



PROGRAM: B ACC

MODULE: COMMERCIAL LAW 100

CODE: CML1B01

DATE: 5 NOVEMBER 2021 (08:30 – 11:30)

DURATION: 3 HOURS

TOTAL MARKS: 80

EXAMINERS: DR S HUNEBERG & DR W N NEL

MODERATOR: PROF J CALITZ

NO OF QUESTIONS: 6

MAIN EXAMINATION 2021

MEMORANDUM

INSTRUCTIONS

- The examination is an **online, open-book examination on Blackboard** and is **subject to all the normal rules and regulations of the University pertaining to formal assessments**. By answering this paper, you acknowledge and accept the University's rules on plagiarism and dishonest behaviour.
- You may use any printed, typed, photocopied or written material at your disposal to answer the questions, including digital versions of the textbook and study material. Quoting relevant sources shows that you have correctly identified the relevant legal principle, but where applicable, such legal principles must still be applied to the relevant case study to show competence and understanding. **Do not include irrelevant information** in your answer, as this detracts from the overall impression of your answer.
- You are **not** allowed to contact or exchange any information with any third party during the examination period. Your answers will be tested for plagiarism in general and in respect of the answers of other students.

- You are **not** allowed to use any internet sources.
- The exam paper will be made available on Blackboard from **08:29 – 11:30** on **5 November 2021**. The **deadline for submissions is strictly 11:30**, at which time the system will auto submit your answers.
- **You can prepare your answers on a separate Microsoft Word document, but only answers submitted on Blackboard will be considered.** Email submissions will only be accepted under exceptional circumstances.
- You have two submission attempts on Blackboard, should you encounter any unforeseen issues. However, **only your final submission will be marked. Answer all your questions on your final submission.** Do *not* submit a second submission unless there was a problem with the first submission.
- **Please read each question carefully and thoroughly before answering**, and make sure to obey the instructions of each question and take note of the marks allocated and approximate time required when answering each question.
- **Structure and layout of longer questions:**
 - Plan your answer so that it is **structured, coherent, relevant, and concise**.
 - The use of **correct legal language and terminology is essential**.
 - **Do not answer a long question in one continuous paragraph.**
 - **Divide sections of your answer into different paragraphs and *use bullet points, section headings, and digital highlights*, where appropriate.**
- Queries during the exam can be directed to Dr Huneberg at: (shuneberg@uj.ac.za) or Dr Nel (wnnel@uj.ac.za).

You **can** do this, good luck!

Question 1**[+/- 60 minutes]****[30]**

You are a chartered accountant at ABC Financial Advisors. One of your clients, T-Bone Restaurants (Pty) Ltd is in financial distress following the governmental restrictions placed on the hospitality sector during the Covid-19 pandemic. Briefly explain the various options available to your financially troubled client in terms of the Companies Act 61 of 1973 and the Companies Act 71 of 2008.

Expected answer:

A company in financial trouble/distress, has three options in terms of the Companies Act 61 of 1973 and the Companies Act 71 of 2008:

1. **Liquidation / winding-up** and subsequent dissolution of the company;
2. **Business rescue proceedings;** or
3. **A compromise with its creditors.**

Liquidation / winding-up and subsequent dissolution of the company (Max. 12 marks)

- Liquidation is the process of winding-up the affairs of a legal entity (company) before dissolution and can be used for solvent or insolvent companies.
- Insolvent companies are liquidated and wound-up in terms of the **Companies Act 61 of 1973** (the “Old Companies Act”).
- Winding-up procedures of insolvent companies will apply if the business is not able to pay its debts – meaning the *company fails the solvency and liquidity test*.
- The overall purpose of a *winding-up* is to allow for an orderly winding down of a company, in terms of which the company will:
 - i. **cease business operations;**
 - ii. **retrench the workforce** based on operational requirements;
 - iii. **realise its assets** (sell off assets)
 - iv. **distribute its assets to any creditors and pay off its debts;** and
 - v. **return any remaining assets to shareholders.**
 - vi. **After liquidation, the company must be terminated or “dissolved” (deregistered)** – this is however, a separate process.
- In order to avoid these severely detrimental consequences, **efforts to avoid the liquidation of companies are warranted** where possible.
- Therefore, **liquidation should be viewed as the last resort** where companies are in financial distress.

