higher education & training

Department:
Higher Education and Training
REPUBLIC OF SOUTH AFRICA

N1170**(E)**(N29)H

# NATIONAL CERTIFICATE

# MERCANTILE LAW N5

(13030105)

**29 November 2018 (X-Paper)**
**09:00–12:00**

**This question paper consists of 14 pages.**

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# DEPARTMENT OF HIGHER EDUCATION AND TRAINING
# REPUBLIC OF SOUTH AFRICA

NATIONAL CERTIFICATE
MERCANTILE LAW N5
TIME: 3 HOURS
MARKS: 200

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**NOTE:** If you answer more than the required number of questions, only the required number will be marked. ALL work you do NOT want to be marked must be clearly crossed out.

**INSTRUCTIONS AND INFORMATION**

1. SECTION A is COMPULSORY and must be answered by ALL candidates.
2. Answer any THREE questions in SECTION B
3. Read ALL the questions carefully.
4. Number the answers according to the numbering system used in this question paper.
5. Start each question on a NEW page.
6. ALL the answers must be in FULL SENTENCES except where indicated otherwise.
7. Write neatly and legibly.

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## SECTION A: COMPULSORY

## QUESTION 1

1.1 Choose an item/word from COLUMN B to match a description in COLUMN A. Write only the letter (A–M) next to the question number (1.1.1–1.1.10) in the ANSWER BOOK.

| COLUMN A | | COLUMN B | |
|---|---|---|---|
| 1.1.1 | Through acts of representation a legal relationship is established | A | real security |
| 1.1.2 | Positive non-performance | B | mandate |
| 1.1.3 | An implied right to retain property of another person with permission | C | enrichment liens |
| 1.1.4 | The value of these securities of companies were misleading under the old companies act and done away with under the new act | D | accord |
| 1.1.5 | Form of business where its members have fiduciary duties | E | close corporations |
| 1.1.6 | A specific instruction given by one person to another to perform on behalf of the person who gave such instruction | F | agency |
| 1.1.7 | Deal with the delivery of movable – and immovable property in specific instances | G | unilateral dissolution of any partnership |
| 1.1.8 | Ultra vires doctrine | H | action/s under the new Companies Law that cannot be ratified |
| 1.1.9 | Insolvent sells of the assets belonging to the estate at a value much less than its real value | I | broker and not estate agent |
| 1.1.10 | Negotiates the sale of movable goods only | J | disposition without value |
| | | K | debtor – and creditor liens |
| | | L | anonymous partner |
| | | M | par value shares |

(10 × 2) (20)

1.2 Various options are given as possible answers to the following questions. Choose the answer and write only the letter (A–D) next to the question number (1.2.1–1.2.5) in the ANSWER BOOK.

1.2.1 Which ONE of the following parties is protected by the Turquand rule?

A The person concluding a contract or transacting with the company
B The company
C Directors
D Shareholders

1.2.2 The term (duration) of a partnership formed for a specific purpose expires as soon as …

A all partners have made their respective contributions.
B its aims are reached.
C the partnership books are open for inspection to all partners.
D all sleeping partners become known to the public.

1.2.3 Which ONE of the following statements below is NOT a common-law rule that has something to do with the maintenance of capital?

A A company may not repurchase its own shares
B No company may provide financial assistance to enable a person to buy shares in that company
C A company may not pay dividends from its share capital
D A company may not issue shares at a discount

1.2.4 … is a characteristic of a close corporation as opposed to a private company.

A Being cheaper and more flexible
B The fact that a CC is not a state-owned company
C Having only shareholders
D Transferability of its shares

1.2.5 Through … is the insolvent relieved of every disability imposed on him/her by the act of insolvency.

A accord
B surrender
C sequestration
D rehabilitation

(5 × 2) (10)

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1.3 Choose the correct word(s) from those given in brackets. Write only the word(s) next to the question number (1.3.1–1.3.10) in the ANSWER BOOK.

1.3.1 In terms of the new Companies Act 71 of 2008, the payment of dividends to any shareholder is regarded as a (distribution/-contribution).

1.3.2 Where more than just one company share a special relationship as a result of common shareholding, the new companies act refers to it as a (fiduciary/subsidiary) relationship.

1.3.3 With reference to Close Corporations, the (CK7/CK1) form is completed to reserve the name of the close corporation.

1.3.4 Only (company directors/company directors and CC members) have a fiduciary duty towards that business entity.

1.3.5 If a person wants to obtain membership in a close corporation, such membership can only be obtained from a/an (existing members' interest/deregistration of the CC).

1.3.6 The (anonymous/en commandité) partner's liability towards the partnership may never exceed the extent of their specific contributions to the partnership.

