

STRICTLY CONFIDENTIAL

THE PUBLIC ACCOUNTANTS EXAMINATION
COUNCIL OF MALAWI

2014 EXAMINATIONS

FOUNDATION STAGE

PAPER 2: LEGAL FRAMEWORK

TUESDAY 3 JUNE 2014

TIME ALLOWED : 3 HOURS
2.00 PM - 5.00 PM

SUGGESTED SOLUTIONS

SECTION A

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

2.
 - (a) The process through which a Bill passes in the National Assembly before it is passed into law is as follows:
 - (i) First reading: The title of the Bill is formally read out. It is then printed and published.
 - (ii) Second reading: The Minister (or Member of Parliament) incharge of the Bill explains the purpose (or objective) of the Bill and a debate on its general principles follows. If the Bill survives any vote, it then passes to the committee stage.
 - (iii) Committee Stage. The Bill is discussed in detail by a relevant standing committee which comprises members of Parliament from both the Government and the opposition sides chosen according to party strengths. Sometimes the Bill may be discussed by the house sitting as a committee of the whole house. At this stage, the Bill is examined clause by clause and any amendments are voted on.
 - (iv) Report Stage. The Bill is formally reported to the house and amendments made in committee stage are then considered.
 - (v) Third reading: At this stage the Bill is debated again in general terms. Only minor verbal amendments can be made. If there is a majority in favour the Bill is then sent for presidential assent.

- (vi) Presidential Assent: The Bill is then assented to by the President. In most cases the presidential approval is never refused except in very few occasions. It then becomes law, an Act of Parliament.
 - (b) Parliament has attempted to overcome the difficulty of making every piece of legislation due to insufficient time by passing enabling Acts which set out the basic structure of the legislation and allow other bodies or people to make detailed rules necessary for compliance. In other words, Parliament delegates its law making power to these other bodies or people. Rules made in this way are known as delegated or subsidiary legislation.
 - (c) Examples of delegated legislation
 - (i) Regulation is one of the pieces of delegated legislation which is made by a Government Minister. For example the Malawi Public Service Regulations (MPSR) is a piece of legislation made by the Minister responsible for the public service who is given power to do so by an enabling Act, the Public Service Act.
 - (ii) Bye-laws are another piece of delegated legislation. They are usually made by local authorities in exercise of powers given to them by an enabling Act, the Local Government Act. This legislation requires the approval of the Minister before it can be implemented.
3. (a) Ratio decidendi
- (i) Finding of fact. This finding may either be direct or inferential. An inferential finding of fact is the deduction drawn by the judge from the direct or perceptible facts. For example, from the direct facts of the speed of a motor vehicle, the road and weather conditions and the length of skid-marks, the judge may infer negligence.
- Negligence is an inferential finding of fact. Findings of facts are not binding. Thus, even where the direct facts appear to be the same as those of an earlier case, the judge need not draw the same inference as that drawn in the earlier case.
- (ii) Statement of law: This is a statement in which a judge states the principles of law applicable to the case. Statements of law applied to the legal problems raised by the facts as found upon which the decision is based are known as "*ratio decidendi*" statements. Other statements not based on the facts as found, or which do not provide the basis of the decision are known as "*obita dicta*" statements. For the purpose of precedent, the *ratio decidendi*, which literally means "reason for deciding" is an important element which binds future judges.

- (iii) The decision: A decision is an important element because it determines the rights and liabilities of the parties in relation to the action and prevents them from re-opening the dispute.
- (b) Both textbooks and law commission reports are considered as sources of law in Malawi.

Textbooks: These are books on law written by law experts. They contain the law formulated by judges in the superior courts. The law in these books is applied to given facts. Some law textbooks of importance include the Coke's Institute, Salmond on Torts, Winfield on Tort, Smith and Hegan on Criminal law, on Cheshire and Fifoot on Contract, among others. Arguably, textbooks written by authors who are long dead command more respect than those of living writers.

Textbooks are becoming of little importance as a source of law because this function is now being fulfilled by the law reports, such as the Malawi Law Reports, the African Law Reports, the All England Law Reports and the Weekly Law Reports, among others.

The Law Commission Reports. The law commission in Malawi is a public institution mainly staffed by lawyers. The function of the Commission is to review areas of law that need reform, simplification or modernization. It produces a steady flow of reports, recommendations and draft Bills for presentation to parliament for enactment into law. In practice, these reports and recommendations are consulted from time to time by judges, academic lawyers and law students for purposes of trying to find the prospective law and how it will change the law when enacted.

