UNIVERSITY OF ZIMBABWE
LLB (HONS) PART II
CIVIL PROCEDURE (LB206)
EXAMINATION

DECEMBER 2011   3 HOURS

INSTRUCTIONS TO CANDIDATES

1. Answer <u>ALL</u> questions. The marks allocated for each question are shown in brackets.

2. 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.

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

Question I

a)   Daniel Mlambo and Chipo Takura of Chief Nhema's area in Shurugwi fell in love with each other in March 2006. Daniel was 22 years old and Chipo was 20 years old. They had sexual intercourse and Chipo became pregnant. Chipo gave birth to a baby girl, Thulani, in June 2007. Their relationship broke up when Daniel refused to marry her after he realized that she was pregnant. He claimed he was too young to marry. Chipo married a man from Gweru in June 2011. She left Thulani with her parents, Farai and Mavis Takura. Daniel also married a woman from his village in August 2009.

Daniel and Chipo are from neighbouring villages. They were born there and grew up together. They attended the same primary and secondary schools. Their parents are communal farmers. Chipo was not formally employed after completing her O 'Levels and never left the village except for a few visits to her aunt who lives in Gweru. She met her husband during one of these visits. Daniel was also not formally employed after O' Level and assisted his parents in their farming. He

acquired a small-scale mine near Shurugwi town in February 2009. He lives at the mine although he visits his parents frequently.

Last month Daniel approached Chipo's parents and asked for custody of Thulani. They consulted Chipo and she agreed that he can have custody. However Mr Takura demanded that Daniel should first pay him $1000,00 as compensation for looking after Thulani. Daniel refused to pay and the dispute has been referred to Chief Nhema's community court.

Chief Nhema approaches you for advice. He wants to know whether he should deal with the dispute.

What advice would you give him? Explain your answer fully.   [8]

b)   Give two (2) differences between an application and an action.   [2]

c)   You represent the plaintiff in an action in which a Pre-Trial Conference was held before a magistrate two weeks ago. The magistrate has provided the Pre-Trial Conference Minute.

What is the next procedural step that you should take on behalf of your client in order to take the matter forward?   [2]

d)   When does a judgment of the Magistrates Court for the payment of money become superannuated?   [2]

e)   What are the requirements which must be satisfied by an applicant for a spoliation order in order for him or her to succeed in his or her application?
     [3]

f)   Can a judgment of the Magistrates Court be executed despite the noting of an appeal against the judgment? Explain you answer.   [3]

Question 2

a)   What are the essential facts which must be established by a defendant to successfully plead *res judicata*?   [4]

b)   What is a plea of *lis pendens*?   [1]

c)   The special procedure of summary judgment was conceived so that a *mala fide* defendant might summarily be denied, except under onerous conditions, the benefit of the fundamental principle of *audi alteram partem*.

So extraordinary an invasion of a basic tenet of natural justice will not lightly be resorted to, and it is well established that it is only when all the proposed defences to the Plaintiff's claim are clearly unarguable both in fact and in law, that this drastic relief will be afforded to a Plaintiff.

REQUIRED

Discuss the requirements of an application for summary judgment citing the relevant Rules of Court and decided cases.   [8]

Question 3

a)   Mr. Pass sued Mr. Tight for specific performance of a contract involving US$5 000.00 in the Magistrates Court at Rusape. Both Mr. Pass and Mr. Tight have signed a Memorandum consenting to the Magistrates' court Rusape hearing the matter.

Should the Magistrate hear the matter? Give reasons for your answer [4]

b)   Explain the meaning of the phrase "cause of action" (section 11(1)(a) (iv) of the Magistrates Court Act) as defined by the Courts. [2]

c)   What is the consequence of failure to discover a document?   [2]

d)   Mr. Peters made an application to compel Mr. Conceal to produce a receipt book which he believed was in Mr. Conceal's possession. Mr. Conceal opposed the application on the basis that the receipt book does not exist. No evidence was produced to prove that Mr. Conceal had the receipt book in his possession.

Briefly explain your decision if you were the Presiding Magistrate.   [2]

Question 4

a)   Under what two circumstances can a defendant except to a Plaintiff's claim?   [2]

b)   Compare and contrast a special plea and an exception.   [2]

c)   Explain two circumstances under which a Plaintiff can apply for default judgment without proceeding to trial.   [3]

d)   Explain the relief available to a Defendant who has a default judgment entered against him stating the facts he is required to satisfy in order to obtain relief.   [6]

e) Mr. Nhamochaiyo sued Mr. Zvemahara in the Magistrates Court in Chipinge for a US$500.00 debt. He knows that Mr. Zvemahara is his sister's neighbour in Gaza Township in Chipinge. Mr. Nhamochaiyo asked his sister to serve the summons on Mr. Zvemahara because he did not have money to pay the Messenger of Court to serve the defendant. His sister agreed and served the summons at Mr. Zvemahara's residence by handing a copy to Mr. Zvemahara. Immediately after perusing the summons, Mr. Zvemahara informed Mr. Nhamochaiyo's sister that he had since paid the debt and he would defend the action. Mr. Nhamochaiyo's sister thereafter confirmed service in writing by way of a letter to Mr. Nhamochaiyo. A day after receiving the summons Mr. Zvemahara collapsed and died. Mr. Nhamochaiyo went to court after nine days of the service of the summons and informed the Magistrate that the defendant had died a day after the summons was served on him. He tendered the letter authored by his sister confirming service on the Defendant and thereafter argued that the case should be heard. He applied for default judgment. The Magistrate refused his application and postponed the matter indefinitely until various procedural issues she raised hereunder were clarified. Mr. Nhamochaiyo approaches you for advice.

REQUIRED

What advice should you give him on the following issues raised by the Magistrate?

i) Mr. Zvemahara's desire to defend the claim   [2]

ii) Manner of service of the summons   [1]

iii) Adequacy of the d*ies induciae*   [1]

Question 5

a) You are a legal practitioner practising in Harare. Your client obtained a judgment for payment of $1 500.00, interest and costs against a judgment debtor who is employed by the Parliament of Zimbabwe. A warrant of execution was issued by the messenger of court could not find any attachable property.

i) What method would you use to enforce the judgment debt and why?
                                                                     [2]

ii) Briefly outline in chronological order the procedural steps involved in giving effect to the method referred to in (i) above.   [10]

b) An order for maintenance for a minor child in the sum of $75,00 per month was made against Peter Moyo by the Maintenance Court, Harare. The summons was served on the receptionist at his work place in Harare whilst he was on an assignment outside Harare. The receptionist forgot to give the summons to him on his return. He only became aware of the order when he met his child's mother in town last week and she told him she had obtained the order the previous week. Peter admits that he has an obligation to maintain the child but he cannot afford $75,00 per month. He earns a net salary of $240,00 and supports his unemployed wife and two minor children born of his marriage.

Outline and explain the procedural steps that Peter would have to take in order to resolve his predicament. [8]

TOTAL MARKS [80]

END OF EXAMINATION PAPER