1.3.7 Ownership of movable goods bought by the insolvent but not yet paid for will be transferred once (the purchase price has been paid/delivery has taken place)

1.3.8 (Pledges/Liens) are the only securities that are applicable to movable – and immovable property.

1.3.9 Suretyship is an agreement that involves the surety and the (debtor/creditor).

1.3.10 With agency, the agent will only be personally liable where he/she has acted (without a mandate/under duress).

(10 × 1) (10)

1.4 Indicate whether the following statements are TRUE or FALSE. Choose the answer and write only 'true' or 'false' next to the question number (1.4.1–1.4.10) in the ANSWER BOOK.

1.4.1 With the payment of proceeds of movable assets sold under insolvency, all creditors are treated as preference creditors and each has an equal claim.

1.4.2 The South African Broadcasting Corporation (SABC) as State-owned enterprise is also governed, like all public companies, by the provisions of the company's act 71 of 2008 because it serves the public at large.

1.4.3 Perpetual succession is an attribute that cannot be given to or associated with any type of company since not all companies are profit-oriented.

1.4.4 The consequences of a rehabilitation order on the insolvent means that he/she is freed from any disqualification as a result of his/her estate being sequestrated although all debt incurred before that time is still owing.

1.4.5 Any person, with or without contractual capacity, may act as a representative or agent of another as long as they have a power of attorney from the principal.

1.4.6 Irrespective of what kind of partner a person is, partners are entitled to reasonable compensation for any expenses incurred even if the business has not benefited by the expense.

1.4.7 With reference to insolvency, an application for sequestration by a debtor or debtor's agent is similar to an application for the compulsory sequestration of a debtor

1.4.8 A valid pledge means that the pledgee must accept delivery of the goods or property from the pledger.

1.4.9 By nature, partnerships are very special in the sense that they cannot exist separately from its members.

1.4.10 Since no new close corporations may be established the office of the Registrar of Close Corporations now functions under the auspices of the Registrar of Companies.

(10 × 1) (10)
**[50]**

**TOTAL SECTION A: 50**

## SECTION B

Answer any THREE questions in this section

## QUESTION 2

2.1 Wolfgang has a friend, Pierre, who is a student. Pierre has approached ABC Bank for a student loan. The loan amount comes to R320 000. Bank ABC is willing to advance the money to Pierre, provided he (Pierre) can bring them any person who is willing to sign an agreement with them that they will pay the money back within a specified time period and interest rate, should Pierre not be in a position to repay the money he had loaned from the bank.

2.1.1 Consider the following: Pierre approaches his friend, Wolfgang and explains to him (Wolfgang) that the bank is willing to lend him (Pierre) the money on condition he (Pierre) brings the bank someone (Wolfgang) who will sign an agreement with them to pay back the money should Pierre not be in a position to do so. Wolfgang agrees.

What is this agreement between the bank and Wolfgang called? (2)

2.1.2 Should Pierre be the debtor in this scenario, who will Bank ABC and Wolfgang (other than being a friend to Pierre) be respectively? Write your answer as follows: Bank ABC is … and Wolfgang is …
(2 × 2) (4)

2.1.3 Should Wolfgang decide that he alone cannot help his friend and will ask another friend to also help out should the situation arise that he (Pierre) cannot repay the loan. If this is acceptable to the bank, what will Wolfgang and the other friend, in terms of the same agreement, be known as? (2)

2.1.4 Under the agreement between Wolfgang and his friend who agrees to assist in paying should Pierre not be in a position to do so and Bank ABC, it happens that when it was time for Pierre to pay back the loan, he could not. In terms of the agreement, Bank ABC approached Wolfgang to pay back the loan. Wolfgang is in a panic and approaches you for advice in this regard. You recommend he uses the benefit of division (Latin: *'beneficium divisionis'*) where the bank demands payment from him.

Explain to Wolfgang the meaning and outcome of this common law benefit that is available to him. (7 × 2) (14)

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2.2 If we want to know whether a certain act of representation or agency has any valid/legal claim, we usually would test whether such act reflects the true characteristics of representation or not.

List FOUR characteristics that make it very clear that a strong case for representation exists. (4 × 2) (8)

2.3 Thabo is married to Portia out of community of property. In adherence to legal requirements and in terms of a duly registered ante nuptial contract, he (Thabo) donated a house to his wife, Portia. Thabo's estate is sequestrated. The house was registered in Portia's name prior to sequestration.

Considering all facts, under which circumstances will the trustee be unable to lay claim to the house as a disposition without value? (5 × 2) (10)

2.4 Consider the duties of partners in the following scenario and answer the questions.

X and Y, an estate agency, buying and selling property also operates as partnership. The following transactions are concluded by partner X:

2.4.1 As a result of heavy rains and a flood that occurred on 1 July, X is forced to sell a piece of ground (erf) for R90 000. He purchased the erf for R145 000 on 1 March the same year. However, the net profit for the year is R235 000.

