UNIVERSITY EXAMINATIONS

UNIVERSITEITSEKSAMENS

UNISA university of south africa

CSL2601 (473624) May/June 2018

Constitutional Law

Duration 2 Hours

100 Marks

EXAMINERS

FIRST	PROF MJ MATHENJWA
SECOND	MISS L STONE
EXTERNAL	PROF B BEKINK

Closed book examination

This examination question paper remains the property of the University of South Africa and may not be removed from the examination venue

This question paper consists of eight (8) pages

PLEASE TAKE CAREFUL NOTE OF THE FOLLOWING INSTRUCTIONS:

1. **Answer all the questions**
2. **Answer question 1 on a mark-reading sheet using an HB pencil.**
3. **Leave enough space for your answer in case you wish to return to a question later Refer to binding and precedent-setting cases or legal authority to support your answers.**
4. **Take note of the marks allocated to each question and make sure that your answer is in keeping with this mark allocation In other words, do not write a comprehensive answer if the question counts only a few marks; the opposite also applies**

TURN OVER

QUESTION 1

Indicate on the mark-reading sheet whether the following statements are true or false If a statement is **true**, you must answer **1** and if it is **false**, you must answer **2**

1 1 In the case *Judicial Service Commission and Another v Cape Bar Council and Another* 2012 (11) BCLR 1239 (SCA), the Court found that the decisions of the Judicial Service Commission about the appointment of judges cannot be reviewed by a court (1)

1 2 The need for the judiciary to reflect the gender composition of South Africa is more important than the need for the judiciary to reflect the racial composition of South Africa (1)

1 3 A member of the National Assembly is only allowed to introduce a Bill in the National Assembly if the majority of members in the National Assembly have given the member permission to initiate such legislation (1)

1 4 Like the President of the United States of America, the President of South Africa has the power to veto legislation merely because he or she opposes the legislation (1)

1 5 The electoral system in South Africa is the closed-list, proportional representation system because it reflects the wishes of the voters more accurately and makes it easier for smaller parties to be represented in the National Assembly (1)

1 6 The test used when tagging Bills as section 75, 76 or 77 Bills is called the "substantial measure test" and it is the same test that is used by a court to characterise a Bill in order to determine which of the national or provincial legislatures has the competence to enact the law (1)

1 7 The constitutional recognition of customary law as a legitimate system of law alongside other legal systems in South Africa means that customary law enjoys equal recognition as a source of law (1)

1 8 According to section 83 of the Constitution, the President is the head of the national executive, therefore, all powers of the President exclusively involve the exercise of executive authority (1)

1 9 In *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC), it was held that Parliament can delegate its powers to make, amend and repeal Acts of Parliament because it is universally accepted in modern societies that a parliament cannot attend to every single task that it is enjoined to perform (1)

1 10 It is a privilege of members of Parliament to say anything in Parliament without fear of being held liable in a court of law, and this privilege serves to protect Parliament from outside interference This means that parliamentary privileges are not subject to judicial review under the new constitutional dispensation (1)

1 11 The Constitutional Court in *Doctors for Life International v Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC) held that public involvement in the law-making process was one of the essential features of participatory democracy and it had already been established under the system of customary law through imbizos or lekgotlas (1)

1 12 In *President of the Republic of South Africa v South African Rugby Football Union* 1999 (10) BCLR 1059 (CC), the Constitutional Court held that due to the President's failure to exercise his power to appoint a commission of inquiry personally, the President had abdicated his responsibility in contravention of section 84(2)(f) of the 1996 Constitution (1)

1 13 In *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC), the Court determined that the legislation-making stage at which it can intervene to enforce Parliament's obligation to facilitate public involvement is before the legislative process is complete in order to prevent irreversible and material harm (1)

1 14 It would be accurate to state that a country is democratic if its elections are held every five years, even if only one political party is allowed to stand in the election (1)

