

UNIVERSITY OF SWAZILAND

FACULTY OF SOCIAL SCIENCE

DEPARTMENT OF LAW

MAIN EXAMINATION PAPER, MAY 2018

TITLE OF PAPER: TRIAL PRACTICE

COURSE CODE: L403

TIME ALLOWED: 3 HOURS

INSTRUCTIONS:

- (1) ANSWER ALL FOUR (4) QUESTIONS**
- (2) MARKS FOR QUESTIONS OR PARTS OF A QUESTION ARE SHOWN IN BRACKETS**

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

QUESTION 1

Mabutfo Matsebula and Mhlab'uhlangene Dlamini have been neighbours for the past nine years. Dlamini, has begun extensive renovations and alteration works on his house. This work entails rather elaborate excavations of foundations that go right up and close to the wall fence separating their properties. Meanwhile Mabutfo notices a crack appearing in the outer wall of his house and his friend, Pete Mayisela, who is a builder and an expert in construction, opines that the crack is caused by the excavation next door. (Mabutfo lives in Plot 123 Soboza Street, Coates Valley, Manzini and Dlamini in Plot 124 Soboza Street in the same suburb).

Mabutfo phones Dlamini and asks him to either stop the excavations or to obtain the services of a civil engineer in order to ensure that no further damages are caused to his (Mabutfo's) house.

Dlamini however responds that he is building in accordance with approved building plans, the foundations are in accordance with the National Building Regulations and that his building operation cannot cause any damages to Mabutfo's house. He does not deem the further expenses to appoint a civil engineer necessary and thus flatly refuses to co-operate. Mabutfo informs Dlamini that he has no choice but to obtain legal advice to which Dlamini responds that he will oppose any legal action that comes his way.

Mabutfo has approached you as his attorney of record to obtain the requisite legal redress on his behalf at the High Court of Swaziland. Draft the necessary papers.

[25 marks]

Maximum Length: Six (6) pages

QUESTION 2

Issued by:

Case No.

.....

Date Stamp

Clerk of Court

SUMMONS COMMENCING ACTION

Sued out by:

MotsaMavuso Attorneys

6th Floor, New SNPF

Parkade Building

MANZINI

File Ref: MOTSA/L0015B

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Plaintiff's Attorneys

Postal Address: P. O. Box 1655, Manzini

Telephone: 2505 8962/2505 8939

IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF MANZINI

HELD AT MANZINI

CASE NO.....

In the matter between:

LINAC INVESTMENTS (PROPRIETARY) LIMITED

Plaintiff

and

BHUBHULA M. NDLOVU

Defendant

TO: BHUBHULA M. NDLOVU, an adult male Swazi employed as Senior Marketing Manager by the Swaziland Posts and Telecommunications and stationed at the headquarters in Mbabane, in the Hhohho region.

YOU ARE HEREBY SUMMONED that you do within three (3) days after the service of this summons upon you enter or cause to be entered with the Clerk of the aforesaid Court, and also the Plaintiff or his Attorneys at the address specified herein an appearance to answer the claim of :-

LINAC INVESTMENTS (PROPRIETARY) LIMITED, a company duly incorporated and registered in accordance with the company laws of the Kingdom of Swaziland and trading as **MANZINI SAVEMART** situate at the President Centre, Ngwane Street in Manzini , in the Manzini region.

The Plaintiff herein for **E28, 000.00 (Twenty Eight Thousand Emalangeni)** and costs, particulars whereof are endorsed hereunder.

AND TAKE NOTICE, in default of your doing so you will be held to have admitted the said claim and the Plaintiff may proceed therein and judgment may be given against you in your absence, but that, on payment of the said claim and costs to the Clerk of Court within the said time, judgment will not be given against you herein, and if at least twenty-four (24) hours before the expiration of the said time, you so pay or lodge with the Clerk of the aforesaid a Consent to judgment, you will save judgment charges.

AND FURTHER TAKE NOTICE THAT:

1. If you allege any exception or claim in reconvention, you must within seven (7) days after appearance, deliver to The Clerk of the aforesaid Court and to the Plaintiff or his Attorneys, a statement in writing of the nature and grounds, thereof; and
2. If you allege a defence on the merits, you must within seven (7) days after appearance, so deliver a statement in writing showing the nature and grounds of such defence.

Costs, if action is undefended,

	Summons	Judgement
Attorneys charges	E	E
Court fees	E	E
Messenger's fees	E	E
Messenger's fees of re-issue	E	E
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Totals	E	E
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NOTICE TO DEFENDANT: Any person against whom a Court has, in a civil case, given any judgment or made any order, who has not satisfied in full such judgment or order, and all costs for which he is liable in connection therewith, shall be guilty of an offence and liable on conviction to a fine not exceeding E50 if he has changed his place of residence or employment and fails to give within fourteen (14) days from the date of every such change to The Clerk of the Court which gave such judgment or made such an order and to the Plaintiff or Plaintiff's Attorneys a notice in writing setting forth fully and correctly the new place of residence or employment and the names of the parties.