Advise partner Y, who is unhappy about the loss suffered. (2)

2.4.2 Partner X buys two stands for R100 000 each at an auction. She sells these stands for R300 000 each. She declares the purchase and sale of only one of the stands to Y. Y hears of X's secret profit.

Advise Y accordingly. (3 × 2) (6)

2.4.3 After an office party where Y had had too much to drink, he sold a certain property (stand 123) for R200 000 thinking that it was another erf (stand 321). As a result of Y's negligence, the partnership suffered damage of R40 000.

Advise partner X, who is unhappy about Y's conduct. (2)

**[50]**

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## QUESTION 3

3.1 Nomawabo owns a small printing and stationery business. She supplies stationery and other materials to college students in her community. As a result of the recent slow growth of the economy and decline in the value of the Rand, Nomawabo cannot afford to pay her suppliers and other accounts to keep the business running. The situation has become so severe that she is scared of going insolvent. Instead, she approached one of her biggest suppliers of stationery and has reached an agreement with them to pay them back a certain sum of money over a period of time so that she (her business) will not be sequestrated. She thinks that by approaching her creditors, she will be better off in this situation and asks you for advice. You mentioned to her that what she has done is known as *composition* or *accord*, in the legal sense of things.

Continue now to explain to her FOUR effects (outcomes) of her action (composition) in this regard. (4 × 2) (8)

3.2 Discuss the liability of members in a CC in respect of:

3.2.1 Authorised Act

3.2.2 Unauthorised Act

3.2.3 Acts not stated in the founding statement

(3 × 2) (6)

3.3 Debentures and shares, as present in a company's financial make-up, are not the same. With reference to debentures and shares of any company, analyse both terms and then write short explanatory notes on the sub-headings (3.3.1–3.3.5) listed below as to make the differences that exist between debentures and shares in each sub-heading, clear:

**HINT:** Debentures and shares must feature as part of each answer in (3.3.1-3.3.5) below.

3.3.1 Specific rights that each are afforded the holder thereof.

3.3.2 Liability of holding a debenture against liability of owning shares

3.3.3 Receipt of interest or dividend as pay-out for each.

3.3.4 Return of capital to the investor.

3.3.5 Extent to which each is secured by a charge on company assets or not

(5 × 2) (10)

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3.4 Name the following documents connected with the registration of a company:

3.4.1 List of names and addresses of all persons who hold shares in the company.

3.4.2 A document which invites the public to buy shares in the company.

3.4.3 The document which regulates the internal affairs and management of the company.

3.4.4 On receipt of this document a private company may commence business.

3.4.5 The document issued by a public company to a person who has lent money to the company.

(5 × 2) (10)

3.5 Four college students, A, B, C and D decided to begin a business, preparing books of accounting for small to medium sized businesses in their community. Their partnership contract is silent as to how profits will be divided between them. They approach you for advice after two months as they have realised a net profit of R20 000 which they wish to divide.

Advise them (state clearly) how profits are divided in each case (3.5.1–3.5.2) and how much each partner will get where …

3.5.1 A and D each contributed R20 000, B and C gave R10 000 and R50 000 respectively (i.e. a total amount of R100 000) (3 × 2) (6)

3.5.2 It cannot be determined in which proportion the four partners respectively contributed to the partnership. (2 × 2) (4)

3.6 Tony and Peter are good friends. Peter is an estate agent. Tony has always indicated to Peter and other friends that he wishes to buy a townhouse in a certain suburb where he (Tony) is currently renting a house. One day Peter phoned Tony to congratulate him on becoming the owner of a townhouse. Peter has negotiated and bought a townhouse for Tony from a seller in the suburb where Tony always wanted to own a house. Tony did not know about nor gave Peter an instruction to negotiate the buying of the house on his (Tony's) behalf.

3.6.1 Correctly identify the phenomenon that has presented itself here with reference to agency (representation). (2)

3.6.2 With reference to the answer in question 3.6.1 and Tony's position in the scenario, briefly explain what this phenomena means. (2 × 2) (4)

**[50]**

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## QUESTION 4

4.1 Discuss the Ultra Vires doctrine and its application to companies under common law provisions of the Companies Act. (2 × 2) (4)

4.2 The Companies Act 71 of 2008 makes provision for the formation of two types of companies, i.e. profit – and non-profit companies.

Other than personal liability companies, list any TWO other profit companies that can exist. (2 × 2) (4)

4.3 Since the introduction of the Companies Act 71 of 2008, it has become the norm for professional people such as lawyers, auditors, accountants and so on to form personal liability companies (PLC) in their own right.

