

HUMAN RIGHTS/BILL OF RIGHTS SPECIAL SUPP 30 JANUARY 2018

HRE0021/HRT41B0

MEMORANDUM

SECTION A:

QUESTION 1: MULTIPLE CHOICE

[10]

- 1.1) C (Rautenbach p 251) (1)
- 1.2) D (Currie & De Waal p 24-25, 31) (1)
- 1.3) D (Rautenbach p 272) (1)
- 1.4) A (Rautenbach p 271-275) (1)
- 1.5) B (Rautenbach p 281-282) (1)
- 1.6) A (Rautenbach p 277-280) (1)
- 1.7) C (Rautenbach p 429) (1)
- 1.8) D (Rautenbach p 333, 340, 343) (1)
- 1.9) C (Rautenbach p 358-359) (1)
- 1.10) A (Rautenbach p 369) (1)

QUESTION 2: TRUE/FALSE

[20]

- 2.1) False, section 37 is a specific limitation clause that makes the limitation of rights easier during a state of emergency. (2) (Rautenbach p 316-317)
- 2.2) False, direct discrimination is differentiation on a ground referred to expressly in the constitution/other legislation. (2) (Rautenbach p 323)
- 2.3) True, because slavery treats a person like property – therefore it always amounts to an infringement of dignity. (2) (Rautenbach p 335)
- 2.4) False, juristic persons cannot be bearers of the right to freedom and security of the person because they do not possess “bodies” that could be injured or infringed in this way. (2) (Rautenbach p 346)
- 2.5) False, the bill of rights applies to all legal rules including those of private law, common law, customary law and rules developed by the courts. (2). (Rautenbach p 284-285)
- 2.6) False, general and specific limitation clauses should be used together. (2) (Rautenbach p 315)

2.7) False, indirect discrimination is differentiation in terms of a measure that has a discriminatory effect in its formulation or on another ground other than a prohibited ground. (2) (Rautenbach p 323)

2.8) True, these types of infringements are very minor limitations of a person's rights and the justification for the infringement outweighs the limiting effect. (2) (Rautenbach p 335)

2.9) False, in the South African law a foetus does not have a right to life, however the reproductive choices of a woman may be limited by the interests that the state has in protecting different stages of foetal development. (2) (Rautenbach p 341/345)

2.10) False, although the Bill of Rights does not apply extra-territorially, South African authorities have a duty, for example to get an assurance from a foreign country that they will not impose the death penalty on such a person, before extraditing any person to such country where they could receive the death penalty. (2) (Currie & De Waal p 55-56)

SECTION B:

QUESTION 1:

1.1) (Rautenbach p 250) [Students must answer both parts of each step in order to receive a whole mark – otherwise a half mark is awarded.] [Students could approach this question in various ways and the conclusion could therefore be for or against the applicant.]

Interpretation of the provision:

1. Who are the **bearers of the right to access to adequate housing**? – Natural persons (1)
2. Which **conduct and interests** are protected by the right to **access to adequate housing**?
- the right entails the enjoyment of access to adequate housing.
(1)
3. Which persons or institutions are **bound by the right to access to adequate housing** and what are their **duties**? – the government and other natural & juristic

Application to the particular case:

... and whether the applicant is such a person; **yes, the community is a group of natural persons and may therefore be bearers of the right.** (1)

...and whether such **conduct and interests** of the community are affected in the particular case; the right protects **the applicants' right of access to adequate housing and the right is affected in this case since the applicants are precluded from such access although they are entitled to it and have to live in dire conditions.** (1)

... and whether the **local government** is such an institution and has not fulfilled its duties; the **local government is bound by this right (and as state institution must respect/protect/promote and fulfil**

persons are bound by the right, and the state has the duty to respect, protect, promote and fulfil the right. (1)

the right); and the state/government did not comply with these duties, but infringed on the applicants' right to access to adequate housing by not making provision for developing the area and building houses even though the community qualified for such assistance. (1)

