



UNIVERSITY
OF
JOHANNESBURG

<u>FACULTY</u>	: Law
<u>DEPARTMENT</u>	: Procedural Law
<u>CAMPUS</u>	: APK
<u>MODULE</u>	: ALS41Y0 / TPR0000 APPLIED LEGAL STUDIES
<u>SEMESTER</u>	: First
<u>EXAM</u>	: July 2019 Aegrotat / Special Exam MEMORANDUM

<u>DATE</u>	: July 2019	<u>SESSION</u>	:
<u>ASSESSOR(S)</u>	: MR EJ HANEKOM		
<u>MODERATOR</u>	: PROF R CLOETE		
<u>DURATION</u>	: 3 HOURS	<u>MARKS</u>	: 100

NUMBER OF PAGES: 6 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

Explain the approaches required to the concepts of “proof”, “relevance”, “facta probanda” and “facta probantia” in the drafting of pleadings. [15]

Proof

- There must be a reasonable possibility [1] of proving each statement and averment [1] made in court documents.
- You do not have to believe in the truth of the evidence. [1]
- You just need to know that the evidence is not false. [1]

•Relevance

Nothing irrelevant, [1]
argumentative, [1] or
superfluous [1]
must be pleaded that does not establish a claim or defence. [1]

•Facta probanda:

Material facts in issue. [1]

•Facta probantia: Evidence that a party needs to adduce to prove the material facts.[1]

- Strike a balance between too few and too many allegations. [1]
- Do not plead the law [1] or evidence (as a general rule); [1]
- Only plead evidence when an inference is sought to be drawn; [1]
- Only mention the history of the case by way of introduction, [1] not to strengthen the cause of action.

QUESTION 2

You are an attorney. You have taken instructions to bring an application on behalf of a client. You draft the Notice of Motion and the Founding affidavit.

In the Founding Affidavit your client refers to a fact that she had been told about by a witness. Your client was not there when this fact occurred, but the witness was present.

2.1 How will you deal with this fact in the papers in order to bring it to the attention of the Magistrate? How will you ensure that it is not disregarded by the Magistrate as being hearsay? [3]

2.2 If you later realise before the date that the application had been set down that certain important facts were mistakenly not included in your client's Founding Affidavit, how will you deal with those additional facts in order for it to be allowed? [4]

2.3 If you later realise that there is a factual mistake in the Founding Affidavit, how will you rectify that? [1]

ANSWER 2

2.1 The fact must be included in the client's Founding Affidavit **[1]** and there must be a Confirmatory Affidavit made by that witness, attached to the founding affidavit. **[1]** In the Founding Affidavit a reference must be made to the Confirmatory Affidavit. **[1]**

2.2 You will draft a Supplementary Affidavit which contains the missing facts **[1]** and serve that on the Respondent as well. **[1]** This may, however, only be done with leave of the court **[1]** or if the court rules allow for it. **[1]**

2.3 Draft a Supplementary Affidavit which explains why the mistake was made and what the correct fact is. **[1]**

QUESTION 3

What is a proper approach to the drafting of "Heads of Argument"? **[6]**

ANSWER 3

- ☐ Identify the legal issues, **[1]**
- ☐ Provide a summary of the relevant background and material facts; **[1]**
- ☐ State the proposition of law with reference to authority and the record (if applicable); **[1]**
- ☐ Apply the propositions of law to the facts; **[1]**
- ☐ State the pertinent conclusions of law; and then **[1]**
- ☐ conclude by referring to the relief the litigant is entitled to. **[1]**

QUESTION 4

You are an advocate in Johannesburg. You have to appear in the Gauteng Division of the High Court. You travel between Johannesburg and the City of Tshwane. It takes you 1 hour and 15 minutes to cover the distance of approximately 66 km between the two cities. Calculate the speed at which you were driving. Show all the steps in your calculation. **[5]**

ANSWER 4

Speed = Distance ÷ Time

S = 66 km ÷ 1 hour 15 minutes **[1]**

S = 66 km ÷ 75 minutes **[1]**

$$S = 66 \text{ km} \div (75 \div 60) \text{ minutes [1] (to convert minute into a decimal figure)}$$

$$S = 66 \text{ km} \div (1.25) \text{ [1]}$$

$$S = 52,8 \text{ km} / \text{h [1]}$$

QUESTION 5

An amount of R 1 500.00 is deposited into an attorney's trust investment account paying an annual interest rate of 6.5%, compounded *halfyearly*. What is the balance after 3 years?