State FIVE characteristics of the personal liability company under the new Companies Act. (5 × 2) (10)

4.4 Like a partnership whom has partners, a close corporation has members who act for and on its behalf. Where individual partners have contracted for the partnership business without the necessary authority, such actions could be rectified afterwards by means of ratification and likewise also in the case of close corporations.

With the aforementioned in mind, write down THREE instances where the close corporation will be bound by the actions of its members, i.e. the CC will be liable for debts incurred by members. (3 × 2) (6)

4.5 Briefly describe the following kinds of agents:

4.5.1 Auctioneer (2 × 2)

4.5.2 Del credere agent (2 × 2)
(2 × 4) (8)

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4.6 Indicate, in each of the following cases, which of the assets mentioned (whether it belonged to the insolvent at the time of sequestration or it was acquired after sequestration) do NOT generally form part of the insolvent estate:

4.6.1 The car of the insolvent which he owned at the time of sequestration.

4.6.2 Income earned by the insolvent after sequestration but which the insolvent requires for the maintenance of himself and his dependants.

4.6.3 Trust monies kept by an insolvent attorney on behalf of his clients.

4.6.4 Pension benefits.

4.6.5 Provisional interest of a fideicommissary heir.

4.6.6 Compensation due to the insolvent as a result of indemnification as a result of injury to the insolvent.

(6 × 2) (12)

4.7 Your neighbour, who is about to go into a partnership with his friends, ask you whether it is true that should the partnership he is going to join become insolvent, he would lose his business (partnership interests) as well as his private assets.

Advise him on what effect an insolvency (bankruptcy) will have on the partnership estate and the estates of individual partners. (3 × 2) (6)

**[50]**

## QUESTION 5

5.1 Write notes on the founding statement of a close corporation with specific reference to any FOUR particulars this statement must contain. (4 × 2) (8)

5.2 In agency or representation, both agent and principal have reciprocal duties and responsibilities towards one another.

State THREE duties of the agent towards his/her principal. (3 × 2) (6)

5.3 Discuss insolvency under the following headings:

5.3.1 The aim of the sequestration process. (2)

5.3.2 Who can apply at the court for the sequestration of a debtor's estate that is insolvent or where a deed of insolvency has been committed?

State clearly the particulars of such person/s. (2 × 2) (4)

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5.4 Discuss briefly the effect sequestration has for all the parties involved on each of the following contracts:

5.4.1 Contracts of service (employment)

5.4.2 Movable goods bought on credit by the insolvent

(2 × 2) (4)

5.5 Briefly distinguish between an anonymous partner and a partner en commandite in terms of their contributions and liability for partnership debts.

HINT: Make a suitable heading for each type of partner and write your answers under each heading. (2 × 2) (4)

5.6 It often happens that, when visiting a company, whilst waiting at the reception area for whatever business you are there for, you will notice magazines etc. on the coffee table or elsewhere in the vicinity. You might also spot a comprehensive and quite expensive looking booklet of sorts that, on closer inspection, will reveal to you the various financial year-end statements of either that or some other company. Besides a few pages of general (background) information and some interesting pictures, the contents should consist of five statements – and/or reports.

Beside the statements of financial position and of comprehensive income, list the THREE other statements and/or reports that would make up such business report. (3 × 2) (6)

5.7 You have spare cash to invest and decided to buy shares in Company XYZ. However before you do, you decided to be wise and do some research about the company you want to invest in. You managed to find recent financial articles about company XYZ in the Financial Times and study it carefully. In one article it is mentioned that company XYZ is a subsidiary company of company ABC and that company ABC is the holding company. You are quite interested in what this could all mean. Using the information above, write down THREE situations under which the company you want to invest in will be the subsidiary company of the holding company ABC.

**HINT:** Refer specifically to both companies in your answer. (3 × 2) (6)

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5.6 Copy the table below (without the example) into your ANSWER BOOK and write the answers in the required spaces as indicated.

| **Key issues relevant to companies** | **Provisions of Companies Act 71 of 2008** |
|---|---|
| Example:<br>Shares | Example:<br>Only no-Par value shares; Par Value shares abolished under new companies act |
| Regulatory body for companies and Close Corporations | 5.8.1 … |
| Membership | 5.8.2 Non-profit companies: … |
| Number of Directors | 5.8.3 Personal Liability Company: … |
| Remedial or preventative action taken before sequestration of ailing company | 5.8.4 … |
| Validity status (value) of shares transferred after the liquidation of a company | 5.8.5 |

(5 × 2) (10)
**[50]**

**TOTAL SECTION B: 150**
**GRAND TOTAL: 200**

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