

LAW OF PERSONS

LONGER QUESTIONS

1. Mrs Smith, an expectant mother, was injured in a motor vehicle accident. Her child was subsequently born with cerebral palsy. As a result of the brain damage the child will never be able to take care of herself. The accident was caused by the sole negligence of the driver of the other motor vehicle.

(a) What do you understand by the *nasciturus* fiction? (3)

If a situation arises where it would have been to the advantage of the *nasciturus* if he or she had already been born, the law protects his or her potential interests. This is done by the implementation of the fiction that the *nasciturus* is regarded as having been born at the time of his or her conception whenever his or her interests are at stake. If it appears on a specific case that, had the *nasciturus* already been born, he or she would have had certain claims or rights, the legal position is kept in abeyance until the *nasciturus* does in fact become a person, or until it becomes certain that no person has developed from the *nasciturus*. If the child is indeed born alive, he or she acquires that rights that have been kept in abeyance.

(b) Name the two requirements for the operation of the *nasciturus* fiction. (2)

- **The fetus must already have been conceived at the time when the benefit would have accrued to him or her.**
- **The child must subsequently be born alive.**

(c) Can the *nasciturus* fiction be applied in this case? Discuss with reference to authority. (5)

It is possible that somebody's negligence may cause injuries to the *nasciturus* before birth. In *Pinchin v Santam Insurance*, where the facts were similar to the question under discussion, the court had to answer the question whether a person has an action in respect of injury inflicted on him or her while he or she was still a fetus in his or her mother's womb. In this case the court concluded that a fetus, if negligently injured before birth, may claim damages from the wrongful party.

In *Pinchin v Santam Insurance* the claim was unsuccessful since it was not proved that the cerebral palsy of the fetus had been caused by the injury sustained by the mother. Should it be proved that Mrs Smith's child's cerebral palsy is the result of the injuries sustained by Mrs Smith during the accident, the *nasciturus fiction* will be applicable to this case.

2. Mrs X has successfully applied for a presumption of death order with regard to her husband who has been missing for 20 years. What will the situation be if it becomes clear that Mr X did not die? Explain the position in a few sentences. (5)

Since the presumption of death order is rebuttable, the court which expressed the presumption can set aside its original order if, on the basis of further evidence, it becomes clear that the missing person did not in fact die. This can be done on the application of any interested person or the missing person himself or herself. In such a case he or she may bring an action for enrichment against those who have been enriched at his or her expense as a result of the presumption of his or her death.

3. Vambu, a citizen of Mozambique, is an illegal immigrant in South Africa. He has lived and worked in Hillbrow for the past two years. He wants to acquire a domicile of choice in Hillbrow. What effect does Vambu's status as an illegal immigrant have on his capacity to acquire a domicile of choice in Hillbrow? Advise him. (4)

The residence relied on for the acquisition of a domicile of choice must be lawful. Illegal immigrants can therefore not acquire a domicile of choice in South Africa even if they have the intention to settle permanently because their intention is unlawful. Persons who are deported from South Africa thus also lose their domicile in this country even if they have the intention to return because their return would be unlawful.

Where prohibited immigrants are, however, openly permitted by the authorities to reside in a country, they may acquire a domicile of choice in that country. In this case, Vambu will not be able to acquire domicile in South Africa.

4. Mr and Mrs Nkosi are married. During their marriage, Mrs Nkosi has an affair with Mr Skosana, as a result of which a child is born. With reference to authority, advise Mr Nkosi fully on how he should go about to rebut the presumption *pater est quem nuptiae demonstrant*. (16)

In terms of the maxim *pater est quem nuptiae demonstrant* Mr Nkosi will be liable for the maintenance of the child as our law recognises

the rebuttable presumption that a child is the child of the man to whom the mother is married.

This presumption is rebuttable however: either of the spouses can prove that the husband is not the father of the child. This can be done, for example, by proving that the husband is impotent or sterile. The fact that the spouses did not indulge in sexual intercourse during the period of conception could also be sufficient proof that the husband is not the father of the child.

5. What do you understand by the following concepts?

(a) multilateral contract

A multilateral contract is a contract in terms of which more than one party undertakes to render a performance. An example of a multilateral contract is a contract of loan.

(b) undue enrichment

Undue enrichment takes place where one person gains a patrimonial benefit at the cost of another without there being a recognised legal ground justifying the transfer of the benefit.

(c) *negotiorum gestio*

***Negotiorum gestio* refers to the liability incurred by a minor's parent or guardian against a third party if the minor has incurred expenses for necessaries (e.g. food) in the parent's absence.**

It can also be defined as managing someone else's affairs to his or her advantage without his or her knowledge.

6. Gugu, a seventeen year old minor, concludes a contract with a certain Mrs Ndlovu, an adult, to rent a bachelor flat. In terms of the contract Gugu has to pay Mrs Ndlovu the exorbitant amount of R4 000,00 per month rental for the flat. Gugu's father was unaware of this contract. When Gugu later had difficulty in paying the exorbitant rental, she phoned her father and told him about the contract, whereupon he gave her money to pay six months' rental.

(a) What do you understand by the concept *restitutio in integrum*? (1)

A prejudicial contract concluded by a minor with the assistance of his or her guardian, can be set aside by means of *restitutio in integrum*. *Restitutio in integrum* literally means return to the previous condition.

- (b) List the two requirements for the application of this remedy. (2)

The requirements for this remedy are the contract should have been concluded with the guardian's assistance, and it should have been to the minors prejudice at the moment it was made.

- (c) Can the abovementioned contract be set aside by means of the *restitutio in integrum*? Answer yes or no and explain your answer in two sentences. (3)

Yes. A minor who contracts without the assistance or consent of his or her guardian is not liable in terms of that contract. However, Gugu's father tacitly ratified her contract by paying six month's rental. The contract is thus completely valid retrospectively. Furthermore, since an exorbitant rental was payable, it was to Gugu's detriment at the moment it was made.

- (d) Is *restitutio in integrum* available to a minor who fraudulently represented himself or herself as a major? Answer yes or no. (1)

No, the remedy is not available to a minor who misrepresented himself or herself as a major or who, in some other fraudulent manner, persuaded the other party to contract with him or her.

- (e) What is the purpose of *restitutio in integrum*? (1)

The purpose of the remedy is to restore the *status quo ante*. This means that complete restitution from both sides must take place, placing both parties in the position they would have been in had they never entered into the contract.

- (f) What can be recovered by this remedy? (3)

Each party must return everything received under the contract, as well as the proceeds or any advantage derived from the contract, and must also compensate the other party for any loss suffered as a result of the contract.

- (g) Who can seek this remedy? (3)

The minor can apply for restitution himself or herself before he or she attains majority, or the guardian may apply on the minor's behalf. If the guardian fails to do so, a *curator ad litem* may be appointed to assist the minor.

The minor may also await majority and then institute the action on his or her own, but in this event he or she has to consider the possibility of prescription of the claim.

