



<u>FACULTY</u>	: Law
<u>DEPARTMENT</u>	: Private Law
<u>CAMPUS</u>	: APK
<u>MODULE</u>	: PIL41A0/ IPR0014 Private International Law
<u>SEMESTER</u>	: First semester
<u>EXAM</u>	: Main Examination Memorandum

<u>DATE</u>	: 06 June 2019	<u>SESSION</u>	: 16.30 - 18.30
<u>ASSESSOR(S)</u>	: Ms. C Johannes		
<u>MODERATOR</u>	: Prof M Wethmar- Lemmer		
<u>DURATION</u>	: 2 hours	<u>MARKS</u>	: 100

NUMBER OF PAGES: 5 PAGES (INCLUDING THIS PAGE)

INSTRUCTIONS:

1. Please write your surname, initials and student number on the answering paper.
2. Read the factual scenario's carefully and answer the questions that follow.
3. Write neatly and legibly.
4. Answer in the answer sheet provided.
5. You must address all the matters required to answer the question, but you need not do so in a particular order.

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6. Your answers should express a clear point of view in relation to each question.
7. All examination rules of the University of Johannesburg are applicable.

QUESTION 1

Minenthle (a South African citizen at all relevant times) and Bongani (an Australian citizen at all relevant times) married in Zambia in 2007. They were married out of community of property excluding the accrual system, subject to an ante-nuptial contract. Both parties were habitually resident in Namibia at the time, working for Windhoek Travel Tours. At the time of the marriage, Minenthle (the wife) was domiciled in Namibia and Bongani (the husband) was domiciled in Kenya. At the time the marriage was concluded, the parties had intended to move to Ghana and acquire domicile there. Instead, they were working in Morocco in 2009 and acquired domicile and became habitually resident there. While in Morocco Minenthle and Bongani adopted a little girl named Busi.

Minenthle and Bongani remained in Morocco for four years, and finally moved to South Africa during 2012. In 2015, they acquired domicile in South Africa, and both were habitually resident there. They purchased a house in Johannesburg.

In 2015, Minenthle and Bongani visited Italy on holiday, while in Italy Bongani gifted Minenthle with a bottle of premium Italian wine.

During 2016, Minenthle contributed a disproportionately large amount to the common household expenses, as Bongani continued his studies. From 2017 to 2018, Minenthle stopped working to further her studies. During this time, Bongani contributed a disproportionately large amount to the common household expenses.

In 2019, Minenthle meets Kenzo with whom she falls in love and decides to separate from Bongani. She then institutes an action for divorce in the Gauteng Local Division of the High Court of South Africa, Johannesburg. At the time of the divorce between Bongani and Minenthle, Busi is 15 years old.

- 1.1 Which legal system governs the content of the concept of domicile? [1]

✓ **LF = South Africa.**

- 1.2 Which legal system governs the inherent validity of Minenthle and Bongani's marriage? [1]

✓ **LLC which students must identify from the set of facts.**

- 1.3 With reference to case law discuss how your answer to Question 1.2 would differ if Minenthle was a minor unable to marry according to her *lex domicilii*. [4]

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- ✓ **Kassim – minors went over the border to marry without parental consent.**
- ✓ **Where parties act in *fraudem legis* court will not apply LLC.**
- ✓ **The court can apply the LD of the minor party or the LF which students must identify from the set of facts. [2]**

1.4 Assume that South African Private International Law provides that the proprietary consequences of the marriage are governed by Kenyan law. The Private International Law of Kenya refers the matter to the law of Namibia. Assume that the Kenyan Court applies the partial *renvoi* theory. The legal system of which country will be applied by in the Gauteng Local Division of the High Court of South Africa, Johannesburg if it were to reject *renvoi*? **[1]**

- ✓ **Kenya.**

1.5 What type of *renvoi* is referred to in Question 1.4 above? **[2]**

- ✓ **Transmission.**
- ✓ **The PIL of one country refers to the law of another country and that country's PIL refers to the law of another country and so on (onward reference) / more than two transfers.**

1.6 The legal system of which country would govern the proprietary consequences of the marriage between Minenthle and Bongani at the time of divorce according to Roman-Dutch law? In your answer, discuss the constitutionality of the common law position with reference to case law. **[4]**

