



<u>FACULTY</u>	:	LAW
<u>DEPARTMENT</u>	:	PRIVATE LAW
<u>CAMPUS</u>	:	APK
<u>MODULE</u>	:	DRC9X0C DRAFTING OF CONTRACTS
<u>SEMESTER</u>	:	FIRST
<u>TEST</u>	:	JUNE EXAM

<u>DATE</u>	:	15 June 2021	<u>SESSION</u>	:	Electronic
<u>ASSESSOR(S)</u>	:	Dr. MM van Eck			
<u>MODERATOR</u>	:	Prof. B. Kuschke (UP)			
<u>DURATION</u>	:	5 hours	<u>MARKS</u>	:	100
<u>OPEN TIME</u>	:	08h30	<u>CLOSE TIME</u>	:	13h30

NUMBER OF PAGES: 9 PAGES (INCLUDING THIS PAGE)

INSTRUCTIONS:

1. The question paper and the answer sheet will be loaded onto Blackboard under "*June Exam (15 June 2021)*" in the section called "*Tests & Exams*".
2. To complete the assessment, you should use the answer sheet that has been loaded onto Blackboard to answer the questions. All answer sheets should be saved (named) with your surname and initials with the words "June Exam" in the file name. For example, "*Your Surname, Initials June Exam*".
3. You should use the answer sheet, however, if there are unavoidable circumstances in which you experience a challenge with opening or completing the answer sheet then you may submit your answers in another MS Word Document or PDF.
4. All answers (irrespective of how it is submitted) must include:
 - The date of the assessment;
 - Your surname and initials; and

- Your student number.
5. If the answer sheet does not contain your details (e.g., your name, surname, and student number) to sufficiently identify you, then it cannot be marked.
 6. All answers must be submitted **BEFORE** the closing time by emailing the answers to the following email address: mmvaneck@uj.ac.za as either a:
 - A PDF attachment (preferred); or
 - MS Word Document.
 7. Take note of the following:
 - You should only send through one answer sheet. If more than one answer sheet is received, then the first answer sheet that was received will be viewed as the submission and all other answers and answer sheets will be disregarded.
 - Late submissions will not be marked, and no extensions or late submissions will be permitted. Therefore, it is your responsibility to ensure that your answers are emailed and received on time.
 8. You may not seek assistance of a fellow student. You may not use any part of another student's answers to complete this assessment. You are reminded that all relevant rules and policies of the University and the Faculty apply to this test. Regarding the assessment, the normal academic integrity rules apply. For example, this means that you cannot cut-and-paste material other than your own work as answers for this assessment.

By undertaking this online assessment, you will be deemed to have made the following declaration:

"I certify that my submitted answers are entirely my own work and that I have neither given nor received any unauthorised assistance in this assessment item".
 9. Good luck with the test.

READ AND FOLLOW THE BELOW INSTRUCTIONS:

- 1 Answer all the questions in the answer sheet.
- 2 All answers must use good language practices, which includes presenting information in a logical structure and the use of plain language principles (e.g. grammar, spelling, paragraphs, headings etc.)
- 3 You may not copy-and-paste from prescribed material or the internet. If any part of an answer contains copied-and-pasted material (which is not reflected as being quoted with an appropriate reference), then the answer will be penalised (in part or in whole). Rather use your own words to answer the question.
- 4 Only use prescribed material and authority (prescribed textbook, case law, legislation, journal articles etc.) to answer the questions.

QUESTION 1

Read “Annexure A” attached to this test paper before answering this question.

Your client, the Renting Company (Pty) Ltd, is the owner of several office blocks that your client leases to several tenants. Your client concluded a lease agreement with Mr. Mzizi for a duration of 3 years. After the first year of the lease, Mr. Mzizi approaches your client to transfer the lease from his name to his business trust, Mzizi Business Trust. Mr. Mzizi is the sole trustee of the trust. Your client agrees in principle to such a transfer but requires the arrangement to be recorded in writing. Your client is presented with the contract as set out in Annexure A to this test paper.

Your client approaches you for advice.

Answer the following questions:

- 1.1 Consider the way Mzizi Business Trust is cited in “Annexure A”. Is this the correct manner to cite the Mzizi Business Trust as a contracting party? Discuss and provide a more appropriate citation of Mzizi Business Trust.

