

**UNIVERSITY OF SWAZILAND
DEPARTMENT OF LAW
FINAL EXAMINATION PAPER
YEAR 2005**

211

TITLE OF PAPER : MERCANTILE LAW

COURSE CODE : L 404

TIME ALLOWED : THREE (3) HOURS

**INSTRUCTIONS : ANSWER ANY FOUR (4)
QUESTIONS.
ALL QUESTIONS CARRY
EQUAL MARKS.**

**THIS PAPER MUST NOT BE OPENED UNTIL PERMISSION HAS BEEN
GRANTED BY THE INVIGILATOR.**

Question 1

Three businessmen, Ken Nkambule, Joe Ngwenya and Stanley Smith whose application for a diamond concession in Siteki has recently been approved by His Majesty the King, decided to form a partnership to exploit the concession. In accordance with the partnership agreement, Nkambule, who owned 400 hectares of private tenure land would contribute 300 hectares for the building and residential quarters for the miners. Ngwenya, who owned three earth-moving machines and other types of drilling equipment, was to give them up to the partnership as his contribution to the common pool. Stanley Smith, who holds a Ph.D. in geophysics from the University of Zimbabwe agreed to make available to the partnership his expertise.

It is almost a year since the deal of partnership was executed but Mr. Nkambule has not arranged to register the land in the name of partnership. Dr. Smith, using data gathered from the exploration activities at Siteki, has written a standard textbook entitled "Diamond Mining in Southern Africa". Much of the research and writing was done during his spare time. However, the manuscript was typed by the partnership secretary using a word processing machine owned by the partnership. The book has been reviewed by the Swaziland Geological Society which awarded it a prize of E50.000.00 plus a certificate of merit. The other partners have requested Dr Smith to pay the prize money into the partnership account but he refused. Mr. Ngwenya, on his part, has become very unhappy with the conduct of his co-partners.

Discuss the rights and liabilities of all the parties. [25 marks]

Question 2

Discuss the liability of Allied Bank Ltd. in the following cases.

(a) Cash Shongwe, a legal practitioner in Manzini, maintains an active current account with Allied Bank Ltd. His confidential secretary, S, who is entrusted with the safekeeping of his cheque books, steals one of the cheques. She draws the cheque on Allied Bank for E15, 000, payable to herself. She then expertly forges the signature of her boss, Cash Shongwe, and presents it for payment at the Mbabane branch of the Allied Bank. The

bank pays S. the E15 000, and debits the account of Cash Shongwe.
(7 marks)

(b) Dr Buhle, a medical practitioner in Manzini, also maintains an active current account with the Manzini branch of the Allied Bank. Alicia Peters, his confidential secretary, presents to him for signature two cheques drawn on the Allied Bank for E11 000 and E 7 000. The cheques were respectively drawn in favour of Victor Vilakati, a trader in animal skins in Steki, and Cash Shongwe, a legal practitioner in Manzini, in payment for goods and services that the two payees had supposedly rendered to Dr. Buhle. Dr. Buhle signs the cheques. Alicia Peters negotiates the two cheques to Vuma Peters, her brother and accomplice, by forging the signatures of Victor Vilakati and Cash Shongwe. Vuma Peters cashes the cheques at the Manzini branch of the Allied which debits Dr. Buhle's account with the amounts. (10 marks)

(c) Ayanda Dlamini draws a cheque on Allied Bank Ltd. with which he has a current account, for E7 000, payable to Jan Simelane. The cheque is stolen by Don Davies who presents it to the Allied Bank for payment. The bank asks Don Davies to sign the cheque at the back, and he does this by forging the signature of Jan Simelane. The Allied Bank has debited the account of Ayanda Dlamini. (8 marks)

[Total marks 25]

Question 3

(a) With the aid of decided cases and / or illustrations, carefully distinguish between implied authority and ostensible authority in the context of the agency contract (15 marks)