7. Mr Molefe owes Peter, a 17-year old minor, R1 000,00 for a painting that Peter painted for him. Without his parent or guardian's assistance, Peter concludes an agreement with Mr Molefe in terms of which Peter extinguishes Mr Molefe's debt to him. Is this agreement valid. Briefly explain your answer. (2)

A minor cannot without assistance enter into a valid agreement with another by which the latter's debt to the minor is extinguished. Peter's agreement is thus invalid.

8. Rachel is 16 years old. Rachel owes Mrs King R500 for clothes she bought from her. Without her parent or guardian's assistance, Rachel concludes an agreement with Mrs King in terms of which Rachel's debt to Mrs King is extinguished. Is this agreement valid. Explain your answer. (2)

A minor can without assistance enter into a valid agreement with someone by which the minor's debt is extinguished. Rachel's agreement is thus valid.

9. The following statements are legal principles laid down in cases dealing with a declaration of majority. Name the case to which the following legal principles apply.

- (a) A strict approach should be followed. Pressing necessity should be present before applications of this nature can be granted.

Ex parte Akiki

- (b) The court should under Act 57/1972 be even more cautious than before, since, in terms of section 7, the effect of an order in terms of the Act is much wider than the concession which the authority could grant earlier. Each application should be judged on its own merits.

Ex parte Smith

- (c) The court will only grant the application if a measure of desirability is proven by the applicant. It is not sufficient to show that the applicant is able to control his or her own affairs, or that he or she wants to conclude a transaction but cannot do so as a minor.

Ex parte Botes

10. What do you understand by the concept "emancipation"? (2)

Emancipation refers to the freedom to contract independently granted to the minor by his or her guardian.

11. How does deafness influence a person's capacity to act? Briefly explain your answer. (5)

The court can appoint a *curator bonis* for anyone who, owing to some or other physical defect, for example deafness, is not capable of managing his or her own affairs. The fact that a curator has been appointed for this person does not result in the individual losing his or her capacity to act altogether.

If, at a given moment, the person is physically and mentally capable of managing his or her own affairs, he or she can enter into valid juristic acts. If the person is not physically and mentally capable of managing his or her own affairs, the curator's assistance is needed while performing juristic acts.

12. When does legal personality begin? (1)

Legal personality begins at birth

13. Discuss the legal requirements for the beginning of legal personality. (4)

The legal requirements for the beginning of legal personality are the following:

- **The birth must be fully completed, that is there must be a complete separation between the body of the mother and the fetus. For birth to be completed it is not required that the umbilical cord be severed.**
- **The child must be alive after separation even if only for a short period. Legal personality is not obtained by a stillborn fetus or a fetus which dies during birth.**

14. A's will contains the following clause: "My daughter B inherits R60 000 and her children who are alive at the date of my death, each inherits R20 000".

A dies on 5 October 2001. B's third child Z is born on 5 November 2001. B has two other children X and Y.

- (a) Can the nasciturus fiction be applied in this case? Discuss with reference to authority. (4)

The nasciturus fiction is also applied in the law of succession. In the case of testate succession, effect must be given to the provisions of the will. If the testator clearly intended that unborn children should not inherit, this intention is simply carried out. Sometimes the testator's intention is not clear, as happened in the question under discussion.

In the prescribed case of Ex parte Boedel Steenkamp 1962 (3) SA 954 (O), the testator's will contained a provision similar to the one in the question under discussion. In this case the court decided that an unborn child who had been conceived before the testator's death but who was born after his death, was entitled to inherit. The reason for the decision was that the word "alive" was not enough to rebut the strong natural presumption that the testator intended to include the nasciturus.

The provisions of the Law of Succession Amendment Act 43 of 1992, that inserted section 2D(l)(c) into the Wills Act 7 of 1953 confirms the operation of the nasciturus fiction in the field of testate succession. The effect of the provision is that benefits allocated in a will to the children of a person, or to the members of a class of persons, also includes children who have already been conceived at the time of the testator's death and are later born alive, unless an intention to the contrary is evident from the will.

- (b) Who are entitled to inherit from A? (1)

If one relies on the Steenkamp case, it is clear that the testator's daughter (B) will be entitled to inherit R60 000 from him, and her children (X , Y and Z) R20 000 each.

15. Thandi is a six-year-old extra-marital child. Her mother lives in Soweto, and her father in East London. Thandi lives with her father. Where is Thandi domiciled? Discuss briefly and refer to authority for your answer. (5)

Section 2(1) of the Domicile Act 3 of 1992 provides that a person who is incapable of acquiring a domicile of choice in terms of section 1 of the Act (ie inter alia a person below the age of 18

years) will be domiciled at the place to which he or she is most closely connected.

Section 2(2) of the Domicile Act contains the rebuttable presumption that if a child has his or her home with one or both of his or her parents, it is presumed that this parental home is the child's domicile. "Child" means any person below the age of 18 years who does not have the status of a major. "Parents" include the adoptive parents of a child, and also the parents of a child who are not married to each other.

Thandi is thus domiciled in East London.

16. Anne and Ben, both unmarried, lived together for two years. When they separated, Anne was pregnant. She later gave birth to a son, John. Ben contributed towards the hospital expenses and paid maintenance for John. Anne agreed that Ben could have access to his child. However, two years after John's birth, Anne refused to allow Ben any further access to his child. Ben approaches you for advice. Advise him fully, with reference to authority, on his position. (15)

In *B v S* the appellate division held that since access is an incident of parental authority, and since the father of an extra-marital child has no parental authority in respect of that child, the father has no inherent right of access to his child. If, at all, there is a question of an inherent entitlement, it is that of the child, if it is in his or her best interests. The court rejected the decision in *Van Erk v Holmer* and confirmed the full-bench decision in *B v P*.

In terms of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 the unmarried father could apply for access. He would have succeeded only if he could prove that access would be in the best interests of the child. The court could make its order subject to whatever conditions it sees fit. The court had to take certain factors into account when considering the application for access, for example the relationship between the father and the child's mother, in particular whether either party has a history of violence against or abuse of each other or the child.

Before the commencement of the Children's Act, the legal position amounted to unfair discrimination against both the extra-marital child and his or her father, and was thus in contravention of section 9 of the Constitution.

Position after the commencement of the Children's Act 38 of 2005 on 1 July 2007:

The Children's Act repealed the Natural Fathers of Children Born out of Wedlock Act. In terms of the Children's Act an unmarried father automatically has parental responsibilities and rights if

- **at the time of the child's birth he is living with the mother in a permanent lifepartnership, or**
- **regardless of whether he has lived or is living with the mother, consents to be identified as the child's father, and**
- **contributes to or has attempted in good faith to contribute to the child's upbringing for a reasonable period, and**
- **contributes or has attempted in good faith to contribute towards the child's maintenance for a reasonable period.**

This section applies regardless of whether the child was born before or after the commencement of the Act.

In the question, Ben would probably have automatic parental responsibilities and rights in respect of John.

17. What do you understand by the following concepts?

- (a) obligation (2)

An obligation is a juristic bond in terms of which the party or parties on the one side have a right to performance and the party or parties on the other side have a duty to render performance.

