



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>	: 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**

A client approaches you to institute a divorce for her. She has been married to her husband for 25 years. She says that she wants to get divorced because her husband "is sleeping with another woman". Furthermore she alleges that he assaults your client and when they argue he doesn't talk to her for weeks thereafter. He also absconded from the communal home for up to 10 months at a time during the past year.

She wants to divorce her husband and insists that due to his unacceptable behaviour, all the assets that her husband owns or may be entitled to as a result of the marriage must be granted to her in the court order.

Analyse the above facts in terms of what is possible in terms of the Divorce Act 70 of 1979 and case law in order to achieve your client's instructions. **[20]**

**ANSWER 1**

She can apply for forfeiture of matrimonial benefits in terms of sec 9(1) of the Divorce Act. **[1]**

- ☐ A party to a divorce cannot forfeit his or her own contributions. **[1]**
- ☐ Section 9 applies to marriages in and out of community of property. **[1]**
- ☐ Benefits out of community of property includes donations in terms of an ante nuptial contract, donations made in the cause of the marriage and the right to share in the accrual. **[1]**
- ☐ The defendant does not forfeit his or her share of the common property, but only the pecuniary benefit that he would have otherwise derived from the marriage. **[1]**
- ☐ The biggest challenge in a forfeiture claim lies in the evidential aspect of the claim. **[1]**
- ☐ One has to prove that a benefit exists, **[1]** what the extent of the benefit is **[1]** and that the benefit will be undue. Court must be satisfied that one party will be "unduly benefitted" if forfeiture is not ordered. **[1]**
- ☐ Even in undefended divorces one will still have to prove the above. **Wijker v Wijker 1993 (4) SA 720 (A).** **[1]** Parties were married in community of property for approximately 35 years which counts as a long marriage.  
The court must consider:
  - ☐ \*Duration of the marriage; **[1]** which is quite long in this case, **[1]**
  - ☐ \*Circumstances which caused break-down; **[1]** which seems to be all caused by the husband here; **[1]**
  - ☐ \*Substantial misconduct on part of parties. **[1]** The assaults and / or adultery may well be considered as substantial misconduct by the husband. **[1]**
- ☐ SEC.9(2): If grounds are mental illness or continuous unconsciousness – no forfeiture order shall be made. **[1]**
- ☐ **KLERCK v KLERCK 1991 (1) SA 265 (W)** **[1]**
- ☐ **BINDA v BINDA 1993 (2) SA 123 (W)** **[1]**
- ☐ SUBSTANTIAL MISCONDUCT is Not necessary before forfeiture order may be made. **[1]**

Will one party be unduly benefitted if forfeiture is not ordered and in order to ascertain this, court looks at:

- \*Duration of the marriage;
- \*Circumstances which caused break-down;
- \*IF PRESENT, the substantial misconduct on part of parties.

The 3 factors are not cumulative. [1]

## **QUESTION 2**

You are an attorney. A new client Mr X consults with you. X tells you that he has cases with another attorney which includes a criminal case as well as a huge claim for damages. X says that he has entered in an agreement with the other attorney to do his cases on a “no win- no fee” contingency fee basis. A now complains to you that the other attorney took 50% of the capital of the claim for damages as his fee.

Furthermore X had been found guilty in the criminal case and now the other attorney told X to first pay his bill of R50 000 before he will further represent X in an appeal.

Analyse the facts and then evaluate the legality the the contingency fees agreement with reference to the law and current issues surrounding those agreements. [15]

## **ANSWER 2**

**CONTINGENCY FEES: COMMON LAW PRINCIPLE: NEVER ALLOWED [1]**

- Fees only payable if the case is successful and from the proceeds of the case. [1]
- “Pactum de quota litis; or champerty agreement [agreement to finance litigation] [1]
- =Unenforceable in SA law: = Unlawful and is unprofessional conduct[1]
- Now contingency fees agreements are allowed i.t.o. Act 66 of 1997. [1]
- Tjatji v RAF, Khoza v RAF, Mxolisi v RA***October 2012 **SGJ** Contingency fees agreement that does not comply with the act is invalid [1]