Show all your calculations and any formula that you use in the script. **[6]**

ANSWER 5

The "annual" compounding takes place after each calendar year.

$$A = P \left(1 + \frac{r}{n} \right)^{n(t)} \text{ [1] [1] [1] plus 3 for the final answer [1] [1] [1]}$$

A = amount of money accumulated after n years, including capital and interest.

P = principal amount (the initial amount you borrow or deposit)

r = annual rate of interest (as a decimal)

t = number of years the amount is deposited or borrowed for.

n = number of times the interest is compounded per year (i.e. if it is monthly the number of times for one year would be 12)

$$P = 1500, r = 6.5 \div 100 = 0.065, n = 2, t = 3.$$

Therefore: **or give the marks like this**

$$A = 1\,500 \left(1 + \frac{0.065}{2} \right)^{(2)3}$$

[1]

$$A = 1\,500 (1 + 0.0325)^6$$

[1]

$$A = 1\,500 (1.0325)^6$$

[1]

$$A = 1\,500 (1.211547266)$$

[1]

$$A = 1\,817.320899$$

[1]

$$A = 1\,817.32 \text{ (rounded off)}$$

[1]

OR: You could also have opted for the long calculation:

R 1 500,00 x 6,5 compound p/a

$$R\ 1\ 500,00 \times 0,065 = R\ 97,50 \div 2 = 48.75 + R\ 1\ 500,00 = R1\ 548.75$$

After the first 6 months. **[1]**

$$R1\ 548,75 \times 0.065 = R\ 100,66875 \div 2 = R\ 50,334375 + R\ 1\ 548,75 = R\ 1\ 599,084375$$

After year 1. **[1]**

$$R\ 1\ 599,084375 \times 0.065 = R\ 103,9404844 \div 2 = R\ 51,97024219 + R\ 1\ 599,084375 \\ = R\ 1\ 651,054617$$

After 1½ years. **[1]**

$$R\ 1\ 651,054617 \times 0.065 = R\ 107,3185501 \div 2 = R\ 53,65927506 + R\ 1\ 651,054617 \\ = R\ 1\ 704,713892$$

After 2 years. **[1]**

$$R\ 1\ 704,713892 \times 0.065 = R\ 110,806403 \div 2 = R\ 55,40320149 + R\ 1\ 704,713892 \\ = R\ 1\ 760,117093$$

After 2½ years. **[1]**

$$= R\ 1\ 760,117093 \times 0.065 = R\ 114,4076111 \div 2 = R\ 57,20380554 + R\ 1\ 760,117093 \\ = R\ 1\ 817.320899 \text{ **[1]**}$$

$$A = 1\ 817.32 \text{ (rounded off)}$$

QUESTION 6

You are an attorney acting on behalf of the Plaintiff in a divorce. Suppose that you have identified a crucial witness regarding the events and reasons leading up to a divorce. You have already ascertained that the defendant's attorney has subpoenaed this person in order to call him as a witness. You also want to consult with this witness and take a statement from him.

Discuss whether you are allowed to consult with this witness and/or subpoena him with reference to the rules of ethics. Make sure that you cover all possibilities. **[10]**

ANSWER 6

In a Civil matter **[1]** a statement may be taken and consultations with witnesses may be held regardless of whether the opposition had subpoenaed him or not **[1]**:

Any time BEFORE the trial starts **[1]** yes you may consult with anybody who may assist your client in the matter.

