

**Legal writing and drafting
Regulation 7(9)(g)
Open book – five hours**

For the purposes of this examination
There are two [2] annexures included at the end of the questions.

Paper 5

5 HOURS [OPEN BOOK EXAM]

19 April 2023

09:00 – 14:30

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.

NB: There are two Annexures [cases] attached for Question1 and Question 2

TOTAL MARKS: [100]

Read all the text below and answer all the relevant questions

Question 1

[40 marks]

1. Tyrone Dlamini from Dlamini Attorneys Incorporated instructs you on behalf of **The Independent Mall** on opinion. The essential facts are as follows.
2. On Monday, 6 June 2022 Judge Wiseman handed down judgment in favour of The Independent Mall against Safe Cleaners (Pty) Ltd in the High Court of South Africa, KwaZulu-Natal Local Division, Durban for R 100,000.00 with costs.
3. Smith and Jones Incorporated, the lawyers for Safe Cleaners (Pty) Ltd noted an appeal. To delay the matter, Mark Smith of Smith and Jones Inc.:
 - 3.1. Wrote to your attorney stating that he had applied for a transcript of the evidence to brief new counsel in the matter on appeal.
 - 3.2. Wrote to the secretary of Judge Wiseman stating that as soon as the transcript becomes available, he will lodge the grounds of appeal and seek leave to appeal. He copied your attorney with the letter.
 - 3.3. When after two months the transcript had not materialised, your attorney applied for the transcript.
 - 3.4. One week later the transcript arrived on Thursday, 1 September 2022. The following day your attorney sent the transcript by email to Mr Smith.
 - 3.5. Mr Smith immediately wrote back stating that his client would not pay for the transcript since your attorney had obtained the transcript 'urgently'.
 - 3.6. Your attorney forthwith applied for a date to hear the leave to appeal and notified Mr Smith that he had done so.
4. Leave to appeal was finally heard on Monday, 28 November 2022. In an *ex tempore* judgment, Judge Wiseman refused the application for leave to appeal with costs.
5. Mr Smith immediately sent a letter to your attorney stating that his client intends 'to petition' the Supreme Court of Appeal for leave to appeal.
6. He also wrote two further letters.
 - 6.1. The first letter was addressed to the secretary of Judge Wiseman to request reasons for the judgment given *ex tempore* in which leave to appeal was refused. Again he copied your attorney.
 - 6.2. The second letter was addressed to your attorney informing your attorney that as he had applied for reasons for the refusal of leave to appeal, any attempt to execute on the judgment would be met with an urgent interdict since 'the matter is now pending before the Supreme Court of Appeal'.

7. Your attorney has waited until today. No process has been served on him nor in the Supreme Court of Appeal concerning any application in terms of section 17 (2)(b) of the Superior Courts Act 10 of 2013.
8. The management at The Independent Mall wants your attorney to execute the judgment.
9. Your attorney needs an urgent opinion on whether he can proceed to execute on the judgment while under notice by Smith and Jones Incorporated that 'the matter is now pending before the Supreme Court of Appeal' and while Mr Smith is awaiting reasons for the refusal of leave to appeal. **[40 marks]**

Question 1

Draft an opinion based on the attached case [ANNEXURE1] of *BP Southern Africa v Mega Burst Oil and Fuels 2022 (1) SA 162 (GP)*. You may assume that the case is good law. Section 17 of the Superior Courts Act 10 of 2013 is set out below.

17 Leave to appeal

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

- (a)
 - (i) the appeal would have a reasonable prospect of success; or
 - (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

(2) (a) Leave to appeal may be granted by the judge or judges against whose decision an appeal is to be made or, if not readily available, by any other judge or judges of the same court or Division.

(b) If leave to appeal in terms of paragraph (a) is refused, it may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after such refusal, or such longer period as may on good cause be allowed, and the Supreme Court of Appeal may vary any order as to costs made by the judge or judges concerned in refusing leave.

(c) An application referred to in paragraph (b) must be considered by two judges of the Supreme Court of Appeal designated by the President of the Supreme Court of Appeal and, in the case of a difference of opinion, also by the President of the Supreme Court of Appeal or any other judge of the Supreme Court of Appeal likewise designated.

(d) The judges considering an application referred to in paragraph (b) may dispose of the application without the hearing of oral argument, but may, if they are of the opinion that the circumstances so require, order that it be argued before them at a time and place appointed, and may, whether or not they have so ordered, grant or refuse the application or refer it to the court for consideration.

(e) Where an application has been referred to the court in terms of paragraph (d), the court may thereupon grant or refuse it.

(f) The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the

application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.

(3) An application for special leave to appeal under section 16 (1) (b) may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after the decision sought to be appealed against, or such longer period as may on good cause be allowed, and the provisions of subsection (2) (c) to (f) shall apply with the changes required by the context.

(4) The power to grant leave to appeal-

- (a) is not limited by reason only of the fact that the matter in dispute is incapable of being valued in money; and
- (b) is subject to the provisions of any other law which specifically limits it or specifically grants or limits any right of appeal.

