

STRICTLY CONFIDENTIAL

THE PUBLIC ACCOUNTANTS EXAMINATION
COUNCIL OF MALAWI

2013 EXAMINATIONS

FOUNDATION STAGE

PAPER 2: LEGAL FRAMEWORK

TUESDAY 3 DECEMBER 2013

TIME ALLOWED : 3 HOURS
2.00 PM - 5.00 PM

SUGGESTED SOLUTIONS

SECTION A

1. (a) (iv)
- (b) (ii)
- (c) (iii)
- (d) (i)
- (e) (ii)
- (f) (iv)
- (g) (iii)
- (h) (i)
- (i) (ii)
- (j) (iv)

2. (a) The first category of courts which have original jurisdiction are all subordinate courts which comprise all magistrate courts and the Industrial Relations Court. The second category comprises the High Court of Malawi. A party to a case who is aggrieved by the decision of a subordinate court may appeal to the High Court. To appeal, he must first give notice to the trial court of his intention to appeal, then he should pay appropriate appeal fees and submit the grounds for appeal.

The second category of courts which have appellate jurisdiction are the High Court of Malawi and the Malawi Supreme Court of Appeal.

The High Court hears appeals from all subordinate courts in both civil and criminal matters. At the same time an aggrieved party against the decision of the High Court at its original jurisdiction takes the same steps to appeal as explained with appeals from subordinate courts. This time the aggrieved party appeals to the Malawi Supreme Court of Appeal which is the final court of record in Malawi. This means that the subordinate courts have original jurisdiction only. The High Court has both original and appellate jurisdiction while the Malawi Supreme Court of Appeal has appellate jurisdiction only, hearing appeals from the High Court of Malawi in both its original and appellate jurisdiction.

- (b) The doctrine of binding precedent operates in the courts of Malawi in the following way:

For the doctrine of precedent to operate properly, the hierarchy of the courts must first be understood. In Malawi, the two superior courts are the Supreme Court of Appeal and the High Court. These are the two courts which are legally mandated to lay down precedents to be followed by all lower courts, in this case, the subordinate courts. Thus, when the High Court hears a case, especially which has come before it for the first time, and there is no other previous case to refer to, the judge creates a principle of law i.e. a rule which becomes the basis for deciding the case before him, i.e. as was the case with the rule in *Rylands v Fletcher (1868)* with regard to strict liability. Since the judge has created or originated the rule, then it becomes a rule of law, or a principle which inferior judges or magistrates are bound to apply when faced with a case of the same type and on the same facts. It is, therefore, by means of original precedents that case law is created. Similarly, when a judge of the Supreme Court of Appeal hears an appeal from the High Court, he also makes a ruling in the relevant appeal case. This ruling becomes a precedent and judges of the lower courts such as the High Court and Magistrate Courts will be bound by the ruling or decision of the Supreme Court of Appeal.

- (c) The word “jurisdiction” means the legal authority given to a court to hear and determine cases to be referred to it whether civil or criminal and whether it is at original or appeal jurisdiction.)

3. (a) The following factors may affect the validity of a contract in spite of the fact that essential elements have been satisfied:
- (i) Form: Some contracts must be made in a particular form; for example, that they must be in writing or that they must be supported in writing. A contract is invalid if its creation does not conform to the required form.
 - (ii) Content: A contract can only be enforced if it is sufficiently complete and precise in its terms. Some terms which the parties do not express may be implied and some terms which the parties do express are overridden by statutory rules.
 - (iii) Genuine consent: A misrepresentation made by one party to the contract may affect the validity of a contract because he may not have given genuine consent when accepting the offer.
 - (iv) Legality: The courts do not enforce a contract which appears to be illegal or which is contrary to public policy.
 - (v) Capacity: Some persons have only restricted capacity to enter into contracts. The most important category of such persons are minors i.e. persons under the age of 18.

