

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

22 AUGUST / AUGUSTUS 2019

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 _____ **[6]**

She should make use of the provisions of Rule 43 (High Court) to apply for:

- a. Interim maintenance for herself and children;
- b. A contribution to costs;
- c. Interim custody;
- d. Access, if applicable.

The rule limits the costs and the order is not appealable.

QUESTION 2 _____ **[5]**

Section 197: (any 5 of the following)

- a. The purchaser is automatically substituted in the place of the old employer;
- b. This can only be avoided by a written agreement;
- c. All rights and obligations that existed at time of transfer continue in force;
- d. Anything done by the old employer is considered to have been done by the new employer;
- e. Any new terms and conditions (e.g. pensions) must be no less favourable than before;
- f. Dismissal by reason of transfer is automatically unfair;

Old employer remains jointly liable for any claims arising from dismissal within 12 months for operations reasons.

QUESTION 3 _____ **[4]**

The requirements for an interim interdict are:

- a. A prima facie right;
- b. Irreparable harm;

c. The balance of convenience must favour the applicant;

There must be no alternative remedy.

QUESTION 4 **[4]**

The rules provide for:

- a. Edictal citation if process is to be served outside the RSA (Rule 5: High Court); or
- b. Substituted service if the person is in the RSA but exact whereabouts unknown.
Rule 4(2) authorises the Court to give suitable directions as to service.

QUESTION 5 **[8]**

- 5.1 Operation requirements arising from economic; technological; structural or similar needs are recognised as grounds for dismissal. (2)
- 5.2 The employer must avoid or minimise terminations e.g. stop hiring; stop overtime; offer voluntary retrenchment; or early retirement; reduce working hours. (6)

QUESTION 6 **[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 7 **[4]**

- 7.1 Yes. (½)
- 7.2.1 Yes, it is an Incidental Credit Agreement (i.t.o. s1, NCA). (½)
- 7.2.2 No. (½)
- 7.2.3 No, court accepted without discussing the definition of Lease in the NCA, that section 8 of the NCA excludes rental i.r.o. immovable property. (½)
- 7.3 No. (1)
- 7.4.1 No, the NCA only applies to a credit guarantee if that guarantee is in respect of a Credit Facility or Credit Transaction. (½)

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

QUESTION 8 **[11]**

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

- 8.1 A person who displays the characteristics of honesty, integrity and reliability; (1)
- 8.2 Anything which is likely to affect your judgment adversely in advising or representing your client; (1)
- 8.3 Overreaching is abusing the ignorance of another in recovering excessive amounts from clients or debtors containing an element of impropriety; (1)
- 8.4 Documents on which the attorney has bestowed skill and labour; (1)
- 8.5 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)
- 8.6 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 purpose of legal advice or representation. (2)
- 8.7 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 9 **[20]**

ARBITRATION

Any dispute, difference, impasse, or deadlock between the parties pursuant to this agreement must be referred to arbitration in terms of the rules and regulations of the Arbitration Foundation of South Africa ("AFS").

Please note that arbitrations before AFSA are not mandatory, and parties may choose a different form of arbitration, where the clause appears as follows:

"1 Arbitration

- 1.1 should any dispute arise between the Parties in regard to:
- 1.1.1 the interpretation of;
 - 1.1.2 the carrying into effect of; or
 - 1.1.3 the Parties' respective rights and obligations in terms hereof; or
 - 1.1.4 the rectification of; or
 - 1.1.5 the termination or arising out of the termination of; or
 - 1.1.6 any question as to whether a valid and binding agreement was concluded between the Parties or whether such agreement is of legal force or effect; or
 - 1.1.7 any other matter whatsoever emanating from this Agreement; (3)

that dispute shall be submitted to and finally settled by arbitration. (1)

1.2 Any Party to this Agreement may demand that a dispute be settled in terms of this clause by giving written notice to the other Party. (1)

1.3 This Clause 1 shall not prevent a Party from obtaining relief on an urgent basis from a competent court, pending the decision of the arbitrator. (1)

1.4 That arbitration shall be held:

1.4.1 In Pretoria and at the Brooklyn Advocates' Chambers; (½)

1.4.2 With only the Parties and their representatives, present thereat; (1)

1.4.3 Mutatis mutandis in accordance with the Rules promulgated in terms of the Supreme Court Act, No 59 of 1959 and the uniform Rules of the High Court of South Africa, provided that no time period specified therein shall be longer than 10 court days for the purposes of the arbitration; (½)

1.4.4 Otherwise in terms of the Arbitration Act No 42 of 1965, it being the intention that the arbitration shall be held and concluded as soon as possible. (1)

1.5 The arbitrator shall, if the matter in dispute is principally:

1.5.1 a legal matter, be a practising counsel or a practising attorney of not less than 10 (ten) years standing; (1)

1.5.2 an accounting matter, be a practising chartered accountant of not less than 10 (ten) years standing;

1.5.3 any other matter, be an independent person qualified to hear and adjudicate upon such matter;

and shall be agreed to between the Parties to the dispute.