Business rescue proceedings

(Max. 14 marks)

- Regulated by the **Companies and Intellectual Property Commission (CIPC)** in terms of Chapter 6 of the **Companies Act 71 of 2008**.
- The **primary purpose** of Business Rescue is **to rehabilitate financially distressed (ailing/troubled) companies, which if given an opportunity, has a ‘reasonable prospect’ of being rescued and/or becoming solvent**. In order to achieve this purpose, business rescue has **one of the following two objectives (section 128(1)(b)(iii))**:
 - a. **to restructure the affairs of the company in an attempt to ensure that the company continues in existence on a solvent basis; or**
 - b. **if it is not possible for the company to so continue in existence, that the business rescue results in a better return for the company’s creditors and shareholders than would ordinarily result from the immediate liquidation of the company.**
- Therefore, **courts will generally give preference to Business Rescue** over liquidation proceedings.

- The **business rescue plan**, proposed by the **business rescue practitioner**, will arrange for the **reorganization and restructuring of the financially distressed company in an attempt to restore its profitability**.
- **To determine the suitability of business rescue**, consideration should be given to:
 - the **nature of the company**,
 - the **extent to which business rescue is the appropriate procedure** for that company and
 - the **extent to which business rescue would be more beneficial** for the company/creditors than liquidation.
- **Voluntary business rescue** allows the board of directors of the company to file a resolution with the CIPC to place itself under the supervision of a business rescue practitioner (BRP).
- The **test for whether a company should institute voluntary business rescue is two-fold**:
 1. Is there is a **reasonable prospect (reasonable possibility) of rescuing the company? AND**
 2. (2) Are there **reasonable grounds to believe that the company is financially distressed?**
- A company is “**financially distressed**” - sec 128(1)(f) - if:
 1. it appears to be **reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months (commercial insolvency); or**
 2. it appears to be **reasonably likely that the company will become insolvent within the immediately ensuing six months (factual insolvency).**
- If liquidation proceedings have already commenced, an application to court for **business rescue will suspend the liquidation proceedings** until the court has adjudicated on the application or until business rescue proceedings end.
- If **business rescue proceedings have commenced by way of an application to court**, the **company may not adopt a resolution for its liquidation** until business rescue proceedings have terminated.
- Solvency and liquidity test i.t.o. **liquidation** = A company will be said to be solvent and liquid if it **fails both factual and commercial solvency tests**.
- Test for financial distress i.t.o. **Business rescue** = A company will be financially distressed if it is **either factually or commercial insolvent**.

A compromise with its creditors

(Max. 6 marks)

- Regulated in terms of **section 155 of the Companies Act 71 of 2008**

- When a company is in financial distress, the board of directors, or its liquidator (if it is being wound up), may propose an arrangement of a compromise of its financial obligations to all its creditors (or to the members of any class of its creditors), to the effect that creditors write off a percentage of the amounts owing to them or grant an extension for repayment.
- Not available to a company already engaged in business rescue proceedings.
- This procedure is available to a company regardless of whether it is in liquidation.
- A compromise makes provision for the restructuring of the company's affairs without the appointment of a practitioner.

Question 2**[+/- 20 minutes]****[11]**

Zanele is a newly appointed chartered accountant at one of the largest accounting and auditing firms in the country. She decides that she is going to purchase a new BMW 3-series to celebrate her new appointment. One day whilst doing her grocery shopping at her local shopping centre, BMW have a promotional stand in the centre advertising and selling their vehicles. She approaches the stand and decides there and then to purchase the vehicle. The salesman arranges finance for Zanele through Best Bank Ltd for an amount of R 400 000 in order for her to purchase the vehicle. Best Bank Ltd will grant her the loan and she will have to repay the loan over 48 months at an interest rate of 10,5%. The contract is then concluded at the shopping centre with BMW and Best Bank Ltd.