- ✓ **LDM.**
- ✓ **Domicile of the husband at the time of the marriage.**
- ✓ **Against s9(3) on basis of gender/ sexual orientation (or similar answer).**
- ✓ ***Sadiku v Sadiku* – harsh consequences for economically weaker spouse.**

1.7 The legal system of which country would govern the proprietary consequences of the marriage between Minenthle and Bongani at the time of divorce according to the proposal of Stoll and Visser? **[4]**

- ✓ **The ANC does not specify a legal system applicable to the proprietary consequences of the marriage.**
- ✓ **No common LD at the time of the marriage.**
- ✓ **The parties shared a common HR at the time of the marriage.**
- ✓ **= Namibia thus Namibian law will govern the proprietary consequences of the marriage.**

1.8 The legal system of which country would govern a claim for maintenance by Bongani against Minenthle at the time of divorce? Discuss how your answer

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would differ if Bongani's claim for maintenance was closely linked to a claim for redistribution. [3]

- ✓ Usually governed by the LF as a divorce issue.
- ✓ If linked to re-distribution, then governed by the LDM which students must identify from the set of facts.
- ✓ Hassan v Hassan.

1.9 Would Bongani meet the requirements to claim for redistribution at the time of divorce against Minenthle in terms of section 7(3)-(4) of the Divorce Act 70 of 1979? [4]

- ✓ Discussion & application of the requirements in s7(3) – (4). [3 marks]
- ✓ Not all the requirements met therefore Bongani cannot claim for redistribution ito s7(3) – (4) of the Divorce Act.

1.10 Assume that Bongani does not have a claim for redistribution in terms of section 7(9) of the Divorce Act and meets the requirements above in Question 1.9. Would Bongani be permitted to claim for redistribution in terms of South African law? [4]

- ✓ Students must discuss the 4 different views held by South African authors of Private International Law in respect of whether someone with a foreign LDM can claim for redistribution ito s7(3) – (4). One mark is awarded for discussing each view.

1.11 Assume that Bongani wants the application of foreign law to be excluded in the divorce matter. List the public policy grounds for excluding foreign law in terms of *Bell v Bell* 1991 4 SA 195 (W)? [4]

- ✓ Principles of justice;
- ✓ Boni mores;
- ✓ Constitutional values;
- ✓ Public interest.

1.12 Discuss the requirements Minenthle and Bongani had to meet to adopt Busi from Morocco? [3]

- ✓ Students must identify that if the child is adopted from a member state of the Hague Convention on Intercountry Adoption, then the requirements of the Convention will apply because SA is a member state of the Convention.
- ✓ Students must identify the requirements in the convention and correctly apply the requirements to the factual scenario. Where

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students list the requirements without application only half a mark is awarded.

- ✓ **Students must identify that in this case Karabo & Kamogelo would not successfully have met requirements to adopt Anna because they offered compensation to the biological mother.**

1.13 Assume that Following the divorce of Minenthle and Bongani, Bongani moves to Canada with Busi, without first obtaining Minenthle' s permission. Discuss the remedies available to Minenthle. **[3]**

- ✓ **Remedy lies in the Hague Convention Civil Aspects of International Child Abduction.**
- ✓ **Students must identify the correct provision in the Hague Convention Civil Aspects of International Child Abduction within which Karabo's remedy will lie - Karabo can apply to the central authority in South Africa.**
- ✓ **The application must be made within 1 year and the children must be under 16.**
- ✓ **The central authority will facilitate the voluntary return or institute proceedings to the return of the children.**

1.14 Refer to Question 1.13 above. Discuss the defences Bongani can raise for Busi not to be sent back to her place of habitual residence. **[4]**

- ✓ **Consent was needed & parent gave consent (express or tacit).**
- ✓ **One year passed – child now settled in new circumstances.**
- ✓ **Convention is only applicable to child under 16 - If a child is over 16 (between 16 & 18) our domestic law applies.**
- ✓ **Grave risk or physical or psychological harm / intolerable situation.**

Students must apply these defences to the factual scenario and identify whether any of the defences are in fact present in the set of facts. Students will only be awarded half a mark for correctly identifying any of the defences without application.