When trial has started and BEFORE witness gives evidence: **[1]** Only after timeous notice to opponent that you intend to consult or will proceed with consultation **[1]** (opponent will not be present **[1]**)

When trial has started and witness HAS testified but litigation has not been completed **[1]**: notice to opponent that you intend to consult or will proceed with consultation **[1]** Only in the presence of opponent. **[1]**

If opponent after timeous notice refuses or does not attend, you may proceed. **[1]**

You may also serve a subpoena on him. **[1]**

QUESTION 7

You are an attorney. Sara Mahlangu instructs you in a divorce matter to represent her. Her husband Jan Mahlangu has instituted divorce proceedings against her.

She hands you a Summons issued from the Regional Court for the Region of Gauteng, held at Johannesburg as well as a "Particulars of Claim". She says a sheriff handed this to her last week. You have consulted with Sara and you have accepted her instructions.

While you have been busy consulting, your secretary has already drafted a proper "Notice of Intention to Defend". You will sign it and have it served.

Refer to and read hereunder what Sara has told you in consultation as well as the ANNEXURE A hereunder – the plaintiff's "Particulars of Claim". You note that there are a number of mistakes in the Particulars of Claim.

After you have read that, do the following:

Draft the necessary Plea and Counterclaim in order to execute Sara's current instructions. You may make up detail regarding your firm, but no other detail may be made up unless it is consistent with the facts. **[50]**

SARA HAS TOLD YOU THE FOLLOWING IN CONSULTATION:

Jan and her own particulars are correct in the document that she received. Both of them and the children have been living at her address as set out in paragraph 2 for 10 years before Jan left on 1 May 2016. They were married on 1 January 1990 in community of property, in Pretoria. They never entered into an ante-nuptial contract as he alleges.

(You know that there is a Regional Court that does divorces in Pretoria which is part of the Regional Division of Gauteng)

Before their marriage they also lived together for many years. (She hands you the original marriage certificate. You decide that everything she has told you is correct).

The two children's particulars are correct. Jan is a good parent. The case number is JHB/GP/RC/321/2019.

It is correct that the children still stays with her because they choose to do so, and she does not know why Jan wants to take them away from her. Vusi is at school. Refilwe is employed, earns a huge income as an IT specialist and supports herself. Sara says she drinks alcohol socially but says she is certainly no alcoholic.

Jan earns R 20 000,00 per month as a lecturer at the University of Johannesburg.

The breakdown of the marriage is, according to Sara, all Jan's fault. Jan was very jealous and always accused her of having affairs. She never had any affairs or committed adultery.

Sara says that Jan is lying about a lot of things here especially the part where he wants to keep all the assets. Sara always had to work too and the children were supported by her and Jan together.

Regarding their property Sara states that she wants only her share of the estate. Sara also wants R 4 000,00 maintenance per month per child, but nothing for herself.

Sara says that there is also no way that the children are going to live with their father. They refuse. Sara wants the children to live with her after the divorce but they must sometimes see their father.

You advised Sara properly on maintenance and where the children must live, and she accepted your good advice.

Jan belongs to the UJ Pension Fund. Sara says she wants 50% of his pension fund because she made 50% of the payments on behalf of Jan. She does not belong to a pension fund.

ANNEXURE A

PARTICULARS OF CLAIM

1.

The Plaintiff is Jan Mahlangu, Identity number: 630514 4321 08 4, a major male lecturer, residing at 123 First street, Auckland Park, Johannesburg.

2.

The Defendant is Sara Mahlangu, Identity number: 630520 6543 08 3 a major female secretary residing at 456 Second street, Germiston.

3.

The Plaintiff is residing within the area of jurisdiction of the above honourable court and had been residing there on the date that this action was instituted.

4.

The parties were married to each other, in community of property, subject to the accrual system in terms of the provisions of Chapter I of the Matrimonial Property Act, 1984 (Act No. 88 of 1984) on 1 January 1990 in Auckland Park and the marriage still subsists.

5.

