Examiner's report

F4 Corporate and Business Law (ZWE)
December 2013

General Comments

In general the candidates who sat for the December 2013 paper F4 (ZWE) showed clear evidence of being adequately prepared. The overall performance was impressive and it is quite clear that comments that have been previously made by the examiner have been of some benefit to a significant number of candidates.

A few of the candidates showed adequate preparedness on sections or portions of the paper and regrettably were unable to answer the rest of the examination question paper. Candidates are encouraged to prepare for the examinations by studying the syllabus in its entirety. Since all the 10 questions are compulsory selecting favourite topics at the expense of the rest is rather unhelpful.

Questions 1 to 7 are exclusively 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. The answer can be brief in words but broad in content. An answer for both essay type and problem type questions would be incomplete if it has not been underpinned by case law or relevant statutory references.

The rest of the question paper (question 8 – 10) comprises of problem type questions. In dealing with such questions, what is of critical importance is for a candidate to have a legally sound answer. The conclusion reached must be supported by relevant and authentic authorities. There should also be a balanced treatment of factual and legal issues and a conclusion on the law should necessarily be drawn pursuant to a thorough discussion based on the factual issues at stake.

A number of standard issues and concerns arose in candidates' answers.

Some of the answers tended to be too brief and superficial. Equally some of the answers were too long and rather unwarranted when one considers the marks that were allocated for them.
A few candidates tended to cite incorrect cases. It is imperative that cases should be cited accurately.

Specific Comments

Question One

Part (a) on customary law attracted more marks (6) than part(b) on the common law which attracted 4 marks. However, a substantial number of candidates had more things to write about in relation to part(b) with fewer marks available than part (a). The most logical inclination would be to concentrate more on the question that attracts the higher marks.

Better answers underscored the dual nature of our legal system under which customary law exists side by side with the general law. It was pleasing to note that a significant number of candidates were able to cite the case of *Van Breda and Others v Jacobs* (1921). The case lays down the requirements that must be fulfilled as a binding rule of law, namely:

(1) the custom must be reasonable
(2) it must have existed since time immemorial
(3) the custom must be generally recognised and observed by the community
(4) the custom must not contradict any existing statute law.

In all, this question was satisfactorily answered.

Part (b) was very well answered by many of the candidates. The answers correctly pointed out that the common law of Zimbabwe in terms of the Constitution that was in force prior to May 2013 was predicated on s89 of the Constitution. It is accurate to say that the basis of our common law is Roman-Dutch law as long as it is borne in mind that some considerable aspects of our common law are derived from English law.

Question Two

Part (a) -Many candidates were able to explain satisfactorily the rules and principles which regulate the award of damages for breach of contract. One of the best known cases in our jurisdiction on damages is *Victoria Falls and Transvaal Power Corporation v Consolidated Langlaagte Mines Limited* (1915). In that case it was held that the sufferer by such a breach is entitled to be put in the position they would have been in had the contract been properly performed so far as that can be done by the payment of money and without undue hardship to the defaulting party. The loss for which damages are claimed must be sufficiently closely connected to the breach and must be presumed to have been within the contemplation of the parties at the time of the agreement.

Part (b) -On the whole this question was better answered than part(a) by the majority of the candidates. Specific performance is an equitable remedy and the courts will exercise a discretion in determining whether or not decrees of specific performance should be made. The famous cases of *Farmers Co-op Society v Berry* (1921) and *Shakinovsky v Lawson and Smulowitz* (1904) list a number of situations when specific performance might not be granted viz;

(1) where damages would adequately compensate the injured party
(2) where it is impossible to effect the specific performance
(3) where the subject matter of the contract involves the rendering of services of a personal nature
(4) where the order would cause undue hardship on the defaulting party or the public at large (*Haynes v King Williamtown Municipality* (1951)).

The performance of the majority of the candidates was satisfactory.