Only contingency fees agreement i.t.o. Act 66 of 1997 are allowed. [1]

- Prescribed agreement in the act. [1]
- Fees only recoverable if case is successfully finalised. [1]
- Criminal law and Family law matters excluded. [1]
- Attorneys’ normal attorney and client tariff are recorded and higher tariff also recorded. [1]
- Higher fee may not exceed attorney’s normal fees by 100%. [1] In claims sounding in money, the higher fees may not exceed 25% of amount awarded to or obtained by client as result of the proceedings. [1] The 50% mentioned here is therefore unlawful and amounts to a common law contingency fee agreement, which is invalid. [1]

- Advocate, if employed, also signs and become party to the agreement. [1]

- Copy of agreement must be given to client on date of signature. [1]
- Agreement must be registered with your Law Society. [1]

**de la Guerre vs Bobroff** NGHC 22645/2011–13 February 2013 Common Law Contingency Fee agreements are illegal.

•**SAAPIL v Minister Of Justice & Constitutional Development & RAF 2013 (2) SA 583 (GNP); [2013] 2 All SA 96 (GNP)** -Contingency Fees Act is Constitutional

•Both on appeal to a full bench. Appeals dismissed.

•Petition for special leave to appeal to the SCA dismissed.

•**Bobroff & Partners v De La Guerre, SAAPIL v Min of Justice and Con. Dev.** [2014] ZACC 2

On appeal from the North Gauteng High Court, Pretoria:

•The applications for leave to appeal in both matters CCT 122/13 and CCT 123/13 are dismissed with costs, including, where applicable, the costs of two counsel.

•**Bitter NO v Ronald Bobroff & Partners Inc and Another (11069/13) [2014] ZAGPJHC 95 (29 April 2014)**

### **QUESTION 3**

Apply the Apportionment of Damages, Act 34 of 1956 and calculate the damages to be paid where 3 drivers were involved in a collision and:

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 12% negligent and the repair costs for the damage to his motor vehicle amounts to R 85 500,00;

and

C the driver of motor vehicle Z is found to be 40% negligent and the repair costs for the damage to his motor vehicle amounts to R 1 000 000,00; [15]

### **ANSWER 3**

- Apportionment of Damages, Act 34 of 1956
- Motor vehicle accident: A=28% B=12% C=40%
- **A's vehicle X**- market value: R 54 000,00
- - salvage: - R 6 200,00
- 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
- =  $28 \div 80 = 35\% \times R 85 500,00$  = R 29 925.00 [1]

- A must pay 28% of C's loss
- $= 28 \div 80 = 35\% \times R\ 1\ 000\ 000,00$  [1] = R 350 000.00 [1]
- B must pay 12% of A's loss
- $= 12 \div 80 = 15\% \times R\ 47\ 800,00$  [1] = R 7 170.00 [1]
- B must pay 12% of C's loss
- $= 12 \div 80 = 15\% \times R\ 1\ 000\ 000,00$  [1] = R 150 000.00 [1]
- C must pay 40% of A's loss
- $= 40 \div 80 = 50\% \times R\ 47\ 800,00$  [1] = R 23 900.00 [1]
- C must pay 40% of B's loss
- $= 12 \div 80 = 50\% \times R\ 85\ 500,00$  [1] = R 42 750.00 [1]
- **and now do set-off!**
- A must pay C R 350 000.00 but C owes A R 23 900.00.
- **So A owes C R 326 100.00 [1]**
- B must pay A R 7 170.00 but A owes B 29 925.00.
- **So B owes A R 22 755.00 [1]**
- C must pay B R 42 750.00 but B owes C R R 150 000.00
- **So B must pay C 107 250.00 [1]**

#### **QUESTION 4**

Assume that the Legal Practice Act 28 of 2014 is in full operation and then critically evaluate the following statement that you read in a letter of application for a position a law firm, from a person alleging to be an attorney.

