

**ADMISSION EXAMINATION / TOELATINGSEKSAMEN
ATTORNEYS' PRACTICE / PROKUREURSPRAKTYK
PART 3 / DEEL 3**

16 OCTOBER / OKTOBER 2018

ANSWERS / ANTWOORDE

**PLEASE NOTE THAT THE GUIDELINE ANSWERS TO PREVIOUS PAPERS MAY NOT BE
A CORRECT REFLECTION OF THE LAW AND/OR PRACTICE AT THE MOMENT OF
READING.**

NOTE TO EXAMINER: *This guideline records the views of the drafters. There may be justifiable variations in practice which are brought out in the answers. When this happens the examiner should apply his discretion in marking the answer.*

QUESTION 1 **[11]**

You enquire whether the debtor has acknowledged liability (1), has been overseas (1) or creditor has been in a position which interrupts or stays prescription (2). You explain that while payments may be received (1), legal action can be resisted by a special plea (1). If creditor proceeds and the plea is not raised, the presiding officer may not do so *mero motu* (1). It is often well worth proceeding with letter of demand and summons (1). If the plea is raised creditor can withdraw while costs are still limited (1). The Prescription Act. The National Credit Act prohibits summons in some cases (2).

QUESTION 2 **[4]**

Claim A is	R90 000	
60% thereof is		R54 000
Claim B is	R100 00	
40% thereof is		R40 000
A is thus awarded a net		R14 000
Contingency fee 20% (one fifth)		R2 800

QUESTION 3 **[19]**

- | | | |
|-----|-------------------------|-----|
| 3.1 | The small claims court; | (1) |
| 3.2 | A High Court; | (2) |
| 3.3 | The CCMA; | (2) |
| 3.4 | CIPC; | (1) |

- 3.5 The Master of the High Court who may appoint a magistrate; (2)
- 3.6 The Maintenance Court; (2)
- 3.7 The Law Society (Assessment Panel); (2)
- 3.8 The Attorneys Fidelity Fund and Law Society (LPC); (3)
- 3.9 Sue the attorney in the appropriate court. The attorney may approach the AIF and his own indemnity insurers. (2)
- 3.10 The Master of the High Court; (1)
- 3.11 The Magistrate's Court. (1)

QUESTION 4 [10]

- A written contract entered into by a person who is acting on behalf of a company that does not as yet exist; (1)
- With the intention that once the company comes into existence the company will be bound by the contract; (1)
- Once the company is incorporated the board of directors may, within three months after the date of incorporation (1), completely, partially or conditionally ratify or reject any pre-incorporation contract (1); (2)
- When this three-month period expires the company will be deemed to have ratified the agreement; (1)
- But: all persons who enter into a pre-incorporation contract will be jointly and severally liable for liabilities created if: (1)
 - the company is not incorporated or (1)
 - once incorporated, the company rejects any part of the agreement (1)
- Unless the company enters into an agreement on the same terms as, or in substitution for the agreement entered into prior to its incorporation. (1)
- IF the agreement is rejected, the person who will incur liability in terms of the agreement will be permitted to recover from the company any benefit that the company has received in terms of the agreement. (1)

QUESTION 5 [22]

- (a) VAT
- 1.1 Both parties are registered as vendors under the Value Added Tax Act.
- 1.2 The business is sold as a going concern and is, therefore zero rated for the purposes of Value Added Tax.
- 1.3 All the assets required for the conducting of the business, are included in the sale.
- 1.4 The business is capable of earning income separately from all other businesses.

1.5 Should this transaction not be Zero Rated for any reason, then the buyer will pay the Value Added Tax and re-claim the input Value Added Tax from the South African Revenue Services.

(5)

(b) DETERMINATION OF COST PRICE OF STOCK

2.1 The seller and the buyer shall jointly take stock at the close of business on the day before the effective date. Any items which are not marketable for any reason must be excluded from the sale unless the parties agree otherwise.

2.2 The seller's invoices and statements of account in respect of the stocks will constitute *prima facie* proof of their cost price.

2.3 If the seller is unable to provide satisfactory proof of the cost price of any item, it must be determined by reference to the supplier, whose determination will be binding upon the parties.

(5)

(c) PROTECTION OF GOODWILL AND ASSISTANCE TO BUYER

3.1 The seller shall not, for a period of 3 (three) years commencing on the effective date, carry on or be interested in, directly or indirectly, the business of a restaurant in the magisterial district of The seller acknowledges that this restraint is reasonable as to subject matter, duration and geographical area.

