FEEDBACK TUTORIAL LETTER

2nd SEMESTER 2019

ASSIGNMENT 2

COMMERCIAL LAW 1B
(CML112S)
Course Name: COMMERCIAL LAW 1B
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Department: SOCIAL SCIENCES
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NQF Level and Credit: NQF LEVEL 5, 12 CREDITS
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Marker-tutor Details

Your marker-tutors for COMMERCIAL LAW 1B
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Dear student

FEEDBACK FOR ASSIGNMENT 2

This tutorial letter contains reading skills, suggested way of answering questions, responses to problems identified during the tutor-marking, clarification of misinterpreted/not clearly understood concepts or questions relating to assignment 2 and other aspects that reinforces learning to improve performance.

The essence of assignment 2

The questions in this assignment are based on learning outcomes formulated for this course. Several components of commercial law 1B were tested in your responses (units 11-18). In your answers we looked for evidence inter alia, critical reading, application of understanding, reflexive responses, coherence and correctness, grammaticality and spelling. You need to focus on the length of your responses.

Understanding the question: task/process words

It is important to analyse the task/process words before you begin to answer any question. The ‘process words’ or instruction words identify what you are supposed to do.

Reading strategies

Before you embark on an assignment, you will need to engage and to interact with the prescribed materials (in this regard your study guide) by applying effective reading skills. These skills will help you to become familiar with the prescribed reading materials.

QUESTION 1

1.1.

This question was problematic for some students. Some students were of the view that the question required for identification of the requirements for the formation of a lease. Remember there was already a valid contract of lease in place. It was specifically required of students to discuss how Mbambo was going to secure rental arrears from Michel. The study guide is clear that a lessor has a tacit hypothec. But a lot of students knew what the question was about. Some problems encountered with this question is that students did not apply the law to the facts. They just copied the law as stated in the study guide.
without deciding whether Mbambo can attach all movables on the leased premises or not and on which basis. They were students that gave very generalised and vague answers.

We awarded marks as follows:

- Mbambo can get security for arrear rent of his outbuilding as he has a tacit hypothec. (1)
- These is over the movables brought to the leased premises. (1)
- These includes goods in terms of a credit agreement (and goods belonging to other third parties). (1).
- The tacit hypothec applies ex lege (by operation of law). (1)
- It comes into operation when (and as long as) rent is owing like in the present case. (1)
- Under common law Mbambo can only attach goods of a third party if express or implied consent has been given. (1)
- In this case implied consent can be regarded to be given as Michel’s sister did not tell Mbambo that the stove and couch are hers (1)
- To render his hypothec legally effective, Mbambo must obtain an attachment order. (1)
- An interdict which operates pending an order of court. (1)

1.2.

This question was on the lessor’s duty in a lease. We awarded marks as follows:

- In a contract of lease, the lessor has a continuing duty to maintain the property. (1)
- And keep it in a fit condition for the lessee’s use and enjoyment. (1)
- Defects parts must be repaired or replaced if it interferes with the proper use and enjoyment of the property. (1)
- James may sue for either cancellation or specific performance. (1)
- And in addition, claim damages. (1)

1.3. For the most part, students copied verbatim from the study guide. This is not allowed. Students should answer in their own words. Only then we can determine students understanding. Most students could not draw a distinction between the application of the rule to long and short leases. Some did not even define or state the purpose of this rule. We encountered instances where students copied from foreign materials. This made some students not to get full marks here.
We awarded marks as follows:

- **Huur gaat voor koop rule** (hire goes before sale) is a rule which protects the lessee. (1)
- By providing security of tenure for the lessee in the event of the lessor deciding to sell the property before the expiry of the lease. (1)
- In regard to long lease, a lease can occupy the leased property if the lease is registered against the title deed, if the property is sold. (1)
- If not registered, the lessee has the right to occupy the leased premises until the first ten years expires (1).
- With short leases, a lessee for less than 10 years is protected for the full term of the lease if in occupation of property. (1)

**QUESTION 2**

2.1. Most students referred to instances where reasonable and fair use of work might not infringe copyright. But this question related to use of work only and the correct answer was under the following instances:

- **Assignment** (1).
- This involves transfer of rights (1)
- **Licensing** (1)
- This involves a contract in which the owner gives a license to another to use the work for a specified purpose (1)

2.2.

