



# Examiners' report

## F4 Corporate and Business Law (ZWE)

### December 2007

#### General Comments

The December 2007 Examination was the inaugural paper for the new syllabus (Paper F4 ZWE) and the overall picture in terms of results was very pleasing. It was evident that most of the candidates were adequately prepared for the examination and the new syllabus did not pose insurmountable challenges to the majority of the candidates. However a significant number of candidates did not seem to have covered topic 4 of the new syllabus guide (the law of delict) and as a result the answers to question 5(a) and 5(b) (on the concepts of negligence and *volenti non fit injuria* respectively) tended to be below the levels and standards expected by the examiner. However on the whole the performance of the candidates was satisfactory.

Paper F4 (ZWE) has a new layout which basically comprises of 10 compulsory questions, the first seven of which are knowledge-based and the rest (questions 8 – 10) are problem type questions. Since all the questions are compulsory and are worth 10 marks each it would be prudent for candidates to prepare for the examination extensively and to cover the syllabus in its entirety and not “cherry-pick” a few select topics. As has been mentioned in the past an adequate and satisfactory law answer inevitably involves the citation of relevant case authorities. A large number of candidates seem to have grasped this elementary point. Citation of relevant case law always enhances the quality of the answer. Equally, if cases are cited inappropriately, that tends to undermine the quality of the answer.

In relation to examination technique, the narrative type questions seemed to pose very few challenges for the candidates as long as one fully understood the import and demands of a particular question.

The analytical questions (8 – 10) often pose more formidable challenges for candidates than the narrative ones. A useful approach (which of course should not be taken as a rule of thumb) would proceed as follows:

- Candidates would need to read and understand the facts of the problem.
- Identify the appropriate area of the law pertinent to the facts.
- In coming up with a solution to the problem, apply the law to the facts.
- In light of the discussion candidates are expected to end the discussion with a conclusion which is supported where applicable by appropriate case law authorities.

#### Specific Comments

##### Question 1

Part (a) -Answers to this question were reasonably satisfactory and almost all the candidates attempted the question. Most of the candidates fully appreciated the significance of the Latin maxim, *stare decisis* which means to stand by past decisions and not disturb settled points of law. This maxim underpins the underlying rationale behind the concept of judicial precedent.

Part (b)- Whilst the majority of the candidates were able to list the advantages of judicial precedent, a significant number of candidates came short on the second leg of the question i.e the disadvantages associated with judicial precedent. Among other disadvantages is the fact that once a hierarchy of binding precedents has been established, a certain amount of rigidity and inflexibility is introduced. To that end, a strict principle of *stare decisis* fails to allow legal rules to change with the times.

##### Question 2

This question in the main was well answered. Candidates were expected to underscore the discretionary nature of the remedy of specific performance in breach of contract cases. Situations in which specific performance as a

remedy in breach of contract cases ordinarily would not be granted by the courts should have been listed. Some of them are:-

- where damages would adequately compensate the injured party.
- where a decree of specific performance would be impossible to effect.
- where the subject matter of the contract involves the rendering of services of a personal nature and
- where the order would work great hardship on the defaulting party or the public at large.

### Question 3

Most candidates did reasonably well in this question with a significant number being able to cite specific provisions of the Companies Act Chapter 24:03 that are meant to preserve the share capital structure of the company. Some of the more popular sections included:-

- Restrictions on the payment of commissions involving the sale of shares (s72)
- Prohibition of financial assistance by a company for the purchase of its own shares or shares in its holding company (s73)
- Prohibitions of loans to directors (s177)
- Dividends to be paid out of profit (article 116)
- Application of share premiums (s74)
- Reduction of share capital (s92)

Whilst there is no substitute for specificity in a law examination some of the candidates made the mistake of incorrectly citing various sections from the Companies Act (Chapter 24:03).

### Question 4

This was a straightforward question which did not pose too many problems for candidates. The critical point which candidates were expected to appreciate was that unlike a sole trader's business or partnership, a private business corporation on registration becomes a juristic person distinct from its members. In Zimbabwean law a partnership is not a legal entity or personality that is separate from its members (**B v Commissioner of Taxes 1957**).

### Question 5

Most of the candidates who sat for paper F4 (ZWE) did not attempt this question and among those who attempted the question, very few performed satisfactorily. As has been intimated in the examiner's opening remarks in the report, the topics on delict and professional negligence (topics 4 & 5 in the study guide) are important additions to the new syllabus and many candidates overlooked them.

Part (a) -Most actions in delict are based on negligence. This is an allegation that a person acted carelessly, was thoughtless or imprudent because, by giving insufficient attention to his actions he failed to adhere to the standard of care legally required of him. The criterion adopted by our law to establish whether a person has acted carelessly and thus negligently is the objective standard of the reasonable person. The defendant is negligent if a reasonable person in his position would have acted differently and if the unlawful act causing damage was reasonably foreseeable and preventable.

In **Kruger v Coetzee (1966)**, Holmes JA formulated the test to be applied on negligence. He said liability on negligence arises if a reasonable person (*diligens pater familias*) in the position of defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss and would take reasonable steps to guard against such occurrence and that the defendant failed to take such steps.