- (b) As a general rule, the performance of an existing obligation imposed by a statute is no consideration for a promise of a reward. This was the decision in Collins v Godefroy (1831) in which the claimant had been summoned to court to give evidence on behalf of the defendant in another case. He alleged that the defendant had promised to pay him six guineas for appearing. The court held that there was no consideration for this promise as the claimant was obliged by law to appear before a court of law. But, if some extra service is given, the service becomes sufficient consideration. This forms an exception to the general rule. It was the decision in Glasbrook Brothers v Glamorgan (1925) in which at a time of an industrial unrest, colliery owners rejected the view of the police that a mobile force was enough. They asked and agreed to pay for a special guard on the mine. Later, they repudiated liability saying that the police had done no more than perform their public duty of maintaining order. It was held that the extra services given, beyond what the police in their discretion deemed necessary, were consideration for the promise to pay. If the judgment of the police authorities had been that a special guard was necessary, they would not have been entitled to payment.
4. (a) My advice to Zex Dayelo is that the sale of Katunga Company Ltd does not affect his employment. He cannot lose his job just because the company which was his employer has been sold. In law, the employees of the company which has been sold go with the company to any person or entity who may have bought the company. All the rights and obligations which applied to Zex when he was an employee of Katunga Company Ltd will continue to apply to him in the new company. Section 32(2) of the Employment Act, 2000 provides that where an undertaking or part thereof is sold, transferred or otherwise disposed of, the contract of employment of an employee in employment at the date of the disposition shall automatically be transferred to the transferee and all the rights and obligations between the employee and the transferor at the date of the disposition shall continue to apply as if they had been rights and obligations between the employee and the transferee and anything done before the disposition by or in relation to the transferor in respect of the employee shall be deemed to have been done by or in relation to the transferee.
- (b) Any five factors which, in relation to Employment Law, support the given statement include the fact that an employee's employment cannot be treated as interrupted if he is absent from work for less than six months:
- (i) due to taking annual, maternity, sick or any other leave.
 - (ii) due to his suspension with or without pay.
 - (iii) due to termination of his employment prior to being re-instated or re-engaged in his employment.

- (iv) due to having been temporarily laid off by the employer.
- (v) due to action in pursuance of a strike in which he participated.
- (vi) due to a lockout.
- (vii) with the leave of his employer.

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SECTION B

5. (a) (i) Existing goods are those which exist and are owned by the seller at the time that the contract is made.
- (ii) Future goods are those which do not exist or which the seller does not yet own when he contracts to sell them. The main point of this distinction is that the property (the ownership in the goods) cannot usually pass from the seller to the buyer unless or until the goods exist as specific or ascertained goods.
- (iii) Specific goods are those which are identified as the goods to be sold at the time the contract is made such as my Toyota Camry registration No. CP 1010 Saloon. Goods which are not specific are unascertained and become ascertained when they are subsequently ascertained or identified as the goods to be sold.
- (b) The price for the sale of goods may usually be fixed by the contract or in a manner set out in the contract such as the ruling market price on the day of delivery, or by the course of dealing between the parties. If there is no agreed price, then a reasonable price may be paid. In *Foley v Classique (1934)* a bus company agreed to purchase its petrol from Foley at a price to be agreed in writing from time to time; any dispute between the parties was to be submitted to arbitration. For three years, the company purchased its petrol from Foley at the current price but there was no formal agreement on the price. The bus company then repudiated the agreement arguing that it was incomplete since it was an agreement to agree on the price. It was held that in view of the course of dealing between the parties and the arbitration clause, there was an agreement that a reasonable price (at any given time) should be paid. The agreement was therefore enforceable.
- (c) In relation to the sale of goods, the word “damages” means the sum claimed or awarded in a civil action in compensation for the loss or injury suffered by the claimant.

6. (a) A promoter is usually a person who processes the formation of a company as was the case with Peter Munthu and Isaac Mwana. A promoter is one who becomes the owner of the company. Therefore as a general rule, the position at law is that if he enters into contracts with third parties before the company incorporates but purportedly on its behalf, he is personally liable on the contract and not the company. The company cannot retrospectively ratify the contract. The solution to this is that the company should, after incorporation, pass a resolution at its annual meeting that the company should itself enter into a fresh contract with the other party on the same terms as was the case with the promoters. In this way, the company will then become a party to the loan agreement and will therefore be bound.

