

**LCP4804**

October/November 2015

**ADVANCED INDIGENOUS LAW**

Duration 2 Hours

100 Marks

**EXAMINERS**

FIRST

SECOND

DR DD NDIMA

MRS NF DLAMINI-NDWANDWE

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**Closed book examination**

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**This examination question paper consists of three (3) pages**

**TURN OVER**

**Question 1**

The trilogy of *Mthembu* cases (*Mthembu v Letsela* 1997(2) SA 936 (T) *Mthembu1*, *Mthembu v Letsela* 1998(2) SA 675 (T) *Mthembu2*, and *Mthembu v Letsela* 200(3) SA 867 (SCA) *Mthembu3*) reflects a particular perspective about the relationship between customary law and the Constitution

- (a) With the above statement in mind, evaluate the judgment of Le Roux J in *Mthembu1* regarding the place of the primogeniture principle in contemporary South African law (10)
- (b) Comment on Mynhardt J's views in *Mthembu2* regarding the powers of the court or the legislature to develop customary law in the democratic South Africa (10)
- (c) Analyse the following extract from Mpati AJA's judgement in *Mthembu3* (para 18) so as to reveal the learned judge's perspective about the equality of African women and children in the post-apartheid dispensation

"In *casu*, it is common cause that no customary union existed between the appellant and the deceased when Tembi was born. It is also common cause that no customary union was entered into subsequent to her birth. It follows that, although part of the bridewealth was paid, without a customary union between her parents, Tembi was not legitimised. Mynhardt J was accordingly correct in holding that Tembi is illegitimate."

(10)

**[30]****Question 2**

Contemporary South African courts are often grappling with the issue of the validity of a customary marriage (Take into account the provisions of section 3 (1)(b) of the Recognition of Customary Marriages Act 120 of 1998 )

- (a) In determining the validity of the customary marriage in *Maluleke v Minister of Home Affairs* Case no 02/24921 [2008] ZAGPHC 129 (9 April 2008) (unreported) The court interpreted the statutory meaning of "entered into" "or celebrated" Please comment on the performance of the court in this regard Your answer should include a brief description of the facts plus the reasons for the judgment (10)
- (b) In *Motsoatsoa v Roro* Case no 46316/09 (South Gauteng) (unreported) and *Fanti v Boto and Others* 2008 (5) SA 405 (C) the courts sought the validity of the customary marriages with reference to its indigenous meaning Give a brief description of the facts plus a comparison between the approaches followed by the two courts (20)

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- (c) The main judgment of Ndita AJA in *Ngwenyama v Mayelane* 2012 (10) BCLR 1071 (SCA), and the main judgment of Froneman J in *Mayelane v Ngwenyama* 2013 (8) BCLR 918 (CC) seem to have construed the matter before them differently although they were dealing with the same issues on appeal. Give a brief description of the facts and evaluate how the two courts arrived at different decisions (10)  
**[40]**

### Question 3

Please refer to the following cases to illustrate how the Constitutional Court has struggled with the matter of ascertaining the living customary law

- (a) In *Bhe v Magistrate Khayelitsha* 2005 (1) BCLR 580 (CC) the two judgments agreed on the undesirability of ascertaining the living customary law in that matter but for different reasons. Give a detailed account of the merits of each set of reasons (10)
- (b) In *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC) Van der Westhuizen J used the distinction between past and contemporary practices of the community as the determinant of the applicable living law. Give details of the community practice he selected and the reasons thereof (10)  
**[20]**

### Question 4

Demonstrate the impact of the current constitutional and legislative changes on the traditional relations, functions, powers and responsibilities of the family head and the other members of his family. Please make reference to the relevant provisions of the law (10)  
**[10]**

**TOTAL. {100}**

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