

STRICTLY CONFIDENTIAL

THE PUBLIC ACCOUNTANTS EXAMINATION
COUNCIL OF MALAWI

2012 EXAMINATIONS

ACCOUNTING TECHNICIAN PROGRAMME

PAPER TC 8: BUSINESS LAW

WEDNESDAY 28 NOVEMBER 2012

TIME ALLOWED : 3 HOURS
2.00 PM - 5.00 PM

SUGGESTED SOLUTIONS

SECTION A

1. (a) Three differences between a criminal action and a tortuous action are as follows:
- (i) a criminal action involves a wrong against the state, while a tortuous action is one against an individual; **2 Marks**
 - (ii) in a criminal action the prosecution will normally be brought by the state. In a tortuous action, such as defamation, the injured party sues in his own name; **2 Marks**
 - (iii) the standard of proof in a criminal action is higher (beyond reasonable doubt) than in a tortuous action (on the balance of probabilities); **2 Marks**
 - (iv) the purpose of a criminal action is to punish the wrongdoer, to prevent him from repeating the crime and to discourage others from committing similar crimes; whereas a tortuous action is aimed at redressing a wrong. **2 Marks**
 - (v) a criminal action can be withdrawn only with the leave of the State, whereas the claimant in a tortuous action can settle out of court or withdraw his/her claim at any time. **2 Marks**
- Any three, 2 Marks each = 6 Marks**
- (b) The High Court of Malawi may issue the following injunctions:-
- (i) **Mandatory injunction** which requires the defendant to do a particular act instead of prohibiting an act. For instance requiring the registrar of companies to register a company. **2 Marks**
 - (ii) **Prohibitory injunction** which prevents the defendant from doing a particular act. For instance preventing a rival company from producing similar products to yours. **2 Marks**
 - (iii) **Permanent injunction** which is an injunction actively sought by a party to a trial and issued at its conclusion. Unlike a temporary injunction, a permanent injunction is perpetual provided that the condition that produced it remains permanent. It may be obtained, for example, against pollution of a river. **2 Marks**

- (iv) **Temporary/interim/interlocutory injunction** which is an injunction issued as a preliminary preventive measure, pending trial. It lasts for shorter periods such as 7 or 14 days. **2 Marks**
- (v) **Mareva injunction/Freeze Order** which prevents defendants from removing assets out of the jurisdiction with the aim of avoiding or frustrating the enforcement of any judgment against them. **2 Marks**
- (vi) **Anton Piller Order/ Search Order** which like the Mareva injunction, it is a preemptive remedy designed to prevent a defendant from disposing of or dealing with material, property or assets in such a way as to frustrate enforcement of a judgment. For instance where your music is being pirated, you can obtain an Anton Piller order to confiscate the pirated products. **2 Marks**

Any three, 2 Marks each = 6 Marks

- (c) **A legal system** is a system of laws, rules and regulations in any particular jurisdiction and the way these are applied or enforced together with the institutions that do enforce or apply them. **2 Marks**

- (d) Sources of Malawi law:-

- (i) **Statute law**, often called legislation, is written law enacted by the approved legislative process of the state. A statute is also called an Act of Parliament. Statute law takes precedence over case law. Examples of statute law include the Sale of Goods Act and the Partnership Act.

2 Marks

- (ii) **Case law** consists of a body of legal rules that have been created by the judiciary through the decisions in the cases they have heard. It is also referred to as common law or judge-made-law. The central concept of case law is the doctrine of precedent which states that when a court has to decide an issue, it looks to previous decisions contained in earlier cases for guidance on how to deal with the present case.

2 Marks

- (iii) **Equity** denotes fairness or reasonableness. When common law was first developed, it was rigid and too strict thereby promoting injustice. The courts therefore resorted to what was just and equitable in particular circumstances resulting in the creation of a body of law referred to as equity.

2 Marks

- (iv) **Customary law** is a historical source of law. Customary law is made up of rules of human conduct, established by usage, which are adopted by the courts because they are followed by the political society as a whole or in part. General customs prevail over the country as a whole unlike particular or local customs. For example, the custom of paying marriage dowry is particular to some areas in Malawi and not others. **2 Marks**

Any three, 2 Marks each = 6 Marks

(TOTAL: 20 MARKS)

