

FUR201F

(481940) October/November 2010

FUNDAMENTAL RIGHTS

Duration : 2 Hours

100 Marks

EXAMINERS :

FIRST :

MS I HARMS

MR TW MASEKO

MS A SPIES

SECOND :

PROF WB LE ROUX

This paper consists of five (5) pages

PLEASE PAY CAREFUL ATTENTION TO THE FOLLOWING:

- 1 ANSWER ALL FOUR QUESTIONS. DO NOT SEPARATE SUBSECTIONS OF THE QUESTIONS.
- 2 QUESTION 1 MUST BE ANSWERED ON A SEPARATE MARK READING SHEET.
- 3 TAKE NOTE OF THE WAY IN WHICH THE MARKS ARE ALLOCATED AND ADAPT YOUR ANSWER ACCORDINGLY.
- 4 REFER TO RELEVANT CASE LAW WHERE APPLICABLE.

QUESTION 1

Are the following statements TRUE or FALSE?

THIS QUESTION MUST BE ANSWERED ON THE MARK READING SHEET

- 1 Direct application of the Bill of Rights refers to the interpretation of legislation and the development of common law and customary law.
 - 1) True
 - 2) False (1)
- 2 The three forms of democracy recognised by the Constitution are representative democracy, participatory democracy and popular democracy.
 - 1) True
 - 2) False (1)
- 3 In the procedural stage of fundamental rights litigation the onus is on the applicant to prove or satisfy all of the issues dealt with. In the substantive stage the respondent bears the onus of showing that an infringement of a right has taken place.

TURN OVER

- 1) True
 2) False (1)
- 4 Franco Phile, a French soccer player, has a one-year contract to play for a South African club. Franco is entitled to vote in general elections.
1) True
 2) False (1)
- 5 A close corporation can invoke the right of access to information.
 1) True
2) False (1)
- 6 The Constitutional Court has exclusive jurisdiction to declare an Act of Parliament unconstitutional.
1) True
 2) False (1)
- 7 The interpretation clause dictates that a court, tribunal or forum **must** consider international law but **may** consider foreign law when interpreting the Bill of Rights. This implies that international law carries more weight than foreign law in the interpretation of the Bill of Rights.
 1) True
2) False (1)
- 8 Affirmative action programmes must:
• promote the achievement of substantive equality
• be designed to protect and advance persons disadvantaged by unfair discrimination
 1) True
2) False (1)
- 9 Our courts use a one-stage approach to the limitation of fundamental rights.
1) True
 2) False (1)
- 10 Formal equality refers to sameness of treatment. This means that the law must treat individuals the same regardless of their circumstances, because all persons are equal and the actual social and economic differences between groups and individuals are not taken into account.
 1) True
2) False (1)
- 11 In the *First Certification* case, the main objections against the inclusion of socio-economic rights in the Bill of Rights related to the doctrine of separation of powers and the issue of polycentricity.
 1) True
2) False (1)

- 12 In the *First Certification* case the Constitutional Court upheld both the objections related to the doctrine of separation of powers and the issue of polycentricity, against the inclusion of socio-economic rights in the Bill of Rights.
- 1) True
2) False (1)
- 13 In *S v Soobramoney* the Court defined emergency medical treatment for the purposes of section 27(3). The court stated that a person who experiences a sudden medical emergency that requires immediate remedial treatment or life saving treatment, may not be denied treatment or turned away by a hospital capable of providing the required treatment.
- 1) True
2) False (1)
- 14 In *Coetzee v Government of the Republic of South Africa* the groundwork for the Constitutional Court's approach to severance was laid down:
- It must be possible to sever the invalid provisions.
 - What remains must give effect to the purpose of the legislative scheme.
- 1) True
2) False (1)
- 15 Squatters may be evicted from land owned by the Pretoria City Council and their homes may be demolished on the basis of an administrative decision alone, provided fair procedure is followed, which includes a court order.
- 1) True
2) False (1)
- 16 The usual remedy after finding that a law or provision is inconsistent with the Constitution is "reading in".
- 1) True
2) False (1)
- 17 The purpose of the suspension of a declaration of invalidity of a section in an Act of parliament is to allow the legislature a specific period of time to correct the defect.
- 1) True
2) False (1)
- 18 The following amendment of the Constitution will be valid: Act 109 of 2005 amends section 11 (right to life) of the Constitution, by authorising Parliament to reinstate the death penalty outlawed in the Makwanyane case. The Act is adopted by one third of the members of the National Assembly and the National Council of Provinces.
- 1) True
2) False (1)
- 19 The Gauteng provincial government can invoke the right to equality
- 1) True
2) False (1)

