



UNIVERSITY  
OF  
JOHANNESBURG

<b><u>FACULTY</u></b>	: Law
<b><u>DEPARTMENT</u></b>	: Procedural Law
<b><u>CAMPUS</u></b>	: APK
<b><u>MODULE</u></b>	: ALS41Y0 / TPR0000 APPLIED LEGAL STUDIES
<b><u>SEMESTER</u></b>	: Second
<b><u>EXAM</u></b>	: 2nd opportunity SSA January 2019 <b>MEMORANDUM</b>

<b><u>DATE</u></b>	: January 2019	<b><u>SESSION</u></b>	: 08:00-10:00
<b><u>ASSESSOR(S)</u></b>	: MR EJ HANEKOM		
<b><u>MODERATOR</u></b>	: PROF R CLOETE		
<b><u>DURATION</u></b>	: 3 HOURS	<b><u>MARKS</u></b>	: 100

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NUMBER OF PAGES: 4 PAGES

INSTRUCTIONS:

1. Answer all the questions.
2. Do not make up any facts unless granted permission to do so in the question.
3. Use full sentences.
4. A pocket calculator may be used.

**QUESTION 1**

You are acting on behalf of the husband in a divorce case. The facts are that the parties have been married for 35 years in community of property and both parties have in turn for approximately half of the time that they were married engaged in successful businesses. The wife also promised to give the husband an option to buy certain shares from her, which she now refuses. She claims forfeiture of matrimonial benefits.

The husband (your client) instructs you that he is not too worried about her claim due to the fact that he and his brother inherited very wealthy from their father and the father created a trust. All assets had been signed over to that trust and the husband alleges that he always had full control over those trust assets with no interference from the wife or anyone else, He could even take loans from banks with the trust assets as collateral.

Evaluate the facts and then create an argument based on case law on behalf of your client to prevent an order for forfeiture. Cite authority to support your argument. [20]

**ANSWER 1****[20]****WIJKER v WIJKER 1993 (4) SA 720 (A) [1]**

- ☐ parties married in community of property for approximately 35 years. [1]
- ☐ for 20 years the husband supported the family adequately. [1]
- ☐ husband transferred certain shares in his business to his wife so that she could obtain income tax benefits. [1]
- ☐ she undertook to give him an option to buy them back.
- ☐ wife later refused to grant this option.
- ☐ wife became successful businesswoman herself and only then (after 20 years) started to contribute to joint household [1]– this mainly led to the breakdown of marriage. [1]
- ☐ she claims forfeiture because husband did not contribute to her successful business. [1]
- ☐ the 3 factors are not cumulative. [1]
- ☐ notwithstanding “no fault” misconduct may be taken into account. [1]
- ☐ “circumstances giving rise to the breakdown of the marriage” are of wide import and may include misconduct giving rise to the breakdown of the marriage. [1]
- ☐ will a party be unduly benefitted? [1]
- ☐ then a value judgment is to be made. [1]
- ☐ court concludes no substantial misconduct and refuses the forfeiture order. [1]

**BADENHORST v BADENHORST [2006] 2 All SA 363 (SCA) [1]**

**TRUST ASSETS** were taken into consideration for redistribution. [1]

Need to prove: \*

\*that party controlled the trust *de facto*; [1]

**Evidence:** father registered the trust; trustees – Badenhorst and his brother; children of Mr. & Mrs. Badenhorst are the trust beneficiaries and any children of Mr. from a subsequent marriage. etc. [1]

\*if it wasn't for the trust, that party would have obtained those trust assets. [1]

**Evidence:** Mr. listed trust assets as his own in an application for credit, etc. [1]

There is therefore an argument that the same principle should be applied to forfeiture and that the trust assets must form a part of what is forfeited. [1]

## QUESTION 2

You are an attorney. After taxation of a High Court Bill of Costs, where the initial totals before taxation were R 500 000,00 on fees and R 70 000,00 on disbursements, the Taxing Master taxed off R 20 000,00 off the fees and R 10 000,00 off the disbursements.