2. (a) (i) A **void contract** is one that is invalid and not legally binding. **2 Marks**
- (ii) A **voidable** contract is one that is capable of being annulled or voided due to some irregularity or problem, but valid until that happens. **2 Marks**
- (b) (i) The prosecution is likely to achieve the following remedies:-
- Punishment in form of a prison sentence with hard labour; **2 Marks**
 - Punishment in form of a fine; **2 Marks**
 - Suspended sentence with a condition not to commit another offence; **2 Marks**
 - Punishment in form of community service such as sweeping around public premises. **2 Marks**
- Any three, 2 Marks each = 6 Marks**
- (ii) The prosecution will commence the criminal case against Alex in the Magistrate's court. **1 Mark**
- (iii) Ben can sue Alex in a civil suit. He can successfully sue Alex in the law of tort for the injury he has suffered. The court will order Alex to pay damages to Ben. Damages are money awarded as compensation for injury or loss. **3 Marks**
- (iv) The advice to Chome on his legal position in this matter is that if he brings a claim in court against Alex for breach of contract, he will not succeed. One of the essential elements of a valid contract is consideration. The law of contract does not consider performance of a public duty as consideration. Testifying in court is a public duty. **3 Marks** In **Collins v. Godefroy (1831)** Collins was subpoenaed to appear as a witness at a trial on behalf of Godefroy. Godefroy promised to pay him "for his trouble". It was held that there was no consideration. Collins was under a public duty to attend and give evidence. This means that Chome cannot claim the K20,000.00. **3 Marks**
- (TOTAL: 20 MARKS)**

3. (a) **A factor** is an agent entrusted with the possession and control of the goods to be sold for his principal **2 Marks** whereas **a broker** does not generally have such possession or control but is a mere negotiator empowered to effect contracts of sale or purchase for others. **2 Marks**
- (b) An agency is created in the following ways:
- (i) by express agreement; **1 Mark**
 - (ii) by implied agreement; **1 Mark**
 - (iii) by ratification; **1 Mark**
 - (iv) through necessity. **1 Mark**
- (c) (i) As an agent, Mr Chadzala's duties towards Milanje Limited will be:
- (1) to be honest to Milanje Limited. He must not take bribes or make secret profits; **2 Marks**
 - (2) to exercise due care and skill in the discharge of his duties; **2 Marks**
 - (3) to obey instructions and avoid having situations where his duties conflict with his personal interests; **2 Marks**
 - (4) duty to perform; the fundamental duty of an agent appointed under a contract is to carry out the agency contract in accordance with its terms, express or implied, and not exceed his authority; **2 Marks**
 - (5) duty to follow trade or professional customs prevailing in Malawi and Mozambique; **2 Marks**
 - (4) to avoid disputing the title of Milanje Limited or setting up the right of a third party to the property in the goods of Milanje. **2 Marks**
- Any three, 2 Marks each = 6 Marks**
- (ii) Mr Chadzala's rights against Milanje Limited will be:
- (1) the right to remuneration i.e. the right to be paid. **2 Marks**
 - (2) the right to indemnity i.e. the right to be refunded for expenses. **2 Marks**

- (3) the right to a lien i.e. the right to retain the principal's goods in return for payment. **2 Marks**

(TOTAL: 20 MARKS)

4. (a) The facts show that there is no contract of sale within the meaning of the Sale of Goods Act, section 3, because there is no agreement to transfer ownership of the car until Mildred exercises her option to or not to buy the car. **4 Marks**

- (b) The facts show that there is a contract of hire purchase within the meaning of the Hire Purchase Act. Section 2 of the Hire Purchase Act defines a hire-purchase agreement as any contract whereby goods are sold subject to the condition that notwithstanding delivery of the goods the ownership in such goods shall not pass except in terms of the contract and the purchase price is to be paid in two or more installments. **4 Marks**

- (c) The term “**purchase price**” under hire purchase agreements includes:-

- (i) the sale price; **2 Marks**
 (ii) any deposit; **2 Marks**
 (iii) compensation or damages for breach of the agreement; **2 Marks**
 (iv) money paid for licence or registration fees; **2 Marks**
 (v) insurance premiums; **2 Marks**
 (vi) interests; **2 Marks**
 (vii) installation payments. **2 Marks**

Any three=6 Marks

- (d) In terms of section 11 of the Hire Purchase Act, in every hire purchase agreement there shall be:

- (i) an implied warranty that the purchaser shall have and enjoy quiet possession of the goods. **2 Marks**
 (ii) an implied condition on the part of the seller that he is not and will not be precluded from passing the ownership of the goods to the purchaser at the time when the ownership is to pass. **2 Marks**
 (iii) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party at the time when the ownership is to pass. **2 Marks**

(TOTAL: 20 MARKS)