(b) A, without any authority, buys goods from T representing to the latter, "I am acting on behalf of the Mayor of Matsapha". T believes that A is acting on behalf of Prince Fakudze, who calls himself the Mayor of Matsapha. A, however, meant Nathan Chambers, a young business tycoon who boasts that he will be the first Mayor of Matsapha. Later that day Nathan Chambers, who had learnt of the deal A had made, met Maria, the wife of T and said to her, "I hear that A has made a fantastic deal with your husband on my behalf. Tell T that I am ready and willing

to take half the goods as I cannot afford to pay for everything”. Much later, Prince Fakudze also met Maria and said to her; “I hear A has made a very good deal with your husband on my behalf. Tell him that I am going through with it.” T is now at his wit’s end and comes to you for advice. Advise him.

(10 marks)

[Total marks: 25]

Question 4

Vusi Zondi is a farmer at Tikhuba. Over a period of three years he obtained various farming materials from the Swaziland Builders Co-operative (SBC) on credit. The total sum for the materials now stands at E90 (ninety Emalangeni). The SBC has sent him several requests for payment but he has consistently ignored them. Vusi also owes Tractor World (Pty) Ltd. an amount of E200.000 (Two hundred thousand Emalangeni) for two tractors he bought on credit three years ago. He also owes the Swazi Bank an amount of E150.000 (One hundred and fifty thousand Emalangeni) in respect of money advanced to him over the past four years.

Wishing to put his house in order, he has negotiated a deal with the Swazi Bank in terms of which he would sell the two tractors and use the proceeds to pay off his debt to the bank and the bank would then give him a fresh loan for the new planting season. He hoped that this arrangement would give him the chance to generate a bounteous harvest so that he could pay the other creditors.

The SBC, having learnt of the deal between Vusi and the bank has now obtained a judgment in its favour from the High Court against Vusi in respect of the sum of money he owes the co-operative.

Advise Tractor World (Pty) Ltd. Swazi Bank as well as SBC.

[25 marks]

Question 5

(a) Define “**general**” and “**special**” crossing of cheques. (4 marks)

(b) Discuss the legal effect of,

(i) crossing a cheque **specialy**, (3 marks)

(ii) crossing a cheque **generally** and adding the words “**not negotiable**”,
(4 marks)

(iii) crossing a cheque **generally** and adding the words “**account payee only**”
(4 marks)

(c) With the aid of the case of *Standard Bank of South Africa v Sham Magazine Centre* 1977 (1) SA 484 (A) discuss the various ways in which a drawer may render a bill (e.g. a cheque) completely and absolutely non-transferable. (10)

[Total marks 25]

Question 6

(a) What do you understand by the doctrine of **subrogation**? What socio-economic role does it play in the law and practice of insurance?
(10 marks)

(b) Gwebu owns a large house in Manzini. He has taken out an insurance policy against fire in respect of the house with Mbabane All Purpose Insurance Company Ltd. At the time he took out the insurance policy, the house was used as a dwelling house for himself and his family.

The previous policy has now expired and Gwebu has filled out a fresh proposal form for the renewal of the policy on 10th May 2000. In July 2000, Gwebu's family moved to Vuvulane and Gwebu gave the house to his sister for use as a brothel and a marulu bar.

In the proposal form there was the following standard question: “To what use is the house to be put?” Gwebu's answer was: “dwelling house.” The Insurance Company promptly renewed the policy.

On 15th November 2000, there was a fire which destroyed the house. Gwebu now seeks to recover on the policy but the Insurance Company which has discovered that the house was in fact being used as a brothel, has refused to pay.

Is Gwebu entitled to recover on the policy? (15 marks)

[Total marks 25]

Question 7

(a) Define the term "value" as used in the Bills of Exchange Act No. 11/1904. (7 marks)

(b) With the aid of decided cases, discuss the *in duplum* rule as used in the law of banking. (10 marks)

(c) What contribution, in your opinion, does the case of *Littlejohn v Norwich Fire Insurance Society* 1905 TH 374 make to the law of insurance? (8 marks)

[Total Marks 25]