



UNIVERSITY OF ZIMBABWE

November/December 2019 Examinations

Faculty: LAW
Department: PRIVATE LAW
Paper code and Title: LB203 FAMILY LAW
Duration: 3 HOURS
Examiner: DR E. RUTSATE

Authorized Materials: Un-annotated copies of Course Outline, Constitution and prescribed Statutes

INSTRUCTIONS:

1. This paper contains 2 Sections and 6 Questions
2. Answer FOUR questions, TWO from Section A and TWO from Section B.
3. NOTE THAT QUESTION 1 IN SECTION A AND QUESTION 4 IN SECTION B ARE COMPULSORY
4. Start each answer on a new page. Note that if a question has sub-questions such as a, b or c, it should be treated as one question. Do not answer the sub questions on new pages but as a continuation.
5. Each question carries an overall mark of 20
6. This question paper comprises 3 printed pages

NB: DO NOT TURN OVER THE QUESTION PAPER OR COMMENCE WRITING UNTIL INSTRUCTED TO DO SO.

SECTION A

Question 1

NtombizodwaKhumalo (hereinafter referred to as Ntombi), a 21 year old student at Summit Polytechnical College in Harare had a sexual relationship with one TauraiMapango for 2 years from June 2016 to July 2018 when Taurai left the country for the United States of America where he was undertaking a one year postgraduate course. Taurai's last sexual encounter with Ntombi was on the night of 12 July 2018 before he flew off to the USA on 14 July, 2018. As always Taurai used protective measures in the form of a condom during the sexual encounter. On 12 August, 2018 at a friend's party Ntombi met and fell in love with a rich business man called Greg Moyo with whom she also immediately started having a sexual relationship. However, Greg Moyo was married with 2 minor children. Taurai's friends would often see Ntombi in the company of Greg late at night in clubs and other drinking places, a development they advised their friend Taurai about in mid-September, 2018. In early October, 2018 Ntombi advised Taurai that she was pregnant and that he was responsible for the pregnancy, which fact Taurai strongly disputed. On 28 May 2019, Ntombi gave birth to a bouncing full term baby boy whom she immediately named Taurai Junior. On 21 July, 2019 Taurai returned from the USA only to receive a summons from Ntombi claiming maintenance for her minor child Taurai Junior and lying in expenses broken down as follows;

- \$500 per month for maintenance for the minor child, and;
- A lump sum payment of \$2000 for lying in expenses.

Taurai filed a plea denying any responsibility for the maintenance of Ntombi's child and any lying in expenses because he vehemently denied being the father of the child. He bases his denial of paternity on the following points;

- While he admits having sexual intercourse with Ntombi up to 12 July 2018; he denies that he is the father of Ntombi's child because;
 - When he had sexual intercourse with Ntombi he was wearing a condom;
 - Having last had sexual intercourse with Ntombi on 12 July 2018, the child should have been born around 12 April 2019 which is exactly 9 months (or 40-42 weeks) later, the normal gestation period of a child. This child was born almost 11 months later.
 - He had no access to Ntombi during the relevant time of conception of this child as he was in the USA and has his passport as proof of his residence abroad for 12 months;
 - He has evidence that Ntombi was having a sexual relationship with Greg Moyo after he himself had left Zimbabwe and so Greg is the father of the child.
 - As drawn from their traditional customs, he has also inspected the lines on this child's palms and they do not match his or those of people from his family and clan;

Finally Taurai argues that if the court is not convinced by his arguments, he will request that the child, himself, Ntombi and Greg Moyo be subjected to either blood or DNA tests as this will show that he is not the father of Ntombi's child. On the other hand Ntombi argues that she will not agree to having herself and the child subjected to a blood test or DNA test as she is a Jehovha's

Witness and her faith does not allow any part of her body to be medically tampered with. She further argues that the Constitution of Zimbabwe guarantees her freedom of worship and a right to privacy.

You are a legal practitioner practising with Kerry, Keagan and Partners Legal Practitioners. Ntombi approaches you seeking legal advice. She particularly seeks to know whether the issues she raises and the defences raised by Taurai are acceptable at law and her chances of success in her claim. Supporting your argument with reference to the positions taken in cases such as (i) **Mtshingwe vs Moyo HB-120-05**; (ii) **Shumba v Shumba HB-25-05** and (iii) **Sanders Moyo vs Helen Moyo HH-31-05**, write down your legal opinion on defences raised by Taurai Mapango and Ntombi's prospects of success in her application.