- (b) reciprocal contract (2)

A reciprocal contract is a multilateral contract in terms of which performance is promised on the one side in exchange for performance on the other side. An example of a reciprocal contract is a contract of sale

- (c) negotiorum gestio (2)

Negotiorum gestio refers to the liability incurred by a minor's parent or guardian against a third party if the minor has incurred expenses for necessities (eg food) in the parent's absence. It can also be defined as managing someone else's affairs to his or her advantage without his or her knowledge

18. Themba is seventeen years old. He decides to buy a second-hand car. He visits Mr Molefe, a dealer in second-hand cars. Without the assistance or consent of his guardian, Themba concludes a contract of sale with Mr Molefe. In terms of the contract, Mr Molefe sells Themba a car at the discount price of R15 000. The actual value of the car at the time of the conclusion of the contract is R20 000. During the negotiations Themba tries to represent himself as a major, but it is obvious to Mr Molefe that he is dealing with a minor. On 24 March, two weeks after the car is delivered to Themba, he sells it for R12 000. He spends R8 000 of this money on a luxury lounge suite, and the remaining R4 000 he uses to pay for his lodging. He does not pay any of his debt to Mr Molefe. On 3 May, Mr Molefe institutes an action against Themba.

- (a) On what basis could Themba be held liable to Mr Molefe? Explain briefly. (2)

The basis of liability is undue enrichment. Themba cannot be held delictually liable on the basis of the representation, since it was obvious to Mr Molefe that he cannot be older than sixteen (one of the requirements for delictual liability are thus not present).

- (b) What do you understand by the concept "undue enrichment"? (2)

Undue enrichment takes place if a person gains a patrimonial benefit at the cost of another, without there being a recognised legal ground justifying the transfer of the benefit.

- (c) What do you understand by the so-called "benefit theory"? Which decision introduced this theory into our law? (2)

The benefit theory entails that once the contract, taken in its entirety, is to the minor's benefit, the minor is contractually liable. The benefit theory was introduced into our law in the case of *Nel v Divine Hall & Co.*

- (d) Does the benefit theory still form part of our law? Explain briefly with reference to authority. (3)

No, the benefit theory no longer forms part of our law. It was authoritatively rejected by the Appellate Division in *Edelstein v Edelstein* where the court decided that the

contract of a minor who acted without assistance can never be valid because it is to his or her benefit. However, the minor is indeed liable for the extent to which he or she has been unduly enriched.

- (e) At which moment should the extent of the minor's enrichment be calculated? What is that date in the question under discussion? (2)

The moment on which the calculation must be made is *litis contestatio*. In the question under discussion *litis contestatio* took place on 3 May.

- (f) One of the principles that are applied when calculating the extent of the minor's enrichment, is that the minor is liable for the lesser of two specific amounts. What are these two amounts? (2)

The relevant two amounts are the amount by which the other party's estate is decreased as a result of the performance, and the amount by which the minor's estate is increased as a result of the performance. Both these amounts are based on the actual value of the performance, not the contract price.

- (g) In which way should the minor's enrichment be calculated if the minor has sold the performance before *litis contestatio*, and has used the proceeds to purchase luxury and necessary items respectively? Apply these principles to the question under discussion. (3)

If the minor has sold the performance before *litis contestatio*, and purchased necessary items with the proceeds, he or she is liable for the purchase price of these items. If the minor has purchased luxury items with the proceeds, he or she is liable for the value of whatever still remains. In the question Themba will thus be liable for the R8 000 spent on the lounge suite (luxury item that is still intact), as well as for the R4 000 spent on his lodging (necessary item).

- (h) Write down the amount of Themba's enrichment. (1)

The amount of Themba's enrichment is R12 000.

19. List the two requirements for the application of *restitutio in integrum*. (2)

The requirements for restitutio in integrum are that the contract should have been concluded with the guardian's assistance (or ratified after it was initially concluded without the necessary consent), and it should have been to the minor's prejudice at the moment it was made.

20. In the case of an application for declaration of majority in terms of the Age of Majority Act 57 of 1972 the court must amongst other things be provided with "any other relevant information that will place the Court in a position to judge whether it is necessary or desirable in the interests of the applicant to grant the application" (s 3(g)). With reference to case law, briefly explain how the courts have interpreted this requirement.(6)

In Ex parte Akiki 1925 OPD 21 1 the court followed a strict approach, requiring pressing necessity before an application of this nature could be granted. In Ex parte Botes 1978 (2) SA 400 (0) the court held that a measure of desirability must be proved, and that it is not sufficient to show that the applicant is able to control his or her own affairs, or that he or she wants to conclude a transaction but cannot do so as a minor.

In Ex parte Smith 1980 (2) SA 533 (0) the court pointed out that, since the effect of the order is much wider than the concession which the authority could earlier grant, applications like these should be handled with caution. Each application should be judged on its own merits.

21. When is a person regarded as mentally ill for the purposes of the Mental Health Act 18 of 1973? (1)

A person is regarded as insane for the purposes of the Mental Health Act 18 of 1973 if he or she is mentally ill to such a degree that it is necessary that he or she be detained, supervised, controlled and treated.

22. According to the Supreme Court of Appeal (in Lange v Lange 1945 AD 332) a person is regarded as mentally ill for the purposes of private law in two instances. Name these two instances. (2)

According to the Supreme Court of Appeal (in Lange v Lange 1945 AD 332) a person is regarded as insane for the purposes of private law in the following two instances:

- **if the person cannot understand what he or she is doing or what the legal consequences of his or her actions are**
- **where the person does, in fact, realise what the legal consequences of his or her actions are but is motivated by delusions which are a result of his or her mental illness**

23. If a person has been influenced by alcohol or drugs to the extent that the person does not know what he or she is doing or what the consequences of his or her juristic acts are, those acts are
 (Write down only the missing word.) (1)

The missing word is "void"

24. In *Pinchin v Santam Insurance Co Ltd* 1963 (2) SA 254 (W) it was decided that a child does have an action to recover damages for pre-natal injuries. Authors have different viewpoints on the applicability of the *nasciturus* fiction in the field of the law of delict. What are the views of the following authors on this issue?:

(a) Joubert (4)

Some authors, such as Joubert are of the opinion that it is unnecessary to invoke the *nasciturus* fiction under circumstances like these. He argues that in the *Pinchin* case the *nasciturus* fiction was applied to a case in which it was never used at common law and for which it was never intended. At common law it was applied in cases relating to succession and to the status of the child. The question which arose in the *Pinchin* case could have been solved without bringing the *nasciturus* fiction into the issue, since one could argue that the defect from which the child suffers after birth was caused by the action of the driver of the car before the child's birth. The fact that the defect manifests itself only after birth makes no difference: the child is now a person who suffers from a defect caused by the delict committed by the driver of the car. According to Joubert it is unnecessary to base the child's action for damages on the *nasciturus* fiction

(b) Boberg (4)

Boberg, on the other hand, argues that the *nasciturus* "rule" should be applied to award an action for prenatal injury. The child does not suffer damage only at birth, but simply continues to suffer the damage which he or she sustained before birth. When the child began to suffer damage it was not

a person, and therefore the *nasciturus* "rule" has to be applied to give an action for prenatal injury

25. At which moment does legal subjectivity begin according to the supporters of the *nasciturus* fiction and the *nasciturus* rule respectively? (2)

According to the supporters of the *nasciturus* fiction legal subjectivity begins only at birth. According to the supporters of the *nasciturus* rule legal subjectivity already begins at conception.