You may supplement any factual elements to the draft citation, as necessary. (5)
- 1.2 Critically analyse the validity of the contract in “Annexure A” and discuss any risks or relevant considerations that should be highlighted to your client before concluding the contract. Your answer, where appropriate, must discuss relevant prescribed authority to substantiate your answer. (15)
- 1.3 Your client is concerned that the Mzizi Business Trust will not fulfil its contractual obligations under the contract of lease. Your client is willing to sign the contract but wishes to suspend the operation of the contract in “Annexure” A until such time as:
 - Mzizi Business Trust pays a security deposit of R15,000 (fifteen thousand Rand) to your client; and
 - One of the trustees of the Mzizi Business Trust signs a deed of suretyship, in which the trustee would be personally responsible for the payment of any outstanding amounts should the Mzizi Business Trust fail to fulfil their obligations under the contract of lease.

Address your client's concerns by:

- (i) Identifying the appropriate clause that you would recommend being included in the contract in "Annexure A" (provide the typical name of such a clause).
- (ii) Explaining how the clause that you should have identified in (i) above would practically work (e.g. how would it impact the operation of the contract) and discuss any relevant authority to substantiate your answer.
- (iii) Providing a draft of the clause that you would recommend being included in "Annexure A" to address your client's concerns.

You may supplement any factual elements to the draft clause, as necessary. You must use plain language principles in the draft clause. (20)

1.4 Assume for the purposes of this question that:

- (i) The clause that you should have identified in your answer in question 1.3 is included in "Annexure A" and that all conditions have been fulfilled.
- (ii) Both Mr. Mzizi and the Mzizi Business Trust signs the contract in "Annexure A" on the dates as indicated in the signature block.
- (iii) Your client signs the contract only 7 (seven) days later (being on 18 March 2019), but the signature block still reflects that your client had signed the contract on 1 March 2019. Your client deliberately retains the incorrect date in the signature block, knowing that s/he had signed the contract on a different date. Your client does this, as it would be of a financial benefit to your client to backdate the contract.

Critically discuss the validity and legal consequences to the contract in "Annexure A" in instances of your client backdating a contract. (10)

[50]

QUESTION 2

Your client provides private security services to individuals (natural persons) and small businesses with an asset value of less than R2,000,000 (two million Rand) in the region of Gauteng. All your client's customers are required to sign "standard terms of service" before any security services are provided to them. Recently, your client received several claims from customers for damages that resulted from negligent actions of your client's employees (e.g. the security guards on duty). Your client now wishes to include an exemption clause in the standard terms of service for any future services provided to customers. Your client wishes the exemption clause to include the following:

- (i) To exclude any liability for indirect or consequential damages and losses.
- (ii) To limit all remaining liability to R1,000,000 (one million Rand) per incident.
- (iii) To exclude liability for negligence on the part your client's employees (which exclusion of liability should include any losses or damages that results in theft, death, and injury).
- (iv) To exclude liability for gross negligence.

You may, for the purposes of this question, assume that the Consumer Protection Act 68 of 2008 applies to the set of facts.

Answer the following questions:

- 2.1 Critically discuss the general validity of exemption clauses and any legal principles or considerations that may be relevant in the exemption clause your client wishes to include in their standard terms of service. (30)
- 2.2 Considering the principles you have discussed in your answer in question 2.1 (above), discuss the different types of (or manners in which) exemption clauses can be drafted in private security contracts and motivate which type of approach you would recommend using when drafting an exemption clause for your client. (10)
- 2.3 Taking into account your client's instructions and the principles you have discussed in your answer to questions 2.1 and 2.2, draft an exemption clause in plain language to be included in your client's "standard terms of service" which would be considered valid and enforceable in South African law. Also include an explanation as to the reason why you have drafted the clause in the manner you have. (10)

[50]

TOTAL:

[100]

TRANSFER AGREEMENT

between

Mzizi Business Trust
("Cessionary")

and

Jacob Mzizi
("Tenant")

and

The Renting Company (Pty) Ltd
("Landlord")

1. INTRODUCTION

- 1.1 The Tenant entered into the Lease Agreement with the Landlord, being owner of the Property.
- 1.2 The Tenant now wishes to cede and assign the Lease Agreement to Cessionary on the terms set out in this Agreement, to which the Cessionary and the Landlord have agreed.
- 1.3 The Parties agree that this Agreement will only be valid if properly executed, and that this written document is the only agreement between the Parties regarding the subject matter hereof.

