CONSTITUTIONAL LAW CLW41A0

WINTER ONLINE EXAM JUNE 2021

MEMORANDUM

TOTAL: 60

QUESTION 1: LANGUAGES [12]

National and provincial government in terms of the Constitution:

-At least 2 languages must be used

Municipal government: Municipal government cannot be forced to use 2 languages, but must indicate that it has taken into account the usage and preference of its residents. **[1]**

The new position under the Use of Official Languages Act 12 of 2012:

-at least 3 languages must be used

-applies to a national department, national public enterprise or national public institution, but does not apply to provinces or local government

- new policy on use of languages in higher education is in favour of multi-lingual approaches to instruction and the development of indigenous languages for this purpose. **[2]**

Lourens cases could be referred to, to the extent that it either does not give adequate recognition to official languages and should therefore not be followed, or that the approach of the courts in these cases should be followed as all official languages cannot be treated with complete equality.

Afriforum and Another v Chairman of the Council of the University of the Free State and Others (A70/2016) [2016] ZAFSHC 130 (1/2) – in this case the high court in Bloemfontein held that the changing of the language policy of the University of the Free State was irrational and unfair. The reasons that the University put forward for changing the language policy did also not justify the change – lower standards of the English classes, compared to the Afrikaans classes, for example, cannot justify removing the Afrikaans lectures. The Court therefore found that in the adoption of the new language policy the University did not take into account the following factors: it's obligation in terms of section 29(2) with regard to being responsive to the needs of Afrikaans students seeking instruction in Afrikaans; the Ministerial Language Policy which favoured the "retention, preservation and promotion" of Afrikaans; and the costs and human resources needed to continue offering instruction in Afrikaans. It is therefore clear that the University did not consider all relevant factors before reaching a decision – consequently there is no rational connection between the reason(s) for

the decision and the new language policy that was ultimately adopted and the decision had to be set aside.

University of the Free State v Afriforum and Another 2017 4 SA 283 (SCA) – in this case the decision of the high court was unfortunately overturned, but the court did not take into account the need for recognising the close connection between language and culture and giving effect to cultural diversity. This cannot be done when other languages are ignored or replaced with a single language.

Afriforum v University of the Free State 2018 (2) SA 185 (CC) – in this case the majority of the CC agreed with the SCA, but seemed not to take into account the importance of language diversity and the Language Policy's emphasis on multi-lingual approaches to instruction. The minority judgment placed more emphasis on the latter, which is more in line with the values of diversity and inclusiveness in the Constitution.

Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch and Others 2020 (1) SA 368 (CC) – in this case the court found that the University's new language policy did not contravene the Dept. of Higher Education's language policy and that costs were a valid reason for the University not to pursue double medium education even when there are students who may wish to do so. The court argued that it was bound by decision in the Afriforum case.

Criticism: Venter – court did not consider all the factors for determining unfair discrimination (1/2); The rulings in *Afriforum* and *Gelyke Kanse* are both contrary to the department's language policy; The rulings therefore do not give adequate recognition to the importance of language rights and respecting diversity. **[6]**

- Rights at issue: discrimination on the basis of language (equality - sec 9); dignity (sec 10); right to language and culture – (sec 30); right to be taught in a language of choice (sec 29) **[2]**

Remedies: students should indicate what remedies are sought from the court. (Declaration of invalidity of the policy of the Univ and having it set aside. Order confirming that more languages be used by the Univ etc.) **[1]**

(p 81-85 and chap 7 slides)

QUESTION 2: NATIONAL LEGISLATIVE AUTHORITY [10]

In ***New Nation Movement NPC v President of the Republic of South Africa*** (2020 6 SA 257 (CC)), the appellants challenged the constitutionality of the Electoral Act 73 of 1998, contending that the Act does not provide for adult citizens to be elected as independent candidates to the National Assembly and the provincial legislatures. This, they argued, infringes the right in section 19(3)(b) of the constitution.

The majority of the court held that sections 19(1) and 19(3) of the constitution need to be read together (par 16). The fact that the political choices mentioned in section 19(1) all relate to political parties <u>does not mean that those are the only political</u>

choices a citizen can exercise, it merely says "including" those rights, but section 19(1) is not limited to those rights (par 17).

The majority pointed out that section 19(3) does not require a person to be part of a political party in order to stand for public office (par 19). If section 19(3) is interpreted to mean that a citizen must be part of a political party in order to stand for and be elected to public office, this would be contrary to the right to freedom of association (s 18 of the constitution) as this would entail compelled association (par 58-59).

The majority of the court therefore concluded that, if political participation were to be limited to members of political parties, which is what the respondents argued, this would limit a citizen's right to freedom of association (s 18 of the constitution), freedom of conscience (s 15 of the constitution) and the right to human dignity (s 10 of the constitution) (par 62).

The majority rightly pointed out that the provisions of the constitution need to be interpreted harmoniously, therefore an interpretation of section 19(3)(b) which sets various rights against each other, goes against this principle (par 63).

