

UNIVERSITY OF FORT HARE
FACULTY OF LAW
(East London Campus)

CIVIL PROCEDURE A
LEC 411E / 412E

JUNE / JULY EXAMINATIONS 2023
MAIN EXAMINATION PAPER

.....

Time: 3 HOURS
Subject: CIVIL PROCEDURE A
Code: LEC 411E / 412E
Marks: 100

EXAMINERS:

Internal Examiners:
Adv S. Seti

External Examiner:
Prof T. Van der Walt

INSTRUCTIONS

1. Answer ALL questions.
2. Please ensure that your assessment paper comprises EIGHT (8) pages.
3. It is in your interest to write clearly.
4. Number your questions appropriately.
5. Substantiate your answer by reference to applicable case law and/or legislation.

QUESTION 1

On 28 April 2020 Ms Nokuzola Lilian Maswanganyi was admitted at Freedom Hospital, a public hospital in East London, Eastern Cape Province. She was diagnosed as suffering from a condition called appendicitis. Due to rupture of the appendix the infection and accompanying inflammation had already spread throughout the abdomen. Her condition complicated and led to appendiceal perforation. Given the seriousness of her condition, a decision was made that an emergency surgical procedure in the form of appendectomy be performed on her. In carrying out the aforesaid surgical procedure, the surgeon(s) in charge (Drs Ernst Kili and Ellen Van Wyk) and other medical staff members of the hospital left a surgical sponge to the left of midline at the mid-abdomen of Ms Nokuzola Lilian Maswanganyi. This caused her a great pain and difficulty in recovering. As a result, thereof, she was later re-admitted and it is during this time when the surgical sponge was detected. She had to undergo a further surgery to remove the surgical sponge.

Ms Maswanganyi tells you that she has spoken to some doctor friends of hers who have advised her that the professional medical staff acted negligently, in one or more of the following reasons: by leaving a surgical sponge to the left of midline at the mid abdomen of the Plaintiff; by failing to perform the surgical procedure with such professional skill and care as is reasonable for a surgeon/nurse / assistants / medical professional; by failing to take all reasonable and necessary steps in accordance with the requirements of the medical standard of care; by failing to ensure that the Plaintiff is treated with the standard of care required in respect of a patient in her condition and circumstances; by failing to exercise reasonable skill, diligence and knowledge of a reasonable medical practitioner in the required field of expertise and to act in a professional manner and without negligence while caring for the Plaintiff.

As a result of the medical staff's negligence or failure to act in line with their mandate, Ms Maswanganyi suffered damages to the tune of R 950 000, 00 (Nine Hundred and Fifty Thousand Rands). Ms Maswanganyi wants to sue for damages and instructed you to issue summons against the wrongdoers. Ms Maswanganyi is a 37-year-old teacher earning a salary of R25 000, 00 per month. The second medical procedure affected her negatively so much that she is unable to stand on her feet for longer than 30 minutes and she has to frequent the hospital for further medical check-ups. She was unable to go to work and could not earn a salary for a period of six months.

You are an advocate and have been instructed by an attorney to provide an opinion on whether his client's claim has prescribed or not. The medical negligence which is the cause of the claim occurred on 28 April 2020. The summons has been issued on Friday, 28 April 2023 and served on the defendant on Tuesday, 02 May 2023.

Ms Maswanganyi asserts that summons could not be issued and served earlier than the dates on which these processes were effected. The basis for her claims are that: (i) Thursday, 27 April 2023 was a public holiday (Freedom Day); (ii) 29 and 30 April fell on Saturday and Sunday respectively; and, (iii) Monday, 01 May 2023 was also a public holiday (Workers' Day).

With reference to authorities, draft a legal opinion discussing whether Ms Maswanganyi's claim has prescribed or not? In your opinion, address the following issues:

- 1.1 If 2022 was leap year, what difference would that make to the claim, if any.
- 1.2 What are the implications, if any, do Ms Maswanganyi's justifications (holidays and weekend) for the late issuing and service of summons have on the fate of

her claim? Do they constitute a legal valid ground or defence against prescription?

[20 Marks]

QUESTION 2

The learned authors of *Hebstein and Van Winsen 'The Civil Practice of the High Courts of South Africa'* 5 ed (1) 2009 page 288 states that:

"Having decided which division of the High Court has jurisdiction, a legal practitioner must determine the form in which the proceedings should be brought. The two fundamental [main] forms of procedure in the High Courts are applications and trial action."