1 15 In March 2011, the Constitutional Court ruled that the Hawks (the corruption-fighting unit of the South African Police Service) lacked sufficient operational and structural independence to enable them to properly combat corruption The Court therefore declared the laws that had disbanded the former Scorpions and created the Hawks in their place (the National Prosecuting Authority Amendment Act and the South African Police Service Amendment Act) unconstitutional In order to rectify this unconstitutional situation, the Court drafted a new law, called the Eradication of Corrupt Activities Act 24 of 2013 (1)

1 16 The rule that Parliament may delegate powers to other branches of government is determined by the "nature and extent of the delegation" and serves to ensure that the legislature is not overwhelmed by the need to determine minor regulatory details However, it is imperative that a distinction be drawn between delegating the power to make subordinate legislation within the framework of an empowering statute, and "assigning plenary legislative powers to another body" What this rule ultimately entails is that Parliament may not ordinarily delegate its "essential legislative functions" to the executive, although it is free to delegate the power to make regulations aimed at implementing legislation (1)

1 17 A precedent has been set in the case *United Democratic Party and Others v Speaker of the National Assembly and Others* (CCT89/17) [2017] ZACC 21 (22 June 2017) that the Speaker of the National Assembly does not have the power to prescribe that voting in a motion of no confidence in the President be conducted by secret ballot (1)

1 18 There is a considerable difference between constitutional supremacy as a value captured by section 1 of the Constitution and the declaration of constitutional supremacy as a binding and enforceable rule set out in section 2 (1)

1 19 The case *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 established the test for judicial independence The test for independence is whether a court, "from the objective standpoint of a reasonable and informed person, will be perceived as enjoying the essential conditions of independence" (1)

TURN OVER

1 20 In the case *Economic Freedom Fighters and Others v Speaker of the National Assembly and Others* (CCT143/15, CCT171/15) [2016] ZACC 11 (31 March 2016) the Constitutional Court confirmed that remedial action recommended by the Public Protector against President Jacob Zuma in terms of section 182(1)(c) of the Constitution in relation to the Nkandla saga is not binding, but dependent on the discretion of the President (1)

[20]

QUESTION 2

Carefully read the scenario below and then answer the questions that follow Substantiate your answers with specific references to relevant provisions of the South African Constitution or other legislation and case law

In January 2015 the South African state ratified the 1966 International Covenant on Economic, Social and Cultural Rights Accordingly, this crystallised the protection of fundamental socio-economic rights – such as the right to education – as a binding obligation, although the Constitution of the Republic of South Africa also includes a long list of justiciable socio-economic rights Notwithstanding this obligation, South African university students from across the country have been protesting since 2016, demanding free university education for those who cannot afford tuition fees The students argue that radical transformation in the higher education sector should be prioritised if South Africa is to achieve the objectives of ensuring

a a post-school system that can assist in building a fair, equitable, non-racial, non-sexist and democratic South Africa,

b expanded access and improved quality, and

c a post-school system that is responsive to the needs of individual citizens and employers in both public and private sectors, and broader societal and developmental objectives

The students further assert that reform will necessarily entail that tuition fees are made affordable since prohibitively high fees exclude black students, in particular, from tertiary education The overriding argument of the students was contained in a press release

PRESS RELEASE

South Africa is a social state that places a specific focus on the importance of community and the fact that all people in society are demeaned when some people do not have their social and economic needs met

Constitutional law is politics by a different means, but it remains a form of politics, and the personal is political! The current academic authority on South Africa's legal order, the book *South African Constitutional Law in Context* by Pierre de Vos and others, indicates on page 51 that a "state is 'social' when it promotes the principle of communally endorsed, collective insurance against individual misfortune and its consequences It is that principle that generates an 'order of equality', inspiring confidence and human solidarity It is the same principle which lifts members of society to the status of citizens, that is, makes them stakeholders in addition to being stockholders beneficiaries, but also actors in the 'social benefits system'"

We therefore demand a state that upholds the rights of its citizens, which includes providing for the material needs of citizens so they can have a life worth living Consequently, we demand fee-free tertiary education *Mayibuye iAfrika! Amandla Awethu!*