4. What are the **requirements for the limitation** of the right to access to adequate housing? – the requirements for limitation may be found in sec 36. (1)

... and whether the limitation of the applicant's right complied with these requirements; **the question is whether the conduct of the state/government in this case may be justified by having regard to the factors in section 36.**

Yes/No + reason. For example: No, the state's failure to provide adequate housing infringes on the rights of the community as the local government has failed to provide the housing to which they were legally entitled. This failure also affects the community's right to dignity which is a very serious infringement. The limitation is therefore not justifiable. (1)

[8]

1.2) [Half a mark for naming the factor and half a mark for explaining the factor in one sentence; one mark for the application of the factor to the facts. Students may argue that the limitation was justifiable or that the limitation is unconstitutional – as long as the answer is motivated. The application part of the memo is therefore only a guideline.]

-Nature of the right (1/2): here it must be determined what is protected by the right, how important the right is and the way it is exercised in a democratic society. (1/2) Application: the right to access to adequate housing is a very important right seen in the light of South Africa's history of human rights violations and ensures that all persons have access to housing. Therefore it is a very important right in an open and democratic society based on human dignity, freedom and equality. It is also important that the dignity of all persons are recognised and promoted in their exercise of their right of access to adequate housing. (1)

-Importance of the purpose of the limitation (1/2): here it is determined what the purpose of the limitation is and how important that purpose is. (1/2) Application: municipality argues that there isn't adequate funding to provide housing. Although scarcity of resources is a reality the limitation must be weighed against the unreasonable actions of the municipality in promising the community housing and then not providing it. (1)

-Nature and extent of the limitation (1/2): here it is determined what method is used to limit the right and how the limitation affects the conduct and interests. (1/2)
Application: the limitation of the community's right to adequate housing infringes on their dignity since it forces them to live in inhumane conditions. This is a serious violation of the rights and not in line with the values of the constitution. (1)

-Relation between the limitation and its purpose (1/2): here it is determined whether the limitation can promote the purpose and, if so, to what extent. (1/2)
Application: the limitation means that resources could be spent on other matters within the municipality and the limitation could therefore promote the purpose, but the question is whether this limitation has gone too far. In this case it would seem that the limitation has gone on for much too long to be justifiable. (1)

-Less restrictive means to achieve the purpose (1/2): here it is determined if there are any other measures that are more or less equally effective in reaching the goal, but less restrictive. (1/2)
Application: Less restrictive means of achieving the purpose of channelling funds to other matters in the municipality could have been addressed by the local government asking the provincial government for funding for the housing project. (1) (Rautenbach p 308-314)

[10]

QUESTION 2: FREEDOM OF EXPRESSION

[12]

2.1) Freedom of expression is a key freedom in democracies because democracies are founded on openness of ideas and information and the freedom to debate issues of importance. It also entails transparency in government and scrutinising government actions. Openness and transparency is also a founding value of our Constitution in section 1. (3)

2.2) a) These exclusions are part of the protected conduct and interests, in other words they have been expressly excluded and therefore form part of the definition of the right. It can therefore not be seen as a specific limitation clause. (1)

b) This does not only include physical violence but also psychological threats. (1)

c) The Promotion of Equality and the Prevention of Unfair Discrimination Act (PEPUDA). This act goes much further in the protection against hate speech by including much more grounds for hate speech than was provided by the Constitution. (2)

d) -*AfriForum v Malema* 2010 5 SA 235 (GNP) the court decided that the song "Shoot the Boer" amounts to hate speech.

-*African National Congress v Harmse: In Re Harmse v Vawda (Afri-Forum Intervening)* 2011 5 SA 460 (GSJ) confirmed this decision.

-*Sonke Gender Justice Network v Malema* 2010 7 BCLR 729 (EqC) the Equality Court stated that Julius' comments about women (after the case regarding the woman who was allegedly raped by Pres Zuma) amounted to hate speech. (5)

