

FUR2601

(499063)

May/June 2014

FUNDAMENTAL RIGHTS

Duration 2 Hours

100 Marks

EXAMINERS

FIRST :

MR TW MASEKO

SECOND

MRS A SPIES

Closed book examination.

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This paper exists 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 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.

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

Indicate whether the following statements are True or False by selecting the correct answer.

- A1 Franco Seedorf, a German soccer player, has a three-year contract to play for a South African soccer club. Franco is therefore entitled to vote in the next general elections in South Africa (2)
- 1) False, because foreign soccer players are not allowed vote
 - 2) True, because our Constitution is similar to the German Constitution
 - 3) True, because foreign nationals are entitled to all the rights in the Constitution
 - 4) False, because political rights are only granted to citizens of South Africa

TURN OVER

- A 2 A magistrates' court may declare a municipal by-law unconstitutional (2)
- 1) True, because a magistrates' court is a creature of statute and, therefore, empowered to declare a municipal by-law unconstitutional
 - 2) False, because a municipal by-law is handled by the traditional courts
 - 3) True, because a municipal by-law governs the area of the magistrates' court's jurisdiction
 - 4) False, because a magistrates' court as a creature of statute may not pronounce on the constitutionality of any law
- A 3 A magistrates' court may interpret legislation in accordance with the Bill of Rights (2)
- 1) True, because this was confirmed by the Constitutional Court case of *Masiya v The Director of Public Prosecution*
 - 2) False, because a magistrates' court may not apply the Bill of Rights
 - 3) True, because a magistrates' court may apply the Bill of Rights indirectly in terms of section 39(2)
 - 4) False, because only the High Court and Supreme Court of Appeal may interpret legislation in accordance with the Bill of Rights
- A 4 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
- A 5 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
- A 6 Reading in is a constitutional remedy that is used to remedy an omission in a statutory provision (2)
- 1) False, because it is a method of statutory interpretation.
 - 2) False, because it is not recognised by s172 of the Constitution
 - 3) True, because its purpose is to add words to cure the defect
 - 4) True, because it is the same as severance

- A 7 A declaration of invalidity is a constitutional remedy that has attained a prominent position in constitutional law, and it means that the law in its entirety is unconstitutional (2)
- 1) False, because a law or conduct must be declared invalid to the extent of its inconsistency with the Constitution
 - 2) True, because you cannot sever unconstitutional provisions and leave the remaining provisions intact.
 - 3) False, because if you do not strike down the entire law, the remainder will not give effect to the purpose of the law.
 - 4) True, because the court will give Parliament the opportunity to draft a new law
- A 8 The customary law rule of male primogeniture, in terms of which wives and daughters are not allowed to inherit where the testator has died without a will, infringes the right to human dignity. (2)
- 1) False, because this statement was confirmed by the Constitutional Court in *Booyens v Magistrate of Khayelitsha*
 - 2) False, because this statement was confirmed by the Constitutional Court in *Minister of Home Affairs v Watchenuka*
 - 3) True, because this statement was confirmed by the Constitutional Court in *Minister of Home Affairs v Fourie*
 - 4) True, because this statement was confirmed by the Constitutional Court in *Bhe v Magistrate Khayelitsha*
- A 9 The Constitutional Court favours a grammatical method of interpretation of the Rights in the Bill of Rights (2)
- 1) False, the Constitutional Court's preferred method of interpretation is a generous and purposive method of interpretation
 - 2) True, the Constitutional Court only favours a grammatical method of interpretation
 - 3) False, the Constitutional Court only favours a generous method of interpretation
 - 4) False, the Constitutional Court only favours a systematic method of interpretation
- A 10 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

[20]

SUBSECTION B

- B 1 Identify and discuss the procedural questions a court will have to consider in fundamental rights litigation (5)
[25]

TURN OVER

QUESTION 2

- 2.1 You are a clerk to Van Leeuwen J, a judge of the High Court. She is presiding over a case in which the constitutionality of an Act of Parliament is under attack. The judge asks you to write a brief opinion on the following questions
- (a) What are the differences between direct and indirect application? (6)
- (b) When should a court apply the Bill of Rights directly to legislation, and when should it rather interpret legislation in conformity with the Bill of Rights? (4)
- 2.2 Section 38 of the Constitution provides that a court may grant "appropriate relief" where a right in the Bill of Rights has been infringed. Explain this phrase briefly, giving examples of such relief. (5)
- 2.3 Can the general limitation clause in section 36 be applied to all rights in the Bill of Rights? (5)
- 2.4 Describe how (i) public international law and (ii) foreign law may influence the interpretation of the South African Bill of Rights. (5)
- [25]

QUESTION 3

- 3.1 ABC Supermarket is charged with the violation of the Liquor Act for selling wine on a Sunday. In its defense, ABC argues that the Act is an unconstitutional violation of their right to freedom of religion.
- (a) Advise ABC whether it can lay claim to the freedom of religion. (3)
- (b) If ABC cannot lay claim to the freedom of religion, can it nevertheless invoke the right to freedom of religion to challenge the constitutionality of the Act? (2)
- 3.2 Is reading down a constitutional remedy? How does it differ from severance and reading in? Refer to case law. (10)
- 3.3 Discuss the analogous-grounds approach adopted by the Constitutional Court in *Harksen v Lane* in its application of section 9(3). In your answer, refer to the tests applied by the court to determine whether an analogous ground exists. (10)
- [25]

QUESTION 4

- 4.1 Explain the difference between formal equality and substantive equality. (2)
- 4.2 Critically evaluate the merits of the following statement. Substantiate your answer with case law.
- "Our Constitution demands a value-laden approach to constitutional interpretation. During such a process the role of the text itself is minimal, if not negligible" (10)

TURN OVER

- 4.3 You are a legal adviser to the Pretoria City Council. The council plans to evict a number of squatters from its land. The land had been earmarked for a housing project. Answer the following questions
- (a) May the council evict the squatters and demolish their dwellings? (3)
 - (b) What procedures should be followed in order to do so? (5)
- 4.4 What is the relationship between the Constitution and the Bill of Rights? (5)
[25]

TOTAL: {100}

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EXAMINATION CENTRE (E.G. PRETORIA)
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For use by examination invigilator
 Vir gebruik deur eksamenopsiener

IMPORTANT

1. USE ONLY AN HB PENCIL TO COMPLETE THIS SHEET
2. MARK LIKE THIS.
3. CHECK THAT YOUR INITIALS AND SURNAME HAS BEEN FILLED IN CORRECTLY
4. ENTER YOUR STUDENT NUMBER FROM LEFT TO RIGHT
5. CHECK THAT YOUR STUDENT NUMBER HAS BEEN FILLED IN CORRECTLY
6. CHECK THAT THE UNIQUE NUMBER HAS BEEN FILLED IN CORRECTLY
7. CHECK THAT ONLY ONE ANSWER PER QUESTION HAS BEEN MARKED.
8. DO NOT FOLD

BELANGRIK

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PART 2 (ANSWERS/ANTWOORDE) DEEL 2

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Specimen only