

COUNCIL OF LEGAL EDUCATION.



**EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES.**

ATP 108: COMMERCIAL TRANSACTIONS.

MONDAY 27TH NOVEMBER 2017.

DURATION: 3 HOURS.

Instructions to Candidates:

- (a) This paper contains **Six printed pages** including the cover page, with a total of **Six questions**.
- (b) Candidates **MUST** answer **FIVE** questions.
- (c) **Question ONE** is compulsory and carries **20 marks**.
- (d) **All other questions** carry **10 marks each**.
- (e) Answers **MUST** be supported by relevant case law and statutory provisions where required.

PLEASE TURN OVER

QUESTION ONE

Your clients, Amy and Ben, have instructed you to register a company on their behalf. The more specific instructions are as follows:

- i. The company's name will be Ambe Traders Ltd.
 - ii. Since they are recent college graduates, they are keen to use the form of company which guarantees them the highest level of protection against potential liability.
 - iii. They would not want to incur unnecessary legal costs and for this reason, they would rather adopt the model Articles of Association appropriate for their company.
 - iv. The company's main "line of business" will be importation of apparel from China for sale in Kenya. They however would also want to "branch" into other lines of business after the company is well established.
 - v. They will each contribute Kshs.500,000 to finance the company's business. In this regard, each one of them will subscribe to 500 shares of the company. Each will pay, upfront, 50% of the Nominal Value of each share subscribed to.
- (a) With reference to the company registration Form CR1 in the Companies Act, 2015, complete the following parts on behalf of your clients:
- i. Part 2: kind/type of company. (1 mark)
 - ii. Part 7: objects (1 mark)
 - iii. Part 8: liability of members (1 mark)
 - iv. Part 9: share capital (6 marks)
 - v. Part 10: paid up capital: (4 marks)
- (b) (i) The legal rules regarding the wording and legal implications of the "Objects Clause" have changed significantly under the new Companies Act, 2015. Noting to compare and contrast these rules with the rules pertaining under the old Companies Act, Cap 486, Laws of Kenya, briefly state the rationale of the specific wording you have used in Part 7, or your decision to leave it blank. (4 marks)
- (ii) If Amy has duly paid 50% of the Nominal Value of the shares that she has subscribed to, in the event that the company is wound-up soon after registration, what would be the extent (state the amount) of Amy's liability *vis-à-vis* the company debts?
- Show your workings and also provide the legal explanation for your answer. (3 marks)

QUESTION TWO

Chichi is a recent college graduate who has heeded the call made by the Government to young people urging them to pursue entrepreneurship instead of seeking formal employment. Chichi studied Business and Information Technology (BBIT) in college. She has decided to use internet to "source" for suitable merchandize from China for re-sale in Kenya. While searching the net, she came across Ming Ltd (Ming), a company based in China which supplies cosmetic products to buyers all over the world. Ming had in stock some lipstick which was described on its website as being "Free of peanuts, good for African skin, warranted only equal to sample." Since she could not afford to travel to China to inspect the lipstick, Chichi requested for a sample which was duly sent to her and received. She gave the samples to some of her friends who gave the

lipstick excellent reviews. Upon receiving this positive feedback Chichi placed an order for seven thousand (7,000) tubes of the lipstick which were duly delivered and paid for. Chichi has been selling this lipstick to her friends, professional beauticians and cosmetic shops in Nairobi for the last two weeks. Recently, based on the feedback received from her customers, the following facts have come to light:

- (a) That the lipstick does in fact contain peanuts and is therefore unsuitable for persons with peanut allergy.
- (b) The lipstick contains a chemical ingredient which bleaches African skin but is otherwise harmful to other skin types.

You and two other candidates are undertaking pupillage at a law firm which has been retained by Chichi. Your supervisor has assigned specific aspects of this matter to each of you. Your specific task is to identify, state and analyze legal grounds the basis of which Chichi could seek redress from Ming. These will be incorporated in a demand letter to be sent to Ming.

(10 marks)

QUESTION THREE

Bernice wants to set up a bridal shop with Aileen and has a number of questions about how they should start trading. At 23, Aileen is much younger than Bernice but has previous experience of running a bridal shop and is a good saleswoman. The plan is to have her work full time in the shop while Bernice will be the owner and manager and will deal with matters of premises, taxes, payroll and all other administrative issues. Bernice has put aside Kshs.300,000 as capital to start off the business. Aileen cannot afford to put up any money into the business and in fact, Bernice has learnt that Aileen is not prudent in financial management and may be deep in debt.

Bernice's key objectives in relation to the business is that she:

- Is keen to start trading as soon as possible.
- Does not desire to engage Aileen as an employee.
- Does not desire to take responsibility for any of Aileen's debts.

- (a) Explain why if Bernice and Aileen started trading together in the Bridal shop, the business would be deemed a partnership. (1 mark)
- (b) Advise Bernice (if she and Aileen trade together in partnership) whether the partnership would be liable if Aileen ordered wedding dresses from a supplier. (4 marks)
- (c) Bernice is contemplating picking a private limited liability company over the proposed partnership.
 - i. Identify two advantages of trading as a limited company and explain why these are directly relevant to Bernice's situation. (2 marks)
 - ii. Draft a letter to Bernice setting out her obligations to keep up-to-date records of the company and the filings that must be made annually. (3 marks)

QUESTION FOUR

William and James own Yummy East Fast Food Limited, a private company limited by shares. The company recently lost a contract to supply meals to a nearby business park. The contract was equivalent to 80% of the company's business. The company is now struggling to stay afloat and some creditors have threatened to file claims in court. William and James believe that the company has a viable future and if afforded 'breathing space' can restructure and seek new sales avenues.

