

**GAUTENG DEPARTMENT OF EDUCATION
SENIOR CERTIFICATE EXAMINATION**

MERCANTILE LAW SG

POSSIBLE ANSWERS OCT / NOV 2006

**QUESTION 1
COMPULSORY**

- 1.1
- 1.1.1 Orally
Conduct / Estoppel
- 1.1.2 Sequestered
- 1.1.3 Deregistered
- 1.1.4 Cession
- 1.1.5 Auctioneer
- 1.1.6 Creditor
- 1.1.7 Suretyship
Liens
pledges / mortgages
- 1.1.8 Independent / contractor
agent / employee 12x1=(12)
- 1.2
- 1.2.1 True
- 1.2.2 False -- date of registration
- 1.2.3 False -- free residue
- 1.2.4 False -- reciprocal will
- 1.2.5 False -- payee
- 1.2.6 True
- 1.2.7 False -- Certificate of Incorporation
- 1.2.8 False -- useful fixtures
- 1.2.9 True
- 1.2.10 True (26)
- 1.3
- 1.3.1 B
- 1.3.2 D
- 1.3.3 C
- 1.3.4 F
- 1.3.5 A
- 1.3.6 E (12)

QUESTION 2 PARTNERSHIPS

- 2.1 2-20 persons (Mark only the first three characteristics where the candidate guesses and names 6 or 7)
Contributions can be capital or labour
The object is to make a profit. 3x2=(6)
- 2.2 **Silent (anonymous, sleeping) partnership**
- When two or more persons enter into a partnership in the name of only one of the partners.
 - The partner's contribution can consist of money and or goods, but not services.
 - He does not take an active part in the business.
 - He is not known to the public as a partner.
 - He is liable pro rata to the other partners for partnership debts.
 - He is not liable to third parties unless he posed as an ordinary partner. 4x2=(8)
 - May see the books of the partnership.
- 2.3 **The right to share in the profit**
- * Every partner has the right to share in the nett profit.
 - * An agreement that one partner will not share in the profits is, therefore, not a valid partnership agreement.
 - * The size in which profit is shared, can be set out in the partnership contract.
 - * It can be divided in proportion to every partner's contribution.
 - * Profits can be shared equally.
 - * Partners are not entitled to interest on capital or any other compensation in the form of salaries. 4x2=(8)
- 2.4 **Duty to account (good faith)**
- * The utmost good faith must exist between the partners.
 - * A partner is obliged to account to his co-partners for any profits or benefit which he received as a result of any activity which falls within the business.
 - * A partner may not keep such a benefit for himself but must share it with the other partners.
 - * A partner must also account for all partnership assets which he has or had in his possession.
 - * All information which may influence matters of the partnership must also be revealed.
 - * A partner who, for example, gains knowledge of an opportunity to enter into a profitable transaction must reveal this to his co-partners.
 - * He must never place himself in a position where his personal interests clash with those of the partnership. 4x2=(8)

Other duties

- | | | |
|---|---|---------|
| 1 | Each partner must contribute something | |
| 2 | Sharing in the nett losses | |
| 3 | Promotion of common interests | |
| 4 | Rendering of accounts and inspection of partnership | 2x2=(4) |

2.5 Court order

- | | | |
|---|--|---------|
| * | Continuous arguments between partners | |
| * | Adultery by one partner with another partner's wife | |
| * | A partner declared mentally disordered. | |
| * | The incapacity of a partner owing to a long illness | |
| * | No profit expected | |
| * | The disappearance and continued absence of a partner | 3x2=(6) |

2.6

- | | | |
|-----|---|---------|
| (a) | Partnership policy | |
| (b) | Jointly
severally | |
| (c) | representational capacity | |
| (d) | that it will be divided the same way as the profits | 5x1=(5) |

2.7

- | | | |
|---|---|---------|
| • | Name of partnership | |
| • | Nature of partnership | |
| • | Period entered into | |
| • | Authorized withdrawals | |
| • | Interest on capital and withdrawals | |
| • | Division of profits and losses | |
| • | Procedures when a partnership is dismantled | |
| • | Control and authority of partners | |
| • | Who is allowed to sign cheques | |
| • | Salaries and bonuses | |
| • | Contribution of partners | 5x1=(5) |