Critically discuss the legal principles that a legal practitioner must consider when determining the form of proceedings to be adopted in a case. In your answer, also address the following aspects:

- 2.1 What are the implication of dispute of facts in the process of determining the form of proceedings?
- 2.2 If it transpired during the course of application/motion proceedings that a genuine dispute of facts exists, how the court is going to determine such proceedings?
- 2.4 What possible types of orders that the court can grant when determining application proceedings where a dispute of facts?

[20 Marks]

QUESTION 3

On or about December 2017, the late Mr Mofati Alfred Oliphant took a loan from Payrite Bank totalling to R900 000.00 ('Nine Hundred Thousand Rands'). A security in the form of bond was registered on January 2018 against his immovable property situated at 35 Old Pine Road, Mitchell's Plain, Cape Town, most appropriately described as Erf 4963, in the City of Cape Town, Cape Division, Province of the Western Cape, Cape Town ("Immovable Property"). In terms of the agreement would repayable in monthly instalments of R5000, 00 per month starting from January 2018 and for a period of 15 years.

Mr Oliphant started repayments commencing from 01 January 2018 until December 2020. On 01 March 2023, He got involved in a car collision near East London as a result of which he died. The deceased's estate was reported to the office of the Master of the High Court in Johannesburg by Mrs Margaret Oliphant, his widow. Accordingly, it was registered as Estate Late Mofati Alfred Oliphant and allocated Estate Number 187/2023. Mrs Oliphant was appointed as Executor and duly authorised as such by the Letters of Executorship issued by the office of the Master of the High Court on 19 March 2023. On 25 March 2023 an advertisement in terms of the Administration of Estates Act was made notifying all the deceased's creditors about his death.

On 28 May 2023 and without any prior notice, Payrite Bank issued combined summons against the deceased for the recovery of the debt owed by him in respect of the loan referred to above. The summons were served on Mrs Oliphant on the same day at her residential address situated at 35 Bell Road, Cove Park Avenue, Johannesburg, Gauteng Province.

After combing through the deceased's files and documents, your client (Mrs Oliphant) managed to find a file with important documents relating this matter. There is a proof

of payment of R720 000, 00 into the loan account dated 01 January 2021. There is another proof of payment of R990 000, 00 also paid by Mr Oliphant into the same loan account on the same date. There are copies of various emails between Mr Oliphant and the bank that the amount where it appears that the second payment was made erroneously and the bank was requested to reverse the said amount of money but to no avail. There is also a letter written by Mr Oliphant's attorneys demanding the bank to pay back the said amount of R950 000, 00.

Instruction:

Use the facts above to draft a pleading that will respond to the Plaintiff's Particulars of Claim (marked Annexure "A" below) and raise defendant's counter claim. Your pleading must contain the following:

- 3.1 Title of Action
- 3.2 Special plea(s)
- 3.3 Plea on merits
- 3.4 Counter-claim

[35 Marks]

QUESTION 5

You are an Advocate and have been briefed by Mr John Magwaca for an opinion relating to the matter against him where he is not sure whether he should oppose it or not. Mr Magwaca is an attorney practising as such as one of the eight directors (partners) of Mouton Magwaca Incorporated Attorneys. The firm has offices in Cape Town, Durban and Johannesburg. He is the firm's head in the Department of Administration of Deceased's Estates, Insolvencies and Business Rescue. He has more than 20 years of experience in this area and he has nationwide reputation as an expert. He is rated by almost all reputable international rating firms as one of the top-ranked attorneys in his areas of practice worldwide.

More than ninety-five percent (95) of Mr Magwaca's practice comprise of administration of deceased's estates, business rescue, and insolvencies. That entails being appointed as executor of the deceased's estates; liquidator of insolvent entities that have been placed under liquidation; and, business rescue practitioner. Among other appointments, Mr. Mgwaca has been appointed as a business rescue practitioner of state-owned entities and has been involved in cross-border insolvency matters. In this regard, the appointments are done by the office of the Master of the High Court. The appointed person is required to provide a bond of security which comprise of a cover from the underwriters/insurance company. It is the requirement for the applicant to be desirable and eligible to act as the executor for the bond of security/cover to be approved by the underwriters.