Although the respondents argued that a party proportional representation system is supported by various sections of the constitution (par 64), the majority found that, with regard to the reference to "multi-party" democracy in section 1(d) of the constitution, this does not necessarily exclude the participation of independent candidates, it merely means that the state should not be a one-party state (par 70-73).

The majority argued that, what these sections (ss 46(1)(a) and 105(1)(a) of the constitution) require is that the electoral system must be one that "results, in general, in proportional representation" (par 78) [emphasis added]. The words "in general" indicate that there is room for accommodating political parties, as well as independent candidates, in our electoral system without losing its proportional nature (par 78-80). With regard to municipal elections, section 157(2)(a) of the constitution does however require parliament to enact legislation that prescribes a system of proportional representation that is exclusively based on party lists. This excludes independent candidates from local government elections. The majority of the court however pointed out that, when the terms of the constitution were negotiated, there were "problems uniquely attendant to municipalities – involving as they did – the intractable problem of racially based spatial distribution of the South African population" (par 98). It is for these reasons that municipal elections are treated differently by the constitution and that section 157(2)(a) was framed in this way. This does not, however, mean that this principle should apply to national and provincial elections per se (par 99). The majority concluded that, given the importance of the protection of political rights within South Africa's unique historical context, as well as the prominence of the right to human dignity, the rights in sections 18 and 19(3)(b) of the constitution call for a generous, rather than a restrictive interpretation (par 106-111). Consequently, the court held that the right in section 19(3)(b) was unjustifiably limited to the extent that the Electoral Act makes it impossible for independent candidates to stand and be elected to public office without being members of a political party (par 120).

In a separate concurring judgment, Jafta J (Cameron J, Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ concurring) emphasised that section 19 must be read within South Africa's historical context of "total disenfranchisement of African people and their exclusion from governing the country" (par 143; see also Ramakatsa v Magashule 2013 2 BCLR 202 (CC) par 64). Furthermore, Jafta J held that the language used in section 19 "must be accorded a generous and purposive meaning to give every citizen the fullest protection afforded by the section" (par 144). The concurring judgment pointed out that section 19 affords political rights to adult citizens, not political parties, and therefore the right in section 19(3)(b) also affords the right to stand for and be elected to public office to citizens (not political parties) (par 154-157). The concurring judgment concluded that "South Africans are bearers of these rights [in section 19(3)] individually just as they hold the right to vote and which they exercise in secret as individuals" (par 162).

In a dissenting judgment, Froneman J disagreed with the reasoning of first and the second judgments. For Froneman J, the value in section 1(d) of the constitution is indicative that the constitution advocates for the prominent role of political parties in its "multi-party system of democratic government" (par 198-204). Froneman J argued that, in his view, section 19(3)(b) does not, as the majority argued, compel individuals to associate with political parties in order to stand for office. He remarked that, in this case "the Constitution itself provides the consequence [of not associating with political parties]: that person must then pursue the direct democratic means available under the Constitution and not that of standing for electoral office" (par 218). In addition, Froneman J stated that:

"The entrenchment of proportional representation, and its achievement through the vehicle of political parties, flows from the prioritisation of equality in political voice (every vote counts equally) over the accountability that might be better secured through a constituency-based system or a mixed system" (par 221).

The dissenting judgment concluded that, allowing individuals to stand and be elected to office without membership of a political party, would cause a "distortion of equality in political voice" (par 221). Froneman J argued that such an interpretation also conflates the "distinction between permissive and prescriptive constitutional norms" – just because the constitution does not prohibit independent candidates, does not mean section 19(3)(b) provides such a right (par 231).

QUESTION 3: NATIONAL EXECUTIVE AUTHORITY [12]

3.1.1) What are the routes for removing a sitting President from office? (1)

- Motion of no confidence (section 102 of the Constitution; *UDM v Speaker; Mazibuko v Speaker*)
- Impeachment (section 89 of the Constitution; *EFF v Speaker*)

NOTE: only partial marks awarded if no authority provided

3.1.2) What are the grounds for removal under these routes? (3)

- Motion of no confidence: grounds are purely political, indicate a loss of confidence in the President (section 102 of the Constitution)
- Impeachment: more serious grounds of serious violation of Constitution or law; serious misconduct; inability to perform functions of office (section 89 of the Constitution)

Both motion of no confidence and impeachment are mechanisms for executive accountability

3.1.3) What is the process for removal under these routes? (2)

- Motion of no confidence: absolute majority ie 50%+1 of the National Assembly must vote. Once they have voted, the President and Cabinet must resign, as must cabinet. New President elected within 30 days, otherwise NA must dissolve and hold a national election. Possible for the vote to be via secret ballot (*UDM v Speaker)*

- Impeachment: 2/3 of National Assembly must vote for impeachment of the President. Parliament must provide rules for impeachment (majority of the CC in *EFF v Speaker*)

3.1.4) What are the consequences of any removal, and do these consequences differ depending on the route taken? (3)

Yes they differ.

