FUR2601 (476896) October/November 2016

FUNDAMENTAL RIGHTS

Duration   2 Hours

100 Marks

EXAMINERS
FIRST   PROF A SPIES
SECOND   DR TW MASEKO

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

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

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

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]

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}

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EXAMINATION MARK READING SHEET EKSAMEN-MERKLEESBLAD

PART 1 (GENERAL/ALGEMEEN) DEEL 1

STUDY UNIT e.g. PSY100-X
STUDIE-EENHEID bv. PSY100-X

1

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VRAESTELNOMMER

2

INITIALS AND SURNAME
VOORLETTERS EN VAN **3**

DATE OF EXAMINATION
DATUM VAN EKSAMEN **4**

EXAMINATION CENTRE (E G PRETORIA)
EKSAMENSENTRUM (BV. PRETORIA) **5**

STUDENT NUMBER
STUDENTENOMMER **6**

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For use by examination invigilator
Vir gebruik deur eksamenopsiener
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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
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7 CHECK THAT ONLY ONE ANSWER PER QUESTION HAS BEEN MARKED
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BELANGRIK

1 GEBRUIK SLEGS N HB-POTLOOD OM HIERDIE BLAD TE VOLTOOI
2 MERK AS VOLG
3 KONTROLEER DAT U VOORLETTERS EN VAN REG INGEVUL IS
4 VUL U STUDENTENOMMER VAN LINKS NA REGS IN
5 KONTROLEER DAT U DIE KORREKTE STUDENTENOMMER VERSTREK HET
6 KONTROLEER DAT DIE UNIEKE 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

10

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2	c1c c2c c3c c4c c5c	37	c1c c2c c3c c4c c5c	72	c1c c2c c3c c4c c5c	107	c1c c2c c3c c4c c5c
3	c1c c2c c3c c4c c5c	38	c1c c2c c3c c4c c5c	73	c1c c2c c3c c4c c5c	108	c1c c2c c3c c4c c5c
4	c1c c2c c3c c4c c5c	39	c1c c2c c3c c4c c5c	74	c1c c2c c3c c4c c5c	109	c1c c2c c3c c4c c5c
5	c1c c2c c3c c4c c5c	40	c1c c2c c3c c4c c5c	75	c1c c2c c3c c4c c5c	110	c1c c2c c3c c4c c5c
6	c1c c2c c3c c4c c5c	41	c1c c2c c3c c4c c5c	76	c1c c2c c3c c4c c5c	111	c1c c2c c3c c4c c5c
7	c1c c2c c3c c4c c5c	42	c1c c2c c3c c4c c5c	77	c1c c2c c3c c4c c5c	112	c1c c2c c3c c4c c5c
8	c1c c2c c3c c4c c5c	43	c1c c2c c3c c4c c5c	78	c1c c2c c3c c4c c5c	113	c1c c2c c3c c4c c5c
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13	c1c c2c c3c c4c c5c	48	c1c c2c c3c c4c c5c	83	c1c c2c c3c c4c c5c	c1c c2c c3c c4c c5c
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28	c1c c2c c3c c4c c5c	63	c1c c2c c3c c4c c5c	98	c1c c2c c3c c4c c5c	133	c1c c2c c3c c4c c5c
29	c1c c2c c3c c4c c5c	64	c1c c2c c3c c4c c5c	99	c1c c2c c3c c4c c5c	134	c1c c2c c3c c4c c5c
30	c1c c2c c3c c4c c5c	65	c1c c2c c3c c4c c5c	100	c1c c2c c3c c4c c5c	135	c1c c2c c3c c4c c5c
31	c1c c2c c3c c4c c5c	66	c1c c2c c3c c4c c5c	101	c1c c2c c3c c4c c5c	136	c1c c2c c3c c4c c5c
32	c1c c2c c3c c4c c5c	67	c1c c2c c3c c4c c5c	102	c1c c2c c3c c4c c5c	137	c1c c2c c3c c4c c5c
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35	c1c c2c c3c c4c c5c	70	c1c c2c c3c c4c c5c	105	c1c c2c c3c c4c c5c	140	c1c c2c c3c c4c c5c

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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

P	S	Y	1	0	0	-	X

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

WRITE | 0 | 1 | for the first paper and | 0 | 2 | for the second If only one paper then leave blank

❸ Fill in your initials and surname

❹ Fill in the date of the examination

❺ Fill in the name of the examination centre

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

❼ In each vertical column mark the digit that corresponds to the digit in your student number as follows [-]

❽ WRITE your unique paper number HORIZONTALLY
NB Your unique paper number appears at the top of your examination paper and consists only of digits (e g 403326)

❾ In each vertical column mark the digit that corresponds to the digit number in your unique paper number as follows [-]

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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