Mr Magwaca has recently been removed as executor in the estate late Carol Jackson in terms of Section 54(1)(a)(v) of the Administration of Estates Act of 1966. Section 54(1)(a)(v) empowers the court to remove an executor from his office at any time '*if any other reason the Court is satisfied that it is undesirable that he should act as executor of the estate concerned*'. The application for removal was filed by the deceased's brother (Martin Jackson) and Mr Magwaca was cited as the first respondent. In removing Mr. Magwaca from executorship, Malcolm J of the Western Cape High Court made the following order on 25 May 2021, that:

'In the result, I therefore make the following order:

- i). It is undesirable that the first respondent should act as executor of the Estate of the late Carol Jackson.*
- ii). First respondent is hereby removed from the office of the executor of the estate of the late Carol Jackson forthwith.*
- iii). First respondent is ordered to return his letters of executorship to the master within 3 days of this order.*
- iv). First respondent is ordered to file a report of the work done with the Master of the High Court, Cape Town, and a copy to the applicant, from the date of the issue of the letter of acceptance of trust as executor i.e. from 11 April 2016 to date within 3 days of this order.*
- v). First and second respondents are ordered to pay costs occasioned by this application.'*

Mr Magwaca was appointed on recommendation by the father of the deceased's minor child, who is the sole heir and beneficiary to the intestate estate. The father of the minor child is the natural guardian of the minor child and he was cited as the first respondent in the application for the removal. The process of administration of estate is already advanced. All the assets of the estate have been collated and a full account has been given to the office of the Master of the High Court.

Mr Magwaca has emphasised that he is not worried about his removal as executor in the estate of Late Jackson, his concern is with the fact that he has been declared as undesirable in terms of Section 54(1)(a)(v) of the Act. In his view, the discharge of the executor in terms of section 54(1)(a)(v) of the Act must be preceded by misconduct or impropriety on the part of the executor. In this case, the declaration of undesirability and in turn removal was ordered by the court notwithstanding the absence of finding of impropriety or misconduct on his part. If the court order stand, then the insurance companies will withdraw their bond.

Mr Magwaca has petitioned the Supreme Court of Appeal for a leave to appeal to that court since his initial application for leave to appeal was refused by Malcolm J. There seems to be many grounds to overturn the judgement but the leave to appeal has been refused by Malcolm J. Subsequently, Mr Martin Jackson has filed an application in terms of section 18 of the Superior Courts' Act 10 of 2013 ("the Act") seeking to put into operation the order of the Western Cape High Court granted by Malcolm J on 25 May 2021 pending the outcome of the appeal process, including the petition for leave to appeal and any appeal noted. The application has been served on Mr Magwaca. It is pursuant to this application that he is seeking your opinion.

Instruction:

Draft a legal opinion advising Mr Magwaca on the prospects of success in opposing the application in terms of section 18 of the Superior Courts' Act filed by Mr Jackson seeking to put the order of the Western Cape High pending the outcome of the appeal process. In your opinion and in relation to the facts this case, critically discuss the test applied by courts when determining applications of this nature. Refer to relevant authorities.

[25 Marks]

TOTAL: 100 MARKS

-END-

Annexure 'A'

