

FUR2601

(473680)

October/November 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. *S v Makwanyane* is a clear example of the indirect application of the Bill of Rights were the Constitutional Court found that section 277 of the Criminal Procedure Act 51 of 1977, was unconstitutional and therefore invalid (2)
- 1) True, the applicable sections in the Bill of Rights were indirectly applied which allowed for a declaration of invalidity in terms of section 172 of the Constitution
 - 2) False, the applicable sections in the Bill of Rights were directly applied which allowed for a declaration of invalidity in terms of section 172 of the Constitution
 - 3) True, the Constitution can only be applied indirectly in all circumstances in terms of the principle of avoidance
 - 4) False, the Bill of Rights was indirectly applied and referred to the South African Human Rights Commission to provide a suitable remedy
- A 2 Only the Constitutional Court can decide on the constitutionality of any amendment of the Constitution (2)
- 1) False, in terms of section 167(4) of the Constitution, the High Courts and Supreme Court of Appeal have concurrent jurisdiction to decide on the constitutionality of any amendment of the Constitution
 - 2) True, only the Constitutional Court can decide on the constitutionality of an amendment of the Constitution as exclusively provided for in the rules of the Constitutional Court
 - 3) True, in terms of section 167(4) of the Constitution, the Constitutional Court has exclusive jurisdiction to decide on the constitutionality of any amendment of the Constitution
 - 4) False, the Constitution cannot be amended as provided in its preamble
- A 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

- A 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
- A 5 A provision in law requiring all medical doctors, but not members of any other profession, to do community service qualifies as a law of general application in terms of section 36 of the Constitution (2)
- 1) False, to qualify as a law of general application it has to apply to all professions and not only a specific profession
 - 2) True, the mere fact that a law differentiates between various professions does not mean that it is not a law of general application. It would only fail if the differentiation is arbitrary
 - 3) False, section 22 of the Constitution ensures freedom of trade, occupation and profession which prohibits any such regulations
 - 4) True, it would qualify as law of general application only if an arbitrary differentiation exists
- A 6 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

TURN OVER

- A 7 A declaration of invalidity is a discretionary remedy that a court could consider to declare unconstitutional laws or conduct invalid (2)
- 1) False, a declaration of invalidity is a non-discretionary remedy that can only be considered for a breach of socio-economic rights
 - 2) True, a declaration of invalidity is only one of the remedies that can be considered by a court to declare unconstitutional laws or conduct invalid
 - 3) False, a declaration of invalidity is not a discretionary remedy as courts are obliged to declare unconstitutional laws or conduct invalid
 - 4) True, a declaration of invalidity is a discretionary remedy that can be utilised to declare a law or conduct unconstitutional in its entirety
- A 8 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
- A 9 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 to 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 10) The Constitutional Court applies a standard of reasonableness in establishing whether the state has achieved the progressive realization of the socio-economic rights provided for in the Constitution (2)
- 1) True, although a considerable margin of discretion is given to the state when deciding on how it is to go about fulfilling socio-economic rights, the reasonableness of the measures that it adopts can be evaluated by a court
 - 2) False, section 26, 27 and 29 of the Constitution provides for minimum core obligations that need to be fulfilled and if this is not the case the state can be held accountable
 - 3) True, the Constitutional Court applies a standard of reasonableness in determining whether the state has given effect to the immediate realization of socio-economic rights
 - 4) False, the Constitutional Court applies a standard of rationality to determine if the state's fulfilment of socio-economic rights is based on rational policy

[20]

TURN OVER

SUBSECTION B**QUESTION 1**

B 1 Differentiate between formal equality and substantive equality (5)

QUESTION 2

2 1 Identify and discuss the procedural questions a court will have to consider in fundamental rights litigation? (5)

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

2 3 What is meant by standing (*locus standi in iudicio*), and why is it important? (5)

2 4 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 5 Discuss whether or not magistrate's courts can develop common law in accordance with the Constitution (5)

[25]**QUESTION 3**

3 1 Ms Axel Rod is an ambitious 26 –year old attorney who works for Sugar and Bean, a firm of attorneys. A month ago, Ms Rod discovered that she was two months pregnant. Since she was not married, she decided to raise the child as a single mother. A month later, Ms Rod was fired from her job at Sugar and Bean on the grounds that she would no longer be able to perform her duties at the firm in an efficient manner. Her job required her to work long hours, and, being a single mother, it was thought that she would no longer be committed to her clients.

Apply the criteria laid down by the Constitutional court in *Harksen v Lane* with regards to the unfair discrimination in Ms Rod's case (10)

3 2 Mbala Babu is a learner at a state high school in Tshwane. He is expelled from school because he is black, does not attend any Christian church and is a Rastafarian. Mbala alleges that his exclusion from the school is unconstitutional.

Is the high school bound by the Bill of Rights? In your answer, refer to the relevant provisions of the Constitution (5)

TURN OVER

- 3 3 Critically evaluate the merits of the following statement. Substantiate your answer with reference to 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)

[25]

QUESTION 4

- 4 1 Discuss suspension of declarations of invalidity as one of the ways in which the courts can regulate the impact of a declaration of invalidity in terms of section 172(1) of the Constitution (5)
- 4 2 Discuss severance as one of the ways in which the courts can regulate the impact of a declaration of invalidity in terms of section 172(1) of the Constitution (5)
- 4 3 The Gauteng Department of health decides to reduce the treatment given to Aids patients who have contracted tuberculosis. This is due to a shortage of funds and the Department's inability to meet the demands placed on it. However, painkillers and sedatives are still available. Is this decision constitutional? Substantiate your answer with reference to case law (10)
- 4 4 “Affirmative action is not an exception to the right to equality, but is a means of achieving equality understood in its substantive or restitutory sense.” Give a critical evaluation of this statement (5)

[25]**Total: {100}**

PART 1 (GENERAL/ALGEMEEN) DEEL 1

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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
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Specimen only

MARK READING SHEET INSTRUCTIONS

Your mark reading sheet is marked by computer and should therefore be filled in thoroughly and correctly

USE ONLY AN HB PENCIL TO COMPLETE YOUR MARK READING SHEET

PLEASE DO NOT FOLD OR DAMAGE YOUR MARK READING SHEET

Consult the illustration of a mark reading sheet on the reverse of this page and follow the instructions step by step when working on your sheet

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
- ❼ In each vertical column mark the digit that corresponds to the digit in your student number as follows [-]
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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)
- 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 [-]
- ◆ For official use by the invigilator. Do not fill in any information here