

# Trial Court Proceedings and Alternative dispute resolution

## Paper 2

12 APRIL 2023

2 Hours

14:00 - 16:15

*Candidates are allowed 15 minutes to read the paper before answering the questions. No candidate may start writing in the answer book during this period. The examination of 2 hours then follows.*

### PLEASE NOTE:

1. Please write the number allocated to you on the cover of your answer book.
2. Candidates **must** write legibly and neatly. ANSWERS MUST BE WRITTEN IN INK OR WITH A BALLPOINT PEN.
3. Please use only **the front** side of each page.
4. Except if a special reason exists, a candidate will not be required to do an oral if a 50% aggregate or more is attained. If a candidate achieves an aggregate of between 40% and 49% he/she will be required to do an oral exam to convince the examiners that he/she does have sufficient knowledge to pass the exam. Candidates who attain less than 40% will have failed this examination.

**TOTAL MARKS: [50]**

**Read all the text below and answer all the relevant questions.**

1. What are the differences between mediation and litigation and arbitration? Explain which of the three is conducted in public and which are not and why. **[6]**
2. Your client, the seller, signed a written contract of sale. The defendant has failed to pay. Pleadings have closed. You are preparing for trial. Your client reminds you that there was an oral variation to the terms of payment of the purchase price, which is correctly pleaded in the particulars of claim. The defendant has admitted the written contract but not the oral variation.  
  
Explain to your client the difference between the *onus* of proof concerning the written contract of sale, and the oral variation to the payment of the purchase price. On the facts stated above, who will have the duty to begin at the trial? **[6]**
3. You represent the defendant. When is it appropriate to apply for absolution from the instance? **[3]**
4. The Rules of the Supreme Court of Appeal require the filing of main heads of argument. What does the phrase “main heads of argument” entail? **[7]**
5. What is hearsay evidence? Why is hearsay evidence generally not permitted? What are the exceptions to the hearsay rule? **[8]**
6. Read the client’s abridged statement, part one and part two, and consider whether the plea complies with Rule 22. Explain your answer meticulously. To amplify your answer, you must use examples of how you would plead the facts to comply with Rule 22. **[20]**

**Abridged statement from the client – part one**

The defendant, Rosemary Khumalo, is not satisfied with the work done by her former lawyers. She has appointed a new attorney who briefs you. The facts are the following. The plaintiff, Mr Rory Riot (as lessee) sued Rosemary (as lessor) on an oral variation of a written contract of lease of the spare room at Rosemary’s house. The allegations against Rosemary, commencing in paragraph 5 below, are:

**Extract from the particulars of claim for Rory Riot**

1. The plaintiff is RR etc. ...
2. The defendant is RK etc. ...
3. The court has jurisdiction ...
4. The parties entered into a written contract of lease on 1 March 2022. A copy is attached marked A. ...
5. The parties agreed to an oral variation of the contract of lease, as pleaded below.

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5.1 The plaintiff avers that the defendant agreed to repaint the spare room occupied by the plaintiff in the defendant's house and to allow the plaintiff a three months' rent holiday owing to the smell of the paint.

5.2 The agreement was an oral agreement entered into between the plaintiff and defendant, each representing themselves.

5.3 The agreement was entered into in the lounge of the defendant's house on Saturday evening 29 August 2022.

6. In breach of the aforesaid agreement, the defendant has failed to paint the spare room yet has required payment of the rent nonetheless, which the plaintiff paid under protest.
7. The plaintiff does not accept the breach and requires repayment of the three months' rent and an order to paint the room.

#### **Abridged statement from the client – part two**

Saturday, 29 August 2022 was Rosemary's fiftieth birthday. Rosemary had a fabulous party at her home. There were 80 guests, including Rory.

Most guests arrived by Uber and eventually went home by Uber. This was necessary since a serious quantity of alcohol was consumed during the five hour party. Rosemary drank a lot. Rory only drank water with Vodka.

During the party Rory teased Rosemary that the room he was renting from her was too dark in colour. In front of the rest of her guests, Rosemary promised to paint the room for Rory for free. Rory replied that it was a great idea. But what would she do about the smell of the paint. In a flippant and somewhat inebriated manner Rosemary said: *Rory I will give you the room with three months' rent free*. Everybody laughed and the party continued until late.

Each month of September, October and November 2022 Rory asked Rosemary when she would get the room painted. He said each month, *you still owe me a freshly painted room and three months' rent free*. Each time Rosemary replied: *we were all joking*.

In December 2022 Rory issued process against Rosemary. She went to her lawyers in a rage. There are no boilerplate terms in the written lease to exclude reliance on oral amendments and variations. So, the attorneys immediately filed a notice of intention to defend and a plea to each allegation in paragraphs 5, 6 and 7 of the particulars of claim as follows:

“The defendant denies each and every allegation contained in this paragraph and puts the plaintiff to the proof thereof.”

Many years ago Rosemary did an LLB. Now she is an estate agent. She realised something is wrong with the plea although she cannot put her finger on it. So she changed attorneys. And her new attorney needs your assistance.

Read question 6 again. Your answer counts 40% of the total mark for this paper. Rule 22 is set out below.

### **Rule 22 Plea**

(1) Where a defendant has delivered notice of intention to defend, he shall within twenty days after the service upon him of a declaration or within twenty days after delivery of such notice in respect of a combined summons, deliver a plea with or without a claim in reconviction, or an exception with or without application to strike out.

(2) The defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies.

(3) Every allegation of fact in the combined summons or declaration which is not stated in the plea to be denied or to be admitted, shall be deemed to be admitted. If any explanation or qualification of any denial is necessary, it shall be stated in the plea.

(4) If by reason of any claim in reconviction, the defendant claims that on the giving of judgment on such claim, the plaintiff's claim will be extinguished either in whole or in part, the defendant may in his plea refer to the fact of such claim in reconviction and request that judgment in respect of the claim or any portion thereof which would be extinguished by such claim in reconviction, be postponed until judgment on the claim in reconviction. Judgment on the claim shall, either in whole or in part, thereupon be so postponed unless the court, upon the application of any person interested, otherwise orders, but the court, if no other defence has been raised, may give judgment for such part of the claim as would not be extinguished, as if the defendant were in default of filing a plea in respect thereof, or may, on the application of either party, make such order as to it seems meet.

(5) If the defendant fails to comply with any of the provisions of subrules (2) and (3), such plea shall be deemed to be an irregular step and the other party shall be entitled to act in accordance with rule 30.

**END OF QUESTIONS**

**TOTAL: 50 marks**

### **FINAL EXAM INSTRUCTION TO CONSIDER:**

Marks are not awarded in accordance with the length of your answer, but in accordance with the insight you demonstrate in your answer.