B gets 10% (R2 000);✓ C gets 50% of R20 000 = (R10 000)✓ and D gets 20% = (R4 000)✓
(3 × 2) (6)

3.5.2 In cases where contributions cannot be determined, the profits will be shares EQUALLY.
Each partner (A, B, C and D) will receive R5 000 (¼ of R20 000)
(2 × 2) (4)

3.6 3.6.1 Doctrine of the UNDISCLOSED PRINCIPAL (2)

3.6.2 Although Tony did not give the agent (Peter) an instruction to represent him (Tony) and buy a house on his behalf, Tony can step forward, reveal or make himself known to the seller (if necessary) and claim the house that the agent (Peter) negotiated and bought on his (Tony's) behalf.

This doctrine allows Tony to be the principal in the act of representation as if he (Tony) had given Peter the direct instruction from the start to Peter (agent) to buy or negotiate the purchase of the house for him (2 × 2) (4)
[50]

QUESTION 4

4.1 **ULTRA VIRES DOCTRINE: COMMON LAW APPLICATION**

Companies founded according to a specific law, can only act in accordance within that act and for the sole purpose for which it was founded/established

This view is also applicable to companies established according to the common law, with the result that such companies may not enter into any juristic act which falls outside their scope or competence

A general meeting could not even ratify such acts

The main aim of a company also states its area of competence. A company is accorded automatically unlimited scope when it comes to ancillary aims and competence to reach their primary goal
However certain aims or competencies may be excluded, expressly in the memorandum of association (Any 2 × 2)

4.2
- Public companies
- Private companies
- State-owned companies or enterprises (Any 2 × 2) (4)

4.3 The PLC is classified as a private company, used mainly by professionals such a accountants, doctors, lawyer etc but who wishes to engage in a business entity that has separate legal personality to conduct business with the public
The Memo of Incorporation (MOI) must state that it is a PLC
The MOI states that the directors of the PLC are jointly and separately liable for all debts of that company during their term of office as director/s
The MOI restricts the sale of shares to the public (shares are not freely transferable)
A personal liability company must have the word 'INCORPORATED' or its shortened form 'Inc' appearing after the last word of its name
Are required to have at least (minimum of) 1 director on its board but the MOI could specify a higher number of directors
A personal liability company need not appoint an independent auditor or a company secretary or an audit committee UNLESS its MOI states otherwise or where the Companies Act requires it to have its financial statements audited
(Any 5 × 2) (10)

3.4 In cases where certain acts (business transaction or not) have been authorised expressly or impliedly by the CC and such actions have been ratified at a later stage

Acts for doing business mentioned in its Founding Statement has been undertaken by a member or members UNLESS a member who acted and had no authority to act on behalf of the CC, had knowledge or reasonably should have had knowledge that the member had no such authority

In cases where the association agreement has limited a CC member's representational authority and a contract has been concluded (in conflict with this restriction) such contract would NOT be binding EXCEPT where the other party had knowledge or should have had knowledge of this restriction, the CC will be bound (3 × 2) (6)

4.5 4.5.1 A licenced agent, authorised by a principal/seller who sells movable/immovable goods on his behalf by public auction on a commission basis (2 × 2)

4.5.2 An agent who undertakes to sell goods for his principal

Guarantees that third party with whom he contracts will meet their obligations (2 × 2)
(2 × 4) (8)

4.6 4.6.1 FORMS PART OF THE INSOLVENT ESTATE

4.6.2 DOES NOT FORM PART OF THE INSOLVENT ESTATE

4.6.3 DOES NOT FORM PART OF THE INSOLVENT ESTATE

4.6.4 BEFORE SEQUESTRATION, WILL FORM PART OF INSOLVENT ESTATE AFTER SEQUESTRATION, WILL NOT FORM PART OF THE INSOLVENT ESTATE

4.6.5 DOES NOT FORM PART OF THE INSOLVENT ESTATE

4.6.6 DOES NOT FORM PART OF THE INSOLVENT ESTATE

(6 × 2) (12)

4.7 THE PARTNERSHIP IS AUTOMATICALLY DISSOLVED

IF A PARTNERSHIP ESTATE IS INSOLVENT, THE COURT WILL SEQUESTRATE THE ESTATE OF ALL PARTNERS AT THE SAME TIME

THE ESTATES OF A COMMANDITARIAN PARTNER OR SPECIAL PARTNER ARE EXCLUDED FROM BEING SEQUESTRATED IN EVENT OF INSOLVENCY OF PARTNERSHIP AS THEIR LIABILITY ARE RESTRICTED ONLY TO THE AMOUNT OF THEIR CONTRIBUTIONS

WHERE ONE PARTNER UNDERTAKES TO PAY THE DEBTS OF THE PARTNERSHIP AND/OR PRESENT SECURITIES TO THAT EFFECT, HIS/HER ESTATE WILL NOT BE SEQUESTRATED

WITH INSOLVENCY THE PARTNERSHIP ESTATE AND THOSE ESTATES OF INDIVIDUAL PARTNERS WILL BE ADMINISTERED SEPARATELY

(Any 3 × 2) (6)

[50]

QUESTION 5

5.1 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)

