higher education & training

Department:
Higher Education and Training
REPUBLIC OF SOUTH AFRICA

MARKING GUIDELINE

NATIONAL CERTIFICATE

MERCANTLE LAW N5

2 DECEMBER 2019

This marking guideline consists of 11 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 D
1.1.2 C
1.1.3 A
1.1.4 D
1.1.5 A

(5 × 2) (10)

1.2 1.2.1 False✓ – a partnership does not pay income tax individual partners pay tax after profit share in their hands✓

1.2.2 False✓ – in this manner agency is formed by ratification and not estoppel✓

1.2.3 False✓ – when the creditor applies for sequestration (not rehabilitation)✓

1.2.4 False✓ – a member of company has no right of access to books✓

1.2.5 False✓ – surety never strengthens/nor replaces a debtor's liability✓

1.2.6 False✓ – non-profit company is not dependent on lives of directors for its continued existence✓

1.2.7 False✓ – sabs is a state-owned enterprise✓

1.2.8 True✓ – par value shares have been abolished by the new companies act and companies may only issue no-par value shares✓

1.2.9 False✓ – not registrars of companies or close corporation anymore under the new act it is known as the companies and intellectual properties commission✓

1.2.10 False✓ – pledgee's rights extend over the pledged goods plus the appendages, of which subject to conditions✓

(10 × 2) (20)

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1.3	1.3.1	I
	1.3.2	J
	1.3.3	H
	1.3.4	A
	1.3.5	C
	1.3.6	F
	1.3.7	D
	1.3.8	E
	1.3.9	B
	1.3.10	G

(10 × 2) (20)
[50]

TOTAL SECTION A: 50

SECTION B

Answer any THREE questions in this section

QUESTION 2

2.1
- Most divorces get settled by the spouses entering into settlement agreements in terms of which the matrimonial assets are divided equally between the parties. The answer depends on whether or not his father wishes for his mother to remain involved in the business.
- If yes, then things can continue as usual (nothing preventing them from being in the business together)
- If no, then best for his father to value the business and offer to buy the mother out in an amount equal to 10% of the total value. Once she accepts that offer, she gets paid out and she resigns as a member of the CC.

(Any 2 × 2) (4)

2.2
- Each member must make a contribution of money, property or services
- The extent of each member's interest must be expressed in a % (total 100%)
- Can become a member from a standing member or his deceased estate of by means of admission of additional member through present members which reduce their interest to accommodate a new member
- Can obtain a member's interest from an existing member (a selling transaction) Where a member's estate is sequestrated the curator can sell the member's interest to existing members or to an outsider
- By means of a ruling in a will unless the existing members have objections to it and the interest is sold to the corporation, members or outsiders (4 × 2) (8)

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2.3
- 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, for example. division of authority, appointment of representatives, % profit sharing and policy issues (3 × 2) (6)

2.4
- Enters partnership in name of one person only – others are unknown
- Unnamed persons are not liable to 3rd parties except to fellow partners
- Exception: where they represent themselves or presented the partnership as such
- Anonymous partner/s have no control or say in the management of the partnership – only have access to the books
- Must bear pro rata share of losses to the extent of their share (5 × 2) (10)

2.5
- The partnership (as business entity) dissolves
- The sequestration of the partnership estate means automatic sequestration of the estates of angelo and manuel, but not freddie – why?
- Thandeka is a commanditarian partner and such partners' estates are excluded from the sequestration process
- As marissa has sufficient money (worth R3 million), she can offer to pay the debts (R920 000) of the partnership or offer security for the debt of the partnership (R920 000) and thereby her personal estate will not be sequestrated
- Should the partnership be sequestrated, the estate of the partnership and that of the partners are absolute independent of each other and is administered separately
- Should the partnership assets be sold/liquidated to pay the creditors and there not be sufficient money, the creditors could sue any one of asanda or marissa for the remainder (R920 000 minus R600 000 = R320 0000) of the money that they have not received, but they cannot sue thandeka (her being a commanditarian partner – see reason above)
- Partners are jointly and severally liable for partnership debts (Any 6 × 2) (12)

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2.6 2.6.1 Memorandum of incorporation

2.6.2 Profit company and non-profit company

2.6.3 Public company = 1 member and private company =1 member

2.6.4 Audit of financial statements for a cc is voluntary

2.6.5 Business rescue offered

(5 × 2) (10)
[50]

