

FUR2601

(477756)

May/June 2016

FUNDAMENTAL RIGHTS

Duration : 2 Hours

100 Marks

EXAMINERS :

FIRST :

DR A SPIES

SECOND :

DR TW MASEKO

Closed book examination.

This examination question paper remains the property of the University of South Africa and may not be removed from the examination venue.

This paper consists of seven (7) 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.

A 1. Franco Seerdorf, 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.

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. The Bill of Rights does not provide for so called "class actions". (2)

- 1) True, class actions coincide with the narrow approach to standing which was rejected by the Constitutional Court in *Ferreira v Levin NO and Others*
- 2) False, section 38(c) of the Constitution provides for anyone acting as a member of, or in the interest of, a group or class of persons.
- 3) True, class actions refer to the common law position of standing which has been replaced by section 38 of the Constitution.
- 4) False, section 38(a) of the Constitution provides for anyone acting as a member of, or in the interest of, a group or class of persons.

TURN OVER

- 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 Bill of Rights applies to the conduct of a farm owner who refuses to provide housing for a group of squatters. (2)
- 1) True, the Bill of Rights applies to everyone and private owners are bound by section 26 of the Constitution.
 - 2) False, private owners cannot be held to have a duty in terms of section 26(2) of the Constitution, given the nature of the duty and the fact that the section only refers to the state's obligation to provide housing.
 - 3) True, private land owners are bound by section 25 of the Constitution.
 - 4) False, private owners are only bound in terms of common law.
- 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]

QUESTION 2

2.1 Discuss the difference between the direct and indirect application of the Bill of Rights. (10)

2.2 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? (5)

2.3. Who in terms of section 38 of the Constitution has standing to approach a court in respect of a violation of a fundamental right? (5)

2.4 Is it possible to approach the Constitutional Court directly circumventing the High Court and Supreme Court of Appeal? Discuss. (5)

[25]

TURN OVER

QUESTION 3

- 3.1 Is reading down a constitutional remedy? How does it differ from severance and reading in? (10)
- 3.2 Describe how (i) public international law and (ii) foreign law may influence the interpretation of the South African Bill of Rights. (5)
- 3.3 What are demarcations (or internal modifiers) and special limitations? Why are they important? (5)
- 3.4 In your opinion, do the following laws and conduct infringe the right to human dignity? Give reasons for your answers.
- (a) a common law rule which criminalises gay sodomy. (2)
- (b) 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. (2)
- (c) the initiation of first-year students, where they are required to strip and crawl naked through a garbage dump. (1)

[25]

Question 4

4.1 Ms M Masipa applied to the Sunnyside Boys' High School, a state school, for admission. At the interview, she was told that it was school policy to admit only boys. She was advised that there were many other single-sex schools in the region and that all school activities were designed for male learners. If female learners were admitted, significant changes would have to be made. For example, the school would have to make arrangements for bathrooms and change rooms for girls. The school believes that it is not acting unfairly. Ms Masipa asks your advice on this issue. There is a girls' high school 15 minutes away, but she lives next door to this school and she wants to attend it. She would also like to take woodwork and Latin, which are not offered at the girls' high school.

- (a) Explain to Ms Masipa which of her constitutional rights may be at issue. (5)
- (b) Apply the criteria laid down by the Constitutional Court in *Harksen v Lane* to Ms Masipa's case to establish whether her rights have indeed been violated. (10)

4.2 "Affirmative action is not an exception to the right to equality, but is a means of achieving equality understood in its substantive or restitutionary sense". Discuss the difference between formal and substantive equality in light of this statement. (5)

4.3 What was the approach of the Constitutional Court to the justiciability of socio-economic rights in the *Certification* judgment? (5)

[25]

TOTAL: {100}