Examiner's report

F4 Corporate and Business Law (ZWE)
December 2010

General Comments

The general performance of candidates in the December 2010 F4 (ZWE) examination paper was satisfactory.

The majority of the candidates were able to attempt all the ten questions but regrettably some candidates were only able to answer some of the questions and not all of them. As has been noted before, candidates are strongly encouraged to prepare for the examinations by studying the syllabus in its entirety. Since all the ten questions are compulsory "cherry picking" favourite topics at the expense of the rest is rather unhelpful and prejudicial.

The paper comprises ten compulsory questions, the first seven (question 1 to 7) of which are knowledge type questions and the rest (questions 8 to 10) are problem type questions.

With both types of questions it is absolutely critical for candidates to support legal propositions or submissions through a citation of specific acts of Parliament (where appropriate) and relevant case law. These authorities (both legislative and case law) underpin particular legal propositions thereby illuminating and clarifying the law.

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 1, candidates were supposed to define the notion of delegated legislation and how it operates in practice. However surprisingly, a sizeable number of candidates decided to write about the structure of the courts and their different levels of jurisdiction. Whilst some of those answers were satisfactory it was not possible to award any marks at all because candidates had "manufactured" a question which had not been asked by the examiner.

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 and had a little "more flesh". At the end of the day it is critically important for an answer to include the essential aspects of the question irrespective of the length of answer.

For a law examination correct spelling and grammar are absolute imperatives. Rather uncharacteristically some candidates made a lot of spelling and grammatical mistakes, probably more as a result of sheer carelessness rather than genuine ignorance. Some of the more common mistakes which feature in one of the answers were as follows:-

Question 2 - breech of contract instead of breach of contract, the route of contract instead of the root of the contract, principle instead of principal.

Specific Comments

Question One

The question was about delegated or subordinate legislation and <u>not</u> about the hierarchy of the courts and their various levels of jurisdiction. The various types of delegated legislation such as proclamation, bye-laws, rules, regulations and statutory instruments needed to be defined and the context within which they operate clarified.

It was particularly important to emphasise the fact that delegated legislation has to be intra vires the enabling act rather than ultra vires.

Question Two
(a) The first section of the question, which deals with the definition of breach of contract, was very well answered by the majority of the candidates. The various forms of breach such as malperformance, mora (delay in performance without lawful excuse) and repudiation were adequately canvassed.

(b) Whilst the question clearly was about the rules governing the award of damages for breach of contract some candidates dwelt at length on issues like specific performance, cancellation, interdict and remedies other than what the question demanded – principles regulating the award of damages for breach of contract. It was important to underscore the point that damages are meant to place the injured party (plaintiff) in the position he would have occupied had the contract been performed in so far as that can be done by the payment of money and without undue hardship to the defaulting party (the defendant). Some candidates confused this approach with the attitude of the courts when awarding damages for a delict (tort). The approach in delictual cases is to place the injured party through monetary compensation in the position he would have occupied had the delict not been committed.

Question Three
The question on capital maintenance and capital reduction was satisfactorily answered by the majority of the candidates. The main points related to the following:-

(a) prohibition of financial assistance by the company for the purchase of its own shares (s73)

(b) the share premium account (s74)

(c) prohibition of loans to directors (s177)

(d) restrictions on payment of dividends (article 116)

(e) power to issue shares at a discount (s75)

(f) rules relating to the reduction of share capital (s92)

Question Four
This question involved an explanation of the main statutory books, records and returns that registered companies in Zimbabwe must keep or make. All that was required was an appreciation of the main points rather than an exhaustive inventory of those books and returns.

The majority of the candidates answered the question relatively well.

Question Five
It was essential for candidates to show evidence that they appreciated the fact that both the common law (which is basically illuminated through case law) and statutory law mainly in the form of the Companies Act (Chapter 24:03) have in place a number of provisions that are meant to manage, regulate and control the activities of directors. It was essential for candidates to cite relevant case law and statutory provisions in their answers.

Question Six
The overwhelming majority of candidates were able to answer both 6(a) and 6(b) satisfactorily.

Our partnership law is basically expressed through the common law and the majority of candidates were able to cite relevant case law such as **Shingadia v Shingadia Brothers, Rhodesia Railways and Others v Commissioner of Taxes (1925)** etc. These cases illustrate and illuminate the common law position in a very tidy way.

Question Seven
Most candidates found this question probably more challenging than the rest of the paper. There was a tendency to confuse between insider trading (which was the gist of the question) and corporate governance. Simply defined insider dealing is the abuse or misuse of sensitive, confidential corporate or business information for personal gain at the expense of the investing public in general and the affected company in particular. It involves the unlawful or illicit and unauthorised trading of confidential and privileged company information for personal gain by someone who by virtue of their close relationship to the company has access to critical information, which is not yet in the public domain and that affects the value of the company's shares and securities.

There are several cases in Zimbabwe involving insider dealing such as Cottco, United Merchant Bank, Southampton Life Assurance, which candidates could have cited, and indeed some of the better answers alluded to those cases.

Question Eight
With problem type questions it is strongly recommended that candidates should understand the facts of the problem first and where applicable, the sequence of events. Having done that the next stage would be to identify the relevant area of the law and then the discussion that follows of the legal issues involved should invariably be accompanied by a conclusion.

Although the question was relatively well answered there were a few candidates with misconceptions about some of the issues involved. For example, the fact that the church was not paying for the accountant's services does not make the accountant (Short) and those people for whom he was vicariously responsible any the less liable. The doctrine of consideration is not part of our law (Roman-Dutch law) and as long as all the other essentials of a valid contract (including legality and the serious intention to be bound contractually) are in existence the parties would have a binding contract.

In light of the Roman-Dutch law position in relation to the facts of the problem, the conclusion that Short was liable to the church in the sum of $20 000.00 is inescapable.

Question Nine
This was a composite problem involving a number of issues in relation to employment law in Zimbabwe. Most of the candidates answered the question well and the main points related to

(a) vacation leave
(b) the annual bonus and
(c) Kundai's demotion from her previous position of sub-accountant to bookkeeper. This amounted to constructive dismissal because the employer deliberately made the employee's position at the workplace untenable and unbearable.

This area of the law is replete with case law and the majority of the candidates were able to cite relevant case law.

Question Ten
(a) This was one of the best answers from most of the candidates. Mrs Kufa was supposed to sue the company (Velvet Furnitures (Pvt) Ltd) and not the shareholders and directors. It is an elementary principle of company law that once a company is properly registered it acquires "juristic personality" and a separate legal existence in law. *Salomon v Salomon and Company (1897)* and s9 Companies Act (Chapter 24:03).

It is quite clear that the proper defendant in this case is the company itself and not the shareholders and directors of the company.

Equally the summons should have been sent to the company's registered office in Harare and not the private residence of the Samaitas.

(b) This part of the question was completely answered by most of the candidates, who were able to note the fact that the company could be compulsorily wound up on the basis of inability to pay debts. A sound answer would have made reference to s205 as read with s206(f) Companies Act (Chapter 24:0