

FUR2601

(476896)

October/November 2016

FUNDAMENTAL RIGHTS

Duration 2 Hours

100 Marks

EXAMINERS

FIRST

SECOND

PROF A SPIES

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Closed book examination

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This exam paper consists of six (6) pages.

PLEASE PAY CAREFUL ATTENTION TO THE FOLLOWING:

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

TURN OVER

QUESTION 1**SUBSECTION A: ANSWER ON MARK READING SHEET**

Indicate whether the following statements are True or False

- 1 Vertical application of the Bill of Rights refers to the application of the Bill of Rights to a dispute between private parties, where the constitutionality of legislations is not at issue (2)
 - 1) True, vertical application of the Bill of Rights is only applicable between private parties
 - 2) False, vertical application refers to the application of the Bill of Rights to a dispute which concerns the constitutionality of legislation, or a dispute to which the state is a party
 - 3) False, the Bill of Rights can only be applied horizontally
 - 4) True, with vertical application of the Bill of Rights the constitutionality of legislation is always not at issue

- 2 The indirect application of the Bill of Rights means that law or conduct is found unconstitutional and a constitutional remedy is provided (2)
 - 1) False, the indirect application of the Bill of Rights means, that rather than finding law or conduct unconstitutional and providing a constitutional remedy, a court applies ordinary law, but interprets or develops it with reference to the values in the Bill of Rights
 - 2) True, indirect application of the Bill of Rights refers to unconstitutionality and always a constitutional remedy
 - 3) False, indirect application of the Bill of Rights refers to a combination of interpretation in accordance with the values of the Bill of Rights including awarding a declaration of invalidity
 - 4) The indirect application of the Bill of Rights means that law or conduct is found unconstitutional and a constitutional remedy is provided, only in relation to state conduct

- 3 The South African Broadcasting Corporation (SABC) can invoke the right to freedom of expression (2)
 - 1) True, because all the rights in the Bill of Rights are for everyone, which includes both natural and juristic persons
 - 2) False, because the nature of the SABC is such that exercising this right is not part of its business
 - 3) False, because the nature of this right is such that it cannot be exercised or invoked by a juristic person
 - 4) True, because there is nothing about the nature of this right that makes it impossible for juristic persons to invoke it

TURN OVER

- 4 To prove that one is acting in the public interest in terms of section 38(d) of the Constitution, one has to show that one is acting in the public interest and that the public has sufficient interest in the remedy (2)
- 1) False, to prove that one is acting in the public interest in terms of section 38(d) of the Constitution, one has to show that one is acting in the public interest and that the public has personal interest in the remedy sought
 - 2) False, section 38(d) of the Constitution does not allow a person to act in the public interest but restricts the grounds of standing to anyone acting as a member of, or in the interest of, a group or class of persons
 - 3) True, section 38(d) of the Constitution allows a person to act in the public interest if prior consent is obtained from individual members of the public which points to sufficient interest
 - 4) True, when acting in the public interest in terms of section 38(d) of the Constitution, one has to show that you are acting in the public interest and that the public has sufficient interest in the remedy
- 5 Immigration authorities are entitled to deport all illegal immigrants immediately, as they are not protected by the 1996 Constitution (2)
- 1) True, if the immigrants are not legally in the country they cannot lay claim to protection under the South African Constitution
 - 2) False, in terms of section 33 of the Constitution, every person has the right to just administrative action
 - 3) True, in terms of section 33 of the Constitution, only citizens have the right to just administrative action
 - 4) False, immigrants are entitled to all the rights in the Bill of Rights
- 6 The Constitutional Court has jurisdiction to hear any matter, if leave to appeal is granted and the matter is of such importance that it ought to be considered by the Constitutional Court (2)
- 1) False, in terms of section 167 of the Constitution the Constitutional Court can only hear constitutional matters
 - 2) True, section 167 of the Constitution has been amended by the Constitution Seventeenth Amendment Act of 2012 granting it jurisdiction to hear any matter
 - 3) False, in terms of section 167 of the Constitution the Constitutional Court can only hear constitutional and criminal matters
 - 4) True, section 167 of the Constitution has been amended by the Constitution Eleventh Amendment Act of 2012 granting it jurisdiction to hear any matter