- Motion of no confidence: President can later run for office or fulfil other public offices, retain benefits of office such as salary and security
- Impeachment – more adverse. No public office, loss of benefits. Possible criminal processes.

Both intended as mechanism for checks and balances

3.1.5) What are the prospects of success if your client decides to initiate a removal process? (1)

Poor prospects. Even though in principle, the mechanisms for removal are intended to vouchsafe executive accountability (*UDM v Speaker*), in practice our dominant party democracy, paired with ANC tendency to issue a party line, means unlikely to be successful. This is borne out by the multiple unsuccessful attempts to remove President Zuma – ultimately, he resigned after having been recalled by the party.

3.2) Does the President have the power to remove cabinet members? (2)

Yes, the President has the power both to select (section 91(3) of the Constitution) and to remove cabinet members. Authority for the President's power to shuffle cabinet in *DA v President.*

QUESTION 4: JUDICIAL AUTHORITY [10]

This is a short essay question, so markers will have a certain degree of discretion when marking. Students who discuss the mechanisms, but who do so without any critical engagement and without any reliance on authority may just pass, but not do well.

The following are important points to raise:

- Judicial independence is critical, and an important component of the separation of powers. The judiciary is charged with upholding the Constitution, and safeguarding rights (sections 1, 165 and 172 of the Constitution, various judgments – see eg *Mwelase*)
- Judicial impartiality requires that judges apply the law without fear, favour or prejudice and uphold the Constitution
- Functional independence: all organs of state have a duty to assist and protect the court; contempt of court as mechanism where there is failure to comply with a court's order; immunity from liability
- Personal independence: Security of tenure, remuneration, conditions of service (Judges' Remuneration and Conditions of Employment Act)
- Appointment process – involving JSC, extensive public interview process – but with some political involvement constitutionally required. (Section 174 of Constitution, Judicial Services Act)
- Difficulty of judicial removal: along with security of tenure, the threshold for removing/dismissing a judge is very high – requiring gross misconduct, gross incompetence or incapacity). This has proven to be even more difficult in practice – see the ongoing Hlophe saga.

Possible critical points that students can argue

- In practice, legitimacy of the judiciary has been assailed especially recently, most notoriously by former President Zuma's refusal to comply with the Constitutional Court's processes and orders. This is serious, and undermines the independence of the judiciary.
- One of the concerns implicit in 'lawfare' is that the judiciary is impermissibly entrenching on the domain of the other arms of state, by pronouncing on what are in effect political questions (ie the politicization of litigation/judiciary concern)
- Judicial accountability in practice is incredibly difficult, and JSC internal processes are ineffectual
- Judicial appointment processes are necessarily political, which serves to undermine the independence of the judiciary (at least on some arguments)

4.2) (4)

A court could limit the retrospective effect of an order, so that the legislative provision's invalidity only runs from a set date (usually the date of the judgment), or it could suspend the declaration of invalidity. (2 marks)

It would typically do so on the basis of separation of powers considerations (eg to allow Parliament time to enact changes), to avoid any rights infringements (as in the *AllPay / Black Sash* saga), or to mitigate against administrative difficulties (particularly apposite with retrospectivity). (2 marks)

QUESTION 5: PROVINCIAL GOVERNMENT [12]

5.1)

- Provide for different provincial and admin. structures
- Provide more detail on provincial and admin structures in the province
- May provide for a traditional monarch (sec 143(1)).
- May provide for a provincial bill of rights. Provincial bill of rights may only contain provisions within the ambit of the powers of the province.
- Provincial bill of rights may provide more rights (within the province) and make their limitation more difficult (may not take away rights or make their limitation easier). **[4]**

5.2) a) The national legislation would be invalid as it is infringing on the powers of the province and may be declared unconstitutional by a court. **[2]**
b) Pre-eminence procedure needs to be followed. Section 146 of the Constitution provides that if one of the following requirements have been met, the national law may prevail:

- The matter can not be effectively regulated by the provincial legislation; or
- National legislation provides uniformity on a certain matter, by providing for norms and standards; or
- National legislation is necessary to provide: national security, economic unity, protection of the common market etc.; or
- National legislation prevails if it is aimed at: prevention of unreasonable action by a province that is prejudicial to the economic, health or security interests of the province or the country etc.
  If the national law prevails, the provincial law becomes inoperative until the conflict is removed. **[4]**

c) National government should urge to province to comply with their obligations, but if the province is unable to do so, the national legislature must intervene and create the legislation for the province. **[2]**

QUESTION 6: LOCAL GOVERNMENT (each example needs to be explained in a sentence) [4]

- Local government can only govern their communities “subject to national and provincial legislation”.
- Traditional local government functional areas are included in functional areas in Schedule 4 and 5 of the Constitution.
- Provincial governments have the authority to monitor the local government matters in Schedules 4 and 5 to see to it that municipalities administer them effectively.

- Provincial governments may intervene, when a municipality does not fulfil an executive obligation.