

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

13 AUGUST / AUGUSTUS 2014

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

[20]

SURETYSHIP

We, the undersigned,

JAMES MODISE
(Identity Number)

and

DEREK COETZEE
(Identity number)

(Hereinafter referred to as "the SURETIES") (2)

Do hereby interpose and bind ourselves as SURETIES for and CO-PRINCIPAL DEBTORS in solidum with and on behalf of (2)

LESSEE (PROPRIETARY) LIMITED
(hereinafter referred to as "the PRINCIPAL DEBTOR") (1)

unto and in favour of
JOE LESSOR
(hereinafter referred to as "the CREDITOR") (1)

For the due and punctual payment by the PRINCIPAL DEBTOR to the CREDITOR of all sums of money which the PRINCIPAL DEBTOR now owes or may from time to time hereafter owe to the CREDITOR, including damages for breach of contract or otherwise arising from a Deed of Lease entered into on (date) into between the CREDITOR and the PRINCIPAL DEBTOR in respect of

premises, being and any extensions or renewals thereof and the due and proper performance by the PRINCIPAL DEBTOR of the PRINCIPAL DEBTOR'S obligations which the PRINCIPAL DEBTOR may now or in the future owe to the CREDITOR thereunder. (3)

1. The SURETIES renounce the benefits of excussion, division, cession of action, no value received, non causa debiti and revision of accounts, with the meaning and effect whereof the SURETIES declare themselves to be fully acquainted. (1)
2. The SURETIES agree and acknowledge that this suretyship shall be in addition to any other suretyships, guarantees or purported suretyships or guarantees concluded by the SURETIES to the CREDITOR on behalf of the PRINCIPAL DEBTOR. (1)
3. Should any extension of time, lenience or other indulgence be granted to the PRINCIPAL DEBTOR for the fulfilment of any of its obligations, irrespective of whether or not the SURETIES have had notice of such extension of time or variation, the SURETIES declare that such extension of time or variation shall not release the Sureties from their liability in terms of these presents and shall not be regarded as a waiver or tacit renunciation of the CREDITOR'S rights hereunder. (2)
4. The SURETIES consent in terms of Section 45 of Act 32 of 1944 or any amendment thereof, to the CREDITOR taking any legal proceedings for enforcement of any of its rights under this Suretyship for recovery of monies claimed under this Suretyship, if the CREDITOR so elects, in the Magistrate's Court in any district having jurisdiction in respect of the CREDITOR by virtue of Section 28 of the aforesaid Act. Should the CREDITOR not elect to take legal proceedings in the Magistrate's Court, but in a High Court, the SURETIES consent to the jurisdiction of the High Court of South Africa (Witwatersrand Local Division) in respect of any action arising under this Suretyship. (2)
5. The SURETIES choose *domicilium citandi et executandi* for all purposes hereunder at:

JAMES MODISE: (1)
DEREK COETZEE:
6. The SURETIES acknowledge that this is the entire agreement between the SURETIES and the CREDITOR and no alteration or amendment shall be valid unless reduced to writing and signed by the CREDITOR and the SURETIES. (1)
7. In the event of any dispute arising out of any breach by the SURETIES of their obligations under this Agreement, the SURETIES agree to pay the CREDITOR'S costs on the attorney and own client scale. (1)
8. The costs of drawing this Suretyship and all charges incidental thereto shall be borne by the SURETIES. (1)

SIGNED by the SURETIES at this day of 2013.

AS WITNESSES:

1. _____ J MODISE
2. _____ D COETZEE (1)

QUESTION 2

[5]

BREACH

In the event of either party being in breach of any of the terms of this agreement and failing to remedy such breach within a period of ten (10) days after receipt by it of a written notice requiring such breach to be remedied, the party aggrieved thereby shall be entitled, without prejudice to any other rights which it may have in terms of this agreement or at law, to: (2)

- Claim specific performance of the terms of this agreement as well as such damages which it may have suffered; or (2)
- Cancel this agreement and claim and recover damages. (1)

QUESTION 3

[6]

