

**UNIVERSITY OF ZIMBABWE
LLB (HONS) PART II
CIVIL PROCEDURE (LB206)
EXAMINATION MAY 2015 3 HOURS**

INSTRUCTIONS TO CANDIDATES

1. You may take into the examination room the following:
 - 2.1 Customary Law and Local Courts Act, Chapter 7:05
 - 2.2 Magistrates Court Act, Chapter 7:10
 - 2.3 Magistrates Court (Civil) Rules, S.I.290/1980
 - 2.4 Maintenance Act, Chapter 5:09

The above must not be annotated in any way.

2. You are required to cite the relevant case or statutory authority wherever appropriate.

SECTION A

Question 1

- (a) A judgment given against a party who is in default is not appealable. Why is this so? **(1mark)**
- (b) What is the difference between an application procedure and action procedure? **(7 marks)**
- (c) What do Rules provide for as proof of service by Sheriff or a party to proceedings? **(2 marks)**
- (d) What is the effect on an action of a finding that the Summons does not disclose a cause of action? In answering the question you should refer to case law. **(5 marks)**
- (e) Your client wishes to institute action against a person who he fears may hide, destroy the evidence by the time the case comes to trial. What would you advise him to do? What factors are taken into account in the granting or refusal of the relief that you may seek for him? **(10 marks)**

(25 marks)

QUESTION 2

- (a) Why is it necessary to start action proceedings sometimes by a letter of demand? **(4marks)**
- (b) What is a liquidated demand? Cite case authority in support of your answer. Give any four examples of a liquidated demand. **(4marks)**
- (c) What is the significance of the court's approach where such an offer or tender has been disclosed to it before judgment? **(2marks)**
- (d) What is the purpose of a pre-trial conference. Is the purpose different from discovery. If so, in which way. **(6marks)**

(15 marks)

SECTION B

QUESTION 3

Kuda is a village head under Chief Murehwa. He is concerned that a case that he decided in his court may become the subject of an appeal or review in a court of higher jurisdiction. He heard that you are studying for an LLB degree course and that you are in the village. He calls you to his home and asks for your opinion on the case.

Kuda advises you that on 21 October 2014, Mano, a resident of the village, killed a pangolin and ate it in a stew. It is well known and accepted in the village that a pangolin is a sacred and spiritual animal and a symbol of ancestral favour. It must not be killed. If anyone captures it, he or she must hand it over to the village head who must give it to the paramount chief.

Kuda further tells you that he has issued a summons from his court claiming, as the plaintiff, 2 cows and 2 goats as damages arising from Mano's offence and for propitiation of the ancestral spirits. He appointed as the site of the court his eldest daughter's marital home two villages away where he was staying for Christmas. He personally presided over the matter and barred Mano's legal practitioner from appearing in his court. He found Mano guilty of the offence. He tells you that he heard that Mano had either appealed against or applied for a review of his decision in the magistrate's court. He however does not think that Mano will pursue the appeal or review because he paid the 2 cows and 2 goats four days after Kuda's decision. Kuda is interested to know the likely outcome if the matter is taken on appeal or review.

Kuda also tells you that within a week of his decision, one Mufudzi came forward and claimed that the 2 cows did not belong to Mano and threatened to drag Kuda to court if he did not return the beasts within 30 days. Mufudzi alleged that some two weeks before Kuda's decision he had given the cows to Mano to use for a short time. Mano on the other hand said that he brought the cows from Mufudzi.

Mufudzi insisted that the 2 cows are his and that he did not sell them to Mano. Further he states that his wife, mother and sister can corroborate this claim.

Kuda wants to proceed with the propitiation ceremony without delay. One of the cows will have to be slaughtered during the ceremony. Kuda also does not want to be dragged into protracted litigation by either Mufudzi or Mano with the prospect that he may be required to handover the cows to the true owner and pay the costs of such litigation.

- (a) If in your opinion Kuda misdirected himself in his decision, briefly outline the misdirection concerned with reference to statutory and case law authority. Kuda is particularly interested to know if this is a proper matter to be taken on appeal or review to the magistrate's court. **(10 marks)**

- (b) What would you advise Kuda to do in relation to Mufudzi and Mano's competing claims to the two cows? Which forum should Kuda approach for this matter to be resolved?

(5 marks)

(15 marks)

QUESTION 4

The plaintiff, a reputable bank, issued a summons claiming \$6 000 from the defendant arising from a loan advanced to the defendant. The money was loaned to enable the defendant, a farmer, to complete the construction of a building in Harare, from which the defendant intended to operate a butchery. The loan advanced was in terms of a written agreement which spelt out, in elaborate detail, the terms and conditions of the loan and it was secured by a mortgage bond over the defendant's house in Harare.