SECTION B

5. (a) (i) **An offer** sets out the terms upon which an individual is willing to enter into a binding contractual relationship with another person. It is a promise to be bound on particular terms, which is capable of acceptance- **Carlill v Carbolic Smoke Ball Co (1893)**. The essential factor about an offer is that it may, through acceptance by the offeree, result in a legally enforceable contract. The person who makes the offer is the offeror; the person who receives the offer is the offeree. **5 Marks**
- (ii) **A counter-offer** arises where the offeree tries to change the terms of the original offer that has been made rather than directly accepting it. The effect of making a counter-offer is to bring the original offer to an end so it is no longer possible for that original offer to be accepted at a later time. For example, in **Hyde v Wrench (1840)**, Wrench offered to sell his farm for £1,000. Hyde offered £950, which Wrench rejected. Hyde then informed Wrench that he accepted the original offer. It was held that there was no contract. Hyde's counter-offer had effectively ended the original offer and it was no longer open to him to accept it. **5 Marks**
- (b) It would appear that Thoko made a unilateral offer to the world at large; **Carlill v Carbolic Smoke Ball Co (1893)**. Although Chiku was not with Thoko's group, the offer was made to 'anyone' and therefore open to Chiku to accept it by performing the required act. He did not have to inform Thoko that he was accepting the offer, he simply had to perform the act. Any doubt about Thoko's intention to create legal relations may be rebutted by the fact that he placed the money on the table, thus indicating the seriousness of his offer. **3 Marks**

The fact that Chiku only swam across the river in order to rescue the child is immaterial. Acceptance does not have to be in the form of express words, as it can be implied from conduct. Although a person cannot accept an offer they do not know about, their motive for accepting it is not important as long as they know about the offer. Generally acceptance must be communicated to the offeror. As a consequence of this rule, silence cannot amount to acceptance. However, acceptance need not be communicated, where the offeror waived the right to receive communication as it appears on the facts. **2 Marks**

Revocation; an offer may be revoked at any time before acceptance and once revoked it is no longer open to the offeree to accept the original offer. As for Thoko's attempt to revoke his offer, it would be ineffective once Chiku had started to perform the required task. His attempt to revoke the offer would actually indicate the seriousness of the original offer. On the above analysis, it would appear that Chiku could claim the K5,000 from Thoko. **5 marks [NB an opposite answer may be granted marks if backed by good reasons]**

(TOTAL: 20 MARKS)

6. (a) My advice to Lester is that he should proceed to take action for the recovery of the bicycle from Allan or its value if it is not in the original condition. The reason is that Fasho, the seller of the bicycle, has no right to sell it because he is not the owner of the bicycle. Since he lacks title, he cannot validly give ownership in the bicycle which he himself does not own. **3 marks** This satisfies the *nemo dat quod non habet* rule- *Bishopgate Motor Finance Corporation Ltd v. Transport Brakes Ltd (1949)*- **Sale of Goods Act**-section 23. The principle is that no one can pass title which himself does not have. Under the law, therefore, Allan, who bought the bicycle does not acquire good title. He is obliged, by law, to return it to Lester in terms of section 14 of the Sale of Goods Act except if the exceptions to the *nemo dat* rule apply. **3 Marks**
- (b) The definition of the term **‘implied warranty of quiet possession’** is that when a person sells goods to the buyer, he gives an implied warranty that he has the right to sell the goods. In addition, the seller also gives an implied warranty that the buyer shall have quiet possession of the goods and that the goods are free from any encumbrance or challenge by a third party unless it was disclosed to the buyer when the contract was being made. **4 Marks**
- (c) The goods are sold of **‘satisfactory quality’** means that whenever goods are sold to the buyer, there is automatically an implied term which is a condition that the goods supplied by the seller under a contract of sale are of satisfactory quality in that: **1 Mark**
- (i) They are fit for the purpose for which goods of the kind in question are commonly supplied; **1 Mark**
- (ii) They are free from minor defects; **1 Mark**
- (iii) They are durable and remain of satisfactory quality for a period which could be expected by a reasonable man; **1 Mark**
- (d) An unpaid seller’s right to lien arises where:-
- (i) The goods have been sold without any stipulation as to credit; **2 Marks**
- (ii) Where the goods have been sold on credit, but the term of credit has expired; **2 Marks**
- (iii) The buyer becomes insolvent. **2 Marks**

(TOTAL: 20 MARKS)