(5) Any leave to appeal may be granted subject to such conditions as the court concerned may determine, including a condition-

- (a) limiting the issues on appeal; or
- (b) that the appellant pay the costs of the appeal.

(6) (a) If leave is granted under subsection (2) (a) or (b) to appeal against a decision of a Division as a court of first instance consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by a full court of that Division, unless they consider-

- (i) that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or
- (ii) that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision,

in which case they must direct that the appeal be heard by the Supreme Court of Appeal.

(b) Any direction by the court of a Division in terms of paragraph (a), may be set aside by the Supreme Court of Appeal of its own accord, or on application by any interested party filed with the registrar within one month after the direction was given, or such longer period as may on good cause be allowed, and may be replaced by another direction in terms of paragraph (a).

(7) Subsection (2) (c) to (f) apply with the changes required by the context to any application to the Supreme Court of Appeal relating to an issue connected with an appeal.

40 MARKS

Question 2

[40 marks]

Tyrone Dlamini from Dlamini Attorneys Inc. again consults with you, this time on behalf of his client, Mr Alfred Kushesha. The matter is urgent. They arrived in your chambers this morning. The following are the facts.

1. Mr Kushesha is a taxi driver in Alexandra, Sandton, Johannesburg. He lives at number 14B Roosevelt Street, Alexandra. For the last ten years he has been driving a Mercedes-Benz Sprinter Minibus, registration MWB 988 GP. He bought it from a friend, Siphso Mbeki (no relation to the former President of South Africa) who gave up taxi driving after winning the National Lottery in December 2012.
 - 1.1. Yesterday evening the police stopped him while he was transporting passengers from Sandton to Alexandra. The roadblock was just before the Grayson Road bridge across the Motorway 1, about 1.5 kilometres from Alexandra (west).
 - 1.2. The police asked for the papers to the vehicle. He handed the papers to the officer in charge, Colonel Frank Peters. The police checked the engine number. The number was not visible at all. The police said the number had been tampered with.
 - 1.3. Kushesha remonstrated with the police. He explained when and where he had bought the taxi, that he had been driving his taxi for ten years, that he was the owner of the taxi and that he belonged to the Alexandra Taxi Association. He handed the police a copy of his membership card.
 - 1.4. Kushesha asked the police which police station they were from. Colonel Peters said they were from the Alexandra Police Station at 69 15th Avenue, Alexandra.
 - 1.5. Then the police ordered the passengers to get out of his vehicle and to walk home.
 - 1.6. The police impounded his vehicle and refused to return his vehicle papers and his Alexandra Taxi Association card. They said they are retaining the papers and card because he was driving a stolen vehicle. The police took his details as to his home address and told him to expect a summons soon.
 - 1.7. Kushesha asked how he should get home. The Colonel told him to walk home like his passengers. While he was walking home, he phoned his attorney, Tyrone and booked an appointment for early this morning. Now they are in your chambers.

- 1.8. Kushesha also tells you that the police are notorious for stripping parts from impounded vehicles. He is gravely concerned about taxi. It is his only source of income.
2. Draw the necessary papers to get Mr Kushesha out of his predicament. The necessary papers are:
- | | |
|------------------------|--------------|
| The Notice of Motion | [10] |
| The Founding Affidavit | [30] |
| TOTAL | [40]. |
3. You are referred to the **attached judgment [Annexure 2]** in *Ngqukumba v Minister of Safety and Security and Others* 2014 (5) SA 112 (CC).

Draft the Notice of Motion and Founding Affidavit.

QUESTION 2

40 MARKS

Question 3

[20 marks]

- Once again, Tyrone Dlamini has a brief for you. His clients want a divorce. Tyrone is concerned that it is not possible to establish irretrievable breakdown of marriage. You are required to draft particulars of claim in an uncontested (amicable) divorce.
- The facts are that Arthur Rogers married Mary Smith out of community of property on 24 September 2022. They have no children. They are immensely fond of each other. But Arthur would like to express himself as a gay man and no longer as a heterosexual man.
- They live together at 16 Marble Arch, Cavendish Square, Rosebank, Cape Town. Arthur will move out to 18 Marble Arch, Cavendish Square, Rosebank, Cape Town. He will move into the flat of his friend Thomas Elizabeth Newbury.
- Arthur and Mary have entered into an agreement of settlement for their divorce. Arthur will continue to support Mary for two years at a rate of seven thousand rand each month. Mary says she does not need that support. She is earning much more than Arthur.
- The matter is too complicated for Tyrone to decide what to do. Both Arthur and Mary have consulted him as a couple requesting a divorce.

6. State briefly how you propose to resolve the conundrum.
7. Draft particulars of claim for a divorce in accordance with your assessment of the situation. Note well: this matter has so many permutations that any practical, logical and legal solution will be correct.

Choose who should be plaintiff and defendant in this amicable divorce.

Draft particulars of claim for divorce accordingly. [20 marks]

END OF QUESTIONS

NB: Question one [1] and Question [2] each have an annexure that is attached to the question paper.