ESSENTIAL TRADE MARK LAW (IPSP044)
20 OCTOBER 2017

100 MARKS

Instructions to all candidates:
❑ Answer all the questions.
❑ You have to submit your exam answers as **Assignment 3** via **myUnisa** on or before 27 October 2017. Click on "Assignments", select assignment number 3 and follow the instructions on the screen (as you did for Assignments 1 and 2). If you are unable to submit your exam answers on myUnisa please send your answers directly to hurtee1@unisa.ac.za and clearly indicate the module code and your student number.
❑ The unique number in order to submit your exam on myUnisa is 788684.
❑ This is an open book examination.

PLEASE READ THE FOLLOWING INSTRUCTIONS CAREFULLY BEFORE ANSWERING THIS EXAMINATION.

(a)   Ensure that you give reasons for each answer when instructed to do so. A mere YES/NO or TRUE/FALSE will earn NO marks if instructed to discuss or provide reasons for your answer.

(b)   We expect a certain amount of detail in your answers. As a rough guideline, your total examination answer should be about five to seven printed pages. Your answers to the various questions should be proportionate to the marks allotted to the questions.

(c)   When answering the examination, remember that an open-book exam is a test at a higher level than the usual type of test, where memory is tested as much as insight. In an open-book exam, you need not memorise any information, so you are expected to prove that you can use information, rather than merely repeat it. In brief, what is being tested is factual knowledge and understanding, not memory skills.

(d)   For this reason, you do not earn marks by merely detailing a list of all the information that you think might be relevant to a particular question. This gives no indication that you know what statutory or other provisions are applicable in a specific context. You are expected to identify precisely what information applies, and then explain why you think so. Also, because you have the guide available when answering questions, we do not give marks for direct quotations from the guide.

(e)   Problem-type questions.
        A number of students lose marks because they do not approach these questions correctly. When answering such questions, it is important to first clarify for yourself the area of work where the answer must be sought. For example, in a trade mark question, first decide whether you are asked if a mark can be registered, opposed or infringed. Different statutory provisions apply in each instance, and to deal with infringement issues by considering the legislation that applies when cancellation is sought, will not earn marks.
        Once you have done this, set out the relevant legal principles. Deal only with those principles that relate to the given facts.
        Next, apply these principles to the facts. This is where a number of students lose marks - they set out the law in some detail, but then do not illustrate how it applies to the factual situation they have been asked to solve.
        Finally, state your conclusion - yes, X may institute infringement proceedings or no, Y cannot obtain registration.
        Also remember that the facts are merely there to illustrate the legal issues we want you to address - if you think the facts are insufficient, just say that it is impossible to reach a definite conclusion. Do not waste your time on unnecessarily lengthy speculation on what might be the case in various scenarios.

QUESTION 1

Aroma Company manufactures cosmetics in South Africa. The cosmetic products are marketed under the name TROPIC GLOW.

(a) Aroma Company wishes to register the trade mark TROPIC GLOW in South Africa in class 3 in respect of soaps, perfumery, essential oils and cosmetics. Advise Aroma Company whether the mark qualifies for registration as a trade mark; whether any absolute grounds exist on which the registrar can refuse to register the mark; and whether the registrar may require that registration be subject to any disclaimers or other conditions. (25)

(b) Aroma Company wishes to register the trade mark TROPIC GLOW in South Africa in class 3 in respect of soaps, perfumery, essential oils and cosmetics. Before filing any applications you conduct a registrability search of the trade marks register and discover the following trade mark applications/registrations:
Registration Number 90/2390 TROPICAL in class 25 in respect of clothing and footwear. Although this trade mark has been used in South Africa since 1998 for shoes and leather goods, it has never been used in respect of clothing.
Registration Number 96/4782 TROPICANA in class 3 in respect of cosmetics. This mark has been used extensively in South Africa in relation to lipsticks since 1996.
Application Number 2000/764 TROPIC LIGHT in class 3 in respect of perfumes. This mark has not yet proceeded to registration and has never been used in South Africa.
Advise Aroma Company whether any of these prior applications/registrations will present an obstacle to the registration of its marks. In each instance, indicate what section(s) of the Trade Marks Act 194 of 1993 is/are relevant. (25)

(c) Aroma Company becomes aware that Beaver Company, a South African manufacturer of cosmetic products, has commenced marketing a new range of hair lotions in South Africa under the mark TROPICLEAN and in a similar packaging to that used by Aroma Company. Identify which subsection of section 34(1) will enable Aroma Company to sue Beaver Company for trade mark infringement if Aroma Company's mark TROPIC GLOW was registered in South Africa in class 3 in respect of cosmetic products? What must Aroma Company establish in order to succeed with any such action? Give reasons for your answer. (25)

(d) Aroma Company's mark TROPIC GLOW is registered in South Africa in class 3 in respect of cosmetic products. Aroma Company decides to appoint Clover Company as a licensee of its trade mark TROPIC GLOW to distribute its products in South Africa. Advise Aroma Company whether any formalities are necessary and/or advisable to protect its trade mark rights. (25)

TOTAL MARKS [100]