



<b><u>FACULTY</u></b>	: Law
<b><u>DEPARTMENT</u></b>	: Private Law
<b><u>CAMPUS</u></b>	: APK
<b><u>MODULE</u></b>	: IPR0014 / PIL41A0 PRIVATE INTERNATIONAL LAW
<b><u>SEMESTER</u></b>	: First semester
<b><u>EXAM</u></b>	: Main Examination

<b><u>DATE</u></b>	:	15 June 2021	<b><u>SESSION</u></b>	:	16:30 – 19:30
<b><u>ASSESSOR(S)</u></b>	:	Ms C Johannes			
		Prof M Wethmar-			
<b><u>MODERATOR</u></b>	:	Lemmer			
<b><u>DURATION</u></b>	:	3 hours	<b><u>MARKS</u></b>	:	80

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NUMBER OF PAGES: 6 PAGES (INCLUDING THIS PAGE)

INSTRUCTIONS:

1. Your answers must be in **ONE TYPED DOCUMENT**, or one scanned document (if you have written your answers) **in Word or Pdf format ONLY**.
2. Your answer sheets **MUST** have your **INITIALS, SURNAME & STUDENT NUMBER** on top of **EACH PAGE**.
3. Ensure that if your answers are written that you write neatly and legibly.
4. Read the scenarios carefully and answer the questions that follow.

5. **You are reminded that all relevant rules and policies of the University and the Faculty apply to this assessment.** This means, for example, that you cannot cut-and-paste material other than your own work as answers for this assessment.
6. By undertaking this 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 unauthorized assistance in this assessment”.
7. Do not make use of the write submission function on blackboard to submit your examination.
8. **You must follow all instructions on the examination paper as well as those provided to you on blackboard.**
9. You must submit before **19:30 pm, Tuesday, 15 June 2021**. Late submissions will not be accepted.
10. The mark allocation should guide you regarding how much you should write/type to answer each question. Do not spend excessive time on questions that only require a short answer.
11. You must work within the allocated time frame. Follow the time guide provided on blackboard.

### **QUESTION 1**

In 2013, Karabo (a female, Tanzanian national at all relevant times) met Kamogelo (a male, Zambian national at all relevant times) while on holiday in Bali (Indonesia). A year later in 2014, Karabo and Kamogelo married in Marrakesh (Morocco). Karabo and Kamogelo married out of community of property, by way of antenuptial contract, excluding the accrual system. At the time when their marriage was concluded Karabo was domiciled in Ghana and habitually resident in Namibia, while Kamogelo was domiciled in Ghana and habitually resident in Nigeria. Kamogelo is an architect and Karabo is a financial consultant.

In 2016, Kamogelo visited Barcelona (Spain) to do research on the local architecture. While in Barcelona (Spain) Kamogelo drafted his first will in a restaurant. In his first will Kamogelo instituted Karabo as his sole heir.

In January 2017, Karabo received a job offer in South Africa to work as the Finance Director of a bank called “Moola Bank” in Johannesburg. Later that year Karabo and Kamogelo moved to South Africa, and they purchased a home in Northcliff, Johannesburg. In that same year Karabo and Kamogelo became domiciled and habitually resident in South Africa.

In 2018, Karabo and Kamogelo had their first child, a boy whom they named Siya. After the birth of their first child, Karabo donated a rare antique watch to Kamogelo, which she inherited from her father. In 2019, while on holiday in Mauritius the parties decided to adopt a little girl named Anna. During the adoption process Kamogelo gave Anna’s biological mother R50 000 for gifting them with Anna. Anna’s adoption prompted Kamogelo to draft his second will, in which he expressly revokes his first will and institutes his children Siya and Anna as his sole heirs. Kamogelo wanted to ensure his

children's financial security if anything should happen to him. Kamogelo's drafted his second will while in Mauritius.

Kamogelo and Karabo lived happily in South Africa until the lockdown in 2020, during which they had several disagreements and realised that they no longer share the same views on life. This caused them to separate and in September 2020, the parties obtained a divorce in the Gauteng Local Division of the High Court of South Africa, Johannesburg.

Following the divorce Kamogelo moved to Dubai (United Arab Emirates) for the opportunity to design a new skyscraper for an architectural firm located there. In January 2021, Kamogelo became domiciled and habitually resident in Dubai. On 28 May 2021, while crossing the road to get to work, Kamogelo was knocked by a speeding Ferrari and died at the scene after losing too much blood.