QUESTION 3

3.1
- The whole property forms the object of the real security which also forms the object of the mortgage bond
- The whole property remains subject to the mortgagee's (Easy Finance Bank's) real right
- Adrian (mortgagor) will have to obtain Easy Finance Bank's (mortgagee's) permission to release the subdivided portion from the mortgage bond
- Without Easy Finance Bank's permission the subdivided portion cannot be registered in Maria's (new owner) name (Any 2 × 2) (4)

3.2 3.2.1
- Is essence of agency
- No formality –implied BUT better if given express authority
- Usually given in writing to agent ('power of attorney') (Any 2 × 2) (4)

3.2.2
- Agent acted without any (implied or express) authority from principal
- Where no principal to give authority, there is NO agency
- Agent fully liable to third person where principal is misrepresented in illegal or fraudulent manner
- No ratification can make agent's actions good (Any 2 × 2) (4)

3.2.3
- Where no express authority, authority may be inferred from conduct of principal
- Courts will be guided by conduct between parties to see if a relationship exists
- Can also be in addition to normal (express/implied) authority where agent performs acts not strictly within authority (taken to include the usual means)
- Is very difficult to prove – onus on third person to ascertain agent's authority (Any 2 × 2) (4)

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3.3
- No
- Agreement could be express or implied from the facts
- Provided that it admits no other interpretation but that they intended to create a partnership (3 × 2) (6)

3.4
- To enable the debtor to overcome his financial hardship
- the insolvent's status is reinstated
- may once again retain the title of director or run the business
- of a general dealer or manufacturer
- apply to court for rehabilitation (automatic after 10 years) (Any 3 × 2) (6)

3.5 3.5.1 Where the insolvent alienates or disposes of assets before sequestration, and in doing so prejudices the rights of creditors (2)

3.5.2
- Where the insolvent makes agreements/a disposition SIX months before sequestration with certain of the creditors to prejudice them over other creditors
- Such actions are VOIDABLE and when discovered are reversed (2 × 2) (4)

3.5.3
- Where the insolvent disposes (sell or give away) assets for less than its true value
- Such dispositions can be set aside (reversed) by the courts where value of liabilities exceeds assets immediately after the disposition (2 × 2) (4)

3.6
- Insolvent loses control over estate/unable to alienate/squander or encumber the remaining assets
- Proceeds of insolvent estate are shared pro rata among creditors
- Creditors may not act in a way that would prejudice the claims of other creditors (3 × 2) (6)

3.7
- One person acts on behalf of another
- Acting for/on behalf of another is a legal or juristic act
- The act is authorised conduct
- The act creates an obligation between the parties (Any 3 × 2) (6)

[50]

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QUESTION 4

4.1 4.1.1
- Not a valid lien
- Reason: The accountant may not keep client's books. He may only withhold the accounting statements he prepared

4.1.2
- Yes, a valid lien exists
- Reason: Jeweller may keep article until paid for the work (labour and parts for repairs) done to the watch

(2 × 2) (4)

4.2 4.2.1 Salvage lien
4.2.2 Debtor and creditor lien

(2 × 2) (4)

4.3
- Meaning: Is effective in cases where the surety has fulfilled his/her main liability and paid the creditor where the latter (creditor) has demanded payment from the surety
- After such payment, the surety now has the right to claim that the creditor must cede all the rights and privileges (in terms of the suretyship agreement) which he (CREDITOR) has against the principal debtor and the co-sureties (IF ANY) to the surety
- Where the creditor has ceded (transferred) these rights to the surety, the surety can now claim the money he (surety) has paid to the creditor PLUS legal costs (if any) and also for damages sustained in this process (if any) from the principal debtor and/or co-sureties (3 × 2) (6)

4.4
- By debtor leaving the country/absent/departing with intention to evade paying his debts
- Failing to satisfy requirements of execution against debtor
- Disposing/attempt to dispose of property whereby certain creditors are prejudiced
- Removing property
- Making an offer to one/more creditors to release him from debts partly/wholly
- Failing to lodge complete statement of affairs by due date for surrender
- Giving notice in writing to any creditor that he is unable to pay such debt
- Giving notice in Government Gazette of intention to sell/alienate business

(Any 4 × 2) (8)

4.5
- Memorandum of Incorporation
- Articles of association (2 × 2) (4)

4.6
- Full name of corporation
- The main business to be done or undertaken by the CC
- Postal address
- Full name/Id numbers/Birth date of members
- Members' interest expressed in % form
- Particulars of contributions (if any)
- Name/Postal address of accounting officer
- Date of end of financial year (Any 4 × 2) (8)

