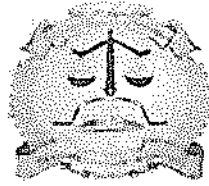


COUNCIL OF LEGAL EDUCATION



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

ATP 108: COMMERCIAL TRANSACTIONS

MONDAY 11 APRIL 2022

DURATION: 3 HOURS.

Instructions to Candidates:

- (a) This paper contains Five (5) printed pages including the cover page, with a total of Six (6) questions.
- (b) Candidates **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) Uvumbuzi Co Ltd, a public company issued and allotted partly- paid shares to its members to boost its capital in order to cope with the adverse impacts of COVID 19 pandemic on the business. Most members lost hope in the company, whose turnover was rapidly declining. In October 2021, the directors of the company proposed and exercised a call to salvage the company's ailing business.

Some members however, quickly moved to sell their shares in November 2021 to unsuspecting investors. It also became apparent that this company could not avoid liquidation or administration at the very least.

The management of the company has approached you and would like you to prepare a brief on the prospects and options the company may have in recovery of any liability against its allottees and subsequent purchasers of the allotted shares. (12 Marks)

- b) Charlie, a resident within Kenya and a long-time shareholder of Uvumbuzi Co. Ltd, has been Director with the company for three (3) years effective June 2018 until July 2021. Around January, 2021 he decided to sell- off his shares in bits and slowly relocated back to his home country, Norway. However, in January 2022, Charlie received a notice from an individual who identified himself as the appointed Official Receiver of Uvumbuzi Co Ltd. Through the notice, the said Official Receiver demanded that Charlie returns with immediate effect, whatever was paid out to him in relation to being previously a shareholder and/or director of Uvumbuzi Co Ltd, because the current company's directors have commenced liquidation proceedings. Charlie quickly reaches out to you, an insolvency practitioner to advise with sufficient details on:
- i) Whether the notice may have any effect on him, having left the company way before it got into problems (4 marks)
 - ii) Whether there are any alternatives to liquidation of Uvumbuzi Co Ltd under the current circumstances and the implication (if any) of the same, to the company (4 marks)

QUESTION TWO

In December 2021, the Central Bank of Kenya (Amendment) Act, 2021 became effective. This Amendment vests in the Central Bank of Kenya, the powers to license and oversight the previously unregulated digital credit providers in the country. One of your clients, Cryptonic Ltd, a digital money lender comes to you seeking legal advice with adequate details on the following:

- a) Why is this legislation important to the financial services and payments sector? (5 marks)
- b) How should CBK implement this legislation in a manner that affords digital credit users with robust consumer protection safeguards? (5 marks)

QUESTION THREE

Flamingo Co. Ltd is a publicly traded company in Kenya with a total turnover of Ksh 5 billion. The company is involved in the manufacturing of consumer electronic equipment and medical diagnostics kits. However, it wants to expand its diagnostic medical devices business by acquiring a company or companies that is/are already in that line of business. Two potential targets have been identified.

One of the identified companies is Ndovu Kuu Ltd, a company with its main offices in Kisumu and with a turnover of Ksh 1 billion. The other one is Afya Bora Co Ltd with its headquarters in Nakuru. About 90% of Ndovu Kuu's Ltd shares are still in the hands of three founders who are still active in the company (they still sit on the Board) and a venture capitalist which also has a seat on the board. The remaining 10% of shares is held among other current and past employees of the company.

Flamingo Ltd now wishes to acquire 100% capital control of both targeted companies by purchasing their all their shares. Ndovu Kuu Ltd controls 40% of the market share while Afya Bora Ltd controls 30% of the same. Further, the proposed acquisitions will most likely result in the loss of jobs as Flamingo Ltd intends to restructure and streamline the operations of the two target companies. The Managing Director of Flamingo Ltd has now come to you, having heard that you possess up-to-date legal expertise in commercial transactions of this nature;

- a) Advice Flamingo Ltd on the nature of the envisaged commercial transaction under Kenya's company law (2 marks)
- b) Based on the above, advice Flamingo Ltd on the process which this transaction will be subjected to, in order to address risks of the company unduly monopolizing the medical diagnostics kit market (6 marks)
- c) Advice Flamingo Ltd on the cost implication (if any) of the envisaged transaction (2 marks)

QUESTION FOUR

In August 2021, the Ministry of Lands of the Republic of Kenya, listed Athi Smart City as a project of national importance and it embarked on preparations for a special land use development plan for the project. This plan seeks to promote optimization of the land within the proposed project site; guide development of affordable housing units (which is part of the government's Big Four Agenda) at the site and its environs and; coordinate the provision of adequate social and physical infrastructure including the efficient transportation system that facilitates accessibility and connectivity of the smart city project site and its environs. Dubai-based Hilshaw Group was hired to serve as the exclusive project management and financing advisory consultant for the smart city project.

You are the Company Secretary for Symiti Cement Ltd which intends to participate in the tender for the construction of the smart-city. However, this project requires real financial muscle and Symiti Cement Ltd may not single-handedly be up to it. The managing director (MD) of Symiti Cement Ltd has identified two Kenyan and one Ugandan cement Companies for this purpose and has been in communication with them over the issue. The target companies are willing to partner with Symiti Cement Ltd and create a special purpose vehicle in order to be able participate in the tendering process and the hopefully, in the construction of the smart-city.

As the company secretary, the MD looks to you for legal guidance as to the envisaged business outfit Symiti Cement Ltd and its partners will create to engage in the smart city project.

Prepare a brief on the roadmap for creating the envisaged special purpose vehicle by Symiti Cement Ltd, and its new partners, highlighting critical matters that would have to be thoroughly negotiated and agreed upon between the parties involved. (10 marks)

QUESTION FIVE

Oduor & Simiyu have been classmates in their LLB studies and as well, in their ATP post-graduate studies. They also worked in the same firm for a period of two years as associates. Thereafter, both felt that since they had a good working relationship, they would open their own joint private practice.

- a) Elaborate on the steps they should take to establish their envisaged business outfit and the information required in the various steps (3marks)
- b) What are the critical provisions that ought to be incorporated while drafting the articles of partnership to effectively regulate their engagement in the joint private practice? Explain (5 marks)

- c) Fast forward, after a successful stint of 10 years in the joint private practice, Oduor has been appointed to his dream job as Judge of the High Court of Kenya and now seeks to resign from the firm. Advise Simiyu on the options of converting the firm into a Limited Liability Partnership (LLP), with a view to attracting new partners (2 marks)

QUESTION SIX

Businesses operating as companies in Kenya are obliged to pay various taxes. Kizungumkuti Ltd, a local trading company is holding a tax workshop for its directors. You have been invited to facilitate a session on the subject from a legal point of view.

- a) What are the key taxes and their rationale, which the directors of Kizungumkuti must always pay attention to owing to the nature of their core business, for the purpose of ensuring compliance of the company with relevant tax law? (5marks)
- b) Chairperson of the Board of Directors of Kizungumkuti Ltd lives in house bought on mortgage but serviced with allowances paid to him by the Company for the last 10 years. The purchase price for house was Ksh 10million and he would like to sell it for Kshs. 20 million after retirement mid this year. He seeks your advice on applicability of capital gains tax on the envisaged transaction. Advise him. (5 marks)

