Examiner's report

F4 Corporate and Business Law (ZWE)
June 2013

General Comments

In general, many candidates who sat for the June 2013 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 unfortunately 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 core 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 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 good 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 meaning 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.

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.
In terms of examination technique, it is imperative that candidates understand the question first so that they avoid the possible pitfall of answering an unasked question. But generally the examination technique was good and there was no evidence of time pressure.

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 rather 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 detailed.

A few candidates tended to cite wrong cases altogether when discussing certain legal concepts. Other candidates 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 definitive 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.

Specific Comments

Question One

The question was split into two parts. Both parts were answered very well. Part(a) referred to the hierarchy of the courts whilst part (b) referred to the criminal and civil jurisdiction of the High Court. Some candidates either omitted to write about the civil jurisdiction and concentrated on the criminal jurisdiction. Others made exactly the same mistake but in a vice-versa manner (omitting the criminal jurisdiction instead). It was important for candidates to canvass both aspects of the question.

In summary it can be said that the jurisdiction of the High Court both civil and criminal is unlimited. However in criminal cases it is possible that certain statutory offences have prescribed (be it minimum or maximum) fines or terms of imprisonment. The death penalty is also available in treason and murder cases where there are no extenuating circumstances in cases in which the accused is an adult male.

Question Two

Part (a), which required candidates to explain the meaning and effect of exemption clauses, was generally competently answered by the majority of the candidates. However part (b) that required candidates to explain how the courts control exemption clauses posed a challenge to a significant number of candidates. As a matter of public policy, the courts tend to mitigate the harshness of exemption clauses through a narrow and strict interpretation generally in favor of the party against whom the clause operates.

Question Three

This question relates to how an agency relationship comes about. Parts (a) express actual authority, (b) implied actual authority, (c) ratification were all very well answered by the majority of the candidates. However parts(d) agency of necessity and (e) agency by estoppel - apparent or ostensible authority, were not particularly well answered. Agency of necessity arises by operation of law in certain cases where a person is faced with an emergency in which the property or interests of another person are in imminent jeopardy. It becomes necessary in order to preserve the property or interests to act for that person without their authority.

Unlike a proper agent, a *negotiorium gestior* is not entitled to any remuneration for their services save their necessary and useful expenses. However though not entitled to remuneration, they are still delictually liable, if they cause loss to the principal by negligence in their voluntary administration of the principal's affairs.

In summary, the following issues relating to agency of necessity need to be highlighted:

i. It is necessary to show that the agent was unable to obtain instructions from their principal;
ii. The agent must satisfy the court that they acted in the interests of the principal in a *bona fide* manner;
iii. The action taken by the agent must have been reasonable and prudent in the circumstances;
iv. There must be some necessity or emergency to compel the agent to act in the way in which they did.

Equally, agency by estoppel exists where a third party holds the principal liable on contracts entered into by the third party and the ostensible agent of the principal, if the principal's conduct is such that it amounts to a representation that the ostensible agent has authority from the principal, and that the third party had been induced to contract with the ostensible agent on the strength of such conduct.

Under this particular situation, there is no actual authority conferred on the ostensible agent by the principal who is simply estopped from denying that the ostensible agent has authority. This is called agency by estoppel.

The principle of agency by estoppel was clearly enunciated in the celebrated case of *Monsali v Smith* (1929). In that case it was held that a person who seeks to set up agency by estoppel must establish that:

i. There was a representation by the principal;
ii. The representation was of such a nature that it could reasonably have been expected to mislead them;
iii. They acted on the faith of the representation;
iv. They were prejudiced by relying on the representation.

Question Four

This question was on the (a) duties of an auditor, (b) (i) the appointment of an auditor and (ii) the disqualification for appointment as an auditor. All the sub questions were very well answered by the candidates. A significant number of candidates were able to quote specific provisions of the Companies Act, Chapter 24:03, particularly Sections 150, 151 and 152 pertinent to auditors.

Question Five

The question specifically related to capital maintenance and dividend law. The question was impressively answered by most candidates. Some answers were able to specifically mention the various provisions in the Act that are meant to preserve the share capital structure of a company such as;

(a) Prohibition of financial assistance by the company for the purchase of its own or its holding company's shares – s.73
(b) Application of the share premium account – s.74
(c) Power to issue shares at a discount – s.75
(d) Prohibition of loans to directions – s.177
(e) Prohibition of company from purchasing its own shares – s.78

In so far as dividend law is concerned it was important it was of critical importance for candidates to cite the provisions of Article 116 of Table A of the Companies Act, Chapter 24:03 which say, "no dividend shall be paid, otherwise than out of profit…" Article 114 which reads as follows, "the company in general meeting may declare dividends but no dividend shall exceed the amount recommended by the directors…" is equally instructive.