5.1 During the marriage two minor children were born, namely:

5.1.1 Vusi, a boy born on 15 December 2006;

5.1.2 Refilwe, a girl born on 16 December 1994.

5.2 The children are presently in the care of defendant and reside with defendant at the address in paragraph 2.

5.3 It is in the minor children's best interests that the children live with the plaintiff.

6.

It is in the best interests of the minor children born from the marriage if the defendant's rights to see the children are restricted because the defendant is an alcoholic that neglects her children.

7.

The marriage relationship between the parties has reached such a state of disintegration that it has broken down irretrievably and there is no reasonable prospect of the restoration of a normal marriage relationship between them for the following reasons:

7.1 the defendant committed adultery and the plaintiff is not prepared to condone it;

7.2 the defendant is a bad mother and she neglects the children.

8.

Plaintiff wants to keep all the assets from the marriage because he bought it.

WHEREFORE THE PLAINTIFF PRAYS FOR JUDGMENT AS FOLLOWS:

- (a) A decree of divorce;
- (b) An order for division of the joint estate;
- (c) Custody over the children
- (d) Further and/or alternative relief.

DATED AT JOHANNESBURG ON THIS THE 26th DAY OF MAY 2019.

A. SMART

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**To: THE REGISTRAR
OF THE ABOVE HONOURABLE COURT**

And to: DEFENDANT SERVICE BY SHERIFF
SARA MAHLANGU
456 Second street
Germiston, Johannesburg.

ANSWER 7**[50]****Correct Header**

**IN THE REGIONAL COURT FOR THE REGIONAL DIVISION OF GAUTENG
HELD AT JOHANNESBURG [1]**

CASE NO: 321/2016

In the matter between:

JAN MAHLANGU

Plaintiff

And

SARA MAHLANGU

Defendant

PLEA [1]

The defendant pleads as follows to the Plaintiffs' particulars of claim: **[1]**

1.

Ad paragraphs 1 and 2: [1] *[For the correct reference approach throughout the Plea]*

The contents of these paragraphs are admitted. **[1]**

2.

Ad paragraph 3:

The contents of this paragraph is admitted. The court has jurisdiction for the reasons set out in the Defendant's counterclaim, and the Honourable Court is respectfully requested to read the same herein as if specifically pleaded. **[1]**

3.

Ad paragraph 4:

- 3.1 Save for admitting that the parties were married in community of property to each other on 1 January 1990, and that the marriage still subsists, the rest of the contents of this paragraph is denied. **[1]**
- 3.2 The parties were married in Pretoria. **[1]**

4.

Ad paragraph 5:

- 4.1 Defendant denies that Refilwe is a minor child. **[1]**
- 4.2 Defendant further avers that only the minor child Vusi is in the care of the defendant.
- 4.3 Defendant denies that it is in the minor child's best interests that the child live with the plaintiff. It is in the minor child's best interests to mainly reside with the defendant.
- 4.4 The rest of the contents of this paragraph are admitted. **[1]**

5.

Ad paragraph 6:

5.1 The contents of this paragraph is denied and Plaintiff put to the proof thereof. [1]

6.

Ad paragraph 7:

6.1 Save for denying that Defendant committed adultery, the rest of the contents of this paragraph are admitted. [1]

6.2 The reasons for the breakdown in the marriage relationship are as stipulated in defendant's counterclaim and the Honourable Court is respectfully requested to read the same herein as if specifically pleaded. [1]

7.

Ad paragraph 8:

The content of this paragraph is denied as if specifically transversed and Plaintiff is put to the proof thereof. [1]

WHEREFORE THE DEFENDANT PRAYS THAT THE PLAINTIFF'S CLAIM IS DISMISSED WITH COSTS. [1]

COUNTERCLAIM [1]

1.

For convenience sake, the Plaintiff in reconvention is referred to as the Defendant, and the Defendant in reconvention is referred to as the Plaintiff. [1]

2.

Brevitas Causa the Defendant repeats the contents of paragraphs 1 and 2 of the Plaintiff's particulars of claim herein. [1]

3.

