

**ADMISSION EXAMINATION / TOELATINGSEKSAMEN
COURT PROCEDURES / HOFPROSEDURES
PART 1 / DEEL 1**

27 FEBRUARY / 27 FEBRUARIE 2008

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

[4]

- 1.1 He can claim the two weeks pay he received over and above his sick-leave entitlement(1) because this was paid to him *ex gratia* by his employer (1). (2)
- 1.2 An orthopaedic surgeon. (1)
- 1.3 No. (1)

QUESTION 2

[5]

- 2.1 Compensation Commissioner (½)
Road Accident Fund (½)
His co-employee (½) (1½)
- 2.2 From the Compensation Commissioner he can claim all his special damages, i.e. R16 500,00. (½)
- From the RAF R25 000,00 in respect of his general and special damages subject to the Fund being entitled to deduct the amount of the Compensation Commissioner's award. (1)
- From his co-employee the balance of his damages that he is unable to recover from the Compensation Commissioner and the RAF. (1)

- 2.3 No. The employer is not responsible for the negligence of employees in his employ against each other. He is absolved from liability by statute. (1)

(Sec 35 of Compensation for Occupational Injuries and Diseases Injuries Act – COIDA).

QUESTION 3

[5]

The alternative plea and prayer would read as follows:

“Alternatively, and in the event of it being proved that the driver of the insured vehicle was negligent in any respect or at all (which is denied) (1), then the Defendant pleads that the Plaintiff was also negligent and that such negligence contributed to the collision (1) and accordingly in terms of the Apportionment of Damages Act any damages recoverable by the Plaintiff must be reduced by the extent to which he was negligent (1).

In the alternative, Defendant prays that the Plaintiff’s claim be reduced by the extent to which this Honourable Court finds that the Plaintiff was negligent, and that such negligence contributed to the collision (1) and that this Honourable Court make such order as to costs as may be just and equitable. (1).

QUESTION 4

[4]

- 4.1 By delivering a written notice of acceptance of the offer to the Defendant. (1)
- 4.2 No. Your client is not entitled to interest (1). In terms of the Act, interest is only payable from a date 14 days after the grant of the Judgment, and not from the date of acceptance of the offer. (1)
- 4.3 Your client can apply for Judgment in terms of the offer on 5 days notice given to the Defendant in writing of his intention to do so. (2)

QUESTION 5

[7]

I will advise both Ben and Charlie that they have valid third party claims against the Road Accident Fund(1).

By virtue of the fact that the driver of motor vehicle CY 1126 was solely to blame for the collision, (1) Ben has an unlimited claim for both special and general damages (1). He will be awarded the total amount of damages that he may be able to prove e.

Charlie was a passenger in motor vehicle CY 1126 whose driver was solely to blame for the collision. As against the Road Accident Fund his claim in terms of Section of 18(1)(b) of Act No 56 of 1996 is limited to the sum of R25 000,00 for special damages only (1) (that is for past medical

and hospital expenses and past loss of earnings). (1) He does not receive any compensation in respect of general damages (1).

Insofar as the balance of his claim is concerned for special and general damages, Charlie may proceed against the driver/owner of (1) CY 1126.

QUESTION 6

[18]

6.1

- a) ABC (Pty) Ltd must address a letter of demand to tenant in which it demands payment of arrear rental within a period of 10 (ten) days from date of delivery of the letter, stating that failing such payment the lease will be cancelled. (1)
- b) If the tenant fails to comply with the demand, a further letter should be addressed to the tenant notifying it of the cancellation of the lease. (1)

6.2

- 1 The plaintiff is ABC (Pty) Ltd, a private company duly registered in terms of the Company Laws of the Republic of South Africa with principal business / registered address at (set out any suitable physical address of the company). (1)
- 2 The defendant is XYZ CC, a close corporation duly registered in terms of the Close Corporations Act (or laws) of the Republic of South Africa, carrying on business at Shop Nr 1, Main Road Mall, King Williamstown, Eastern Cape. (1)
- 3 On the 1st March 20..., the defendant and plaintiff concluded a written Agreement of Lease (hereinafter referred to as the "Lease") in respect of Shop Nr 1, Main Road Mall, King Williamstown, Eastern Cape (hereinafter referred to as the "Premises"). (1)
- 4 The Lease provided *inter alia* as follows:
 - 4.1 the duration would be three years commencing on 1st March 20... and expiring on 28th February 20 ... (1)
 - 4.2 the defendant would pay rental to the plaintiff in the sum of R100 000,00 per month plus value added tax at the prescribed rate, monthly in advance on/before the 1st day of every month with effect from 1 March 20... (1)
 - 4.3 Should the lessee fail to pay the rental or any other amount due by it in terms of the lease or commit any other breach of any term or condition of the lease or fail to make such payment or remedy such breach within a period of 10 (ten) days after the given of written notice to that effect to it by the plaintiff, the plaintiff shall be entitled, but not obliged, to cancel the lease forthwith and claim possession of the premises without prejudice to its claim for any arrear rental and other sums payable in terms of the

