Examiner's report

F4 Corporate and Business Law (ZWE)
June 2010

General Comments
The In general the candidates who sat for the June 2010 paper F4 (ZWE) showed clear evidence of being adequately prepared. Overall candidates performed well and it is quite clear that comments that have been previously made by the examiner have been of some benefit to a significant number of candidates.

A few of the candidates showed they were adequately prepared on sections or portions of the paper but were unable to answer the rest of the examination question paper. Candidates are strongly encouraged to prepare for the examinations by studying the syllabus in its entirety. Since all the 10 questions are compulsory "cherry-picking" favourite topics at the expense of the rest is rather unhelpful.

Questions 1 to 7 are exclusively narrative or essay type in character. A candidate would be expected to fully understand the meaning of a question, interpret it properly and use relevant information in answering the question. The answer can be brief in words but broad in content. An answer will never be complete if it has not been underpinned by case law or relevant statutory references.

The rest of the question paper (question 8 – 10) is comprised of problem type questions. In dealing with such questions, what is of critical importance is for a candidate to have a legally sound answer. The conclusion reached must be supported by relevant and authentic authorities. There should also be a balanced treatment of factual and legal issues and a conclusion on the law should necessarily be drawn pursuant to a thorough discussion based on the factual issues at stake.

Specific Comments

Question One
(a) The majority of the candidates were able to adequately discuss issues pertaining to the impact of human rights law on statutory interpretation. In interpreting statutes the courts have to make sure that the particular statute does not infringe upon the existing rights of citizens, both in terms of domestic human rights legislation and International Human Rights Instruments which Zimbabwe has ratified.

(b) This particular question was well answered by the majority of the candidates. It was quite evident that most of the candidates appreciated the fact that the common law has largely been modified by statute irrespective of the fact that the statute in question has a human rights dimension or not. In applying the common law any legal position which goes against the spirit of the Declaration of Rights in the country's constitution is invalid. Part 3 of the Declaration on Rights spells out the various aspects of Human Rights and freedoms which people living in Zimbabwe are entitled to.

Question Two
(a) A significant number of candidates had difficulty in distinguishing terms from mere representations. Terms of a contract are those promises susceptible to and capable of enforcement. *Vogues v Wilkins (1992).* Representations are often made at the pre-contractual stage and are usually meant to induce the contract.

Breach of the terms amounts to breach of contract and an aggrieved party can seek recourse from the courts. In a written contract it will usually be easier to identify the terms of the contract and to seek their enforcement. Representations on the other hand do not form part of the contract and are therefore not contained in written contracts. Once a representation is contained in a written contract it becomes elevated to a term of the contract and becomes binding and actionable.

(b) The majority of the candidates were able to satisfactorily answer this question. They were able to classify the various terms into categories such as express and implied terms. Under implied terms candidates understood

the fact that there are those terms that are implied by law, those implied from trade usage/custom and those terms which are implied from the facts are also known as tacit terms.

Question Three
Most of the candidates were able to answer this question very well. They showed a clear appreciation of the concept of professional negligence in so far as it relates to the work of an auditor. Important cases like *In Re Kingston Cotton Mill Company (1986)* were cited. In that case the court stated that an auditor is expected to exercise that skill, care and caution which a reasonably competent, careful and cautious auditor would employ. It stated that "an auditor is not bound to be a detective or to approach his work with suspicion or a foregone conclusion that there is something wrong. He is a watchdog and not a blood hound".

Question Four
This was one of the most popular questions in terms of the candidates' performance. Most of the candidates were able to give a full inventory of the principal duties of the employer towards his employee and some of the notable bullet points which were raised are as follows:

(i) the duty to accept the employee into his service.
(ii) the duty to pay the remuneration agreed upon.
(iii) the duty to provide safe working conditions.
(iv) the duty to exhibit good faith.
(v) The duty to observe the various statutory provisions pertinent to the employee's contract.
(vi) the duty to refrain from unfair labour practices in whatever form.
(vii) the duty to respect the employee's dignity.

