

UNIVERSITY OF SWAZILAND

FACULTY OF SOCIAL SCIENCES

DEPARTMENT OF LAW

SUPPLEMENTARY EXAMINATION

JULY 2018

TITLE OF PAPER : CONSTITUTIONAL LAW 11

COURSE CODE : LAW 104

TIME ALLOWED : THREE (3) HOURS

INSTRUCTIONS

1. This paper consists of 4 questions
2. You must answer all questions.

QUESTION 1

Mohamed Ali Khan (“Mohammed”) is permanently resident in Swaziland. He is a citizen of the Islamic Republic of Pakistan. Mohammed is a business, he owns a general dealer in Msunduza, Mbabane trading under the style “Khan’s Cash and Carry”.

In December 2017 Mohammed went to the Trading Licences office with the intention of renewing his shop’s licence for 2018. Khanyisile Nxumalo, the licensing officer, refused to renew the licence. Khanyisile informed Mohammed that Parliament had enacted the Trading Licences Act, 2017 (“the Act”) which reserves the operation of general dealers for “Indigenous Swazis”.

Mohammed is aggrieved by the provision of the Act which exclude him from operating a general dealer business. Mohammed approaches you, a human rights lawyer, for help. He wants your advice on the following issues:

- (i) The application of the bill of rights. (4)
 - (ii) The right or rights engaged by the prohibition in the Act. (4)
 - (iii) Legal standing to vindicate a right in the bill of rights. (4)
 - (iv) The court which has the power to hear a bill of rights case. (1)
 - (v) The content of the right or rights identified in (ii) above (4)
 - (vi) Permissible limitations of the right if any. (4)
 - (vii) Remedies for violation of rights. (4)
- (25)

QUESTION 2

Sabelo and Gciniwe Mahlalela are pupils at Lomahasha Community Primary School. Sabelo, Gciniwe and their parents are members of a Christian denomination which teaches that the singing of the national anthem is a form of idolatry and therefore evil.

The national anthem is sung every school day during morning assemblies at Lomahasha Community Primary School. Sabelo and Gciniwe remain silent during the singing. The head teacher of the school, Mr Peter Masilela, is unimpressed by the conduct of the Mahlalela siblings. He has directed them to sing the national anthem numerous times and has even administered corporal punishment on them several times. These interventions have failed to change the behavior of the Mahlalela children. Mr Masilela decides to expel the two children.

Sabelo and Gciniwe's parents challenge the expulsion in the court on constitutional grounds. They allege that the expulsion of their children because they refused to sing the national anthem was a violation of their children's right to freedom of religion.

The case was heard by the full bench of the court. Two judges found that the expulsion did not infringe the right to freedom of religion. One judge found that requiring children to sing the national anthem, contrary to their religious beliefs, is a violation of the right to freedom of religion but it is a justifiable limitation of the rights. She found that singing the national anthem engenders discipline and patriotism which are forms of public morality.

The Mahlalelas are dissatisfied with the court's judgment. They appeal to the Appeal court. You are a judge of the appeal court. The court is unanimous that the court below was wrong. You are designated by the Chief Justice to write the reasons for judgment. Write the unanimous judgment of the court. (25)

QUESTION 3

- (a) Name any 3 core United Nations Human Rights instruments. (3)
- (b) What is mootness in constitutional litigation? (2)
- (c) What is ripeness in constitutional litigation? (2)
- (d) What is the difference between formal equality and substantive equality?
Give an example of the difference. (5)
- (e) What is the difference between direct discrimination and indirect discrimination? (5)
- (f) What is the difference between Independence and Impartiality? (3)
- (g) In Swaziland what grounds justify the removal of the Chief Justice and who carries out the necessary inquiry? (5)

Question 4

“The appointment, tenure and removal of judges under the Constitution of Swaziland fall short of best practice, in the light of the *Commonwealth (Latimer House) Principles*.” Critically discuss the accuracy of this statement. (25)