

UNIVERSITY OF SWAZILAND

DEPARTMENT OF LAW

MAIN EXAMINATION PAPER, MAY 2018

PAPER TITLE: FAMILY LAW

COURSE CODE: LAW 206

TIME ALLOWED: THREE (3) HOURS ONLY

TOTAL MARKS: [100]

INSTRUCTIONS:

- 1. ANSWER ANY FOUR QUESTIONS.**
- 2. ALL QUESTIONS CARRY EQUAL MARKS.**
- 3. THIS QUESTION PAPER CONTAINS FOUR PAGES. PLEASE ENSURE THAT YOU HAVE THEM ALL.**

UNLESS PERMISSION HAS BEEN GRANTED BY THE INVIGILATOR, DO NOT OPEN THIS PAPER.

Question 1

*“Now the operative phrase in the above section is ‘marry in terms of this Act’. This is defined in Section 1(2) of the said Act as: - ‘This Act applies to all marriages intended to be solemnised after the commencement of this Act, except **marriages contracted in accordance with Swazi law and custom.**’ (emphasis added).*

*On the face of it, the marriage certificate ‘PMM1’ records that the deceased and the Respondent did indeed enter into such a customary marriage. **In Ex parte Ginindza reported at 361 of the Swaziland Law reports 1979- 1981.** Nathan CJ said the following at page 362:*

‘In my view at the risk of restating the position, the second marriage must be marriage under or in terms of the Act; and a marriage by Swaziland Law and custom does not qualify as such....’”

(Per Ramodibedi CJ in the Case of **Nolwazi Mndzebele V Patricia Cebisile Mndzebele (Nee Msibi) [17/2014] (2014) SZSC 60 (3December 2014)**). Critically discuss the above statement in light of your understanding of bigamous marriages, stating whether you agree or disagree with the learned Chief Justice.

(25 Marks)

Question 2

*“As pointed out by Sinclair, *The Law of Marriage* Vol. 1 (1996), to hold a party liable for contractual damages for breach of promise may in fact lead*

parties to enter into marriages they do not in good conscience want to enter into, purely due to the fear of being faced with such a claim. This is an untenable situation.” (quoted by Henney J. in **Cloete v Maritz 2013 (5) SA 448 (WCC)**).

Critically discuss the above statement giving your opinion whether this position should be followed in Swaziland. **(25 Marks)**

Question 3

Nsika Nkambule and Phetsile Ndlela are embroiled in a fiercely contested divorce. It is not in dispute that Nsika, who is the defendant in the divorce action, committed adultery with one Tengetile Dlamini. At the heart of their failing marriage are two lovely daughters, Carlotta (9 years old) and Lindelwe (7 years old). Nsika so dearly loves his children and is keen to have custody of the two “princesses” even if he loses the divorce action and even if he forfeits everything from the marriage. At the instance of the Court, the Social Welfare Department has filed a socio-economic report to assist the Court to determine the issue of custody.

The report indicates that Phetsile is unemployed and lives with her abusive step-father, Thabani Nkomonye, in a two-bedroom house situated in the notorious Ka-Khoza location. The house is occupied by Phetsile’s mother and her step-father together with their five children. Both Phetsile’s parents are unemployed and survive on the elderly grants provided by the Government once every three months. Phetsile is a loving and caring mother who can sacrifice her own life to save her children.

The report further reveals that Nsika is a well-off businessman who owns a fleet of trucks and buses together with various properties in the major cities of Swaziland. He is an outgoing person who enjoys his leisure time on holidays around the globe. This is the type of life his two daughters like,

even though they only have such opportunities on the weekend of the month-end as their father is a very busy person. The children spend most of their time with their mother who is only a housewife. They have a strong bond with their mother, just as they do with their father. Nsika lives in a five-bedroom mansion in Dalriach, Mbabane, where he lives with his extra-marital lover, Tengetile, together with their baby born out of wedlock. The children are currently at boarding school but they spend their holidays with their mother at Ka-Khoza.

In her judgment, Magistrate Dandure awards custody of the minor children to Nsika Nkambule as he is well-off and is in a position to maintain the children. Phetsile has approached you for legal advice as she intends to file an appeal to the High Court. Advise her on the factors to be considered by the Court in determining the issue of custody. Refer to decided cases.

Question 4

“In dissolving a marriage by divorce, [because it has irretrievably broken-down] the court does not kill a live marriage: it certifies that the marriage is dead.” (HR Hahlo, the SOUTH AFRICAN LAW OF HUSBAND AND WIFE, 5th ed. at 331). Critically discuss the above statement with reference to the law governing divorce in Swaziland. **(25 marks)**

Question 5

Discuss the concept of “household necessities” and the extent to which a person may contractually bind his/her spouse in respect of same. Refer to relevant authorities. **(25 marks)**