4. (a) A prospectus or an advertisement issued by a company to the public to subscribe for shares or debentures is not an offer to sell shares to the public. In legal terms, this is only an invitation to treat even if as is the custom, it is described as "an offer for sale". A member of the public is the one who makes an offer by completing and sending an application form to the company. A member of the public such as Teddie Malonda is the offeror and the Company is the offeree. The company is at liberty to either accept or reject Teddie Malonda's offer as it sees fit.

Sometimes, a company may make a partial acceptance of the offer. This forms an exception to the rule that acceptance of an offer must correspond exactly with the offer. However, a prospectus makes it clear that the company has the right to accept only a proportion of the shares applied for.

- (b) It is true that revocation of an offer is not effective until it is actually communicated to the offeror by the offeree. In other words, the offeror is expected to learn of the revocation from the offeree personally **Raffles v Wichhaus (1864)**.

However, it is also enough revocation if the offeror gets the information through the agency of third party. He cannot therefore proceed to accept the offer if a third party has effectively communicated to the offeror of the revocation. This was the decision in **Dickson v Dodds 1876** in which the defendant offered to sell his house to the plaintiff for £800 and the offer was to be left open until 9.00 am on Friday. On Thursday, the defendant sold the house to Mr Allan and a Mr Berry told the plaintiff of this sale. The plaintiff then wrote a letter of acceptance which he handed to the defendant before Friday 9.00 am. It was held that there was no contract, the offer having been withdrawn before acceptance and communication by a third party was valid. An offer to sell a particular item is withdrawn by implication if that item is sold to another person.

SECTION B

5. (a) In relation to the sale of goods, the legal effect of a “retention of title clause” is that when goods are sold by a seller to a buyer, and before the buyer pays the price in full, possession of goods may pass to the buyer but legal title, that is ownership, is retained and does not pass to the buyer until the price is paid in full. This clause is often known as the *Romalpa Clause*. In **Aluminium Industrie Vassen BV v Romalpa Ltd 1976**, Romalpa bought aluminium foil on the terms that the stock of foil and any proceeds of sale should be the property of the seller (the supplier) until Romalpa had paid to the seller all that it owed. Romalpa got into financial problems and a receiver was appointed. The receiver found that Romalpa still held aluminium foil and the proceeds of selling other stocks of foil and had not paid its debts to the supplier. The receiver applied to the court for direction as to whether or not the foil and the cash were assets of Romalpa which was under his control as receiver.

It was held that the assets, although in the possession of Romalpa did not belong to it. The receiver could not deal with these assets since his authority under the floating charge were restricted to the assets of the company.

- (b) (i) Under a contract for the sale of goods, the property in the goods i.e. legal title passes from the seller to the buyer. This means that after a sale has taken place, the seller relinquishes or transfers the ownership in the goods to the buyer who acquires good title. An agreement to sell is where the transfer of property i.e. legal title in the goods takes place at a future date subject to some conditions to be fulfilled. It becomes a sale when time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.
- (ii) The distinction between a sale and an agreement to sell is important in several consequences followed at the time when the property passes.

The first consequence is that unless the parties agree otherwise, the risk passes with the property. Secondly, if the property i.e. legal title has passed to the buyer, the seller can sue the buyer for the price. Thirdly, if the seller re-sells the goods after the property has passed to the buyer, the second buyer does not acquire any title unless he is protected by one of the exceptions to the *nemo dat rule*. Similarly, the principle applies where the buyer re-sells the goods before the property has passed to him.

6. (a) When fixing the minimum wage for a group of wage earners, **Section 54 of the Employment Act 2000** provides the procedure as follows:
 - (1) The Minister should consult with organization of workers and employers relevant to the group of wage owners as to the appropriate level of minimum wages to be prescribed (sub section (1)).
 - (2) He may, after the consultation, publish in the gazette a wage order prescribing the minimum wage to be paid to the group of wage earners to which such wage order applies (sub section (2)).
 - (3) In prescribing the wages, the Minister was to consider:
 - (i) the needs of workers and their families, the general level of wages, the cost of living, social security, benefits and the relative living standards of other social groups (sub section (3)(a)).
 - (ii) the economic factors, including the requirements of economic development, level of productivity and any effects the wage might have on employment (subsection (3)(b)).
 - (4) In consultation with representative organizations of workers and employers, the Minister should reconsider the levels of minimum wages at least once every three years (subsection (4)).
 - (5) He should consult with organization of workers and employers at any time he is of the opinion that the procedure for setting wages set out in this section should in any way be modified (sub section (5)).
- (b) The three remedies which an employee may be awarded if he complains of an unfair dismissal are:
 - (i) an order for reinstatement by which the employee should be treated in all respect as if he had not been dismissed. This remedy effectively means that the employee is restored to his work and starts working with full benefits as was the case before his dismissal.

