

LCP4804

May/June 2016

ADVANCED INDIGENOUS LAW

Duration 2 Hours

100 Marks

EXAMINERS .

FIRST

SECOND

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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.

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.**

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QUESTION 1

With reference to relevant case law and applicable legislation comment on the various ways in which the court would determine the validity of the following customary marriages

- (a) Sizwe and Noziwe lived as husband and wife together with Sizwe's parents, Zizi and Makhumalo, at their family home at Randburg. Sizwe and Noziwe had a 10 year old daughter, Ntombi, who was born at this home after an amount of R1200 was delivered to Noziwe's maiden family as part-performance following a *lobolo* agreement for the delivery of R3000 worth of marriage goods. Soon thereafter Sizwe died intestate leaving some assets that were acquired through his own efforts. A succession dispute regarding the inheritance of those assets arose between Noziwe claiming as the widow and Zizi claiming as the deceased's father. How would the court resolve this matter?
- (i) if Zizi was claiming his rights under section 23 of the Black Administration Act and the regulations framed thereunder and Noziwe's claim was based on her customary marriage, or (10)
- (ii) if Noziwe and Ntombi were challenging Zizi under section 9 of the Constitution of the Republic of South Africa, 1996, as against Zizi's efforts to exclude both of them, or (10)
- (iii) if Zizi was disputing the validity of the customary marriage of Sizwe and Noziwe in terms of the non-observance of the necessary customary rituals such as handing over of the bride, *imvume* or *ukumekeza* as well as non-observance of the Recognition of Customary Marriages Act 120 of 1998, or (10)
- (iv) if Noziwe and Ntombi's claims were based on Noziwe's status as the widow and Ntombi's status as a descendant in terms of the Reform of the Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 as well as the judgment of *Bhe v The Magistrate Khayelitsha*, *Shibi v Sithole*, *Human Rights Commission v President of Republic of South Africa* 2005 (1) BCLR 580 (CC), (10)

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- (v) if another woman, Nthabiseng, appeared claiming to be Sizwe's first wife and disputing the customary marriage of Nozizwe as Sizwe had never introduced her (Nozizwe) to her and had never made any application in terms of section 7(6) of Act 120 of 1998 for the court's approval of the contract paving the way to proceed to a further customary marriage. How would the court determine the status of these customary marriages? (10)

[50]

QUESTION 2

On the basis of recent case law and transformative legislation please advise the following parties as to the validity of their transactions at customary law

- (i) the traditional authority decides to abandon its tried-and-tested principle of male primogeniture as the method of appointing new traditional leaders. At a meeting attended by the traditional community they resolve to amend their past practice by placing females at the same level as males in compliance with the dictates of the provisions of section 9 of the Constitution of the Republic of South Africa, 1996. A secessionist group threatens to take this resolution to the Constitutional Court on the basis that it amounts to a violation of customary law. This group also threatens to form a separate traditional community if their demands are not met. Advise the traditional authority as to the validity or otherwise of their actions, telling them how you think the court will handle the matter. (12)
- (ii) Mkhumla refuses to recognise Sikhathi's customary marriage to Nelisiwe on the basis that Sikhathi transferred the money value of the required cattle, not the cattle as required by custom, as the *lobolo* goods for Nelisiwe. Mkhumla insists that Nelisiwe had been his girlfriend and vows to continue to treat her as such since her customary marriage is invalid. Sikhathi applies to court for a declaratory order, asserting his status as the valid customary law husband of Nelisiwe. He also applied for an interdict restraining Mkhumla from interfering with his wife. According to Sikhathi the community practice to deliver live cattle has been replaced by the contemporary one that accepts the cattle's monetary

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values as agreed by the *lobolo* negotiators Advise Sikhathi about the circumstances in which the court would accept the substitution of new practice for the old one, as an enforceable and binding community practice In your advice you must bear in mind that precedent is on Mkhumla's side since he has clearly established that from time immemorial the community's practice was to deliver live cattle in order for a *lobolo* performance to be valid

(13)

[25]**QUESTION 3**

Some of the features of the philosophy of *Ubuntu* are **communal living, co-operation, group solidarity, collective ownership, inclusiveness and reciprocity**. Apply each of these features to the elements of the concept of *ukufakwa* to demonstrate whether or not this concept (*ukufakwa*) embodies the following principle- *umuntu ngumuntu ngabantu/motho ke motho ka batho* – a person is a person because of other people

[13]**QUESTION 4**

Analyse the following judgments whilst stating clearly the contribution of each if any to the development of customary law in South Africa

- (a) *Mabuza v Mbatha* 2003 (7) BCLR 43 (C) (6)
- (b) *Mabena v Letsoalo* 1998 (2) SA 1068 (T) (6)

[12]**TOTAL : {100}**