**QUESTION 3
COMPANIES / CCs**

3.1

- | | | |
|-----|-------------------|---------|
| (a) | Close Corporation | |
| (b) | Private company | |
| (c) | Public company | 3x2=(6) |

3.2

- | | | |
|-------|--|-----|
| 3.2.1 | CC = unlimited existence, except in case of deregistration and liquidation
Public company = unlimited existence, except in case of insolvency and sequestration | (2) |
|-------|--|-----|

3.2.2 CC = Founding statement
Public comp = Memorandum of Association (2)

3.3 **PROMOTERS are responsible for the following:**

1. Preparation of the Memorandum and Articles
2. Preparation of any other legally required documents
3. Nomination of directors
4. Procuring of capital
5. Issuing of a prospectus (public company)
6. Acquisition of property for the company
7. Proof of payment of registration fees 3x2=(6)

3.4 **What does the term “limited” mean at the end of the name of a public company?**

The word “limited” is an indication that the liability of the members in respect of the liability of the company is limited to the nominal value of their share capital.

Shareholders can only lose their share capital in cases where the company becomes insolvent. 1x2=(2)

3.5 **Differences between a company and a natural person**

COMPANY

1. Has continuity except during insolvency
2. Can be given a fine
3. Imaginary entity
4. Directors act on behalf of company
5. Company is liable, not members
6. Assets and liabilities belong to company

NATURAL PERSON

1. Natural person dies
2. Can be given a jail sentence
3. Physically perceptible
4. Person concludes his own contracts
5. Rights belong to himself
6. Assets and liabilities belong to himself 6x1=(6)

3.6 **Distinctive characteristics of a Close Corporation**

- * The Close Corporation is suitable for a small- to medium-size undertaking.
- * A Close Corporation has members and not shareholders as in a company.
- * The membership varies from one to ten members.
- * The name of the Close Corporation ends with letters “CC”.
- * The Close Corporation has an unlimited existence. It remains as such irrespective of changes in membership.
- * A Founding Statement is registered with the Registrar of Close Corporations on establishment.
- * The internal relationship between members can be defined in the co-operation agreement.
- * Members have an “interest” in the Close Corporation and not shares as in a company. The combined interest of the members adds up to 100 per cent. 4x2=(8)

3.7 **Documents registration of CC**

- * Founding Statement CK 1
- * Co-operation agreement
- * Altered Founding Statement CK 2
- * Reinstatement of the registration of a Close Corporation
- * Reservation of the name of the CC CK 7
- * Application for the change-over from a company to a Close Corporation 2x2=(4)

3.8 **Rights of members**

- Ø Participate in the carrying-out of the business
- Ø Participate in the management of the business
- Ø Remuneration from the CC for expenses incurred
- Ø The number of votes (at a meeting) which are according to his interest in the CC
- Ø An interest in the CC expressed as a percentage of the total interest (100%)
- Ø Each member is issued with a certificate, stating the current percentage of such member's interest in the Close Corporation. 2x2=(4)

3.9 **Dissolution of Close Corporations****Deregistration**

The deregistration of a CC means the cancellation of the registration of the Founding Statement.

Deregistration may take place in the following cases:

If the registrar has reasonable grounds to believe that:

- the corporation is not in business, or
- the corporation does not work.

If the members apply at a registrar for deregistration because:

- the corporation has ceased business, or
- the corporation has no assets or liabilities. (6)

Liquidation of a Close Corporation

Liquidation takes place if the assets of the CC have been sold on an auction under the supervision of the Master with a view to paying creditors. (4)

[10]

QUESTION 4**LEASE****LEASE OF IMMOVABLE PROPERTY**

4.1

- 4.1.1 Yes --Specified property
 Specified period
 Specified amount as rent 3x2=(6)

4.2

- 4.2.1 Registered
- 4.2.2 Three months / one month according to new legislation
- 4.2.3 Forfeiture clause
- 4.2.4 Reasonable rent 4x1=(4)

4.3

4.3.1 **Statutory tenant**

- If the lease contract is terminated as a result of passage of time without reasonable notice by the landlord the contract may not be terminated.
- As long as the tenant continues to occupy the property in person, pays the rent and complies with all other formalities 2x2=(4)

4.3.2 **Necessary improvements**

- The tenant has a right to remuneration, as long as he did them with the consent of the owner.
- The claim is limited to the value of the material.
- These improvements may not be removed.