(1) **PARTICULARS OF CLAIM**

The Plaintiff's claim is against the Defendant for payment of the sum of **E28, 000.00 (Twenty Eight Thousand Emalangeni)** being in respect of monies due for goods sold and delivered (two white sofas and a matching white armchair) by the Plaintiff to the Defendant at the latter's special instance and request on or about the 1 April 2017 in Manzini in the Manzini Region, which amount remains due, owing and payable by the Defendant.

NOTWITHSTANDING due and legal demand, the Defendant has either, failed, refused and/or neglected to pay the amount of **E28, 000.00 (Twenty Eight Thousand Emalangeni)** to the Plaintiff.

WHEREFORE: the Plaintiff prays for judgment against the Defendant in the said amount of **E28, 000.00 (Twenty Eight Thousand Emalangeni)** and interest at the rate of 6% per annum, costs of suit and or any further and or alternative relief.

The cause of action having arisen wholly within the jurisdiction of this Court.

(2) CONSENT TO JUDGEMENT

I admit that I am liable to the Plaintiff as claimed in the Summons (or in the amount of E..... and costs to date) and I consent to judgment accordingly.

Dated atthis.....day of.....2017.

.....

Defendant

NOTE: If the consent is not given on the original Summons served, or, on the copy served, it must be witnessed by two witnesses whose address must be given.

(3) FORM OF APPEARANCE TO DEFEND

To: The Clerk of the Court

Enter an appearance for the Defendant, who intends to defend action.

Dated atthis day of.....2017.

Address:

Give full address

for acceptance of

service(within 5km

of Court) also postal **Defendant or Defendant's Attorney**

address

Postal Address:

NOTE: The Original Notice must be filed of record with the Clerk of Court and a copy thereof served on the Plaintiff or his Attorneys.

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INSTRUCTIONS:

You are instructed as follows:-

- (a) Defendant has been served with the Summons and has filed an Appearance to Defend the matter through MTK Attorneys who are based at Apex Hose in Manzini;
- (b) Defendant was meant to make full payment by way of cash deposit into the Plaintiff's bank account on April 3, 2017;
- (c) You are representing the Plaintiff in this matter. Take the necessary steps to further your Client's interests by drawing the subsequent pleading.

Maximum Length: Four (4) pages

QUESTION 3

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO: 177/2017

In the matter between:

LIDWALA INSURANCE COMPANY

Plaintiff

and

SWAZILAND GOVERNMENT

Defendant

PLAINTIFF'S PARTICULARS OF CLAIM

1. The Plaintiff is **LIDWALA INSURANCE COMPANY**, a company incorporated in accordance with the Company laws of the Kingdom of Swaziland carrying on business in Manzini in the Manzini region.
2. The Defendant is **THE SWAZILAND GOVERNMENT**, acting through the **MINISTRY OF HEALTH**, a Government Department situate at Ministry of Justice Building, Mhlambanyatsi Road, Mbabane in the Hhohho region.
3. In the ordinary course of business of its insurance business the Plaintiff concluded an insurance contract with Chrisilda Transport (Pty) Limited (the Insured) in terms of which the Plaintiff insured the Insured's motor vehicle, to with; a **Mercedes Benz Actros truck** registered **ASD 975 BH**.
4. During the subsistence of the contract of insurance between Plaintiff and Chrisilda Transport (Pty) Limited, and on or about the 20th February 2017, at or near the Mountain traffic lights along the MR3 public road, the Defendant's motor vehicle, a **Toyota SUV Landcruiser**, registered **GSD 167 PM** belonging to the Prime Minister's office, unlawfully and negligently caused an accident by knocking the Insured's motor vehicle which was driven from the Manzini towards Mbabane, while the Defendant's motor vehicle was driven the opposite direction.

