

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

22 FEBRUARY / 22 FEBRUARIE 2012

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.

- NOTES TO EXAMINER:**
1. *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.*
 2. *Some questions involve fairly new material and are thus relatively difficult, in others the question really indicates the answer and the test is drafting more than facts. Please mark as indicated.*

QUESTION 1

[11]

Note: too many examples indicate lack of understanding or of drafting ability

- 1.1 A person who displays the characteristics of honesty, integrity and reliability; (1)
- 1.2 Anything which is likely to affect your judgment adversely in advising or representing your client; (1)
- 1.3 Overreaching is abusing the ignorance of another in recovering excessive amounts from clients or debtors containing an element of impropriety; (1)
- 1.4 Documents on which the attorney has bestowed skill and labour; (1)
- 1.5 The Fund was established to reimburse members of the public who have suffered financial loss through the theft by an attorney, his employee or candidate attorney of funds or goods entrusted to that attorney; (2)
- 1.6 It is a rule of evidence that an attorney may not disclose to the Court without the consent of the client information given to him for purposes of legal advice or representation; (2)
- 1.7 Lack of expertise/qualification/experience (1); danger of a conflict of interest (1); mandate to do or assist in the doing of something illegal or improper. (1)

QUESTION 2**[10]**

- 2.1 A body corporate gives continuity and sometimes protection against personal liability. It may be beneficial to avoid sequestration and has a better organised regulatory structure and may have tax flexibility. (5)
- 2.2 See Section 8 and definition of “non-profit company” in new Companies Act no 71 of 2008. Types of company are:
- 2.2.1 Profit company, which can be either a
- (a) State-owned company; or
 - (b) Private company;
 - (c) Personal liability company; or
 - (d) Public company.
- 2.2.2 Non-profit company, ie incorporated for a public benefit or other object (similar to old Section 21 Company). (5)

QUESTION 3**[5]**

Note: answer implied in question.

The relationship is one of mandate (1). In common law the agent may not terminate without good cause (1); is not entitled to reward until the mandate has been executed (1); may not take a secret commission (1); must give a financial accounting to the principal on completion (1).

QUESTION 4**[3]**

The instructed correspondent may not settle without instructions (1); may not communicate directly with the client (1); is deemed to have granted a one-third allowance on fees unless otherwise agreed (1); must keep instructor informed (1).

QUESTION 5**[6]**

Contempt in facie curiae includes insulting the bench; threatening the bench; wilfully interrupting or disturbing court proceedings; defying the rulings/directions of the bench; failure to appear in court; destroying documents; breach of court orders; breaching sub judice rule.

QUESTION 6**[24]**

Note: this precedent is what is taught to candidates in the practice manual to reflect “plain English”

The agreement:

1. ACKNOWLEDGEMENT

I, the undersigned,

JOHN DOE,

acknowledge that I owe

ABC LOAN SPECIALISTS CC,
CK 90/00492/23

("the creditor")

R200 000 (two hundred thousand rands)
("the capital sum")

(4)

in respect of monies lent and advanced to me by the creditor.

2. INSTALMENTS

2.1 I will pay the capital sum and all interest due in terms of this acknowledgement of debt in 60 (sixty) monthly instalments of [insert the applicable amount and clearly indicate how it has been calculated by providing a breakdown of its components] ([state the instalment amount in words]) each. If at any time the interest rate changes, the amount of the instalments from then on must be changed to an amount that will result in the loan being repaid over the same period.

2.2 I will pay the instalments

2.2.1 in cash, free of deduction or set-off.,

2.2.2 on the first day of each month, commencing in the month following that in which this acknowledgement is signed.

2.2.3 to the creditor at the address which it specifies in writing from time to time, being initially [state payment address]

2.3 if so required by the creditor, I shall arrange (at my own expense) for payments to be made by means of a stop or debit order. (4)

3. ADDITIONAL CHARGES (2)

The creditor may include in the principal debt or recover all amounts permitted by the National Credit Act, 2005, to be included or recovered if the creditor is authorised by written agreement to do so. Such charges are the following: [The consumer has a right to information in terms of the NCA and such charge amounts must be set out in the agreement. Be lenient.]

4. DEFAULT (8)

4.1 Should I fail to make payment on due date of any amount owing in terms of this acknowledgement, I will be liable for interest on that amount at the rate then payable on the capital sum in terms of 2.1.

4.2 If any of the following occurs:

4.2.1 I fail to make payment of any amount by due date;

4.2.2 I am sequestrated (provisionally or finally) or if I take steps to surrender my estate;

4.2.3 I make, or attempt to make, a compromise with any of my creditors;

4.2.4 any of my property is attached in execution of a court judgment; the full balance outstanding (including interest) will immediately become due and payable and the creditor will be entitled, without prejudice to any other remedy he may have against me, to proceed immediately for recovery of the balance.