At the time of his death Kamogelo left behind immovable property located in Zambia and money in a bank account in Dubai. According to the law of South Africa and Dubai, Siya and Anna are Kamogelo's sole intestate heirs. According to the law of Zambia, Kamogelo's parents Lwandile and Malebo are his sole intestate heirs.

- 1.1** The legal system of which country governs formal validity of the marriage between Kamogelo and Karabo? **[1]**
- 1.2** Identify which conflicts methodology was employed in your answer to Question 1.1 above. **[1]**
- 1.3** Assume that Karabo is the sister of Kamogelo's first wife Thandi from whom he obtained a divorce in 2010. According to the relevant legal system, the marriage between a man and his divorced wife's sister is not permitted. Discuss the inherent validity of the marriage between Kamogelo and Karabo considering the role and function of public policy. **[4]**
- 1.4** The legal system of which country would govern Karabo's domicile immediately after her marriage to Kamogelo according to Roman Dutch Law? **[2]**
- 1.5** The legal system of which country governs the proprietary consequences of the marriage between Karabo and Kamogelo? Apply the proposal by Stoll & Visser. **[3]**
- 1.6** Refer to Stoll & Visser's proposal applied in Question 1.5 above. Discuss Karabo's prospects of successfully claiming against Kamogelo in terms of s7(9) of the Divorce Act 70 of 1979 at the time of divorce. **[3]**
- 1.7** Assume that according to the law of Ghana donations between spouses are revocable and are regarded as a proprietary consequence of a marriage. In South Africa donations between spouses are regarded as irrevocable and cannot be claimed at the time of divorce.
  - 1.7.1** The legal system of which country would determine whether Karabo is entitled to claim back the watch she donated to Kamogelo at the time of divorce if classification *lege causae* were applied? **[5]**
  - 1.7.2** Would Karabo be entitled to claim back the watch she donated to Kamogelo if classification *lege fori* were applied? **[3]**

- 1.8** Could the doctrine of renvoi be applied to determine the legal system applicable to a claim by Karabo for the watch she donated to Kamogelo at the time of divorce. **[3]**
- 1.9** Discuss the requirements Karabo and Kamogelo had to satisfy to adopt Anna and whether based on the information provided they would have successfully met these requirements. **[3]**
- 1.10** Assume that both will 1 and will 2 are formally valid in terms of the law of Nigeria only. Who would inherit Kamogelo's immovable property? **[4]**
- 1.11** Assume that will 1 is formally valid in terms of the law of Ghana only and the second will is formally valid in terms of the law of Nigeria only. Who would inherit the money in Kamogelo's bank account in South Africa? **[3]**
- 1.12** Assume that Kamogelo drafted his second will by recording an audio containing his last wishes on his cell phone. The legal system(s) of which country(ies) will govern the formal validity of Kamogelo's second will in respect of the money in his bank account in South Africa? **[3]**
- 1.13** Assume that Kamogelo dies intestate. At the time of Kamogelo's death Natalie (a female South African national) claims that she is entitled to Kamogelo's immovable property located in Zambia on account of a marriage ceremony she concluded with Kamogelo in Tanzania prior to his death, in February 2021. According to South African private international law the *lex situs* governs the intestate succession of Kamogelo's immovable property, making the law of Zambia applicable. According to the law of Zambia a surviving spouse is regarded as the sole intestate heir. If there is not a surviving spouse, the deceased's children (if any) are regarded as the intestate heirs.

The internal law of South Africa regards the marriage between Kamogelo and Natalie as invalid. The internal law of the Tanzania regards the marriage between Kamogelo and Natalie as valid. The internal law of Zambia regards the marriage between Kamogelo and Natalie as valid. According to the private international law of Zambia, the *lex domicilii* of the husband at the time of the marriage, Dubai, determines the validity of a marriage. The internal law of Dubai regards the marriage between Kamogelo and Natalie as invalid.