3x2=(6)

4.3.3 **“Hire goes before sale”**

- * If the landlord of a property sells that property before the lease has expired, the tenant may not be prejudiced. Tenant may not be evicted as long as he pays the rent as set out in the lease.
The purchaser takes the place of the landlord from the date on which he becomes the owner of the property.

* **The purchaser of the property is bound by the lease if the following**

- * In the case of a long-term lease, the rule applies for the first ten years of the contract.
- * In the case of short-term lease, the rule applies as long as the tenant is in possession of the property.

3x2=(6)

4.4 **Purpose of the Rent Control Act / Rent Tribunal**

- To keep rent within limits
- To provide stability of occupation

2x2=(4)

4.5 **Fails to effect the necessary repairs**

- The tenant may resort to the following legal remedies:
- The tenant may have the necessary repairs effected and deduct the costs involved from the landlord, **provided** he has informed the landlord in advance of his intention to do so.
- The tenant may claim a reduction in rent.
- If the property becomes unsuitable for the purposes for which it has been hired, the tenant may vacate the property without being liable for further rent.

3x2=(6)

4.6 **Grant the tenant free use and enjoyment of the property**

- * Every tenant is entitled to the free use and enjoyment of the property.
- * The landlord undertakes to grant the tenant undisturbed use and enjoyment of the leased property by:
 1. Not encroaching upon the use and enjoyment himself
 2. Giving a warranty against eviction by third parties with a better title than himself to the tenant.

3x2=(6)

4.7 **Termination of lease**

1. Expiry of time, once the period is complete, e.g. 10 years
 2. Notice, for example, one month for a monthly lease
 3. If the property is completely destroyed, the contract is terminated, e.g. the house burned down
 4. Merger – If the tenant buys the property for himself
 5. Insolvency of the tenant
 6. By the death of tenant or landlord, if such a condition has been written in the contract
 7. By mutual agreement between the landlord and tenant
 8. By cancellation – if one the parties is legally entitled to do so
- 4x2=(8)

QUESTION 5
AGENCY

5.1 **Requirements for contract of agency**

The parties must have mutual consent regarding:

- * the service to be performed
 - * the remuneration attached thereto
 - * the right and duties of the principal
- 3x2=(6)

5.2 **Examples of agency by estoppel**

- a. Where the principal signs a blank power of attorney, the agent is entitled to fill in the terms.
 - b. The owner of an article stands by and allows another person to sell the article to a buyer.
 - c. Previous transactions are cited as proof.
 - d. A person authorises his domestic servant to buy household necessities on credit.
 - e. Where it is the custom of a parent to permit his child to buy goods on credit.
- 2x2=(4)

5.3

- 5.3.1 B
- 5.3.2 C
- 5.3.3 A
- 5.3.4 D
- 5.3.5 E
- 5.3.6 F
- 5.3.7 G

7x2=(14)

5.4 **Court case: Levy vs Philips****Duty to pay the promised remuneration**

- * The principal has a duty to pay his agent the agreed-upon remuneration, or the customary remuneration.
- * The agent must prove that there was an express or tacit agreement that remuneration would be payable and that an actual fulfilment of his duties occurred.
- * Once the agent has executed his authority, he has the right to his commission, even if the principal does not benefit therefrom.
- * In Levy vs Philips an agent was appointed to find a buyer for houses. He managed to do so and a purchase and sale contract was set up between the parties. Thereafter the principal released the buyer from his duty to buy and refused to pay the agent's commission, on grounds thereof, that he did not benefit from the agent. The court decided that the principal was obliged to pay the commission.
- * OR Doyle vs Gibbon – the estate agent proved that he had been the effective cause of the sale of a house and that he had to receive the commission.
- * With regard to the amount of remuneration, the parties agree that a specified amount will be paid if the agent fulfils his obligation. 4x2=(8)