- 2.1. Explain whether both the Consumer Protection Act and the National Credit Act are applicable to these transactions. (3)
- Both the CPA and the NCA are applicable due (1) to the fact that Zanele, as a consumer, is purchasing a vehicle from a supplier, BMW and the vehicle is considered a good to the CPA (1). With regards to the credit agreement with Best Bank, this is an instalment transaction and is within the ambit of the NCA (1).
- 2.2. Zanele does not know which category the credit agreement with Best Bank Ltd falls within. Explain to Zanele with reference to her credit agreement. (2)
- This is a large (1) credit agreement as it is a credit transaction (Instalment agreement (1/2)) worth R 400 000 (1/2) (over R250 000).

- 2.3. After 3 days of purchasing the vehicle from BMW, Zanele decides that she no longer wants the vehicle and does not want to commit to a credit agreement for 4 years with Best Bank Ltd. She has heard that she has a cooling-off right in respect of both the CPA and the NCA. Explain to Zanele whether she may exercise her cooling-off rights in respect of both transactions (your answer should identify the differences between both cooling-off rights). (6)

NCA: The cooling-off right in the NCA is limited to only leases and instalment agreements (1) entered into at a location other than the registered business (1) premises of the credit provider and must be done within 5 business days after signing the agreement (1). Therefore, Zanele may utilize this right as it is an instalment agreement entered into at premises other than registered business of the credit provider (1).

CPA: As far as the CPA cooling-off right goes, Zanele may only rely on this right if it results from direct marketing. (1) In this case, Zanele approached BMW and it did not result from direct marketing therefore she may not utilize the cooling-off right in terms of the CPA (1).

Question 3**[+/- 18 minutes]****[9]**

Justice leases his garden cottage to Nonhlanhla for a period of 12 months. Nonhlanhla fails to pay the rental as agreed and is subsequently in arrears. Because of Nonhlanhla's default, Justice takes possession of Nonhlanhla's 105-inch UHD Samsung television set which she uses at the garden cottage. Justice informs Nonhlanhla that he will only release the television set once he receives payment of the outstanding rent from her.

- 3.1. May Justice legally take possession of the television set? Motivate your answer. (4)

Yes, As the lessor, Justice is entitled to a form of security known as the landlord's tacit hypothec (1) which entitles him to attach any movable property belonging to the lessee (Mary) (1) once the lessee's rent is in arrears. (1) This type of security is only perfected in terms of a court order, therefore Justice may not just simply take the TV (1)

Depending on how a student motivates this answer, a mark should also be awarded for “no” – i.e. that Justice is not allowed to take possession of the television set as a court order hasn’t yet been obtained

- 3.2. Assume, for this question only, that the 105-inch UHD Samsung television set actually belongs to Nonhlanhla’s uncle, Desmond. Discuss how this will affect your answer given in *question 3.1* above. (5)

Landlord’s hypothec extends to property brought on to the leased property;

- Property belonging to 3rd parties – also covered by the landlord’s tacit hypothec provided such movables have been brought on to the leased property with their owner’s consent (1) for the purpose of remaining there permanently (1) and for the use of the lessee; (1)
- The goods of the 3rd party are subject to the landlord’s tacit hypothec only to the extent that the lessee’s goods are insufficient (1) to secure the arrear rent; and
- Lessor was unaware that goods belong to a third party. (1)

Question 4

[+/- 15 minutes]

[8]

Themba is a fixed-term employee at the KFC take-away restaurant in Capital Park. His job description provides that he is responsible for deep-frying chicken portions in the prescribed manner. At the end of his last shift, Themba forgot to switch off the deep fryer. Consequently, the deep fryer overheated, and the pressure caused a small explosion of boiling cooking oil. Apart from the damage to the kitchen, no staff member suffered any injuries. However, Wanda, a customer that was standing at the nearby order-counter, suffered serious burn wounds, and was rushed to hospital. She spent four weeks in hospital.

