

CONSTITUTIONAL LAW CLW41A0/SRG0000

WINTER EXAM 9 JUNE 2018

MEMORANDUM

QUESTION 1: [one mark each]

[10]

- 1.1) B (p 3)
- 1.2) A (p 8-11)
- 1.3) C (p 31)
- 1.4) D (p 42)
- 1.5) B (p 44-45)
- 1.6) A (p 48)
- 1.7) D (p 68-69)
- 1.8) A (p 91)
- 1.9) B (p 89-90)
- 1.10) C (p 103-105)

QUESTION 2: SA LEGISLATIVE PROCESS (p 113-120)

[7]

- a) Departments and cabinet (1)
- b) Section 76 bill/concurrent bill/bills affecting provinces (1)
- c) NA (1)
- d) 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.(1)
- e) Section 75 bills/bills not affecting provinces (1)
- f) Budget votes are the different subdivisions of the budget for e.g. the budget for health or education. (1)

QUESTION 3: GOVERNMENT AUTHORITY

[10]

South African Broadcasting Corporation Soc Ltd v Democratic Alliance:

- The public protector wrote a report which concluded that there were “pathological corporate governance deficiencies at the SABC”.

- The SABC ignored the findings of the PP and in turn appointed attorneys to compile its own report which exonerated the SABC of any wrongdoing.
- DA and other parties instituted proceedings to get clarity on the status and enforcement of the PP's reports.
- High court: compared the PP's function to that of a court and stated that the PP's findings, unlike a court's, was not binding. The court, however, concluded that a decision to ignore the PP's findings must not be "irrational" – which in this case it was found to be.
- Criticism: this view undermines the status of the PP as envisioned by the constitution.
- SCA: on appeal the SCA however found that the PP is not comparable to a court, but rather to an executive organ – findings/orders of executive organs need to be followed, or taken on review in order to set them aside.
- SCA: the findings of the PP can therefore not simply be ignored.
- Criticism: the SCA however did not properly take the legislature's role into account in the enforcement of the decisions of the PP, since the PP is in effect an instrument of parliament.

Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly

- PP wrote a report on the misappropriation of funds in the upgrading of the President's home at Nkandla.
- The report was however ignored by the President and parliament, again a parallel investigation was launched which cleared the President of any wrongdoing.
- Political parties took the president and the speaker of parliament to court about their refusal to give effect to the PP's report.
- CC: With regard to the powers of the public protector the constitutional court argued: firstly, that the impartiality of the public protector would be irrelevant "if the implementation of the decisions it takes is at the mercy of those against whom they are made"; secondly, the court remarked that the public protector's substantial budget, offices and staff as well as the time and resources utilised in its investigations would suggest that the powers and decisions of the public protector was never meant to be inconsequential; and lastly, the court concluded that the chapter 9 institutions would be meaningless if they lacked the potential to do what they were created to do, in other words to strengthen constitutional democracy (par 49).
- CC: the court therefore concluded that the PP's findings cannot simply be ignored.

- CC: also found that the parliament and the president failed to fulfil their constitutional obligations.

QUESTION 4: EXECUTIVE AUTHORITY

[6]

Mazibuko v Sisulu

Four legal questions:

- Whether the Speaker had the power to schedule the motion of no confidence on his own authority in terms of rule 2(1) of the rules of parliament;
- Whether the rules were inconsistent with the constitution to the extent that they did not fully provide for the consideration of motions of no confidence by the Assembly as envisaged by section 102(2);
- Whether it was necessary for the court to make a ruling at all in the light of the fact that the committee was in the process of reviewing the rules regarding these motions and that any determination would therefore infringe on the separation of powers;
- Whether parliament's failure to provide rules for the moving, scheduling, debating and voting on these motions amounted to a failure to fulfil a constitutional obligation as envisaged by section 167(4) of the Constitution.

Majority judgment:

1) The court held that the Speaker did not have the power to schedule the motion on his own authority, because the rule in rule 2(1) was only permissive and did not oblige the Speaker to do anything and could in anyway be overridden by the Assembly. (1/2) It is however strange that the court could come to this conclusion even after they have found that there is a *lacuna* in the rules with regard to motions of no confidence – clearly this is an eventuality for which the rules do not provide, which is exactly why rule 2(1) was created. (1/2)

2) The court found that the unconstitutionality of the rules were located in the absence of decision-making and deadlock-breaking mechanisms in the committees with regard to motions of confidence and that it did not really matter whether the committees used the prescribed rules or their informal procedures since both could frustrate the moving of motions of no confidence. (1/2) Although the court is correct in stating that the rules are unconstitutional because it does not provide for mechanisms to effectively give effect to a member's power to move motions of no confidence, the unconstitutionality is not so much located in the absence of decision-making and deadlock-breaking mechanisms but rather in the absence of any rules relating to motions of no confidence at all. A motion of no confidence is such an important check on the executive that these motions should be expressly provided for and not just treated like ordinary motions. In addition section 55(2)(a) of the Constitution provides that the assembly must provide for mechanisms to ensure that executive organs are held accountable to it. (1/2)