lease or any damages which it may be suffer by reason of such breach and/or cancellation and/or to any other remedy which it may have against the defendant arising out of the lease or the law. (1)

4.4 In the event of the defendant committing a breach of the lease, it shall be liable for the legal costs incurred by the plaintiff on an attorney/client scale. (1)

5. In breach of the provisions of the lease, defendant has failed to pay the rental for the period (set out a three month period prior to the consultation date) and is currently in arrears in the sum of R300 000,00 plus value added tax thereon. (1)

6 The plaintiff has on (date) by written notice demanded payment of such arrear rental in terms of the provisions of the said lease but notwithstanding such notice/demand, defendant has failed or refused to pay the amount due or any part thereof. (1)

7 Plaintiff has elected to cancel the said lease and has done so by written notice to the plaintiff to this effect on (date). (1)

8 Defendant is presently in unlawful occupation of the leased premises. (½)

9
9.1 The rental value of the premises is R100 000,00 per month. (½)

9.2 As a result of the defendant's breach of contract, the cancellation of the lease and the defendant's continued unlawful occupation of the Premises the plaintiff has suffered a loss of rental income of R100 000,00. (1)

10 Plaintiff has complied with its obligations in terms of the lease.

11 In the premises plaintiff is entitled to the relief claimed hereunder.

WHEREFORE plaintiff claims against defendant :

a) Ejectment; (½)

b) payment of the sum of R342 000,00 (inclusive of VAT) in respective arrear rental; (½)

c) R100 000,00 in respect of damages; (½)

d) costs of the action; (½)

e) further/alternative relief

6.3 An advocate and plaintiff's attorney, alternatively an attorney with the right of appearance in the High Court. (2)

Note to examiner:

If the candidate answers that the particulars of claim must be signed by an attorney with the right of appearance as well as plaintiff's attorney (as is required in some divisions of the High Court) he/she should not be penalised.

QUESTION 7

[4]

Section 24.1

- 1 Absence of jurisdiction. **1 mark**
- 2 Interest in the cause, bias, malice or corruption on the part of the presiding officer. **1 mark**
- 3 Gross irregularity in the proceedings. **1 mark**
- 4 The admission of inadmissible evidence or the rejection of admissible evidence. **1 mark**

QUESTION 8

[3]

Any 6 of the following:

- Lis pendens **½ mark**
- Res judicata **½ mark**
- Prescription **½ mark**
- Lack of jurisdiction **½ mark**
- Non joinder **½ mark**
- Arbitration **½ mark**
- Lack of locus standi **½ mark**

QUESTION 9

[12]

- 9.1 The Prosecutor reads out the charge sheet, a copy of which would have been furnished to the defence in advance before commencement of the trial.
- 9.2 The accused will then either in person or through his or her legal representative enter a plea of not guilty.
- 9.3 The accused's statement in terms of Section 115 prepared by his attorney or himself will be read out, that is if the accused chooses to set out the grounds of his defence.
- 9.4 If the accused is represented and the statement was read on his behalf then the magistrate will ask the accused to confirm the correctness of the Section 115 statement.
- 9.5 If there are any admissions made in the statement in terms of Section 115 the magistrate will enquire if the admissions can be recorded in terms of Section 220 of the Criminal Procedure Act and the admissions will be so recorded if the accused consents thereto.