5.2 To perform his/her mandate punctually

Must perform with utmost good faith
- No secret profits
- No conflict of interest
- No delegation of authority
- No disclosure of information
- Must use care, skill and diligence to perform his mandate
- Must be obedient to principal's instructions
- Has duty to account to principal (in full) (Any 3 × 2) (6)

5.3 5.3.1 To take the debtor's assets away from him/her (2)

5.3.2
- The insolvent debtor
- All members of a partnership
- Insolvent debtor's representative with express authority to do so
- A curator bonis (if any is appointed)
- The executor of the estate of the insolvent debtor who has died

(Any 2 × 2) (4)

5.4 5.4.1 INSOLVENCY OF THE EMPLOYER MEANS THE CONTRACT OF SERVICE IS TERMINATED, HOWEVER …
THE SERVICE PROVIDER/EMPLOYEE HAS A CLAIM FOR DAMAGES AGAINST THE INSOLVENT ESTATE FOR SERVICES RENDERED
EMPLOYEES MAY LODGE A CLAIM FOR LOST BENEFITS (Salary, Medical Aid, Pension, Bonus, Holiday pay et cetera)
Any similar answer is acceptable (Any 2 × 2) (4)

5.4.2 DEPENDS WHETHER DELIVERY HAS TAKEN PLACE OR NOT
SELLER SELLS GOODS TO BUYER AND AFTER DELIVERY OF GOODS, BUYER GOES INSOLVENT – HERE SELLER WILL ONLY HAVE A CONCURRENT CLAIM AS A NORMAL CREDITOR AGAINST BUYER'S INSOLVENT ESTATE BECAUSE WHEN DELIVERY TOOK PLACE, OWNERSHIP WENT OVER FROM SELLER TO THE BUYER
GENERAL: OWNERSHIP OF GOODS NORMALLY GOES OVER TO THE BUYER WHEN THE PURCHASE PRICE FOR THE GOODS HAVE BEEN PAID IN FULL
Any similar answer is acceptable (Any 1 × 2)

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5.5 **ANONYMOUS PARTNER**

CONTRIBUTIONS – MAY CONSIST OF MONEY AND/OR GOODS BUT NOT LABOUR

LIABILITY FOR DEBTS: THIS PARTNER IS NOT LIABLE FOR DEBTS TOWARDS THIRD PARTIES EXCEPT WHERE HE/SHE BECOMES KNOWN OR IS MADE KNOWN TO THE PUBLIC

LIABILITY IS NOT LIMITED TO ANY AMOUNT

LIABLE ONLY TOWARDS CO-PARTNERS BUT FOR FULL EXTENT OF HIS/HER SHARE AND HAS TO BEAR HIS/HER PROPORTIONAL SHARE OF LOSSES

AT TERMINATION OF PARTNERSHIP, ANONYMOUS PARTNER NOT LIABLE FOR WHOLE DEBT OF PARTNERHSIP, ONLY THEIR PRO RATA SHARE (Any 1 × 2)

EN COMMANDITÉ PARTNERS

CONTRIBUTIONS – MUST BE A SPECIFIC SUM OF MONEY

LIABILITY FOR DEBTS – THIS PARTNER'S LIABILITY MAY NEVER EXCEED HIS /HER SPECIFIC CONTRIBUTIONS OR AN AGREED AMOUNT

TO AVOID LIABILITY, HE/SHE MUST REMAIN UNKNOWN TO THIRD PERSONS

NOT LAIBLE TO THIRD PARTIES, ONLY TOWARDS PARTNERS WHO ARE KNOWN

IF HE/SHE ACTS AS AN ORDINARY PARTNER OR WHERE HE/SHE OPENLY TRADES IN NAME OF PARTNERSHIP AS ORDINARY PARTNER, HE/SHE WILL BECOME LIABLE (Any 1 × 2) (4)

5.6 CASH FLOW STATEMENT
DIRECTOR'S REPORT
AUDITOR'S REPORT (3 × 2) (6)

5.7 WHERE THE COMPANY IS A MEMBER OF THE HOLDING COMPANY AND THE HOLDING COMPANY CONTROLS THE COMPOSITION OF THE SUBSIDIARY COMPANY'S BOARD OF DIRECTORS

WHERE THE HOLDING COMPANY OWNS MORE THAN 50% OF THE EQUITY SHARE CAPITAL OF THE SUBSIDIARY COMPANY

WHERE THE HOLDING COMPANY AND ITS AFFILIATES OWN MORE THAN 50% OF THE EQUITY SHARE CAPITAL OF THE SUBSIDIARY COMPANY

WHERE THE SUBSIDIARY (AFFILIATED) COMPANY IS AFFILIATED TO ANOTHER COMPANY (i.e. sub-affiliated). (Any 3 × 2) (6)

5.8 5.8.1 COMPANIES and INTELECTUAL PROPERTY COMMISSION (CIPC)

5.8.2 Non-profit companies: NO REQUIREMENT

5.8.3 Personal Liability Company: MINIMUM 1

5.8.4 BUSINESS RESCUE

5.8.5 ALL SHARES STATUS ARE VOID (UNLESS LIQUIDATOR AUTHORISES IT) OR all shares have NO VALUE

(5 × 2) (10)
[50]

TOTAL SECTION B: 150
GRAND TOTAL: 200

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