5.5 **There are two exceptions:**

- An agent can delegate his authority to someone if he obtained the necessary consent from his principal.
- Where it is an acknowledged trade usage to appoint subagents 2x2=(4)

5.6 **Termination of Agency**

- * By completion of the work or order by the agent
- * If the agency is granted for a specified time, it will expire at the end of that period.
- * The principal and agent can together agree that the agency contract expires.
- * Insolvency of the principal or agent
- * Death or insanity of the principal or agent.
- * Where the principal revokes the authority which he granted the agent.
- * Where the agent terminates the authority, he is liable for any loss suffered by the principal. 4x2=(8)

5.7 **Duty to report (account)**

- a. An agent has the duty to keep account of and report to his principal on all transactions, payments, receipts, etc. which occurred in the execution of his authority.
- b. The principal is entitled at any time to study these books and property.
- c. Where there are shortages for which the agent cannot account, the agent will be liable to the principal. 3x2=(6)

QUESTION 6
SURETY / LIENS

- 6.1.1 A
- 6.1.2 C
- 6.1.3 B
- 6.1.4 B
- 6.1.5 C

5x2=(10)

6.2 Formalities for suretyship

1. A contract of suretyship is concluded by agreement between the **creditor and surety**. The principal debtor is not a party to it.
2. In terms of Section 6 of Act No. 50, a contract of suretyship must be **in writing**
3. and the document must be **signed** by the surety and the creditor (bank). 3x2=(6)

6.3 Beneficium divisionis

- * This is the benefit of division.
- * May be invoked where there is more than one surety.
- * Co-sureties are liable jointly and severally on the suretyship.
- * This benefit is available where there are several sureties in respect of one and the same obligation, and the creditor attempts to recover from a single surety the debt which is due.
- * Such surety is then at liberty to demand that the creditor divide his claim between the available sureties, so that his (the surety's) liability may be restricted to his proportionate share of the principal debt.
- * Co-sureties who are insolvent, abroad and have left nothing behind, or a minor - at the time the action is brought – are regarded as never having become sureties.
- * This benefit also may be waived, by signing as co-debtor or not claiming this benefit. 4x2=(8)

6.4 Termination of surety

1. The contract of suretyship is terminated when the principal obligation is terminated, for example, by the settlement of the principal debt, novation or prescription.
2. The expiration of time, if the surety had only rendered himself liable for a specified period.
3. Where the contract makes provision for the surety to terminate the suretyship by means of due notice.
4. Where the debtor offers payment, but the creditor refuses it and the debtor then becomes insolvent. 2x2=(4)

6.5 CONDITIONS:

- The creditor has done work, or spent money on the property.
- It was done with the consent of the owner, and the property is still in possession of the creditor. 2x2=(4)

6.6

	Debt/Cred lien		Enrichment lien
1.	With permission	1.	Without permission
2.	Object to secure a liability	2.	Object to enrich owner
			4x1=(4)

6.7.1 **Part played by possession for liens**

1. A lien is basically a right to retain something. The person claiming the right must therefore be in possession of the property which is the object of the lien.
2. The person claiming the lien must therefore be in continuous possession of the property.
3. It must be a legal possession; which is composed of physical control, together with the intention of holding the property for one's own benefit.
4. If he loses possession he automatically loses his lien. His lien does not revive if he later recovers possession of the property.

2x2=(4)

6.7.2 **The holder does not lose his lien in the following cases:**

- * If physical control of the object of lien was lost as a result of force, fraud or any other unlawful action, it is revived as soon as effective control is recovered.
- * The trustee of an insolvent estate claims the property.
- * or it is an order of the court.

2x2=(4)

6.7.3 **Example of a building contractor:**

- * In the case of buildings which are being erected or repaired, the builder must have physical control of the premises, either personally or through his worker on the building.
- * Where the building has advanced so far towards completion that it may be locked up, possession of the keys is sufficient. Absence in the night does not deprive the builder of his lien. But where the work is suspended for a considerable time, special precautions must be taken, by putting a fence around the property. Putting up notices that trespassers will be prosecuted is not sufficient.