Complete the Allocatur.

[15]

## ANSWER 2

[HIGH COURT]	<u>TOTALS</u> FEES:	DISBURSEMENTS
	<b>500 000.00</b>	<b>70 000.00</b>
LESS TAXED OFF	20 000.00 [1]	10 000.00 [1]
<b>Subtotals</b>	<b>480 000.00 [1]</b>	<b>60 000.00 [1]</b>
DRAWING FEE (10,6%)	50 880.00 [1]	
Subtotal	530 880.00 [1]	
DISBURSEMENTS	60 000.00 [1]	
<b>Subtotal</b>	<b>590 880.00 [1]</b>	
Attendance Fee (10,6%- 1 <sup>st</sup> R10 000)	1 060.00 [1]	
Attendance Fee (5,10%- 1 <sup>2nd</sup> R10 000)	510.00 [1]	
Attendance Fee (2.12%- Balance) (On R 570 880.00)	12 102.66 [1]	
<b>SUBTOTAL</b>	<b>604 552.66 [1]</b>	
VAT ON FEES (R 480 000.00) 15%	72 000.00 [1]	
VAT ON DRAWING FEE 15% (R 50 880.00)	7 632.00 [1]	
VAT ON ATTENDANCE FEE 15% (R 13 672.66)	2 050.90 [1]	
<b>TOTAL:</b>	<b>686 235.56 [1]</b>	

**QUESTION 3**

You are Judge. Apply the Apportionment of Damages, Act 34 of 1956 and calculate the damages to be paid where:

A the driver of motor vehicle X is found to be 28% negligent and the market value of his motor vehicle amounts to R 54 000,00. The vehicle is written off and the salvage value amounts to R 6 200,00;

and

B the driver of motor vehicle Y is found to be 52% negligent and the repair costs for the damage to his motor vehicle amounts to R 85 500,00. **[8]**

**ANSWER 3**

- Apportionment of Damages, Act 34 of 1956
- Motor vehicle accident: A=28% B=52%
- **A's vehicle X**- market value: R 54 000,00
- - salvage: - R 6 200,00 [1]
- Written off: damage amounts to = R 47 800,00 [1]
- **B's vehicle Y**- just damaged:
- Repair costs: = R 85 500,00
- A must pay 28% of B's loss
- =  $28 \div 80 = 35\%$  [1] x R 85 500,00 [1] = R 29 925.00 [1]
- B must pay 52% of A's loss
- =  $52 \div 80 = 65\%$  [1] x R 47 800,00 [1] = R 16 730.00 [1]
- **and now do set-off!**
- R 29 925.00 – R 16 730.00 = **A must pay B R 13 195.00 [1]**

**QUESTION 4**

Critically evaluate the correctness of following statement applicable to legal practice management and motivate your answer with reference to the elements of a practice: "A legal practice is aimed at serving the poor and providing free legal services to the community." **[5]**

**ANSWER 4**

The answer is intrinsically incorrect. **[1]** A legal practice is a business enterprise: legal services are rendered for financial gain to the owners. **[1]**

Elements of a Practice are that it sells legal services; **[1]** it produces profit for its owners and has expenses; **[1]** employs people; has a business premise; is subject to statutory requirements; has an infrastructure with resources and it requires finances from owner(s). **[1]**

### **QUESTION 5**

Assume that the Legal Practice Act is in full operation and that you want to be admitted as a “legal practitioner”, either an attorney or an advocate, in 2020. Critically evaluate the 3 types of legal practitioner that is available for you in the legal profession. Mention the requirements for each and then criticize the positive and negative aspects of each of the possible options. **[17]**

### **ANSWER 5**

#### **ADVOCATES- Without Fidelity Fund Certificate (FCC) [1]**

S24 - High Court admission application is required to be admitted to practice **[1]**

S30 - Application must be made to the Legal Practice Council to be enrolled **[1]**