- (ii) an order for re-engagement by which the employee is to be engaged in work comparable to that in which he was engaged prior to his dismissal or other reasonably suitable work from such date and such terms of employment as may be specified in the order or agreed by the parties.
 - (iii) an award of compensation which is monetary in nature.
7. (a) A person may become a member of a company in the following ways:
- (i) By subscribing to the memorandum of association. Membership commences from the moment of subscription. On registration of the company the names of the subscribers must be entered in the register of members.
 - (ii) By agreeing to become a member and having his name entered in the register of members. Actual entry on the register is essential for membership which commences only from the date of entry.
 - (iii) By obtaining shares from the company by applying for them as a result of a prospectus (public company) or following private negotiations (private company).
 - (iv) By taking a transfer from an existing member following a purchase or a gift of the shares.
- (b) The three types of companies are chartered, statutory or registered.
- (i) Chartered companies are formed by the grant of a charter by the Crown (Head of State) under the Royal Prerogative or under special statutory powers. This method of incorporation is no longer used by trading companies since it is far cheaper and quicker to obtain incorporation by registration. It is only used by, for example, charitable organizations, learned and artistic societies and some schools and colleges. Chartered companies include the Institute of Chartered Accountants in England and Wales, the British Broadcasting Corporation and Oxford and Cambridge Universities.
 - (ii) Statutory companies are those which are created by an Act of Parliament. They are in a sense public institutions. They are “controlled” by the state. Their powers and functions are given by statute. The Board of Directors is appointed by the President. They can be dissolved by an Act of Parliament. Such companies include what are called statutory corporations. Some examples include the Public Accountants Examination Council of Malawi, University of Malawi, Malawi Broadcasting

Corporation, Malawi Housing Corporation and Electricity Supply Corporation of Malawi, among others.

- (iii) Registered companies are created by registration under the Companies Act 1984. Promoters submit a number of documents to the Registrar of Companies and pay a prescribed fee. Such documents include the Memorandum and Articles of Association. If the Registrar is satisfied with the documentation and the contents therein, he then registers the company. Such companies may be public or private companies. Examples include all companies limited by shares and those limited by guarantee.
8. (a) (i) Share capital is the minimum value of net assets which must be raised initially and so far as possible retained in the business i.e. it is the amount that purchasers of shares have agreed to contribute to the company in return for their shares.
- (ii) Paid-up capital is the sum of the payment received by the company. Unless some shareholders refuse to pay calls, the paid-up capital will equal the called-up capital. Paid up capital is important because if a company makes a reference on its stationery to the amount of its capital, the reference must be paid up capital.
- (iii) Uncalled capital is the difference between the amount already paid-up and the total nominal value of the issued shares. Uncalled capital is rare because it is unpopular with both companies and investors. It is unpopular with companies because of the possibility that calls will not be met, and investors because of the uncertainty as to when calls will be made. Where it exists, uncalled capital is a further guarantee fund for creditors. It is an asset equivalent to debtors, the debtors in this case being the members. The creditors can only gain access to this fund in the event of liquidation since they cannot compel the directors to make calls, nor can they levy execution on uncalled capital.
- (b) The rule is that where a wrong is done to a company, or there is an irregularity in the management of a company and there arises a need to enforce the rights of the company, it is for the company to decide what action to take. This rule was formulated in *Foss v Harbottle 1853* in which a shareholder, Foss, sued the directors of the company alleging that the directors had defrauded the company by selling land to the company at an inflated price. The company was by this time going through financial difficulties and efforts to call the directors to account at a general meeting had failed.

The court held that the action must be dismissed on the following two principles:

- (1) The company, as a separate legal person from its shareholders, is the only proper claimant in an action to protect its rights or property.

- (2) The company must, in a general meeting, decide whether or not to bring such legal proceedings.

The principle in *Foss* is applied in *Pavledes v Hensen (1956)* in which the directors sold an asset of the company to a third party at a gross undervaluation. A majority shareholder commenced an action. It was held that he could not do so, because it was up to the company to decide whether or not to sue the directors for negligence.

The importance of this rule is that:

- (1) It is a logical consequence of the fact that a company is a separate legal person. It is the company that has suffered a wrong and therefore it is the company that should seek a remedy.
- (2) It preserves the principle of majority rule.
- (3) It prevents multiple actions. If each shareholder were permitted to sue, the company might be subjected to many law suits started by numerous plaintiffs.
- (4) It prevents futile actions. If the irregularity is one which can effectively be ratified by the company in a general meeting, it would be futile to have litigation about it without the consent of the general meeting.

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