3x2=(6)
[50]

QUESTION 7 PLEDGE AND MORTGAGE

7.1

- 7.1.1 False – Legal bond
- 7.1.2 False – Covering bond
- 7.1.3 True
- 7.1.4 True

(10)

7.2 **Differences between pledges and mortgages****PLEDGES**

1. Movable property
2. Delivered
3. Prescribes after 6 months

MORTGAGES

1. Immovable property
2. Registered
3. Prescribes after 25-30 years

4x1=(4)

7.3 Special bond on immovable property

- * A special document, called a mortgage bond, must be drawn up by an attorney.
- * This bond must be registered against the ownership of the property.
- * Will contain the following information:
 - The name and address of the property
 - The interest to be paid
 - The date and the manner of the repayment of the capital
 - The rights of the mortgagee in the event of non-payment
- * The bond must be signed by the owner in the presence of the Registrar of Deeds.
- * As soon as the Registrar of Deeds has signed and validated the mortgage bond with the official seal, the bond is registered.
- * The mortgage bond must be submitted for registration within two months after the debt has been incurred. 5x2=(10)

7.4

7.4.1 Kustingsbrief

7.4.2 Mortgage bond 2x1=(2)

7.5

7.5.1 By operation of the law / Impliedly 1x2=(2)

7.5.2 Examples:

- liens
- the landlord's hypothec for arrears rent
- instalment sales hypothec
- preferences 3x2=(6)

7.6

7.6.1 Interest clause

7.6.2 Foreclosure clause 2x2=(4)

7.7 Termination of mortgages and pledges

1. Discharge of principal debt: When the debt together with all interest due is paid
2. Renunciation: When the creditor expressly or by implication renounces his rights under a bond.
3. Expressly - when the creditor agrees to the cancellation of the bond, or returns the pledged goods.
4. Destruction of mortgaged property: A bond or pledge is terminated by the total destruction of the goods. If the goods are only partly destroyed, the pledge or bond continues to be in operation on that portion which remains undamaged.
5. Novation: The replacement of the original debt by a new debt or new agreement.

6. Merger: This is when the person becomes owner of the mortgaged property or goods, e.g. the person inherits the property or goods.
7. Alienation of pledged property: Pledged property in the possession of the creditor may be transferred only with the consent of the pledgee.
8. Prescription: This is when a mortgagor pays no interest for 30 years, or has redeemed any amount. Six months in the case of pledges.
9. Order of court: The mortgage / pledge may be set aside by an order of court on the grounds of fraud, or by misrepresentation.
10. Alienation of mortgaged property in terms of a judgement of court. Where the trustee sells it on the debtor's insolvency. 6x2=(12)

QUESTION 8 INSOLVENCY

- 8.1
 - 8.1.1 Insolvency
 - 8.1.2 Sequestration
 - 8.1.3 Rule nisi
 - 8.1.4 Voluntary surrender
 - 8.1.5 Liquidation 5x2=(10)
- 8.2 **The separate estate of the insolvent's spouse (wife, husband)**
 - If the insolvent is married in community of property, the estate of the solvent spouse (wife, husband) also vests in the Master.
 - **Exception** – in the case where people are married out of community of property (antenuptial contract). The creditors may not claim the property of the solvent spouse.
 - The trustee must return all the property of the solvent spouse where it is proved:
 - # Antenuptial contract
 - # That it was obtained by the spouse in terms of a marriage contract
 - # That it is property which is protected by the Insurance Act
 - # That it was obtained during the marriage in terms of a title which is enforceable on the creditors of the insolvent
 If the solvent spouse is carrying on business as a trader apart from the insolvent, or if it appears that the immediate vesting of her/his property in the Master or trustee will be seriously harmful to her/him, the court may exclude the results of a sequestration order on such assets. 5x2=(10)
- 8.3 **At this meeting:**
 - There will be opportunity for the proof of claims against the estate
 - The election of a trustee
 - The interrogation of the insolvent and of any other person 3x2=(6)

8.4 **Persons who are disqualified from acting as trustee**

- * An insolvent
- * A minor
- * Any person who does not reside in South Africa
- * A corporate body
- * Any person related to the insolvent by blood
- * Any person who acted as bookkeeper, accountant or auditor of the insolvent person
- * Any person who has at any time been convicted of theft, fraud, forgery 4x1=(4)