- 20 The Bill of Rights applies to the imposition of a fine by a traffic officer.
 ① True (1)
 2) False
- 21 The Constitutional Court favours a broad approach to standing as opposed to a narrow approach.
 ① True (1)
 2) False
- 22 The Constitutional Court has jurisdiction in constitutional and non-constitutional matters.
 1) True (1)
 ② False
- 23 The "principle of avoidance" entails that indirect application of the Bill of Rights must be considered before direct application is undertaken (in cases where both are possible).
 ① True (1)
 2) False
- 24 A decision by the airport authorities that no public meetings will be allowed on the airport premises, qualifies as a law of general application even where such a decision has not been published.
 1) True (1)
 ② False
- 25 A provision in a law requiring all medical doctors (but not members of any other profession) to do community service, qualifies as a law of general application.
 ① True (1)
 2) False [25]

QUESTION 2

- 2.1 Who will bear the onus of proof at the different stages of litigation? *S21* (5)
- 2.2 Shortly after he had been appointed as CEO of Hot Property (a real estate agency), Mr Plum Pie was fired because he disclosed that he was HIV positive. He then became a member of an organisation called "Treating All Patients" (TAP), which aimed solely at advocating the rights of HIV-positive people. TAP wishes to institute an action in the Constitutional Court on behalf of Mr Plum Pie. Answer the following questions:
- (a) Does Mr Plum Pie have standing to approach the court? If so, on what grounds? (5)
- (b) Does TAP have standing to approach the court? Refer to case law - *Formosa & L. v. C. of Education* (10)
- 2.3 Give a short discussion on special limitations and give two examples of special limitations. (5)
 [25]

TURN OVER

QUESTION 3

- 3.1 Explain the role of public opinion in the interpretation of the Bill of Rights. Refer to relevant case law in your answer. (10)
- 3.2 How did the court approach the concept of proportionality in *S v Makwanyane*? (10)
weighing of competing values
- 3.3 How does section 6 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, which provides for the prevention of unfair discrimination, differ from section 9(3) of the Constitution? (5)
programmes & policies for previously disadvantaged against
↳ no unfair discrimination on listed grounds
when directly or indirectly
gender, race, sexual orientation cultural preferences [25]

QUESTION 4

- 4.1 Read the following statement carefully: "In terms of section 172(1)(b)(ii) of the Constitution, a court is empowered, after finding a law or conduct to be inconsistent with the Constitution, to temporarily suspend the effect of a declaration of invalidity". Answer the following questions:
- (a) What is the purpose of this power? (2)
- (b) What is the effect of such an order? (2)
- (c) What considerations will a court take into account when exercising this power? (6)
- 4.2 List five provisions in the Constitution which mention human dignity. *- S1 S* (5)
SFO
- 4.3 The Gauteng Department of Health decides to reduce the treatment given to Aids patients who have contracted tuberculosis. This is due to a shortage of funds and the Department's inability to meet the demands placed on it. However, painkillers and sedatives are still available. Is this decision constitutional? Substantiate your answer with reference to case law. (10)
↳ socio economic demands
progressively realisation of rights
Short & long term must be provided [25]

TOTAL: {100}