

## **MEMORANDUM**

### **HUMAN RIGHTS/BILL OF RIGHTS (HRT41BO/HRE0021)**

SSA EXAMINATION

19 January 2021

180 MINUTES/THREE HOURS

60 MARKS

EXAMINERS: DR M ROUX/PROF MR PHOOKO

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#### **QUESTION 1**

**1.1 Express your opinion on whether this would be a matter of direct or indirect application of the Bill of Rights, as well as whether it would be a matter of horizontal or vertical application. You must justify your answer. (10)**

- *Very important that student don't just describe direct/indirect and vertical/horizontal application, but applies it to the set of facts, explaining exactly why they say it is direct vertical application.*
- *Direct application:*
  - *Student must correctly identify that this is a direct violation of rights, as this is a constitutional matter (allegation of infringement to the rights to privacy, equality and dignity of registrants).*
  - *Section 39(1) of the Constitution is therefore applicable.*
  - *BOR 'overrides' ordinary law: human right guaranteed in the BOR is infringed, therefore 'only' the BOR is applicable, or 'only' if constitutional matters.*
- *Vertical and horizontal application:*
  - *Can be either, specifically because a marriage officer could solemnise civil unions at a court, or a minister at a church for example (public vs private).*
  - *Re vertical: student must explain that the state may not encroach on rights of individuals through legislation (or bills).*
  - *Re horizontal: private marriage officer may not discriminate against private persons.*
- *NB: there is also the possibility that students argue that there should not be a differentiation between direct and indirect application, based on the controversy regarding this distinction, citing the following (and discussing the relevant points):*
  - *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the RSA 2000 (2) SA 674 (CC) (paras 44 – 46);*
  - *Masiya v Director of Public Prosecutions, Pretoria 2007 (5) SA 30 (CC); and*
  - *Section 167(3) of the Constitution.*

**1.2 Critically evaluate whether the repeal of Section 6 of the Civil Union Act by the Civil Union Amendment Act would constitute a justifiable limitation of constitutional rights(s) in terms of section 36 of the Bill of Rights. (15)**

- *Student has to make an assessment based on the various aspects set out in the limitations enquiry in section 36, and refer to reasonableness, the proportionality enquiry (harm vs benefits) and apply it to the set of facts.*
- *NB: memo is broad outline, assess student's argument individually.*
- *Nature of the rights that may possibly be infringed: section 9 right to equality, specifically on grounds of sexual orientation. Very important right in SA constitutional democracy.*
- *Importance and purpose of the limitation: to protect persons against discrimination in terms of right to equality. Very important, as same sex couples have been discriminated against severely in the past, to prevent this.*
- *Nature and extent of the limitation: section 15 right to freedom of religion, belief and opinion, may not use this any longer to refuse to solemnise a civil union.*
- *Relation between the limitation and its purpose: religion, belief and opinion are the stereotypical grounds used to discriminate against same sex couples, therefore by*

*prohibiting these grounds from being used to justify refusal to solemnise will achieve the purpose of protecting this group from being discriminated against.*

- *Less restrictive means to achieve the purpose: can these purposes of the limitation be achieved in a less intrusive way, less far-reaching way?*
- *NB that student concludes the argument by stating whether or not they think it is a justifiable limitation or not.*

**1.3 Outline which constitutional remedies would be the most appropriate should this amount to a constitutional violation. (5)**

- *Student to apply the available constitutional remedies, and specifically apply it to the answers provided in question 1.1.*
- *If student wrote that this is DIRECT application, then the following constitutional remedies should be applied to the answer given in question 1.1:*
  - *Declaration of invalidity: Section 2 and 172 of the Constitution - 'law or conduct' that is inconsistent with the Constitution must be declared unconstitutional to the extent of its inconsistency.*
  - *Interdict: final, mandamus, interim, or structural.*
  - *Constitutional damages.*
  - *Declaration of rights.*
- *Bonus: description of the purpose behind constitutional remedies.*
- *If student wrote that this is INDIRECT application, constitutional remedies would not be appropriate, but remedies in terms of the common law/legislation. Student should justify what other remedies would then be appropriate (student to be rewarded for creativity and critical thinking).*

**[30]**

**QUESTION 2**

Xxx

**[15]**

**QUESTION 3**

Xxx

**[5]**

**QUESTION 4**

4.1 xxx (5)

4.2 xxx (5)

**[10]**

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**TOTAL EXAM:**

**[60]**

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1.1 =

1.2 =

1.3 =

2 =

3 =

4 =

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%