5. PROOF OF AMOUNT OF INDEBTEDNESS (2)

A certificate signed by a person identified in the certificate (or otherwise) as a member of the creditor will be proof, until the contrary is proved, of the amount then owing by me and the due date (dates) for payment.

6. LEGAL COSTS (4)

I will be liable for:

6.1 the legal costs (including any tax or duty) incidental to the negotiation, preparation, and signing, of this acknowledgement of debt;

6.2 any legal costs, including attorney and own client costs, incurred by the creditor in enforcing this acknowledgement of debt, except costs which the creditor incurred, or which were incurred on its behalf, before it gave instructions to institute proceedings.

6.3 Value added Tax on the costs and collection commission.

[Date and place for debtor and witnesses to sign.]

[Magistrates' Court has jurisdiction ito s 29 of the Magistrates' court Act for enforcing the AOD.]

QUESTION 7

[12]

Note: answers implied in question. Consider drafting.

7.1 Each partner must contribute; all must share in profits; the purpose must be to conduct business and earn profits. (4)

7.2 TERMINATION

Death / Insolvency

The partnership will terminate automatically upon the death of a partner or the surrender or sequestration of his estate. (2)

Retirement

A partner may retire from the partnership by giving not less than 6 (six) months' prior written notice to that effect to all the other partners.

A partner shall automatically retire from the partnership at the end of the financial year in which he attains the age of 65 (sixty five) years.

Should a partner, as a result of illness or injury, be unable to perform his duties for longer than 6 (six) months, then the other partners may give him notice requiring him to retire at the end of 2 (two) months from the date of the notice. (4)

On the expiration of the periods referred to in 19.2, 19.3, or 19.4, the partnership will terminate.

Breach/Misconduct

A partner may terminate the partnership by written notice to the other partners in the event of any of the following: (2)

- a breach of a material term of this contract by one of the other partners;
- misconduct of one of the other partners which offends against the duty of good faith between the partners;
- a conviction of one of the other partners for theft, fraud, forgery or uttering. (8)

QUESTION 8

[15]

WHOLE AGREEMENT

This document contains the entire agreement between the parties. Neither party will have any right or remedy arising from any undertaking, warranty, or representation not included in this document.

(In consumer legislation such as the NCA s90 and the CPA s50(1)(g)(1) such a term will be unlawful and is prohibited.)

VARIATION

This contract cannot be varied, added to, or cancelled by agreement otherwise than by means of a further written agreement between the parties.

(Note that variation requirements of certain contracts are dealt with in legislation. Eg consumer legislation such as the NCA, ss116 to 120 and the CPA s46)

JURISDICTION OF MAGISTRATE'S COURT

Each party consents in terms of section 45 of the Magistrate's Courts Act, 1944, to the jurisdiction of the **district** magistrate's court in respect of any proceedings pursuant to this agreement.

(From 15 October 2010, there are also Regional Magistrates' Courts with civil jurisdiction up to R300 000 in some instances and hence the word "district" can be inserted to avoid uncertainty in this type of clause.)

(Such a clause is not necessary for credit agreements as the Magistrates' Court has unlimited jurisdiction in such instances.)

SEVERABILITY

Each clause or part of a clause in this agreement is separate and severable from the rest of the agreement (unless severing would render the agreement unlawful or it would not be reasonable to do so having regard to the price, the clause or the agreement as a whole.)

Should any clause or part thereof be unenforceable, it will not affect the enforceability of the rest of the agreement (unless severing would render the agreement unlawful or it would not be reasonable to do so having regard to the price, the clause or the agreement as a whole.)

QUESTION 9

[9]

Dear A

Your claim for goods sold and delivered against X must now be prosecuted against the trustee in his insolvent estate viz Y. In order to prove the claim we shall have to lodge:

- (a) A resolution;
- (b) Special power of attorney;
- (c) Affidavit; and
- (d) Statement of account.

Before we prove the claim we have to consider the danger that you may be held liable for a contribution to costs of sequestration. If there are not sufficient funds in the insolvent estate to pay these costs the shortfall is recovered pro rata from the concurrent creditors who have proved claims. It is accordingly advisable to establish the probable financial position of the estate before we decide whether to prove.

QUESTION 10

[5]

10.1	Included	(1)
10.2	Included	(1)
10.3	Excluded	(1)
10.4	Excluded	(1)
10.5	Included	(1)

TOTAL: [100]