

Examiner's report

F4 Corporate and Business Law (ZAF)

December 2013



General Comments

The examination consisted of ten compulsory questions. The first seven questions were of a theoretical nature and the last three were problem-type questions. Each question was worth ten marks. Candidates are expected to be acquainted with the whole of the syllabus.

A substantial number of candidates did not attempt all ten questions. Where questions were left unanswered by candidates, this appeared to be due to a lack of knowledge or inadequate exam technique, as opposed to time pressure.

Candidates tend not to answer questions in the order they are asked, but rather to attempt the questions they are more comfortable with first.

Most candidates performed well on questions 1, 3, 5, 7 and 9. Candidates mostly provided incomplete answers relating to questions 2, 4, 6, 8 and 10. Candidates often simply did not provide enough material to obtain marks; their answers were incomplete and incoherent.

A number of common issues arose in candidate's answers:

- Failing to read the question requirement clearly and therefore providing irrelevant answers which scored few if any marks.
- Inadequate time management between questions, some candidates wrote far too much for some questions and this put them under time pressure to finish remaining questions.
- Not answering all of the questions, this might be due to inadequate time management mentioned above.
- Not learning lessons from earlier examiner's reports and hence making the same mistakes, especially in relation to Questions 6 and 8.
- Inadequate layout of answers.

Specific Comments

Question One

This question required candidates to distinguish between the *ratio decidendi* and the *obiter dictum*. Most candidates were able to answer this question. Many candidates performed well in this question.

Question Two

This 10-mark question asked candidates to explain the rules relating to the award of damages in the context of the law of contract. Most candidates were able to discuss issues that are relevant when dealing with the award of damages. However, a majority of candidates did not discuss this in sufficient detail and often provided incoherent answers. Certain rules influence the recoverability of damages as well as the extent of the claim that make it difficult and sometimes even impossible for the injured party to succeed with a claim for damages. Most candidates did not discuss these rules adequately. The principles that must be applied when calculating damages also had to be dealt with; this was often not the case.

It is of utmost importance to know how damages will be awarded in case of a breach of contract. Candidates must ensure that they are able to answer a question based on the relevant principles and rules.

Question Three

In this question candidates had to distinguish shareholders from debenture holders. This was the question that most candidates were able to answer well. The majority of candidates were able to list and discuss the differences between shareholders and debenture holders. A number of candidates provided detailed feedback to this question.

Question Four

In this question candidates had to explain the delict of “passing off”. The majority of candidates were not able to answer this question. Most candidates did refer to the five elements of a delict but most of the candidates did not discuss the actual delict of “passing off”. The answers to this question were unsatisfactory.

In an action for passing off the plaintiff must prove the following: that the trade mark, service mark or trade name that they claim have been imitated is known in the market and has acquainted with the public a reputation associated with the goods, services or business and; that the defendant’s conduct is likely to deceive the public into thinking that the two businesses or the merchandise is the same thing or connected. Candidates had to discuss this.

Question Five

In this question candidates were required to distinguish between an employee and someone who is self-employed for purposes of employment law. The majority of candidates were able to answer this question to a certain extent. Unfortunately many candidates did not refer to the important tests developed by the courts in this regard. Candidates had to refer to the control test, which is based on the element of control, which at one time was regarded as the most important aspect of the employment contract. According to this test, the presence of control points to the existence of an employment relationship. However, in an environment where many “employees” are highly skilled and often act independently of the employer (doctors, captains of ships and pilots, for example) the courts have tended to concentrate on the employer’s right to control rather than actual control.

The organisation test asks whether the worker is part and parcel of the organisation of the employer. This test has been considered too vague, and it has been dismissed by the courts.

The courts today use the so-called multiple or dominant impression test. This test looks at the employment relationship as a whole, rather than looking at a single factor, such as control or integration. Some of the important factors which courts have found relevant are: the employer’s right to select who will do the work; the power to discipline and dismiss; the employee’s obligation to work for a given time and for certain hours; whether remuneration is paid for time worked or for a particular result; whether remuneration is paid on a commission basis; whether the employer provides the employee with tools, equipment and office space; and whether the employer has the right to utilise the employee’s labour potential as it sees fit. The court weighs up all these and other factors to decide whether or not the dominant impression is that the person in question is an employee.

Question Six

This question required candidates to explain when the courts will “lift” or “pierce” the corporate veil. This question deals with an important part of the work. It is unsatisfactory that a substantial number of candidates were not able to answer this question, especially if one considers previous comments made in Examiner Reports. Most candidates did not refer to the important and very relevant case law that deals with this issue. See for example: *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* (1995); *Hülse-Reutter v Gödde* (2001) and *Botha v van Niekerk* (1983).

Question Seven

This question asked candidates to explain how the agency relationship is established. Most candidates were able to answer this question. They had to indicate, *inter alia*, that a person who wishes to conclude a contract does not have to do so personally. Such person may prefer, whether for the sake of convenience, or for other purposes, to authorise someone else to enter into the contract on his behalf or in his name. Sometimes representation is essential. A legal entity like a company or a close corporation cannot, for example, itself conclude a contract. The enterprise must of necessity be represented by a natural person or persons. They then had to indicate how this agency relationship is established. It seems if most candidates understand this part of the work well.

Question Eight

This question required candidates to analyse the problem scenario by discussing the law relating to the duty of care, skill and diligence, in the context of company law. It seems if candidates found this ten mark question challenging. This question tested some provisions of the Companies Act 2008 and it might be that candidates are not yet familiar with this Act. Candidates need to make sure that they understand the prescribed provisions of the Companies Act 2008 as they will be tested on it again due to its practical importance in the business world.

Most candidates answered this question based on general knowledge, they did not apply the legal principles to the facts given and they also did not refer to relevant case law.

Question Nine

This question required candidates to analyse the problem scenario from a perspective of corporate governance and specifically audit committees. It also dealt with the duties of a company secretary. Some of the answers were satisfactory and candidates were able to identify the problem. Most of the candidates performed satisfactorily.

Question Ten

In this question candidates had to list the various profit companies and indicate which one is most suitable for the parties mentioned in the set of facts. Many candidates referred to partnerships and close corporations in this question, even though the question specifically dealt with companies. Also, the new Companies Act of 2008 had a significant impact on the future of close corporations as new ones can no longer be formed. It seems if many candidates are not aware of this.#