



PROGRAM: B ACC
MODULE: COMMERCIAL LAW 100
CODE: CML1B01
DATE: 1 DECEMBER 2021 (08:00 – 11:00)
DURATION: 3 HOURS
TOTAL MARKS: 80
EXAMINERS: DR S HUNEBERG & DR W N NEL
MODERATOR: PROF J CALITZ
NO OF QUESTIONS: 6

SUPPLEMENTARY 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 **08:00 – 11:00** on **1 December 2021**. The **deadline for submissions is strictly 11:00**, 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**[+/- 20 minutes]****[12]**

You are a representative for We-Insure Ltd. A prospective client calls the company in order to procure household insurance for their new home. They are first time insurance buyers and therefore are not familiar with various terms in the insurance realm. As a representative of We-Insure Ltd, you need to explain to the prospective client whether they should be taking out indemnity or non-indemnity insurance as well as explain the differences of these concepts to them. The prospective insured is also confused on the value of the household items involved and wants to give a lower value in order to save on premiums. Explain to the prospective insured the consequences of under-insuring and what clause insurers insert into policies in order to deter such conduct.

Students must refer the client to the fact that they will require indemnity insurance for household contents. Indemnity insurance means that the amount of damages claimed is

directly proportionate to the loss suffered. It covers a patrimonial interest (ie short term insurance). The amount that the insured can claim cannot exceed the amount of the loss or damages incurred. Non-indemnity insurance is where the loss suffered and the amount paid are not necessarily proportionate. It covers a non-patrimonial interest (long term insurance). The amount paid in such a case is based on agreement between the insurer and insured.

If the insured is under-insured, then they will never be able to claim for their full loss. Average clauses are utilised in cases where the insured is under-insured. This means that the value of the object insured at the time of the loss or damage exceeds the insured amount. Insurers include average clauses to protect themselves in cases where the insured is under-insured. These clauses stipulate that the insured will then accept responsibility for a portion of his loss (therefore acting as self-insurer for a % of the loss).

Question 2**[+/- 20 minutes]****[10]**

Kenny is tasked by Henry to undertake repair work on Henry's motor vehicle. Kenny informs Henry that the work required will cost Henry R7500. Henry approves the amount and tells Kenny that he may go ahead with the work. Henry then decides that the cost of the repair work was far too much and that he will not pay Kenny the R7500. Kenny approaches you for legal advice on what he can do in this specific instance. Kenny is still in possession of the motor vehicle and he has undertaken all the repair work.

Explain to Kenny in detail what rights he has in this instance and the legal effect of such rights. Your answer must also take into account Kenny's rights if he was to part with the vehicle and give it back to Henry even if he has not been paid.

Students must refer to security in the form of a debtor/creditor lien. They must provide the definition of the lien and that Kenny may keep the vehicle as security until such time that he is compensated for the work done. Due to the fact that there was an agreement between the parties for work to be done, this means that there is a debtor/creditor lien that arises. This means that Kenny may hold onto the vehicle and that Henry may not claim the vehicle back until he compensates Kenny.

Legal effect = Kenny may retain the vehicle until reimbursement has been made. He may not use it for his own purpose and has a duty of care towards it. He also has a preferential right in terms of insolvency of Henry due to the fact that he is a secured creditor.

If Kenny voluntarily parts with the vehicle, then the lien lapses and he will no longer have any rights.

Question 3**[+/- 10 minutes]****[6]**

Joanna enters into a 24-month gym contract with Fitness Corp (Pty) Ltd. After 6 months of joining, Joanna wants to cancel her gym contract with Fitness Corp. However, Fitness Corp tell her that she is legally not allowed to cancel the contract and that she is bound for the 24-month period. Joanna approaches you for legal advice regarding this situation. Explain to Joanna whether Fitness Corp may legally hold her liable for the full 24-month period or whether she has options to cancel the contract. Your answer must make reference to the applicable laws and exactly what processes Joanna must follow.

Students to refer to the CPA and s 14. The consumer has the right to cancel the fixed term contract by giving the supplier 20 business days notice in writing or any other recorded manner at any time prior to such expiry. The consumer remains liable to the supplier for any amounts due in terms of the agreement up to the date of cancellation. The supplier may also charge a reasonable penalty. Students must make use of the facts to receive full marks.

Question 4**[+/- 25 minutes]****[13]**

What has been the effect, if any, of the Constitution of the Republic of South Africa, 1996, on residential leasing agreements and related evictions? In your answer, you must refer to relevant legislative provisions and case law.

