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**NATIONAL UNIVERSITY OF LESOTHO**  
**FACULTY OF LAW**  
**LL.B FINAL EXAMINATIONS**  
**L483 – INSURANCE & BANKING**

**MAY 2018**

**MARKS: 100**

**TIME: 3 HOURS**

**INSTRUCTIONS**

1. Answer any **FOUR (4)** questions.
2. All questions carry equal marks.

## QUESTION ONE

The Director of Public Prosecutions has instituted an action against Basotho Bank & Credit (Pty) Ltd. In that case, the DPP accuses Basotho Bank of contravening section 5 (5) of the *Financial Institutions Act* No. 21 of 2012, which makes it a criminal offence for anyone to conduct “banking business” without a licence. The charge sheet alleges that Basotho Bank has been canvassing nationwide for deposits from the general public – promising prospective depositors ten per cent interest on their deposits. It is further alleged in the charge sheet that Basotho Bank has received over M3 000 000 in deposit from members of the public.

In defence, Basotho Bank & Credit argues that its conduct does not amount to banking business within the meaning of the *Financial Institutions Act* because the moneys that it receives from the public are not deposits but loans. This defence is based on the fact that, upon receipt of money from a person, Basotho Bank & Credit does not issue him or her with a traditional deposit slip. On the contrary, such a person is issued with a document entitled “acknowledgement of debt,” which contains the terms and conditions of the transaction, including the rate of interest and the manner of repayment. The relevance of this argument is that, at common law, a contract of deposit or *depositum* arises only when the bank accepts money for safekeeping. When a purported bank accepts money in the form of a loan, the contract which arises is that of *mutuum* or loan for consumption. It is argued on that basis that the conduct of Basotho Bank & Credit cannot be construed as banking business because, strictly speaking, it does not receive deposits from the public.

Discuss whether the activities of Basotho Bank & Credit amount to banking business.

[25 MARKS]

## QUESTION TWO

Mr Khutsang is the managing director of Letsoai Holdings (Pty) Ltd. An agreement was reached between him and the company in terms of which the company acquired a right to use his motor vehicle for its affairs. Part of the agreement was that the company would insure the motor vehicle, amongst others, against theft. The motor vehicle in issue was duly insured with Alliance Insurance Co. In applying for cover, the company made it explicit to the insurer that it was not the owner of the motor vehicle, but that it was contractually obliged to insure the motor vehicle in terms of an agreement under which it acquired the right to use it.

The motor vehicle was hijacked somewhere in Motimposo while being driven by an employee of the company, as a result of which the company lodged a claim for compensation with the insurer. The insurer rejected the claim on the ground that the company did not have an insurable interest in the motor vehicle.

Advise the company on whether it is true that it does not have an insurable interest in the motor vehicle. **[25 MARKS]**

## QUESTION THREE

Critically discuss the extent to which you agree or disagree with the following statements:

1. The duty of good faith is not applicable upon the renewal of a contract of insurance. **5 Marks**
2. Because of the banker's duty of secrecy, a bank cannot validly cede its claim against a customer to a third party. **5 Marks**

3. Where the proposer withholds relevant information or makes a misrepresentation at the time of applying for insurance cover, it is much easier for the insurer to avoid the contract on the basis of a breach of a warranty, rather than a breach of a duty to disclose. **5 Marks**
4. The basic relationship between banker and customer in respect of a current account is one of debtor and creditor. **5 Marks**
5. Where the risk insured against occurs due to the negligent or intentional conduct of a third party, neither the insured nor the insurer has a right to recover damages from that third party. **5 Marks**

**[25 MARKS]**

#### **QUESTION FOUR**

Critically discuss the concept of a “holder in due course” within the meaning of the *Bills of Exchange Proclamation* No. 13 of 1912. **[25 MARKS]**