TURN OVER

- 7 The Constitution makes provision that a matter can be brought directly to the Constitutional Court (2)
- 1) False, the Constitutional Court is only an appeal court and can never hear a matter directly
 - 2) True, the Constitution makes provision that any matter can be brought directly to the Constitutional Court
 - 3) True, the Constitution makes provision that a matter can be brought directly to the Constitutional Court, only if the matter is of such public importance or urgency that direct access will be in the interest of justice
 - 4) False, it is not the Constitution but only the rules of the Constitutional Court that allows for direct access
- 8 The purposive method of interpretation is in favour of rights and against their restriction (2)
- 1) True, the purposive method of interpretation entails drawing boundaries of rights as widely as the language in which they have been drafted and the context in which they are used will allow
 - 2) False, the purposive method of interpretation is the interpretation of a provision that best supports and protects the core values that underpin a society based on human dignity, equality and freedom
 - 3) False, the purposive method of interpretation refers to the textual interpretation of rights combined with a generous method of interpretation as indicated by the Constitutional Court in *S v Zuma*
 - 4) True, the purposive method of interpretation is in favour of rights but only in so far as they are textually qualified
- 9 Formal equality refers to sameness of treatment (2)
- 1) True, because this means that the law must treat individuals the same regardless of their circumstances
 - 2) False, because it requires an examination of the actual social and economic differences between groups and individuals
 - 3) True, because formal equality refers to the sameness of treatment only in the workplace
 - 4) False, because substantive equality refers to sameness of treatment
- 10 The general limitation clause can meaningfully be applied to all rights in the Bill of Rights (2)
- 1) True, because all rights are textually unqualified
 - 2) True, because all rights have demarcations
 - 3) False, because some provisions contain internal demarcations that repeat the phrasing of section 36
 - 4) False, because some provisions contain external demarcations that repeat the phrasing of section 36

[20]

TURN OVER

SUBSECTION B

- 1 Discuss the substantive stage of fundamental rights litigation (5)
[25]

QUESTION 2

- 2.1 Explain Chaskalson P's approach to standing in *Ferreira v Levin No*. Discuss the criteria used to establish whether or not an applicant has standing (10)
- 2.2 Does the Bill of Rights apply to the following?
- (a) a decision by Parliament to adopt a new Immigration Act (1)
 - (b) a decision by a private school to expel five learners (1)
 - (c) an interim interdict issued by a magistrates court (1)
 - (d) the requirement that only people between the ages of 20 and 40 may apply for membership of a gymnasium (1)
 - (e) a will in terms of which a female descendant is prevented from inheriting the deceased estate (1)
- 2.3 In which circumstances can a court avoid a declaration of constitutional invalidity by interpreting legislation in conformity with the Constitution? (5)
- 2.4 Discuss whether or not a magistrate's court may declare a municipal bylaw unconstitutional (5)
[25]

QUESTION 3

- 3.1 Is reading down a constitutional remedy? How does it differ from severance and reading in? (10)
- 3.2 What is the meaning of "context" in constitutional interpretation? (5)
- 3.3 Describe how (i) public international law and (ii) foreign law may influence the interpretation of the South African Bill of Rights (5)
- 3.4 What does "law of general application" mean? (5)
[25]

TURN OVER

QUESTION 4

- 4.1 Explain in your own words how the Constitutional Court approached the idea of unfair discrimination in *Harksen v Lane* (5)
- 4.2 Is section 9(2) of the Constitution, which provides for affirmative action measures, an exception to sections 9(3) and 9(4)? (5)
- 4.3 Mrs Molefe is a 43-year-old unemployed woman, who is gravely ill. She is diabetic, suffers from a rare heart disease and has chronic renal failure. The Department of Health in the North West province, where she resides, has refused to allow her access to renal dialysis facilities. The basis for the refusal by the Department relates to the fact that she does not satisfy the criteria laid down by it to ensure that maximum benefit is derived from the limited number of renal dialysis machines available in the province.