26. Mr X has been missing for 10 years since the light aeroplane in which he was travelling disappeared without a trace off the Natal coast. Mrs X has trouble administering her husband's large estate. She applies for a presumption of death with regard to her husband, but her application is unsuccessful. Advise her on possible solutions to her problem. (5)

If the court refuses to express a presumption of death it may nonetheless order that the missing person's property be divided among his or her heirs. On occasion, the courts order that the heirs must provide sufficient security for return of the property should the missing person reappear. In *In re Kannemeyer* (1899) 16 SC 407, K had been missing for 28 years. Because there was insufficient evidence of death the court merely ordered a division of his estate subject to the provision of. If the court refuses to express a presumption of death it may appoint a *curator bonis* to administer the missing person's affairs.

27. A, who has been domiciled in South Africa for the past 30 years, leaves the country with the intention never to return. He spends three weeks in Australia whilst deciding where to settle permanently. Where will he be domiciled during this period? Explain your answer briefly with reference to authority. (4)

In the past, a person's domicile of origin revived if the person abandoned his or her domicile of choice without acquiring a new domicile. This position has now been changed by the Domicile Act 3 of 1992. The Domicile Act provides that no person will lose his or her domicile until he or she has acquired a new domicile, whether by choice or by operation of law, and, notwithstanding any law or the common law, no person's domicile of origin will revive except within the meaning of sections 1 or 2 (s 3(2)).

A will thus be domiciled in South Africa until he has acquired a new domicile of choice.

28. Anne and Ben, both unmarried, lived together for two years. When they separated, Anne was pregnant. She later gave birth to a son, John.

Ben contributed towards the hospital expenses and paid maintenance for John. Anne agreed that Ben could have access to his child. However, two years after John's birth, Anne refused to allow Ben any further access to his child. Ben approaches you for advice. Advise him fully, with reference to authority, on his position. (16)

In F v L 1987 (4) SA 525 (W), the court decided that a father does not acquire parental authority over his extra-marital child and, since access is a component of parental authority, the father does not have an inherent right of access to that child.

In B v P 1991 (4) SA 113 (T), the full bench of the Transvaal Provincial Division accepted the decision in F v L. The court added that the father may apply for an order granting him access to his child. He must then prove on a balance of probabilities that such an order will be in the best interests of the child, and that the order will not unduly interfere with the mother's right of custody-

In Van Erk v Holmer 1992 (2) SA 636 (W), the Witwatersrand Local Division held that the time had arrived for our courts to recognise the inherent right of access of the natural father of an extra-marital child. The acknowledgement of such a right is justified by considerations of justice, fairness, reasonableness and public policy. The access right should be denied only if it would be contrary to the best interests of the child.

In B v S 1995 (3) SA 571 (A), the Supreme Court of Appeal held that since access is an incident of parental authority, and since the father of an extra-marital child has no parental authority in respect of that child, the father has no inherent right of access to his child. If, at all, there is a question of an inherent entitlement, it is that of the child, if it is in his or her best interests. The court rejected the decision in Van Erk v Holmer and confirmed the full bench decision in B v P. The Supreme Court of Appeal added that if the parents of an extra-marital child cannot agree on whether access would be in the best interests of the child and they are compelled to go to court, it seems just and equitable that the court should, inter alia, take the following into consideration:

- the degree of commitment which the father has shown towards the child
- the degree of attachment which exists between the father and the child
- the reasons of the father for applying for the order

In T v M 1997 (1) SA 54 (A), the Supreme Court of Appeal held that,

whether or not access is granted is not dependent on the legitimacy of the child, as it used to be in common law, but that each case depends wholly on the welfare of the child. It therefore is the child's right to have access, or to be spared access, and not the mother's or father's right.

In terms of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 the unmarried father may apply for access. He will succeed only if he can prove that access will be in the best interests of the child. The court must consider certain factors, such as the relationship between the child's mother and his or her natural father, and the attitude of the child, when evaluating the application.

The existing legal position amounts to unfair discrimination against both the extra-marital child and his or her father, and is thus in contravention of section 9 of the Constitution of the Republic of South Africa 108 of 1996.

29. What do you understand by the following concepts?

(a) obligation (2)

An obligation is a juristic bond in terms of which the party or parties on the one side have a right to performance and the party or parties on the other side have a duty to render performance.

(b) multilateral contract (2)

A multilateral contract is a contract in terms of which more than one party undertakes to render a performance.

(c) ratification (2)

Ratification is that behaviour whereby an error in a juristic act is rectified so that it acquires full validity retrospectively.

30. Sipho is 18 years old. He concludes a contract with Mr Molefe, an adult, to buy a second-hand car for R30 000. Sipho brings Mr Molefe under the false impression that he is 21 years old by producing a forged identity document. Sipho pays a deposit of R3 000 and Mr Molefe delivers the car to him. Sipho now refuses to pay the remainder of the contract price on the ground that he is a minor and therefore not liable in terms of the contract. Answer the following questions on this set of facts:

- (a) The generally accepted view is that the minor who has falsely misrepresented himself or herself as an adult should be held liable in these circumstances, but there is no consensus on what the basis for this liability should be. There are two possibilities. What are these possibilities? (2)

The first possibility is that the minor can be held liable on the basis that the contract he or she concluded is enforceable (ie, contractual liability). The second possibility is that the minor can be held liable on the basis of the delict he or she committed, namely misrepresentation (ie, delictual liability).

- (b) In *Louw v MJ 6- H Trust* 1975 (4) SA 268 (T) the court decided that a minor, who had bought a motor cycle from an adult without the assistance of his guardian, could not recover, by means of the *restitutio in integrum*, the purchase price already paid. The reason for this was that he had fraudulently misrepresented himself as an adult. Is there any other remedy that the minor can use to recover the purchase price already paid? (1)

Yes, the minor could have reclaimed that part of the purchase price already paid with the *condictio indebiti*. Since he was not bound by the contract he should be allowed to reclaim the money.

- (c) Would you say that it is acceptable to hold the fraudulent minor contractually liable in these circumstances? Substantiate your answer in a short paragraph. (4)

No, it is not acceptable to hold a fraudulent minor liable on the ground of the contract. Such liability would mean that a minor who contracts without the assistance of his or her guardian will be allowed to supplement his or her limited capacity by misrepresentation. This would be unacceptable. The minor's capacity to act is limited to protect the minor against his or her own lack of judgment. The purpose of this limitation is to protect the best interests of the minor.

- (d) A minor who makes a misrepresentation, commits a delict and can therefore be held delictually liable. This means that the prejudiced party has a claim for damages against the person committing the delict (the minor). What are the requirements for delictual liability in these circumstances? (3)

The requirements for delictual liability in these circumstances are the following: The minor will be liable only if he or she

made a misrepresentation regarding his or her majority or capacity to contract, if the other party to the contract was induced to contract by the misrepresentation, and if the other party suffered damage as a result of the misrepresentation.