“I am a 25-year old male citizen of Uganda, seeking employment as an attorney at your firm. I hold a study permit and is therefore legally in South Africa. I have obtained my LLB degree from the University of Johannesburg in May 2018, and I am now a qualified attorney. I currently practice in association with two advocates. I do appearances in Magistrates’ Courts, High Courts and the Constitutional Court. I also am in partnership with the Bank of Borra-Borra and I do all their property work.” [16]

#### **ANSWER 4**

Almost all statements in this letter are intrinsically incorrect and is probably fraud and unethical conduct. [1] Candidate attorneys must do Practical Vocational Training (PVT) as prescribed in the LPA [1] and write a competency-based examination. [1] Since the PVT lasts for at least 12 months, this person could not have finished it yet. [1] Admission as an attorney is therefore impossible. [1] Furthermore, only persons with permanent residency or who are South African citizens may be admitted as legal practitioners / attorneys. [1]

Attorneys must be admitted by the High Court to practice in terms of S24 of the Legal Practice Act. [1] and must apply to the Legal Practice Council to be enrolled as a “legal practitioner”. [1] Attorneys may appear in any Magistrates’ Court [1] but for an attorney to be able to appear in a High Court, Supreme Court of Appeal and the Constitutional Court a S25- certificate is required. [1]

S34(5) states that an attorney may practice for his/her own account or as member of legal entity [1] but attorneys may only share fees and practice with other attorneys and no other person or entity. [1] Furthermore, Sec. 34(6) of the LPA states that:

- (6) Advocates [in private practice] may only practise—
- (a) for their own account and as such may not make over to, share or divide any portion of their professional fee whether by way of partnership, commission, allowance or otherwise; [1] therefore an advocate may not practice with “partners” after the Legal Practice Act (LPA). [1] This was also the position before the LPA anyway. [1]

This person is therefore not allowed to practice in partnership with either advocates or with the Bank of Borra-Borra. [1]

### **QUESTION 5**

Under the Legal Practice Act, 28 of 2014 what would the functions of the Legal Practitioners Fidelity Fund be? [4]

### **ANSWER 5**

- Covers theft of trust funds, [1] but
- Could voluntarily enter into annual agreements for professional indemnity insurance for attorneys and advocates. [1]
- (Not compulsory- they can stop this at any time.)
- Subsidise *de Rebus*; Law Clinics. [1]
- Income from interest earned by attorneys on trust monies- goes to LPFF. [1]

### **QUESTION 6**

Mr. Letlhokwa Nkosi gave you instructions to represent him in a divorce against his wife in the Regional Court of Johannesburg. He is the plaintiff. Summons was served on 5 September 2018. The case number is 123/2018.

His wife is Julie Nkosi, identity number: 630520 3456 08 1, a housewife, residing at 456 Second street, Parktown, Johannesburg.

His own details are: identity number: 630514 1234 08 4, he is an engineer working at ABC Engineers (Inc.) in Johannesburg, and he resides at 123 First street, Melrose, Johannesburg.

They got married to each other on 14 September 1996 in Cape Town. Letlhokwa says that they are married out of community of property and he shows you the ante-nuptial contract. They own no immovable property and each of them will keep the moveable property in his or her possession on the date that both of them have signed the deed of settlement.

They have two children namely Happy, a boy born on 16 May 1997 and Milly, a girl born on 10 December 2001. Happy cannot find work and Julie gives him R 3 000,00 per month to maintain himself. Letlhokwa has offered to take over this liability after the divorce until Happy finds a job.

Julie contacted you and stated that she wants the children to live with her and that Letlhokwa can have full unrestricted access to them. She needs R 2 500,00 per month to maintain Milly. Letlhokwa say this is in order. She says she does not want to deliver a Notice of Intention to Defend. She says Letlhokwa is a wonderful and exemplary parent but an awful husband. She is willing to settle as proposed.

There is nothing else to settle. Letlhokwa instructs you to settle on that basis.

