

**Criminal procedure  
Regulation 7(9)(e)**

**Paper 3**

13 APRIL 2023

2 Hours

09:00 - 11:15

***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. Your attorney briefs you on consultation. Your attorney needs advice for her client. The client will be present at the consultation. Your attorney needs to know:
- Should her client plead guilty and remain silent and wait for the judge to ask questions to confirm the material facts to be satisfied that the plea of guilty is correct?
  - Should her client plead guilty and make a statement in terms of section 112 of the Criminal Procedure Act 51 of 1977 (CPA) instead of waiting for the judge's questions?
  - Should her client plead not guilty and remain silent?
  - Should her client plead not guilty and make a statement in terms of section 115 of the CPA?

Your attorney furnishes you with the memorandum set out in the table below. You must advise your attorney on each of the above questions. Set out what advice you will give on each question and motivate your answer by sound legal reasoning. This question counts for half the entire mark of this exam. Apply your mind, your knowledge of the law and your reasoning. Reasoned answers based on the stated facts score the most marks. Do not import your own facts. **[25]**

**Memorandum from your Attorney**

(Note to Pupils: all the places and characters in this question, save the landmarks, are fictitious and are composed purely for the purposes of the exam.)

- a) My client, Josh Tshabalala, owns a popular tavern in Dube, Soweto near the Community Centre which used to be the Baby Jakes Gym for aspirant boxers and other assorted fitness freaks. The tavern is called The Tshabalala Lounge.
- b) The Tshabalala Lounge is doing very well. Its turnover exceeds three million rand each month. Of course, turnover is not profit. It costs a lot to run the tavern and the taxes for SARS are steep.
- c) Josh Tshabalala pays his own taxes diligently and makes sure the taxes for the tavern are also paid diligently.
- d) Three months ago a group of men dressed in immaculate attire entered the tavern while Josh was working. Josh's wife, Lerato was in the tavern when they entered. The two children of Josh and Lerato, Thandi – 7 years old and Karabo – 6 years old, were at the local school. It was the early Friday morning of 11 November 2022.
- e) The group of about ten men was led by a man called Mr Flabby. It is a nickname. He is clearly not flabby. Indeed, Josh thought he was an athlete or gymnast, such was his physique.
- f) Mr Flabby was very polite but very menacing.
- g) Mr Flabby told Josh that his tavern needed protection from criminals.
- h) Josh laughed at that suggestion. Josh told Mr Flabby that in the previous four years of operation he had never had any robberies, cellphone snatching or any other form of petty crime.
- i) Mr Flabby smiled at Josh and said: "We offer our protection services at one million rand *per*

month. Do we have a deal?"

- j) Josh lost his temper with Mr Flabby and his group and, although he now profoundly regrets what he said at the time, Josh told them to go away using the most vulgar expletives he could muster. Even Lerato was a bit flabbergasted by his language.
- k) Unperturbed, Mr Flabby and his group left the tavern.
- l) On Saturday morning, 12 November at 11h30, they returned. Josh was not at the tavern. He was collecting supplies. Mr Flabby and his group waited for Josh. Josh arrived at noon. He was not pleased to see Mr Flabby and his group.
- m) Mr Flabby greeted him obsequiously politely and said: *we know where you live; we know your wife, Lerato works here; we know your young children are in the school up the road. If you do not accept our protection, we cannot guarantee that your wife and children will be safe until the end of this month. So, what do you say?*
- n) Josh immediately had an idea. He said to Mr Flabby: *I will not consider your offer here in the tavern. You must never come back to this tavern ever again. However, I will come to your house. We can make a deal. Where do you live?*
- o) Mr Flabby and his group were all smiles. Mr Flabby told Josh where they could meet. It was at a non-descript location in Phiri, not far from the Community Hall. Josh agreed. The meeting was set for Sunday, 13 November at noon (12h00).
- p) After Mr Flabby and the group left, Josh phoned his best friend who works in a private security company. Josh explained his situation and asked to borrow a firearm. His friend, Anony Mouse, agreed. Josh collected the firearm later that day.
- q) The following morning Josh went to the meeting. When he arrived, Mr Flabby and his group had been drinking some bubbly wine in celebration of some victory. Josh walked up to Mr Flabby, shook hands, took out the firearm and shot him through the forehead. Mr Flabby died on the spot.
- r) Josh waived his firearm at the group. They backed off. Josh drove to the Moroka Police Station and handed himself into police custody and surrendered the firearm.
- s) When Josh explained to the police what he had done and why, the police gave him bail of two thousand rand. Josh was happy and went home. Josh's friend Mr Mouse was not happy about the firearm being handed over to the police.
- t) Yesterday, the police served a summons on Josh to appear in court on 30 April 2023 on a charge of murder of Mr Flabby.