- (e) Suppose that, in the question under discussion, Sipho was not old enough to be reasonably mistaken for a major. Can Sipho still be held delictually liable? Explain briefly. (2)

The general rule is that the minor, in order to be liable, should be old enough to be reasonably mistaken for a major. If, in the question, Sipho was not old enough to be reasonably mistaken for a major, he could not have been held delictually liable.

- (f) Is Mr Molefe entitled to accept Sipho's statement that he is of age, or is he obliged to enquire into the truth of Sipho's statement? Explain briefly. (3)

Yes, Mr Molefe can accept Sipho's statement regarding his age. The general rule is that the other party is under no obligation to inquire into the truth of the minor's statement. The other party is entitled to accept the minor's statement, unless he or she has good cause to believe that he or she is dealing with a minor. Since there is no indication in the question that Mr Molefe had reason to believe that Sipho was a minor, Mr Molefe was entitled to accept Sipho's statement, and he was under no obligation to inquire into the truth of Sipho's statement.

31. What is the age of majority in South African law? (1)

The age of majority in South African law is 18 years.

32. What do you understand by the concept "emancipation"? (2)

"Emancipation" refers to the freedom to contract independently granted to the minor by his or her guardian.

33. When is a person regarded as insane for the purposes of

- (a) the Mental Health Act 18 of 1973 (2)

A person is regarded as insane for the purposes of the Mental Health Act 18 of 1973 if the person is mentally ill to such a degree that it is necessary that he or she be detained, supervised, controlled and treated.

- (b) private law? (Refer to authority for your answer in (ii).) (3)

According to the Supreme Court of Appeal (in *Lange v Lange* 1945 AD 332) a person is regarded as insane for the purposes of private law in the following two instances:

- **if the person cannot understand what he or she is doing or what the legal consequences of his or her actions are**
- **if the person does, in fact, realise what the legal consequences of his or her actions are but is motivated by delusions which are a result of his or her mental illness.**

34. Briefly indicate how intoxication affects a person's capacity to act. (2)

If a person has been influenced to the extent that the person does not know what he or she is doing or what the consequences of his or her juristic acts are, then those acts are void (not voidable). As regards the degree of intoxication, it is not sufficient that the person is influenced in such a way that it is merely easier to persuade that person to conclude the contract, or that the person is more willing to conclude the contract: the person must be influenced to such an extent that he or she does not have the faintest notion of concluding a contract, or of the terms of the contract. The contract will then be void.

35. Mr X disappeared seven years ago after going fishing on the rocks on a stormy day. Mrs X's application to the High Court to have a presumption of death expressed concerning her husband, was unsuccessful. Can Mr X's estate still be divided among his heirs? Discuss with reference to authority. (5)

In a given case the court may be of the opinion that the circumstances do not justify the granting of the order presuming death, but it may nonetheless order that the missing person's property be divided amongst his or her heirs. On occasion the courts have ordered that the heirs must provide sufficient security for the return of the property, or its value, should the missing person reappear.

In *In re Kannemeyer* (1899)16 SC 407, for example, K had been missing for 28 years. Because there was insufficient evidence of death the court merely ordered a division of his estate subject to the provision of security.

In Ex parte Pieters 1993 (3) SA 379 (D) (Casebook [6]) the court also refused to issue a presumption of death but was willing to order division of the missing person's estate. However, in this case the amount in the estate was so small that the court did not require security from the heirs.

36. Define the concept "domicile". (4)

Domicile is the place where, for the purpose of the exercise of his or her rights and the fulfillment of his or her obligations a person is deemed to be constantly present, even in the event of his or her factual absence.

37. Ben and Karin, both unmarried, were involved in a relationship as a result of which Karin fell pregnant. She gave birth to a girl three years ago. Ben requested Karin to submit herself and her daughter to blood tests in order to attain certainty on whether he could be the father of the child. However, she refused. With reference to case law, discuss the question whether the court can compel Karin to submit herself and her daughter to blood tests. (16)

In cases where blood tests are submitted to voluntarily, the courts accept blood tests as sufficient proof that a man cannot be a child's father. However, there is no certain answer to the question of whether the court may compel a person to undergo blood tests despite that person's refusal.

The following cases deal with the question of whether the court can compel children to undergo blood tests despite the parent's refusal: In *O v O* 1992 (4) SA 137 (C), *Seetal v Pravitha* 1983 (3) SA 827 (D) and *M v R* 1989 (1) SA 416 (O) the courts decided that they could order a child to be submitted to blood tests despite the parent's refusal, if the tests are in the best interests of the child.

However, in *S v L* 1992 (3) SA 71 3 (E) the court decided that it did not have the power to interfere with the decision of the mother that the child should not undergo blood tests, even if the court would have come to a different decision. The court held that ordering someone to submit to a blood test is not merely a procedural order.

The following cases deal with the question whether the court can compel adults to undergo blood tests in spite of the parent's refusal: In *M v R* above the court decided that it did have

the power to compel an adult to undergo blood tests in order to establish paternity, since the High Court has the inherent power to regulate its own procedures.

In S v L above and Nell v Nell 1990 (3) SA 889 (T), the courts decided that they did not have the power to compel an adult to undergo blood tests, because such an order was not merely a procedural order.

In O v O above, the court stated that there was no statutory or common-law power enabling the court to order an adult to undergo blood tests for the purpose of establishing paternity.

Section 2 of the Children's Status Act 82 of 1987 creates a presumption that, if a party in a paternity dispute has been requested by the other party to submit himself or herself, or the child over whom he or she has parental authority, to blood tests, and he or she refuses to do so, that party wishes to conceal the truth concerning the child's paternity.

Cronje & Heaton indicate that it may be argued that an order compelling a person to undergo blood tests infringes his or her right to privacy and bodily and psychological integrity (which includes the right to security in and control over the body, as well as the right not to be subjected to medical or scientific experiments without informed consent.

They add that the infringement of the rights of privacy and bodily integrity would be justifiable if it were in the best interests of the child to determine paternity by ordering a person to undergo a blood test.

38. Thembi is seventeen years old. She decides to buy a second-hand car. She visits Mrs Bester, a dealer in second-hand cars. Without the assistance or consent of her guardian, Thembi concludes a contract of sale with Mrs Bester. In terms of the contract, Mrs Bester sells Thembi a car at the discount price of R25 000. The actual value of the car at the time of the conclusion of the contract is R30 000. During the negotiations Thembi tries to represent herself as a major, but it is obvious to Mrs Bester that she is dealing with a minor.

On 20 April, two weeks after the car is delivered to Thembi, she sells it for R20 000. She spends R15 000 of this money on a luxury lounge suite, and the remaining R5 000 she uses to pay for her lodging. She

does not pay any of her debt to Mrs Bester. On 3 May, Mrs Bester institutes an action against Thembi.

- (a) On what basis could Thembi be held liable to Mrs Bester? Explain briefly. (2)

The basis of liability is undue enrichment. Thembi cannot be held delictually liable on the basis of the misrepresentation, since it was obvious to Mrs Bester that she was dealing with a minor (one of the requirements for delictual liability are thus not present).

