

COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

ATP 108: COMMERCIAL TRANSACTIONS

FRIDAY 19TH APRIL, 2024.

DURATION: 3 HOURS.

Instructions to Candidates:

- (a) This paper contains **SEVEN (7)** printed pages including the cover page, with a total of **SIX (6)** questions.
- (b) A Candidate **MUST** answer **FIVE (5)** 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

(a) Vero is an industrious young woman. From a very young age, Vero had known that her passion was in high-end fashion. As soon as she joined the University, Vero established Waka Co. Ltd, which she operated for a long time as a sole proprietorship before registering it as a one-person private company following the company law reforms that were completed in 2015. Vero is very excited about the industry and hopes to expand her business using new technologies. During her fashion show events, Vero met Tana, a very popular brand ambassador in various social media platforms. Tana has been in the sector for many years and has a huge influence on young consumers of fashion. Vero approached Tana to negotiate possibilities of doing business together. The two eventually agreed on establishing a limited liability partnership (LLP) as their preferred model of business. Both parties agreed that Waka Co. Ltd could be converted into an LLP so that the business could maintain its continuity.

The two parties have approached your law firm to advise them on the information that should be contained in the statement to be lodged with the Registrar during the process of conversion. Proceed. (5 marks)

(b) Vero and Tana have decided to also operate a payment service that will help the business reach and better serve their predominantly online customers located in diverse parts of the country. Write a detailed legal opinion explaining to the two business partners on the specific details regarding the application for authorization provisions under the National Payment System Act, 2011. (5 marks)

(c) Vero recently received a letter from KRA communicating the fact that she was late in submitting her annual tax returns in relation to Waka Co. Ltd. In panic, Vero made a frantic phone call to you seeking your advice on whether she can request the Commissioner for an extension of time to submit a tax return under the Tax Procedures Act, 2021. Advise her on the steps she can take to request for such an extension. (5 marks)

(d) Vero and Tana are very ambitious business partners. They have identified a prime location in the middle of CBD to launch their operations. The two have decided to jointly take out a mortgage using their log books and other movable property that they own. Explain to the two partners the obligations that may be secured and assets that may be encumbered. (5 marks)

QUESTION TWO

Zacchaeus is a well-known South African millionaire who has made his wealth in the fast food business by selling tasty crunchy chicken through his outlets in South Africa known as 'BFC Chicken'. He inherited the business from his father and the reason for the success of his business has been the secret recipe for the crunchy chicken. This recipe is a well-guarded family secret, and over the years the family has ensured that only members of the immediate family have access to the recipe. In fact, all the branches in South Africa are headed by family members who are the only ones who have access to the recipe. Unfortunately, Zacchaeus and his immediate relatives are well over 70 years old and are considering retiring from the business soon, at least in the active sense. He has many grandchildren who may eventually take over but for the time being they are still quite young.

Zacchaeus visited Kenya in June 2023 and he was very impressed by the vibrancy of Nairobi and the touristy nature of Mombasa as well as the level of business growth and population. He is of the opinion that despite the existence of KFC and Burger King, he sees a greater opportunity to expand his business and expand his income for his grandchildren. He has decided to visit your distinguished law firm which specializes in commercial law, with a view to exploring business format options available to him. He has provided you with the following information:

- i. He is not interested in engaging directly in the expanded business but wants to regain a great measure of control over how the business is to be conducted.
 - ii. He will play a role in determining who will be the manager of the business outlets.
 - iii. He does not want to invest any money in the business but he is looking for someone who can invest assets and resources into the business in both Nairobi and Mombasa.
 - iv. He will be able to share in the profits by way of an agreed sum.
 - v. He will allow the use of his business format, brand name and image, and these should be retained as they are.
 - vi. He will reveal to the business his recipe and other business information and knowledge but these secrets should be strictly protected.
- a) Advise Zacchaeus on the most appropriate business format. (1 mark)
 - b) Explain clearly what such a commercial concept would entail, its suitability and the entire scope of legal and other considerations that would have to be reflected in such an arrangement and the nature of the agreement to be signed. (5 marks)
 - c) Highlight 4 clauses that should be in the agreement in (b) above. (4 marks)

QUESTION THREE

Hot Wheels Limited - the largest used car retailer by market cap in Kenya - has resolved to purchase all of the assets of one of its competitors - Auto Mart Limited. Auto Mart is a local subsidiary of the conglomerate known as Tajiri Holdings and it is operated independently from its parent company. An assignment and transfer agreement for the acquisition of "any and all motor vehicles and intellectual property rights that are associated with "Auto Mart Limited" has been signed by the parties. Of the agreed purchase price of Kenya Shillings Five Hundred Million (KSh. 500,000,000/=), Kenya Shillings Two Hundred Million (KSh. 200,000,000/=) has been paid to Auto Mart Limited. The Competition Authority (CA) has now written to Hot Wheels inquiring on the nature of the transaction and why they were not notified. In response, the Acquirer and the Target company insist that the Acquirer has merely acquired the assets of the Target company and that the said Target company is and will continue as a going concern.

