

**UNIVERSITY OF SWAZILAND**

**FACULTY OF SOCIAL SCIENCE**

**DEPARTMENT OF LAW**

**MAIN EXAMINATION PAPER, MAY 2011**

**TITLE OF PAPER : TRIAL PRACTICE**

**COURSE CODE : L403**

**TIME ALLOWED : 3 HOURS**

**INSTRUCTIONS : (1) ANSWER ALL THREE (3) QUESTIONS**

**: (2) MARKS FOR QUESTIONS OR PARTS**

**A QUESTION ARE SHOWN IN BRACKETS**

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

**QUESTION 1**

Mr Tom Magubane is employed as a General Manager in a division of the Headquarters of the Swaziland Development and Savings Bank (commonly known as the Swazi Bank) based in Mbabane. He is third in rank from the Managing Director. It was generally known in his division that women did not like being alone in the office with Mr Magubane, as he had been known to make verbal and physical advances on the younger female members of staff. Although many women spoke privately of having been harassed by Mr Magubane, it was not until Ms Kubheka, a new member of staff joined the office that a formal complaint of sexual harassment was brought against Mr Magubane. The company rules prohibited sexual harassment and the schedule of offences and penalties in its disciplinary procedure indicated that sexual harassment was dismissible, even for a first time offence. All employees had access to the disciplinary procedure and it was referred to in contracts of employment as a condition of service. The company had dismissed a Clerk the previous year for sexual harassment.

Ms Kubheka claimed that one evening shortly after starting at Swazi Bank, she was required to work late to complete a report for Mr Magubane. Ms Kubheka said that she was alone in the office when Mr Magubane came up behind her. She was busy writing the report and only noticed that he was behind her when she felt something wet in her neck. To her amazement she realized that he has kissed her in her neck. She jumped up in fright and asked him what on earth he thought he was doing.

He told her to relax and asked her if she did not find him attractive, as most women in the office found him very attractive. Ms Kubheka told Mr Magubane that his behaviour was completely inappropriate and irrespective of what other women thought of him, his behaviour was unacceptable. With that, Mr Magubane stepped closer to Mr Kubheka and said "come on, just one kiss and you will see why the women find me irresistible". As she tried to step away from him, Mr Magubane pushed himself against Ms Khubeka and squashed his lips against hers, fondling her breasts at the same time. Using all her strength, Ms Kubheka pushed Mr Magubane away and ran out of the office.

On her way home, she went via Ms Neliswa Malengwa, one of her colleague's houses to tell her what had happened. The following day when Ms Kubheka got to work, she went straight to the Human Resources Manager, Mr Peter Brown, and told him what had happened. Having heard the allegations, Mr Brown approached Mr Magubane and told him about Ms Kubheka's allegation of sexual harassment and asked him what his response was. Mr Magubane told Mr Brown that Ms Kubheka had completely overreacted to the incident and that he was simply being friendly. He said that all the women in the office knew he was an affectionate person and that it did not mean anything when he touched people. He said that he had given her a hug to show his appreciation for the fact that she has worked overtime, but he denied having kissed or fondled her. Mr Brown then spoke to Ms Malengwa who told him that Ms Kubheka had arrived at her house the previous evening in a shocked state claiming to have been sexually harassed by Mr Magubane.

Mr Brown decided that there was enough evidence to charge Mr Magubane with sexual harassment. He verbally informed Mr Magubane of the pending disciplinary enquiry which would be held four days later in the boardroom at 10.00 a.m. four days later and gave him a written notice to the same effect. The notice explained in English (a language Mr Magubane could easily communicate in).

- That he was charged with sexual harassment in respect of the incident involving Ms Kubheka (the date, time and place were indicated);
- The date, time and venue of the enquiry;
- His right to have a representative in the form of another employee (including a shop steward);
- His right to an interpreter if he needed one;
- His right to bring witnesses, if any, and
- His right to state his case in response to the allegations and in respect of any possible sanction.

Mr Magubane signed the form to acknowledge having received notice of the hearing. Mr Magubane was also placed on suspension pending the hearing. This suspension was on full pay. Mr Brown felt it was necessary because the allegation was a serious one and because he was concerned that Mr Magubane might jeopardize the investigation.

The disciplinary hearing four days later was chaired by an attorney from one of the local law firms in Mbabane, by the name Mangaliso Gondwe and Mr Brown was the Initiator. Mr Magubane appeared in person without representation. The hearing was conducted in English and Mr Magubane indicated that he did not require interpretation. The Chairperson started the hearing by introducing everyone present and explaining their roles. He then explained Mr Magubane's rights to him and allowed him an opportunity to ask questions about these.

Mr Magubane raised his hand in an effort to draw the Chairperson's attention. The latter then pointed at him and informed him that he had the floor. Mr Magubane stated that he intended to make an application before the Chairperson to be allowed the right to bring in an external legal representative to assist him in the hearing. He stated that he had taken all efforts to find a representative in the form of another employee, however, all his efforts have been futile, more so because of his rank in the company no one subordinate to him was willing to assist him and besides, he would not wish to be represented by a junior to him.

He stated further that, other than the Managing Director together with his Deputy who are both senior to him, there is no one else that qualifies to assist him. Worse off, according to him, he informed the hearing that if he dismissed after the hearing, the company policy requires him to lodge his appeal, if need be, to the Managing Director hence he was automatically disqualified to represent him at this level of hearing as he is the Chairperson of the Appeals Tribunal within the company.

