



NAMIBIA UNIVERSITY
OF SCIENCE AND TECHNOLOGY

13 Jackson Kaujeua Street
Private Bag 13388
Windhoek
NAMIBIA

T: +264 61 207 2081
F: +264 61 207 9081
E: coll@nust.na
W: www.nust.na

Centre for Open and Lifelong Learning

FEEDBACK TUTORIAL LETTER

2ND SEMESTER 2020

ASSIGNMENT 2

BUSINESS LAW

(BLW512S)



ΠΑΜΙΒΙΑ UNIVERSITY
OF SCIENCE AND TECHNOLOGY

CENTRE FOR OPEN AND LIFELONG LEARNING

BUSINESS LAW (BLW512S)

TUTORIAL LETTER 03/2020

Dear Student

I trust that, by the time you are reading this Second Tutorial Letter of 2020 for Business Law, you have received and perused your marked Assignment number 2.

To those of you that did well – CONGRATULATIONS! It is a pleasure to mark assignments that have obviously been completed with care. To those of you that fared poorly – remember that your marks are often a reflection of your attitude; if you try to complete an assignment in the shortest time possible you cannot expect to do well.

It is apparent that many students still do not know how to study on distance mode. The study guide contains a detailed introduction with recommendations about how to use the guide. You do not learn anything by simply scratching around to find the page in the study guide that appears to have the answer to a particular question in the assignment. You need to work systematically from the beginning of the semester; otherwise you will be unable to master the subject.

Please feel free to contact me for assistance while you are studying. I prefer e-mail as method of communication, and will try my best to respond as soon as possible. Very few students approached me for assistance while they were completing their assignment. Yet during the week before the exam I am inundated with students crying that they do not understand the work. By then it is too late! I must unfortunately make it clear that I will NOT be available to explain the entire semester's work within a couple of hours to students who have not made the effort to work during the semester.

The purpose of this letter is, *inter alia*, to make certain observation regarding your answers to the questions as contained in the aforesaid assignment in an attempt to guide you to find the most appropriate answers and/or solutions. (In these explanations, references to page numbers refer to page numbers in the only study guide for Business Law, which you received upon registration.)

Business Law is a difficult course, especially so if you are not proficient in the English language. However, it is not impossible to pass, or even to do exceptionally well. All it takes is hard work and commitment.

Remember that tutorial letters form part of your study material for examination purposes.

Firstly, some general comments:

1. Some students tend not to **read a question** in order to establish exactly what is asked and, as a result, you have lost marks. Also observe the **mark allocation** in order to decide how many facts to include in your answer.
2. **Read your answer!** Carelessness costs marks!
3. Make sure that you have answered all the questions. In an assignment there is no excuse to omit questions.
4. Make sure of the **spelling of words**. You were already requested to do so in the First Tutorial Letter. There is therefore no excuse if you have lost marks as a result thereof. It is really alarming to note that tertiary students misspell words even when copying from the study guide!
5. The use of **telegram-style answering** is not accepted. Again, it is evident that most of you have not read the First Tutorial Letter where these issues have been addressed. A mere “Yes” or “No” answer also does not deserve any marks, as you were warned that such an answer requires a proper motivation in addition.
6. On the other hand, if the question asks you to “name” something, an explanation is not required, and you will waste valuable time in the exam writing unnecessary long paragraphs.
7. Keep your answers concise and to the point. In the examination the markers do not have time to wade through pages of jumble in order to search for one correct key word. In fact, we do not mark on key words at all; if the context in which you use the words does not show understanding no marks will be allocated.
8. Please do not copy the questions into your assignment book; the tutors have a copy of the assignment and it wastes time to have to figure out where the question ends and the answer starts.
9. Note that in the exam you will be penalized if the first part of your answer is wrong, but your motivation is perhaps correct (or *vice versa*). The reason for this way of marking is that if you contradict yourself in your answer it gives the impression that you do not understand the study material properly.
10. A new trend is for students to use an internet paraphrasing tool in an attempt to avoid the detection of plagiarism. Do not do this! Paraphrasing tools often replace key legal terms with random terms, leading to answers that are just garbled.