Framework of the expected answer:**Sec 26 of the Constitution – Housing:**

- In **Glen Elgin Trust v Titus** [2001] 2 All SA 86 (LCC) – the Land Claims Court held that the **Constitution is applicable to lease agreements**.
- **Section 26 of the Constitution** of the RSA, 1996 guarantees the **right to adequate housing**:

- **Everyone has a right to have access to adequate housing - s 26(1).**
 - The **state must take reasonable legislative and other measures** within its available resources **to achieve the progressive realisation of this right** (i.e., the right to adequate housing) – s 26(2)
 - **No one may be evicted from their home without an order of court** made after considering all the relevant circumstances. **No legislation may permit arbitrary evictions – s 26(3).**
- Rental housing is a key component of the housing sector and the right to adequate housing, and there is thus a need to promote the provision of rental housing.
 - Consequently, the Rental Housing Act was introduced to give effect to the right to adequate housing (sec 26).

Rental Housing Act:

Based on the State's duty to take reasonable legislative measures – s 26(2), the **Rental Housing Act was enacted to achieve the progressive realisation of the right to adequate housing.**

- It ensures everyone's right to have access to adequate housing by creating mechanisms to **promote the provision of rental housing property** and promoting access to adequate housing through **creating mechanisms to ensure the proper functioning of the rental housing market.**
- It aims to **balance the rights of tenants and landlords** and to create mechanisms to **protect both tenants and landlords against unfair practices** and exploitation.
- It introduces speedy and cost-effective **mechanisms for conflict resolution** between tenants and landlords (e.g., the establishment of **Rental Housing Tribunals**).

Effect on eviction:

- **An eviction may have a serious impact on a tenant's constitutional rights** – including his/her **right to adequate housing (s 26)**, as well as on his **right to privacy (s 14)** and **dignity (s 10)**.
- **Consequently, a complex process has to be followed with residential leases, arising as a result of the possible application of various legislative provisions.**
- A lessor's right to evict the lessee has been significantly affected by **Sec 26(3)** of the Constitution: it states that **no one may be evicted from their home without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.**
- **In the case of evictions, the tenant's right to housing and not to be evicted arbitrarily or without a court order - s26(3), often conflicts with the protection of the owner's property rights (s 25 of the Constitution).**

A friend of yours, Miss X, is in financial trouble. Her financial advisor has recommended that she apply for a sequestration order. Section 6(1) of the Insolvency Act 24 of 1936 lists several requirements that an applicant must prove, on a balance of probabilities, in order to be successful with such an application. Identify the type of sequestration order that Miss X may apply for and briefly explain the requirements that she will have to prove in her application.

Expected answer:

Miss X (or her legal representative) may institute an **ex parte application** for **voluntary surrender** in terms of **section 3(1)** of the Insolvency Act, or supported by **affidavit(s)**.

The following requirements must be satisfied – sec 6(1): (Max. 10 marks)

1. the **preliminary formalities have been observed**
 - a. **Publication of the notice of intention to surrender** *in the Government Gazette and in a newspaper circulating in the magisterial district where he resides;*
 - b. **Copies of notice of surrender to be sent to creditors and other parties** - within seven days of publication of the notice of surrender, the debtor must *furnish copies of the notice to all creditors whose addresses are known, and to other parties, including employees, registered trade unions that represent such employees, and SARS;*
 - c. **Preparation and lodging of statement of financial affairs** – the *debtor must prepare a statement of financial affairs that notifies interested parties of his his/her financial position, and it can be inspected by them;*
2. the **debtor's estate is, in fact, insolvent (factual insolvency)**, based on the statement of affairs;
3. the **debtor owns realisable property of sufficient value to cover sequestration costs**, payable out of the free residue of his estate - includes Master's fees, costs of application, trustee's compensation and any other liquidation costs; and
4. the **sequestration will be to the advantage of creditors**, i.e., *fairly certain* that creditors as a group will receive *some* dividends - (this requirement is to reduce the risk of debtors abusing the sequestration procedure and resorting to sequestration when it holds little or no real benefit for creditors and simply gives the debtor a means of escaping his liabilities).

Question 6

[+/- 15 minutes]

[8]

T-Bone Restaurants (Pty) Ltd is in financial distress following the governmental restrictions placed on the hospitality sector during the Covid-19 pandemic. The restaurant chain has obtained a winding up order to liquidate the company in terms of the Companies Act 61 of 1973 and has given retrenchment notices to all of its employees. Given the severely detrimental consequences of retrenchment on these employees, HOTELLICA, a majority trade union in the sector, wishes to avoid liquidation of the company and rather place the restaurant under business rescue in an attempt to save the company.