The defendant caused a notice of intention to defend to be filed. Thereafter the plaintiff served on the defendant a notice of amendment which reduced the amount of the claim from \$6 000 to \$4 000. Simultaneously with the notice of amendment

the plaintiff also served an application for summary judgment on the defendant's attorney.

In response to the summary judgment application, the defendant advanced the defence that he had a counter claim against plaintiff and applied for the judgment to be stayed against him pending the final determination of the counter claim.

The defendant alleged that the counter claim stemmed from an oral agreement concluded by the defendant and a senior employee of the Bank. He stated that the senior employee whom he dealt with at the bank agreed, on behalf of the bank, to advance a further \$5 000 on completion of the construction of the building to enable the defendant to kick-start his operations. The business would then generate income from which the defendant would pay off the amounts owing to the bank.

The defendant contended that if the plaintiff had not reneged on the agreement to provide working capital, he would have generated enough income to look after his family and pay the money owing to the bank. He stated that from his experience as a farmer he would have earned a profit of \$2 500.00 per month.

You are the magistrate hearing the application for summary judgment.

(a) Would you grant or refuse to grant the summary judgment application?
Answer this question with the word "I would grant summary judgment" or "I would not grant summary judgment". **(1mark)**

(b) Give detailed reasons for your answer to (a) above **(8marks)**

(c) Is the amendment of the claim relevant to your decision on the application for summary judgment? Give your reasons.(1 mark)

(d) What is the difference between payment into court and tender(5 mark).
(15 marks)

QUESTION 5

In May 2014, Mr. Hoto bought a second hand Benz SUV vehicle under a hire-purchase agreement from Hire car [Private] Limited ("N. Motors") for US\$32 000.00. He paid a deposit of US\$9 000.00 and agreed to pay the balance in 3 monthly instalments of US\$7 000.00. Despite his huge salary at a government parastatal, Mr.

Hoto to only paid a total of US\$11 000.00. He however bought a new Jeep Cherokee for US\$90 000.00 cash soon after signing the hire-purchase agreement.

Hire Car took out a summons claiming the return of the motor vehicle, payment of the balance of the purchase price, interest thereon at the prescribed rate and costs. The claim is consistent with the terms of the hire-purchase agreement. The summons was served upon Mr Hoto by affixing it to the principal door of his residence in Bluffhill, Harare, on 10 September 2014. Mr. Hoto was, unknown to Hire Motors, away on holiday in Mauritius.

Returning from holiday on 30 September 2014, Mr. Hoto was shocked to find the summons affixed to the door of his house.

You are acting for Hire Motors. What advice would you give to Hire Motors as to the courses of action available to it in any of the scenarios outlined below?

(a) No action was taken by or on behalf of Mr Hoto by the date of his return to Zimbabwe. **(1mark)**

(b) An appearance of intention to defend was entered by Mr. Hoto legal practitioners on 1 October 2014 before Hire Motors took any further step in the proceedings. The defence proffered was – *“I am going to pay the money in 2 months’ time. I pray that the court gives me time to do so.”* Hire Motors wishes to obtain relief without delay.

(3marks)

(c) On 1 October Mr Hoto entered an appearance to defend and filed a plea in which he stated that he is not liable to pay the balance of the purchase price. He alleged, without giving details, that the Mercedes was not in a good condition and that he had spent \$12 000.00 repairing its engine. He further alleged that he could not be expected to pay the balance for such a seriously defective vehicle. Hire Motors intends to file a reply to the plea and have the matter resolved by the Court.

(1mark)

(d) A judgment in favour of Hire Motors is given by the court. With knowledge of the judgment Mr. Hoto removes the motor vehicle from his home in Harare and hides it in a dilapidated garage at his rural home in Buhera and is unwilling to disclose its whereabouts.

(2marks)

- (e) The messenger of court having indicated that he will not be able to execute the judgment until after a period of four weeks due to an over-stretched schedule, Hoto sent its security officers who took the motor vehicle in Mr.Hoto's presence. Mr.Hoto's reaction when advised of the intended action was – *"Well I know I should have paid the outstanding amount. I really have no issues with Hire Motors. I know you are just employees, go ahead."* After the motor vehicle was taken Mr.Hoto applied for the return to him of the motor vehicle alleging that he was unlawfully disposed. What must you establish in order to obtain relief for your client? **(3marks)**
- (f) Discuss steps which a Plaintiff would fulfill before issuing a writ of arrest for non payment of a debt sounding in money (5 marks)

(15marks)