Based on this set of facts, select the correct word/phrase from the set of options in the drop-down list to complete the sentence.

- 4.1. Wanda has suffered harm/damage as a result of the commission of a **[wrongful]** act and will be able to institute a **[delictual]** claim.

- 4.2. Because Themba is **[an employee]** of KFC Capital Park and was responsible for the incident **[while acting within the scope and course of performing his vocational duties]**, Wanda is entitled, in terms of the doctrine of **[vicarious liability]**, to recover her damages from **[either Themba, KFC Capital Park, or both]**.
- 4.3. In terms of this doctrine, KFC Capital Park **[can be held liable without fault]** for the conduct of Themba based on the **[principles of agency]**.

Question 5**[+/- 15 minutes]****[8]**

With regards to insurance law, identify the applicable concept/term in each of the following cases:

- 5.1. Hashim informs his insurer that he has never tested positive for HIV. (2)
(Affirmative warranty)
- 5.2. Faadhil fails to inform his insurer at the pre-contractual stage when taking out new car insurance that he has previously been in three motor vehicle collisions. (1)
(Non-disclosure)
- 5.3. Belinda assures her insurer that she will keep her vehicle in a road worthy condition for the duration of her motor vehicle policy. (2)
(Promissory warranty)
- 5.4. Cayle's insurer asks him, at the pre-contractual stage when taking out household insurance, whether his home has an alarm system and he informs them that it does. Cayle, in fact, does not have an alarm system installed in his home. (1)
(Misrepresentation)
- 5.5. Belinda takes out a motor vehicle policy with ABC Insurers. The policy contains the following clause, "*The Insurer will reject a claim if the Insured, or anyone acting on the Insured's behalf submits a claim, or any information or documentation relating to the claim, that is in any way fraudulent, dishonest or inflated*". What type of clause is this?

(1)

(forfeiture clause)

- 5.6. George reads his insurance policy for his home and finds a clause which states that he must bear a certain amount of the damages in respect of every successful claim instituted against the insurer. What type of clause is this? (1)

(Excess clause)**Question 6****[+/- 28 minutes]****[14]**

Choose only the *most appropriate* answer from the alternatives provided:

1. Sub-letting is normally an express term to the leasing contract. In the absence of such a term, may be sub-let without consent of the landlord.
 - a. rural land
 - b. commercial property
 - c. rural dwellings
 - d. **city dwellings**
2. Which of following categories of things cannot be leased?
 - a. Movable things
 - b. Immovable things
 - c. Corporeal things
 - d. Incorporeal things
 - e. All of the above
 - f. **None of the above**

Use this set of facts to answer questions 3 and 4 below: Thulani has been leasing a one-bedroom flat near the UJ APK campus for R3500 per month. During a recent incident of loadshedding, the geyser in Thulani's flat became faulty and was no longer useable. Thulani informed the landlord about this breakdown and that it would require urgent repairs. A week later, the landlord has still not fixed the faulty geyser and Thulani has had to use cold water.

3. What is the landlord's common-law duty in this situation?
 - a. At the end of the lease period, the lessor must return the leased property in the same condition as that in which it was received, with due allowance to ordinary wear and tear.
 - b. **The lessor must maintain the property for the duration of the lease, in a manner that it is suitable for the purpose for which it was hired**