3) The court found that because there was still a lack of consensus in the committee charged with the reviewing of the rules, the problem would most likely persist. The court also found that it would not infringe on the separation of powers if the court made an order stating that the parliament should make a rule giving effect to motions of no confidence, because it would not be prescribing a rule only ordering that a rule should be made. (1/2) One can agree with this determination of the court since the court would not be creating rules for the assembly and would therefore not be an infringement of the separation of powers. (1/2)

4) The majority judgment did not really focus on this question and somewhat lamely determined that this question “must wait for another day”. (1/2) Once the court has determined that there is a lacuna that the parliament failed to fill by not giving effect to section 55(2)(a), it is strange that the court could still not find that the parliament has failed to fulfil a constitutional obligation in terms of sec 167(4). (1/2) [6] (as discussed in class)

QUESTION 5: JUDICIAL AUTHORITY

[4]

Examples of prior abstract control	Example of <i>ex post facto</i> abstract control
1. Constitutionality of any bill of parliament or provincial legislature after referral by the President/Premier. (1)	1. Constitutionality of any act of parliament or provincial legislature after referral by a 1/3 of the NA or a 1/5 of the provincial legislature, within 30 days after the President/Premier assented to the act. (1)
2. Certification of a provincial constitution or an amendment to a provincial constitution. (1)	
3. Constitutionality of any amendment to the Constitution. (1)	

(4) (p 172-174)

QUESTION 6: PROVINCIAL GOVERNMENT

[15]

6.1) –**Concurrent legislative matters**: with regard to these matters the national legislature and the provincial legislature share legislative authority – these matters are found in schedule 4 of the Constitution. (1)

-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) This section provides that national legislation will only prevail over provincial legislation if the national and provincial statutes contain **conflicting provisions** (1) and the national statute complies with **any one** of the following requirements: (1) 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]. (2)

-If either the national or provincial statute prevails the other law becomes **inoperative** for as long as the conflict persists. (1)

-Case: *Mashavha* case (1) [spelled correctly] – in this case the provincial government could not administer social welfare grants effectively and the court found that this function should be administered by the national government since it could deal with the matter more effectively and also provide uniformity in the country with regard to the issuing of social grants. (1) Although the case resulted in the social grants being administered more effectively, the court's conclusion cannot be supported since the provinces' administrative capacity should be supported and developed by the national government, before powers or functions are simply taken over by the national government. This would better give effect to the principle of co-operative government. (1) OR This judgment should be followed since it would lead to more effective administration of housing in the province and would provide uniformity with regard to housing matters in the country. (1)

-Final verdict: although the *Mashavha* case is the highest authority on this issue it should not be followed since it would be more in line with the constitutional principle of co-operative government if the national government were to support and strengthen the administrative capacity of the Limpopo province before deciding to exercise the function itself. (1) The provincial law will therefore prevail, but the court orders that the national government must take all necessary steps to ensure that the province has the support it needs in order to fulfil their housing obligations toward the community. (1) OR The *Mashavha* case is the highest authority on this issue and should therefore be followed. (1) The court therefore orders that the national law prevails over the provincial housing law and that the national government should therefore administer the Limpopo province's housing obligations. (1) (p 200-205) (10)

6.2) -Provincial constitutions need to be adopted by 2/3 majority in the provincial legislature;

- It needs to be consistent with all the provisions of the national Constitution;
- It needs to be certified by the CC;
- It must comply with principle of co-operative government (chapter 3);
- It must comply with sec 1;
- It may not confer more powers than is conferred by the national Constitution. (any 5) (p 195-197)

QUESTION 7: LOCAL GOVERNMENT

[8]

-The Const. recognises local government as an independent sphere of government.(1) Const. entrenches the existence of the local government level; and the other spheres may not encroach on the independence of the local government; or do away with this level without amending the Const. (Any one) (1)

-Principle of co-operative government also applies to the local government. (1) Other levels may not encroach on the local government's authority and the local government may not encroach on the other government levels' authority; national and provincial government must assist the local government and develop its capacity. (Any one) (1)

-Local government enjoys representation in the NCOP. (1) Organised local government may appoint 10 members to represent the municipalities in the NCOP. (1)

-Local government is also involved in the structures for the promotion of intergovernmental relations. (1) SA Local Government Association, Financial and Fiscal Commission; Intergovernmental Relations Framework Act (Any one) (1) **(p 230-231) (8)**