5. The accident was caused by the negligence of the driver of the Defendant's motor vehicle, one **Sicelo Nxumalo**, who at all material times was acting in the course and within the sphere of his employment with the Defendant.
6. The Defendant's driver at the time of causing the accident was duly authorised to drive the aforesaid motor vehicle under Authority No. 6729. The Defendant is therefore vicariously liable for all delictual acts committed by the said Sicelo Nxumalo in the course and within the sphere of his employment.
7. The road accident was caused by the sole negligence of the Defendant's employee driver, the said Sicelo Nxumalo, in one or all of the following ways:
 - 7.1 He drove at a high speed, disregarding the weather condition that it was foggy and the road was wet;
 - 7.2 He failed to keep a proper look out and crossed the centre line towards oncoming traffic;
 - 7.3 He failed to apply brakes on time and failed to avoid an accident which a reasonable driver would have avoided.
8. On the basis of the contract of insurance between the Plaintiff and Chrisilda Transport (Pty) Limited, the Plaintiff had an obligation to compensate the Insured for the damages incurred due to the road accident (being the risk insured).
9. The total cost for repairing the insured motor vehicle was E165 681.22 (One Hundred and Sixty Five Thousand Six Hundred and Eighty One Emalangeni Twenty Two Cents). However, a sum of E36 568.12 (Thirty Six Thousand Five Hundred and Sixty Eight Emalangeni Twelve Cents) was paid by the insured as his "excess" contribution.
10. Accordingly, the Plaintiff suffered damages in the sum of **E129 113.10 (One Hundred and Twenty Nine Thousand One Hundred and Thirteen Emalangeni Ten Cents)** being equivalent, necessary and reasonable repair costs for the motor vehicle insured.

The said amount was, in fact, paid by the Plaintiff to the Insured's garage on or about March 20, 2017.

11. Plaintiff avers that as the insurer of the damaged motor vehicle, and having paid the cost of repairs for the same, it is duly entitled in the exercise of its subrogation rights to recover, and the Defendant is obliged to pay the sum of **E129 113.10 (One Hundred and Twenty Nine Thousand One Hundred and Thirteen Emalangenani Ten Cents)**.
12. Notwithstanding lawful demand, the Defendant has failed, refused and/or neglects to pay the Plaintiff its damages.

WHEREFORE as against the Defendant, Plaintiff prays for judgment to be entered in the following terms:

- (a) Payment of the sum of **E129 113.10 (One Hundred and Twenty Nine Thousand One Hundred and Thirteen Emalangenani Ten Cents)**;
- (b) Interest thereon at the rate of 9% per annum *a tempore morae*;
- (c) Costs of suit;
- (d) Further and/or alternative relief.

DATED AT MANZINI ON THIS THE 5th DAY OF APRIL 2017.

MotsaMavuso Attorneys

c/o MUSA M SIBANDZE ATTORNEYS

1st Floor, Development House

MBABANE

(Motsa/mm/L0355B)

TO: REGISTRAR OF THE HIGH COURT

MBABANE

AND TO: THE SWAZILAND GOVERNMENT

c/o Hospital Hill

MBABANE

Received a copy hereof

this theday of April 2017

INSTRUCTIONS:

The Defendant is your client. After filing a Notice of Intention to Defend, your instructions are to draft the subsequent court process.

[25 marks]

Maximum Length: Four (4) pages

QUESTION 4

The law firm of **Simelane Mtshali Attorneys** based in Mbabane has through the office of the Registrar sued out summons for the breach of contract in favour of their Client Banele Ngcamphalala an adult male Swazi of Mbabane in the sum of E200 000.00 (Two Hundred Thousand Emalangeni) against Banele Gamedze another adult male Swazi of Siphofaneni area in the Lubombo region.

The Defendant through his attorneys, to wit, **Sithole Magagula Attorneys** has exercised his rights in accordance with rule 19 of the High Court Rules as amended. Ngcamphalala has waited in vain for the Defendant to deliver his subsequent pleading until the former was compelled to exercise his rights in terms of rule 26 of the High Court Rules as amended. Once again Gamedze and his attorneys of record were not concerned and still did nothing until the *dies* for so doing expired and/or lapsed.

Ngcamphalala is now eager to take the proceedings forward to achieve a result in the matter. Assist him with legal advice on the following issues so that he can instruct his attorneys to act according to your legal advice.

- (i) State the type of summons that was sued out in this matter and the rule under which they were issued judging from the facts of this case? [5 marks]

- (ii) What does exercising the Defendant's rights under rule 19 of the High Court Rules entail? [2 ½ marks]

(iii) Explain the nature of the subsequent pleading which the Defendant was required to deliver for which Ngcamphalala waited for in vain? Name the specific rule of the High Court Rules which governs the pleading in question here? [5 marks]

(iv) What is the pleading or court process that Ngcamphalala had recourse to under rule 26 of the High Court Rules and what does it mean to the Defendant? [5 marks]

(v) Considering that the Defendant has once again ignored responding to the requirements of rule 26, what do Ngcamphalala's attorneys need to do to take the matter forward and obtain a remedy for their client? In support of your answer state the procedure to be followed, nature of the remedy to be sought and court rule providing for the remedy in question. [7 ½ marks]

[25 marks]

Length: Two (2) pages

Possible attainable marks: [100]