NOW THEREFORE the Parties agree as follows:

2. INTERPRETATION AND DEFINITION

- 2.1 In this Agreement:
 - 2.1.1 expressions in the singular include the plural, and *vice versa*;
 - 2.1.2 words and phrases indicating natural persons refer also to juristic persons, and *vice versa*;
 - 2.1.3 pronouns of any gender include the corresponding pronouns of the other gender; and
 - 2.1.4 clause headings appear in this Agreement for purposes of reference only and must not influence the proper interpretation of the subject matter.
- 2.2 Unless the context appears otherwise, the following terms will denote the following meaning:
 - 2.2.1 “**Agreement**” means this transfer agreement with all schedules and annexures attached thereto;
 - 2.2.2 “**Cessionary**” means Mzizi Business Trust;
 - 2.2.3 “**Landlord**” means the Renting Company (Pty) Ltd, with registration number [●];
 - 2.2.4 “**Lease Agreement**” means the agreement of lease entered into between the Lessor and the Tenant and attached hereto as Annexure A;
 - 2.2.5 “**Parties**” means all the parties to this Agreement and “**Party**” means either one of them;
 - 2.2.6 “**Property**” means [●], which property the Landlord owns and is the subject matter of the Lease Agreement;
 - 2.2.7 “**Signature Date**” means the date of the Party that signs last in time; and
 - 2.2.8 “**Tenant**” means Jacob Mzizi with ID number [●].

3. EFFECTIVE DATE

This Agreement shall become effective on the Signature Date.

4. **CESSION AND ASSIGNMENT**

- 4.1 With effect from the Signature Date, the Lessee cedes and assigns to the Cessionary all the Lessee's rights, title, interest, and obligations under, in and to the Lease Agreement.
- 4.2 The Cessionary hereby accepts the cession and assignment as set out in clause 4.1 (above).
- 4.3 The Lessor hereby consents to the assignment in terms of clause 4.1 (above).

5. **DOMICILUM AND NOTICES**

- 5.1 The Parties select their respective *domicilia citandi et executandi* for the purpose of legal proceedings and for the purposes of giving or sending any notice provided for or necessary in terms of this Agreement, as the following addresses:

Landlord	Lessee	Cessionary
7 Luck Street, Casino Boulevard, Fourways	3 Exit Road, Freedom's Valley, Sandton	10 Shackle Avenue, Bound & Life Valley Estate, Pretoria (this being unit 10 within the gated community)

- 5.2 Each of the Parties may from time to time to vary its *domicilium* by written notice to the other Parties, provided that such new *domicilium* is an address within the Republic of South Africa which is not a *poste restante*.
- 5.3 Any notice addressed to a Party at its physical or postal address must be sent by prepaid registered post, delivered by hand, or sent by electronic mail (e-mail).
- 5.4 A notice shall be presumed, unless the contrary is proven, to have been given, if:
- 5.4.1 posted by prepaid registered post, 5 (five) days after the date of postage;
- 5.4.2 hand-delivered during business hours on a business day, on the day of delivery; or
- 5.4.3 sent by electronic mail (e-mail), on the first business day following the date of sending of such electronic-mail (e-mail) message.

6. **WHOLE AGREEMENT**

- 6.1 This is the entire Agreement between the Parties on the subject matter of this Agreement.
- 6.2 None of the Parties relies, in entering into this Agreement, upon any warranties, representations, disclosures or expressions of opinion which have not been incorporated into this Agreement as warranties or undertakings.
- 6.3 No variation or consensual cancellation of this Agreement shall be of any force unless reduced to writing and signed by all the Parties.

7. **NON-WAIVER**

- 7.1 No extension of time or indulgence must be interpreted as a waiver of any right in terms of this Agreement that one Party may have against the other.

7.2 The failure of any Party to comply with any non-material provision of this Agreement will not excuse the other Party from performing its obligations fully and on time.

8. **GENERAL**

8.1 The legal costs incurred in the preparation of this Agreement will be the responsibility of all the parties equally.

8.2 The Parties hereby agree that they shall, at all times, act in good faith towards each other.

SIGNED at **Melville** on **1 March 2019** in the presence of the undersigned witnesses

Witnesses:

1

2

(Signatures of witnesses)

(Signature of Landlord)

SIGNED at **Melville** on **1 March 2019** in the presence of the undersigned witnesses

Witnesses:

1

2

(Signatures of witnesses)

(Signature of Tenant)

SIGNED at **Melville** on **1 March 2019** in the presence of the undersigned witnesses

Witnesses:

1

2

(Signatures of witnesses)

(Cessionary)