With regard to the Deputy Managing Director, Mr Magubane stated that the two of them have personal differences which have even affected their work relations hence he was also automatically disqualified to assist him in this hearing. He stated that the consequences of an adverse finding in the hearing can be very serious hence he needed the assistance of an external representative.

Without even allowing the Initiator of the hearing to respond, the Chairperson, Mr Gondwe, stated that the notice inviting Mr Magubane to the hearing specifically and categorically stated that he had a right to be represented by a fellow employee (including a shopsteward), and nothing less or more would be acceptable. He then ruled that the hearing shall proceed as scheduled, in effect dismissing Mr Magubane's application for representation by a legal counsel.

As a last resort, Mr Magubane sought a postponement to the following day to enable him to find a representative in the form of a fellow employee. The Chairperson reluctantly granted the postponement of the hearing to the next day and placed Mr Magubane on strict terms that should he not come along with a fellow employee to assist him, the hearing shall not be delayed any further.

Right after this postponement, Mr Magubane has come to your Law Firm for consultation and has instructed you to assist him.

**TASK**

Move the necessary application to the relevant Court, with the pertinent prayers, and accompanied by the necessary affidavit(s), if any.

**[50 Marks]**

**QUESTION 2**

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Siphamandla Nsoko a taxi man has been arrested by the Swaziland Royal Police and charged with armed robbery. He instructed you that he was hired by three men in Manzini to ferry them to Luve. He tells you that these men had been his customers for many years and have occasionally engaged his services when in town. He instructs you further that on this particular day (20<sup>th</sup> February 2010), as usual, they asked him to take them to Luve and they told him that they would not be long there as they were picking up something and would come back with him. Upon arrival at the Luve Shopping Complex, they instructed him to park by one of the shops. Two of them got out and the other remained with him in the car. When the two took longer to return, he informed the one with him in the car that he now was going back as he had other appointments in town. At that point, he instructs you that the guy pointed a gun to his head and told him to shut his big mouth. Suddenly, the other two guys came running to the car carrying white money bags and told him to drive off immediately, which he did under obvious duress. Now he has been arrested because members of the public identified his car by the registration, called the police and they were all arrested before they could reach the Mafutseni Junction. It is now alleged that the two guys committed armed robbery in one of these shops.

Draft the necessary bail application on his behalf.

**[25 Marks]**



### **QUESTION 3**

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Comprehensive Car Hire, a company based in Swaziland, specializes in hiring out its light fleet motor vehicles to a multiplicity of customers comprising of government, companies, tourists and private individuals. During the period between 2009 and December 2010, the government of Swaziland almost entirely depended on this company for transport services.

Comprehensive Car Hire does not own most of the fleet vehicles it hires out to its customers, instead on or about January 2008 it entered into a written contractual agreement with Tempest Car Hire, a South African based company, in terms of which the latter hires out vehicles to the former and Comprehensive Car Hire in turn hires them out to its Swaziland customers. In fact, Tempest Car Hire who hires out the cars to Comprehensive Car Hire for a fee, and the latter also does the same to its customers in Swaziland. From this fee, the Comprehensive Car Hire pays the South African company and retains any profits made.

During the negotiations for this arrangement Comprehensive Car Hire was represented by Mr Siphamandla Ginindza while Tempest Car Hire was represented by Leslie Van Vurren, in their respective capacities as Managing Directors of the respective companies.

In the run up towards the end of 2010, the Swaziland Government breached its contract with Comprehensive Car Hire and did not comply with monthly invoices for rental services, which in turn meant that Comprehensive Car Hire was also in breach of its contract with Tempest Car Hire. In essence, if the Swazi based company was not being paid by their major Client, it automatically meant they would not have funds to service their contractual obligations to the South African company. By the 1<sup>st</sup> of March 2011, Tempest Car Hire had issued a composite statement of account to Comprehensive Car Hire amounting to E2, 488, 780.00 (Two Million Four Hundred and Eighty Eight Thousand Seven Hundred and Eighty Emalangeni) representing unpaid invoices spanning from 1<sup>st</sup> September 2010 of 10<sup>th</sup> January 2011.

Notwithstanding written and verbal reminders for payment, Comprehensive Car Hire has failed to pay, stating that it is being owed invoices in excess of E4, 000, 000.00 (Four Million Emalangeni) by the Swaziland Government hence their inability to pay Tempest Car Hire. Legal demand has been dispatched to Comprehensive Car Hire by Tempest Car Hire attorneys in South Africa, but nothing has yielded positive results.

Mr Van Vurren of Tempest Car Hire has instructed your law firm to institute legal proceedings for the recovery of their money from Comprehensive Car Hire and he has also advised your office that his company has since recalled all their vehicles from Comprehensive Car Hire with effect from the 10<sup>th</sup> of January 2011.

- (i) Using the factual matrix, improvising very minimally where necessary, draw the required substantive pleading through which the proceedings may be instituted at this stage.

**[25 marks]**

- (ii) After Comprehensive Car Hire has indicated their opposition, advise your Client of the most appropriate and speedy procedure worth adopting to enable the matter to be placed before Court sooner than later, stating the reasons for same and your legal authority for so suggesting.

**[5 marks]**

- (iii) Using the factual matrix draft the substantive pleading necessary for the implementation of your legal advice given to your Client above.

**[20 marks]**

**TOTAL: [50 Marks ]**