In **Jones v Santam (Bpk) (1965)** it was stated that:-

“A person is guilty of culpa (negligence) if his conduct falls short of the standard of diligens pater familias - standard that is always objective and which varies only in regard to the exigencies arising in any particular circumstances. It is a standard which is one and the same for everybody under the same circumstances.

The first stage in any case of alleged negligence is for the court to decide the facts. After the facts have been decided, the court has to determine how an ordinary average reasonably careful citizen would have behaved in the circumstances.

Part -(b) -*Volenti non fit injuria* means, he who voluntarily exercises his will suffers no injury. The concept embodies the principle that a defendant is not liable where the injured person has consented to injury or the risk thereof. Thus if a person, knowing the full nature and extent of the risks involved in an enterprise, voluntarily goes into the enterprise thereby assuming the risk of injury to himself, he should not be able to sue for injuries caused by that enterprise. *Volenti non fit injuria*, thus constitutes a total defence in delict even in circumstances where the defendant was negligent.

The defence would thus cover injuries sustained by sportspersons engaged in sports that inevitably cause harm such as Boxing and in some such other circumstances. Thus in **Lampert v Hefer NO (1995)** the defence was maintained under circumstances where a passenger was aware that the motorcyclist with whom he was traveling was under the influence of alcohol, which intoxication led him into an accident and resultant injuries to the plaintiff.

#### Question 6

Both questions 6(a) and 6(b) on the liability of partners for partnership debts and on how a partnership comes to an end respectively were answered very competently by the majority of the candidates. Relevant case law was duly cited.

#### Question 7

As was the case with the preceding question (question 6) the majority of the candidates gave very satisfactory answers. The question required a mere narration of the duties of the agent towards the principal. This is a topic that is replete with case law (for example on the duties of skill, care and utmost good faith).

#### Question 8

Part (a) - The first of the problem type questions related to the principle of corporate personality. Messrs Nhidza and Mujere the two shareholders and directors of Clearwaters (Pvt) Ltd were not personally liable to Diamond Bank Ltd for the loan default to the bank by the company. S9 of the Companies Act (Chapter 24:03) reads as follows:

**“a company shall have the capacity and powers of a natural person in so far as a body corporate is capable of exercising such powers ...”**

Equally, cases such as **Salomon v Salomon and Company (1897)** and **Dadoo Ltd v Krugersdorp Municipality (1920)** underscore the principle of separate personality of a registered company. Thus it is quite clear from the facts that the proper defendant in the case is the company itself and not the two directors.

Part (b) - The majority of the candidates answered this question satisfactorily. Candidates were able to identify the major legal principle at stake i.e payment of dividends is alone at the sole discretion of the board of directors. Equally it is now settled both in terms of the common law and statutory law (Article 116 of the Companies Act, Chapter 24.03) that:

**“no dividend shall be paid otherwise than out of profits...”**

A dividend becomes only due if and when declared by the directors, as a result Simoni cannot compel the directors to pay his dividend notwithstanding the fact that the company may have made profits which the

directors in their wisdom have decided to reinvest through the purchase of more advanced mining equipment and computers.

#### **Question 9**

This is a typical case of unfair dismissal and the normal remedies of reinstatement or alternatively damages are available. Candidates were able to show an appreciation of this fact in their answers. In Zimbabwean law before the court can grant reinstatement it will consider the possibility of the restoration of a normal working relationship between the parties. If that objective cannot be attained reinstatement will not be ordered and in that event the issue of damages becomes a viable alternative. There is a plethora of case law on this issue and citation of relevant case law would have enhanced the quality of the answer.

#### **Question 10**

It is beyond doubt that the building in its dilapidated state constituted/posed a serious risk of danger and harm to a passersby. In the circumstances, there was a duty upon the owner to prevent such harm and also upon the builders as they were in control of the building. A warning sign which was also an exemption notice was however posted on the building. The matter has to be determined on the adequacy or otherwise of this sign/warning.

The steps that must be taken by a person who is responsible for the creation of a dangerous state of affairs are determined by the following factors. The degree of risk that harm would occur, the nature of harm that would occur and the nature of the preventive measures needed.

These factors were spelt out in **Lomagundi Sheetmetal v Basson (1973)**, where a person who had been carrying out welding operations on the top of a building was rendered liable as a result of the destruction caused by a fire sparked by molten metal which had dropped on dry material alongside the building.

Whilst authorities seem divided, in conclusion one can make the following observations:-

1. That the owners/occupiers of the building were in control of a dangerous object (the dilapidated building).
2. That there was a warning which should have been heeded by members of the public including Aimless Murombo.

In light of this and on a balance the warning sign might just be enough to give legal protection to the owners/occupiers of the building in the event of litigation being mounted against them.

The answers to this question were rather disappointing because most candidates neglected to study the section on delict (Item 4 of the Study Guide). Question 5 and 10 were the two main questions where the majority of the candidates who attempted the questions did not do so satisfactorily.