William and James have heard that under a relatively new law, it is now possible to have the company put under administration rather than liquidated in the hope of a better outcome for all stakeholders.

Advise William and James on:

- (a) The nature of administration of an insolvent company and the objectives thereof. (6 marks)
- (b) Whether they can appoint an administrator and any restrictions if such a power exists. (4 marks)

QUESTION FIVE

The following advertisement appeared in yesterday's Daily News, a newspaper with country-wide circulation.

Quick Sure Traders
P.O. Box 197 - 00032, Nairobi
Tel: 020-00030010

Public Auction

Duly instructed by Bima Insurance Company Ltd, we shall sell by Public Auction the undermentioned vehicles on Sunday 26th November 2017:

<i>Vehicle</i>	<i>Make</i>
1. KBTU 031C	Nissan Navara
2. KQBA 321D	Mazda Premacy
3. KPPU 297D	Toyota Fielder

Conditions of Sale

1. A refundable Banker's cheque of Kshs.100,000 deposit needed to obtain a bidding number. Cheques to be drawn in favour of Bima Insurance Company.
2. The declared purchaser must deposit 25% of the sale price at the fall of the hammer and the balance paid within fourteen (14) days.
3. Sale is subject to reserve price.
4. Vehicles are offered for sale 'as is where is' basis.

- (a) Identify two missing items of detail that are required by law and draft suitable additions to remedy the advertisement. (4 marks)
- (b) The advertised sale is subject to 'reserve price'. Distinguish between sales 'with reserve' and those 'without reserve' and the legal implications of reserve prices on the advertised auction. (6 marks)

QUESTION SIX

Andrew was always a dedicated hardworking fellow. He took his work and responsibilities seriously. Among his responsibilities was looking after his 10 years younger brother Nick, especially after the death of their parents.

Andrew and Nick inherited their parents' travel agency business: Domestic Travel, where Andrew was already a general manager. After Nick completed School, Andrew started to give Nick tasks, assignments and other jobs to help him learn the business. Soon enough, Nick joined Andrew in the business. Andrew told Nick that they were now partners and should register the business as such. They did.

As the business grew and based on the advice from their accountant the two brothers decided to convert their partnership into a Limited Liability Partnership (LLP) - Domestic Travel LLP and admitted a company, DT Ltd as the third partner to manage the business. Although Andrew and Nick submitted all appropriate and required documents to the Registrar, the application was initially rejected. The brothers were informed that DT Ltd could not join them as a partner then. However, they managed to rectify the problem. Both Andrew and Nick became limited liability partners with 45% share of business each. The company DT Ltd, a third partner with 2% ownership share, was owned 51% by Andrew and 49% by Nick so that he could maintain management control. Andrew became a director in the new LLP, Andrew's wife Sandra, the Treasurer and a director and Nick a director.

The business continued to grow and eventually purchased a huge 5-star hotel, North of Mombasa. They named the hotel Five Star. On the advice of their lawyer, the brothers placed the ownership of the hotel into the company they called 55 Holdings Ltd (55HFS) in which each of the brothers held a 50% interest. At the same time 55 Holdings Ltd entered into a contract with Domestic Travel LLP to manage the Five Star Hotel for three years with an option of renewal upon expiry. Five Star appointed Nick to manage the contract at Kshs.50,000/- monthly. The hotel, with its luxurious accommodation became a big hit at the Coast.

As Andrew grew older, he wished to cut back on the business because it was draining him. He considered selling the hotel. He thought he could make Kshs.95-100 million. He discussed it with his wife Sandra and they agreed that it would be a good idea but the sale could not be rushed if they intended to realize maximum value. To ease the burden on Andrew the family eventually agreed on the following:

- i. Andrew would transfer the ownership of 55 HFS to Nick so that Nick would own 60% and Andrew would also cancel the management contract with Domestic Travel LLP.
- ii. Nick would transfer 9% of his shares in Domestic Travel LLP to Andrew (reducing Nick's share of that business to 40%).

Since taking over the hotel, and with the help of his wife Hellen, Nick managed to live much more comfortably though bookings for accommodation have declined and the value of Five Star has gone down too.

Without Andrew's and Sandra's knowledge, Nick and Hellen established Melhel Travel Ltd (MHL), a travel agency, with a subsidiary MH Efficient Management Ltd. The subsidiary secured a contract to manage Five Star. The hotel has been paying MH Efficient Management Ltd Kshs.80,000/- per month and every three months Nick has been receiving another Kshs.120,000 consultation fee for his managerial expertise.

On her part, Hellen has been working tirelessly to expand Melhel Travel Ltd's business, using the contacts, networks and information acquired from Domestic Travel LLP. Melhel Travel Ltd is now one of Domestic Travel LLP's major competitors. She competed fiercely to sign and close deals and dropped the ones that in hindsight did not look profitable keeping only those that promised superior returns. She underbid Domestic Travel for a contract with City Polytechnic College (CPC) for a 30-day holiday package to accommodate 100 students and earned Kshs.10 million in profit.

Nick and Hellen intended to sell Five Star and negotiated a deal for Kshs.80 million with Mombasa Holidays Corporation.

When they went to discuss the deal with Andrew, he had already learnt about the existence of Melhel Travel Ltd (MHL), its subsidiary MH Efficient Management Ltd and other business deals. The family meeting did not take place. Andrew is at a loss and unsure of how to proceed.

- (a) Advise Andrew on how to proceed. (4 marks)
- (b) Explain why Domestic Travel's application for conversion of partnership into a limited liability partnership was initially rejected by the Registrar. (2 marks)
- (c) What benefits did Andrew and Nick obtain by converting their business into a limited liability partnership? (4 marks)

END