1.15 According to South African Private International Law the donation of the wine from Bongani to Minenthle is regarded as a personal consequence of the marriage. Assume that the law of Kenya regards the donation of the wine as a proprietary consequence of the marriage.

1.15.1 The legal system of which country would govern a claim for the donation of the wine by Bongani against Minenthle at the time of the divorce if classification *lege fori* were applied? Illustrate your answer with a diagram. **[10]**

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- ✓ Students are awarded 10 marks for correctly drafting the classification table. Students must be able to identify the correct columns and must be able to complete each column correctly for the two legal systems at hand namely SA and Kenya.
- ✓ Students will only be awarded 2 marks where they are able to identify the correct columns for the classification table but unable to complete the table correctly.
- ✓ For every row of each column of the classification table that is completed correctly students will be awarded 1 mark in total students who correctly and completely draft the classification table will be awarded $1 \times 10 = 10$ marks.
- ✓ Students will only be awarded 5 marks where they are only able to complete the columns correctly for one of the two legal systems namely SA and Kenya.
- ✓ Students must be able to identify that in this instance SA law will be applicable.

1.15.2 Explain whether your answer to Question 1.15.1 would be affected if you were to apply classification *lege causae*. [5]

- ✓ South Africa – Personal Consequence governed by LD.
- ✓ LD = SA therefore SA is applicable.
- ✓ Kenya = Proprietary consequence governed by the LDM.
- ✓ LDM = Kenya therefore Kenyan law is applicable.
- ✓ Both systems are applicable = Cumulation.

SUB -TOTAL: [57]

QUESTION 2

Bonang, a South African national, died in Ethiopia in March 2019. She was at all relevant times domiciled and habitually resident in Kenya. She left money in a bank account in South Africa and a house in Johannesburg. She executed two wills during her lifetime. In her first will, her first husband, Thabo, was instituted as her sole heir. This will was executed in Zimbabwe while Bonang was on holiday at the Victoria Falls with Thabo. In her second will, her second husband, Siphiso, was instituted as sole heir. This will was executed in Lesotho at the top of the Sani Pass. The second will expressly revokes the first will. Thabo and Siphiso are still alive. Bonang leaves one child behind named Vuyo. Vuyo is the son of Thabo her first husband. Bonang divorced from both Thabo and Siphiso during her lifetime. The second divorce took place three years before her death. In terms of South African law Vuyo would be Bonang's sole intestate heir.

2.1 Assume that both the first and the second will are formally valid in terms of the law of Kenya only. Who inherits the money in Bonang's bank account in Johannesburg? [3]

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- ✓ **Will 2 valid in terms of its own testing systems.**
- ✓ **Therefore, second will and revocation is valid.**
- ✓ **Siphiso will inherit.**

2.2 Assume that the first will is formally valid in terms of the law of Kenya only and the second will is valid in terms of the law of Zimbabwe only. Who inherits the money in Bonang's bank account in Johannesburg? **[3]**

- ✓ **Will 2 invalid in terms of its own testing systems.**
- ✓ **Revocation invalid & cannot be saved / Will 1 valid in terms of its own systems.**
- ✓ **Thabo inherits.**

2.3 Assume that both the first will and the second will are formally valid in terms of the law of Zimbabwe only. Who inherits the money in Bonang's bank account in Johannesburg? **[3]**

- ✓ **Will 2 invalid in terms of its own testing systems.**
- ✓ **Will 2 is valid in terms of testing system of Will 1 in terms of which will 1 is also valid – revocation valid.**
- ✓ **Vuyo inherits.**

SUB -TOTAL: [9]

QUESTION 3

Denver, a Nigerian national, domiciled in Ethiopia, executed his will in Tanzania.