The seller warrants and represents that

- 3.1 he is the beneficial owner of the shares which are fully paid; (1)
- 3.2 neither the members of the company nor its directors have passed or agreed to pass, any resolution for the increase of the capital of the company, or for the issue of any other shares in the company, and that no such resolution will be passed prior to the transfer of the shares; (2)
- 3.3 any rights of pre-emption in respect of the said shares or any portion thereof whether granted by the articles of association of the company or otherwise, will be waived. (2)
- 3.4 the books and records of the company accurately reflect, in accordance with accepted accounting principles, its financial affairs and all the transactions to which it has been a party. (1)

QUESTION 4

[16]

4.1 Suspensive Condition

This agreement is conditional (1) upon the purchaser obtaining a bond (1) on customary conditions (1) for 80% of the purchase price from a financial institution, within 30 days from date hereof (1). If the bond is not obtained this agreement shall be null and void (1) and neither party shall have any claim against the other arising herefrom (1). (6)

4.2 Resolutive Condition

Should the purchaser be advised in writing that his application for a bond for 80% of the purchase price has been unsuccessful (1) or should the purchaser not be successful in obtaining the said bond (1) within 21 days from date of signature hereof (1) this agreement shall terminate (1) and each party shall, insofar as any terms of this agreement have been implemented (1), be obliged to restore the other into the same position as he would have been had the agreement never been concluded (1) (6)

(4 marks for clarity of drafting)

QUESTION 5**[15]**

5.1

- 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 cost price thereof before the effective date.

(5)

5.2 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)

5.3 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 6**[5]**

6.1 JOHNNY WALKER ("Walker") in his capacity as trustee for a company about to be formed (the "buyer")

(1)

6.2 FAILURE OF XYZ INVESTMENTS (PTY) LTD TO RATIFY AGREEMENT

If, within 21 (twenty one) days from the date of signature of this agreement, the buyer has not been incorporated, or having been incorporated has failed for any reason to adopt this agreement, then Walker will be deemed to be the buyer in terms of the agreement.

(4)

QUESTION 7**[20]**

7.1

- (i) One can have recourse to the authorities (rules, textbooks, judgments)
- (ii) enquire from a senior colleague; then
- (iii) enquire from the Law Society .

(3)

7.2 Your membership is suspended followed by a disciplinary hearing and a court application, if necessary.

(2)

- 7.3 Reimburse to public loss suffered due to theft of money/property entrusted to an attorney by attorney or employee. (3)
- 7.4 (i) Complications on intestate succession;
(ii) brings certainty to appointment of executor and beneficiary/ies;
(iii) ensures wishes are known. (3)
- 7.5.1 No (1)
7.5.2 Yes (1)
- 7.6 Professional work in respect of work stipulated in section 83(8) of the Attorneys Act,
 - Agreement for immovable property rights;
 - Will or testamentary writing;
 - Pre-incorporation agreement/memorandum or articles;
 - Partnership and related agreements;
 - Prospectus of a company;
 - Civil proceedings/pleadings
(7)
There are exemptions for advocates and trust companies.

QUESTION 8

[13]

- 8.1 Once your client is under cross examination you may not consult with him at all. The reason for this is obvious namely that you may advise him how to answer questions or how to rectify evidence already given. (3)
- 8.2 Yes, in very limited circumstances, e.g. to the client's executor after his death and to his curator if the client is placed under curatorship. Of course if the client waives confidentiality the information may be disclosed. (3)
- 8.3 It is not unethical to defend a person who the attorney knows to be guilty. The onus is on the state to prove guilt. The attorney may not mislead the court or allow the client to give evidence which the attorney knows to be untrue. The attorney may, however, test the state witnesses by cross examination in regard to matters of identification, etc. (4)
- 8.4 You must be absolutely honest with your client and the facts and particularly the fact that the claim has prescribed must be told to your client immediately you become aware thereof. You should advise your client to seek independent advice in respect of a possible claim against you and if necessary you should assist him in obtaining such advice. You should however not admit liability as this may prejudice your professional indemnity insurance. You should report the matter to your insurer at once. (3)

TOTAL: [100]