8.5 **Duties of the trustee**

1. He must take all movable goods, books and documents belonging to the insolvent estate into his possession and under his control.
2. If he has good reasons for believing that any property has been concealed, he may apply to the magistrate for an order to search and attach.
3. He must obtain a full explanation from the insolvent of the reason for his insolvency.
4. He must open a banking account in the *name of the insolvent estate*.
5. He must open a book and enter details of all money, goods, documents or accounts received by him on behalf of the estate into it.
6. The trustee must examine all proved claims and documents in support submitted to him.
7. He must determine whether the estate is actually indebted for those amounts.
8. He must convene the general and special meetings of creditors under certain circumstances.
9. The trustee is required to publish a notice of his appointment and his address in the Gazette.
10. He must call upon all debtors of the estate to pay their debts within a specified period and at a place mentioned in the notice.
11. He must investigate the affairs and transaction of the insolvent and, at a second meeting of the creditors, submit a full report thereon.
12. The trustee must sell all the estate property in accordance with the directions. 5x2=(10)

8.6 **Statement of affairs:**

8.6.1 **Definition:**

- This statement of affairs takes the form of a balance sheet of the insolvent and shows the deficiency.
- It must list fully all his assets and liabilities. The statement of affairs must be affirmed by a sworn declaration. 2x2=(4)

8.6.2 **Annexures to the statement of affairs contain:**

- * A statement of every book (accounting) in use at the time
- * A detailed description of the causes of insolvency
- * Personal details of the insolvent's place of birth, nationality, his marital state
- * Whether his estate or that of which he was a partner was previously sequestrated 3x2=(6)

[50]

QUESTION 9
WILLS / NEGOTIABLE DOCUMENTS

- 9.1
- 9.1.1 C
- 9.1.2 D
- 9.1.3 F
- 9.1.4 E
- 9.1.5 B
- 9.1.6 A 6X2=(12)
- 9.2
- 9.2.1 master
beneficiaries 2x1=(2)
- 9.3 **Formalities when drawing up a will**
- Every will must be in writing. It may be written by hand, typed or printed.
 - The will must be signed at the end thereof, as near as possible to the last provision of the will.
 - The signing must be done personally by the testator.
 - The testator must sign the will in the presence of two competent witnesses who are simultaneously present.
 - Thereafter the two witnesses must attest and sign the will in the presence of the testator and each other.
 - If the will consists of more than one page, only the last page must be signed by the two witnesses.
 - If the testator signs the will by making a mark, a commissioner of oaths must certify that he has satisfied himself as to the identity of the testator. 3x2=(6)
- 9.4
- 9.4.1 B
- 9.4.2 C 2x2=(4)
- 9.5 Table A = model set of articles for a **public company**
Table B = model set of articles for a **private company** 2x2=(4)
- 9.6 **Formal requirements as to the name**
- The right to use a company name is subject to the following **restriction**:
- The name may not be undesirable in the opinion of the Registrar.
 - The name may not possibly mislead the public as to the nature of the company's activities.
 - The Act requires that certain last words be added to the name of the company, for example, "Limited", in the case of a public company with a share capital, and "Pty Ltd" in the case of a private company.
 - Registrar can forbid a company to do business in a name which, for example, is offensive or blasphemous or immoral in nature.
 - A company can also register for itself an official recognised translated form and abbreviated form of its name.
 - Words such as "Government, State" may not be used without the permission of the State President.
 - The word "Bank" may not be used without the consent of the Minister of Finance. 3x2=(6)

9.7		
9.7.1	Cheque	
9.7.2	Crossing	2x2=(4)
9.8		
9.8.1	Dishonoured cheques	
*	When the drawer's funds are insufficient, except if an overdraft facility has been arranged.	
*	When payment has been stopped by the drawer.	
*	When notified of the death of the client.	
*	When the cheque is not signed / filled in incompletely	
*	The cheque may be post-dated.	
*	Words and figures differ.	3x2=(6)
9.8.2	Not transferable = can only be paid into the account of the payee / may not be transferred from one person to another	
	Not negotiable = cannot be cashed over the counter / can be transferred and paid into another bank account.	2x2=(4)
9.8.3	BOB bank	(2)
		[50]
	TOTAL:	300