What was particularly gratifying about this question is the fact that the overwhelming majority of the candidates were able to quote relevant case law in order to demonstrate the various points under discussion.

Question Five
The majority of the candidates were able to correctly identify the main classes of shares and their major differences. The classes are as follows:-

(a) ordinary shares
(b) preference shares
(c) redeemable preference shares
(d) deferred/founders' shares

Candidates had to specify the major distinguishing features of the shares particularly in relation to matters such as payment of dividends and the return of capital on winding up of the company. It should be noted however that the rights which may be enjoyed by the different classes of shareholders is a matter to be determined and clearly spelt out by the company's articles of association.

Most of the candidates performed well in this question.

Question Six

(a) The question could be adequately answered by reference to S33 of the Companies Act [Chapter 24:03]. S33 summarises the major differences between a private limited liability company and a public company. The talking points should be around the following issues:-

(i) membership
(ii) transferability of shares

(iii) ability/inability to invite members of the public to subscribe for shares or debentures in the company
(iv) commencement of business
(v) statutory meetings
(vi) appointment of external auditors.

The majority of the candidates did not encounter difficulties in answering the question.

(b) The question was answered well by the majority of candidates. It was important to specify some of the more important issues which are included in the memorandum and articles of association for purposes of registering a private company. Equally it was important to note that a private company can commence business or exercise its borrowing powers immediately upon registration of the company (s.114) unlike a public company which must meet the additional requirement of securing a certificate to commence business.

Question Seven
This question was on a very important aspect of the syllabus that relates to the meaning of corporate governance in the context of the conduct of business in an ethical manner.

Candidates had to show an appreciation of the meaning of corporate governance. Corporate governance is a concept that is meant to enhance shareholder value in a company through best practices.

Corporate governance promotes sound business practices by placing a high premium on ethics, integrity, transparency and accountability. The essence of corporate governance is to do with the curbing and prevention of business malpractices such as mismanagement, bad company practices, corruption, nepotism, abuse of company property, insider dealing and other forms of corporate perfidy.

A sound answer would have cited specific examples from the recent past in which several companies particularly in the banking sector experienced glaring corporate governance deficits which ultimately led to company failures and liquidation. A significant number of candidates did not fare very well in answering this question.

Question Eight
(a) In dealing with problem type questions candidates are strongly urged to take some time to understand the facts of the problem thoroughly. Correct application of the law to the facts can only follow from a correct understanding of the facts of the case and in this particular case, the sequence of events. The advertisement which was placed in the paper by Country and Town Petroleum Ltd amounted to an invitation to treat rather than a firm offer. *Crawley v Rex (1909).*

Sly's response in which he filled in an application form for 5,000 shares and sent a cheque for the shares in the amount of $50, 000 constituted a firm offer. Acceptance of the offer was done through the issuance of a share certificate and subsequent despatch of that certificate to Sly through the post.

Sly's attempt to withdraw his offer was a legal nullity because a valid contract was already in existence. Equally the attempt by Country and Town Petroleum Limited to revoke their acceptance of Sly's offer is of no force or effect in law. One cannot purport to reject an offer which they had earlier on validly accepted. Such conduct amounts to breach of contract.

In conclusion, Sly is a duly registered shareholder of the company and as such is entitled to the privileges, rights and benefits associated with membership of a company.

The majority of the candidates answered this question relatively well.

The question specifically was about whether or not Morgan Save could sue Gabriel Gushungo for specific performance. A small number of candidates discussed some remedies (damages, etc) other than specific performance. It was absolutely imperative for candidates to discuss comprehensively the approach of Zimbabwean courts to the remedy of specific performance in breach of contract cases. Specific performance is a discretionary remedy which the courts will not award as a matter of course. See *Farmers Co-operative Society v Berry (1912)*.

Candidates needed to specify the various situations where specific performance has been deemed untenable or unawardable by the courts in terms of judicial precedent.

