

UNIVERSITY OF ESWATINI

DEPARTMENT OF LAW

FINAL EXAMINATION PAPER, DECEMBER 2018

PAPER TITLE: CONFLICT OF LAWS

COURSE CODE: L404 (LLB PROGRAMME)

TIME ALLOWED: THREE (3) HOURS ONLY

INSTRUCTIONS:

- 1. ANSWER ANY FOUR QUESTIONS OF YOUR CHOICE. ALL QUESTIONS CARRY EQUAL MARKS.**
- 2. THIS QUESTION PAPER HAS SEVEN PAGES, KINDLY ENSURE YOU HAVE ALL PAGES.**

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

Question 1

In March 2007 Stokvel (Pty) Ltd, a mining company based in Matsulu in the Republic of South Africa, entered into a verbal agreement with Ibhudango-2022 (Pty) Ltd, a wine distillery carrying on business in the busy city of Sinyamantulwa in the Kingdom of Eswatini. In terms of the verbal contract the former agreed to supply and the latter agreed to purchase coal in such tonnages as may from time to time be requested by the purchaser. The contract was concluded in Matsulu in the Republic of South Africa and the goods were to be supplied and consumed in Swaziland at the purchaser's place of business.

Between May 2007 and November 2011 Stokvel (Pty) Ltd supplied various tons of coal to Ibhudango-2022 (Pty) Ltd. The purchaser, Ibhudango-2022 (Pty) Ltd was issued with invoices for goods sold and delivered. The invoices were paid in part and at the end of 2012 Ibhudango-2022 (Pty) Ltd had an unpaid balance of R8 472 331.00 (Eight Million Four Hundred and Seventy Two Thousand Three Hundred and Thirty One Rands). In April 2014 Stokvel (Pty) Ltd sued out summons against Ibhudango-2022 (Pty) Ltd before the High Court of Eswatini. The Defendant raised two special pleas, each plea being in the alternative of the other.

First special plea. On a proper interpretation of the 1907 Proclamation importing section 16 of the *Placaat* of 5th October, 1540 regulating prescription merchandise '*ter slete gelever*' plaintiff's claim for payment of the purchase price of the coal has prescribed and cannot found an action at law in the courts of the Kingdom of eSwatini. According to section 16 of the *Placaat* of Emperor Charles V, 4th October 1540, the price for merchandise '*ter slete gelever*' (that is, goods which are sold in small quantities and for consumption) should be claimed by court process within two years in order to found an action in the courts of Eswatini.

Second special plea. On the basis that the proper law of the contract is South African law (the *lex loci contractus*) the South African Prescription Act 68 of 1969 applies and the debt has been extinguished in terms of section 11(d) of that Act it not having been claimed timeously. The 1969 Act forms part of the substantive law of South Africa. For the proposition that the proper law of the contract is South African law, the Defendant relies on facts, inter alia, that the contract was concluded in South Africa, payment was to be made in South Africa, invoices were issued in South African Rands and payment was to be made in South African currency.

The Plaintiff denies that the *lex causae* should be South African law, but maintains that the law of Eswatini should be applied. Plaintiff argues that the *Placaat* is not part of the Roman Dutch common law applicable to eSwatini.

Citing relevant case law, draft an opinion on the proper law of the contract between Stokvel (Pty) Ltd and Ibhudango-2022 (Pty) Ltd. Proceed on the assumption that the *Placaat* has been found to be part of the law of Eswatini.

[25 Marks]

Question 2

Shimela and his wife Magida were married in community of property in 1995 in the Kingdom of Mooihoek. Shimela was born in the Republic of Mfishane whilst his wife, Magida, was a native of Moihoek by birth. Upon marriage they both agreed to permanently settle in the Kingdom of Moihoek which became their domicile. Shimela started serving in the Sigeja Peoples Movement, the ruling party of the kingdom of Moihoek. They lived a happy life with their three sons, Shali, Mfomfo and Zuka, as well as their only daughter, Julia.

