

FUR2601

(497293)

May/June 2017

FUNDAMENTAL RIGHTS

Duration 2 Hours

100 Marks

EXAMINERS

FIRST

PROF A SPIES

SECOND

DR TW MASEKO

Closed book examination

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This 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

- A 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
- A 2 In the substantive stage, the onus is first on the respondent, who must show that he/she infringed the applicant's rights (2)
- 1) False, in the substantive stage, the onus is first on the applicant, who must show that an infringement of a right has taken place
 - 2) True, in the substantive stage, the onus is first on the respondent, who must show that he/she infringed the applicant's rights
 - 3) False, in the substantive stage the onus is on the respondent to indicate that the applicant's rights can be limited
 - 4) False, in the substantive stage, the onus is on the applicant, to show that the infringement is not justifiable in terms of section 36 of the Constitution
- A 3 In terms of section 38(e) of the Constitution an association who would like to act in the interest of its members has to fulfil all the applicable common law requirements (2)
- 1) True, the association needs to prove that its own constitution allows it to partake in litigation
 - 2) False, section 38(e) of the Constitution does not allow an association to act in the interest of its members but only allows a person to act in the public interest
 - 3) True, the association needs to prove that it has a personal interest in the matter
 - 4) False, it is not necessary to show that the common law requirements are complied with, only that the members have sufficient interest in the remedy it seeks

TURN OVER

- A 4 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
- A 5 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 6 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

TURN OVER

- A 7 Section 39 of the Constitution, the interpretation clause, provides that any court, tribunal or forum, when interpreting the Bill of Rights may consider international law and must consider foreign law (2)
- 1) False, section 39 of the Constitution provides that any court, tribunal or forum when interpreting the Bill of Rights, must consider international law and may consider foreign law
 - 2) True, section 39 of the Constitution provides that any court, tribunal or forum when interpreting the Bill of Rights, may consider international law and must consider foreign law
 - 3) False, section 39 of the Constitution provides that any court, tribunal or forum should only consider national law when interpreting the rights in the Bill of Rights
 - 4) True, section 39 of the Constitution provides that any court, tribunal or forum, when interpreting the Bill of Rights may consider international law and must consider foreign law, however only as far as it pertains to matters of state security
- A 8 If a claim of discrimination is based on an unspecified ground in terms of section 9 of the Constitution it is presumed to be unfair in terms of section 9(5) (2)
- 1) True, if a claim of discrimination relies on an unlisted ground the presumption of unfairness stands in terms of section 9(5)
 - 2) False, if a claim of discrimination is based on a specified ground in terms of section 9(3) of the Constitution it is presumed to be unfair in terms of section 9(5)
 - 3) True, section 9 of the Constitution does not provide for any specified grounds of discrimination and any discrimination is presumed to be unfair in terms of section 9(5)
 - 4) False, the Constitution only provides for specified grounds of discrimination in section 9(2)
- A 9 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*

TURN OVER

A 10 You are a legal adviser to the Pretoria City Council. The Council plans to evict a number of squatters from its land that has been earmarked for a housing project. The Council has the right to evict the squatters and demolish their dwellings (2)

- 1) True, because fair procedure does not apply to illegal occupants
- 2) False, because evictions can only occur once a court order has been granted
- 3) False, because South Africans are allowed to squat anywhere in the country
- 4) True, because the actions of the Council amount to an administrative decision

[20]

SUBSECTION B**QUESTION 1**

Who will bear the onus at the different stages of fundamental rights litigation? [5]

QUESTION 2

2 1 Discuss whether a juristic person can rely on the protection on the Bill of Rights and to what extent. For instance can *Noseweek*, an independent newspaper, invoke the right to life and the right to freedom of expression? (5)

2 2 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 3 Explain the role of public opinion in interpreting the Bill of Rights. Refer to relevant case law (10)

[25]

QUESTION 3

3 1 What does "law of general application mean"? (5)

3 2 Ronnie Rebel is a (white) pupil at a state high school. He is suspended from school because he insists on wearing dreadlocks (contrary to the dress code of the school) and smokes dagga. He maintains that he is a Rastafarian and, as such, cannot be prohibited from using "soft" drugs. Apply section 36 of the Constitution to Ronnie's case and explain how each of the limitation criteria should be applied to the hairstyle issue and the dagga issue (10)

3 3 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)

TURN OVER

- 3 4 Differentiate between a declaration of invalidity and a declaration of rights (5)
[25]

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 Differentiate between formal equality and substantive equality (5)
- 4 3 List any five provisions in the Constitution which mention human dignity (5)
- 4 4 Ms Fortune discovers that she has leukaemia. On her way home, she is so upset by the news that she skips a red traffic light and is involved in a car accident. She is taken to hospital in a very serious condition. With reference to constitutional provisions and case law, discuss whether (and to what extent) she can demand emergency medical treatment (5)
- 4 5 What was the approach of the Constitutional Court to the justiciability of socio-economic rights in the *Certification* judgment? (5)
[25]

TOTAL: {100}

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For use by examination invigilator
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IMPORTANT

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Instruction numbers ❶ to ❿ refer to spaces on your mark reading sheet which you should fill in as follows

- ❶ Write your paper code in these eight squares, for instance

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- ❷ The paper number pertains only to first-level courses consisting of two papers

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- ❸ Fill in your initials and surname
- ❹ Fill in the date of the examination
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- ❻ WRITE the digits of your student number HORIZONTALLY (from left to right). Begin by filling in the first digit of your student number in the first square on the left, then fill in the other digits, each one in a separate square
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NB Your unique paper number appears at the top of your examination paper and consists only of digits (e.g. 403326)
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- ❿ Question numbers 1 to 140 indicate corresponding question numbers in your examination paper. The five spaces with digits 1 to 5 next to each question number indicate an alternative answer to each question. The spaces of which the number correspond to the answer you have chosen for each question and should be marked as follows [-]
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