- c. The lessor is obliged to use the leased property as a reasonable man would use and care for his own property
 - d. The lessor must guarantee the lessee undisturbed use and enjoyment of the property
4. Which remedies do Thulani have available if the landlord does not fix the geyser within a reasonable time?
- a. specific performance
 - b. rescission (cancellation)
 - c. a claim for damages
 - d. reduction of rent
 - e. Thulani may undertake the repairs and recover the costs from the lessor or deduct the costs from the rent
 - f. **All of the above**
 - g. None of the above
5. In terms of the Rental Housing Act (Act 50 of 1999, as amended by the Rental Housing Amendment Act 43 of 2007), the landlord may require a tenant, before moving into the dwelling, to pay as agreed to between the parties, which is refundable with interest.
- a. three months' rent in advance
 - b. **a deposit**
 - c. for any maintenance work
 - d. the advertising costs
6. The Rental Housing Act is only applicable to
- a. **leases of residential property**
 - b. leases of movable property
 - c. leases of agricultural land
 - d. leases of industrial properties
 - e. leases of commercial properties
7. Section 5(5) of the Rental Housing Act provides that if the lessee remains in the dwelling after the expiry of the lease agreement with the tacit or express consent of the lessor, the parties are deemed to have entered into on the same terms and conditions as the expired lease, except that at least one month's written notice must be given should either party wish to terminate the lease.
- a. a new lease agreement (novation)
 - b. an inferred lease agreement
 - c. a renewed lease agreement
 - d. **a periodic lease agreement**
 - e. All of the above
 - f. None of the above

8. The following statement regarding a mortgage is incorrect:
- It comes about in terms of agreement between the mortgagor and the creditor
 - Security only takes effect upon registration of the mortgage bond in the Deeds Office
 - Parate executie* is always invalid in the case of a mortgage
 - Mortgagee takes possession of mortgaged property**
 - Lex commissoria* always invalid in the case of a mortgage

Use this set of facts to answer questions 9 and 10 below: Pranith and Kensie are engaged. After the wedding, they plan on spending their honeymoon in Paris. The cost of the trip is however too expensive for the couple to afford, and Pranith approaches his father for a loan. Pranith's father is prepared to provide them with a loan, provided that they furnish him with some form of security.

9. Pranith agrees to allow his father to keep his motor vehicle as security up until such time that he has repaid the loan. This type of security is known as:
- mortgage bond;
 - pledge;**
 - special notarial bond;
 - storage lien;
 - surety.
10. Assume that instead of granting them a loan, Pranith's father suggests that they approach ABC Bank Ltd for a loan. Pranith's father agrees to repay the loan should the couple fail to do so themselves. This type of security is known as:
- mortgage bond;
 - pledge;
 - special notarial bond;
 - storage lien;
 - surety.**
11. When a person binds himself as surety and co-principal debtor a potentially problematic situation arises. Which of the following statements are correct?
- The effect of such a suretyship is that the defences of excussion and splitting of debts are usually impliedly waived.
 - The surety is only liable after the principal debtor has been excused.
 - The surety is not liable with the principal debtor to the creditor when the principal debts become due and payable.
 - The creditor must claim against the surety before he can claim against the principal debtor.
- a. **Only (i) is correct.**

- b. Only (i) and (iii) are correct.
- c. Only (ii) and (iii) are correct.
- d. Only (ii) and (iv) are correct.
- e. None of the above (i) to (iv) are correct.

12. A builder of a house has a lien over the house until he is fully remunerated in terms of the building contract. This type of lien is a(n) _____ lien.

- a. salvage;
- b. storage;
- c. improvement;
- d. **debtor/creditor;**
- e. hypothec.

13. If the lessee of the leased property does not pay his rent payable to the lessor, the lessor is granted a tacit hypothec of the movable property on the leased property, this right does not include the following property:

- a. Property belonging to the lessee himself;
- b. **Property belonging to a sub-lessee if the sub-lessee is up to date with their rental payments to the sub-lessor (lessee);**
- c. Property belonging to a third party if the property of the lessee is insufficient to cover the rent in arrears;
- d. Both options (a) and (b);
- e. None of the above.

14. Which of the following expenses may be claimed in terms of a salvage lien?

- a. Necessary expenses.
- b. Luxurious expenses.
- c. Useful expenses.
- d. **Both (a) and (c) are correct.**
- e. All of the above are correct.

TOTAL MARKS: 80