11. Read the instructions in each question carefully. The following terms appear frequently in the phrasing of questions. You should know their meaning and answer accordingly.
- **Analyse:** Separate the topic into parts and examine each part critically.
 - **Compare:** Look for qualities or characteristics that resemble each other. Emphasise similarities but also mention differences.
 - **Contrast:** Stress the differences between concepts, qualities, events or problems.
 - **Criticise:** Assess and evaluate. Point out correct and incorrect aspects.
 - **Define:** Give a concise, clear and authoritative meaning. Details are not required.
 - **Describe:** Recount, characterise, sketch or relate in sequence or story form.

Please feel free to contact any one of your marker-tutors at the following numbers:

Ms M Hanekom

Tel. No. (W): (061) 207-2089

E-mail: mhanekom@nust.na

Mr B Tjatjara

Tel. No. (W): (061) 207-2377

E-mail: btjatjara@nust.na

BUSINESS LAW [BLW 512S]**ASSIGNMENT 2 / 2020**

QUESTION 1

Questions often cover more than just one part of the work. If a question consists of subsections, always read the entire question (all the subsections) before attempting to answer. Many students gave the same information under both questions 1.2 and 1.4.

1.1

Remember the methodology of answering problem questions: it is not sufficient to simply identify the relevant legal concept – you need to give the requirements and indicate whether they have been met or not, because only then will the particular legal concept be applicable. This was discussed in detail in the previous feedback letter.

DO NOT START YOUR ANSWER WITH A CONCLUSION!

Revise the unit on Agency (unit 8). A thorough knowledge of the principles of agency is presupposed for the successful study of Partnerships, as well as for Company Law (which you will be doing next year). Please distinguish carefully between implied authority based on the mutual mandate, ostensible authority (estoppel) and authority granted retrospectively (ratification). The concepts are mutually exclusive. Furthermore, “ratification” does not mean “inform the third party that they do not accept liability”. In fact, it means exactly the opposite.

*PLEASE do NOT give an answer in the following vein: “The partner acted in terms of the mutual mandate because the contract is within the scope of the business. The third party can therefore use estoppel to hold the partnership liable and the partners must ratify the contract.” Even if you (accidentally) used one or two correct keywords you will get ZERO marks, as your confused answer indicates a total lack of understanding of the relevant legal concepts. Similarly, it is wrong to say “the contract is valid **because** it is in the scope of the business” – “scope of the business” is not a requirement for the validity of a contract. See Annexure “A” to this Tutorial Letter.*

We may assume that the requirements for a valid contract have been met and it is also clear that Freddy acted on behalf of the partnership. Freddy did not have express authority to conclude the contract, and due to the provisions of the partnership agreement he also did not have implied authority. However, in terms of the mutual mandate each partner has implied authority to bind the partnership in transactions that fall within the scope of the

partnership. The contract fell within the scope of the business and the USA supplier was bona fide. The partnership is bound to the contract.

1.2

Read the facts carefully. This sub question does not concern the liability of the partnership as a whole. Also, at this stage the partnership still exists.

A partnership is not a juristic person and the partners can be held personally liable for the debts of the partnership. During the existence of the partnership the partners can be held jointly liable. If there are insufficient funds/assets in the partnership fund to pay the USA supplier, it can attach the personal assets of the partners.

1.3

Read the facts! Freddy entered into the contract, thereby participating in the business of the partnership.

A silent partner does not participate actively in the business of the partnership and cannot be held liable by third parties. By entering into the contract with the USA supplier, Freddy forfeited his protection and can therefore be held liable. The answer will not be different.

1.4

Read your questions! The question was not "what are the effects of the dissolution of a partnership?" Reference to the mutual mandate terminating has no place here.

