

Examiner's report

F4 Corporate and Business Law (ZWE)

December 2012



General Comments

In general, the candidates who sat for the December 2012 Examination F4 (ZWE) showed clear evidence of preparedness. It is quite clear from the overall performance of the candidates that comments that have been previously made by the Examiner have been of some benefit to a significant number of candidates. Some of the candidates showed adequate preparation on sections or portions of the paper but regrettably were unable to fully answer the rest of the questions. As has been noted before candidates are encouraged to study the syllabus in its entirety. There is always a fair and even coverage of the major topics covered by the syllabus. Since all the 10 questions are compulsory, "cherry-picking" favourite topics or "spotting" and trying to predict likely questions to be examined at the expense of the rest of the syllabus can prove to be unhelpful.

Questions 1 to 7 are knowledge based questions. A candidate would be expected to fully understand the meaning of a question, interpret it properly and use relevant information in answering the question. A sound answer in a law examination would be underpinned by appropriate authorities such as case law and legislation.

The rest of the paper (questions 8 – 10) consists of analysis or problem-type questions. It is imperative for candidates to understand the facts and import of the question first, identify the appropriate area of the law under which the question falls and finally give a reasoned answer supported by authentic sources, be they case law or statutory references.

There should also be a balanced treatment of factual and legal issues and a conclusion on the law would necessarily be drawn in light of both the factual and legal issues raised by the questions.

With both types of questions it is absolutely critical for candidates to support legal propositions or submissions through a citation of specific pieces of legislation (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. But generally the examination technique was good.

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, and as a result, candidates might not be able to gain as many marks as they would if the answers were more profound and have a little "depth". It is critically important for an answer to include the essential aspects of the question, irrespective of the length of the answer.

A few candidates tended to cite wrong cases altogether when discussing certain legal concepts. Other candidates would inaccurately refer to certain pieces of legislation.

With questions 8 – 10 (problem type questions) it is absolutely essential for candidates to round off the discussion by coming up with a conclusion. Whilst the examiner might not always agree with a candidate's conclusion to a particular question, marks and recognition will be given for a rational and reasoned discussion that leads to a particular conclusion (the process of disputation).

Specific Comments

Question One

The majority of the candidates answered the question very well. They were able to describe the impact of human rights on statutory interpretation and the common law. Some answers went beyond domestic human rights legislation and instruments and cited international best practices in Southern Africa and the European Union on topical human rights issues like the death penalty and corporal punishment of delinquent juveniles. However a few candidates would answer an unasked question relating to the canons of statutory interpretation such as the literal rule, the golden rule and the mischief rule.

Overall it is an important area of the law which was competently answered by a large number of candidates.

Question Two

The emphasis in answering this question should have been put on the concept of equitable remedies for breach of contract such as specific performance, interdict, cancellation or rescission and quantum meruit. It was also important for candidates to specify the various requirements and “conditionalities” that must be met before a particular equitable remedy can be granted.

A number of candidates included damages (incorrectly) among the equitable remedies, which they are not. The majority of the candidates answered this question quite well.

Question Three

Part (a) - It has been said by academic commentators that the essential purpose of the law of delict (tort) is to afford a civil remedy usually by way of compensation for wrongful conduct that has caused harm to others. The essence of delict law is that a person has certain interests which are protected by law and the law of delict or tort constitutes a body of liability rules. These rules signal when a person is to compensate another by the payment of damages or to be restrained from doing certain acts by way of an interdict or injunction. Overall this question was very well answered.

- (a) Part (b) - Passing off is a form of deception that consists of taking unfair advantage of a trade reputation that the plaintiff has built up. This delict is committed when the defendant by means of a misleading name, mark or description or otherwise represents that his business or merchandise is that of another so that members of the public are misled. Both parts (a) and (b) were answered extremely well by the majority of the candidates. The tendency to answer an unasked question was again in evidence when a tiny minority of candidates wrote about contributory negligence instead of passing off.

Question Four

The question required an appreciation by candidates of the general principles of law that govern the liability of both the principal and the agent towards third parties. Very few candidates encountered difficulties in answering this particular question and there was an impressive array of case law that was cited by many candidates.

Question Five

Part (a) - This question dealt with how partnerships are established and was virtually correctly answered by the overwhelming majority of the candidates.

