higher education & training

Department:
Higher Education and Training
REPUBLIC OF SOUTH AFRICA

MARKING GUIDELINE

NATIONAL CERTIFICATE

MERCANTILE LAW N5

30 September 2020

This marking guideline consists of 11 pages.

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SECTION A

QUESTION 1

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

(10 × 2) **[20]**

QUESTION 2

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

(10 × 1) **[10]**

QUESTION 3

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

(10 × 1) **[10]**

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QUESTION 4

4.1 Legal persons, such as companies and close corporations are liquidated. It means that their liabilities exceed their assets. Their assets are sold to pay creditors.

4.2 The buyer buys something on credit, pays a deposit and then pays off the purchase price in instalments.

4.3 A contract whereby the pledgor (debtor) places his/her movable property in the hands of the pledgee (creditor) as security for a debt

4.4 An agent appointed to sell the principal's goods at a commission

4.5 A person obtains an advantage at the expense of the creditors without resulting in a decrease in the debtor's obligations.

(5 × 2) **[10]**

TOTAL SECTION A: 50

SECTION B

Answer any THREE questions from this section.

QUESTION 5

5.1 5.1.1 The debtor is no longer able to pay his/her debts.✓✓ His/her liabilities exceed his/her assets. (2)

5.1.2
- The debtor leaves the country with the intention to evade or escape paying his/her debt.
- The debtor fails to comply with letters of demand from creditors or the requirements of a court order.
- The debtor disposes of (or attempts to get rid of his/her property) and in so doing, puts the creditors at a huge disadvantage.
- The debtor makes an offer (or attempts to make an offer) to one or more of his/her creditors to release him/her (the debtor) from paying his/her debts.
- The debtor fails to submit a complete statement of his/her financial affairs on the due date set for him/her to surrender his/her estate to the curator.
- The debtor gives written notice to any creditor that he/she is unable to pay his/her debts.
- The debtor publishes a notice in the Government Gazette of his/her intention to sell his/her business. (Any 5 × 2) (10)

5.1.3

COMPULSORY SEQUESTRATION	VOLUNTARY SEQUESTRATION
Application for sequestration is done by the creditors. ✓✓	Application for sequestration is done by the insolvent debtor.
Application for sequestration must be submitted by the creditor/s to the Master of the High Court.	Before acceptance of surrender by the court, the insolvent debtor must publish a notice of surrender of his/her estate✓✓
The application by the creditor/s must mention the amount, nature of the claim and any security given by the debtor.	A statement of affairs must be submitted in duplicate to the court and the local magistrate's court.

(Any 2 × 2) (4)

5.1.4 Yes,✓ but your salary will be administered by the curator.✓ (2)

5.1.5
- Remuneration for work done after sequestration
- Pension monies
- Clothing and other essential means of livelihood
- Insurance policies
- Trust monies of a lawyer, notary or conveyancer
- Shares in accrual
- Property obtained with money received by the insolvent that does not fall within the insolvent estate
- Property excluded in terms of the Land Bank Act
- Benefits under the Unemployment Insurance Act
- Compensation under the Compensation for Occupational Injuries and Diseases Act
- Provisional interests of a fideicommissary heir
- Indemnification due to the insolvent
- Compensation due to insolvent as a result of injury or defamation
- Assets obtained by selling/exchanging any of the above-mentioned property (Any 3 × 1) (3)

5.1.6
- Your mortgage bond over your house
- The money you owe for the construction of a fence (lien)
- Outstanding rent (tacit hypothec)
- The money you owe on the instalment-sale transaction (hypothec) (4)

5.1.7
- You can be rehabilitated.
- You will no longer be liable for any debts incurred prior to sequestration.
- You can make a new start. (2)

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5.1.8
- The insolvent person loses control over his/her estate and is unable to alienate or squander the remaining assets.
- No creditor may act in a way that will disadvantage another creditor.
- Proceeds of the insolvent estate are shared pro rata amongst the ordinary creditors after the preferential creditors have been paid. (3 × 2) (6)

5.1.9
- The sequestration process comes to an end.
- The insolvent is released from all disqualifications resulting from the sequestration.
- All the insolvent's debts, contracted before the sequestration, are cleared. (3 × 2) (6)

5.1.10 10 years. (1)

5.2
- A voluntary disposal of his/her 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 × 2) (10)

[50]

QUESTION 6

6.1
- Public company
- State-owned company
- Private company
- Personal liability company (4)

6.2 Firstly, they have to compile a notice of incorporation.✓✓ The purpose is to inform the Commission that they intent to have the company registered. This notice should include the following information:
- name of the company
- initial directors
- registered office
- date of its financial year-end
- notice of appointment of its first company secretary
- auditor or audit committee (Any 5 × 1)

Each person should complete and sign a Memorandum of Incorporation.✓✓ This is the founding document of the company.
It sets out the rights, duties and responsibilities of the shareholders,✓ the directors✓ and others within the company and in relation to the company as well as various other matters.
It enables the company to regulate its internal affairs.✓ (Any 5 × 1) (10)

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6.3
- There must be a written contract.
- The person who concludes the contract must declare that he/she acts as agent for the company that is still to be formed.
- At registration of the company the MOI must contain the acceptance of such contracts as one of its aims.
- Two copies of the contract must accompany the submission of the memorandum for registration.
- After incorporation, the company must accept or ratify the contract. (5 × 2) (10)

6.4
- Balance sheet/Statement of financial position
- Income statement/Statement of comprehensive income
- Cash flow statement
- Directors' report
- Auditors' report (5)

6.5
- The liability of its members is limited to the amount invested in the company.
- Continuous existence, meaning that changes in membership will not affect the lifespan of the company. (Perpetual succession)
- Investments in the company are transferable. (3 × 2) (6)

6.6

SHARE	DEBENTURE
Forms part of equity✓	Forms part of liabilities/loans✓
Dividends can be paid on shares✓	Interest must be paid on a debenture✓
Stays in a company/transferable✓	Must be redeemed✓

(6)

6.7 6.7.1 The doctrine of constructive notice – was applicable in terms of the previous Act and meant that it was deemed that all persons were familiar and fully acquainted with the public documents of the company they were dealing with.