Denver's will ("will 1") granted the power of appointment of a final beneficiary under a trust to Rory. Denver's will is formally valid in terms of the law of Nigeria, but not in terms of the law of Tanzania and Ethiopia. Rory, a South African national, executed the power of appointment conferred upon him, in his own will ("will 2"). Rory drafted his will in Botswana. Will 2 is formally invalid in terms of the legal systems of South Africa and Botswana, but it is formally valid in terms of the law of Tanzania. Is the execution of the power of appointment (the appointment of a final beneficiary in Rory's will) formally valid? **[5]**

- ✓ **Will 2 invalid in terms of its own testing systems, will 2 is invalid.**
- ✓ **The POA can however be saved if valid in terms of the LLA of Will 1.**
- ✓ **POA is valid ito LLA of Will 1.**
- ✓ **Therefore, the power of appointment can be saved.**
- ✓ **Power of appointment executed by Rory in Will 2 = valid.**

SUB -TOTAL: [5]

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QUESTION 4

Player One is a company incorporated in Johannesburg (South Africa). Games Galore, a kids' entertainment company, is incorporated in England. Player One (seller) and Games Galore (buyer) concluded a contract of purchase and sale in respect of eight PlayStation Fours, produced in Germany. The contract was concluded in Antwerp (Belgium) during February 2019. In terms of the contract, the PlayStations that were manufactured in Germany had to be delivered by Player One in the harbour of Hamburg (Germany) during March 2019. Payment by Games Galore had to take place in Player One's bank account at First National Bank in South Africa. The parties did not choose a legal system to govern their agreement. Assume that a dispute between Games Galore (plaintiff) and Player One (defendant) arises in respect of the quality of the PlayStations as delivered by Player One. Several of the PlayStations overheated and blew up after a few hours of play on the game machines. Payment took place as agreed.

- 4.1** Assume Games Galore institutes a claim against Player One in the Gauteng Local Division of the High Court of South Africa, Johannesburg based on their contractual agreement. Predict which legal system would be applied to the contractual dispute by the Gauteng Local Division of the High Court of South Africa, Johannesburg. **[12]**

- ✓ **No express agreement in set of facts. [1]**
- ✓ **Must discuss 2 Approaches and indicate that regardless of approach most important factor LLS. [2]**
- ✓ **LLS – place of performance = place of delivery & payment. Students must be able to indicate the place of delivery and the place of payment from the set of facts. [2]**
- ✓ **Scission principle – place of defective performance which students must identify from the set of facts. [2]**
- ✓ **Unitary principle – Scission principle, delivery, payment = Germany or South Africa. [3]**
- ✓ **Germany or South Africa. [2]**

Where students mention the applicable connecting factor without any application only ½ mark will be awarded for listing the connecting factor.

- 4.2** Assume Games Galore institutes a delictual claim for the malfunctioning PlayStations. Predict which legal system is applicable to the delict and use case law to motivate your answer. **[5]**

- ✓ **Students must indicate that the LLD is applicable and explain how the LLD is interpreted in South Africa. [2]**
- ✓ **LLD = Johannesburg, South Africa.**

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- ✓ **Applicable case law must be identified & applied - *Burchell v Anglin & Caterham Car Sales*. Students must not only name the cases but apply the case law. [2]**

4.3 Assume that the case was not heard by a South African Court but rather a German Court. Predict whether the judgment against Player One will be recognised and enforced in South Africa. **[8]**

- ✓ **Students must identify and apply the requirements applicable to the recognition & enforcement of foreign judgements in South Africa – international jurisdiction, final & conclusive judgment, not against public policy, the judgment must not involve the enforcement of a penal (punitive) or revenue (related to tax of income) law of the foreign state, the judgment must not be obtained by fraudulent means, the judgment must be in line with (must not be precluded by) the Protection of Businesses Act 99 of 1978.**
- ✓ **Each requirement must be applied, and students must identify whether the requirement has been met. Only half a mark is awarded for identifying the requirement without application.**
- ✓ **Applicable case law must be identified.**
- ✓ **Students must conclude that the judgment will most likely not be recognised & enforced in South Africa because not all the requirements appear to be met.**

½ mark awarded for listing a requirement only without application.

4.4 Assume that the PlayStations have not yet been shipped from Player One to Games Galore but have already been sold to Games Galore. Which legal system would govern the transfer of ownership of the PlayStations from Player One to Games Galore? **[4]**

- ✓ **LS applies = Germany. [2]**
- ✓ **At RDL = Domicile of person wishing to transfer ownership of goods which is South Africa. [2]**

SUB -TOTAL: [29]

TOTAL: 100

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