

LCP4804

October/November 2016

ADVANCED INDIGENOUS LAW

Duration : 2 Hours

100 Marks

EXAMINERS :

FIRST

DR DD NDIMA

SECOND :

MRS NF DLAMINI-NDWANDWE

Closed book examination.

This examination question paper remains the property of the University of South Africa and may not be removed from the examination venue.

This paper consists of FOUR (4) pages.

INSTRUCTIONS

PLEASE PAY CAREFUL ATTENTION TO THE FOLLOWING:

- 1. ANSWER ALL FOUR (4) QUESTIONS.**
- 2. REFER TO THE RELEVANT CASE LAW OR AUTHORITY TO SUPPORT YOUR ANSWERS.**
- 3. NOTE THE MARKS ALLOCATED TO EACH QUESTION, AND ENSURE THAT YOUR ANSWER IS IN LINE WITH THIS MARK. THAT IS, DO NOT WRITE A LENGTHY ANSWER IF THE QUESTION COUNTS ONLY A FEW MARKS AND VICE VERSA**

TURN OVER

QUESTION 1

You are a customary law expert working at the Centre for Indigenous Law, Unisa, Pretoria. There are several files on your desk from advocates, attorneys, community leaders and members of the public seeking your advice in a number of customary law matters. Go through **two** of these files carefully.

With recent statutes and case law in mind, write your opinion on each of the matters raised in each file, demonstrating your expertise in the application of customary law in South Africa's constitutional system.

File 1: Thabang Nkosi is a senior counsel practicing law in the superior courts of South Africa. His client, Joe Kalie, resides in a Setswana speaking area in Mabopane, Tshwane. Joe seeks to marry Nthabi by customary law rites but he has another wife, Kedi, also by customary law rites already. Kedi resides at Joe's family home outside Mabopane. Advocate Nkosi seeks your opinion on how, if at all, Joe can marry Nthabi without letting Kedi know about this further marriage. (10)

File 2: Thabang Thabong is a leader of a distinct community that occupies a village within the area administered by the Taung Traditional Authority. This community is not satisfied with the treatment it is receiving from the Taung Traditional Authority and is planning to secede and to form its own separate traditional authority. Thabang Thabong is planning to hold his village community meetings to discuss the secession issue. However, he is aware that the Taung Traditional Authority is not likely to allow such meetings to take place. With reference to case law and the Constitution, advise Thabang Thabong as to

- (i) whether his community can legally call its own meetings to discuss the secession issue without the permission of the Taung Traditional Authority, (5)
and
- (ii) if so, whether his community can in fact legally secede from the Taung Traditional Authority and form their own separate traditional community with its traditional authority. (5)

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TURN OVER

QUESTION 2

- 3.1 You are a professor of customary law from Rhodes University making a presentation at a customary law workshop at the Centre of Indigenous Law at UNISA. Delegates want to know to whom customary applies in view of the discrepancy between
- (a) section 1 (3) of the Law of Evidence Amendment Act 45 of 1988 which refers to customary law as the law that applies in disputes **between blacks** (i.e. the race of the parties determines customary law's applicability), and (5)
 - (b) section 211(3) of the 1996 Constitution which refers to customary law as the law that must be applied **when it is applicable** (i.e. the nature of the transaction that determines customary law's applicability) (5)
- 3.2 In view of your conclusion in 2.1 (a) and (b) above how would you describe the **status of customary law** within the South African legal system? (Refer to case law) (10)
- [20]**

QUESTION 3

You are a student of Advanced Indigenous Law at Unisa attending a conference on Moral Regeneration held at Kroonstad in the Free State. Write a comprehensive essay for presentation at the conference on how the values engrained in the indigenous philosophy - *motho ke motho ka batho/umuntu ngumuntu ngabantu* - such as communal living, shared belonging, co-operation, collective ownership, inclusiveness, reciprocity and group solidarity can engender good living and improve moral values among the youths in South Africa. Use any applicable customary law institution to illustrate the practical operation of these values in extended families

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TURN OVER

QUESTION 4

Read the following extract from *Pilane and Another v Pilane and Others* 2013 (4) BCLR 431 (CC) paras 34-35 and apply it on the cases that follow in order to point out the extent to which the South African courts affirm or reject this dictum

It is well established that customary law is a vital component of our constitutional system, recognised and protected by the Constitution, while ultimately subject to its terms. The true nature of customary law is as a living body of law, active and dynamic, with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs. Our history, however, is replete with instances in which customary law was not given the necessary space to evolve, but was instead fossilised and “stone-walled” through codification, which distorted its mutable nature and subverted its operation. The Constitution is designed to reverse this trend and to facilitate the preservation and evolution of customary law as a legal system that conforms with its provisions.

- (a) *Bhe v The Magistrate Khayelitsha, Shibi v Sithole, Human Rights Commission v President of Republic of South Africa* 2005 (1) BCLR 580 (CC), (10)
- (b) *Mabena v Letsoalo* 1998 (2) SA 1068 (T), (10)
- (c) *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC); (10)
- (d) *Maluleke v Minister of Home Affairs* Case no 02/24921 [2008] ZAGPHC 129 (9 April 2008) (unreported) (10)
- [40]**

TOTAL: {100}

EXTERNAL EXAMINER PROF PF IYA