What was required for this question was straightforward and were this:

- **Be new/novel** (1)
- **Not anticipated by prior art** (1)
- **Involve an inventive step** (1)
- **Not obvious to a person ordinarily skilled in the technical field of the invention** (1)
- **Be practically viable** (1)
- **Must be applicable to a certain industry or can be used in a particular industry** (1)
QUESTION 3

3.1. This question was problematic for some students. It is important to know that all contracts must first comply with the general requirements to be valid. It does not matter whether it is a sale, lease, insurance, employment or agency. All those contracts must comply with the general requirements you learnt in commercial law 1A, which are reiterated in commercial 1B and are these:

- The principal and agent must reach consensus (1)
- The principal and agent must have contractual capacity (1)
- The performance in terms of the contract must be physically possible (1)
- The nature, object and performance in terms contract must be lawfully (1)
- The necessary formalities in terms of the contract must be complied with. (1)

It is important to always keep in mind that all contracts have the general requirements and what distinguishes these contracts are the essentialia (the essential requirements). In exams you can either be asked the general requirements or the essential. Take note that if the question relates to the formation of a specific contract then a student is required to combine the general requirements and the essentialia.

3.2. Some students could not get all the 5 marks due to issues of spelling i.e principle instead of principal. Remember that agency relationships are created between the principal and agent (and third parties) and not with the principle. Marks awarded for any of the following five:

- Performance (1)
- Effluxion of time (1)
- Revocation by the principal (1)
- Renunciation by the agent (1)
- Death of the principal (1)
- Death of the agent (1)
- Insolvency of the principal (1)
- Mental incapacity of the principal or agent (1)
Some students mentioned all of the above instances. That was not necessary. It is important to highlight that the insolvency of an agent does not necessarily terminate agency and principal relationship. Insolvency of the principal does.

QUESTION 4

This question was straightforward but most students just copied word for word from the study guide without applying the law to the facts. Facts were simply ignored. Facts are there for a reason.

Without being too prescriptive, we awarded marks as follows:

- A contract of insurance differs from other contracts in that it is based on utmost good faith. (1)
- This is gives rise to the duty of disclosure. (1)
- The duty entails that both the insured and the insurer has a duty to disclose to each other prior to the conclusion of the contract. (1)
- Of every fact relative and material to the risk of assessment of the premium. (1)
- This means material facts of which the parties have actual or constructive knowledge prior to the conclusion of the contract of insurance must disclosed. (1)
- The past convictions relating to drunk driving and speeding is material (1) and
- Festus should have disclosed it (1)
- The incident of the girlfriend is not material and need not be disclosed (1)
- The contract is voidable as the failure to disclose the relevant information amounted to misrepresentation (1)
- Provident is entitled to cancel the contract and not pay any claim of Festus (1)

It was puzzling why some students considered the accident of the girlfriend as material. Why would this be the case if she was a named driver in this regard and her own insurance and had nothing to do Festus. You must bear in mind that with regard to the question of disclosure, the test is of materiality. In other words, is the information important to be disclosed or not. Duty of disclosure is an important subject matter for a contract of lease and students can expect a question in the exams on this.
GENERAL OBSERVATIONS/COMMON MISTAKES

As we were marking your scripts, we identified the following weaknesses from some of the students:

- Lack of understanding of the questions. You should make sure that you analyse the key words/task words of the question and your answer should give the required response.

- Incorrect spelling of words such as principal by referring to principle. You should ensure correct spelling of words as they appear in the study guide. If you type your work this can generally be avoided as the computer will spot this.

- Use of foreign materials (such as English law books) thereby referring to requirements for the formation of a valid contract such as specifics, consideration and proper form. (BE CAREFUL WHEN USING MATERIALS OF OTHER JURISDICTIONS-LAWS ARE DIFFERENT). Your study guide in most cases is enough to answer questions in an assignment. Stick to that. Use sources that you are sure they are applicable to Namibian law.

- Some students’ answers were unnecessarily too long. Always consider marks allocation and that should be a factor to help you determine how long your response to each question should be. It is hard to contemplate a student answering a 3 marks for example for a full page or half page or answering a 10 Marks question in 2 to 3 pages.

- Some students did not attempt all the questions. Some questions were left blank. This behavior is discouraged. Students are encouraged to attempt to answer all questions where this is the instruction. Students should phone us on numbers provided in tutorial letters or make arrangements for face to face consultation if this possible to discuss challenges faced when answering questions (especially if a question or questions are not clear to them. WE ARE HERE TO HELP.

- There were instances of verbatim copying from the study guide. You should always paraphrase and put explanations in your own words. Only then we can be sure you understand the work.

END OF FEEDBACK TUTORIAL LETTER