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BISHO)**

CASE NO: 112/23

In the matter between:
PAYRITE BANK LIMITED

Plaintiff

and

MOFATI ALFRED OLIPHANT

Defendant

PARTICULARS OF CLAIM

1. Plaintiff is **PAYRITE BANK LIMITED**, a public company (Registration Number: 2045/189839/07) duly incorporated in accordance with the laws of the Republic of South Africa, and registered as a banking institution in accordance with the provisions of the Banks Act 94 of 1990 with its registered office and principal place of business situated at Third Level, ABSA Towers, 170 Main Street, Johannesburg, Gauteng Province. Plaintiff is registered as a credit provider in terms of section 40 of the National Credit Act 34 of 2005 with registration number NCRP13.
2. Defendant is **MOFATI ALFRED OLIPHANT** an adult female businessman and resident of 35 Bell Road, Cove Park Avenue, Johannesburg, Gauteng Province.
3. On 02 January 2015 and at Johannesburg, Plaintiff and Mofati Alfred Oliphant (hereinafter 'deceased') concluded a written mortgaged loan agreement in terms of which Plaintiff lent and advanced to the deceased certain amounts of money in the sum of R900 000.00 ('Three Hundred Thousand Rands'), a copy of which is annexed hereto marked "**POC2**". The material and express terms of the mortgaged loan agreement were the following:
 - 3.1. the Plaintiff lent and advanced to the deceased a capital amount of R900 000.00 ('Nine Hundred Thousand Rands').
 - 3.2. The loan would be repaid into 180 monthly instalments of R5 000, 00 per month. Therefore, the agreement would endure for a period of 15 years.
 - 3.3. The loan would be secured by means of a mortgaged bond which was registered in favour of the Mofati Alfred Oliphant over the abovementioned immovable property.

- 3.4. Deceased acknowledged and declared to be truly bound in favour of Plaintiff and the security conferred by the bond to be in the capital amount, together with interest on the capital amount set out therein;
- 3.5. Should the deceased fail to observe or perform any of the terms or conditions of the agreements in respect of any amount secured under the bond, or fail to discharge any obligations or liability to Plaintiff, then all the amounts which are secured under the bond shall become immediately become payable in full; and Plaintiff will be entitled to institute proceedings for the recovery of all such amounts and for a Court Order declaring the immovable property specially executable
- 3.6. Deceased's chosen *domicilium citandi et executandi* ("notice address"): 35 Old Pine Road, Mitchell's Plain, Cape Town
4. In concluding the agreement as aforesaid, Plaintiff was represented by John Kruger, he being duly authorised thereto and Deceased sign the agreement in person.
5. The abovementioned agreement is a credit agreement in terms of Section 8 of the National Credit Act of 2005.
6. Plaintiff has duly performed its obligations in terms of the loan agreement in that:
 - 6.1 The loan amount in the sum of R900 000, 00 (Six Hundred and Fifty Thousand Rands) was made available to the deceased.
 - 6.2 On or about 03 January 2021 and at Cape Town a mortgage bond No. B19996/2012 in favour of Plaintiff and against the immovable property situated at 35 Old Pine Road, Mitchell's Plain, Cape Town, most appropriately described as Erf 4963, in the City of Cape Town, Cape Division, Province of the Western Cape, Cape Town ("Immovable Property").
7. In material breach of the mortgage loan agreement, deceased has failed to pay a full monthly instalments and interests due in respect of the period between the months of January 2021 and March 2023 in the sum of R900 000, 00. The aforesaid sum of R900 000, 00 is overdue and payable by the deceased to Plaintiff in terms of the agreement.
8. In the premises deceased owes Plaintiff the capital sum of R900 000, 00 together with interests thereon as pleaded above. The said capital sum together with interest thereon is overdue and payable to Plaintiff.
9. Notwithstanding demand, Deceased and/or Defendant has neglected, failed and/or refused to make payment of the said sum of R900 000, 00, or any part thereof, to Plaintiff.

WHEREFORE Plaintiff prays for judgment in its favour against Defendant as follows:

- (i) Payment of the sum of R900 000, 00,
- (ii) Interest in the aforesaid sum of R900 000,00 at the prescribed rate of 15,5 % p.a. *tempore morae* to date of payment in full; and,

- (iii) An Order declaring Erf 4963, in the City of Cape Town, Cape Division, Province of the Western Cape, situated at 35 Old Pine Road, Mitchell's Plain, Cape Town specially executable.
- (iv) Costs of suits.
- (v) Further and/or alternative relief.

DATED AT JOHANNESBURG ON THIS DAY OF MARCH 2023.

GTR ATTORNEYS

Per:

MS E Rabie
(Attorneys for Plaintiff)
5th Floor, GTR House
30 West Street
SANDTON
Tel: (011) 822 7811
Fax: 086 558 6483
Email: exrabie@gtr.co.za

C/O MGUDLWA ATTORNEYS
Suite 405, Tulbagh Centre,
13 Hans Strydom Street
KING WILLIAM'S TOWN

TO: REGISTRAR OF THE HIGH COURT
4 Independent Avenue
BISHO

AND TO: MARGARET OLIPHANT NO
35 Bell Road
Cove Park Avenue
JOHANNESBURG