According to this decision, a patient suffering from chronic renal failure cannot be admitted automatically to the province's renal dialysis programme. Stringent requirements have to be met, inter alia, that a patient be eligible for a kidney transplant in order to qualify for the dialysis. Since Mrs Molefe suffers from a rare heart condition, she does not qualify for a transplant. She feels that the state hospital is obliged to provide her with the treatment as she cannot afford it herself. Answer the following questions.

- (a) Identify and explain any constitutional grounds on which Mrs Molefe might succeed with her objection to the ruling by the Department of Health (North West) (5)
- (b) Advise whether Mrs Molefe would have *locus standi* to raise such an objection to the Department's ruling. If she has, is the *locus standi* restricted to herself? (5)
- 4.4 What was the approach of the Constitutional Court to the justiciability of socio-economic rights in the *Certification* judgment? (5)

[25]**Total {100}**

PART 1 (GENERAL/ALGEMEEN) DEEL 1

STUDY UNIT (E.G. PSY100-K) / STUDE-EENHEID (B.V. PSY100-K) **3**

INITIALS AND SURNAME / VOORLETTERS EN VAN **4**

DATE OF EXAMINATION / DATUM VAN EKSAMEN **5**

PAPER NUMBER / VRAESTELNOMMER **2**

EXAMINATION CENTRE (E.G. PRETORIA) / EKSAMENSENTRUM (B.V. PRETORIA) **6**

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17 18 19 20 21 22 23 24	17 18 19 20 21 22 23 24
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33 34 35 36 37 38 39 40	33 34 35 36 37 38 39 40
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89 90 91 92 93 94 95 96	89 90 91 92 93 94 95 96
97 98 99 00 01 02 03 04	97 98 99 00 01 02 03 04

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 - CHECK THAT ONLY ONE ANSWER PER QUESTION HAS BEEN MARKED
 - DO NOT FOLD
- 1 GEBUIK SLEGS N HB-POTLOOD OM HIERDIE BLAD TE VOLTOOI
 - 2 MERK AS VOLG
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 - 4 VUL U STUDENTENOMMER VAN LINKS NA REGS IN
 - 5 KONTROLEER DAT U DIE KORREKTE STUDENTENOMMER VERSTREK HET
 - 6 KONTROLEER DAT DIE ONIEKE NOMMER REG INGEVUL IS
 - 7 MAAK SEKER DAT NET EEN ALTERNATIEF PER VRAAG GEMERK IS
 - 8 MOENIE VOU NIE

