



Examiner's report

F4 Corporate & Business Law (ZWE)

December 2009

General Comments

The general performance of candidates in the December 2009 F4 (ZWE) paper was satisfactory. However there was evidence of the fact that a few of the candidates were inadequately prepared for the examination. It is always advisable for candidates to attempt all the ten questions.

In terms of examination technique, it is imperative that candidates understand the question first so that they can avoid the possible pitfall of answering an unasked question. One or two practical examples may be appropriate here. For example with question 2, candidates were specifically asked to explain the nature of exemption clauses and how they are regulated by the courts. Instead, a handful of candidates wrote on the requirements of a valid contract. Equally, question 5 was about the termination of agency and not on how a contract of agency is created, an erroneous interpretation or understanding of the demands of the question.

Candidates as a general rule are expected to provide answers which magnify or illuminate the law in relation to the examined area in a meaningful way. Some of the answers tended to be too brief and superficial. Merely scratching the surface is not good enough and as a result, candidates might not be able to gain as many marks as they could if the answers were more profound.

Specific Comments

Question One

The salient points in relation to question 1 were as follows;

- a) Judges – explain the role of judges, the courts in which they are found, High and Supreme courts and the powers of jurisdiction they have i.e. appellate, review over both criminal and civil, etc.
- b) Magistrates – roles, found in magistrates' courts, have adjudicating powers over civil and criminal matters.
- c) Prosecutors – courts in which they are found i.e. Magistrates and High Court, represent the state, act in criminal matters only and not civil cases. Overall the question was reasonably well answered.
- d) Assessors – play advisory role in areas demanding expertise, maybe lawyers or lay persons, sit on both criminal and civil matters in both lower and higher courts.

Question Two

This question was rather inadequately answered by a significant number of candidates. Candidates had to give a basic definition of exemption clauses and the fact that the purpose underpinning an exemption clause is either to limit or totally exclude liability, which would in terms of the common law attach to the party in whose favour the exemption clause is being made to operate.

The issue of regulation of exemption clauses by the courts on the grounds of public policy needed to be fully canvassed by candidates. The usual approach of the courts is to narrowly and conservatively interpret exemption clauses, confining them to within reasonable grounds requiring that the party against whom it operates must have full knowledge of the clause.

There is also the contra preferentum rule which provides that where the exemption clause is unreasonable in its scope, application and limits, the court will interpret it against the party seeking to rely on it.

Question Three

(a) Passing off is a form of deception, which consists of taking unfair advantage of a reputation that another person has built in relation to goods or services. Remedies include interdict i.e. prohibitory, damages and rendering of an account.

(b) For duty of care to be established, the following requirements have to be met. (i) harm should have been caused on a party, (ii) the harm should have been reasonably foreseeable, (iii) the defendant should have been negligent in causing the harm, (iv) there should therefore be a close nexus between the defendant's conduct and the injury suffered and (v) moral blame should attach to the defendant's conduct. Examples of cases where duty of care is required, as statutory duty, by creation of dangerous situations, where there is a protective relationship/public office, in situations of vicarious liability or ownership or possession of dangerous property. Some candidates were unable to answer this question satisfactorily.

Question Four

(a) Points in relation to part (a) are to do with the formation of a partnership. This is done by agreement written, express or tacit. The following requirements have to be there (i) a contribution whether (goods, money or labour) (ii) an objective of making money or profit, (iii) for the joint benefit of the parties, (iv) the partnership agreement must be lawful and it is essential that the parties must intend to create a partnership.

(b) Part (b) is on the topic of the authority of partners such as (i) acting on behalf of partnership, (ii) managing partnership, (iii) reviewing books (iv) sharing profits. Parts (a) and (b) were very well answered by the majority of the candidates. A lot of pertinent cases were cited.

Question Five

The majority of the candidates performed well on this question. Relevant cases were cited by most of the candidates.

Question Six

Candidates needed to have a fair knowledge of the relevant statutory provisions for this question. The rules which are meant to protect the share capital structure of the company broadly, can be stated as follows:

(a) Restrictions on the Payment of Commissions involving the Sale of Shares.

S.72 of the Companies Act allows payment of commissions as consideration for subscribing or agreeing to subscribe for its shares. The restrictions thereunder are that :

- (i) articles must allow it,
- (ii) commission is under 5% of price of single share or such rate authorized by the articles, whichever is less.

(b) Prohibition of assistance by a company of the purchase of its own shares or in its holding company.

The primary capitalisation method of a public company is the sale of shares. If it were to purchase its own shares, capital would not increase neither would it do so if it assisted a buyer in purchasing its own shares. Thus s.7 prohibits a company from financing the purchase of its own shares or those of its holding company. Such assistance would amount to a back door reduction of share capital without following acceptable rules as set out in s.92-96. However, under exceptional circumstances the law allows a company to provide assistance towards the purchase of its own shares.