Draft only the clauses in the Draft Deed of Settlement that applies to: **[16]**

- 1.1 the children; (11)
- 1.2 how any waiver of any rights and obligations in terms of the settlement must be done. (5)

## **ANSWER 6**

### **1. MINOR CHILDREN [1]**

#### **1.1 PARENTAL RESPONSIBILITIES AND RIGHTS [1]**

The parties will be co-holders of parental rights and responsibilities in respect of the following minor child: **[1]**  
Milly Nkosi, a girl born on 10 December 2000 **[1]**

#### **1.2 Residency**

The primary residence of the minor child will vest with the Defendant. **[1]**

### **1.3 Contact**

- 1.3.1 The Plaintiff will have reasonable contact [1] with the minor child.
- 1.3.2 The contact with the minor child will be unrestricted [1] but subject to her educational, religious and extra-mural activities. [1]

### **1.4 Maintenance**

- 1.4.1 The plaintiff shall pay maintenance to the defendant for the minor child Milly in the amount of R 2 500.00 per month. [1]
- 1.4.2 The plaintiff shall pay maintenance to major dependent child Happy in the amount of R 3 000.00 per month, [1] which maintenance shall terminate when Happy is able to find employment. [1]

## **10. NON WAIVER [1]**

No waiver which either of the parties may allow to the other, [1] of any of their obligations arising out of or in terms of this agreement, [1] shall prevent the party from relying upon strict compliance [1] of all of the obligations of the other party upon any other or subsequent occasion. [1]

### **QUESTION 7**

One often hears about attorneys or advocates who “win” their cases. However, the Contingency Fees act for instance does not refer to “winning” a case. Briefly analyse whether the concept of “winning” is correct in a legal context and explain your answer. [4]

### **ANSWER 7**

“Winning” is probably incorrect in a legal context and should rather be replaced with “success”. [1] Instead referring to winning a case one should rather revert to being successful in the case. [1] This is in any event as it is described in the Contingency Fees act and it could mean a host of things. [1]

Success from a practitioner’s point of view could also be gaining respect from clients & colleagues. It could also mean your own satisfaction from- providing quality legal services and access to justice. [1]

### **QUESTION 8**

Evaluate the set of facts carefully and then answer the questions below.

A motor vehicle collision occurred on 1 January 2018 in Soweto. The driver of a motor vehicle involved in the collision, Miss Precious Mogoeng, suffers personal injuries, and her motor vehicle is written off. She blames the driver of the other vehicle, a soldier in the employment of the South African National Defence Force, Colonel David Mboweni, for the collision. Mboweni was driving a marked military vehicle at the time of the collision. After Mogoeng swore at Mboweni and



spat in his face at the scene of the collision, Mboweni retaliated and slapped Mogoeng on her cheek, in front of lots of people.

Miss Mogoeng wants to institute claims for:

- her personal injuries sustained in the motor vehicle collision;
- the damage to the motor vehicle;
- for *contumelia*, because Colonel David Mboweni slapped her on her cheek.

**Explain:** [10]

8.1 against whom or which entity each of her possible claims lie; (5)

8.2 when, i.e. on which dates the claims will become prescribed. (5)

**ANSWER 8.1** (5)

Personal injury: Road Accident Fund [1]

Motor vehicle that is written off – patrimonial damages:

Colonel David Mboweni [1] and the Minister of Defence and Military Veterans vicariously liable [1]

Assault: Colonel David Mboweni [1] and the Minister of Defence and Military Veterans vicariously liable [1]

**ANSWER 8.2** (5)

**Personal injury:** Lodge a claim with the Road Accident Fund before or on 31 December 2020 [1]

Then issue and serve summons on the RAF before or on 31 December 2022. [1]

**Motor vehicle that is written off – patrimonial damages and assault:**

Notice i.t.o. section 3(1) of the Institution of Legal Proceedings against certain Organs of State Act the Minister of Police before or on 30 June 2018. [1]

Then issue and serve summons on both of them before or on 31 December 2020.[1] [1] ---END---