

**UNIVERSITY OF SWAZILAND
DEPARTMENT OF LAW
FINAL EXAMINATION PAPER
YEAR 2006**

TITLE OF PAPER : CONFLICT OF LAWS
COURSE CODE : L 404/L 503
TIME ALLOWED : THREE (3) HOURS
**INSTRUCTIONS : ANSWER ANY FOUR (4)
QUESTIONS.
ALL QUESTIONS CARRY
EQUAL MARKS.**

**THIS PAPER MUST NOT BE OPENED UNTIL PERMISSION HAS BEEN
GRANTED BY THE INVIGILATOR.**

Question 1

With reference to *Ogden v Ogden* [1908] P 46, discuss the shortcomings of “classification by the *lex fori*”. What palliatives would you advocate to arrest the recurrent problems of classification in private international law? [25 marks]

Question 2

John Mavuso and his two friends, Eric Mamba and James Gamedze, are Swazi nationals. The three friends have always nursed the ambition to go out of Swaziland one day and seek their fortune. Their big opportunity came when in their final year at UNISWA, they won scholarships to pursue graduate studies overseas. John was to go to Italy, while Eric and James were to go to France and Scotland respectively.

The three friends quickly adapted to life in the new countries and successfully completed their graduate studies. In pursuance of their original dreams to seek their fortunes outside Swaziland, the three decided to settle permanently in their new countries. John Mavuso married Maria, an Italian girl, who bore him two beautiful daughters. Eric Mamba, who had always been a playboy, never got married but acquired lots of property in Paris. James Gamedze settled in Aberdeen, Scotland. He (James) wrote to his two friends that he had initiated the process for procuring Scottish nationality. Two years after obtaining the Scottish nationality, he married Alicia Anderson, a Scottish girl. Unfortunately, the marriage was never blessed with children.

In the light of the facts given above, consider the following problems:

(i) After living in Italy for 45 years, John Mavuso died. He left a will in which he bequeathed all his movable property in Italy to his brothers and mother in Mbabane. Under Italian law, the will is partly invalid because the testator had omitted to leave the *legitima portio* to his surviving children. According to Italian conflict of law rules, the validity of a will is governed by the *lex patriae*. Under the Roman-Dutch law which operates in Swaziland however, the validity of the will depends on the *lex ultimi domicilii*. The brothers and mother of John Mavuso petition the Master of the High Court in Mbabane to enforce the will.

With reference to relevant decided cases and sound legal arguments, advise him. (9 marks)

(ii) Eric Mamba died intestate in Paris. According to the French conflict of law rule on the subject, succession to movables is governed by the national law of the deceased. The surviving members of Eric Mamba's family in Swaziland petition the Master of the High Court to declare them his legitimate heirs.

With reference to relevant decided cases and sound legal argument, advise him. (7 marks)

*(In the two cases above, i.e. 2 (i) and (ii), you are to assume that the Swaziland court adopts the *total renvoi* approach)

(iii) Four years after his marriage, James Gamedze moved to Pretoria, South Africa, with his wife so that he could be near Swaziland, his native land, and to increase his business prospects. He died two years later in Pretoria leaving a will in which he had left all his property to Londiwe Gama, his Swazi mistress and their two sons that their affair had produced. His wife, Alicia, now brings an action in the High Court in Johannesburg, contesting the validity of the will because she was entitled under Scottish law of *jus relictæ* to one third of his estate. Under the Roman-Dutch law rule which regulates the matter in South Africa, the validity of the will is governed by the *lex domicilii*. Assuming that under Scottish law the validity of the will is tested by the *lex patriæ*, how will the Master of the High Court in Johannesburg determine the issue?

(It is common cause that James Gamedze never acquired a new domicile in South Africa, he retained at all relevant times, his Scottish domicile of choice)

(9 marks)

[Total marks 25]

Question 3

The appellant, Overseas Trading (Pty) Ltd, is a company registered according to the laws of Swaziland and carries on business in Mbabane. The respondent is Agricola Corporation which is described by the applicant as an autonomous Institute of the Republic of Venezuela created in accordance with the laws of Venezuela and having its head office and place of business in Caracas, Venezuela.

