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INDEPENDENT MODERATOR : PROF E. COUZENS

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INSTRUCTIONS

1. This paper consists of FOUR (4) pages. Please make sure you have them all.
2. This paper consists of FOUR 4 QUESTIONS. You are required to answer any THREE (3) of the FOUR (4) questions.
3. Students are requested, in their own interests, to write legibly.
QUESTION 1

A nightclub opened early last month in Bellville. This event has resulted in an outcry from residents in the area, who say they have had to endure sleepless nights because of the noise from the club, which is in a warehouse. Residents allege that the owner of the nightclub has illegally established his business in a residential area.

The owner of the nightclub alleges that he was granted a licence to operate his business. It would seem, however, that the license is nonspecific to the premises where the nightclub is presently being conducted.

The owner of the nightclub denies that his business is illegal and dismisses the complaints saying 'It's time that people woke up in this area. They are behind the times and besides, in terms of the Constitution, a man is allowed to earn his living however he likes. We're starting with soundproofing the ceilings. It's costing us a mega amount of money. We're a new club, so we don't really have a budget. We had eight bass speakers; we have reduced it to four. We built the windows closed, so there's no more sound coming through them. The problem will be totally solved in a month or two. We ask a bit of patience.'

Residents, on the other hand, say that the music is clearly audible and the vibrations are felt as far away as six houses down the road from the warehouse.

Mr Wilkie, who lives within 500 metres of the warehouse, tells how his prizewinning Chihuahua dogs have become completely hysterical and almost uncontrollable since the nightclub started. He fears that his dogs will no longer be able to participate in competitions and he depends on the prize money to augment his state pension of R540 per month.

The Clinton family has a new baby born prematurely. Neither Mrs Clinton nor the baby is able to rest and the baby was recently re-admitted to hospital, suffering from dehydration. The doctors believe that the noise is contributing to the baby's failure to thrive.

Write an answer in which you explain what is meant by the concept of a “nuisance”. In your answer you must also set out and discuss the test applied by the courts in order to determine whether a landowner’s conduct is unlawful and thus a nuisance. In your answer you should advise Mr Wilkie and the Clinton family as to their chances of success, should they seek legal relief against the nightclub owner on the basis of the nuisance. You should advise Mr Wilkie and the Clinton family as to any specific defences which the nightclub owner might raise. You should refer to case law if possible and appropriate.

[Total Q1: 20 Marks]
QUESTION 2

Answer question 2.1, question 2.2 and question 2.3

2.1 “Servitudes are either praedial or personal. Though they have a few features in common and are created and terminated in similar ways, there are various important differences between praedial and personal servitudes.” See CG van der Merwe “Servitudes” in LAWSA: First Reissue Vol 24 (2000) at para 388

Write a note in which you explain what is meant by a praedial servitude and a personal servitude. In your note you must also set out and discuss the differences between praedial and personal servitudes.

[Total 2.1: 10 marks]

2.2 In accordance with the maxim servitus in faciendo consistere nequit, write a note in which you explain what is meant by the “principle of passivity” and explain whether there are any exceptions to it. Refer to relevant case law.

[Total 2.2: 5 marks]

2.3 Write a note in which you explain whether a negative servitude may be acquired by prescription. In your note you must explain what is meant by the concept of a “positive servitude” and what is meant by the concept of a “negative servitude”.

[Total 2.3: 5 marks]

[Total Q2: 20 Marks]

QUESTION 3

3.1 Critically discuss the two theories that attempt to explain the distinction between real and personal rights.

[Total 3.1: 10 marks]

3.2 Explain and discuss fully, with reference to case authority, what an applicant for a mandament van spolie must prove in order to obtain relief when the interest protected is an incorporeal in the form of a right.

[Total 3.2: 10 marks]

[Total Q3: 20 Marks]
QUESTION 4

Jerry lives in Camperdown in KwaZulu-Natal and Oprah lives in Mdantsane, Eastern Cape. They both have very strong interests in race horses and each owns and races several horses. Jerry advertises that he has a horse for sale. Oprah comes to hear of the advert and travels to Camperdown to inspect the horse. The parties negotiate and Oprah pays the cash price, but just as Oprah is about to depart for the Eastern Cape with the horse, she and Jerry discover that there has been an outbreak of Foot and Mouth disease in the Camperdown area and a strict quarantine is in effect. No animals, including horses, may be removed from the Camperdown area for at least three weeks and then the removal will be subject to a permit being issued following an inspection by the State veterinarian. Oprah cannot, however, delay her departure as she has urgent business to attend to in Mdantsane and so she leaves the horse with Jerry.

Four weeks later, Oprah manages to arrange for a permit to be issued in accordance with the requirements and sends a horse box and her head groom to collect the horse. Jerry refuses to allow the horse to be removed, denying that the horse belongs to Oprah.

Oprah is most concerned and seeks your advice. She wants to know whether or not the horse is hers. She now wants to know whether she can claim the horse from Jerry using the rei vindicatio. Advise her on her chances of successfully claiming the horse. In your answer you should explain the elements of the rei vindicatio and should refer to case law, if possible and appropriate.

[Total Q4: 20 Marks]

TOTAL FOR PAPER: 60 MARKS