Question Nine

The majority of the candidates were able to answer this particular question very well indeed. It is quite clear that John Brown, the managing director of Dryland Products Limited was in breach of a number of duties that he owed to the company. Directors are enjoined to act with utmost good faith and in the best interests of the company. Specifically a director must refrain from making secret profits or procuring a secret commission at the expense of the company.

In the case of *Robinson v Randfontein Estates Gold Mining Company (1921)*, Chief Justice Innes stated that:

"**where one man stands in a position of confidence involving a duty to protect the interest of the other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty …"**

Some answers made reference to s.186(1) Companies Act [Chapter 24:03] which states,

"It shall be the duty of a director of a company, who is in any way, whether directly or indirectly interested in a contract or proposed contract with the company to declare the nature and full extent of his interests at a meeting of the directors of the company."

Apart from obtaining damages from its managing director, the company can also relieve Mr Brown of his duties as managing director both in terms of the common law of employment and the Labour Relations Act [Chapter 28:01].

Question Ten

(a) This was one of the best answered questions in which virtually all the candidates came up with a standard answer to the effect that the shareholders could not force the company to declare a dividend.

Generally a shareholder does not have a right to any dividend payment until the corporate body through its directors has determined that the money can properly be paid out. A dividend only becomes due if, and when, declared by the board of directors***, Burland v Earle (1902).***

In conclusion, the proper advice to the three shareholders is that although the company made large profits from which it could pay the three shareholders a dividend, it does not have a legal obligation to pay their dividends. In fact, the company can put the profits in reserves instead of paying dividends to shareholders. Therefore, the three shareholders cannot compel the directors to pay them dividends until they declare the dividend.

(b) This question was poorly answered by the majority of the candidates. A significant number of the candidates were rather unsure about the various formalities and processes that must be complied with prior to the removal of a director whose term of office had not expired.

1. The detailed procedure for the removal of a director before the expiration of his term of office is to be determined under s175 as read with s.126 Companies Act [Chapter 24:03]. Members holding at least 20% of the paid up capital of the company can request the convening of an extra-ordinary general meeting.

In terms of s.126(2) those so requesting must give special notice as to the purpose and intention of the meeting to all concerned shareholders and directors who are naturally supposed to be present at the extra-ordinary general meeting

2. At the general meeting, a motion should be moved for the removal of the directors and put to vote of the present shareholders. This is subject to the provisions in the company's articles of association.

In the case of *Afre Holdings (Pvt) Ltd & Ors v Kingdom Meikles Africa Ltd (2008)*, the court held that the holding of a meeting for the purposes of the removal of directors must be in accordance with s.126 Companies Act [Chapter 24:03] as read with the articles of association of the particular company. If it fails to comply with this requirement, any resolution passed in the meeting shall be void and shall have no force and effect.

3. In terms of s175 Companies Act [Chapter 24:03], once a vote has been made by the majority of the shareholders to the effect that a director should be removed from office and relieved of his duties, a resolution is passed and recorded by the company confirming the removal of such a director.

It is noteworthy to mention that the removal of a director under s.175 Companies Act [Chapter 24:03] can be made notwithstanding anything in the company's articles of association or any agreement between the company and the director. In *Eley v Positive Government Assurance Company (1876)*, the court held as valid the removal of a director despite the fact that it had provided in its articles of association that he was to be the company's legal advisor. It held that nothing contained in the articles or prior contracts affects the conditions of the statute. In light of this, it is possible for the shareholders to institute proceedings for the removal of Mr Wiseman and Mr Knowledge from their positions as chairperson and deputy chairperson of the board of directors of ChromeTech Ltd. However, s. 175 makes it clear that the removal of a director prior to the expiry of his contract of service does not preclude the said director from suing for compensation for benefits and privileges associated with loss of office. Since the chairman and his deputy's directorships had another two years to run, at law they would be eligible to sue for compensation for loss of benefits.