4.7
- Each member must make a contribution of money, property or services
- The extent of each member's interest must be expressed in a % (total 100%)
- Can become a member from a standing member or his deceased estate of by means of admission of additional member through present members which reduce their interest to accommodate a new member
- Can obtain a member's interest from an existing member (a selling transaction)
- Where a member's estate is sequestrated the curator can sell the member's interest to existing members or to an outsider
- By means of a ruling in a will unless the existing members have objections to it and the interest is sold to the corporation, members or outsiders (4 × 2) (8)

4.8
- 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, for example division of authority, appointment of representatives, % profit sharing and policy issues (3 × 2) (6)

4.9 The partnership has no legal personality and as such all assets and liabilities belong to individual partners and NOT the partnership business (2)

[50]

QUESTION 5

5.1

COMPANIES		
PRIVATE	**PUBLIC**	**PARTNERSHIPS**
Minimum of 1 member✓	Minimum of 1 member✓	2–20 members✓✓
Restrict shares to public✓	May offer shares to public	No shares to transfer✓✓
Members are shareholders✓	Members are shareholders✓	Members are partners✓✓
Members have no implied authority to act as agent of the company✓✓	Members have no implied authority to act as agent of the company✓✓	Partners have implied authority to act as agent and bind the partnership✓✓

(18)

5.2 The ratio in which profit sharing will take place is used. (2)

5.3 Any disputes (current or future) can be resolved as all the necessary provisions in terms of contributions etc. are set out in the partnership agreement (2)

5.4 5.4.1
- Not entitled to unless agreed beforehand
- Unless partnership benefited by special services in excess of normal services
- Reasonable compensation
- Reimbursement expenses in service of partnership for injuries sustained in execution of duties (Any 2 × 2) (4)

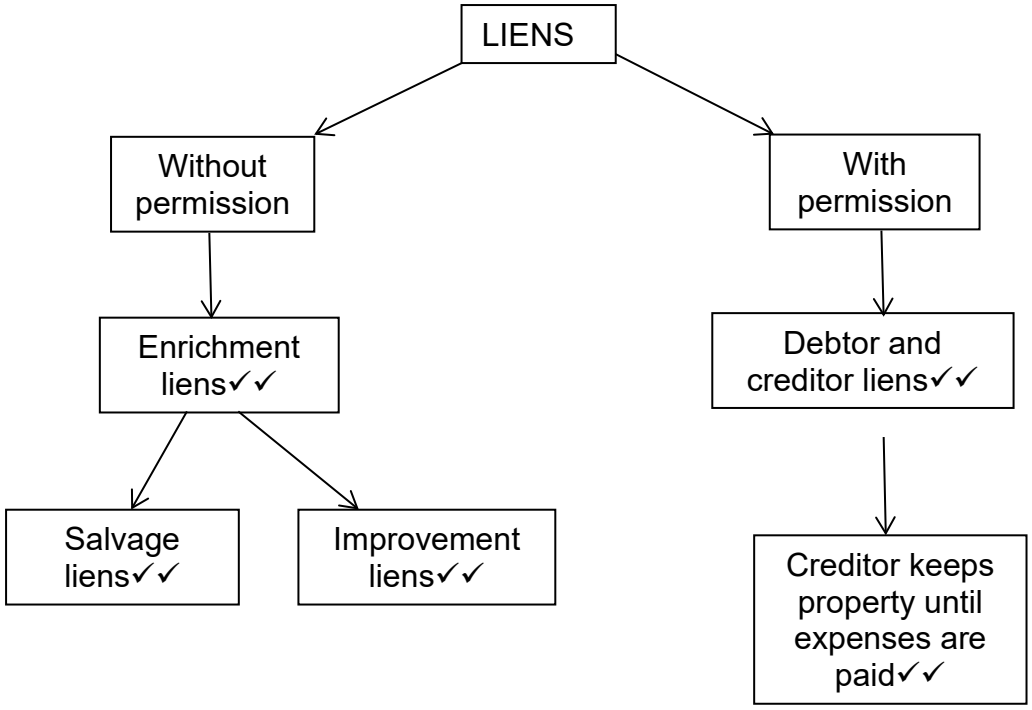
5.4.2
- Partners are co-owners and thus have a right in this regard
- May share in assets in proportion determined in partnership agreement or as they agreed to beforehand
- If no agreement, then share in same proportion as they would divide profits (Any 2 × 2) (4)

5.5
- 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)

5.6 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)

5.7



(5 × 2) (10)
[50]

TOTAL SECTION B: 150
GRAND TOTAL: 200

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