[20 MARKS]

Question 2

(a) The courts in Zimbabwe may grant a divorce when there is evidence showing that a marriage has irretrievably broken down. What criteria must the court apply to determine whether a marriage has indeed reached the point of "irretrievable breakdown"? Briefly discuss with reference to relevant statutory and case law. **[10 marks]**

(b) Giving examples, define what the courts have generally viewed as "assets of sentimental value" and how they are dealt with during the division of matrimonial assets in divorce matters? **[10marks][20 MARKS]**

Question 3

(a) Define the "best interests of the child" concept and discuss the family law issues in which the concept has generally been applied by courts. **[8 marks]**

(b) In which international and regional human rights and national legal frameworks is the concept specifically mentioned? **[4 marks]**

(c) In your opinion, have the courts in Zimbabwe been consistent in their application of the concept vis-à-vis the factors they take into account in reaching a decision. Should Zimbabwean courts continue to be allowed to use their discretion in determining the key factors to be applied or should there be a guideline? **[8 marks]**

[20 MARKS]

SECTION B

Question 4

At an office party held at her cousin George's workplace on 16 June, 2019, MaideiShava, a 2nd year law student at the University of Zimbabwe met and fell in love with Lesley Ndlovu, a Marketing Manager at Fallacy Products Limited. Maidei is aged 19 years while Lesley, aged 32 years has three children aged 8 and 6 and 3 years born of a woman called Heidi Summers, to whom he is married in terms of the Marriage Act [Chapter 5:11]. Although at the time Maidei met Lesley, he was on separation from Heidi due to some matrimonial differences, the two's chances of reconciliation were high as they were being assisted by a marriage counsellor. Maidei had been informed by George about Lesley and Heidi's rocky marriage due to Lesley's philandering ways. After six weeks of courtship, on 27 July, 2019, Lesley and Maidei attended a wedding of one of Lesley's friends, who was a divorcee. At that wedding reception, Lesley and Maidei drank a lot of champagne which resulted in their getting very drunk. In his drunken stupor Lesley whispered into Maidei's ear that he would definitely divorce his wife now that he had met her, his perfect match. Lesley then invited Maidei to his house to spend the night. The two had sexual intercourse that night and continued to do so on numerous occasions thereafter until Maidei informed Lesley in early September that she was pregnant. In response Lesley indicated to Maidei that; while it was unfortunate that she had fallen pregnant, he could not do anything about it as he was a happily married man with three children. He also accused her of being promiscuous since her cousin George had told him lots of stories about her numerous lovers who gave her money to support her lavish lifestyle at University. As far as he was concerned, what had existed between them was a brief fling by two adults satisfying each other's sexual needs with no strings attached. Lesley further accused Maidei of throwing herself at him knowing very well that he was a married man. Being drunk he had made a promise to marry Maidei, a promise that was impossible to fulfil as it would amount to committing the crime of bigamy. While Maidei insists that she was still a virgin at the time she first had sexual intercourse with Lesley, the latter argues that he was too drunk to notice whether Maidei was a virgin or not but he assumes she was not, given her previous night clubbing record at the University of Zimbabwe. In mid-September 2019, Lesley immediately reconciled with his wife, who in turn immediately moved back into their matrimonial home with her children. Lesley cut off all ties with Maidei and blocked her from accessing his mobile phone number. At the end of September, 2019, Maidei instituted action against Lesley for (i) seduction damages and (ii) breach of promise to marry. After learning about Maidei's legal action from Lesley, Heidi is threatening Maidei with a claim for adultery damages emanating from her affair with her husband. Due to the shock emanating from being jilted by Lesley and the possible adultery claim against her, Maidei had a miscarriage on 5 October, 2019 and was hospitalised for a week in the Avenues Clinic.

A distraught Maidei, who wishes to be appraised of all the legal issues arising from her case has approached Tichasekwa, Tose and Associates, a successful law firm in Harare, where you are employed as a junior legal practitioner. The Senior Partner has assigned Maidei's case to you.

Making reference to relevant case law and statutory law, you are required to fully advise Maidei on:

- (a) the strengths and weaknesses of her case against Lesley and; **[10 marks]**
- (b) Whether or not the adultery claim which is being levelled against her is sound at law. **[10 marks]**

[20 MARKS]

Question 5

You are a Magistrate at Harare Civil Court. The maintenance case of Linda Moyo versus Benjamin Moyo (hereinafter referred to as Lin and Ben) is brought before you for a hearing. The facts of the case are as follows;

Ben and Lin were married 16 years ago in terms of the Marriage Act Chapter 5:11. The case is as follows:-