Based on the set of facts above, indicate whether the following statements are TRUE or FALSE:

- 6.1. HOTELLICA cannot institute business rescue proceedings because T-Bone Restaurants (Pty) Ltd has already obtained a winding up order to liquidate the company. **FALSE**
- 6.2. HOTELLICA is an “affected person” for purposes of section 131(1) of the Companies Act 71 of 2008. **TRUE**
- 6.3. HOTELLICA may apply to court for an order placing the company under supervision and commencing voluntary business rescue proceedings. **FALSE**
- 6.4. In terms of section 129(3) of the Companies Act 71 of 2008, the board of directors of T-Bone Restaurants (Pty) Ltd may file a resolution with the Companies and Intellectual Property Commission (CIPC) to place itself under the supervision of a business rescue practitioner. **FALSE**
- 6.5. T-Bone Restaurants (Pty) Ltd may apply to court for an order placing the company under supervision and commencing voluntary business rescue proceedings. **FALSE**
- 6.6. Under the circumstances outlined above, should a court grant an application for business rescue, it will have the effect of suspending liquidation proceedings until the court has dismissed the business rescue application or, if the court grants the order, until the end of the business rescue proceedings. **TRUE**
- 6.7. In order for HOTELLICA to succeed with an application to place T-Bone Restaurants (Pty) Ltd under business rescue, the court must be satisfied that (1) there is a reasonable prospect of rescuing the company, and (2) there are reasonable grounds to

believe that the company is financially distressed, or the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment related matters, or it is otherwise just and equitable to do so for financial reasons. **TRUE**

- 6.8. During the course of the liquidation proceedings of T-Bone Restaurants (Pty) Ltd, a court may *mero motu* (of its own volition) place the company under business rescue and appoint an interim practitioner. **TRUE**

Question 7 **[+/- 15 minutes]** **[8]**

Fill-in the missing word/phrase: (1 mark each)

- 7.1. The South African labour law has undergone significant changes since the start of the new constitutional dispensation. One of these important changes was re-joining the **[International Labour Organization]** in 1994 and ratifying its core conventions.
- 7.2. Once it is proven that the 'main reason' an employee was dismissed was on one of the **[automatically unfair reasons]** in terms of section **[187]** of the Labour Relations Act 66 of 1995, the employer will *not* be afforded the opportunity to discharge the onus of showing that the dismissal was fair, and the *proceedings must move directly to a consideration of the remedy* to which the employee is entitled.
- 7.3. In order to address inequality in the workplace and rectify the imbalances of the past, the **[Employment Equity Act]** was enacted in 1998 and, *inter alia*, prohibits **[unfair discrimination]** in employment.
- 7.4. In terms of Section 200A of the of the Labour Relations Act 66 of 1995, there is a **[rebuttable]** presumption that a person who works for or renders services to another is, until the contrary is proven, considered to be an **[employee]**, regardless of the form of contract.
- 7.5. A dismissal on the basis of **[incompetence]** of an employee could manifest by way of unsatisfactory performance, inability to reach a fixed standard of work, and incompatibility in the work situation.

Question 8 **[+/- 10 minutes]** **[5]**

Match the question/statement in column A to the most accurate answer/description in column B:

Column A	Column B
Melanie agrees to pay her son's loan from ABC Bank Ltd if he cannot repay them as agreed	Suretyship
Jerome sees a neighbour's yacht sinking in the dock and immediately reacts with a few others and manages to save the yacht from sinking. Jerome acquires security over the yacht in the form of a	Salvage lien
Sienna wants to borrow R10 000 from her friend, Masindi. Masindi is only willing to lend her the money if Sienna provides her with her sapphire ring.	Pledge
Francis leases her flat in Melville to Thomas. Thomas does not pay his rent for two months. Francis has security for the rent in arrears in the form of:	Landlord's tacit hypothec
Vuyisile enters into a contract with Douglas in terms of which Douglas will build a house for Vuyisile and will be paid R100 000 for the work. Vuyisile does not pay Douglas for the work. Douglas acquires security over the house in terms of a	Debtor-creditor lien
	Improvement Lien
	Mortgage
	Luxurious expenses

Question 9**[+/- 4 minutes]****[2]**

Fill in the missing word (one mark each):

1. Credit-For-All (Pty) Ltd provide a loan to Jason of R40 000 without checking Jason's creditworthiness. They did not conduct a proper assessment of Jason and his ability to repay the loan. This is known as **[reckless]** credit.
2. Frederick enters into an instalment transaction with Y-Bank Ltd for an amount of R300 000. This falls in the category of a **[large]** credit agreement.

Question 10**[+/- 6 minutes]****[3]**

Indicate whether the following statements are TRUE or FALSE:

- 10.1. Kyle wants to return the goods which are the subject of a credit agreement to the credit provider as he can no longer afford to pay for the goods. As soon as Kyle is in default, he may not surrender the goods to the credit provider. **(False)**
- 10.2. Consumers have the right to be granted credit. **(False)**
- 10.3. A credit provider may unilaterally increase the credit limit of a consumer if the contract contains a standard provision to do so. **(False)**

TOTAL MARKS: 80