Agricola Corporation does not carry on business in Swaziland and, other than the maize hereinafter referred to it has no assets in Swaziland. The applicant is the cessionary under a deed of cession dated 3 June 1994 in terms of which, Global Maize Corp. (Pty) ceded all its rights, title and interest in and to certain claims which Global Maize Corp has against Agricola Corporation for breach of contract, to the applicant. In order to prosecute this claim for damages, the applicant

seeks to attach a cargo of maize aboard a truck parked at a warehouse in Matsapha, Swaziland. From the affidavits it appears that the respondent is a corporation subject in every respect to the control of the government of Venezuela and its sole function was to acquire agricultural products and equipments on behalf of the state of Venezuela and it was in pursuance of that function that the cargo of maize in question was acquired.

The issue has been referred to the Legal Division of the Ministry of Foreign Affairs of Swaziland. You are a Senior Legal Counsel in the Ministry. Write a comprehensive memorandum to the Minister indicating how the matter should be resolved.

[25 marks]

Question 4

The plaintiff, Marcus, was a maintenance technician living and domiciled in Mozambique. The defendants are a nationalized company in Tanzania which was registered in Swaziland under the Companies Act. In June 1997 the plaintiff was employed by the defendants through agents in Mbabane to work for them in Tanzania. The contract of employment was duly made in Mbabane, and the plaintiff worked in Tanzania until November 1998 when he had a serious accident at work. The plaintiff has commenced legal proceedings against the defendants in Swaziland for damages for personal injuries. The defendants in their statement of defence claimed that the proper law applicable to the contract and/or to any obligation owed to the plaintiff was Tanzanian law.

You are a Senior Counsel in charge of civil matters in the firm of Sihlangu, Mamba and Dlamini in Mbabane. Write a comprehensive brief for the partner's meeting indicating how the case should be argued.

[25 marks]

Question 5

(a) Outline the differences, if any, between the Roman-Dutch common law rules governing the enforcement of foreign judgments and the rules prescribed by the Reciprocal Enforcement of Judgments Act, 1922 of Swaziland. (15 marks)

(a) In an action in the High Court of Lesotho, judgment is given in favour of Dudlu Nkambule, a shareholder in a public company against Peter Stanley, one of the directors, who under the relevant Lesotho statute is personally liable to the members for any loss

sustained by them as the result of false statements in the company's prospectus. Under Lesotho law, such actions are classified as penal. Peter Stanley did not appear at the trial, nor has he appealed, and he has subsequently to the said action become resident in Swaziland.

Advise Dudlu Nkambule as to whether he can successfully enforce his judgment in the High Court of Swaziland.

(10 marks)

[Total marks 25]

Question 6

You are the technical adviser to the newly constituted Task Force on "Reforming the Choice-of-Law Rules of the Private International Law of Swaziland." The Chairman of the Task Force has tasked you with writing for that body, a preliminary paper,

- (a) explaining how foreign law may be applied in the forum of a sovereign state like Swaziland without infringing local sovereignty, and
- (b) what the guiding principles ought to be in selecting the appropriate foreign law.

Write a memorandum to the Task Force explaining how,

- (i) the statutists,
 - (ii) Ulrich Huber, and
 - (iii) Count von Savigny,
- attempted to provide lasting answers to the two interrogatories.

(25 marks)

Question 7

In 2000 Mamba, a Swazi citizen and domiciliary, was appointed Swaziland's High Commissioner to Great Britain. While in London, he met and married Vanessa, a young English girl and they bought a home in the outskirts of the city. He also bought a farm near Gatwick, London, which was managed by Vanessa who has studied agriculture at Cardiff, Wales.

In 2002, Vanessa gave birth to two twins. In the same year, Mamba founded a broadcasting company called Mojaha Broadcasting Corporation (MBC). In 2003 he resigned from the foreign service but continued to stay in London with his wife and children. In his letters to his friends in Swaziland, he frequently stated that Swaziland would always be his home and that he would one day return to help his party,

Swaziland Democratic Effort (SDE), lead the country to democratic rule.

In 2005, as elections were approaching, he was invited by the SDE to return to Swaziland to contest for election in the Manzini constituency where he was very popular. The opinion polls showed that he was the candidate of choice of about 80% of the electorate in the Manzini constituency. Disturbed by his huge popularity, the incumbent who was a member of the party which had ruled the country since independence, came up with evidence that he was “not a Swazi”. He was therefore denied entry into Swaziland when he and his family tried to enter the country with Swazi passports.

He was thus forced to fly back to London. At the Johannesburg international airport, he issued a press release in which he vowed to fight till death to return to his fatherland. Mamba died a week later in London from complications caused by stress and hypertension.

Discuss the domicile of Mamba, his wife Vanessa and the twins at the time of his death.

(25 marks)