In response to the demands made by students, President Jacob Zuma appointed a commission of inquiry in terms of section 84(2)(f) of the Constitution, whose mandate was to determine the feasibility of providing free tertiary education in South Africa Assume that, in the light of the seriousness of the issue, President Zuma appointed the Deputy Chief Justice to head the inquiry into fee-free tertiary education The Deputy Chief Justice concluded the inquiry in January 2018 and delivered his report to President Zuma immediately thereafter It is now May 2018 and President Zuma has still not released the findings of the inquiry Interestingly, in March 2018, South Africa withdrew from the International Covenant on Economic, Social and Cultural Rights and declared that this withdrawal had immediate effect The government stated that it is not

necessary to be a party to the international treaty, because the Constitution 'embodies the required legal behaviour, imparting the spirit of life to a dead letter"

As a lawyer specialising in constitutional matters, you have been approached by a political party in South Africa, who argue that they view the President's conduct in not releasing the report of the commission of inquiry as a violation of the Constitution They ask you to provide a legal opinion on various matters relating to the factual scenario above and to take appropriate action to ensure compliance with the law

2 1 The political party's instructions are that you must prepare a legal opinion that deals with the following four fundamental issues relating to South Africa's constitutional democracy

(a) Whether it is constitutionally permissible for the President to have appointed a sitting judge to head the commission of inquiry into fee-free tertiary education and, if not, the reasons why not (10)

(b) Whether there are any legal principles and precedents that can be used to compel the President to release the findings of the commission of inquiry (10)

(c) Whether the idea that South Africa is a social state has any relationship with traditional African concepts that can be used to justify the state's obligation to ensure that real access to education for all students is realised, and what the substance of this argument would be (10)

(d) Which court(s) will have jurisdiction to hear these matters if litigation is instituted, and what the powers and responsibilities of these courts are in these types of matters (10)

2 2 While you are researching the issues for the legal opinion you are drafting, you also look into the question of whether South Africa had the authority to withdraw from the international treaty it had ratified, namely, the Covenant on Economic, Social and Cultural Rights You come across the following quote

> Sovereignty is a sign of the rule of law and, at the same time, supervenes the law Sovereignty is both the source of law and above the law It is all law and no law Its every utterance is law, and it is lawless

You are so fascinated by this quote that you decide to write a newspaper article in which you fully explain the meaning and the significance of the rule of law in South Africa and argue (with reference to authority to substantiate your arguments) that South Africa is not permitted to use its sovereignty to defeat its obligations (10)

2 3 In an article, Sujit Choudhry describes South Africa as a one-party dominant democracy He goes on to state that "[o]ne of the pathologies of a dominant party democracy is the colonisation of independent institutions meant to check the exercise of political power by the dominant party, enmeshing them in webs of patronage " This remark relates to an incident that occurred in April 2008 when Judge John Hlophe (the Judge President of the Western Cape High Court) allegedly said to two Constitutional Court justices "You are our last hope, you must find in favour of our comrade", apparently in reference to a case against Jacob Zuma shortly before he became the President of the Republic of South Africa

Discuss the validity of Choudhry's statement, using the matter concerning Judge John Hlophe and any other examples and authority as evidence to support and justify your answer (10)

2 4 Assume that in 2009, just before Jake Bavuma became President of South Africa, 387 criminal charges that had been instituted against him for corruption, were dropped It has subsequently come to light that the charges were dropped because the Minister of Justice was not personally satisfied that there was sufficient information and evidence to prosecute Jake Bavuma, thus the National Director of Public Prosecutions, Gary de Goat, was not permitted to discharge his duties or perform his functions

Explain the position and status of the National Prosecuting Authority in South Africa and describe fully whether the facts set out above are consistent with the Constitution (10)

2 5 Write an essay in which you critically discuss the concept of cooperative government" in the constitutional sense In your answer, you must compare the term "sphere of government" with the term 'level of government" and explain the implications of each concept for the institutional status of local government In addition, you must explain the rules that apply in the case of a conflict of laws when the local or provincial sphere passes a law that directly conflicts with a national law (10)

[80]

TOTAL {100}

©
Unisa 2018