After dissolution of the partnership the partners become jointly and severally liable. This means that a creditor can sue any one of the former partners, or one or more of them together, for the debt. The answer will be different

1.5

Assets are liquidated, debts are paid and the balance is distributed amongst the partners.

1.6

A partner is obliged to display reasonable care in the management of partnership affairs, and can be held liable for damages if, due to his/her negligence, the business is otherwise negatively affected. They can hold Freddy liable.

QUESTION 2

Remember that no marks are awarded for yes/no without a correct motivation. Also remember that a motivation requires a reference to the relevant legal principle, not just repeating the facts.

- 2.1 No. No intention to make a profit for personal gain. (Charitable organisation)
- 2.2 Yes. There was a hope of making a profit / it is not a requirement that profit should actually ensue.
- 2.3 No. No profitsharing.
- 2.4 No. Performance not possible. *They intended mining for diamonds on Mars, not dealing in unlicensed diamonds. Read the facts.*
- 2.5 Yes. Exception to limit of 20 persons.

QUESTION 3

These were straightforward theory (knowledge-based) questions and should have been unproblematic; surprisingly many students fared poorly. Read your questions carefully and make sure that you know what is required.

3.1

DO NOT COPY DIRECTLY FROM THE STUDY GUIDE!!! Use your own words. Not only will this force you to actually understand the work before you attempt the question, but direct copying is a breach of copyright, which is a criminal offence. Answers that are copied directly from the study guide will not be marked!

The rules follow a specific sequence. If you did not list them in the correct sequence, no marks were allocated.

Profits are shared according to the partners' agreement. If there is no agreement, profits are shared according to the value of their contribution. If the value of the contribution cannot be ascertained, profits are shared equally.

3.2

The concept "joint and several liability" is of extreme importance in Business Law and in Company Law. Make sure you know what it means.

No, it is not correct to refer to joint and several liability in this context. A sole proprietor is

personally liable. Joint and several liability requires at least 2 debtors.

3.3

Always read your questions carefully. The question referred to "specific performance", not a claim for damages or any other claim. If you cannot remember what specific performance means, revise Commercial Law 1A!

No. A court will never force an unwilling partner to remain in a partnership.

Please do not hesitate to contact me if you have any queries regarding the work covered in the assignment.

ANNEXURE A

Guidelines for answering problem questions

1. The purpose of problem-based questions is to assess whether you have the ability to apply the law to a given set of facts in order to come to a well-motivated conclusion.
2. Problem-type questions sometimes have more than one possible answer, depending on your interpretation of the facts. Even judges sometimes differ on how the facts of a case should be interpreted, so it is not unusual that you will, too. Marks are awarded for a well-constructed argument that shows understanding, irrespective of the final conclusion. If your conclusion is motivated by applying the correct legal principles, you will get maximum marks.
3. Simply re-stating the law is not enough. COMPARE the requirements with the facts given in the problem narrative. State which ones are applicable / not and give reasons based on the facts. In other words, MOTIVATE YOUR ANSWER. Simply stating the legal principles will not earn you marks. The above approach is illustrated by means of the following three examples. Please study the examples carefully and make sure you understand the difference.
4. Concentrate on the structure of your answer. A good answer has an introduction, a body and a conclusion. You will lose marks if your answer consists of a jumble of unrelated facts.
5. Keywords used out of context do not deserve marks. For example, an answer in the following vein: “The partner acted in terms of the mutual mandate because the contract is within the scope of the business. The third party can therefore use estoppel to hold the partnership liable and the partners must ratify the contract” is utterly nonsensical and WRONG!!! (See example 3). Even if you (accidentally) used one or two correct words you will get ZERO marks, as your confused answer indicates a total lack of understanding of the relevant legal concepts.
6. Keep your answers concise and to the point. In the examination the markers do not have time to wade through pages of jumble in order to search for one correct key word. In fact, we do not mark on key words at all; if the context in which you use the words does not show understanding no marks will be allocated.