- 9.6 The prosecutor will lead evidence by the witnesses that have been subpoenaed to prove the allegations against the accused and each witness will then be cross-examined by the accused or his legal representative. The prosecutor will be entitled to re-examine his witness once the said witness has been cross-examined by the other side and the same will apply when the attorney's witness has been cross-examined by the prosecutor. The court will be entitled to ask questions in clarification and allow both parties to ask further questions arising therefrom.
- 9.7 The state finalises its case and closes it and depending on circumstances the accused may apply for his acquittal in terms of Section 174 of the Criminal Procedure Act or he may close his case without himself giving evidence or calling any witnesses in his defence.
- 9.8 The accused may elect to give evidence and also call witnesses who will be cross-examined by the Prosecutor.
- 9.9 The accused closes his case and the Prosecutor argues on the merits of the case and asks the Court to accept the version of the State witnesses and to reject that of the accused and his witnesses.
- 9.10 The Defence addresses the court on the merits and may argue for the acceptance of the accused's version and the rejection of the version of the state witnesses, and ask for an acquittal.
- 9.11 The Magistrate summarises the evidence and gives reasons for accepting the one version and reasons for rejecting the other version and passes a judgement of guilty.
- 9.12 The prosecutor may elect to prove or not prove previous convictions and may also call witnesses in aggravation of sentence.
- 9.13 The defence may lead evidence in mitigation of sentence.
- 9.14 Both prosecutor and defence then address the Court on sentence.
- 9.15 The magistrate weighs the evidence and passes an appropriate sentence.

QUESTION 10**[3]**

- 10.1 After the pleas have been entered the prosecution will ask for a separation of the trials.
- 10.2 The magistrate will then proceed to deal with the plea and admissions of accused number 1 and then pass a verdict of guilty against accused number 1.
- 10.3 The case against Mr X will continue before a magistrate other than the one who convicted number 1.

QUESTION 11**[4]****STATEMENT IN TERMS OF SECTION 115 : PUBLIC VIOLENCE, ATTEMPTED MURDER AND ARSON**

I, the undersigned hereby declare that:

1. I am the accused in this matter and I plead not guilty to all the charges.
2. I deny that I committed any of the offences preferred against me.
3. On the 1st June 2000 I left my home in Limpopo and drove to Durban with my wife and we only returned on the 4th June 2000.
4. I was therefore not at the scene of the crimes.

QUESTION 12**[3]**

1. Inform the Prosecutor of your instructions and that you intend changing the plea of guilty to not guilty in terms of Section 113.
2. Either prepare a statement to be read out to court setting out the reasons why the accused pleaded guilty as well as the nature of his defence. Alternatively the accused may be obliged to lead evidence explaining why he pleaded guilty instead of not guilty.
3. Make a formal application to Court that a plea of not guilty be entered.

QUESTION 13**[3]**

The general principle is that when an accused has placed his case in the hands of his legal representative the legal representative is in full control of the case and the accused cannot repudiate his actions. Where the attorney and the client do not agree in respect of the handling of the case or acts contrary to the advice of the attorney, the attorney ought to withdraw. An attorney is also obliged to withdraw where the attorney / client relationship between him and his client has broken down eg. when the client accuses the attorney of unprofessional conduct or requires the attorney to act in an unprofessional manner.

A conflict of interests between more than one accused may develop during the trial and the attorney must withdraw from the case. An attorney may also be entitled to withdraw if the client gives contradictory instructions. An attorney may also withdraw if his client does not pay him, depending on the circumstances.

QUESTION 14**[4]**

The document required is an exception based on the failure of the plaintiff's to allege a valid cause of action. The notice must state:

- a. summons does not disclose the cause of action
- b. the grounds on which the exception is founded (viz. The fact that defendant owns the vehicle does not per se make him liable for the driver's negligence).

QUESTION 15**[5]**

- a. Grant absolution from the instance. (2)
- b. Issue a fresh summons or, if the plaintiff feels he did show that defendant in fact entered into the contract, he can appeal. (3)

QUESTION 16**[5]**

- a. section 65 proceedings (1)
- b. obtain a certified copy of the judgment (civil extract) and send them with an affidavit in terms of section 65 to your correspondent in that town. (1)
- c. garnishee proceedings (1)
- d. apply for rescission of judgment (plus one bonus mark if candidate says apply for an order staying plaintiff's execution of judgment). (1)

- e. administration order (unlikely that he would be entitled to relief under NCA). (1)

QUESTION 17 [6]

- a. notice in terms of rule 23 (4) (4)
- b. as a general rule it may not be used though it may be if you consent or if the court agrees to it being used but the court would, at your request, adjourn the hearing if you asked them to do so at the plaintiff's costs. (2)

QUESTION 18 [5]

- a. arrest tanquam suspectus de fuga.
- b. ex parte application and supporting affidavit (and the order to be granted). The affidavit would allege the existence of a debt greater than R40.00 and the facts to justify the allegation that the respondent is about to leave the RSA and that the applicant holds no security for the debt.

TOTAL [100]