

LCP4804

May/June 2017

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 OTHER AUTHORITY TO SUPPORT YOUR ANSWERS.**

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

Examine the following scenario and answer the questions that follow

X is the most senior son of B, a deceased traditional leader of one of the prominent kingdoms in South Africa. He hopes to succeed his father as a traditional leader and head of the relevant traditional authority in terms of legislation and customs presently practised by the jural community. The royal family has identified him (X) as the person qualified for appointment to those roles and has presented his particulars to the government for that purpose in terms of section 11 of the Traditional Leadership and Governance Framework Act 41 of 2003.

X has an elder sister Y who also aspires to succeed her father as the traditional leader and head of the said traditional authority. She believes that she has a stronger right than X to succeed her father (B), and that her feminine gender is no bar to her assumption of that role. However, Y's bid has not been supported by the royal family and consequently has not been recommended by the traditional authority in terms of the Act.

Y has launched a high court application to be declared the rightful successor to the position left vacant by her father's (B's) death. The traditional authority is supporting X in his defence against Y's high court application.

Critically evaluate X's and Y's chances of success for appointment in the position of traditional leader and head of the traditional authority.

- (i) Taking into account the historical traditions and the culture surrounding appointments to traditional leadership in South Africa, what considerations do you think would have persuaded the traditional authority to support X rather than Y in their recommendations to the government, notwithstanding Y's age and the provisions of section 11 of the Traditional Leadership and Governance Framework Act, 41 of 2003 and case law, and why? (10)

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- (ii) If the traditional authority has not amended its past practices for appointing traditional leaders, and no contemporary practices have been adopted in line with the values of the new constitutional order, which version of customary law is it applying in recommending X and why? (10)
- (iii) if a contemporary practice has emerged among the entire community, mainstreaming compliance with the Bill of Rights in the appointment processes of traditional functionaries, which version of customary law would the traditional authority be obliged to apply in recommending either X or Y and why? (15)
- [35]**

QUESTION 2

The extracts quoted in (a), (b) and (c) below have been taken from three of your prescribed cases. You must identify the judgement from which each extract comes, and then briefly outline the facts of the case and evaluate the judgment based on the relevant extract

- (a) "once it is clear that the negotiations have taken place, the next inquiry, applying the Act is whether there are any factors that show that the marriage was "entered into" or "celebrated" " (10)
- (b) "the primary purpose of the rule is to preserve the family unit and ensure that upon the death of the family head, someone takes over the responsibilities of the family head" (10)
- (c) "Our Constitution contemplates that there shall be a coherent system of law built on the Bill of Rights, in which the common law and indigenous law should be developed and legislation interpreted so as to be consistent with the Bill of Rights and with our obligations under international law" (10)
- [30]**

TURN OVER

QUESTION 3

Write a comprehensive essay for presentation at an international conference on good governance highlighting the potential of the values engrained in the indigenous philosophy – *kgosi ke kgosi ka batho/finkosi yinkosi ngabantu* – to limit public power (this principle means - the source of royal authority is the community) Your reference to the Constitutional Court in *Pilane and Another v Pilane and Others* 2013 (4) BCLR 431 (CC) may indicate whether in your view a wonderful opportunity was not missed to illustrate this indigenous principle of enforcing freedom of expression, freedom of assembly/demonstration as well as freedom of association Your views will take into account that the court substituted Roman-Dutch principles for the African ones in its efforts to resolve this customary law dispute. [15]

QUESTION 4

Write a critical evaluation of the extent to which the constitutionally envisioned customary law of the 21st century is being realised in the following cases In doing so briefly discuss in each case what the **previous unconstitutional** position was, before the court brought about the **current innovations**

- (a) *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC) (5)
- (b) *Ngwenyama v Mayelane* 2012(10) BCLR 1071 (SCA) and *Mayelane v Ngwenyama and Another* 2013 (8) BCLR 918 (CC) (5)
- (c) *Mabuza v Mbatha* 2003 (7) BCLR 43 (C) (5)
- (d) *Mabena v Letsoalo* 1998 (2) SA 1068 (T) (5)

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

EXTERNAL EXAMINER PROF PF IYA