1.6 Should the Parties to a dispute fail to agree whether the dispute is principally a legal, accounting or other matter within 7 (seven) days after arbitration has been demanded, the matter shall be considered to be a legal dispute. (1)

1.7 Should the Parties fail to agree upon an arbitrator within 14 (fourteen) days after the arbitration has been demanded, then the arbitrator shall be appointed at the request of either of the Parties to the dispute by the President for the time being of the Law Society of (1)

1.8 The Parties irrevocably agree and undertake with each other that any award that may be made by the arbitrator: (1)

- 1.8.1 Shall be final and binding upon them; (1)
 1.8.2 Will be carried into effect: (1)
 1.8.3 May be made an order of court of the country to whose jurisdiction such Party to the dispute may be subject. (1)
- 1.9 The provisions of this clause constitute the irrevocable consent of the Parties to the arbitration proceedings in terms hereof and none of the Parties shall be entitled to withdraw therefrom or to claim at any such arbitration proceedings that it is not bound by the provisions of this clause." (1)

[Also note that consumer legislation such as the Rental Housing Act, 1999, the NCA, and the CPA introduces consumer tribunals and other ADR for which may also be made use of in such clauses. One must just be careful to read the various applicable statutes as there are limitations. (For example, the Rental Housing Tribunal does not have jurisdiction to evict tenants).]

QUESTION 10

[15]

- 10.1 • The seller and purchaser will do a stock taking together at close of business on the day preceding the effective date. All items which, for whatever reason are not marketable, will be excluded from the purchase except if the parties agree otherwise.
 • The seller's statements of account and invoices for stock will serve as proof of the cost price thereof.
 • If the seller cannot provide adequate proof of the cost price of any item, it will be referred to the supplier thereof for a determination and his determination will be binding on the parties.
 • The parties will reduce the cost price of the stock to writing and will sign the document.
 • The parties will take all reasonable steps and cooperate fully with each other to complete the stock taking and to calculate the stock taking and to calculate the cost price thereof before the effective date. (5)
- 10.2 The seller will not for a period of three years, calculated from the effective date, operate a business or have an interest direct or indirect in any restaurant business in the Magistrates District of Kuruman. The seller agrees that this restriction is fair and reasonable having regard to the nature of the business purchased, the duration thereof and the area to which it applies. (5)
- 10.3 I will advise the client to place an advert in the newspaper circulating in the area where the business is conducted in order to protect him against claims from creditors. Section 34 of the Insolvency Act makes provision for the advert. An omission to advertise could prejudice the purchaser in case the seller is sequestrated. (5)

QUESTION 11**[8]**

The introduction of FICA impinges upon the traditional role and independence of the attorneys' profession and upon the confidentiality of all communications between attorneys and their clients. Apart from having the duty to establish and verify the identity of clients and of their authority, they are obliged to keep detailed records of clients, business relationships and of transactions for a specified period; they are also under an obligation:

1. to make such records available to the Financial Intelligence Centre on the strength of a warrant;
2. to inform the centre on request of the existence of a current or past mandate;
3. to report cash transactions above a prescribed amount to the Centre; and
4. to report to the Centre the conveyancer in terms of a transaction with a client of cash above a prescribed amount to or through a specified account or institution.

QUESTION 12**[8]**

Dear X

On discovering that the claim of A had prescribed due to our negligence, I called A in and informed him of the position. While not admitting liability I advised him to consult another attorney to assert his rights. As you know we cannot continue to act in this matter (e.g. by taking the chance that the defendant will not raise a plea of prescription).

The client will no doubt get his new attorney to send us a letter of demand which I shall pass on to the Attorney Indemnity Fund. We are covered for amounts in excess of R200 000-00 and should be out of pocket in the worst case by no more than the excess payment of R20 000-00. I understand that the AIIF normally instructs their own attorneys to handle the matter and either to defend or settle same as they may be advised in consultation with us.

TOTAL: [100]