6.7.2 The ultra vires doctrine – a company exists only for the purpose for which it was incorporated. Where an act falls outside this main purpose, it would be regarded as an ultra vires deed.

6.7.3 The Turquand rule - if a bona fide outsider transacts with a representative of a company and there is a pre-condition regarding the authority of such a representative, the third person is entitled to assume that all internal requirements have been complied with.

(3 × 2) (6)

6.8
- Ordinary shares
- Preferential shares
- Deferred/Founding shares (3)

[50]

QUESTION 7

7.1 7.1.1

ESSENTIALIA	MOTIVATION FROM CASE STUDY
A legal contract✓	Wedding planner business is a legal business✓
Between two and twenty partners✓	There are at least two partners.✓
Contribution by partners✓	Each partner contributed R40 000.✓
Main aim of making a profit✓	It went well, indicating that they were making a profit.✓
For joint benefit and advantage✓	They would split the profit 50/50.✓

(5 × 2) (10)

7.1.2
- Partners are jointly and severally liable.
- No continuity
- The partners, and not the partnership, will be taxed (Any 2 × 2) (4)

7.1.3 Non-performance /one partner is not performing as agreed. (2)

7.1.4
- Partners' joint and separate liability.✓ During existence of a partnership individual partners cannot be sued personally for partnership debts, but after dissolution of the partnership, the situation changes.✓
- Termination of a partner's mandate.✓ After termination a partner can no longer act on behalf of the partnership.✓
- Joint and separate liability of ex-partners.✓ From the moment of dissolution, the partners are in solidum liable towards their creditors.✓
- Accountability between partners.✓ Any partner has the right to inspect the books of the partnership after termination.✓ (4 × 2) (8)

7.1.5
- To contribute
- To share in the losses
- To promote the common interest of the business
- To act in good faith (4)

7.2.1 Suretyship is an agreement✓ between the surety and the creditor✓ in terms of which the surety binds him- or herself for the debtor's obligation✓ in case the latter cannot pay his or her debt.✓ (4)

7.2.2 Parents sign suretyship for their children to start a business. The business is unsuccessful and the parents become liable for the debts. (Any applicable example) (2)

7.2.3 7.2.3.1
- This is applicable to cases where more than one surety signs suretyship for one principal debt (thus co-sureties).
- A co-surety can demand that the principle debt should be divided amongst all the sureties.
- Pro-rata liability can thus be demanded if the creditor addresses only one surety. (3 × 2) (6)

7.2.3.2
- The surety has fulfilled the main liability and paid the creditor.
- The surety can now ask the creditor to cede his right to receive payment from the debtor to the surety.
- The surety can then try to reclaim his or her money from the debtor. (3 × 2) (6)

7.2.4
- Payment in full✓
- Merger of the capacities of both surety and creditor vesting in one person✓
- Novation (where a new suretyship agreement replaces a previous one)✓
- Prescription✓

Also take into account:
Expiry of the period for which the surety has bound him- or herself and during which period the creditor has not taken any action against him or her.
Where the surety retains the right to terminate the suretyship agreement by means of proper notice
Where the principal debtor offers payment but the creditor fails to accept or refuses it (4 × 1) (4)

[50]

QUESTION 8

8.1
- One person acts on behalf of another person.
- This act on behalf of another is a legal act.
- The act is authorised.
- The act is binding between two parties, of which one was not involved in the original negotiations or action. (4)

8.2 By agreement (1)

8.3
- She should not make a secret profit.
- She must not allow her own interests to be in conflict with the interests of her principal.
- She must not delegate her authority.
- She must not disclose any information of her principal's private affairs that have come to her knowledge in the course of the agency. (4 × 2) (8)

8.4 Ratification is one way in which agency may be established. It means that consent is given afterwards for a deed that was unauthorised at the time.✓✓
Requirements:

- The person who entered into the contract must profess that at the time of entering into the contract she was acting on behalf of the principal.
- The principal must be named and the act must be done in her name.
- The act must be legal.
- The principal must have been in existence at the time of the transaction.

(5 × 2) (10)

8.5

- By performance or completion of the work
- By expiration of time
- By impossibility of performance
- By revocation by the principal
- By renunciation of the agent's mandate
- By terminating the legal relationship between the principal and the agent
- By any change in the status of the parties (insolvency, merger, death or insanity)
- By mutual agreement (Any 4 × 2) (8)

8.6 8.6.1

- Description of the bonded property
- Interest payable by the debtor
- Manner in which the borrowed capital will be paid back
- Period over which the bond will be paid back
- Rights of the mortgagee in the event of non-payment (5 × 2) (10)

8.6.2

- Payment of the principal debt
- Renunciation of rights over the property by the creditor
- Novation
- Extinction of the mortgagor’s title
- Destruction of the mortgaged property
- Merger
- Prescription
- Order of court
- Sale in execution or insolvency
- Alienation of the bonded property in terms of a court judgment

(Any 9 × 1) (9)
[50]

TOTAL SECTION B: 150
GRAND TOTAL: 200

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