7. (a) (i) **A sole trader** is a businessperson who owns the business alone. A single owner of a business can commence operation free from any formalities. In fact, unlike a company which for it to exist needs to be registered by the Registrar of Companies, a sole trader is mostly unregulated by the law because the law does not consider the business and owner as separate legal entities. As a result if the business suffers serious losses resulting in inability to pay creditors, the sole trader will be called upon to make good the losses from his private resources. Like a partnership, the sole trader has no limited liability. **3 Marks**
- (ii) **A partnership** unlike a sole trading business which consists of only one person, is an association of two or more persons, but not exceeding 20 which is formed for the purpose of carrying on business with a view to make profit. A partnership is not a legal entity or persona separate from its members. In Malawi the partnership is normally governed by the ordinary rules of contract through a partnership deed and if there is no partnership deed regulating the activities of the partnership the relations between partners are automatically governed by the **Partnership Act**. **3 Marks**
- (iv) **A registered company**, unlike sole trading business or partnership, upon incorporation it becomes a juristic person distinct from its members- **Companies Act** section 15(2) and *Salomon v Salomon v. Salomon & Company Ltd (1897)*. Some of the consequences of separate personality is that the company can sue and be sued in its own name and the liability of its members is usually limited. Unlike a partnership and sole trading business, a company is obliged to abide by various regulations and rules laid down in the Companies Act. **4 Marks**
- (b) A close mutual or reciprocal fiduciary relationship between the partners arises from the formation of the partnership agreement. A partner must promote the interest of the partnership unselfishly. In general a partner must therefore avoid a conflict between his personal interests and the interests of the partnership and, in cases where a conflict arises, subordinate his own interests to the interests of the partnership. James is in breach of his fiduciary duties with regard to his intention to sell stationery in competition with the partnership. **3 Marks**

Liability of partners according to the general rules of agency and the **Partnership Act** (section 11) is that a partnership will be liable in terms of a contract that a person concludes on behalf of the partnership if that person had the necessary authority to conclude that agreement on behalf of the partnership. In terms of the principle of mutual mandate each partner has the power to bind the partnership in transactions that fall within the scope of the partnership business. **2 Marks**

A third party, Bongwe, who wishes to hold the partnership liable for a contract which was concluded by a partner does not need to prove that the partner had the necessary power to conclude the agreement on behalf of the partnership. He must simply prove that the specific contract fell within the usual scope of the partnership business. On the facts the buying of stationary fell within the usual business of the partnership making all partners liable. Such a contract will be binding on the partnership, irrespective of whether the partner in fact had the necessary authority or not. It would thus appear that the partnership would indeed be bound by the contract irrespective of the fact that James did not have the authority to buy more than K100,000.00 worth of goods on credit. **5 Marks**

8. (a) **A Bill of Exchange** is defined in Section 3 of the Bills of Exchange Act as an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determined future time a sum certain in money to or to the order of a specified person or to the bearer. **3 Marks**

The bill of exchange must be an unconditional order in writing and it must be an order to pay. It must be unconditional. The bill has to state in words and figures the amount to be paid, the date, the person who has to be paid and the bank, drawee or other person who has to make the payment to the payee. Finally the bill must be signed by the drawer. The sum of money must be certain and if there is a discrepancy between the figures and words then the figures will prevail. **3 Marks**

- (b) **The relationship between a banker and a customer** is that there is a legally binding contract between the two parties. The bank holds the customer's money or overdraft with an obligation on the bank to make payments, subject to agreed limits, in accordance with a customer's order. The bank owes the customer the following duties:-

1. The bank should not make payments on behalf of the customer without his authority; **2 Marks**
2. The bank is under a duty to maintain confidentiality over the customer's affairs and not to divulge details without authorization; **2 Marks**
3. The bank must honour cheques duly drawn up to the amount available; **2 Marks**
4. The bank owes a duty to credit a customer's account with dividends received on the customer's behalf and it owes a duty to take care in doing so. **2 Marks**

Any three, 2 Marks each = 6 Marks

- (c) The relationship between the banker, Isaac and Vee is that there is a legally binding contract between them. The bank held Isaacs' and Vee's money with an obligation on the bank to make payments, subject to agreed limits, in accordance with a customer's order. The facts show that both Isaac and Vee had to sign the cheque for the bank to make any payment. **2 Marks**

When Isaac came to know about the forgery he should have reported the same to the bank to protect his interests. However Isaac was negligent himself when he failed to inform the bank about the forgery. He is therefore not protected by the law. **2 Marks**

The decision in *Greenwood v. Martins Bank Ltd (1933)* illustrates how the bank will be protected in the event of the customer's negligence. Greenwood's wife had been drawing money from his account by forging his signature on his cheques. In order to protect his wife, he did not inform the bank. The wife later committed suicide and he then decided to sue the bank for the return of the money. It was held that the husband was under a duty to disclose what had happened, and as he had failed to do so his conduct precluded him from alleging the forgery. **2 Marks**

The law, especially equity, assists a party who comes to court with clean hands. It would appear that Isaac does not have clean hands because he allowed the forgery to continue and yet he wants to rely on it to have the money back. He would be stopped from making such a claim. **2 Marks**

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