Question Three

The overwhelming majority of the candidates showed an impressive appreciation of the main duties placed on the parties to a contract of employment (employer and employee). Some of the answers tended to be too bulky to the detriment ultimately of questions that still needed to be answered.

The art of time management is very essential for candidates to master. It would have been useful to cite relevant case law and statutory provisions.

Question Four

The question was based on the law of partnership which in our jurisdiction is exclusively based on the common law. It is completely untrue to say (as some candidates suggested that there is a Partnership Act, (as is the case with some other jurisdictions) which regulates the activities of partners in Zimbabwe.

Part (a) -In relation to this question it was necessary to underscore the point that each partner becomes the agent of each of the other partners for purposes of carrying on the partnership business and each partner has authority to do all acts incidental to the proper conduct of the business. The partners have implied authority to bind each other in so far as partnership business is concerned unless there is an express agreement to the contrary. At the same time a partnership is not bound by the acts of a partner which are beyond the powers or scope of the partnership, *Stein v Garlick and Holdcroft* (1910).

Part (b) -The majority of the candidates did not have a problem with this question and it was very well answered.

Question Five

Part (a)(i) -A rights issue occurs where the company offers a new issue of shares to its existing shareholders in proportion to their current shareholding. Rights issues are usually offered at a discount to the market price of the shares. A significant number of candidates wrongly stated that a rights issue is offered to members of the public as is the case with an Initial Public Offer.

Regrettably this question was incorrectly answered by a significant number of candidates.

Prat (a)(ii)-The majority of the candidates correctly defined the concept of selling shares at a premium and many candidates correctly identifying s74 Companies Act [Chapter 24:03] as the appropriate statutory provision. It was also important to mention the fact that a sum equal to the aggregate amount or value of the premiums on those shares has to be transferred to an account called the share premium account, which can only be used in clearly defined and circumscribed situations.

Part -(b)-Virtually every candidate knew the law relating to the distribution of dividends.

> Article 16 of table A of the Companies Act [Chapter 24:03] which reads:
> "No dividend shall be paid otherwise than out of profits."
> was cited by many. A negligible number of candidates had problems with this question.

Question Six

Part (a)-The objects clause is one of the most important organs of the memorandum of association and it defines the parameters within which the company may engage in business and anyone dealing with the company can verify and ascertain the legality or otherwise of a particular contract by looking at the company's objects clause. Many candidates were able to discuss meaningfully the limited operations of the ultra vires doctrine in Zimbabwean law in light of s10 Companies Act [Chapter 24:03].

The question was reasonably competently answered by the majority of the candidates.

Part (b) -This question carried 6 marks. A large number of the candidates appreciated the fact that one needs a special resolution to amend articles of association. Many candidates mentioned s133 Companies Act [Chapter 24:03], which deals with the technical requirements pertaining to the passage of a special resolution in general terms. However only a few candidates were able to combine s133 with s20 which specifically mentions three ways in which articles of association of a company can be altered, namely;

(i) by deleting an article
(ii) by deleting and replacing an article
(iii) by inserting a new article.

Very few of the candidates were able to cross link s133, which deals with the enactment of special resolutions in general and s20, which deals with the alteration of articles of association.

Question Seven

This question deals with the duties of directors. The answers tended to be good and comprehensive. However a few candidates tended to concentrate on the common law duties of directors and neglected the statutory duties. It was necessary to have a balanced answer and in the main, answers were satisfactory.

Question Eight

Part (a) -The question that needed to be determined by candidates is whether or not that not attending the Five Seasons Hotel for dinner on the 14th February 2013 by Joe and Ketty, constituted a breach of contract or not. The reservation they made for a table for two on Valentine's Day constituted an invitation to treat rather than a firm offer *Crawley v Rex* (1909). The court put it very succinctly in *Glass Service Company v State Farm Mutual*

Auto Insurance Company Ltd (1995). The court said 'we do not believe people intend to be legally bound when they make reservations at a restaurant, or schedule appointments to have their car repaired, their hair cut, or their teeth checked. Nor is it likely that the providers of such services perceive the customers to be bound or intend to be legally bound themselves by scheduling appointments.' Therefore Joe and Ketty are not liable to pay anything to the Five Seasons Hotel as there was no concluded contract between them and the hotel.