Question Six

Part (a) relates to the principle of separate personality of a company upon incorporation. One of the fundamental principles upon which corporate law is predicated is the concept of separate personality. It is now universally accepted that once a company is legally incorporated it must be treated like any other independent person or entity with rights and liabilities appropriate to itself. Cases like *Salomon v Salomon and Company* (1987) *Lee v. Lee's Air Farming (Pvt) Ltd* (1920) and *Dadoo V Krugerdorp Municipality* (1960) would have been useful to cite. On the whole part (a) was answered well.

(a) In part (b) very few candidates were able to give specific instances both common law and statutory, involving the "lifting" of the corporate veil – in other words situations when the courts will disregard the concept of separate personality of a company.

Apart from the well-known common law exceptions, there are numerous statutory exceptions dealing with "lifting" of the corporate veil.

Question Seven

Part (a) was very well answered indeed. It deals with specific circumstances spelt out under s.206 dealing with the winding up of companies by the court (compulsory winding up).

Although part (b) (an explanation of judicial management as an alternative to winding up) was not as well answered as part (a) by many candidates in the main the answers were relatively satisfactory.

In the case of *Lief v. Western Credit (Africa) Ltd* (1963) Synman observed that a winding up order in its nature is intended to bring about the dissolution of the company whereas the purpose of the judicial management order is to save the company from dissolution. Some of the answers made reference to s.300 Companies Act 24:03.

Question Eight

Overall, the majority of the candidates were able to identify the delict of passing off by Uchi Delights. In *Capital Estates and General Agencies v. Holiday Inns Incorporated and Another* (1977) the court said, "the wrong known as passing off consists of a representation by one person that his business or merchandise as the case may be is that of another or that it is associated with that of another..." This delict falls under those relating to unlawful trading practices. In *Policansky Bros Ltd v. L & H Policansky* (1935), the court in explaining the source of our

law of passing off said, "The Roman-Dutch law was well acquainted with the general principle that a person cannot, by imitating the name, marks or devices of another, who had acquired a reputation of his goods, steal the former's trade secrets …" The majority of candidates were able to identify the appropriate legal remedy available to Huchi Delights, namely interdict and damages.

Question Nine

Part (a), which pertains to employment law, was satisfactorily answered by the majority of the candidates. From the facts of the case, it is clear that Maria's fears for her health were not foolish or unreasonable but very genuine. Reinstatement would be the most appropriate remedy under the circumstances. Even if the court were to make a finding (which is very unlikely) that there was a willful disobedience to lawful orders, the circumstances surrounding Maria'a case are highly mitigatory and no reasonable court or tribunal would be dismissive of her fears and claims. All things considered, the prospects of reinstatement as a remedy available to Maria are high.

Part (b) dealt with retrenchment and was reasonably well answered by many of the candidates. From the facts it is clear that, *prima facie,* John and Samson will have no remedy against the looming retrenchment if it is subsequently carried out. However, if the employer does not follow the procedure provided for the Act, the workers will be entitled to approach the court for a remedy against unfair dismissal. To be substantively fair, the reasons for retrenchment must be valid, not inherently unfair and fall within the definition of "retrench", reducing expenditure costs. If this is the paramount reason, then the requirements of fairness dictate that the employer must produce evidence showing that it is "factoring" in overall costs and not just labour costs. Further, the cuts must not only be aimed at the ordinary workers, but other categories of employees including supervisory and managerial employees. On the issue of technological changes, the employer has to show that technological changes resulting in loss are a last resort absolutely necessary for the survival or reasonable profitability of the firm.

In conclusion, it can be said that the facts of the case disclose a *prima facie* case in favour of retrenchment and therefore John and Samson might find it extremely difficult to fend off retrenchment. The answers were generally satisfactory.

Question Ten

This question dealt with a director's duties towards the company. A director owes the company a number of common law and statutory obligations. The most familiar duties of a director can be conveniently and usefully be broken down into the following categories:

(1) fiduciary duties
(2) the duty to exercise powers *'bona fide* in the company's interest'
(3) the duty not to make 'secret profits'
(4) the duty not to have personal interests conflict with those of the company
(5) the duty to disclose
(6) the duty of care and skills
(7) the duty to act *intra vires* the company's statutes (memorandum and articles of association).

An analysis of the facts of the problem shows that Jongwe as managing director of Hatcho (Pvt) Lts breached a number of obligations, (particularly the fiduciary duties), which he owed the company.

The company has a wide array of remedies, including dismissal and damages available to it. In the main, this question was well answered.