CONSTITUTIONAL LAW

CLW41A0

SUPPLEMENTARY EXAM 2021 MEMO

QUESTION 1: SA LEGISLATIVE PROCESS (p 113-120) [10]

1.1) Money bills are prepared by the department of finance, minister of finance. The minister of finance must introduce the bill in parliament (NA). The bill goes to the portfolio committee on finance where they consider the budget for 7 days. The committee however cannot amend the budget. The most important money bill of the year, the budget, is introduced in February at the annual budget speech. This is the first reading of the bill where the minister of finance addresses the house on the budget. The budget cannot therefore be introduced when the house is not in sitting. Some tariffs come into effect immediately after the first reading. The NA approves the budget at the first reading. The budget votes (subdivisions of the budget) are discussed in the house or in committees. The second reading considers the budget votes and the budget is then approved. The money bill is then referred to the NCOP where a shortened version of this process is followed. After the bill has been approved by both houses it is referred to the president for assent. (8)

1.2) With section 76 bills the houses form a mediation committee that try to resolve the issue. (1) If no agreement is reached within 30 days, the bill lapses or should be adopted with a 2/3 majority by the NA. This is not the case with money bills – NA may adopt with simple majority. Although rejection of the budget may come down to a motion of no confidence in the government. (2)

1.3) 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). Student needs to express and opinion as to the correctness of this (dissenting) judgment in relation to the majority judgment. (4)

QUESTION 2: OFFICIAL LANGUAGES [12]

National (1/2) and provincial government (1/2) in terms of the Constitution:

-At least 2 languages must be used

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

The new position under the Use of Official Languages Act 12 of 2012: (1/2)

-at least 3 languages must be used (1/2)

-applies to a national department, national public enterprise or national public institution, (1/2) but does not apply to provinces or local government (1/2)

Students may refer to ruling in *UNISA* (SCA) although this was not prescribed.

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. (1)

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. (1/2)

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. (1/2)

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. (1/2)

Criticism: Venter – court did not consider all the factors for determining unfair discrimination (1/2); there are no provisions that compel the legislature to translate legislation, but there are also none that compel the executive to do so (1/2); what was needed in this case was some decisive action to be taken by the court that would resolve the issue – parliament could have been ordered to create rules, executive could have been ordered to create or amend legislation to regulate the matter, or both organs could have been ordered to collaborate and find a solution to the translation problem (1/2). The ruling therefore does not give adequate recognition to the importance of language rights and respecting diversity (1/2).

Final ruling: ruling must follow the precedent set by die CC case law, but may be criticized. (1/2)

(p 81-85 and chap 7 slides)

QUESTION 3: NATIONAL EXECUTIVE AUTHORITY

3.1 Grounds for removal set out in section 177 of the Constitution:

- Incapacity
- Gross incompetence
- Gross misconduct

The relevant process is housed in the JSC, established in ection 178 of the Constitution, and the JSC Act. The JSC is mandated to deal with complaints, and the Code of Judicial Conduct serves as the standard against which judicial conduct is to be measured.

The JCC is established to receive and deal with complaints. For impeachable conduct, the JSC must sign off and then the process involves that the National Assembly must resolve by 2/3 majority, following which the President must remove the judge.

Article 12(1)(b) of the Code sets out that a judge should not become involved in political controversy. On this, it is true that judges, like anyone else, have the right to freedom of expression. However, courts must apply the law impartially, and without fear, favour or prejudice, and FOE is not absolute. Confidence of the publc, including in manifest fairness of the process, is important.

Students can engage with the JCC decision regarding Mogoeng CJ's comments on Israel, and the long-running Hlophe saga.

3.2 No – the 17th amendment of the Constitution extends the court's jurisdiction to determine an arguable point of law of general public importance.

QUESTION 4: JUDICIAL AUTHORITY

4.1 Does the Constitution require, allow or prohibit votes of no confidence against the President?
Cabinet shuffle which affected SA's credit rating. UDM motivates for secret ballot – ANC as majority party in Parliament, and had directed its members to vote against the motion of no confidence. Secret ballot would allow ANC members to vote according to conscience, rather than party line.

Speaker maintained that lacked power to order vote by secret ballot.

Unanimous judgment by Mogoeng CJ. MONC important mechanism for executive accountability. Speaker has power to order a secret ballot, and must take a number of factors into account when deciding whether to order a secret ballot:

- Would this allow members to vote according to conscience?
- What are the relevant facts?
- Speaker must be impartial
- MONC is critical accountability tool
- Guard against risk of corruption
- Need for transparency
- Power must be exercised rationally

Students must critically engage with the question, and indicate their views. The competing considerations (on whether a secret ballot should be permitted) are that MPs are publicly elected, and so there are reasons to want their votes to be open and transparent. There were also separate of powers considerations – would the court trench on SOP by ordering parliament to permit for votes in secret? Those considerations militate against a secret ballot.

In favour of a secret ballot is that President is elected by secret ballot and should be removed in the same way. One way of resolving the tension is that, in the context of motion of no confidence, MPs are acting in exercise of their executive accountability powers, which may not require similar degrees of transparency.

4.2 Wording of the relevant legislation. Ceremonial powers as head of state typically exercised alone.

- **"together with other members of cabinet":** joint decision
- **"in consultation with"**: joint decision
- **"after consultation with":** President has to consult, but is not bound

- **“On the advice of”/ “on recommendation of”:** President is bound by the advice/ recommendation

QUESTION 5: PROVINCIAL GOVERNMENT [10]

Exclusive legislative matters: with regard to these matters the provincial legislature has exclusive legislative authority – these matters are found in schedule 5 of the Constitution. (1/2)
- Pre-eminence does not apply to exclusive legislative matters, unless the province has indicated that they do not want to, or are able to, make legislation on an exclusive matter – in which case the national legislature may make legislation. (1/2)
-With regard to concurrent matters it may be necessary to choose between national and provincial legislation. There is a procedure that needs to be followed for legislative pre-eminence and is contained in **section 146** of the Constitution. (1/2) This section provides that national legislation will only prevail over provincial legislation if the national and provincial statutes contain **conflicting provisions** (1/2) and the national statute complies with **any one** of the following requirements: (1/2) a) national legislation is more **effective** than provincial legislation; b) national legislation provides **uniformity** by setting norms and standards; c) the national legislation is **necessary** for maintenance of national security, economic unity etc.; d) national legislation is aimed at **preventing unreasonable action** by the province etc. [students may name any two of these]. (1/2 + 1/2)
-Case: *Liquor Bill* case (1/2) [spelled correctly] – in this case the national government made a national law partially regulating liquor licences (which is an exclusive legislative matter for provinces) (1) This lead to the national legislature infringing on the exclusive legislative authority of the provinces as held by the Constitutional Court – the court stated that the national legislature has no authority to infringe on exclusive powers in this way. (1/2) This judgment should be followed since it gives effect to the principle of co-operative government and separation of powers. (1/2)
-Final verdict: the *Liquor Bill* case is the leading authority on this issue and should be followed since it gives effect to the principle of co-operative government and the separation of powers (1/2). (p 200-205) (10)

QUESTION 6: LOCAL GOVERNMENT [4]

The 1996 Constitution, however, changed this position:

- Local government is now a fully-fledged sphere of government;
- The principle of co-operative government also applies to local government;
- Local government enjoys representation in the NCOP;
- Local government is also involved in the structures that promote intergovernmental relations.