#### **QUESTION FIVE**

On 12 January 2017, Mr Marotholi approached the Manager of Liboba Bank (Pty) Ltd to seek financial advice as to where and how he could invest a sum of M1 000 000 for high and quick returns. He was informed that he had to be a client of Liboba Bank in order to get financial advice, as a result of which he instantly commenced the application process for a current account. In the morning of 16 January 2017, a day before the finalisation of the application process, the Manager of Liboba Bank telephoned Mr Marotholi to inform him

that a company known as MajakathataGold (Pty) Ltd was looking for investors, and that the overall record of the company showed that it was prosperous and profitable. The Manager of Liboba Bank also informed Mr Marotholi that a meeting was scheduled to be held in the afternoon with the representatives of MajakathataGold to negotiate and finalise Mr Marotholi's investment in that company. The meeting was duly held that afternoon, between the Manager of Liboba Bank, Mr Marotholi and the representatives of MajakathataGold. At the end of that meeting, Mr Marotholi's investment of M1 000 000 was accepted by the representatives of MajakathataGold; he was moreover persuaded by both the Manager of Liboba Bank and the representatives of MajakathataGold to make a transfer of the investment amount to the bank account of MajakathataGold before the end of the day as the company was currently in the process of purchasing a new mine in South Africa. For all intents and purposes, the investment process was completed by the end of business on 16 January 2017. On 17 January 2009, Mr Marotholi received a telephone call from the manager of Liboba Bank informing him that his bank account has been successfully opened. Mr Marotholi never used this account, wherefore it was subsequently closed by the bank after a few months.

Immediately after the closure of his bank account by Liboba Bank, Mr Marotholi was informed by the board of directors of MajakathataGold that the company was being liquidated due to poor performance. Mr Marotholi wants to sue Liboba Bank in delict, for pure economic loss, on the ground that its manager negligently advised him to invest in a failing company.

Critically discuss whether Mr Marotholi was the customer of Liboba Bank at the time obtaining financial advice, and whether he has an action in delict against Liboba Bank.

**[25 MARKS]**

## QUESTION SIX

Mr Ralikonyana is a livestock farmer. On 23 January 2012, he successfully insured his animals with Meraka Livestock Insurance Co against death caused by diseases. The policy in issue expired on 23 January 2017, and was renewed by Mr Ralikonyana that same day. A month after the renewal of the policy, over 20 animals in Mr Ralikonyana's farm died from foot-and-mouth disease. Mr Ralikonyana consequently claimed compensation from Meraka Livestock Insurance Co. His claim for compensation was, however, rejected by the insurer on the basis that Mr Ralikonyana failed to disclose certain material information. The insurer alleges in that regard that, towards the end of December 2016, over 200 animals on Oxfarm & Co (which is a farm adjacent to Mr Ralikonyana's) died from an outbreak of Anthrax. Anthrax is a dangerous and a highly contagious airborne disease. This outbreak prompted the Ministry of Agriculture and Food Security to quarantine Oxfarm & Co, and to issue a notice of the outbreak to all the farms adjacent to Oxfarm & Co. Although none of Mr Rakonyana's animals ever died from that outbreak, the insurer nevertheless alleges that Mr Ralikonyana breached the duty to disclose.

Mr Ralikonyana comes to you seeking legal advice on the following issues:

- (a) What does the duty to disclose entail, and why is it important for the proposer to disclose all material facts to the insurer? **5 Marks**
- (b) Was the information relating to the outbreak of Anthrax, and the quarantining of Oxfarm & Co, material to Mr Ralikonyana's application for insurance? **5 Marks**
- (c) Does the issue to disclose apply to the renewal of Mr Ralikonyana's policy? **5 Marks**

(d) Can it be said that Mr Ralikonyana breached the duty to disclose if he did not know of the outbreak of Anthrax and the quarantining of Oxfarm & Co at the time of renewal of the policy? **5 Marks**

(e) Can Meraka Livestock Insurance Co still avoid liability if it had prior knowledge of Mr Ralikonyana's failure to disclose, but nevertheless continued to accept premiums from him? **5 Marks**

**[25 MARKS]**