The plaintiff is domiciled within the area of jurisdiction of this honourable court and was so domiciled on the date that this action was instituted. [1]

[or: The plaintiff resides within the area of jurisdiction of this honourable court and had been residing in the Republic of South Africa for a period of one year immediately prior to the date that this action was instituted. [1]]

4.

The parties were married to each other, in community of property **[1]** on 1 January 1990 in Pretoria and the marriage still subsists. **[1]**

5.

5.1 During the marriage two children were born, namely:

5.1.1 Refilwe, a girl born on 16 December 1994 who is a major. **[1]**

5.1.2 Vusi, a minor boy born on 15 December 2006; **[1]**

5.2 The minor child is presently in the care of defendant and resides with defendant at the address in paragraph 2. **[1]**

5.3 It is in the minor child's best interests that the parties are co-holders of parental responsibilities and rights in respect of him. **[1]**

5.4 It is in the minor child's best interests to mainly reside with the defendant **[1]**

5.5 It is in the minor child's best interests if the plaintiff has the right to reasonable contact with him. **[1]**

6.

The marriage relationship between the parties has reached such a state of disintegration that it has broken down irretrievably and there is no reasonable prospect of the restoration of a normal marriage relationship between them for the following reasons:

6.1 the Plaintiff was excessively jealous and accused Defendant falsely of adulterous affairs; **[1]**

6.2 the parties have not lived together for more than a year as husband and wife since 1 May 2007, at which date the Plaintiff left the common household. **[1]**

7.

The Plaintiff is a member of a pension fund, namely the UJ Pension Fund. **[1]**

7.1 The pension fund as named above is a pension fund as described in section 1(1) of the Divorce Act 70 of 1979. **[1]**

- 7.2 The pension benefits of the defendant are regarded as part of the joint estate. **[1]**
- 7.3 The abovementioned pension fund is not a retirement annuity. **[1]**
- 7.4 The defendant's pension benefits were not brought into consideration at a previous divorce; **[1]**

8.

Defendant requires maintenance for the minor child from plaintiff in the amount of R 4 000,00 per month as she is not able to sustain him on her current income and because the minor child is still at school. **[1]**

WHEREFORE THE DEFENDANT PRAYS FOR JUDGMENT AS FOLLOWS:

- (a)** A Decree of Divorce; **[1]**
- (b)** Division of the joint estate; **[1]**
- (c)** **(c)(i)** The UJ Pension Fund or its successor in title is ordered to pay/transfer 50% of the pension interest to which the Plaintiff is entitled to on the date of divorce as a member of the fund, to the Defendant, as a cash benefit, or to transfer 50% of the pension interest on her behalf to an approved pension fund / provident fund as if the Plaintiff's membership of the fund is terminated on the date of the divorce on which date such benefit accrues to the Plaintiff. . **[1] [1]**
- (c)(ii)** An order directing the Registrar of this Honourable Court to forthwith notify the UJ Pension Fund or its successor in title to make an endorsement in its records that that part of the pension interest benefits is so payable to the defendant and that the administrator of the pension fund furnish proof of such endorsement to the registrar, in writing, within one month of receipt of such notification. **[1] [1]**
- (c)(iii)** That the UJ Pension fund or its successor in title is ordered to endorse its records accordingly. **[1] [1]**
- (d)** An order that the parties shall be co-holders of parental responsibilities and rights in respect of the minor child, subject to the provisions set out below; **[1]**
 - (i)** The minor child shall mainly reside with the Defendant; **[1]**
 - (ii)** The plaintiff shall have reasonable contact with the minor child **[1]**

- (e) Maintenance for the minor child in the amount of R 4 000,00 per month;
- (f) Costs of the action; [1]
- (f) Further and/or alternative relief. [1]

DATED AT JOHANNESBURG ON THIS THE 3rd DAY OF JUNE 2019.

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TO:

**THE REGISTRAR OF THE REGIONAL COURT [1]
JOHANNESBURG**

AND TO:

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