- a) As counsel for the CA briefly explain to your boss how you intend to make a case against the concerned undertakings in support of a finding of anti-competitive behavior by the parties and the penalties that may be levied. (4 marks)
- b) All other facts remaining constant, Hot Wheels Limited has instead opted to buy a controlling number of shares in Auto Mart rather than buying out its assets and will also wield the power to appoint or veto a majority of the directors. Analyze whether or not this proposed transaction satisfies the definition of the term "merger" and the criteria spelled out in law for a party to be considered "in control" of an undertaking. (6 marks)

QUESTION FOUR

- (a) Busi Co. Ltd joined the Kenyan tourism market in 2020 at the height of the tourism boom. It invested heavily in tour vans that were to be used to transport tourists to various destinations of interest. The first few months proved to be very lucrative since the company had managed to secure full booking throughout the year. In March 2020, the COVID-19 pandemic struck the world and many bookings were cancelled. The deposits that had been secured had to be refunded at short notice. The company found itself unable to pay its employees and had to let go many of them who were drivers. Gude Co. Ltd specializing in medical emergencies on the other hand witnessed a surge in demand for their services after securing a government contract to respond to critical cases in far flung areas. Their vans were no longer adequate to respond to the medical emergencies throughout the country and they risked losing the contract if some urgent action was not taken. Gude Co. Ltd passed a resolution to acquire

additional fleet of vans from Busi Co. Ltd that could penetrate remote areas that they were expected to cover under the terms of the contract they signed with the government. The vans from Busi Co. Ltd fitted the specifications. Although they were initially intended to transport tourists, with limited modifications, the vehicles could also be used to respond to medical emergencies in remote areas of the country.

Draft an Asset Purchase Agreement to facilitate the transaction. (4 marks)

- (b) Some of the drivers of Busi Co. Ltd had taken unsecured loans to invest in various facilities in the tourist sector. Most of these drivers had defaulted on their payments and the microfinance institution, Peki Co. Ltd, where they had borrowed money was getting concerned about losing millions of shillings which would potentially sink their businesses as well. Peki Co. Ltd was particularly concerned because it had loaned 100million shilling to Mr. Mkali to put up a resort where the tourists would spend some of their stay when they visited the country because Mr. Mkali had negotiated an informal deal with the drivers who were his relatives to get this done. Peki Co. Ltd has decided to go to court to secure a bankruptcy order against Mr. Mkali.

Advise on the conditions to be met by Peki Co. Ltd before an application for bankruptcy order may be made. (4 marks)

- (c) The government announced a rescue plan to save small enterprises in the wake of the COVID-19 challenges. How can Busi Co. Ltd validly execute their company documents which it intends to send to various government institutions to request for assistance. (2 marks)

QUESTION FIVE

Megan and Wayne are recent graduates of the world renowned Culinary School of Kenya and having graduated with flying colors, they now wish to venture into the restaurant business. Armed with preliminary research, they visit your Chambers for counsel on the type of company structure that would best suit their needs as they incorporate a venture by the name "Kulasasa." Megan and Wayne explain that they have invited several of their former classmates numbering almost sixty (60) to join them in Kulasasa as minority shareholders while they retain majority shareholding. It is also their wish that Kulasasa remain in the hands of the original subscribers for the foreseeable future. Advise them on the following aspects:

- a) Whether they meet the threshold of incorporation as a private company and the conditions that need to be met for the company to be deemed a private company pursuant to the Companies Act, 2015. (5 marks)
- b) Megan and Wayne further explain that their former instructing Chef, one Mr. Goldberg, may be interested in sourcing for some investment funds from some of his friends in Denmark on condition that Kulasasa's registration as a private company is completed and business has picked up. All this Mr. Goldberg will do in exchange for some shares in the company. Explain to Megan and Wayne the following:
- i. Can they make such an offer to Mr. Goldberg and his friends? (2 marks)
 - ii. Should the offer be found to be in contravention of the law, what actions can be taken to bring the offer into conformity with the law? (3 marks)

QUESTION SIX

- A. Kweli Co. Ltd discovered an exciting business opportunity of gas refilling for hybrid cars that recently became fashionable in the transport sector especially amongst Uber, Bolt, Little Cab among others. The business became especially lucrative when the government decided to remove all fuel subsidies and increase the rate of VAT on fuel from 8% to 16%. Consequently, the prices of petrol and diesel in the country became extremely high that some drivers opted to fuel in neighboring countries. Taxi drivers countrywide complained of reduced profits. They adopted several measures in order to cope. One measure was to plead with customers to pay them extra than the amount stated in their apps. The other measure taken was to resort to hybrid cars, which could use both petrol and gas. In just five years, Kweli Co. Ltd has grown in leaps and bounds and has become one of the top blue-chip companies. Most of their operations however are still located in Mombasa, Nairobi, and Kisumu. The rural market is largely underserved and according to Kweli Co. Ltd market analysis, this segment of the market represents another goldmine. Having done its market survey, Kweli Co. Ltd identified Swasi Co. Ltd to be a potential collaborator because of their extensive infrastructure in terms of petrol stations in the rural areas. Swasi Co. Ltd has ruled out any discussion of selling its business to Kweli Co. Ltd. As the legal officer in charge of this deal, you have advised that the two entities negotiate a full function joint venture as the best special purpose vehicle to be utilized since both companies wish to retain their independence but have accepted to integrate their operations. What criteria should be satisfied? (7 marks)

B. James is in the process of selling a property that he had bought 5 years ago. The selling price of this property is Kshs. 3,500,000 and the other relevant/incidental costs are as follows:

- Legal cost on acquisition - Kshs. 100,000
- Valuation - Kshs. 150,000
- Legal cost to defend title - Kshs. 50,000.

The cost of the property was Kshs. 1,200,000 when he acquired it 5 years ago and incurred the following additional costs:

- Costs to change the roof of the property - Kshs. 250,000
- Legal cost on acquisition - Kshs. 50,000
- Valuation - Kshs. 70,000
- Defending the title - Kshs. 50,000

Compute the capital gain tax that is due on the sale of the property. (3 marks)