This question was inadequately answered by the majority of the candidates. The incorrect conclusion they arrived at was that there was a binding contract between Joe and Ketty, and the Five Seasons Hotel.

Part (b) -It can be said that when applying the foreseeability test on negligence and duty of care as pronounced in the well-known English case of *Donoghue v Stevenson* (1932), it is quite clear that the City Council as the local authority in charge of road maintenance and street lighting owed Gamu and other citizens a duty of care.

In *Norman v High Construction* (1975) gravel dumps were left on the road. A motorist hit one of these. The company was held liable as it had taken totally inadequate steps to warn motorists of the hazard and in *Cape Town Municipality v Paine* (1952) the Municipality had leased a sport ground. In terms of the lease, the Municipality retained the duty to repair grandstands. A spectator was injured when a plank on a grandstand broke. The Municipality was held liable.

In light of the decisions in the above mentioned cases, it is quite clear that the City Council of St Thomasburg is liable to Gamu for damages occasioned to her car as a result of the City Council's negligence in failing to maintain roads falling under their jurisdiction. Gamu is likely to be awarded by the court $1 000, which is the cost of the repairs to her car.

The majority of the candidates answered this question very well.

Question Nine

In summary, the situations under which a provisional judicial management order in Zimbabwe will be granted are as follows:

(i) where the company is unable to pay its debts;
(ii) where there is mismanagement of the company;
(iii) where the company is probably unable to meet its obligations;
(iv) where the company is prevented from becoming a successful concern;
(v) where it is just and equitable;
(vi) if the company is placed under judicial management, the grounds for is winding up may be removed and it will become a successful concern.

It should be emphasised that a provisional judicial management order is instituted primarily to protect the company. Anyone applying for such an order must generally prove that it is necessary and that the company is better off under judicial management than not. In the exercise of its discretion in terms of s.300 Companies Act [Chapter 24:03], the court is empowered to look into several factors without restrictions provided this is done for the good of the company and all interested parties. In *Tobacco Auctions Ltd v A.W. Hamilton* (1966), the court considered the extent and scope of the business activities of the company, its assets and liabilities and the nature of its difficulties as relevant factors in deciding whether judicial management proceedings apply to very small companies.

The facts of the case clearly show that there has been gross mismanagement of the company, poor corporate governance systems and an extravagant use of the company's resources. The company's trading prospects are not hopeless and if surrendered into the hands of capable managers, there is a probability that Machira Investments (Pvt) Ltd can be nursed back to vitality and profitability.

On the facts of the case, it would appear that the prospects of success in having the company placed under provisional judicial management are very good. An appreciable number of candidates gave satisfactory answers.

Question Ten

In the instant case it is quite clear that the benefits which Ripai received (an all-expenses paid holiday for two people) were meant to be a "kickback" for facilitating the award of a tender to construct the largest shopping mall in Harare to Blue Tooth Investments (Pvt) Ltd.

The crime of bribery is the practice of tendering and accepting a private advantage as a reward for the performance of a duty. Section 170(1) Criminal Law (Codification and Reform) Act [Chapter 9:23] criminalises bribery. The legislature takes a very dim view of the crime of bribery such that s.170(1) provides for imprisonment of up to 20 years.

Bribery corrodes the moral fibre of society and undermines good public administration, investment opportunities and sound business practices and ethics.

Clearly the actions of Ripai are in contravention of both the Prevention of Corruption Act [Chapter 9:16] and the Criminal Law (Codification and Reform) Act [Chapter 9:23] Chapter IX (Bribery and Corruption). Both James and Ripai are liable for bribery and corruption and stern sanctions of up to 20 years imprisonment might be vested upon them.

This question posed very few problems to the majority of the candidates and it was very well answered.