In 2015 a military *coup d'état* instigated by Mzayoni overthrew the government of Mooihoek. Shimela and his family fled to the neighbouring

Kingdom of Mfishane. Shimela and the children were happy with their new life in the Republic of Mfishane. His wife, Magida, on the other hand, never liked the Republic of Mfishane. She wished she could get an opportunity to return to the Kingdom of Mooihoek. Shimela settled well in the Republic of Mfishane and in no time he was involved in the country's politics where he held a high position in the country's ruling party, Sishingishane Democratic Alliance. His eldest son, Shali also began a political career in the Republic of Mfishane being his father's greatest rival in the opposition party, Ukhahlamba Collective Front. Shimela was so happy with his new life in the Republic of Mfishane and in no time he declared that country to be his permanent home.

In 2017 Shimela was shot dead by unknown people. His wife, Magida, remained in the Republic of Mfishane to support her eldest son's flourishing political career. She kept on reminding her children that the day the tyrant Mzayoni would die, she will return to her native country, the Kingdom of Mooihoek. In February 2018, Magida got tired of her son's political life in the Republic of Mfishane and she decided to start a new life of her own in the neighbouring Republic of Ngudzeni. In July 2018 she died after a short illness. She never acquired Ngudzenian nationality even though she had a visa allowing her to stay there indefinitely. She left an estate consisting entirely of movables worth more than US \$3million. She died intestate.

A dispute arose among her children as to who should inherit the estate of their mother. The intestate succession laws of Ngudzeni dictate that the movables should be distributed equally among all four children, Shali, Mfomfo, Zuka, and Julia. The intestate succession laws of Mfishane, however, provide that the movables should be shared equally among the deceased's male children. The intestate succession laws of Mooihoek provide that the male eldest son (*primogeniture*) should inherit the movables.

An examination of the conflict rules of the various countries reveals that the following choice of law rules govern intestate succession to movables in each country:

- (a) Ngudzeni: the laws of the place of domicile of the deceased at the time of her death.
- (b) Mfishane: the laws of the place of death.
- (c) Mooihoek: the laws of the deceased's country of origin.

Both Mooihoek and Mfishane adopt the “**no renvoi**” approach. Determine who will succeed to Magida's movables. **[25 Marks]**

Question 3

With reference to decided cases, briefly discuss any three approaches to the problem of classification pointing out the deficiencies of each approach and, where possible, making your own suggestions on how to address those deficiencies. **[25 Marks]**

Question 4

Various attempts at answering the questions as to which (foreign) law should govern cases containing a foreign element, and as to how such foreign law can be applied without infringing local sovereignty have been made by different legal scholars and jurists. Focussing on any three scholars and jurists of your choice, critically discuss their contributions and the abiding legacies (if any) which are derived from the views of those scholars and jurists. **[25 Marks]**

Question 5

- (a) Critically comment on the case of *Anderson v The Master 1949 (4) SA 660 (E)* and express your views on how it addresses the problem of classification. (10)
- (b) Discuss the conflict rule applied in determining the proprietary consequences of a marriage. Refer to applicable case law. (10)
- (c) Which court has jurisdiction to determine the status of a person. Cite relevant case law. (5)

[25 Marks]

Question 6

Her Royal Highness Queen Karim is the head of state of the Kingdom of Alahabad. Section 15 of the Constitution of Alahabad provides as follows:

“The Queen shall be immune from suit or legal cause in any case in respect of things done or omitted to be done by her, and she shall not be summoned to appear as a witness in any civil or criminal proceedings.”

In November 2015 Queen Karim entered into an agreement with Tafiq of Pakistan in terms of which Tafiq was to supply the Queen and her children with dairy products such as yoghurt, milk, cheese and butter. It was agreed that Queen Karim would pay Tafiq within 30 days of receipt of invoices from the seller (Tafiq). In 2016 Queen Karim stopped paying Tafiq despite being served with invoices for the goods sold and delivered. The debt owed to Tafiq has accumulated to a staggering US \$40 000.00.

Whilst on a visit to Pakistan, Queen Karim had her private jet, a luxurious Bombardier Challenger 850 Learjet attached by the Sheriff of

the High Court of Pakistan to found jurisdiction in respect of an action instituted by Tafiq in respect of the goods sold and delivered to Queen Karim. Discuss the jurisdiction of the High Court of Pakistan over the above matter.

[25 Marks]