

MEMORANDUM

HUMAN RIGHTS/BILL OF RIGHTS (HRT41BO/HRE0021)

SUMMER EXAMINATION (MAIN)

29 OCTOBER 2020

180 MINUTES/THREE HOURS

60 MARKS

EXAMINERS: DR M ROUX/PROF MR PHOOKO

EXTERNAL MODERATOR: PROF M PIETERSE (WITS)

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 application:*
 - *Student must correctly identify that it is vertical application, as it is a bill introduced by the Minister of Justice and Correctional Affairs that may potentially infringe individuals' rights to privacy, equality and dignity.*
 - *Student must explain that the state may not encroach on rights of individuals through legislation (or bills).*
- *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 section 7(c) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill [B16 – 2020] 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: privacy, dignity and equality.*
- *Importance and purpose of the limitation: to protect vulnerable persons (children and mentally disabled) against sexual violence, as well as protecting the public's right to information and right to freedom and security of the person.*
- *Nature and extent of the limitation: making the full names and ID number available on a website on internet is far-reaching, and could limit the right to privacy.*

- *Relation between the limitation and its purpose: does the publication of these details protect vulnerable persons, and protect the public's right to information and right to freedom and security of the person?*
- *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

Comprehensively explain the concepts of 'progressive realization', 'reasonable measures' and 'within available resources' as they appear in sections 26 and 27 of the Constitution.

Your answer **should NOT** exceed one page.

[10]

- 'progressive realization', - not immediate but over a period of time.
- *Government of the Republic of South Africa and Others v Grootboom and Others* 200 (3) BCLR 277 (CC)
- 'reasonable measures' – there must be a clear comprehensive plan that will cater for the majority of the beneficiaries
- *Minister of Health v Treatment Action Campaign (TAC)* (2002) 5 SA 721 (CC)
- *Government of the Republic of South Africa and Others v Grootboom and Others* 200 (3) BCLR 277 (CC)
- 'within available resources – state cannot do beyond what it can afford
- *Soobramoney v. Minister of Health* [1997] ZACC 17; 1998 (1) SA 765 (CC)

QUESTION 3

During the fees must fall protests, students recited various political slogans to pursue their cause for free tertiary education in South Africa. On one occasion, Jacob Zondi could be heard singing a remixed version of one of the notorious political songs. He chanted, "Kill the management, Kill the leaders".

With reference to decided cases, critically discuss the right to freedom of expression in terms of section 16 of the Constitution of the Republic of South Africa, 1996. In your answer, indicate whether the aforesaid statements fall within the ambit of protected speech. Your answer **should NOT** exceed three pages. **[10]**

- Section 16 of the Constitution provides: 15 (1) Everyone has the right to freedom of expression, which includes:
 - (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas;
 - (c) freedom of artistic creativity; and
 - (d) academic freedom and freedom of scientific research.

The word "includes" indicates that although mention is made of only four aspects of this right, it could encompass other forms of speech.

Section 16(2) lists circumstances under which the right afforded in section 16(1) can be excluded.

According to section 16(2), this right can be limited when it is used as propaganda for war 2(a), to incite imminent violence 2(b) or as a form of hate speech 2(c).

There are two elements to constitute prohibited speech:

1. Advocacy of hatred that is based on race, ethnicity, gender or religion:
2. Constitutes incitement to cause harm:

Freedom of expression is internally limited in section 16(2) right)

Freedom of expression can also be limited under the general limitation clause (section 36).

The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (section 10)

- Section 10: Prohibition of hate speech

1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to-

- a) be hurtful;
- b) be harmful or to incite harm;
- c) promote or propagate hatred.

Afri-Forum and Another v Malema and Others (20968/2010) [2011] ZAEQC 2; 2011 (6) SA 240 (EqC); [2011] 4 All SA 293 (EqC);

- *Jacob's speech falls outside the constitutionally protected grounds of freedom of expression.*
- *NB: marks have been awarded where student has referred to other relevant cases.*

QUESTION 4

Daniel Tshuku, a leader of the movement called "housing for all" lobbied his constituency to occupy vacant land not far from Sandton in Johannesburg. Within a week, countless houses made out of corrugated iron were built in the area. The residents collectively decided to name their informal settlement "Freedom Park". During one of the cold and rainy days in October 2020, the City of Johannesburg decided to demolish all the structures at Freedom Park informal settlement and evicted the residents. There was no form of notice whatsoever given to the residents.

In light of the above, what is your understanding of the concept of meaningful engagement as developed by the courts in eviction cases? Your answer **should NOT** exceed one page. **[10]**

There is no closed list of the objectives of engagement. Some of the objectives of engagement in the context of a city wishing to evict people who might be rendered homeless consequent upon the eviction would be to determine:

- (a) what the consequences of the eviction might be;
- (b) whether the city could help in alleviating those dire consequences;
- (c) whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period;
- (d) whether the city had any obligations to the occupiers in the prevailing circumstances; and
- (e) when and how the city could or would fulfil these obligations.

Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (CCT 22/08) [2009] ZACC 16

Port Elizabeth Municipality v. Various Occupiers 2004 (12) BCLR 1268 (CC)

TOTAL EXAM:

[60]

1.1 =

1.2 =

1.3 =

2 =

3 =

4 =

=

%