(c) Prohibitions of Loans to Directors – s177

S.177 generally prohibits loans to directors, though subject to certain exceptions. The major exception again is that if a company's core business is the lending of money, then directors can be considered for loans along with everyone else.

(d) Company Purchasing its own Shares

The rule that a company cannot buy its own shares enunciated in **Trevor v Whitworth (1887)** has been reversed by statute, namely s.78, provided that the purchase is authorised by articles and a resolution passed at a general meeting. Further, this purchase can only be made by funds which would otherwise be available for dividend – s.82.

(e) Dividends Paid out of Profit

Both the common law and statute law are very clear on the issue of payment of dividends, that it can only be done out of profits and not capital. Article 116 says, “no dividend shall be paid otherwise than out of profits.” To do otherwise would amount to an unauthorised reduction in share capital and this would be strictly contrary to the provisions of the law.

(f) Application of Share Premiums

If a company issues shares at a premium whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to an account called the share premium account. In terms of Zimbabwean law, the share premium account cannot be used anyhow notwithstanding the fact that the company has made “profits” on the sale of shares. The account is primarily used:

- (i) in paying up unissued shares to be allotted to directors, members or employees as fully paid bonus shares and
- (ii) in writing off preliminary expenses associated with the formation of the company.

In summary it is quite clear that there are several provisions in the Companies Act [Chapter 24:03], which are designed to protect the integrity of the share capital structure of the company. Ultimately, the rules are meant to prohibit or prevent the illicit or unauthorised reduction of share capital.

Question Seven

There was overwhelming evidence to the effect that most of the candidates had thoroughly understood this very important area of the law and the talking points relate to both common law and statutory duties and these are: (a) fiduciary duties (b) duty to exercise powers for a proper purpose (c) duty of

good faith (d) duty not to make secret profit, (e) duty to avoid conflict of interest (f) duty of care and skill, (g) duty to exercise an independent discretion, (h) duty to disclose. S. 186 (1) of the Companies Act [Chapter 24:03] imposes a duty on directors to disclose both direct and indirect interest in contracts involving the company.

Equally section 140(5) of the Companies Act imposes a duty on directors to make sure that all the necessary books of accounts relating to the company are accurate and give a fair and true view of the state of affairs of the company. Section 124 of the Act also imposes a duty on directors to convene a general meeting of the company's members within three months of the registration of the company. If the director fails to do so he shall be guilty of an offence. Both statutory and common law provisions were very appropriately cited.

Question Eight

This question dealt with breach of contract. In the first place candidates had to determine whether or not a valid contract exists between Ngoni and Mhizha Enterprises, using a basic tool by establishing the existence of essential elements of a contract such as offer and acceptance, lawfulness, serious intention to be bound contractually and so forth.

Clearly there is breach of contract on the part of Mhizha Enterprises and Ngoni would be entitled to the usual remedies, the most appropriate being damages. Specifically candidates needed to discuss the question as to whether or not Ngoni's claim can include the loss of sales as damages? Most candidates were able to cite appropriate case law.

Question Nine

The treatment of Maria by her employer amounts to constructive dismissal. Constructive dismissal occurs when an employer makes the working environment unbearable or untenable for an employee and no other conclusion can be reached except that the employer has terminated the employee's employment.

Remedies for constructive dismissal would be reinstatement or damages. By and large this question was well answered by most candidates and relevant case law was cited.

Question Ten

(a) The court may grant a provisional management order in respect of the company in terms of s .300 of the Companies Act [Chapter 24.03].

(b)(i) S 242 of the Companies Act [Chapter 24:03] spells out the circumstances under which the voluntary winding up of a company can be done. A company may be wound up voluntarily:-

(1) when the period, if any, fixed for the duration of the company by articles expires, or the event, if any, occurs on the occurrence of which the articles provide that the company is to be dissolved and the company in a general meeting has passed a resolution requiring the company to be wound up voluntarily.

(2) if the company resolves by special resolution that the company be wound up voluntarily.

(b)(ii) A voluntary winding up shall be deemed to commence at the time of the passing of the resolution for voluntary winding up.



When a company is wound up voluntarily, the company shall from the commencement of the winding up cease to carry on its business, except in so far as may be required for the beneficial winding up thereof. However, the corporate powers of the company shall notwithstanding anything in its articles continue until it is dissolved, see s.245 of the Companies Act [Chapter 24:03].

Other than the technical aspects of the various parts to question 10, it can be said by way of general comment that the majority of the candidates answered the question well. The various statutory provisions were appropriately cited by many candidates.