PART 2 (ANSWERS/ANTWOORDE) DEEL 2

1 c1 c2 c3 c4 c5	36 c1 c2 c3 c4 c5	71 c1 c2 c3 c4 c5	106 c1 c2 c3 c4 c5
2 c1 c2 c3 c4 c5	37 c1 c2 c3 c4 c5	72 c1 c2 c3 c4 c5	107 c1 c2 c3 c4 c5
3 c1 c2 c3 c4 c5	38 c1 c2 c3 c4 c5	73 c1 c2 c3 c4 c5	108 c1 c2 c3 c4 c5
4 c1 c2 c3 c4 c5	39 c1 c2 c3 c4 c5	74 c1 c2 c3 c4 c5	109 c1 c2 c3 c4 c5
5 c1 c2 c3 c4 c5	40 c1 c2 c3 c4 c5	75 c1 c2 c3 c4 c5	110 c1 c2 c3 c4 c5
6 c1 c2 c3 c4 c5	41 c1 c2 c3 c4 c5	76 c1 c2 c3 c4 c5	111 c1 c2 c3 c4 c5
7 c1 c2 c3 c4 c5	42 c1 c2 c3 c4 c5	77 c1 c2 c3 c4 c5	112 c1 c2 c3 c4 c5
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9 c1 c2 c3 c4 c5	44 c1 c2 c3 c4 c5	79 c1 c2 c3 c4 c5	114 c1 c2 c3 c4 c5
10 c1 c2 c3 c4 c5	45 c1 c2 c3 c4 c5	80 c1 c2 c3 c4 c5	115 c1 c2 c3 c4 c5
11 c1 c2 c3 c4 c5	46 c1 c2 c3 c4 c5	81 c1 c2 c3 c4 c5	116 c1 c2 c3 c4 c5
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15 c1 c2 c3 c4 c5	50 c1 c2 c3 c4 c5	85 c1 c2 c3 c4 c5	120 c1 c2 c3 c4 c5
16 c1 c2 c3 c4 c5	51 c1 c2 c3 c4 c5	86 c1 c2 c3 c4 c5	121 c1 c2 c3 c4 c5
17 c1 c2 c3 c4 c5	52 c1 c2 c3 c4 c5	87 c1 c2 c3 c4 c5	122 c1 c2 c3 c4 c5
18 c1 c2 c3 c4 c5	53 c1 c2 c3 c4 c5	88 c1 c2 c3 c4 c5	123 c1 c2 c3 c4 c5
19 c1 c2 c3 c4 c5	54 c1 c2 c3 c4 c5	89 c1 c2 c3 c4 c5	124 c1 c2 c3 c4 c5
20 c1 c2 c3 c4 c5	55 c1 c2 c3 c4 c5	90 c1 c2 c3 c4 c5	125 c1 c2 c3 c4 c5
21 c1 c2 c3 c4 c5	56 c1 c2 c3 c4 c5	91 c1 c2 c3 c4 c5	126 c1 c2 c3 c4 c5
22 c1 c2 c3 c4 c5	57 c1 c2 c3 c4 c5	92 c1 c2 c3 c4 c5	127 c1 c2 c3 c4 c5
23 c1 c2 c3 c4 c5	58 c1 c2 c3 c4 c5	93 c1 c2 c3 c4 c5	128 c1 c2 c3 c4 c5
24 c1 c2 c3 c4 c5	59 c1 c2 c3 c4 c5	94 c1 c2 c3 c4 c5	129 c1 c2 c3 c4 c5
25 c1 c2 c3 c4 c5	60 c1 c2 c3 c4 c5	95 c1 c2 c3 c4 c5	130 c1 c2 c3 c4 c5
26 c1 c2 c3 c4 c5	61 c1 c2 c3 c4 c5	96 c1 c2 c3 c4 c5	131 c1 c2 c3 c4 c5
27 c1 c2 c3 c4 c5	62 c1 c2 c3 c4 c5	97 c1 c2 c3 c4 c5	132 c1 c2 c3 c4 c5
28 c1 c2 c3 c4 c5	63 c1 c2 c3 c4 c5	98 c1 c2 c3 c4 c5	133 c1 c2 c3 c4 c5
29 c1 c2 c3 c4 c5	64 c1 c2 c3 c4 c5	99 c1 c2 c3 c4 c5	134 c1 c2 c3 c4 c5
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31 c1 c2 c3 c4 c5	66 c1 c2 c3 c4 c5	101 c1 c2 c3 c4 c5	136 c1 c2 c3 c4 c5
32 c1 c2 c3 c4 c5	67 c1 c2 c3 c4 c5	102 c1 c2 c3 c4 c5	137 c1 c2 c3 c4 c5
33 c1 c2 c3 c4 c5	68 c1 c2 c3 c4 c5	103 c1 c2 c3 c4 c5	138 c1 c2 c3 c4 c5
34 c1 c2 c3 c4 c5	69 c1 c2 c3 c4 c5	104 c1 c2 c3 c4 c5	139 c1 c2 c3 c4 c5
35 c1 c2 c3 c4 c5	70 c1 c2 c3 c4 c5	105 c1 c2 c3 c4 c5	140 c1 c2 c3 c4 c5

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P	S	Y	1	0	0	-	X
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- ② The paper number pertains only to first-level courses consisting of two papers

WRITE

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 for the first paper and

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 for the second. If only one paper then leave blank

- ③ Fill in your initials and surname
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