- 1.13.1** Identify the incidental question in the set of facts above. **[1]**
- 1.13.2** Apply the approach followed in the decision of *Phelan v Phelan 2007 1 SA 483 (C)* to answer the incidental question. The legal system of which country would be applicable to the incidental question? **[1]**
- 1.13.3** Apply the legal system that according to the criticism of South African conflicts authors should have been used to answer the incidental question in *Phelan v Phelan 2007 1 SA 483 (C)*. Who will inherit Kamogelo's immovable property? **[1]**

**1.13.4** Apply the private international law of the *lex fori* to answer the incidental question. Who will inherit Kamogelo's immovable property? [1]

**1.13.5** Does the type of incidental question present in the set of facts above differ from the incidental question in *Dhansay v Davids 1991 4 SA 200 (C)* and how? [2]

**SUB -TOTAL: [44]**

## **QUESTION 2**

In December 2019, "Daisy" (seller) a flower company with its usual place of business and incorporated in Hong Kong entered into a sales agreement with "Potted Lilly" (buyer) a company with its usual place of business and incorporated in Johannesburg, South Africa. According to the agreement Daisy sold 1000 orchid flowers (500 white orchids and 500 purple orchids) to Potted Lilly to be sold at their new flower store opening in Windhoek (Namibia). The agreement between the parties was concluded in Japan at a flower festival. The orchids were pruned and prepared for delivery at Daisy's flower store in Hong Kong. According to the contract delivery had to take place in Namibia at Potted Lilly's store while payment of the purchase price had to be made in three equal instalments into one of Daisy's bank accounts in Hong Kong. Assume that payment took place as agreed, but a dispute between Potted Lilly (plaintiff) and Daisy (defendant) arises in respect of short delivery. Daisy only delivered 300 white orchids and 200 purple orchids. The parties did not choose a legal system to govern their agreement. Assume that Potted Lilly institutes proceedings against Daisy in the Gauteng Local Division of the High Court of South Africa, Johannesburg.

**2.1** The legal system of which country would most likely be applicable to the contractual dispute between Potted Lilly (plaintiff) and Daisy (defendant) in respect of the breach of contract (short delivery)? [6]

**2.2** Refer to your answer in Question 2.1. Could the South African National Credit Act nevertheless be applicable to the contractual agreement between Potted Lilly and Daisy? [2]

**2.3** Refer to your answer in Question 2.1. The legal system(s) of which country(ies) would govern following:

**2.3.1** the onus of proof? [2]

**2.3.2** costs awarded in favour of the plaintiff? [1]

**2.4** The legal system(s) of which country(ies) would govern the transfer of ownership of the orchids from Daisy to Potted Lilly if ownership passes:

**2.4.1** once the orchids are shipped and en route to its destination? [2]

**2.4.2** upon payment of the final instalment? [3]

**2.4.3** at the conclusion of the contract? Apply Roman-Dutch Law. [2]

**2.5** Assume that a dispute arises in respect of Daisy's contractual capacity:

**2.5.1** The legal system(s) of which country(ies) would be applicable to the dispute if the decision in *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* 2000 (1) SA 167 (W) is applied? [2]

**2.5.2** If the court today were to apply the decision in \_\_\_\_\_ to the dispute, it would apply the law of Japan to determine Daisy's contractual capacity. [1]

**2.6** Assume that Potted Lilly obtained judgment in its favour before a court in Hong Kong and not a South African court. Assume that the court in Hong Kong ordered specific performance. During the proceedings Daisy entered an appearance only to contest the jurisdiction of the Hong Kong court. Following the decision, Daisy appealed the Hong Kong court's judgment, and the appeal is pending. Identify whether the South African court would recognise and enforce the Hong Kong court's judgment? [8]

**2.7** Assume that Potted Lilly purchases vases for their flower store from a company called "Vase Display". Vase Display has its principal place of business and is incorporated in South Africa but manufactures all its vases in Bangkok (Thailand). Potted Lilly also sells the vases it purchases from Vase Display to clients online from around the world. A woman named Delphine who lives in Johannesburg (South Africa) purchased 20 vases from Potted Lilly. Delphine purchases the vases to display the flowers she grows in her garden at an annual flower show where she ordinarily sells her flowers. As soon as Delphine began filling the vases with water, the vases began to crack due to a manufacturing default. Delphine institutes delictual proceedings against Vase Display in the Gauteng Local Division of the High Court of South Africa, Johannesburg.

**2.7.1** The legal system of which country would most likely be applied by the Gauteng Local Division of the High Court of South Africa, Johannesburg to Delphine's delictual claim against Vase Display? [4]

**2.7.2** How would your answer to Question 2.7.1 above differ if the Gauteng Local Division of the High Court of South Africa, Johannesburg applied the Rome II Regulation. [3]

**SUB -TOTAL: [36]**

**TOTAL: 80**

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