S25- Appearance: any court **[1]**

S34(2)(a)(ii) & 34(2)(b) Instructions must be taken from attorneys & “Justice Centres” (LASA); these advocates do not have a trust accounts or FCC **[1]** which makes it easier for them to practice. **[1]**

But, this is also negative when compared to the advocate with an FCC who may take instructions directly from the public. **[1]**

S34(6) May practice:

For own account only / alone. **[1]**

No fee sharing with anybody or entity is allowed. **[1]**

Or at a:

Law Clinic

LASA

**[1]**

State Attorney/SAHRC

#### **ADVOCATES (with FCC)**

The positive for these advocates are that in terms of S34(2)(a)(i) & 34(2)(b) they may take instructions directly from the public **[1]** & “Justice Centres”; but the negative is that they must have a trust account & FCC. **[1]**

The rest of the requirements are the same as for the Non-FCC advocate.

### **ATTORNEYS**

S24 - High Court admission application is required to be admitted to practice **[1]**

S30 - Application must be made to the Legal Practice Council to be enrolled [1]

S25- Appearance: any court but a Certificate is required for HC, SCA & CC [1] which is a negative extra requirement.

S34(1) Instructions may be taken directly from public; must have a trust account & FFC [1]

S34(5) May practice:

For own account or as a member of Legal entity [1] which is a positive as fee sharing with other attorneys is allowed. [1]

They may also, like advocates practice at a Law Clinic, LASA or the State Attorney/SAHRC.

## **QUESTION 8**

**[35]**

**You are an attorney. Read the “Particulars of Claim” and set of facts and draft the “Plea and counterclaim” for the Defendant, Matshela Zuma.**

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### **‘Particulars of Claim’**

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**1.** The Plaintiff is John Davids, identity number 630614 0014 08 1, a major male driver by occupation who resides at No. 230 Justin Bieber Street, Soweto.

**2.** The Defendant is Matshela Zuma, a major male who resides at no.35 Drake Street, Wynberg, Johannesburg, whose full and further particulars are to the Plaintiff unknown.

**3.** At all relevant times hereto the Plaintiff was the owner of a GWM Steed 5 with registration number: MY 08 FY GP and Matshela drove a blue 2015 BMW with the registration number: BE 24 CH GP (hereinafter referred to as ‘Plaintiff’s vehicle’).

**4.** On the 17th of December 2017 at the corner of Fox and Ntemi Piliso Streets, Johannesburg, a motor vehicle collision occurred between the Plaintiff’s vehicle driven by the Plaintiff and a blue BMW motor vehicle bearing registration number: BE 24 CH GP (hereinafter referred to as ‘Defendant’s vehicle’) driven by the Defendant.

**5.** The whole cause of action arose within the jurisdiction of this Honourable Court.

**6.** The said collision was caused solely as a result of the negligent driving of the Defendant in one or more of the following respects:

6.1 failing to keep a proper lookout;  
6.2 failing to apply his brakes timeously or at all;  
6.3 failing to adhere to road signals; and  
6.4 failing to avoid the collision when by the exercise of reasonable care and skill, he could have done so;

7. As a result of the Defendant's negligent conduct the Plaintiff's vehicle was damaged.

8. The reasonable and necessary costs of repair to the Plaintiff's vehicle's to its pre-collision state, amounts to: R 26 767.00 (twenty six thousand seven hundred and sixty seven rand).

9. Despite written demand, the Defendant fails or refuses to pay the amount or any part thereof to the Plaintiff or the Plaintiff's Attorneys.

10. In the circumstances, the Defendant is liable to the Plaintiff in the amount of R 26 767.00 (twenty seven thousand seven hundred and sixty seven rand).