- (b) At which moment should the extent of the minor's enrichment be calculated? What is that date in the question under discussion? (2)

The moment on which the calculation must be made is *litis contestatio*. In the question under discussion *litis contestatio* took place on 3 May.

- (c) One of the principles that are applied when calculating the extent of the minor's enrichment, is that the minor is liable for the lesser of two specific amounts. What are these two amounts? (2)

The relevant two amounts are the amount by which the other party's estate is decreased as a result of the performance, and the amount by which the minor's estate is increased as a result of the performance. Both these amounts are based on the actual value of the performance, not the contract price.

- (d) Write down the amount of Thembi's enrichment (1)

The amount of Thembi's enrichment is R20 000.

39. Mr Modise's will contains the following clause:

"My daughter, Linda, inherits R90 000 and her children who are alive at the date of my death. each inherits R40 000."

Mr Modise dies on 15 August 2004. Linda's third child, Peter, is born on 18 September 2004. Linda has two other children, Matome and Sarah.

- (a) Who will inherit from Mr Modise? Explain your answer with reference to authority. (5)

**Linda, Matome, Sarah and Peter will all inherit from Mr Modise.")
Linda, Matome and Sarah will inherit from Mr Modise in terms of**

the express provisions of Mr Modise's will from which it is clear that he intended them to inherit. Peter will inherit testate in terms of the nasciturus fiction.") In terms of the nasciturus fiction, if a situation arises where it would have been to the advantage of the nasciturus if he or she had already been born, the law protects his or her potential interests.") This is done by the implementation of the fiction that the nasciturus is regarded as having been born at the time of his or her potential interests are at stake. In *Ex parte Boedel Steenkamp* 1962 (3) SA 954 (O) it was held that the words "wat by datum van dood in die lewe is" in the testator's will were not enough to rebut the strong natural presumption that the testator intended to include the nasciturus and that the nasciturus should therefore inherit. Therefore if a testator appoints his heirs as members of a class, a child in that class who was already conceived at the time of the testator's death but was born only after the testator's death, can also inherit. Accordingly Peter can inherit because he too is a member of the class Mr Modise indicated as his heirs.

- (b) What would the position have been if Peter died while his mother was giving birth to him? (3)

In this case only Linda, Matome and Sarah will inherit from Mr Modise. Peter does not qualify for protection under the nasciturus fiction because, for the fiction to come into operation the child must subsequently be born alive. If the child is not born alive he or she is considered as never even having been conceived. Peter therefore never obtained legal personality and cannot inherit.

40. Briefly discuss the court's decision on the constitutionality of the Choice on Termination of Pregnancy Act 92 of 1996 in *Christian Lawyers Association of South Africa v The Minister of Health* 1998 (4) SA 11 13; [1998] 11 BCLR 1434 (T). (5)

In *Christian Lawyers Association of South Africa v The Minister of Health* the plaintiffs contended that the Choice on Termination of Pregnancy Act is unconstitutional. They argued that human life starts at conception and that the Act contravenes section 11 of the Constitution (the right to life). They sought a declaratory order striking down the Act in its entirety. The defendants excepted to the plaintiffs' particulars of claim inter alia on the ground that it did not disclose a cause of action because section 11 does not confer any right on a fetus. The court upheld the exception, holding inter alia that no provision of the Constitution bestows legal personality or protection on the fetus, and that the

Constitution does not qualify a woman's right to make decisions about reproduction and her right to security in and control over her body in order to protect the fetus submit that the outcome of the case is correct. The law grants rights and obligations only to legal subjects. In the absence of a clear provision elevating the unborn child's status to that of a legal subject the Constitution cannot be said to have conferred any rights on unborn children. An allegation that human life begins at conception is clearly an insufficient basis on which to found the argument that a fetus has a right to life as "life" is not the determinant in respect of legal personality.

41. Xavier and Yvonne, both South African citizens who are domiciled in South Africa, decide to get married in Canada during their holiday there.
- (a) Which legal system determines whether Xavier and Yvonne may enter into a valid marriage? Explain your answer. (2)

The law which determines a person's status is the law which is in force at the place where that person is domiciled, that is, his or her *lex domicilii*. Therefore South African law will be applied to determine whether Xavier and Yvonne may marry each other because they are both domiciled in South Africa.

- (b) Which legal system determines Xavier and Yvonne's matrimonial property system? Explain your answer. (2)

The *lex domicilii* of a man at the time of his marriage dictates what the matrimonial property regime of the marriage will be. Therefore South African law will determine Xavier and Yvonne's matrimonial property system.

- (c) Suppose Xavier and Yvonne are validly married to each other and that Xavier is domiciled in Pretoria. Can Yvonne, being a married woman, acquire a domicile of choice elsewhere in terms of South African law? Very briefly explain your answer with reference to authority. (3)

Section 1(1) of the Domicile Act 3 of 1992 provides that every person who is 18 years old or above, as well as every person under the age of 18 who has acquired the status of a major is competent to acquire a domicile of choice, regardless of such a person's sex or marital status. Therefore

Yvonne, being a married woman, can indeed acquire a domicile of choice elsewhere.

42. Mavis and James, both unmarried, are involved in a sexual relationship as a result of which Mavis becomes pregnant. When Mavis is four weeks pregnant, she catches James in bed with another woman. Mavis terminates her relationship with James. Immediately thereafter, she meets Trevor. She does not disclose her pregnancy to Trevor. A month later she and Trevor get married. Seven months after their wedding, she gives birth to a baby boy, Sammy. Trevor suspects that Sammy is not his biological son and requests Mavis to submit herself and Sammy to blood tests to obtain certainty as to the child's paternity. Mavis refuses to do so.

(a) What is the presumption of paternity regarding a child who is born to a married woman? (2)

There is a rebuttable presumption in our law that a child born from a woman who was legally married at the time of the child's conception or birth, or at any intervening time is the child of that woman's husband and not some third party. Therefore the child is presumed to be the couple's legitimate child. The presumption is expressed in the maxim pater est quem nuptiae demonstrant (the marriage indicates who the father is).

(b) Fully advise Trevor on whether the court can compel Mavis to submit herself and Sammy to blood tests. Substantiate your answer with reference to authority. (15)

In cases where blood tests are submitted to voluntarily, the courts accept blood tests as sufficient proof that a man cannot be a child's father. However, there is no certainty as to whether the court can compel a person to undergo blood tests despite that person's refusal. The following cases deal with the question whether the court can compel children to undergo blood tests despite the parent's refusal: In *O v O* 1992 (4) SA 137 (C), *Seetal v Pravitha* 1983 (3) SA 827 (D) and *M v R* 1989 (1) SA 416 (O) the courts decided that they could order a child to be submitted to blood tests despite the parent's refusal, if the tests are in the best interests of the child.

However, in *S v L* 1992 (3) SA 713 (E) the court decided that it did not have the power to interfere with the decision of the mother that the child should not undergo blood tests, even if the court would have come to a different decision. The court held that

ordering someone to submit to a blood test is not merely a procedural order. The following cases deal with the question whether the court can compel adults to undergo blood tests despite their refusal to do so: In *M v R* above the court decided that it does have the power to compel an adult to undergo blood tests in order to establish paternity, since the high court has the inherent power to regulate its own procedures.