- (a) Part (b) - This question was on how partnerships can be terminated and most candidates answered this question correctly.

In both parts (a) and 5(b) the common law position governing the creation and termination of partnerships was correctly spelt out and relevant case law was cited. However it is important to point out that, unlike with other jurisdictions, Zimbabwe has no Partnership Act and our law represents the common law position.

Question Six

Part (a) - Candidates had a wealth of information on the various classes of shares and the answers were of a very high standard indeed.

- (a) Part (b) - A significant number of candidates found this particular question very challenging and some of the answers were rather deficient. A debenture means a document which either creates a debt or acknowledges it and basically we are looking at loan capital that is given to a company at a specified rate of interest. Debenture holders are entitled to their specified interest on the due date, whether or not the company has made any profits.

Question Seven

Part (a) - Most of the candidates appreciated the centrality of the office of the company secretary. The office of the company secretary is a statutory one in terms of the Companies Act [Chapter 24:03] and it is literally the administrative hub and nerve centre of the company's various activities. The secretary is responsible for keeping the statutory books, submitting the annual returns to the Registrar and ensuring compliance with the various administrative and statutory obligations in terms of the Companies Act [Chapter 24:03].

Part (b) (i) & (ii) - These particular questions presented challenges to a number of candidates and most of the answers were unsatisfactory.

An ordinary resolution is one that is passed in the ordinary way by a simple majority of votes cast in person or by proxy and entered in the minute book by the company secretary on behalf of the chairman. On the other hand, a special resolution is a resolution which has been passed by not less than three-fourths of such members entitled to vote as are present in person or by proxy at a general meeting of which not less than 21 days' notice has been given, specifying the intention to propose the resolution as a special resolution and the reasons for it and at which members holding in aggregate not less than one-fourth of the total votes of the company are present in person or by proxy (s.133 Companies Act, Chapter 24:03). A declaration by the chairman that an ordinary or special resolution has been carried is conclusive unless a poll is demanded.

Special resolutions are necessary for the following purposes, among others:

- (a) change of the company's name (s.25).
- (b) to alter the articles of the company (s.20)
- (c) to alter the memorandum (s.20)
- (d) to reduce the share capital of the company with the leave of court (s.92)
- (e) to increase the share capital of the company (s.87)
- (f) voluntary winding up of the company (s.24(b))
- (g) winding up of the company by the court (compulsory) (s.206(a)).

Question Eight

The invitation to submit tenders by Northern Star Investments (Ltd) constituted an invitation to treat. In **Spencer v Harding (1870)** the court held that as a general rule a request for tenders is an invitation to treat. Mamhepo's bid constituted a firm offer, which he subsequently withdrew or revoked before acceptance had been done by Northern Star Investments. The revocation complied with the requirements of the law in that among other things it was done before valid acceptance of the offer was done and it was brought to the notice of the offeree.

Most candidates were able to correctly cite the case of **Crawley v Rex (1909)**, which seems to be very apposite and relevant in this instance. This problem type question was answered very well by the majority of the candidates.

Question Nine

The problem encompasses various issues pertaining to employment law. Essentially we are looking at breach of employment contracts by Tambaoga Investments through unfair labour practices, constructive dismissal and the remedies that are available to the aggrieved employees. An important case like **POSB v Chimanikire and Others (2005)** was cited by a number of candidates whilst many candidates opined that James could seek reinstatement after having been unfairly dismissed. Sight should not be lost of the very important case of **Hama v NRZ (1997)**.

In that case it was stated that at common law an employer cannot be compelled to retain in employment an employee with whom the employment relationship has soured beyond redemption. The question was competently answered by the majority of candidates.

Question Ten

Most candidates were able to identify the various legal issues at stake, particularly a director's fiduciary obligations towards the company. It is incumbent upon directors to exhibit utmost good faith, and to avoid a conflict of interest situation from arising. Similarly it is the duty of directors to avoid making a secret profit at the expense of the company. Company law literature is replete with case law that illuminates and illustrates the concept of fiduciary duties that are owed by the directors towards the company.

Most candidates illustrated their answers with an impressive array of such cases and by and large the answers were very impressive.

Clearly the directors in this case have seriously transgressed.