3.2 The seller shall, during the period preceding the effective date,

3.2.1 instruct the buyer on his (the seller's) business methods and the running of the business generally,

3.2.2 give the buyer complete access to every facet of the business and, in particular, to any records relating to customers and all recipes used in the business.

3.3 The seller will not be entitled to any remuneration for assistance given to the buyer in terms of 3.2.

(6)

(d) WARRANTIES BY SELLER

4. The seller warrants that

4.1 he is, or by the effective date will be, the sole owner of the assets being sold and entitled to transfer them to the buyer;

4.2 he has duly complied with the provisions of the Liquor Act 1977, that the liquor licence in respect of the premises is valid and free of any endorsement, and that he has not been given notice in terms of the Liquor Act to perform remedial or other work on the premises;

- 4.3 the unaudited financial statements of the business prepared for the period ending 28 February 2019 and disclosed to the buyer were drawn up according to generally accepted accounting principles, and fairly reflect, as at that date, the assets and liabilities of the business and the results of its trading operations.
- 4.4 he has disclosed to the buyer all information in his possession which would be material and relevant to an intending purchaser of the business. (6)

QUESTION 6

[9]

- 6.1 The rental payable by the tenant to the landlord throughout the period of this lease shall be as follows:
- 6.1.1 R2 000 p.m. for the first year of the lease;
- 6.1.2 on the first anniversary and thereafter on each subsequent anniversary the rental shall escalate by an amount equivalent to 10% of the rental payable during the month immediately preceding the anniversary date.

(NOTE TO EXAMINER: Candidate may specify and calculate rental over 5 years as well)

The rental shall be payable monthly in advance, without deduction or set off by not later than the 7th day of each month. (5)

- 6.2 The tenant shall be entitled to renew this lease for a further period of 5 (five) years provided
- (a) the tenant has faithfully complied with the terms and conditions of this lease.
- (b) the landlord should have been given three months' written notice of the tenant's intention to renew the lease.
- (c) The terms of the lease shall apply *mutatis mutandis* during the renewal period. (4)

QUESTION 7

[11]

Note: too many examples indicate lack of understanding or of drafting ability

- 7.1 A person who displays the characteristics of honesty, integrity and reliability. (1)
- 7.2 Anything which is likely to affect your judgment adversely in advising or representing your client. (1)
- 7.3 Overreaching is abusing the ignorance of another in recovering excessive amounts from clients or debtors containing an element of impropriety. (1)

- 7.4 Documents on which the attorney has bestowed skill and labour. (1)
- 7.5 The Fund was established to reimburse members of the public who have suffered financial loss through the theft by an attorney, his employee or candidate attorney of funds or goods entrusted to that attorney. (2)
- 7.6 It is a rule of evidence that an attorney may not disclose to the court without the consent of the client information given to him for purposes of legal advice or representation. (2)
- 7.7 Lack of expertise/qualification/experience (1); danger of a conflict of interest (1); mandate to do or assist in the doing of something illegal or improper (1).

QUESTION 8

[3]

- Insulting or threatening a magistrate/judge.
- Showing disrespect to a magistrate/judge.
- Wilfully interrupting or disturbing court proceedings.
- Defying the rulings or directions of a magistrate/judge.
- Failure to appear in court.
- Destroying relevant documents.
- Breach of court orders.
- Contravening sub judice rule.

(½ mark each maximum 3 marks)

QUESTION 9

[7]

Having satisfied him/herself of the identity of the deponent the commissioner of oath must ask the deponent whether he/she knows and understand the contents of the affidavit; must ask the deponent whether he/she has any objection to taking the prescribed oath; must ask the deponent whether he/she regards the oath as binding on his/her conscience. If the deponent has an objection to taking the oath, he/she may make a solemn declaration. The affidavit or solemn declaration is then signed in the presence of the commissioner of oaths, who also signs it. A certificate must be added to the bottom of the document, confirming that the document was signed and attested to before him/her. The affidavit must contain the full names, physical address and authority of the commissioner of oaths.

QUESTION 10

[4]

- 10.1 Yes. (½)
- 10.2.1 Yes, it is an Incidental Credit Agreement (i.t.o. s1, NCA). (½)
- 10.2.2 No. (½)
- 10.2.3 No, court accepted without discussing the definition of Lease in the NCA, that section 8 of the NCA excludes rentals i.r.o. immovable property. (½)
- 10.3 No. (1)

10.4.1 No, the NCA only applies to a credit guarantee if that guarantee is in respect of a Credit Facility or Credit Transaction. (½)

10.4.2 Yes, as it guarantees an instalment sale which is a credit transaction in terms of s8(4)(c) NCA. (½)

TOTAL: [100]



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