In *S v L* above and *Nell v Nel* 1990 (3) SA 889 (T) the courts decided that they do not have the power to compel an adult to undergo blood tests, because such an order is not merely a procedural order.

In *O v O* above, the court stated that there was no statutory or common-law power enabling the court to order an adult to undergo blood tests for the purpose of establishing paternity.

Section 2 of the Children's Status Act 82 of 1987 creates a presumption that, if a party in a paternity dispute has been requested by the other party to submit himself or herself, or the child over whom he or she has parental authority, to blood tests, and he or she refuses to do so, that party wishes to conceal the truth concerning the child's paternity.

Cronje & Heaton indicate that it may be argued that an order compelling a person to undergo blood tests infringes his or her right to privacy and bodily and psychological integrity (which includes the right to security in and control over the body, as well as the right not to be subject to medical or scientific experiments without informed consent).

They add that the infringements of the rights of privacy and bodily integrity would be justifiable if it were in the best interests of the child to determine paternity by ordering a person to undergo blood tests.

43. Absalom is a 17-year-old minor who lives with his parents. While his parents are overseas for three months, he learns that Martin wants to sell his BMW for R140 000. Absalom enters into a purchase agreement with Martin, who is 30 years of age. Martin knows that Absalom is 17 years of age. In terms of the agreement, Absalom undertakes to pay a deposit of R15 000 and to pay the rest of the purchase price by way of 48 monthly instalments of R3 500 each.

He uses R15 000 he received as a gift for his 16th birthday to pay the deposit. As Absalom wants to surprise his parents upon their return to South Africa by arriving at the airport in the BMW, he hides the purchase from them. The month after purchasing the BMW from Martin, Absalom pays the first instalment of R3 500 to Martin. Two days later the BMW is seriously damaged when a truck crashes into it. Absalom is unhurt. The BMW, which was uninsured, is now worth only R25 000. When the next instalment falls due, Absalom relies on his minority and informs Martin that he will not be paying any further amounts to him. Absalom has still not told his parents that he bought the BMW, and is now hoping that they will never discover that he bought a vehicle without their consent and drove around without a driver's licence in an uninsured vehicle. When Martin consults his attorney, he learns that Absalom is not contractually bound to pay the outstanding instalments, but that Absalom could be sued on the ground of undue enrichment. Explain what liability on the ground of undue enrichment entails, and what amount Martin could claim with this remedy. (6)

Liability on the ground of undue enrichment arises if one person obtains a patrimonial advantage (that is, is enriched) at the expense of another in the absence of a recognized legal ground justifying the enrichment. The enrichment claim is limited to the lesser of either the amount by which the enriched person's estate remains enriched at the date of institution of the action or the amount by which the other person's estate remains impoverished at that date. In arriving at this amount the contract price is ignored and the actual value of the asset at the time of institution of the action is used. Accordingly, if the value of the asset has decreased by the time the action is instituted, it is the decreased value that is used. If the asset was lost prior to institution of the action, the impoverished party cannot claim anything. If the asset was alienated, the impoverished party can claim only what is left of the proceeds, unless the enriched party used the proceeds to obtain necessaries. In the latter case, the cost of the necessaries is the value that is used to determine the amount of the enrichment even if nothing remains of those necessaries. In the present case, Absalom can be sued for the value of the BMW at the time of the institution of the action, that is, R25 000.

44. Maria, a 17-year-old minor, concluded a contract with Mrs King, an adult, to rent a bachelor flat. In terms of the contract Maria has to pay Mrs King the exorbitant amount of R3 500 per month rent for the flat. Maria's father was unaware of the contract. When Maria later had difficulty in paying the rent, she telephoned her father and told him

about the contract, whereupon he gave her money to pay six months' rent. Discuss in detail whether, and if so, under what circumstance, the contract between Maria and Mrs King can be set aside. (14)

The general rule concerning the minor's contractual liability is that minors between the ages of seven and 18 have limited contractual capacity, in other words, they cannot be liable for the fulfillment of the contract if they are not assisted by their guardian in concluding the contract. The assistance of the guardian may take various forms. In the first place the guardian can contract on behalf of the minor, and secondly, the minor can enter into the contract himself or herself with the consent of the guardian, or, as in the given facts, the guardian can ratify the agreement after it has been concluded. Ratification can take place expressly or tacitly. The effect of proper assistance by the minor's guardian is that the minor is liable *ex contractu* as if he or she were a major. However, a contract a minor concluded with his or her guardian's assistance, and a contract a minor concluded without his or her guardian's assistance but which was subsequently ratified can be set aside by means of *restitutio in integrum*.

***Restitutio in integrum* is an extraordinary legal remedy whereby a minor can escape liability if he or she contracted with the assistance of his or her guardian (other guardian contracted on his or her behalf) and the contract was prejudicial to the minor at the time it was made.**

The requirements for granting *restitutio in integrum* are that the minor concluded the contract with the assistance of his or her guardian or the guardian concluded the contract on behalf of the minor, and the contract must be prejudicial to the minor at the moment it is made. The purpose of *restitutio in integrum* is to place both parties in the position they would have been in had they never entered into the contract. Each party must return everything received under the contract, as well as the proceeds or any advantage derived from the contract. Each party must also compensate the other for any loss he or she has suffered as a result of the contract. The minor may apply for *restitutio in integrum* before he or she attains majority or his or her guardian may apply for it on his or her behalf. The minor may also await his or her majority and then sue for *restitutio in integrum*. Maria is a minor and therefore has limited contractual capacity but her agreement with Mrs King was tacitly ratified by her father when he gave her money to pay six months' rent. Maria is therefore liable *ex contractu* as if she were a major. Maria can however apply for

restitutio in integrum as both requirements for this remedy have been met. Firstly, Maria concluded the contract and the contract was later ratified by her father and, secondly, the contract was prejudicial to her because she had to pay an exorbitant rent for a bachelor's flat. Therefore, Maria will have to vacate the flat and Mrs King will have to return all the rent she has received from Maria in terms of this contract.

45. Edna and Brian were married two years ago. At that stage, Edna was 18 years old and Brian was 24 years old. Because Edna's parents were opposed to them getting married, Edna and Brian married without Edna's parent's consent. Last week Edna's parents became aware of the marriage. They would like to have the marriage dissolved. They are unsure whether the marriage can be dissolved and approach you for advice.

- (a) Under what circumstances and by whom can a marriage be dissolved as a result of the failure of a minor to obtain consent to get married? (3)

The marriage may be set aside by the court on application by:

- **the parents or guardian before the minor attains majority and within six weeks from the date on which they become aware of the existence of the marriage, or**
- **the minor before attaining majority or within three months thereafter**

- (b) Can Edna and Brian's marriage be dissolved? (1)

No, this marriage cannot be dissolved anymore, because Edna is already 20 years old

46. Donald, a 17-year old minor, lives and works in Pretoria while his parents live in Cape Town. He has a bank account in which his salary is deposited, and he fully supports himself. He rents a flat from Fred and pays his rent monthly by cheque. The last two cheques were dishonoured when they were presented for payment. Donald refuses to pay for the rent because he is a minor and therefore does not have capacity to contract. Fred now approaches you for advice. Advise him with reference to authority. (3)

Although Donald is a minor, he is emancipated. Emancipation occurs if the guardian grants the minor the freedom independently to contract. Whether a minor has been emancipated is a question of fact. Factors such as whether the minor lives on his own and manages his own business, his age, the relationship between the minor and his guardian, the nature of his occupation, and the length of time for which he has been working, are taken into account to determine whether the minor has been emancipated.

