

**UNIVERSITY OF SWAZILAND**  
**FACULTY OF COMMERCE**  
**FINAL EXAMINATION PAPER MAY 2013**

**TITLE OF PAPER : COMMERCIAL LAW II**  
**COURSE CODE : IDE- AC 204**  
**TIME ALLOWED : THREE (3) HOURS**  
**INSTRUCTIONS :**  
**(a) THE PAPER CONSISTS OF FIVE QUESTIONS**  
**(b) ANSWER FOUR QUESTIONS ONLY**  
**(c) QUESTION ONE IS COMPULSORY**  
**(d) REFERENCE TO CASE LAW AND ANY**  
**OTHER LEGAL AUTHORITY IS A MUST**  
**WHERE APPLICABLE**

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**THE INVIGILATOR**

**QUESTION 1 [COMPULSORY]**

Hlomendlini Mdavu Simelane owned and operated an IT business called Y2K Eyami as a sole proprietor. Through this business Hlomendlini removed viruses from computer systems infected with the "year 2000" virus. Some of his customers needed help with the removal of the "short cut" virus, a virus that Hlomendlini did not know well. He thus engaged Mabodweni, a short cut virus expert, to serve those customers. Hlomi paid Mabodweni a modest base monthly emolument plus a generous commission based on payments received from the customers that Mabodweni served. He also paid Mabodweni a double commission for customers that he found and brought into the business. Mabodweni was outfitted with a Y2K Eyami T-shirt, socks, boxers, hat and was given business cards describing him as a "Short Cut Virus Expert."

After some months working with Y2K Eyami, Mabodweni discovered that CompCon, Inc., a computer consulting firm, had clients in need of short cut virus removal. Mabodweni represented to CompCon Inc, that he alone owned and operated Y2K-Eyami, described his services, and landed the job as a subcontractor. Mabodweni directed CompCon to make a single upfront cheque payable to him personally for FIFTY-THOUSAND EMALANGENI which he duly received. After some months of promising to begin the project "just a few days from now," as assigned to him by CompCon, Mabodweni disappeared. CompCon lost not only the money it paid, but its clients in the banking sector lost valuable income because their computers crashed and yet they had paid CompCon. The Bank has sued CompCon for breach of contract and is seeking damages to the tune of FIVE MILLION EMALANGENI.

While pursuing legal remedies against Mabodweni, CompCon discovered that Hlomendlini actually owned Y2K Eyami and confronted him. Hlomendlini professed ignorance of Mabodweni's dealings with CompCon and denied all responsibility. Mabodweni was finally tracked down and claimed that he was acting only as per the instruction of Hlomendlini and thus he was not liable. All the parties have agreed to submit the dispute to an arbitrator for final adjudication. CompCon has thus brought a joint suit against Mabodweni and Hlomendlini for loss and damages suffered at their expense.

Exhaustively analyse the rights, remedies and possible defences of **ALL THE PARTIES UNDER THE LAW.**

**[TOTAL: 40 MARKS]**

**QUESTION 2**

(a) Discuss the justification for and circumstances under which the veil of incorporation may be lifted at common law.

[5]

(b) Discuss the circumstances, requirements and procedures that must be met under the Companies Act before a company may wound up by a third party.

[5]

(c) Discuss the common law doctrine of *ultra vires* and the doctrine of constructive notice relating them to the contractual capacity of a company in general as well as the significance of statutory intervention as per **Section 29(1) of the Companies Act, 2009**.

[10]

[TOTAL: 20 MARKS]

**QUESTION 3**

(a) Define the term Partnership and list the essentials that must exist for the legal recognition of a Partnership.

[5]

(b) Exhaustively discuss the similarities, differences and entitlements of a General Partner, Sleeping Partner and Partner en commandite.

[5]

(c) Briefly discuss the term “Insurable Interest” with the aid of illustrative examples and/or Case Law, clearly highlighting its significance in the acceptance or repudiation of an insurance claim.

[10]

[TOTAL: 20 MARKS]

**QUESTION 4**

(a) Discuss the main difference between a servant and an independent contractor, highlighting factors a court will take into consideration in determining whether a person is a "servant" or an independent contractor; as well as those factors a court would take into consideration for the determination of a master's liability or lack thereof for the wrongful conduct of a servant and independent contractor.

[10]

(b) Discuss the term utmost good faith, highlighting the possible consequences of breach of the term in relation to insurance contracts.

[5]

(c) Discuss the key personnel, the essential steps and the key documentation needed for the incorporation of a private company.

[5]

[TOTAL: 20 MARKS]

**QUESTION 5**

(a) Briefly discuss the main similarities and differences between a Pledge and a Notarial Bond as forms of security.

[5MARKS]

(b) With the aid of the South African case of Mapenduka v Ashington 1919 A.D. 343; discuss the nature of a *Pactum Commissorium* having due regard to the rights of a pledgee and make a clear distinction between a *Pactum Commissorium* and a *Parate executie*.

[10 MARKS]

(c) Discuss the nature and operation a landlord's hypothec and any possible limitation therein to its operation.

[5 MARKS]

[TOTAL: 20 MARKS]

.....THE END.....