**WHEREFORE PLAINTIFF PRAYS FOR JUDGMENT AGAINST DEFENDANT FOR:**

1. Payment of the amount of R 26 767.00 (twenty seven thousand seven hundred and sixty seven rand);

2. Interest of 9% per annum according to the interest rate prescribed by law, *a tempore morae*;

3. Costs of suit; and

4. Further and alternative relief.

**SET OF FACTS: MOTOR VEHICLE COLLISION (Summary of your consultation with the defendant, Matshela Zuma)**

Mr Matshela Zuma says his particulars is correctly cited but he knows nothing of the plaintiff and has never met him before.

The detail of the collision is also correctly cited. Zuma denies that he was negligent in any way.

Mr Zuma alleges that John Davids alone caused the collision because John attempted to "jump" the intersection and made an illegal emergency stop, whereafter Mr Zuma collided with the rear of John's vehicle. Zuma's damages to his motor vehicle amounts to R21 000, 00.

Mr Zuma further instructs you that he himself is a detective policeman who was in full uniform and was on duty but driving his private vehicle.

(You may make up and add all necessary information that are required to draft documents, within the context of the above facts provided).

Draft Zuma's Plea and Counterclaim. [30]

**ANSWER 8** [30]

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**DEFENDANT'S PLEA [1]**

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**[1]# for correct numbering**

**AD PARAGRAPHS 2, 4, 5 and 9** 1. [1]

The defendant admits the contents of these paragraphs. [1]

**AD PARAGRAPH 1, 3, 8 and 10** 2. [1]

The defendant denies the contents of these paragraphs and put the plaintiff to the proof thereof. [1]

3.

**AD PARAGRAPH 6**

The defendant denies the contents of these paragraphs and put the plaintiff to the proof thereof. [1] The said collision was caused solely as a result of the negligent driving of the Plaintiff in one or more of the following respects: [1]

- 6.1 failing to keep a proper lookout; [1] [1] [1]  
6.2 failing to apply his brakes timeously or at all;  
6.3 making an inopportune and illegal emergency stop; and  
6.4 failing to avoid the collision when by the exercise of reasonable care and skill, he could have done so;

3.

**AD PARAGRAPH 7**



Save for admitting that the plaintiff's vehicle was damaged, the rest of the content of this paragraph is denied and the plaintiff is put to the proof thereof. **[1]**

Wherefore the defendant prays for the plaintiff's claim to be dismissed **[1]** with costs. **[1]**

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**CLAIM IN RECONVENTION [1]**

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**1.**

For the sake of brevity the parties remain the same as in the Particulars of Claim. **[1]**

**2.**

Defendant repeats paragraphs 2, 4, 5 and 9 of the Particulars of Claim as if specifically pleaded. **[1]**

**3.**

The Plaintiff is John Davids, identity number 630614 0014 08 1, a major male driver by occupation who resides at No. 230 Justin Bieber Street, Soweto. **[1]**

**4.**

The said collision was caused solely as a result of the negligent driving of the Plaintiff in one or more of the following respects: **[1]**

- 6.1 failing to keep a proper lookout; **[1] [1] [1]**
- 6.2 failing to apply his brakes timeously or at all;
- 6.3 making an inopportune and illegal emergency stop; and
- 6.4 failing to avoid the collision when by the exercise of reasonable care and skill, he could have done so;

**5.**

As a result of the plaintiff's negligent conduct the defendant's vehicle was damaged. **[1]**

**6.**

The reasonable and necessary costs of repair to the defendant's vehicle's to its pre-collision state, amounts to: R 21 000.00 (twenty one thousand rand). **[1]**

**7.**

Despite written demand, the plaintiff fails or refuses to pay the amount or any part thereof to the defendant or the defendant's attorneys. **[1]**

In the circumstances, the plaintiff is liable to the defendant in the amount of R 21 000.00 (twenty one thousand rand). **[1]**

**WHEREFORE DEFENDANT PRAYS FOR JUDGMENT AGAINST PLAINTIFF FOR:**

1. R 21 000.00 (twenty one thousand rand). **[1]**
2. Interest according to the interest rate prescribed by law, *a tempore morae*; **[1]**
3. Costs of suit; and **[1]**
4. Further and alternative relief. **[1]**

**---END---**