In the present case the minor lives on his own far away from his parents, and he supports himself. He has therefore probably been emancipated.

In Dickens v Dale 1956 (2) SA 11 (N) the court decided that it depends on the facts and circumstances of the case whether the minor was emancipated regarding all contracts, or only to conclude contracts dealing with his or her occupation or business. In this case the facts were every similar to those in the question, and the court decided that the minor was responsible for payment of the rent.

It was also decided in Watson v Koen 1994 (2) SA 489 (0) that the extent of the emancipation is a question of fact depending on the circumstances of each case. It thus appears as if Donald will have to pay the rent.

47. **Gehard, a married man, was recently declared a prodigal by the court and was interdicted from administering his estate. He wants to know from you what a prodigal is and what the effect of the order is. Explain these matters to him. (5)**

A prodigal is someone with normal mental ability who is incapable of managing his or her own affairs because he or she squanders his or her assets in an irresponsible and reckless way due to some defect in his or her power of judgment or character. Because he was also interdicted from administering his estate, Gerhard's legal position is analogous to that of a minor. A curator bonis is appointed to administer his estate. Gerhard can therefore only enter into a transaction if he is assisted by his curator or if the curator acts on his behalf.

48. **Because X was missing for ten years after the light aeroplane in which he was a passenger disappeared without a trace somewhere over the war-ravaged Angola, his wife, Y successfully applied for an order presuming**

his death in terms of the common law. She has now met Z, and would like to marry him. Explain her legal position with reference to authority. (4)

Section 1 of the Dissolution of Marriage on Presumption of Death Act 23 of 1979 stipulates that the court which expressed a presumption of death may, at the request of the remaining spouse, make an order dissolving the marriage as from the date determined by the court. Such an order can be made at the same time as the presumption of death is made or at any time thereafter, in other words, by means of a separate application. If such an order is made, the marriage is deemed to be dissolved for all purposes. In accordance with the wording of the Act, the court is not bound to grant the application but has a discretion to refuse it.

49. Jennifer, an unmarried woman in a same-sex life partnership, gives birth to a daughter, Amy. Amy was conceived using donor sperm. The couple now approach you for advice on the issue of Amy's legitimacy. Fully advise them with reference to case law. (6)

In terms of the Children's Act 38 of 2005 a child who is born to spouses who consented to the use of another person's gamete or gametes for purposes of artificially fertilising the wife, is deemed to be the couple's legitimate child. The inapplicability of section 5 to lesbian life partners was recently challenged in *J v Director General, Department of Home*. The constitutional court found that the section discriminates unfairly against same-sex life partners on the ground of their sexual orientation and that the discrimination cannot be justified in terms of the limitation clause in the Constitution. It was ordered that the unconstitutionality be cured by *inter alia* striking out the word "married" and reading in the phrase "or permanent same-sex life partner" in several places in the section. The result is that a child who is born as a consequence of artificial fertilization of a woman who is a partner in a same-sex life partnership is now also covered by section 5 of the Children's Status Act and is deemed to be the same-sex partners' legitimate child. Therefore, Amy is the same-sex life partners' legitimate child.

50. What remedy is available to a minor who has concluded a contract without the assistance of his or her guardian, to recover performance that he or she has already rendered in the following cases?
- (a) where the minor's performance consisted of money (1)

The remedy is *condictio*

- (b) where the minor's performance consisted of something other than money (1)

The remedy is *rei vindicatio*

51. Suppose that a minor concluded a contract with the assistance of his or her guardian and the contract was prejudicial to the minor:
- (a) What remedy can the minor use to escape contractual liability? (1)

The remedy is *restitutio in integrum*

- (b) List the two requirements for the application of the remedy in (a) above. (2)

The two requirements for this remedy are first of all that the minor should have concluded the contract with the assistance of his or her guardian or that the guardian should have concluded the contract on behalf of the minor, and secondly that the contract should have been prejudicial to the minor at the moment it was made.

- (c) What can be recovered with the remedy in (a) above? (4)

The purpose of *restitutio in integrum* is to place both parties in the position they would have been in had they never entered into the contract. Each party must thus return everything received under the contract, as well as the proceeds or any advantage derived from the contract. He or she must also compensate the other party for any loss he or she has suffered as a result of the contract.

52. Define the benefit theory as introduced into our law in the case of *Nel v Divine Hall & Co* (1890) 8 SC 16. (2)

In terms of this theory, once the contract, taken in its entirety, is to the minor's benefit the minor is contractually liable.

53. Ben is 17 years old. He concludes a contract with Mrs Shabangu, an adult, to buy a second-hand computer for R3 500. Ben brings Mrs Shabangu under the false impression that he is 17 years old by producing a forged identity document. Ben pays a deposit of R350 and Mrs Shabangu delivers the computer to him. Ben now refuses to pay the remainder of the purchase price on the ground that he is a minor and therefore not liable in terms of the contract.
- (a) A minor who makes a misrepresentation (like Ben did in this question) commits a delict and can therefore be held delictually liable. This means that the prejudiced party has a claim for

damages against the person committing the delict (the minor). What are the requirements for delictual liability in these circumstances? (3)

The minor will be liable only if he or she made a fraudulent misrepresentation regarding his or her majority or capacity to contract, if the other party to the contract was induced to contract by the misrepresentation and if the other party suffered damage as a result of the misrepresentation.

- (b) Can Ben recover his deposit? Briefly explain your answer with reference to authority. (3)

No, in *Louw v MJ & H Trust* the court decided that a minor who had bought a motor cycle from a major without the assistance of his guardian, could not recover the purchase price already paid. The reason for this was that he had fraudulently misrepresented himself as an emancipated minor at the time of the conclusion of the contract.

54. List the entities that are recognised as juristic persons in our law.

- (a) **Associations incorporated in terms of general enabling legislation. Banks, for example, are juristic persons.**
- (b) **Associations especially created and recognised as juristic persons in separate legislation. Universities, for example, are juristic persons.**
- (c) **Associations which comply with the common-law requirements for the recognition of legal personality of a juristic person.**

55. In our law there is a rule that the nasciturus of a father who died as a result of another person's delict may institute a claim for damages, owing to loss of maintenance after his or her birth, against the person who caused the death of his or her father.

- (a) In what case was this rule laid down?

Chisholm v ERP

(b) On what basis will the damages be calculated in such an instance?

The damages are calculated on the basis that the child is placed, as far as maintenance is concerned, in the position he or she would have been in had the father not been killed

56. May the parents of an unborn child validly agree that the father will not be held responsible for the maintenance of the child after his or her birth? Give authority for your answer.

No. In *Shields v Shields* it was held that such an agreement is invalid, because it is contrary to good morals or the legal convictions of the community.