Lin has three minor children with Ben namely Sekai aged 15; Ben Junior aged 13 and Thandekile (Thandi) aged 9. All these children attend private schools. Lin is self-employed and makes around \$4,200 per month. Due to minor matrimonial differences, Lin and Ben have since gone on separation and Ben has not been contributing any maintenance for the children. Lin is feeling the full burden of looking after the children on her own. She pays rent in the sum of \$800 per month. Since she has a heart problem and is asthmatic, Thandi requires expensive medication and frequent medical attention. Lin is also looking after her parents who are in the rural areas. Ben on the other hand is employed as a General Manager at a retail outlet. His net income is \$6,300 per month. Ben's defence for not paying maintenance is that he will only look after the children if Lin and the children come back home. He is also afraid that if he gives Lin any money, she will be reckless and not spend it on the children. He also avers that the amount in the sum of \$3,600 that Lin seeking (i.e. \$1,200 for each child) is excessive. If the court finds that he should be paying maintenance (which he still disputes that he should pay) he is offering \$800 per child per month. On top of it all, Ben avers that a month prior to the current maintenance application, he also received summons from his son Donald Mhaka who was born from a relationship he had with one Beulah Mhaka and the matter is set for hearing the following week at the same court. Donald's mother never made an application for maintenance in the past but now she has been laid off from work and is finding it hard to pay fees for Donald aged 20 years and is a 2nd year law student at the University of Zimbabwe. Ben also avers that since he is looking after his late sister's three children, he hardly has any money left at the end of the month. At the hearing, Ben's lawyer vigorously cross examines Lin who ends up crying.

After hearing the case, prepare a judgement covering the following issues:

- (a) Comment on the nature of a maintenance hearing and what the court can do to deliver a just outcome; **[3 marks]**
- (b) the factors that the court considers in determining whether or not a respondent should pay maintenance; **[3 marks]**
- (c) the quantum of maintenance based on the Gwachiwa formula and any other factors that the court will take into account in making a determination on the quantum; **[8 marks]**
- (d) Whether or not Ben is legally liable to pay maintenance for Donald (as this has an effect on the quantum of maintenance paid to Lin and her three children) and how you would calculate his maintenance using Gwachiwa formula if your answer is yes. **[6 marks]**

[20 MARKS]

Question 6

In June, 2010, Ntombikayise (Ntombi) Vundhla then aged 16 years was living with her maternal aunt in Magwegwe, Bulawayo when she had a sexual relationship with GomboMareza, a tenant at a neighbouring house. The relationship resulted in the birth of a baby girl on 14 March, 2011. She named the child Lahlekile. Gombo who at the time was a general worker at a leather factory in Bulawayo did not marry Ntombi as he was customarily married to another woman. Gombo however, consented to Ntombi obtaining a birth certificate for Lahlekile using his surname Mareza. Thereafter, Ntombi went back to her parents' rural home in Ntabazinduna Communal lands where she nursed the child for 6 months after which she left the child in the care of her mother and went back to Bulawayo. She secured a job as a housemaid in Selborne Park suburb where she still is but is now cohabiting with Vusumuzi (Vusa) Nxumalo, also employed by her employer as a gardener and the two are living together in the workers' 3 roomed accommodation. In May, 2012 when Ntombi was aged 17 years, 10 months, her former boyfriend Gombo approached Chief Ndiweni's court where he lodged a claim for guardianship and custody of Lahlekile then aged 1 year 2 months. Gombo was successful in his claim and was ordered to pay "*amaloboloemntwana*" to Ntombi's father which he did. Lahlekile now aged 8 years lives with Gombo's customary law wife in Seke communal lands as Gombo is now a factory worker in Harare. Gombo has six other children with his customary law wife that is 4 boys and 2 girls of which three of the children are younger than Lahlekile. Despite several attempts being made by Ntombi over the years to be allowed access to her child, Gombo has categorically refused Ntombi the opportunity to visit her daughter or allow Lahlekile to visit her mother in Bulawayo. Due to his low income, Gombo is failing to cope such that Lahlekile and three other school going children are always being expelled from school due to non-payment of school fees and levies. On the other hand, despite having lived in cohabitation with Vusa for 4 years, Ntombi's union has not been blessed with a child. Now aged 25 years, Ntombi strongly desires to have custody of her minor child Lahlekile and Vusa supports her in this since their employer is willing to pay school fees for Lahlekile at the local primary school and place her under medical aid. Gombo however is strongly opposed to this, arguing that since he had paid "*chiredzwa*" or "*amaloboloemntwana*" to Ntombi's father, he is entitled to continue having sole guardianship and custody over Lahlekile. Ntombi has tried to approach the local traditional chief's court in Seke Communal lands but the court has refused to entertain her indicating that she has no case at all. To worsen matters, Ntombi's father agrees with Gombo's argument.

Ntombi approaches you as a lawyer seeking legal advice as she wants to lodge an application for custody of the minor child, Lahlekile at the Harare Civil Court. Advise her accordingly of the legal position vis-à-vis her claim for custody. **[20 MARKS]**

END OF EXAMINATION QUESTION PAPER