2. What are the competent verdicts on a charge of murder?

[7]

3. The State charged your client, Innocent Dlamini, with the murder of Gerald Fish. The State has no witness to link your client directly to the murder of Gerald. Nonetheless the State wants you to agree to allow the hearsay evidence of the late Martha Maepa in terms of section 3 (1)(a) of the Law of Evidence Amendment Act 45 of 1988.

For exam purposes, the statement below is redacted, reduced, edited and amended from the Constitutional Court case, *Kabo v The State* [2023] ZACC 1. However, the principles to be applied stem from section 3 of the Law of Evidence Amendment Act 45 of 1988, quoted later.

**You must make your own assessment to answer the question.**

**Police statement by the witness, Martha Maepa, before she died. When she gave her statement to the police in isiXhosa, the police sergeant translated what she said into English as below. The sergeant also noted that Martha was not injured at all during the incident.**

*On Sunday 6 August 2022, at about 4pm, I arrived at home, from Gugulethu. I heard from my mother that there were guys looking for me, driving a white Tazz. I saw the Tazz passing in my street. I decided to follow it. The Tazz parked in front of the deceased's house. I saw the deceased, Gerald, before he died. Both his hands were tied up with a rope. Also his legs were tied up with yellow-and-black rope.*

*Someone was carrying a hockey stick and was busy beating Gerald.*

*Innocent and Aziz were also carrying silver golf sticks. Makhi pulled the deceased to other room as he was bleeding over his head and mouth. Bongane said to the deceased, nicknaming Nono, he must stand up. And he said he can't stand.*

*Nono did ask me to pick him up to those people in dining room. He did crawl to dining room. Anele did kicked him over his chest, and he fell down. Anele took out a knife and stabbed Monwabisi on his hips and left side and on right side. He also stabbed him twice on lower abdomen. Svegi did call Bulelwa as she was on that room. Sakumzi did hit Bulelwa with a plank over her head. Xolani was having a sjambok. He assaulted Bulelwa with it over her body. Vubela Viwe, he did hit Zukisani under his feet and also hit him over his hands, saying he will 20 times. Anele did also hit me with chisel while I was trying to block him not to assault Makhuze. He hit me over the head.*

*By the time I arrived, Monwabisi was already being assaulted as he was bleeding. Siyabulela did slap Monwabisi over his face several times. Mara did kick Makhuze on his groin several times. The role players on this matter who assaulted both deceased and victims are Innocent, Makhi, Azizo, Andile, Anele, Svitch, Sakumsa, Vubela, Xolani, Siyabulela and Mara. All of them, they suspect that deceased and victim has stolen music of Makhi.*

Martha Maepa died on 16 December 2022. Having regard to section 3 of the Law of Evidence Act, what will you advise your client to do? What will you argue before court in favour of, or against, the request by the State to admit Martha's hearsay evidence as a consequence of your advice? You may use each subsection as a heading and explain your answer subsection by subsection. **[18]**

## **LAW OF EVIDENCE AMENDMENT ACT 45 OF 1988**

### **3 Hearsay evidence**

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

- (c) the court, having regard to-
- (i) the nature of the proceedings;
  - (ii) the nature of the evidence;
  - (iii) the purpose for which the evidence is tendered;
  - (iv) the probative value of the evidence;
  - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
  - (vi) any prejudice to a party which the admission of such evidence might entail; and
  - (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1) (b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

(4) For the purposes of this section-

**'hearsay evidence'** means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

**'party'** means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.

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**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.