Sample question

Abraham and Bartholomeus are partners in a fishing business. Abraham is the managing partner and is authorised to enter into contracts on behalf of the partnership. Bartholomeus purchases a racehorse on behalf of the partnership without the consent or even knowledge of Abraham. Abraham is furious, but when the horse wins its first race he decides that the partnership should keep the horse. The seller, however, would like the horse back, and now alleges that the contract is not binding because Bartholomeus never had authority to represent the partnership.

Discuss the legal position of the partnership and the seller in full.

Example 1

Model answer for 10 marks.

The agreement appears to be valid and was entered into in the name of / on behalf of the partnership.

Bartholomeus clearly had no express authority to purchase the horse, because he bought the horse without the consent and knowledge of Abraham. B also does not have implied authority, since his implied authority was excluded in the partnership agreement. A racehorse is not in the scope of the business of a fishing partnership and the mutual mandate will therefore not be applicable.

The partners have, however, ratified the transaction by deciding to keep the horse. They can do this, because the contract was concluded in the name and on behalf of the partnership.

The effect of ratification is that the act of the unauthorized partner is regarded as though the contracting partner had actual authority at the time the act was concluded.

The contract is binding on all the parties and the seller cannot set aside the contract based on B's alleged lack of authority.

Example 2

Although the following answer appears "perfect" it will, at most, be awarded 2 or 3 marks.

Why? Because it is simply a re-statement of the legal principles and does not contain any motivation with reference to the facts. In fact, it does not answer the question at all. Note that no marks are awarded for a correct conclusion if it is not supported by a correct motivation based on both the facts and the law.

The legal concept is contractual liability of a partnership. In general, a partnership will be bound by a contract if an authorised representative concluded a valid agreement on its behalf. The following requirements must be met, namely the agreement must be valid, the agreement must be concluded in the name of or on behalf of the partnership and the representative must be authorized.

In order for the partnership to be bound to a contract purportedly entered into on its behalf, the contracting partner must have had authority to bind the partnership. The authority may be actual or ostensible. Actual authority can be express or implied.

Every partner has implied authority to bind the partnership to transactions falling within the scope of the partnership business. This implied authority is a *naturalia* of the partnership and may be changed by express agreement between the partners. When a partner whose implied authority has been restricted exceeds his/her authority and concludes a contract with a *bona fide* third person who is unaware of the limitation, the partnership can be held to the contract by way of the principle of the mutual mandate, provided that the contract falls within the usual scope of the business.

If a partner professing to act on behalf of the partnership exceeds his authority, the other partners may adopt the transaction by ratifying his act, in which case they will be bound by it. The effect of ratification is that the act of the unauthorized partner is regarded as though the contracting partner had actual authority at the time the act was concluded.

An unauthorised act by a partner can only be ratified if such act was concluded in the name and on behalf of the partnership. If the partner acted in his own name the partners cannot by ratification acquire rights or incur obligations. Ratification can be express or by conduct. If the partners disapprove of the act of unauthorized partner, they should notify the other party to the contract within a reasonable time of the lack of authority. If they do not do so timeously they could be regarded as having ratified the act by their conduct.

The partnership is bound.

Example 3

The following answer will not earn any marks at all. It is simply a jumble of unrelated keywords which indicates a total lack of understanding of the relevant concepts.

Please remember: the presence or absence of the 5 requirements for a valid contract is what determines whether a contract is valid or void. (Revise Commercial Law 1A!) If there is no authority, the contract is not binding on the partnership. IT IS NOT VOID!!!

The legal concept is external relations. The contract is valid because it was entered into in the name of the partnership. According to the principle of mutual mandate B had express authority but the *naturalia* may be changed by express agreement between the partners and the agreement is therefore void or non-valid.

The requirements are that the agreement must be valid, must be in the name of or on behalf of the partnership and there must be authority. The agreement was in the scope of the business, however this is ostensible authority and the partnership must ratify the contract. The partnership is bound.