This law appears to explain that Peter Munthu and Isaac Mwana are personally liable to repay the loan of K2,500,000 to Lenders' Bank because they acted in their personal capacities. They could not, in law, get a loan on behalf of a company which was not at the time incorporated. It therefore had no separate legal personality from the promoters: Salomon v Salomon (1893). In spite of this, however, it is possible that if this loan of K2,500,000 is to be paid by the company, then the company should enter into fresh terms with Lenders Bank so that the contract exists between the company and the bank. In this way, the two promoters will not be held personally liable.

- (b) Most companies trade under their own names, but sometimes, a company may prefer to use some other name. If so, the company must follow the following procedure:

- (i) It must state its registered name and its address on all business letters, invoices, receipts, written orders for goods or services and written demands for payment of debts.
- (ii) It must display its name and address in a prominent position in any business premises to which its customers and suppliers have access.
- (iii) On request from any person with whom it does business, give notice of its name and address.

- (c) The registered office of a company is important for the following two reasons:

- (i) Legal documents such as a notice or writ to commence legal proceedings have to be served on a company and this is done by delivering the documents at the company's registered office or by sending it by post to that office. The company cannot then deny that it has received the document.
- (ii) Various registers and other documents are held either at the registered office or in some cases at another address.

7. (a) The legal effect of a memorandum and articles of association, is that when registered, these documents bind the company and its members to the same extent as if they had respectively been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the memorandum and the articles. Consequently, all money payable by any member to the company under the memorandum or the articles shall be a debt due from him to the company as a specialty debt.
- (b) The two main contents of an object clause of a memorandum of association are:
- (i) objects and powers: these are contained in the objects clause. They normally list permissible transactions which a company may carry out. They include issues like powers to lease and construct buildings, employ and remunerate staff, sub-contract work, and so on. The most common and most important express powers are to borrow money, to give security by creating charges over property and to give guarantees.
- The list of express powers may be long and detailed. This is to avoid the uncertainty caused by the fact that some powers to enter into transactions in pursuit of the company's objects may only be implied. The danger here is that powers can only be implied to further the objects. Hence, any action which does not promote the objects and is not an express power may not be effective as an implied power.
- (ii) "Objects as a general commercial company". It is now possible to register a company with objects which state that the company's object is to carry on business as a general commercial company. This means that the object of the company is to carry on any trade or business whatsoever and that the company has power to do all such things as are incidental or conducive to the carrying on of any trade or business by it.
8. (a) The statement is true to say that a private company may give financial assistance for the acquisition of its own shares or the shares of its holding company. This, however, is subject to the following conditions:
- (i) The financial assistance given must not reduce the net assets of the company or, if it does, the financial assistance is to be provided out of distributable profits.
- (ii) there must be a statutory declaration of solvency by the directors of the company (with a report of the auditors) of the same type as prescribed when a private company purchases its own shares by a payment out of capital.

- (iii) a special resolution must be passed to approve the transaction. Normally, this is the resolution of the company which gives assistance. But if that company is a wholly owned subsidiary which assists the acquisition of shares of its holding company, the members of the latter company must pass the resolution.
 - (iv) a right to apply to the court is given to members holding at least 10% of the issued shares (or of a class of shares). To permit them to exercise this right, there is a four week delay in the implementation of the resolution.
- (b) The “Indoor Management rule” was formulated in the *Turquand Case (1856)* which states that any outsider of a company who deals with the directors:
- (i) is deemed to be aware of the requirements or restrictions imposed by the articles; but,
 - (ii) is entitled to assume (unless he knows or should suspect to the contrary) that these internal rules have been observed.

In *Royal British Bank v Turquand (1856)* the facts were that under the articles, the directors could only borrow for the company such amounts as might be authorized by ordinary resolution passed in a general meeting. A resolution was passed but it was defective since it did not specify the amount which the directors could borrow. The directors issued to the bank a debenture for £2,000 believing that they had authority to do so. The bank did not know of the defective terms of the resolution and no legal right to inspect it since no copy of the ordinary resolution is filed at the registry. The company went into liquidation and the liquidator (Turquand) argued that the company had no obligation to repay the loan since the loan contract (debentures) had been made without the authority required by the articles (which the bank must be deemed to be aware of the doctrine of constructive notice of a company’s back public documents). It was held that the bank must be deemed to be aware that the directors needed authority to borrow but it was also entitled to assume that authority had been properly given since the bank had no means of discovering whether a valid resolution had been passed.

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